

TYPES NOT MAPPED YET March 07, 2017 | TTR not mapped yet | Richard J. Pautler

## In a significant change, 2nd Circuit requires strict compliance with Department of Labor claim regulations

At least in the 2nd Circuit, new pitfalls await ERISA administrators processing claims and appeals from adverse benefit determinations. If that administrator fails to comply **strictly** with all Department of Labor regulations regarding claims administration, it is likely to lose the significant benefit of the arbitrary and capricious standard of review. A case decided February 28, 2017, emphasizes one of the ways this pitfall may surprise administrators.

ERISA imposes upon administrators specific deadlines for ruling upon claims and appeals in addition to other requirements regarding the content of denial letters. For example, an administrator has 45 days to rule upon a participant's appeal from an adverse benefit determination denying a claim for disability benefits. 29 C.F.R. §§2560.503-1(b), 2560.503-1(h)(3)(i). The Department of Labor Regulations allow that the claims administrator may have a 45-day extension "if the plan administrator determines that special circumstances (such as the need to hold a hearing, if the plan's procedures provider[s] for a hearing) require an extension of time for processing the claim." 29 C.F.R. § 2560.503-1(i)(1)(i). But what if the administrator does not rule within 45 days or if "special circumstances" are not present to warrant a 45-day extension? And what constitutes "special circumstances?"

Historically, the courts have held that so long as the administrator "substantially complied" with the DOL regulations, the court would apply the arbitrary and capricious standard of review. But in *Halo v. Yale Health Plan*, 819 F.3d 42 (2d Cir. 2016), the 2nd Circuit held that substantial compliance was no longer enough, that the administrator had to strictly comply with the DOL's claim regulations or it would lose the benefit of the arbitrary and capricious standard of review. In *Halo* the administrator failed to comply with the DOL's regulations in two respects. First, the administrator delinquently denied the claim beyond the regulation's deadline. Second, although the DOL regulations require that the denial state the "specific reason or reasons for the adverse determination" and "reference the specific plan provisions upon which the determination is based," the denial letter in *Halo* offered no reason other than "Service not Authorized." As a result, the 2nd Circuit in *Halo* held that the district court should apply *de novo* review.

The *Halo* court did allow that the administrator might avoid *de novo* review if the plan establishes (1) that the plan includes procedures "in full conformity with the regulations" and (2) can show that its failure to comply with the regulations when processing the particular claim was "inadvertent and harmless." The court did not offer insight into what constitutes "inadvertence."

In *Salisbury v Prudential Ins. Co. of America*, decided by the Southern District of New York on February 28, 2017, the court tackled the issue of what constitutes the "special circumstances" permitting the administrator the 45-day extension. Prudential advised it would be taking a second 45 days to decide Ms. Salisbury's appeal "to allow for review of the information in Ms. Salisbury's file which remains under physician and vocational review." After noting that it was unable to find any precedent discussing what was meant by the term "special circumstance," the district court held that Prudential's reason did not constitute a "special circumstance." The court looked to the DOL's preamble to its regulations and noted that the DOL had concluded that "special circumstances" had to be something beyond the administrators control and that having too much work was not an acceptable justification. The New York court explained that if being too busy constituted a "special circumstance" the exception would swallow the rule. The court also rejected Prudential's attempt to offer a "special circumstance" in its briefing, explaining that it had been incumbent upon Prudential to include that "special circumstance" in its letter to Ms. Salisbury advising that an additional 45 days was required. Finally, the court noted that Prudential had not argued that its failure to comply with the regulation had been either inadvertent or harmless.

It is unknown whether other circuits will follow the 2nd Circuit's lead and adopt this strict compliance rule to DOL claims regulations. A betting man would place money that at least the 9th Circuit will soon be citing *Halo* with approval.

Here are the lessons from *Halo* and its progeny:

1. Make certain your administrator complies with all regulatory deadlines when processing a claim for benefits and any appeal from an adverse benefit determination.
2. If your administrator requires an extension of time to decide a claim or an appeal, make certain that it has a good, solid reason for the extension and that in its letter advising of the extension, it sets forth those reasons. A good, solid reason is one that is beyond the administrator's control (e.g. despite repeated requests the participant or his physician failed to timely provide necessary medical records) and at least in some way is extraordinary. The fact the administrator has been flooded with claims or is short-handed is not a sufficient justification for an extension.
3. In any denial letter the administrator should detail the reasons it is denying the claim and to the best of its ability cite applicable or controlling plan provisions. Denial letters that say no more than "Services not authorized" are clearly insufficient. In another case applying *Halo - Montefiore Medical Center v. Local 272 Welfare Fund* decided December 2, 2016 – the denial letter was equally deficient, stating only "Claims paid as out of network provider under plan." This requirement is hardly new or surprising, but *Halo* places renewed emphasis on the need to be clear in why the claim is being denied.
4. When an administrator is delinquent denying a claim or an appeal, it should detail in the letter why it is delinquent (assuming there is a legitimate reason for its delinquency). The letter should explain why the delinquency was inadvertent and harmless and to the extent possible should support that explanation with documentation. The court may not allow the plan to supplement the administrative record to add the documentation that explains and justifies the delinquency so it is prudent for the administrator's communications with the participant to include as much of this rationale as possible.

Faced with the daunting task of proving a claims denial arbitrary and capricious, plaintiffs frequently strive to find some procedural misstep that will allow them to argue the court should apply *de novo* review. Attorneys for participants frequently search for the stumble by the constable in hopes of escaping arbitrary and capricious review. *Halo* imposes many more pitfalls into which the administrator may stumble and plaintiff attorneys no doubt will do their best to push administrators into those pitfalls.

Five years from now the 2nd Circuit may regret having dug so many pitfalls for administrators as the district courts may be overwhelmed with arguments that the administrator did not cross this "t" or dot this "i" so that the court should apply *de novo* review. Nonetheless, best practices require that administrators review their procedures for processing claims and appeals.

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