# *Disability, Long Term Care & Employee Benefit Advisory*

Re: *THOMAS VS. CIGNA (E.D.N.Y.)*

***Will This Permanently Change How Employee Benefits Are Communicated?***

First let's review the details of this 2015 court case as we see them and examine the uniqueness of *THOMAS VS. CIGNA (E.D.N.Y.)* from a benefit professional's perspective. Today the "industry standard" is that group life, short & long term disability contracts almost always have a waiver of premium provision. Premiums can be waived upon proof of disability per the policy contractual definition. Group short & long term disability policy forms allow for employees to be out of work, disabled, with premiums waived by the insurer. This allows for benefits to continue without the employer or employee required to make premium payment. Moreover, it enables the employee to become fully insured again, upon recovering from their disability and returning to full-time employment.

On the other hand, group life insurance operates in a very different manner. Group life waiver of premium typically requires a 6 to 9 month continuation of total disability and disability almost always must occur prior to age 60. The good news here is that an employee can become disabled at say age 55, file for waiver of premium and not die for 10 or 15 years. Then death benefits are ultimately paid without the employer or former employee having to pay premium since after the 9th month of becoming disabled.

In **THOMAS V. CIGNA CRP. INS.** E.D.N.Y. UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK 09-CV-5029 (SLT) (RML) 02-19-2013 RAYMOND THOMAS, Plaintiff, v. CIGNA GROUP INSURANCE, et al., Defendants; a plan participant had group life insurance through her employer's ERISA (Employee Retirement Income Security Act). The insured became disabled and stopped working or paying premiums. After she eventually passed away, her beneficiaries filed a claim for life insurance benefits.

The insurer denied the death claim based on the fact that the insureds life insurance was no longer in force. As it turned out, the group life insurance coverage had a waiver of premium benefit for disability. However, the insured had not requested the premium waiver be initiated so she was no longer covered when she died.

The insured's beneficiaries sued the insurer based on the fact the waiver of premium requirements had not been appropriately communicated to the plan participant due to inadequate delivery of the employers SPD (Summary Plan Description). As the claim was an ERISA claim, the court determined there was no evidence that the plan administrator had provided the plan participant with an appropriate SPD.

**Problem #1 The Internet Problem**
We, my colleagues and I, believe there is a threefold problem in today's world of benefit communication. First, an observation about the electronic world of today. Sitting in a local Starbuck's, wherever I turn, it seems almost everyone has a smart phone or tablet. And most of us have internet access at work and/or at home. If we don't, our local library has up-to-date computers with research librarians eager to assist us. And there's no turning back.

Regrettably, we now live in a most litigious society. I remember reading about a mom who was suing McDonald's for making her child heavy! Whether McDonald's is ever found guilty of offering her child french fries, let's just say it's a "sign of the times".

**Problem #2 The Over One Hundred New Government Agencies Problem**
With the arrival of the Affordable Care Act, using my home state of Massachusetts as an example; for several decades the MA Department of Insurance carefully, efficiently and effectively monitored the actions of insurers doing business in MA. Today, those same insurers now have to comply with the federal government "overseeing" how they conduct business. It's been reported that 126 new federal agencies were created to manage and monitor National Health Reform. Point being, the word COMPLIANCE looms large. Where employers might have been "casual" about employee benefit communication and compliance in the past, those days are now officially behind us.

**Problem #3 The Corporate Responsibility and Liability Faced by Benefit Professionals Problem**
This brings to mind yet another major obstacle the "smaller" employer is now facing. Let's first define what we refer to as a small company with say 50 employees or less. Note that 95 percent of the number of businesses in the U.S. fall within this group. In thinking about our own client base, let's explore the individuals who are personally responsible for managing and administering their organizations employee benefits . . . a 25 person law firm's *Business Manager,* a 15 person museum's *Office Administrator,* a 9 person consulting firm *Office Manager,* a 70 person nonprofit green company *Senior VP* and a 50 person manufacturer corporate *Treasurer.*

The key point here is that none of these skilled professionals has ever specialized in the administration of Employee Benefits, to the best of my knowledge. At this point in time, clients have reported to us they're somewhat dependent upon the *"Dear Colleague" communiqué* we send them bi-monthly. Our communique is a culmination of ideas, laws, regulations and articles we receive from four different law firms that specialize in employee benefits. [If you would like a sample of our *Dear Colleague communiqué,* send an email to sandra@disabilityservices.com.

Since this article is about employee benefit communication and the proper delivery of SPD's, here's the bad news . . . The process between employer and disabled employee in *THOMAS VS. CIGNA (E.D.N.Y.)* references what was determined to be the inappropriate internet communication of an employee's group life coverages.

What's apparent is the internet advancements have automatically evolved into quick, efficient electronic delivery of corporate employee benefit programs. In 2015 HR departments almost automatically communicate via email with their employees, which includes their employee benefit programs; without any proof of receipt of the email.

At the same time, the group life and disability insurers no longer automatically provide us with printed booklets to hand deliver to employees as we did in the "old days". Adding more insult to injury, I was recently informed by one insurer that I would have to pay for printing a client's booklets myself.

Fortunately, the pace of instantaneous communication modern day technology via the internet has enhanced the communication of employee benefits until this point in time. Our awareness of how benefit professionals communicate with their employees involves the "standard" of emailing PDF's of employee benefit booklets. For businesses with employees in outlying areas and especially residing in other states, the internet has become the automatic choice of employee benefit communication. I'm here to tell you today that benefit professionals need to review what *THOMAS VS. CIGNA (E.D.N.Y.)* is telling us. We believe that the safest approach to benefit communication is via delivery of SPD's with a delivery receipt attached.

What have we learned from *THOMAS VS. CIGNA (E.D.N.Y.)*? We're reminded that we can expect the proper communication of employee benefits will be scrutinized more frequently in future years. Regardless of whether a corporate employee benefit program is subject to ERISA laws and regulations, employers need sufficient proof that their employees have ready access to all the most recent details of their employee benefit programs. Our Statement on ERISA & Department of Labor (DOL) clarification follows.

**Please note:** We want to stress we are not Employee Benefit Attorney's. We're Employee Benefit Advisors. As such, we've created our Employee Benefit Communication process based on our determination and interpretation of the *THOMAS VS. CIGNA (E.D.N.Y.)* court case and consulting with our own professional advisors. ERISA claims procedures for Disability benefits, DOL regulations and helping HR professionals avoid corporate employee benefit liability has become our "mantra" in 2016 and beyond.

ADDENDUM

**Warning Re: Correctly notifying terminating employees of their right to "port" or convert their group life insurance**

Since we're writing about communicating employee benefits correctly, we need to pay special attention to the group life insurance conversion options offered by most insurers today. For decades, group life insurers have offered conversion rights to terminating employees. Conversion to whole life is an industry: "norm". Some insurers offer conversion to one year term that then converts to whole life. With the increasing popularity of voluntary term life coverages, insurers began to allow for "porting" or continuing the coverage as term insurance. Since the employee has been paying their voluntary life premium via automatic payroll deductions, upon termination of employment or loss of eligibility, it's most advantageous to be allowed to continue their life coverage as term insurance.

Employers have the responsibility of notifying employees of their rights within a certain time frame (usually 15 to 30 days) from the date the group insurance ends. With employees purchasing voluntary life on their own, they expect the opportunity to be able to "port" their voluntary life.

Consider the situation where an employee has become uninsurable while working for their employer and terminates employment without being properly notified of their conversion rights. We urge employers to establish a "stop gap" system of notifying terminating employees of their group and voluntary life conversion rights.

Allan Checkoway, RHU
allan@disabilityservices.com

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## ERISA & Department of Labor (DOL) clarification

**From the Department Of Labor (DOL) website:** Group Health and Disability Plans Benefit Claims Procedure Regulation – A booklet on the rules that apply to group health and **disability** benefit claims.

**From the Department Of Labor (DOL) website:** 'Compliance Assistance', ERISA covers retirement, health and other welfare benefit plans (e.g., life, **disability** and apprenticeship plans).

**Compliance Assistance** states**:**

> The Employee Retirement Income Security Act of 1974 (ERISA) is a federal law that sets minimum standards for retirement and health benefit plans in private industry. ERISA does not require any employer to establish a plan. It only requires that those who establish plans must meet certain minimum standards.
>
> ERISA covers retirement, health and other welfare benefit plans (e.g., life, disability and apprenticeship plans). Among other things, ERISA provides that those individuals who manage plans (and other fiduciaries) must meet certain standards of conduct. The law also contains detailed provisions for reporting to the government and disclosure to participants. There also are provisions aimed at assuring that plan funds are protected and that participants who qualify receive their benefits.

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We urge employee benefit professionals to review the Department of Labor's (DOL) website references to ERISA/Employee Retirement Income Security Act of 1974. Stated simply, the Employee Retirement Income Security Act of 1974 (ERISA) is a federal law that sets minimum standards for most voluntarily established pension and health plans in private industry to provide protection for individuals in these plans. ERISA requires plans to provide participants with plan information including important information about plan features and funding; provides fiduciary responsibilities for those who manage and control plan assets; requires plans to establish a grievance and appeals process for participants to get benefits from their plans; and gives participants the right to sue for benefits and breaches of fiduciary duty.

The words fiduciary responsibilities remind us of when corporate pension plans were being scrutinized and 401k's were administered by banks, investment firms, insurance companies and others. Protection of each participant's individual account gave cause for concern and ERISA clarified how an employer's responsibilities were being watched by our federal regulators.

The key point is that ERISA most commonly referred to 401k investment accounts and pension plans. Point being, upon reviewing the DOL website, we see reference to Group Health and **Disability** Plans Benefit Claims Procedure Regulations**:** Group Health and Disability Plans Benefit Claims Procedure Regulation , a booklet on the rules that apply to group health and **disability** benefit claims. Plus it notes under 'Compliance Assistance', ERISA covers retirement, health and other welfare benefit plans (e.g. life, **disability** and apprenticeship plans).

You'll note the subject headings refer to **disability.** Does ERISA apply to **disability** and pension plans and fiduciary responsibility? We believe the short answer is "yes".

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