Custom Disability Solutions

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From The Murphy Files - CDS Compliance News and Notes

By Mark Murphy, Director of Contracts and Compliance

New York Pre-Existing Conditions Provisions (i.e. Benesowitz Ruling)

On February 27, 2008, the NY Insurance Department issued Supplement No. 1 to Circular Letter No. 14 (originally issued in December 2007). The supplement clarifies that in the wake of the Benesowitz ruling that had led to the December Circular Letter, "the Department will expect elimination periods and pre-existing condition waiting periods to run concurrently rather than consecutively…. [and] all elimination periods should be construed to run from the first date of the disability, rather than upon expiration of the pre-existing condition waiting period."

The supplement also included several examples to illustrate the appropriate application of elimination period and pre-existing condition provisions under Circular Letter 14. Appropriate procedures for claims incurred with pre-existing conditions under NY policies have been instituted in CDS Claim Operations.

Also, a new bill (SB7470) has been introduced in the NY legislature to allow insurers to at least offer the industry standard pre-existing conditions exclusion, in addition to the version as described in Circular Letter 14. The industry standard version would presumably be made available by carriers at a different cost. The bill is still looking for a sponsor in the legislature.

Discretionary Clauses

MD - A recent bill proposing to ban discretionary clauses in group disability policies was withdrawn.

MI, MT - In the wake of recent state court decisions in MI and MT, the tide may be turning against the disability industry on the issue of discretionary clauses in disability policies. The state courts ruled that the MI and MT laws prohibiting discretionary authority provisions in policies were regulating insurance activities, and thus ERISA did not pre-empt those laws. The courts saw little distinction between these laws regarding discretionary authority provisions and other state laws that have long been accepted as examples of regulation of insurance activities, and thus protected from ERISA pre-emption (e.g. state mandates on health benefits). Appeals activity is underway in each case. Trade groups are spearheading appeal activity in the 6th Circuit in connection with the MI law.

CT - On March 19, 2008, the CT Insurance Department issued Bulletin HC-67, "Use of Discretionary Clauses". The bulletin noted that there have been complaints in other states about health insurers' use of discretionary clauses, but stopped short of advising any type of prohibition on such provisions. The bulletin did state however that such provisions "… cannot be used to improperly deny claims or restrict any rights an insured has under the policy…" (e.g. the right to appeal or to take legal action).

SD – The legislature is moving forward with a proposed regulation prohibiting discretionary clauses that will likely be effective June 30, 2008. This will formalize what has been standard practice of the SD DOI in the last several years, in refusing to approve such provisions.

NY - There is speculation that New York may yet in 2008 pick up with efforts to ban discretionary clauses that have been dormant since NY's abortive release of Regulation 184 in 2006.

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United States Supreme Court - On April 23, 2008, the Supreme Court is slated to hear arguments in the Glenn v. MetLife case, which involved a claim incurred under an ERISA plan that included a "discretionary authority" provision (see the "Litigation" section for details).

The transcript of the oral argument suggests that even the leading legal minds of the land struggled – as we have struggled, and as the lower courts have struggled – with understanding the rightful implications and impacts that a "conflict of interest" on the part of the claims administrator/insurer should have on the varying standards of judicial review that are at issue in this case. The justices spent much of the oral argument peppering counsel with questions that highlighted the complexities encountered in trying to weigh an insurer's potential conflict of interest against its role and obligations as an ERISA claims fiduciary. The Supreme Court ruling in Glenn will have far-reaching implications, and is likely to be one of the more significant decisions for the group disability benefits industry in some time.

Optional Federal Charter (OFC)

The OFC initiative leapt from the business section to the front page with the March 31 recommendation by Treasury Secretary Paulson that a national insurance regulatory agency be set up within the Treasury Department as part of the proposed overhaul of the financial services regulatory framework. This agency would regulate those insurers that elected to be federally chartered. Under the OFC approach, an insurer could choose to be regulated either at the state or federal (national) level.

The Paulson proposal acknowledged that debate between proponents of the present state-based system of insurance regulation and backers of the OFC is not likely to end soon, and suggests that for the near term, a national insurance regulatory agency focus on dealing with international insurance issues and advising the Treasury Secretary on insurance matters.

Since the Paulson proposal, Representative Kanjorski (D-PA) has introduced legislation in the House to create an Office of Insurance Information in the Treasury Department.

It seems hard to deny that the call for new and different insurance regulatory schemes is gaining strength. Where it ends up is anybody's guess. But for those who enjoy U.S. history, this debate points up one of the classic themes of the nation's history – the question of whether state or federal regulation better serves the interests of the people. You have to wonder if 31 states would have passed the Interstate Compact without more and louder voices calling for the alternative of a national regulatory framework for insurance.

New Jersey Paid Family Leave Benefits

The NJ legislature has approved legislation that provides paid family leave benefits for NJ workers. The law extends NJ statutory TDI benefits for up to 6 weeks to employees who take time off to care for family member with a serious health condition or to be with a newborn or newly adopted child.

NJ joins WA and CA as the only other states with similar paid family leave requirements. Benefits become available under the NJ program beginning in July 2009; benefits for WA's employees are available beginning in October of 2009. CA's program has been in place since July 1, 2004.

California State Filings

We are pleased to report that we recently received an approval from the CA DOI of one of the policy form filings we had initially submitted in the fall of 2006 in connection with the July 2006 CA DOI Settlement Agreement. Unfortunately, our approval seems to have been an exception, not a norm, and the trade groups that led the industry effort that resulted in the 2006 settlement agreement are considering further legal steps to promote closer adherence to the agreement on California's part.

Feel free to contact Mark Murphy, CDS Director of Compliance, if you would like more information on any of these items. You can reach Mark at: mmurphy@customdisability.com or 860-751-7160.

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