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DOL Information Letter Regarding Production of Recording of Call Between Plan Representative and Claimant

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The Department of Labor ("DOL") recently issued an information letter, DOL Information Letter 06-14-2021 (the "Letter"), addressing the question of whether the ERISA claim regulation requires production of an audio recording or transcript of a telephone conversation between the participant and a plan representative to a participant making a claim for benefits (i.e., a "claimant"). The question was posed by an attorney who represented a claimant whose request for such a recording was denied. The plan took the position that because: (1) notes of the conversation were made available "which contemporaneously documented the content of the recorded conversation, and which became part of the 'claim activity history through which [the insurer] develops, tracks and administers the claim'"; (2) the recording was for quality assurance purposes; and (3) it was not "created, maintained, or relied upon for claim administration purposes" (and thus not part of the administrative record), the recording did not have to be furnished to the claimant. The DOL disagreed, based on DOL regulations that require a plan's claim procedures to give the participant access to information "relevant to the claimant's claim for benefits."

We discuss the Letter, and its potential implications, below.

Summary

As background, the claim regulation provides that claim procedures do not meet the requirement to provide for a full and fair review of denied claims

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unless the claimant is provided (upon request) with copies of "all documents, records, and other information relevant to the claimant's claim for benefits."

The Letter notes that the claims regulation provides that "relevant" information includes information "generated" in the course of making a benefit determination, irrespective of whether the information was "created, maintained, or relied upon **for** claim administration purposes." (emphasis in Letter).

In response to the plan's position that the call recording or transcript did not need to be produced because it was generated for quality assurance purposes, the Letter notes that information is subject to production if it "demonstrates compliance with the administrative processes and safeguards" required by the claims regulation. However, the Letter does *not* go on to address whether recordings of calls made during the claim process are necessarily subject to production because they could demonstrate compliance (or lack thereof). The Letter also explains that nothing in the claim regulation requires that the "relevant documents, records or other information" consist only of paper or written materials.

The Letter concludes that a recording or transcript of a conversation with a claimant would not be excluded from the requirement to disclose relevant information "… merely because the plan or claims administrator does not include the recording or transcript in its administrative record; does not treat the recording or transcript as part of the claim activity history through which the insurer develops, tracks and administers the claim; or because the recording or transcript was generated for quality assurance purposes."

GROOM INSIGHT: The Letter addressed a narrow question based on the specific representations made by the requesting attorney and the positions taken by the plan involved. It does not purport to address whether call recordings are required to be produced in all cases. For example, claimants sometimes assert they were provided with inaccurate information regarding their benefits in phone calls that took place well before any adverse benefit determination was made. Recordings of such calls would not appear to fit within the claims regulation's definition of "relevant" information, unless they are considered in the course of making the benefits determination. The issue of whether to request historical recordings in the claims context is an important issue to discuss with qualified counsel.

We note also that the Letter is not binding on courts or technically even on the DOL itself. The Letter was provided pursuant to ERISA Procedure 76-1, which states: "An information letter issued by the department is informational only and is not binding on the department with respect to any particular factual situation." Although federal courts will sometimes defer to formal agency rules and rulings, they generally will not defer to other expressions of agency opinions. *See Christensen v. Harris County*, 529 U.S. 576, 585 (2000) ("Interpretations such as those in opinion letters – like interpretations contained in policy

statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-style deference."). Thus, the courts may take a different view of the particular circumstances addressed in the Letter, or of whether call recordings are subject to production pursuant to the claim regulation in different scenarios. Nevertheless, plan sponsors may want to review the Letter with recordkeepers, third party administrators, and individuals that communicate with claimants to confirm that they understand that such recordings and transcripts may be subject to disclosure and the associated implications.

If you have any questions about the Letter, please contact your Groom attorney, and we would be happy to discuss these issues with you further.