

ERISA & DISABILITY BENEFITS NEWSLETTER

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Eric Buchanan & Associates, PLLC is a full-service disability benefits, employee benefits, and insurance law firm. The attorneys at our firm have helped thousands of disabled people who have been denied social security disability benefits, ERISA LTD benefits, health insurance, life insurance and other ERISA employee benefits, as well as private disability and health insurance benefits.

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Eric L. Buchanan, R. Scott Wilson, and D. Seth Holliday are certified as Social Security Disability Specialists by the Tennessee Commission on CLE and Specialization.

OBTAINING INFORMATION FROM THE ERISA PLAN OR INSURANCE COMPANY: TOOLS TO HELP ATTORNEYS DODGE THE LANDMINES IN ERISA BENEFITS CASES. BY: ERIC BUCHANAN AND JULIE MILLER

In the past we have compared litigating ERISA benefits cases with negotiating a mine-field. When a person has been denied such benefits as life insurance, long-term disability benefits, or health benefits, and those benefits are provided through work, any litigation to recover those benefits almost always falls under ERISA. ERISA laws, regulations, and procedures are so different from those used in most areas of litigation, that even experienced litigators can accidentally "blow-up" an ERISA case by miss-stepping. In continuing that theme, we will review some more common land-mines and how they can be avoided by gathering available information early in the case.

Landmine Number 1: "Oh no! This case isn't what we thought it was!"

An attorney must know if ERISA applies and what special rules apply in ERISA cases. A review of published ERISA benefits cases shows a disturbing trend, wherein the first line in many decisions says something like, "this case was originally filed in state court as a breach of contract case, and was removed by the Defendants to federal court under ERISA." Because one of the fundamental rules of ERISA litigation is that the federal court will not allow new evidence regarding the merits of the case in court, but will review only the record compiled during the administrative claims proceedings below, it can be a big problem if an attorney used to normal trial procedures mistakenly thought he or she could put on the evidence supporting the case at trial. Thus, it is not surprising that many reported ERISA decisions that were first filed as state law breach of contract cases often result in defense verdicts.

Landmine Number 2: "I am fighting the enemy in the dark, and I don't have all the information that I need!"

You need to know the rules of the game, and those rules are set out in the controlling plan documents. Once you know you are fighting for your client on the ERISA battlefield, there are tools under ERISA that you can use to learn a lot about your client's case at the beginning. For example, ERISA plan administrators (usually the employer) must provide a plan participant or beneficiary, a copy of any controlling plan documents within 30 days of a written request, or be liable for a penalty of up to \$110 per day. ERISA § 502(c), 29 U.S.C. § 1132(c). Similarly, the insurance company that made the decision to deny your client benefits must provide a copy of their claim file and any other documents that are "relevant" to the claim. 29 C.F.R. § 2560.503-1 (h)(2)(iii) and (m)(8).

Additionally, if you ask an ERISA fiduciary (either the employer as Plan Administrator or the insurance company making the decision on the claim) for information about the beneficiary's benefits or the procedures to obtain those benefits, the fiduciary must give complete and accurate information in response to participant's questions. *Drennan v. General Motors*, 977 F.2d 246, 251 (6th Cir. 1992). The fiduciary may not give misleading answers, or even negligently omit to give relevant information. *Id.*, and see also, *Berlin v. Michigan Bell Telephone Co.*, 858 F.2d 1154, 1163-64 (6th Cir. 1988). "The duty to inform is a constant thread in the relationship between beneficiary and trustee; it entails not only a negative duty not to misinform, but also an affirmative duty to inform when the trustee knows that silence might be harmful." *Krohn v. Huron Memorial Hospital*, 173 F.3d 542, 548 (6th Cir. 1999).

Landmine Number 3: "I didn't know how bad this case is, because I didn't ask the right questions."

We help a lot of people who have been denied long-term

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disability (LTD) benefits under ERISA plans. Unfortunately, we have to decline many cases for the simple reason that the amount of benefits due are so low that it is not practical to work on the case. Most ERISA LTD plans pay a percentage of the person's pre-disability earnings (most often 60%, but sometimes higher or lower), but those benefits are usually offset by social security benefits. While in some cases the net LTD benefits represent a valuable case for our client, and a case worth working on, other times the LTD benefits are totally or nearly totally offset by the client's Social Security benefits.

If your client is already getting paid Social Security benefits, you can find out the amount of your client's social security benefits by asking them for a copy of their award notice. If they have not won yet, you can ask the client to give you a copy of their PEBES (personal earnings and benefits estimate statement), which is sent to everyone who has paid into the social security system each year. If your client has lost the PEBES, a new one can be requested at www.SSA.gov or by calling 1-800-772-1213.

You also need to verify the amount of LTD benefits your client will receive, from which the Social Security benefits will be reduced. When you first take in the LTD case, and you write a letter to the insurance company asking for the documents that were relied on in making their decision, in the claim file should be a portion of the initial application filled out by the employer which states the person's pre-disability earnings. We have even found times where that information is wrong, so we also write a letter to the employer at the beginning of the case asking, among other things, for our client's rate of pay and recent pay history at the time the person became disabled. With that information, we can calculate the gross LTD benefits (i.e. the amount that is usually 60% of earnings), from which social security benefits are deducted.

But, be careful, offsets are not limited to just social security benefits. Typically, ERISA LTD plans will offset worker's compensation benefits, disability pension benefits paid at work, and other disability benefits. You should look at the plan documents you get from the Plan Administrator (usually the employer) and from the insurance company to see what else might be an offset, and check with your client and the employer to see if the client has those other sources of income that will be potential offsets.

Landmine Number 4: "I have no idea when to file, because I don't know when the statute of limitations runs."

The ERISA statute does not contain a specific limitations period in claims for benefits under ERISA § 502(a)(1)(B), so courts have used the most analogous state-law statute of limitations. Thus, for example, in Tennessee there is a six-year statute of limitations for breach of contract claims. However, courts usually allow ERISA benefits claims to have a shorter period of limitations if the ERISA plan or insurance policy has a shorter time period. Often, that period is three years "from when proof of loss is first due." So you need to review the policy to review first for the time limit for legal actions, and then secondly, if that time period runs from

another time period in the policy, you need to review that, too. Some other plans (often self-funded plans) have a contractual period of limitations that runs from the time the decision to deny benefits is made; we have seen several ERISA plans that limit that time to one year, but at least one was as short as 60 days.

Landmine Number 5: "This case is not as simple as I thought, because it is not just a claim for LTD benefits."

In addition to asking the employer/plan administrator for the plan documents controlling the LTD plan, you should also ask for any other plans that describe any benefits the person would be eligible for if the person becomes disabled. This is not true for all employers, but some employers provide certain "collateral" benefits automatically if a person is found disabled. For example, some employers' health insurance plans provide that an employee can remain on the health plan as long as the person is found disabled for LTD.

Other benefits may also be available, but are not automatically tied to a finding of disability under the LTD plan. For example, many employers' life insurance plans provide that if a person goes out of work due to a disability, the person can keep the life insurance and have premiums waived, but the person must file a separate application for that benefit under the company life insurance plan.

Because some other benefits may be provided automatically, and others require a separate application, it is very important to specifically ask if the employer/plan administrator about those benefits and what application process is required to obtain those benefits.

Other information to obtain to help avoid landmines:

By writing to the plan administrator and the insurance company early on, you can also find out other important information. For example, you can ask for the name and address for service of process for the plan and for the insurance company. Often, that information is found in the plan documents, but if it is not, that is probably information the plan administrator or insurance company should provide because they are ERISA fiduciaries.

We also ask the employer/plan administrator to tell us the last day the person actually went to work and actually worked, so we can verify the date of disability.

We also review the policy or ERISA plan closely to see if there are different classes of coverage for different employees, and we ask the employer/plan administrator to tell us which class the person was in, because that information is not always clear from the claim file.

This article does not cover every valuable piece of information that an attorney must learn by carefully reviewing the claim file and ERISA plan documents; our last piece of advice is to get the documents early, and plan on reviewing them carefully to discover if there are any other landmines out there that will keep you from doing the best job you can for your client.