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What To Do If You Become Disabled

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Becoming disabled has a huge impact on your financial future. Knowing your legal rights before you become disabled or are about to become disabled is imperative. This article is part one of two articles providing some common sense tips to help ensure you receive the benefits you may be entitled to.

Saving your job

Most people are reluctant to tell their employer about a serious illness, fearing it may jeopardize their income. However, not telling your employer could also jeopardize your future. The Americans with Disabilities Act (ADA) only provides legal protection if your employer knows that you have a disability. If your illness adversely affects your job performance and your employer has no knowledge of it, you could be fired with no legal recourse.

Employer-provided accommodations. Under the ADA, once you tell your employer about your disability, you are entitled to certain "reasonable" accommodations, such as modifying your work schedule, altering some of your nonessential job duties, changing your physical work space, and providing special equipment. Your employer is required to make these accommodations unless it can be proven that they would be an "undue hardship," which varies given the size and financial resources of the company.

Before you tell your employer about your disability, first speak with your doctor to determine whether accommodations would even enable you to continue working. If the answer is yes, secure a note from your doctor.

If you can't perform your job duties with an accommodation, your employer can generally fire you. The ADA only applies to people who can perform the duties of their job—with or without an accommodation. If you can't perform your job duties, then you should investigate your company's disability and/or retirement benefits. Many companies also have pension plans that permit either early or disability retirement.

Short-term disability. If you cannot perform your job duties on a short-term basis (several weeks) and you will be out of work for a longer period, determine whether your company has a short-term disability plan. These plans usually cover the first six months of disability. If your company doesn't have such a plan, most states mandate that your employer subscribe to a state disability program. Check with your state or your employer.

If you will be out of work for an extended period (up to 12 weeks), you may be able to apply for medical leave under the Family and Medical Leave Act (FMLA). Under FMLA, if you have worked for at least one year at a company with 50 or more employees and have a serious health condition, you can request a medical leave of up to 12 weeks and your employer must guarantee your job or provide you with an equivalent job on your return.

The FMLA does not require your employer to pay you, but some companies do, so check with your company. The FMLA does, however, require your employer to provide you with the same employee benefits you received prior to your leave.

A 12-week medical leave under the FMLA can be requested only once during a 12-month period. It is also possible to take the 12-week leave incrementally, e.g., one or two days per week, which could be helpful if you are receiving ongoing medical treatment.

Leaving your job

If you must leave your job, you may be able to negotiate a severance package with your employer. However, before you negotiate a salary and/or medical benefit, be sure you are not endangering your ability to apply for the company's long-term disability plan. Long-term disability plans only cover you if you become disabled while employed. If you resign and then later apply for benefits, it may be difficult to prove you became disabled before your resignation.

Many people opt to phase out of their jobs rather than quitting, but this could be a liability. Many pension plans and disability plans are based on multiplying your years of service by a percentage of your final average salary. If your salary is reduced during your phaseout, it could affect your benefits.

Phasing out of your job may also affect whether you will be awarded disability benefits at all. This is particularly true if your job duties changed over an extended period of time. Many long-term disability plans provide benefits if you can't perform the "material duties" of your regular occupation. By phasing out of your job, you may be changing these material duties. For example, a surgeon who can no longer perform surgery and now does office exams only may have to demonstrate that she can no longer perform office exams.

Finally, by continuing to work during the phaseout, you may be artificially raising your burden of proof by showing that you can perform your job despite your disability.

Obtaining disability benefits

Before you go out on disability, research all available benefits, including Social Security disability; worker's compensation; state-mandated, short-term disability benefits; employer short-term and long-term disability benefits; and privately purchased disability benefits.

Most disability plans have strict time limits for applying and for making internal appeals if a benefit claim is denied. Because many plans allow only 60 days to submit an appeal, you must act quickly if you are denied. Disability plans also frequently contain a time limit on when lawsuits can be filed.

If your company has an employer-provided plan, request a summary plan document (SPD) and the plan document. The SPD summarizes your rights and outlines the amount and duration of benefits, waiting periods, application deadlines, coverage limits, type of proof required, and the definition of disability. The plan administrator is legally required to furnish you with any plan documents within 30 days upon written request.

Review all forms carefully and complete them fully. Incomplete or misleading responses could result in a denial or a delay of benefits.

You should also consult with your doctors before applying for benefits. If you are to establish that you are disabled, it is important that they support your claim.

The following are other plan clauses to which you need to pay particular attention to.

Definition of disability. Most plans define disability in one of three ways, and how the term "disability" is defined is often the determining factor for the award of benefits.

1. **Own occupation**—under this definition, you are totally disabled if you are unable to perform the material duties of your own or regular occupation. This is the best

definition, as you only have to demonstrate that you cannot do your job, regardless of whether you are able to do other jobs.

2. **Education, training, and experience**—under this definition, you are totally disabled if you are unable to perform the material duties of any occupation for which you are qualified by reason of education, training, or experience. This is more difficult to satisfy because you must demonstrate that not only can't you do your regular job, but you can't do any other job for which you are qualified.
3. **Any occupation**—under this definition, you are totally disabled if you cannot do the material duties of any job. This is the most difficult definition to satisfy because you must demonstrate that you can't work at all.

Elimination periods. Long-term disability plans usually have an elimination period, or waiting period, of 90 or 180 days before you are eligible for benefits. If you recover during this period, you will not be eligible for any benefits.

Offset provisions. Most plans provide for offsets for other income, meaning your monthly benefit is reduced if you draw other income. Many insurers also require that you apply for other benefits for which you may be qualified.

Benefit limits. Many disability plans have a two-year limit on benefits to people disabled by mental or nervous disorders. Thus, many insurers try to characterize chronic fatigue and immune dysfunction syndrome (CFIDS) patients as suffering from depression. If you have depression as a result of being disabled or having a chronic illness, make sure your doctor clearly indicates in writing that your depression is a result of your physical disability.

Partial disability. Many disability plans contain provisions for partial disability benefits, which vary greatly. Often, you are partially disabled if you can do your job on a part-time basis or you can work a full-time job (other than your own) at less pay. Benefits for these plans often limit instances in which you are entitled to total disability benefits.

Beginning the application process

Certain steps can help you successfully navigate the disability benefits process, including seeking professional legal help early. Be certain that you and your doctor complete forms accurately. Proofread all forms and retain copies of everything.

Have your doctor write a report describing your disability and containing: (1) a statement of your medical history; (2) a statement confirming your diagnosis; (3) an explanation of your disease; (4) an opinion as to whether you are totally disabled based on your plan's definition of disability; (5) an explanation of how your specific symptoms prevent you from working; (6) references to evidence in support of disability, e.g., results of tests; and (7) a statement of your prognosis.

Don't assume that the plan administrator knows the details of every illness. Include with the applications literature on CFIDS.

When the insurer requests a physical exam. If your insurer requests that you undergo a physical exam, you must comply. However, you do not have to undergo repeated exams. Before the examination, research the reputation and credentials of the doctor. If you find a problem, send the insurer a letter voicing your concern before the examination.

Don't go to the examination alone. Have a witness observe the scope of the exam in case you need to dispute a doctor's report if you receive a cursory or substandard exam. If you do receive a unsatisfactory exam, have the witness document his observations and send a letter to the insurer stating your concern.

You can do a lot to help ensure that your family's financial future is secure before beginning the disability benefits process.

Scott M. Riemer is an attorney specializing in long-term disability litigation. He may be reached at 212-297-0700.

Have family or friends help with:

- Reviewing plan documents
 - Typing letters
 - Making copies for your file
 - Mailing correspondence certified return receipt
 - Organizing documents and medical records
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APPLICATION TIPS

- Keep copies of all correspondence sent to and received from plan and insurance company employees.
 - Save the envelopes of all correspondence received from the insurance company and the plan should you need to prove that something was mailed after the statutory deadline. Proving a deadline was violated could be helpful if litigation is necessary.
 - Send all correspondence by certified mail, return receipt, so that there is no question that it was received. This could be crucial if the insurance company claims you did not comply with a deadline.
 - Describe in your cover letter any and all attachments you send as proof that a particular attachment was sent.
 - Send a letter to the plan or insurance company confirming the content of any telephone conversations that you have.
 - Ask your doctor not to talk to plan or insurance company employees on the telephone. Insurance companies often misrepresent what doctors tell them.
 - Tape record conversations so that the details can be reviewed later.
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