Amendments to the Department of Labor's Claims Handling Regulations for Disability Insurance Go into Effect on January 1, 2018

During the final days of the Obama administration, the United States Department of Labor finalized amendments to 29 C.F.R. § 2560.503-1, thereby amending the regulations pertaining to ERISA covered disability claims. Despite a strong lobbying effort by the industry and Guardian, the amended regulation will go into effect on January 1, 2018, for claims filed on or after that date. For purposes of readability, all references to the amended regulation will simply refer to "the new regulation."

While some of the regulation's new provisions merely codify requirements previously established by the federal courts, other provisions will have a material impact on the adjudication of disability claims. The new regulation seeks to improve the following aspects of claims handling:

- **Independence and Impartiality**. The regulation requires that claims administrators take certain measures to ensure that claims determinations are not made in a manner that would financially incentivize claims personnel to deny the claims. This provision also requires that administrators take certain prophylactic measures with respect to hiring or retaining third party experts such as medical or vocational experts.

- **Disclosures.** The regulation also seeks to improve the transparency of initial and final denials by requiring claims administrators to explain their rationale when reaching different conclusions than those of the claimant's treating physician, the Social Security Administration, vocational experts, or experts retained by the claims administrator. Additionally, administrators are required to cite any internal rules, guidelines, protocols, or standards relied on in making claims determinations. Alternatively, if no such internal rules, guidelines, etc., are relied on the administrator must say so affirmatively.

- **Right to Review New Evidence and Rationales Developed During an Appeal.** One of the more onerous provisions in the regulation is the requirement that administrators provide claimants with any "new or additional evidence considered, relied upon, or generated by the plan" during an appeal. The new evidence must be supplied "as soon as possible," and far enough in advance of the deadline for adjudicating the appeal, so that the claimant can respond to the new evidence before that deadline. Additionally, if a claims administrator discovers a previously undisclosed rationale for denying benefits, the administrator must also communicate that rationale to the claimant "as soon as possible" and far enough in advance of the deadline for rendering a decision so as to allow the claimant the ability to respond. This portion of the regulation is especially troubling because it does not provide claims administrators any additional time to adjudicate the appeal despite these new obligations.

- **Right to Obtain "Notices in a Culturally and Linguistically Appropriate Manner**." The new regulation also requires that claim administrators provide any denial letters and other "notices" in a "culturally and linguistically appropriate manner." The intent of the provision is to help ensure that claimants fully understand their rights and obligations, and so that they can obtain a full and fair review of any denied claim. This provision has its genesis in the Affordable Care Act. The new regulation requires that claims administrators translate notices, an provide oral translation services, upon request, to the applicable non-English language, for certain counties in the United States where more than ten percent of the population is literate in a foreign language. This will likely be an expensive requirement since denial letters can often

exceed ten pages. The new regulation is also unclear as to exactly which communications must be translated.

- **Exhaustion of Administrative Remedies**. Historically, courts have allowed claimants to file suit without completing the appeals process only in certain limited circumstances such as: where the claims administrator failed to make a final within the required period of time; or where further administrative review would be futile. Under the new regulation, claimants will be able to skip further administrative review and file suit based on *any* claimed violation of 29 C.F.R. § 2560.503-1. The regulation provides a safe harbor for claims administrators who can show that the alleged violation was "de minimis" under a multipart test. Additionally, claimants can send a letter to the claims administrator to complain of any alleged procedural violation, which must be responded to within ten days. If the claimant sustains his or her burden in showing that a procedural violation occurred, (which does not fit within the safe harbor for de minimis violations), the case will be reviewed by the federal court on a de novo basis. Alternatively, if the claims administrator convinces the court that there was no violation, or that the violation is de minimis, the court will remand the claim back to the claims administrator.

In sum, the Department of Labor's new regulation is likely to create several challenges in both work flow and expenses. Moreover, it can be anticipated that more claimants will file suit before the conclusion of their claim, and that the expense and length of time required to litigate these cases will increase. Lastly, the courts will be required to sort out many aspects of the regulation that are unclear and it may take several years for the courts to fully address these issues.