

DISABILITY INSURANCE: WHAT EVERY PHYSICIAN NEEDS TO KNOW ABOUT ERISA

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There are three types of disability policies: individual, group and employer-sponsored. As the name suggests, individual disability insurance policies are purchased by individuals directly from the carrier and provide long-term disability benefits in the event of sickness or injury. Individual policies fall into two categories: "general" and "occupational." A "general" disability policy insures against sickness or injury that precludes the insured from performing all work while an "occupational" policy provides relief if the insured cannot perform the material and substantial duties of his or her own occupation. Thus, an "occupational" policy will provide greater coverage to the insured, who will be entitled to benefits even if he or she is able to engage in another occupation. Individual policies usually provide coverage in set amounts, *e.g.*, \$5,000 per month, rather than as a percentage of the insured's salary.

Group disability insurance policies are made available to participants of organizations, such as members of professional associations. Unlike most individual policies, group policies typically confer benefits calculated as a percentage of the insured's base salary, usually from 50-75%. These policies may limit the maximum amount of benefits payable, *e.g.*, no more than \$5,000 per month, regardless of base salary. Further, group policies often reduce benefits when the insured receives income from other sources such as Social Security disability benefits or Worker's Compensation.

Employer-sponsored disability insurance policies are typically the least expensive policies and are similar to the "group" policies described above, often providing employees with disability insurance based on a percentage of their base salary as part of the employer's overall benefits package. Unlike group policies, however, employer-sponsored policies are governed by the Employee Retirement Income Security Act of 1974 (ERISA), which significantly affects the administration and litigation of disability insurance claims. Unfortunately, ERISA deprives insureds of significant rights to which they would normally be entitled under state law. These include the right to a trial by jury and the possibility of punitive damages where the carrier has acted unreasonably or maliciously. The most an aggrieved claimant can recover in an ERISA lawsuit is the amount of the benefits due, interest, costs and a discretionary award of attorneys' fees.

Courts have extensively broadened the parameters of ERISA to include even individual policies if insurance premiums are paid by the business. Although courts have not been entirely consistent, there are rulings holding that disability claims brought by business partners or even sole shareholder organizations purchasing individual insurance coverage for the owner of the business are covered by ERISA. Thus, it is critical to determine at the time of policy application whether you are more interested in tax savings or significantly expanded coverage.

ERISA policies have other disadvantages as well. For example, with limited exceptions, such policies require that the claimant proceed with an administrative appeal before bringing litigation. Even if the claimant ultimately wins, attorneys' fees are never recoverable for legal

services rendered during the administrative review process. Further, court review of an administrative decision in an ERISA case can be quite differential. If the plan provides the administrator with discretion to determine the propriety of the claim, courts may only overturn that decision upon a finding that the administrator acted “arbitrarily and capriciously.” Thus, so long as the administrative decision reflects a rational basis, even if the overwhelming weight of the evidence favors the claimant, the court will uphold the decision. Finally, it is important to understand that an insured is typically not able to offer as evidence at trial anything that was not first presented to the administrator. As a result, the insured may not have an opportunity to offer additional documents, present testimony or submit expert reports in court in the event such matters were not first presented as part of the administrative appeal. This is where insureds are most often prejudiced as they often attempt the administrative appeal without first consulting with counsel and, after an adverse decision is rendered, they are stuck with the record that they created.

Some disability insurers actually target “high end” policies – such as policies issued on physicians – for denial or termination with the hope that ERISA will limit their exposure for bad faith and punitive damages. Indeed, in an ERISA case, companies have the incentive to force the insured to bring a lawsuit because the insurer's potential liability is severely limited. An internal memorandum from one major carrier actually discusses the formation of a “task force” utilized to identify policies covered by ERISA and to initiate active measures to get new and existing policies covered by ERISA. The memorandum identified twelve claim situations that were settled for \$7.8 million and stated that if the twelve cases had been covered by ERISA, “our liability would have been between 0 and \$0.5 million.” Further, the memorandum stated, “[t]he advantages of ERISA coverage in litigious situations are enormous . . . there are no jury trials. There are no compensatory or punitive damages.”

Disability carriers have increasingly used ERISA's loopholes to their advantage. While ERISA was supposed to be for the protection of employees, it is actually being used to protect insurance companies and employers. ERISA leaves insureds little leeway, because it preempts state insurance laws and allows insurers to insert policy language that makes it easier to deny claims. Despite these disadvantages, the insured is not necessarily doomed to fail provided that he or she takes appropriate measures before filing suit – often, consulting with an attorney before filing a claim can substantially increase the odds of receiving benefits. It is important to understand your policy now, so as to prevent the double disaster of incurring a disability and not being able to recover the benefits that you deserve.