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SMALL BUSINESS

Understanding Long-Term Disability Benefits

As a lawyer who has represented businesses and professionals in the claims and litigation process of long-term disability insurance benefits for more than 20 years-- and a business owner myself--I have learned the importance of long-term disability insurance, as well as the importance of having the right package of long-term disability insurance benefits.

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Inasmuch as statistics demonstrate the far greater likelihood of becoming disabled rather than dying before your life expectancy, the importance cannot be overstated of obtaining disability insurance, along with obtaining the right disability insurance, as a business and life planning tool. The following is a summary of the disability benefits available to businesses and individuals for business planning purposes, and the features of these benefits.

Types of Coverage

Individual Disability Income Insurance

Individual disability income insurance, or “IDI”, is the primary product available to professionals and high-income earners who wish to protect their income in the event that an injury or sickness prevents them from working. The current marketplace contains long-term disability insurance with excellent features for occupational protection.

Most professionals—accountants, lawyers, doctors— can buy an insurance policy that will pay them a monthly benefit if they cannot perform the material and substantial duties of their occupation. This is especially important for professionals with physically demanding jobs, such as surgeons and dentists, or sales people who have to travel frequently. It is equally important, however, for accountants and lawyers, for example, who have to work long hours and are under constant pressure to function at high cognitive levels. These policies protect the most important facet of our ability to work — our ability to think clearly.

Another important option available in IDI policies is a residual or partial disability provision. These types of provisions pay a proportionate amount of a monthly benefit in the event that an insured loses income due to his or her inability to work full time or inability to perform all of the duties required by the insured’s occupation.

Individual disability income of policies contain many other benefit features, including cost of living increases on benefits, lifetime benefits, waiver of premium benefits, and options to increase the amount of monthly benefits without further medical evidence, to name a few.

A critically important element of appropriate business planning is making sure individuals who are sole proprietors, as well as all of the key members of an organization, are properly insured with individual disability income benefits because it protects their income level in the event medical circumstances prevent them from performing at past levels of productivity

Disability Buyout Insurance

Like key person life insurance, disability buyout insurance (DBO) can be used to completely fund or substantially supplement the obligation to buy out a key person in an organization who suffers a disability which prevents them from continuing to work in the organization. Typically, these policies require the insured to be totally disabled for at least a year before the insurance company’s obligation to buy out the insured’s interest is triggered. The benefits are ordinarily payable to the entity or

individual who is required to buy out the disabled individual's business interest, and most policies require the buyout to occur before the benefit will be paid to reimburse the person or entity responsible for the buy-out. Nevertheless, most disability insurers will advance the monies if proof of disability exists, a written buyout agreement is in place, and the payment is going to be made in accordance with the provisions of the buyout agreement.

Also, most of these policies require proof of an appropriate valuation methodology that would be approved by an accountant to protect the insured company from overpaying.

Disability buy-out insurance is a great tool for any business organization with key members without which business revenues would suffer, coupled with the possible cost of reimbursing that member his or her ownership interest in the business.

Business Overhead Expense Insurance

Disability Business Overhead Expense Insurance ("BOE") provides benefits to help pay the cost of doing business while a key individual in the organization is disabled. The policies usually provide payment for items like rent, utilities, equipment rental salaries, and other typical overhead expenses.

The average waiting period under a BOE policy is much shorter, typically 30-90 days, and requires proof of disability, along with monthly proof of the expenses incurred. These policies typically limit benefit periods from 12 to 24 months because they contemplate that other forms of reimbursement will be available to the business to cover it for the loss of a key person to disability such as the acquisition of another partner or stockholder who can partially shoulder the burden of a organization's on-going business expenses.

Individual versus Group Coverage

Most larger organizations offer group long-term disability to their employees and other higher-level executives. While a valuable supplement, these policies, in and of themselves, should not be relied upon as the exclusive methodology to protect employees or the business for a number of reasons.

First, these policies are not non-cancelable and guaranteed renewable, like privately purchased disability income policies acquired outside of the employer/employee

setting. Thus, they can be changed or canceled by either the employer or the insurance company and their rates can go up

Second, most group policies contain many features that are far less beneficial than are available to those who purchase private disability insurance. Many group policies sponsored by employers, for example, contain limitations for benefits payable as a result of a mental and nervous disability, or a disability which cannot be verified through objective testing, such as fibromyalgia, chronic fatigue syndrome, certain back and neck conditions, and certain pain syndromes. Importantly, after two years of benefits, most group policies change their definition of disability from the inability to perform your “own” occupation to the inability to perform “any” occupation. The “any occupation” definition of disability is a far more difficult standard to satisfy. Moreover, any policies sponsored by private employers are governed by ERISA. The applicability of ERISA to disability insurance policies has a severe negative impact on the ability of the disabled individual or entity to recover benefits.

Whenever ERISA applies to disability insurance claims, the requirements to either prove the claim or litigate the claim become far more difficult and stringent for the disabled person or entity. For example, when ERISA applies, the law requires that an insured who had benefits denied or terminated must first pursue an administrative appeal of those benefits through the insurance company that made the adverse determination. If unsuccessful and the disappointed insured must go to court, the insured is not entitled to a jury trial and most often not entitled to submit additional evidence, hire new experts, or obtain discovery. Further, if ERISA applies to the claim, judges typically limit their review to the file compiled by the very insurance company that denied the claim. In addition, the court will often be required to defer to the determination made by the insurance company at the pre-litigation stage and only reverse the insurance company's determination if the court finds that the decision was arbitrary and capricious or an abuse of its discretion. In other words, in deciding a group disability insurance benefits contest, a court does not determine if the individual is disabled; rather, it determines whether the bases of the insurance company's decision is too irrational to sustain.

Of course, premium costs of group disability insurance are far lower than the cost of obtaining a private disability insurance policy. But as described above, you get what you pay for. Nonetheless, having group disability insurance as a supplement to your private policies can certainly enhance your business planning, but should not be relied upon exclusively for the reasons set forth above.

Conclusion

All professionals and high-income earners should evaluate and consider purchasing individual disability income insurance to protect their ability to work in their occupation and their ability to earn a living. In doing so, however, it is important to have a fundamental understanding of the types of available coverage and the features that will best protect them and their business. Moreover, BOE and DBO coverage should be considered and acquired to protect closely held businesses and individuals from the more likely scenario of suffering a disability rather than an untimely death.

Evan S. Schwartz is a founding partner of [Quadrino Schwartz](#), a boutique insurance law firm. He has a national reputation for his work in the field of Disability Income Insurance, and he is an adjunct professor of insurance law at [Touro Law Center](#) in New York.

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