

# Compensation and Benefits Insights

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## Disability Claims and Appeals Rules Finalized

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On December 19, 2016, the U.S. Department of Labor published final regulations regarding the administration of disability claims and appeals under ERISA plans (the “Final Rules”). The Final Rules are largely unchanged from the 2015 proposed regulations. Employers sponsoring plans that provide disability benefits (such as long-term disability plans or retirement plans that provide benefits based on a disability determination) will need to consider the impact of the Final Rules.

The Final Rules are effective for disability claims filed on or after January 1, 2018 and contain rules similar to those required in group health plans. The new requirements include the following:

1. Independence and Impartiality

The Final Rules expand the scope of potential conflicts of interests relating to the disability claims review process. Under the Final Rules, plans must ensure that all claims and appeals for disability benefits are “adjudicated in a manner designed to ensure the independence and impartiality of the persons making the decision.” Accordingly, the Final Rules require that decisions relating to hiring, compensation, termination, promotion or other similar matters with respect to a claims adjudicator (including members of review committees) or medical/vocation expert must not be made based on the likelihood that he or she will deny disability benefits. Thus, there should be no incentives or bonuses tied to the result or the number of disability claim denials, and hiring a medical expert based on a reputation of denying claims would not be permissible. The preamble to the Final Rules note that the application of this rule means that plans must monitor the plans’ service providers in charge of hiring, compensating, terminating or promoting an individual involved in the disability claims decision making process to make sure that such service providers are not making any decisions based on the likelihood that the individual will deny the claim.

## Our Practice

We advise public, private, taxable and tax-exempt clients on a wide variety of issues related to the design, preparation, communication, administration, operation, merger, split-up, amendment and termination of all forms of employee benefit plans and executive compensation programs and related funding vehicles. The firm has defended clients in significant high-profile ERISA litigation matters, including 401(k) plan “stock drop” cases and other breach-of-fiduciary-duty class actions.

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## 2. Content of Denial Letters

The Final Rules provide that adverse disability benefit determinations must include an explanation of the decision, including an explanation of why the plan agreed or disagreed with any relevant information or opinions presented relating to the claim, regardless of if such opinions were relied upon in denying the claim. Such information includes (i) the views of the medical/vocation expert, (ii) the views presented by the claimant, (iii) any disability determination made by the Social Security Administration, (iv) an explanation of the scientific or clinical judgement used in the determination, if any, or a statement that such explanation can be provided upon request, and (v) any internal rules, guidelines or other criteria relied upon in denying the claim, regardless of whether the plan deems such rules proprietary. The denial letter must also include a statement that the claimant is entitled to receive a copy of any documents or records relevant to the disability claim, including the claim file.

If a plan has a deadline for filing a lawsuit upon the denial of a disability claim appeal, the denial letter must describe the deadline and include a date in the denial letter indicating when this right will expire. Interestingly, the DOL noted in the preamble to the Final Rules that this requirement would apply to any plan with a deadline for filing a lawsuit, not just those relating to disability claims.

The Final Rules also provide that all adverse disability benefit determinations must be provided in a “culturally and linguistically appropriate manner.” Consequently, if 10% or more of the population residing in the county to where the denial is sent is literate in only a non-English language, the plan must indicate, in such non-English language, that language assistance is available and that the denial letter may be provided in the non-English language.

## 3. Opportunity to Respond/File Suit

The Final Rules provide that if new or additional evidence is provided during the pendency of a disability claim appeal, the claimant must be given notice and a fair opportunity to respond. In other words, all evidence or rationales used to deny the benefit must be communicated to the claimant as soon as possible after that information becomes available before the final denial.

If a plan fails to “strictly adhere” to the plan’s disability claims procedures, the claimant is deemed to have exhausted the administrative remedies available and can file a lawsuit against the plan immediately. Importantly, this means that such a lawsuit would be reviewed *de novo* by a court without any deference to the plan administrator’s actions. However, infrequent “*de minimis*” violations of the disability claims procedures that don’t harm the claimant and occurred as a result of circumstances beyond the employer’s control will not cause the claimant having been deemed to have exhausted the claims procedures.

In order for claimants to make informed decisions about whether they can file suit immediately, the Final Rules also allow claimants to request that the plan explain how and why it violated the disability claims procedures and the plan must respond within 10 days if it believes the claimant should not be permitted to file a lawsuit at that time.

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## 4. Retroactive Rescissions of Coverage

The Final Rules require retroactive rescissions of disability coverage to be treated as claim denials. As a result, the disability claims procedures must apply to such actions made by plans unless it was caused by a failure to timely pay premiums or contributions.

### *Next Steps for Employers*

The Final Rules provide a good opportunity for employers to review their disability benefit claims procedures and the content of denial letters. Plan sponsors should take steps to comply with these changes before the effective date of January 1, 2018, including engaging in discussions with insurance carriers about possible required changes to insurance contracts and possible amendments to self-insured plan documents. Unless retirement plans rely on objective third-party disability determinations (e.g., Social Security determination or the employer's long-term disability administrator's determination), then such plans will also need to comply with the new rules. Further, all plans (not just those relating to disability benefits) that provide for a deadline to file a lawsuit with regard to a denial should include a discussion of the deadline in any denial of benefits.

King & Spalding is happy to answer any questions employers may have about adhering to these new requirements.

## February and March 2017 Filing and Notice Deadlines for Qualified Retirement and Health and Welfare Plans

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Employers and plan sponsors must comply with numerous filing and notice deadlines for their retirement and health and welfare plans. Failure to comply with these deadlines can result in costly penalties. To avoid such penalties, employers should remain informed with respect to the filing and notice deadlines associated with their plans.

The filing and notice deadline table below provides key filing and notice deadlines common to calendar year plans for the next two months. If the due date falls on a Saturday, Sunday, or legal holiday, the due date is generally delayed until the next business day. Please note that the deadlines will generally be different if your plan year is not the calendar year. Please also note that the table is not a complete list of all applicable filing and notice deadlines (including any available exceptions and/or extensions), just the most common ones. King & Spalding is happy to assist you with any questions you may have regarding compliance with the filing and notice requirements for your employee benefit plans.

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Deadline	Item	Action	Affected Plans
February 14 (within 45 days after the close of the fourth quarter of previous plan year)	Quarterly Fee Disclosure	Deadline for plan administrator to disclose fees and administrative expenses deducted from participant accounts during the fourth quarter of the previous plan year. Note that the quarterly fee disclosure may be included in the quarterly benefit statement or as a stand-alone document.	Defined Contribution Plans that allow participants to direct investments
	Benefit Statements for Participant- Directed Plans	Deadline for plan administrator to send fourth quarter benefit statement for previous plan year to participants in participant-directed defined contribution plans.	
February 28 (if filing paper forms)	IRS Form 1099-R	Deadline for employer to file IRS Form 1099-R. If the form is filed electronically, the deadline can be extended until March 31.	Qualified Retirement Plans*
	IRS Form 1094-B Transmittal Forms	Deadline for providers of minimum essential coverage to transmit forms to IRS reporting the months during the year that individuals enrolled in the group health plan satisfied the individual mandate by enrolling in minimum essential coverage. If the form is filed electronically, the deadline can be extended until March 31.	Self-Insured Group Health Plans and Group Health Plan Insurers

\* Qualified Retirement Plans include all defined benefit and defined contribution plans that are intended to satisfy Internal Revenue Code §401(a).

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Deadline	Item	Action	Affected Plans
February 28 (if filing paper forms)	IRS Form 1094-C Transmittal Forms	Deadline for plan sponsors that employed an average of at least 50 full-time employees in 2016 (also known as “Applicable Large Employers” or “ALEs”) to transmit forms to IRS reporting whether the ALEs offered an opportunity to enroll in (and whether employees did enroll in) minimum essential coverage under the ALE’s sponsored plan. If the form is filed electronically, the deadline can be extended until March 31.	Applicable Large Employers
March 1  (60 days after the beginning of the plan year)	Medicare Part D Creditable Coverage Disclosure	Deadline for employers that provide prescription drug coverage to Medicare Part D eligible individuals to disclose to the Centers for Medicaid and Medicare Services (CMS) whether the coverage is “creditable prescription drug coverage” by completing the Online Disclosure to CMS Form at <a href="https://www.cms.gov/Medicare/Prescription-Drug-Coverage/CreditableCoverage/CCDisclosureForm.html">https://www.cms.gov/Medicare/Prescription-Drug-Coverage/CreditableCoverage/CCDisclosureForm.html</a>	Health and Welfare Plans that provide prescription drug coverage to Medicare Part D eligible individuals
March 2	IRS Form 1095-B Individual Statements	Deadline for providers of minimum essential coverage to distribute forms used to report to responsible individuals the months during the year that the individuals satisfied the individual mandate by enrolling in minimum essential coverage. This deadline was extended from its original deadline of January 31.  Note that self-insured ALEs can report this information on Form 1095-C. Fully insured plan sponsors that are not ALEs are not required to distribute Form 1095-B, which are distributed by the group health plan insurers.	Self-Insured Group Health Plans and Group Health Plan Insurers

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Deadline	Item	Action	Affected Plans
	IRS Form 1095-C Individual Statements	Deadline for ALEs to report to provide a written statement to employees indicating whether the ALEs offered an opportunity to enroll in (and whether the employee did enroll in) minimum essential coverage under the ALE's sponsored plan. This deadline was extended from its original deadline of January 31.	Applicable Large Employers
March 15	Plan Contribution Deadline	Deadline for corporate employer contributions to be made to plan trusts in order for such amounts to be deductible on corporate tax returns (assuming the employer is operating on a calendar-year fiscal year). Note that this deadline may be extended if an extension is obtained for the corporate tax return.	Qualified Retirement Plans
March 15 (2 ½ months after the plan year)	Excess Contributions	Deadline for plan administrator to distribute any excess contributions and earnings from the prior year to avoid 10% excise tax on employer (other than eligible automatic contribution arrangements (EACAs)).	401(k) Plans Other Than EACAs
March 31 (last day of 3rd month following the end of the prior plan year)	Certification of Adjusted Funding Target Attainment Percentage (AFTAP)	Deadline for actuary to certify AFTAP to avoid presumption that AFTAP is 10 points less than prior year AFTAP.	Defined Benefit Plans
March 31 (if filing electronically)	IRS Form 1094-B Transmittal Forms	Deadline for providers of minimum essential coverage to transmit forms to IRS reporting the months during the year that individuals enrolled in the group health plan satisfied the individual mandate by enrolling in minimum essential coverage.	Self-Insured Group Health Plans and Group Health Plan Insurers

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