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HANDOUT FOR ICSOM TALK

“Your ERISA Disability Plan 101”
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- I. ERISA (“Employee Retirement Income Security Act”) DISABILITY LAW IS UNFAVORABLE TO THE EMPLOYEE WHO SEEKS DISABILITY BENEFITS.
 - A. ERISA Preempts Most State Law and Deprives Claimants of Important Remedies.
 - Only benefits due plus attorney’s fees and costs are recoverable
 - No punitive damages, pain and suffering, mental anguish or consequential damages
 - B. Jury Trials are Generally Not Available.
 - C. Insurers Have no Fear Because The Standard of Review in the Federal Courts Is “Abuse of Discretion” or “Arbitrary and Capricious” So Long as Your Disability Plan Contains “Firestone” language. The decision can be wrong and the court will still uphold it. Thank You Supremes! (The Court that is.)
 - D. For the Most Part No New Evidence is Allowed in Federal Court.
 - Closed administrative record
 - Almost never any discovery
 - E. Claimant Can’t Rely on Oral Representations or Promises About Plan.
 - F. Insurer Does Not Have to Honor Your Doctor’s Opinion on Disability Nor Does it Have to Honor the Opinion of the Social Security Disability System.

G. Insurer Is Safe to Rely on Its Own Conflicted Doctor or Nurse to Deny Claim.

H. Your Appeal of a Denial (which is mandatory before you go to court) is Made by the Insurer Who Is Inherently Conflicted.

- The Fox is Guarding the hen-house!
- Lawyers are necessary for an ERISA appeal but expensive and you can't recover attorney fees for winning your case in the appeal process.

II. KNOW YOUR DISABILITY PLAN AND CONSIDER BARGAINING OVER SPECIFIC PROVISIONS.

A. Provisions Affecting the Amount of Disability Benefit.

- % of income (60%?, 66 2/3%?)
- definition of income
- Maximum benefits
- elimination period/coordination with sick leave
- Deductible Sources of income/offsets
 1. SSDI/ dependents
 2. Workers' Comp
 3. Veterans' benefits
 4. income replacement from tort recovery
 5. other disability plans through your employer (AF of M Plan is one)
 6. other employment
 7. retirement
 8. severance pay
- minimum benefit in case your benefit is completely offset
- Cost of living increase each year of disability
- Taxability of benefit/for all or by election

B. Provisions Affecting Eligibility

- Pre-existing condition exclusion – these come in different sizes and are regulated by state law
- Own occupation (“own occ”) definition/duration of own occupation benefits – try define as narrowly as possible to track job duties/ try to get 5 years of own occ coverage

Compare;

“due to sickness or injury unable to perform each and every material and substantial duty of your regular occupation”

with;

“limited from performing the material and substantial duties of your regular occupation due to your sickness or injury” (better)

with:

“due to sickness or injury unable to perform any one material duty of your own occupation”(better)

with;

“inability to perform your regular job duties due to sickness or injury”(better)

or ;

“a disability that renders one unable to perform with reasonable continuity the substantial and material acts necessary to pursue his usual occupation in the usual and customary way”(endorsed by California Dept. of Ins.)

- Any Occupation (“any occ”) definition/Gainfulness standard

“unable to perform the material and substantial duties of any gainful occupation for which you are fitted by education, training or experience”

Or;

“unable to engage with reasonable continuity in another occupation in which he could be reasonable expected to perform satisfactorily in light of his age, education, training, experience, station in life and physical and mental capacity” (endorsed by California Dept. of Ins.)

- Pregnancy

C. But Watch Out for These! Can be used to deny claims for chronic pain, headaches, fibromyalgia, chronic fatigue, angina associated with heart disease, Parkinson's disease, IBS etc.

- Mental illness limitation
- “Self-reported symptoms” limitation
- “objective medical evidence” standard

D. Other Provisions

- Firestone language or discretionary language - get rid of it! or keep it out!

“When making a benefit determination under the policy, [the insurer] has discretionary authority to determine your eligibility for benefits and to interpret the terms and provisions of the policy.”

- Reimbursement for representation in obtaining Social Security benefits
- More than one level of appeal
- Waiver of pre-x if change in carriers
- Arbitration? Depends on your location and availability of skilled arbitrators

III. THINK ABOUT CBA PROVISIONS THAT AFFECT THE DISABLED MUSICIAN – IT COULD BE YOU!

A. Any of the Provisions in II Can be Incorporated Into CBA

B. Sick leave vs. Short Term Disability until LTD Kicks In. Try to avoid third party administration of short-term benefits.

C. Health insurance benefits during disability

D. Pension credits during disability

E. Job security/leave of absence

F. Just cause

IV. IF YOU GET DENIED OBSERVE THE FOLLOWING PRINCIPLES.

A. Watch Out For Deadlines for Appeal to Insurer!

B. Don't Shoot at a Cloaked Target: Ask for Your Claim File From Insurer.

C. Don't Shoot at a Cloaked Target: Make a Written Request For Governing Plan Documents Especially SPD (Summary Plan Description) and Formal Plan Documents) With The Correct Date Including All Modifications and Amendments From Your Plan Administrator.

D. Get an ERISA Lawyer. (Call your state bar association or ask an employment attorney.)

E. Get an ERISA Lawyer.

F. Get an ERISA Lawyer.

G. If Possible Do Not Use Social Security Representative Provided by Insurer if You are Seeking Social Security Disability Benefits.

H. If You are Signing a Severance Agreement Get Help From an ERISA Lawyer.