ERISA Disability Benefit Claims for the Non- or New ERISA Attorney

Presented by Michelle L. Roberts, Esq.
Roberts Disability Law, P.C.

AIDS LEGAL REFERRAL PANEL MCLE

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Presentation Outline

- Brief intro to the Employee Retirement Income Security Act of 1974 (“ERISA”)?
- How to identify an ERISA plan.
- The available claims and remedies under ERISA.
- Common terms in long-term disability policies.
- ERISA benefit claims procedures.
- Preparing a strong pre-litigation appeal.
- How to avoid inadvertent waiver of ERISA claims.

What is ERISA?

- Federal law enacted in 1974 in response to widespread pension problems.
- Provides minimum standards for *voluntarily* established benefit plans for employees in the *private* industry.
- ERISA expressly preempts any state law as it relates to any employee benefit plan. Relates means the law "has a connection with or reference to a plan." *Shaw v. Delta AirLines,* 463 U.S. 82, 103 S.Ct. 2890 (1983).

What is an ERISA plan?

ERISA governs “employee benefit plans”:

- Pension Benefit Plans
- Welfare Benefit Plans
  - **Short- and Long-Term Disability Plans**
  - Health Plans
  - Severance Plans
  - Life and AD&D Plans

What is NOT an ERISA plan?

Benefits that are NOT governed by ERISA:

- Government plans
- Church plans
- Plans maintained solely to comply with workers' compensation, unemployment, or disability laws
- Individual insurance policies (not obtained through an employer)
- Payroll practice exemption
  - "Payment of an employee's normal compensation, out of the employer's general assets, on account of periods of time during which the employee is physically or mentally unable to perform his or her duties, or is otherwise absent for medical reasons (such as pregnancy, a physical examination or psychiatric treatment)" 29 C.F.R. § 2510.3-1.

What is an ERISA plan?

There are formal or informal plans

A plan may be held to exist even in the absence of a written plan document or compliance with other ERISA requirements. *Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir. 1982) (en banc)

Donovan test is whether a reasonable person could ascertain from the surrounding circumstances:

(1) intended benefits,

(2) intended beneficiaries,

(3) the source of financing, and

(4) a procedure for obtaining benefits, or an ongoing administrative program.

POLL

Types of ERISA Claims

- **ERISA § 502(a)(1)(B) – denial of benefit claims (most common)**
- "A civil action may be brought—
- "(1) by a participant or beneficiary—
- "(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."

Types of ERISA Claims

- ERISA § 502(a)(2) – breach of fiduciary duty claims brought on behalf of a plan
- **ERISA § 502(a)(3) – breach of fiduciary duty claims for other appropriate equitable relief**
- ERISA § 510 – interference/retaliation claims
- ERISA § 502(a)(1)(A); (c) – civil penalties for any administrator's failure to supply information requested under ERISA by a participant or beneficiary

ERISA remedies

- Payment of Plan benefits.
- Attorneys' fees for prevailing party under ERISA Section 502(g)
  - Need not be the "prevailing party" but must show some degree of success on the merits.
  - ERISA's is a 2-way fee statute, but most courts will not award fees against a losing plaintiff unless frivolous or bad faith
- Other forms of monetary damages (e.g., consequential or punitive damages) and emotional distress damages are NOT available.
- No jury trials.

ERISA remedies

- What is equitable relief?
- *CIGNA Corp. v. Amara*, 131 S. Ct. 1866, 1869, 179 L. Ed. 2d 843 (2011) changed the landscape of potential available remedies under ERISA Section 502(a)(3).
- The Supreme Court approved of monetary relief in the form of an equitable surcharge and a roadmap to three additional specific equitable remedies providing for make-whole relief: injunctive relief, reformation, and estoppel.
- Amara clarified that the standard of harm plaintiffs must show depends upon the equitable remedy sought.

POLL

Long-term disability (LTD) claims

- Every LTD Plan is different. There are insured and self-funded plans.
- You MUST obtain and review the Plan document(s).
- Obtain the LTD plan documents from the Plan Administrator (typically the employer).
  - Make a written request under ERISA Section 104(b)(4), 29 U.S.C. Section 1024(b)(4).
  - Must be provided within 30 days or penalties can accrue. 29 U.S.C. § 1132(c)(1).
  - Look up Form 5500 for Plan Administrator. https://www.efast.dol.gov/5500Search/

Google LTD Policy

For an example of common LTD terms, we're going to review Google's LTD insurance policy from MetLife.

YOUR BENEFIT PLAN

Google LLC

Disability Income Insurance: Long Term Benefits

Certificate Date: January 1, 2022

What to look for in LTD plans

- Eligibility requirements

ELIGIBLE CLASS(ES)

You must be in an “eligible class” of employee in order for Long Term Disability Benefit to cover You. Eligible classes include all individuals employed by Google LLC or its subsidiaries or affiliates whom Google LLC or its subsidiaries or affiliates regards, classifies or treats as a regular employee on the United States payroll scheduled to work twenty (20) or more hours per week for at least five months (5) months during any calendar year. Persons classified by Google LLC or its subsidiaries or affiliates exclude:

- employees who pursuant to a job agreement with the Policyholder are not eligible for Insurance Benefits;
- variable part-time employees;
- interns; and
- leased employees, agency workers, and independent contractors even if such persons are later determined by a court, regulatory body or administrative agency to be or have been common law employees.

What to look for in LTD plans

- Benefit amount and waiting period

BENEFIT	BENEFIT AMOUNT AND HIGHLIGHTS
Disability Income Insurance For You: Long Term Benefits You may elect either Plan Option 1 or Plan Option 2	
Plan Option 1: For all employees who elect Noncontributory Long Term Benefits	
Monthly Benefit……	60.00% of the first $25,000 of Your Predisability Earnings, subject to the INCOME WHICH WILL REDUCE YOUR DISABILITY BENEFIT section
Maximum Monthly Benefit……	$15,000
Minimum Monthly Benefit……	$100 subject to the Overpayments and Rehabilitation Incentive subsections of this certificate.
Elimination Period……	The greater of: - the short term disability maximum benefit period, provided to You by the Policyholder on a self-funded basis and excludes California voluntary disability income CA VDI; or - 180 Days

What to look for in LTD plans

- Predisability Earnings or Covered Earnings

Predisability Earnings means, for exempt employees, Your benefits salary You were earning from the Policyholder as of Your last day of Active Work before Your Disability. "Predisability Earnings" for You if You are eligible to receive commissions, will be based on 100% of Your on target earnings as determined by Your Policyholder. If You are a non-exempt employee, Your Predisability Earnings will be based on your annualized hourly rate as of Your last day of Active Work before Your Disability. If You are classified as a Massage Therapist, Your Predisability Earnings will be based on the hourly rate from the massage pay rate and admin pay rate over the preceding 12 month period as of Your last day of Active Work before Your Disability, or period of employment if less than 12 months. If there is an increase in your Predisability Earnings in the first 12 months following Your date of disability, it will be applied as of the effective date of the increase.

What to look for in LTD plans

- Predisability Earnings or Covered Earnings

The term does not include:

- Tips, awards and bonuses;
- overtime pay;
- the grant, award, sale, conversion and/or exercise of shares of stock or stock options;
- the Policyholder's contributions on Your behalf to any deferred compensation arrangement or pension plan; or
- any other compensation from the Policyholder.

What to look for in LTD plans

- Maximum Benefit Period
- Many pay to SSNRA
- Some to age 65
- Some have a shorter cap

Maximum Benefit Period*

the later of:

- Your Normal Retirement Age;

or

- the period shown below:

Age on Date of Your Disability	Benefit Period
Less than 60	To age 65
60	60 months
61	48 months
62	42 months
63	36 months
64	30 months
65	24 months
66	21 months
67	18 months
68	15 months
69 and over	12 months

What to look for in LTD plans

- Definition of Disability
- Own Occ vs. Any Occ

Totally Disabled or **Total Disability** means:

During the Elimination Period and the next 24 months, You are unable to perform with reasonable continuity the Substantial and Material Acts necessary to pursue Your Usual Occupation in the usual and customary way.

After such period, You are not able to engage with reasonable continuity in any occupation in which You could reasonably be expected to perform satisfactorily in light of Your:

- age;
- education;
- training;
- experience;
- station in life; and
- physical and mental capacity

that exists within any of the following locations:

- a reasonable distance or travel time from Your residence in light of the commuting practices of Your community;
- a distance of travel time equivalent to the distance or travel time You traveled to work before becoming disabled; or
- the regional labor market, if You reside or resided prior to becoming disabled in a metropolitan area.

What to look for in LTD plans

- Definition of Partial Disability

Partially Disabled or **Partial Disability** means while actually working in an occupation, You are unable to earn 80% or more of Your Predisability Earnings.

If You are Partially Disabled and have received a Monthly Benefit for 24 months, We will adjust Your Predisability Earnings only for the purposes of determining whether You continue to be Partially Disabled and for calculating the Return to Work Incentive, if any. We will make the initial adjustment as follows:

We will add to Your Predisability Earnings an amount equal to the product of:

- Your Predisability Earnings times
- the annual rate of increase in the Consumer Price Index for the prior calendar year.

Annually thereafter, We will add an amount to Your adjusted Predisability Earnings calculated by the method set forth above but substituting Your adjusted Predisability Earnings from the prior year for Your Predisability Earnings. **This adjustment is not a cost of living benefit.**

What to look for in LTD plans

- Termination of coverage

Your insurance will end on the earliest of:

1. the date the Group Policy ends; or
2. the last day of the calendar month when insurance ends for Your eligible class; or
3. the last day of the calendar month for which the last premium has been paid for You; or
4. the last day of the calendar month in which You cease to be in an eligible class. You will cease to be in an eligible class on the last day of the calendar month in which You cease Active Work in an eligible class, if You are not disabled on that date; or
5. the last day of the calendar month in which Your employment ends; or
6. the last day of the calendar month in which You retire.

In certain cases insurance may be continued as stated in the section entitled CONTINUATION OF INSURANCE WITH PREMIUM PAYMENT.

What to look for in LTD plans

- Termination of benefits

DISABILITY INCOME INSURANCE: DATE BENEFIT PAYMENTS END

Your Disability benefit payments will end on the earliest of:

- the end of the Maximum Benefit Period;
- the date benefits end as specified in the section entitled LIMITED DISABILITY BENEFITS;
- the date You are no longer Disabled;
- the date You die;
- the date You cease or refuse to participate in a Rehabilitation Program that We require;
- the date You fail to have a medical exam requested by Us as described in the Physical Exams subsection of the GENERAL PROVISIONS section;
- the date You fail to provide required Proof of continuing Disability.

While You are Disabled, the benefits described in this certificate will not be affected if:

- Your insurance ends; or
- the Group Policy is amended to change the plan of benefits for Your class.

What to look for in LTD plans

- Temporary recovery.

If You Return to Active Work After Completing Your Elimination Period

If You return to Active Work after completing Your Elimination Period for a period of 180 days or less, and then become Disabled again due to the same or related Sickness or accidental injury, We will not require You to complete a new Elimination Period. For the purpose of determining Your benefits, We will consider such Disability to be a part of the original Disability and will use the same Predisability Earnings and apply the same terms, provisions and conditions that were used for the original Disability. If You return to Active Work for a period of more than 180 days and then become Disabled again, You will have to complete a new Elimination Period.

For purposes of this provision, the term Active Work includes all of the continuous days which follow Your return to work for which You are not Disabled.

What to look for in LTD plans

- Work Incentives

While You are Disabled, We encourage You to work. If You work while You are Disabled and receiving Monthly Benefits, Your Monthly Benefit will be adjusted as follows:

- Your Monthly Benefit will be increased by Your Rehabilitation Program Incentive, if any; and
- reduced by Other Income as defined in the DISABILITY INCOME INSURANCE: INCOME WHICH WILL REDUCE YOUR DISABILITY BENEFIT section.

Your Monthly Benefit as adjusted above will not be reduced by the amount You earn from working, except to the extent that such adjusted Monthly Benefit plus the amount You earn from working and the income You receive from Other Income exceeds 100% of Your Predisability Earnings as calculated in the definition of Disability. In addition, the Minimum Monthly Benefit will not apply.

After the first 24 months following Your return to work, We will reduce Your Monthly Benefit by **50**% of the amount You earn from working while Disabled.

For purposes of calculating this Work Incentive, the amount You earn from working while Disabled does not include:

- any bonus payments; or
- increases in pay from the Policyholder occurring more than 12 months following Your date of Disability.

Limit on Work Incentive

After the first 24 months following your return to work, We will reduce Your Monthly Benefit by 50% of the amount You earn from working while Disabled.

What to look for in LTD plans

- Offsets

DISABILITY INCOME INSURANCE: INCOME WHICH WILL REDUCE YOUR DISABILITY BENEFIT

We will reduce Your Disability benefit by the amount of all Other Income that was actually paid to You for the same disability for which You are claiming benefits under this certificate. Other Income includes the following:

1. any disability benefits for You, Your Spouse or child(ren) under:
   - Federal Social Security Act;
   - Canadian Pension Plan;
   - Quebec Pension Plan;
   - Railroad Retirement Act; or
   - any similar plan or act;
2. temporary disability benefits under a workers' compensation law;
3. amounts under any other occupational disease law, Longshoremen's and Harbor Worker's Act, Maritime Doctrine of Maintenance, Wages and Cure or similar act;
4. any disability benefits under:
   - the Jones Act;
   - any government compulsory/statutory benefit law;
   - any government retirement system, including but not limited to the California State Teachers Retirement System (CalSTRS) and/or the California Public Employee Retirement System (CalPERS); and/or the Federal Employee Retirement System (FERS). You must apply for such benefits through the highest appeal level that is applicable to such benefits and available under the plan;
   - the Policyholder's Retirement Plan;

What to look for in LTD plans

- Offsets (continued)

5. any retirement benefits for You under:
   - Federal Social Security Act;
   - Canadian Pension Plan;
   - Quebec Pension Plan;
   - Railroad Retirement Act;
   - the Policyholder's Retirement Plan; or
   - any similar plan or act;
6. third party liability payments by judgment, settlement or otherwise (minus attorneys' fees);
7. sick pay;
8. amounts from compromise or settlement of any claim for any of the Other Income sources shown in this provision (minus attorneys' fees);
9. return to work earnings as set forth in the Work Incentive and Limit on Work Incentive sub-provisions, in the REHABILITATION INCENTIVES provision.

What to look for in LTD plans

- Limitations and Exclusions – Substance Abuse

For Disability Due to Alcohol, Drug or Substance Abuse or Addiction

If You are Disabled due to alcohol, drug or substance abuse or addiction, We will limit Your Disability benefits to one period of Disability during your lifetime. During Your Disability, We require You to participate in an alcohol, drug or substance abuse or addiction recovery program recommended by a Physician.

We will end Disability benefit payments at the earliest of:

- the date You receive 60 months of Disability benefit payments;
- the date You cease or refuse to participate in the recovery program referred to above; or
- the date You complete such recovery program.

What to look for in LTD plans

- Limitations and Exclusions – Mental or Nervous Disorders

For Disability Due to Mental or Nervous Disorders or Diseases

If You are Disabled due to a Mental or Nervous Disorder or Disease, We will limit Your Disability benefits to a lifetime maximum equal to the lesser of:

- 60 months; or
- the Maximum Benefit Period.

This limitation will not apply to a Disability resulting from:

- schizophrenia;
- dementia; or
- organic brain disease.

Mental or Nervous Disorder or Disease means a medical condition which meets the diagnostic criteria set forth in the most recent edition of the Diagnostic And Statistical Manual Of Mental Disorders as of the date of Your Disability. A condition may be classified as a Mental or Nervous Disorder or Disease regardless of its cause.

What to look for in LTD plans

- Limitations and Exclusions – War, Riot, Felony

DISABILITY INCOME INSURANCE: EXCLUSIONS

We will not pay for any Disability caused or contributed to by:

1. war, whether declared or undeclared, or act of war, insurrection, rebellion or terrorist act;
2. Your active participation in a riot;
3. commission of or attempt to commit a felony.

ERISA Benefit Claims Procedure

- ERISA's implementing regulations provide certain minimum requirements for a participant's initial claim for benefits and for an appeal of an adverse determination. *See* 29 C.F.R. § 2560.503-1, et seq.

ERISA Benefit Claims Procedure

- Administrator must make a decision within 45 days of receipt of the claim and can take up to two 30-day extensions. 29 C.F.R. § 2560.503-1(f)(3).
- If there is a denial, the administrator must issue a written decision and provide the claimant with 60 days to appeal (180 days for health and disability benefit claims). 29 C.F.R. § 2560.503-1(h)(2); (3)(i) and (h)(4).
- Upon receipt of an appeal, the administrator must make a decision within 60 days, with the possibility of one 60-day extension (45 days for disability benefit claims, with one 45-day extension). 29 C.F.R. § 2560.503-1(i)(1)(i); (i)(3).

ERISA Benefit Claims Procedure

- If there is a denial, and the policy sets forth review procedures, the claimant MUST submit a written appeal by the 180-day deadline.
  - Deadlines are currently extended per the EBSA Disaster Relief Notice 2021-01 for claims denied on or after 3/1/2020.
    - Under the DOL extension order, the timeframe for submitting an appeal has been extended to the earlier of one year from the date the appeal would have otherwise been due (1 year and 180 days), or the appeal period provided under ERISA beginning 60 days after the announced end of the order.
    - The National Emergency end date is set for 5/11/2023
    - Ex. The deadline for a claim denied on 1/1/23 would be 1/6/24 (5/11/23 plus 60 days (7/10/23) plus 180 days.

ERISA Benefit Claims Procedure

- The 180-day appeal deadline is a minimum. Plans can agree to provide more time.
  - Get any extension in writing.
  - If an extension is not granted, submit the appeal with the evidence you have by the deadline and then continue to supplement the appeal.
  - If the plan administrator obtains new evidence on appeal, it must share that evidence with your client before it makes a final decision on appeal.

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The Administrative Record

- What is the “Administrative Record?”
- Under 29 C.F.R. § 2560.503-1(m)(8), a document, record, or other information is “relevant to a claim for benefits” if it:
- (i) Was relied upon in making the benefit determination;
- (ii) Was submitted, considered, or generated in the course of making the benefit determination, without regard to whether such document, record, or other information was relied upon in making the benefit determination;
- (iii) Demonstrates compliance with the administrative processes and safeguards required pursuant to paragraph (b)(5) of this section in making the benefit determination; or
- (iv) In the case of . . . a plan providing disability benefits, constitutes a statement of policy or guidance with respect to the plan concerning the denied treatment option or benefit for the claimant’s diagnosis, without regard to whether such advice or statement was relied upon in making the benefit determination.

The Administrative Record

- Judicial review is of the "administrative record."
- Limited exceptions.
  - *Mongeluzo v. Baxter Travenol Long Term Disability Ben. Plan*, 46 F.3d 938, 943 (9th Cir. 1995) (on de novo review, new evidence may be considered under certain circumstances to enable the full exercise of informed and independent judgment); *Abatie v. Alta Health & Life Ins. Co.,* 458 F.3d 955, 972-73 (9th Cir. 2006) (When a plan administrator has failed to follow a procedural requirement of ERISA, the court may have to consider evidence outside the administrative record).

Preparing a Strong Administrative Appeal

- The first step is to request a copy of the claim file from the decisionmaker (in writing) to review all the information. The file may include:
  - Reasons for claim denial
  - Internal notes
  - Medical reviews
  - Vocational reviews
  - Surveillance reports and videos

Preparing a Strong Administrative Appeal

- What is involved in an appeal?
- 1) A statement that “I disagree with the decision” is NOT enough.
  - Remember, a reviewing court will generally be limited to the record before the plan administrator when it finally decided the claim.
- 2) You must obtain and submit all available medical and other evidence that will support the claim of disability.

Preparing a Strong Administrative Appeal

- Medical records
- “Objective” evidence
  - 1) current symptom[s];
  - 2) other medical conditions that might affect or lengthen the recovery period;
  - 3) existing abnormalities or deficiencies;
  - 4) results from physical examinations;
  - 5) observations made by the provider during office visits/therapy sessions;
  - 6) diagnostic tests and their results (for example, lab results, x-rays and MRIs);

Preparing a Strong Administrative Appeal

- Medical records
- “Objective” evidence (cont.)
  - 7) a treatment plan;
  - 8) any prescribed medications and the response to those medications;
  - 9) level of functionality (restrictions and limitations);
  - 10) clinical documentation that supports the rationale that the treatment provider used when determining the level of functionality; and
  - 11) a description of the impact that the employee’s level of functionality has on their ability to perform their job or any other job assigned by the company.

Preparing a Strong Administrative Appeal

- Other Evidence?
  - Letters from medical providers
  - Address adverse opinions by medical reviewers
  - Address surveillance
  - Declarations (claimant, friends, co-workers, etc.)
  - Functional Capacity Evaluations and Independent Medical Examinations
  - Vocational Analysis
  - Medical literature (from reputable online or print source)
  - Social Security file or WC file for supporting information

Avoid Inadvertent Waiver of ERISA Claims

- Release of claims in severance agreements or settlements – watch out for unintended consequences!
- Consider who the parties are (is “employee benefit plan” a party?)
- Consider what claims are being waived (ERISA claims)
- Consider explicit carve-out for specific employee benefits if you know there is an on-going claim
- Certain ERISA rights can’t be waived.

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Carve out your client's ERISA claim

3. **Release:** The Employee, her representatives, heirs, successors and assignees do hereby completely release and forever discharge [redacted] and its past and present parent, affiliated and subsidiary corporations, and the past and present shareholders, officers, directors, agents, employees, ~~insurers, administrators,~~ and attorneys of each and their successors and assigns (collectively, the "Company") from all claims, rights, demands, actions, obligations, liabilities, attorneys' fee claims and causes of action of any and every kind, nature and character whatsoever, known or unknown, which the Employee may now have or has ever had against the Company, including without limitation those arising from or in any way connected with the employment of the Employee by [redacted] or one of its subsidiaries or the termination thereof, whether based on tort, contract, public policy or any federal, state or local law or regulation, and specifically including, without limiting the above, any claims or rights arising under the Age Discrimination in Employment Act of 1967, as amended (the "ADEA"), and the Older Workers Benefit Protection Act (the "OWBPA"), (collectively, the "Released Claims"). The Released Claims do not include claims that cannot be released by an individual without court or government approval (unless such approval has been obtained) or pursuant to applicable law. The Released Claims do not extend to claims against a third party with respect to benefits, including short- and long-term disability benefit benefits, under a welfare benefit plan governed by the Employee Retirement Income Security Act (ERISA).

based upon an action filed by [redacted] or by a governmental agency. However, the following claims are specifically and expressly excluded from the foregoing Release: (i) claims for workers' compensation benefits, (ii) claims for unemployment compensation, (ii) claims under the Fair Labor Standards Act, (iv) health insurance benefits under the Consolidated Omnibus Budget Reconciliation Act (COBRA); (v) claims with respect to benefits, including short- and long-term disability benefit benefits, under a welfare benefit plan governed by the Employee Retirement Income Security Act (ERISA); or (vi) claims with respect to vested benefits under a retirement plan governed by the Employee Retirement Income Security Act (ERISA).

Is severance pay an offset?

- Check terms of LTD policy's "Other Income" benefits.
- If "severance" is an offset, consider different characterization in release agreement.

2. **Consideration:** [redacted] shall, within twenty-one (21) days after the receipt of this General Release executed by the Employee, provide the Employee with the sum of Eighty-Nine Thousand Five Hundred Eighty-Eight Dollars ($89,588) as payment for emotional distress, and will issue a 1099 for such payment ("~~Severance~~Payment Amount"). The Employee acknowledges that this ~~Severance~~ Payment Amount is good and valuable consideration for this General Release, and that prior to her execution of this General Release [redacted] was not required to provide such Payment Amount ~~Severance~~ and that [redacted] provision of such ~~Severance~~ represents a compromise of all claims released hereunder. The Payment Amount will be made payable to [redacted]