

## Defining “Regular Occupation” in Long-Term Disability Insurance Policies

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Abstract:

Millions of American workers purchase “regular occupation” disability insurance to protect against disability-related job loss. Unlike general disability insurance policies, which require workers be disabled from doing any job to receive benefit payments, “regular occupation” insurance pays benefits when workers become disabled from doing their specific job. Whether a disabled worker receives benefits under such a plan often turns on how insurers and courts define the worker’s “regular occupation.”

Some Circuits look to the duties, conditions, and experience required to do a worker’s job. But others define a worker’s “regular occupation” in generic terms—even if that description does not accurately capture the person’s work. When a worker’s occupation is defined generically, the worker is unlikely to qualify as disabled under their insurance plan and thus does not qualify for benefits. The divergent interpretations of “regular occupation” insurance plans across circuits run headlong into the goals of fair and uniform benefit administration set out in the Employee Retirement Income Security Act (ERISA).

This Note argues “regular occupation” must be defined with reference to a worker’s actual job requirements. We explore the shortcomings of defining “regular occupation” without reference to a worker’s actual job and propose several solutions to standardize the definition of “regular occupation.”

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## INTRODUCTION

It is impossible for Juanita Nichols to do her job. Now sixty-two years old, Nichols spent her entire career working in a poultry factory.<sup>1</sup> Her job involved processing raw chicken, a task for which she received industry-specific training applicable only to inspecting and processing poultry. Because the work involved raw meat, Nichols' job required she work in near-freezing temperatures all day.<sup>2</sup> Prolonged exposure to this extreme cold caused Nichols to develop Raynaud's disease,<sup>3</sup> a circulatory disorder that causes people to lose circulation in their extremities when exposed to cold temperatures. Nichols' diagnosis meant she could no longer work in the chicken-processing plant. She was now disabled from doing the only job she had ever had.

Before falling ill, Nichols purchased long-term disability insurance through her employer to protect against this exact scenario.<sup>4</sup> Her policy provided benefits if, as a result of injury or illness, Nichols could not "perform the material duties of [] her Regular Occupation."<sup>5</sup> But when Nichols filed a claim for benefits under the policy after developing Raynaud's, her claim was denied.<sup>6</sup>

When evaluating whether Nichols was disabled from doing "her Regular Occupation," Reliance Standard Life Insurance (Reliance) defined "regular occupation" in terms of how a food processing job was "normally performed in the national economy," not "the way it is performed for a specific employer or in a specific locale."<sup>7</sup> In short, Reliance defined "regular occupation" in general terms; it did not define Nichols' "regular occupation" with reference to her specific job requirements.

Without considering any additional information, Reliance defined Nichols' job using a reference manual called the Dictionary of Occupational Titles (DOT). The book contained an entry titled "sanitarian, any industry," which Reliance asserted best fit Nichols' position. The company then used the list of associated job duties to assess whether Nichols' Raynaud's diagnosis disabled her from performing her job. Because the "sanitarian (any industry)" entry did not refer to working in the cold, Reliance found Nichols was not disabled and denied her benefits.<sup>8</sup> Nichols asked Reliance to reconsider, but the insurance company concluded "[a]ny exposure to cold temperatures would be job-site specific, rather

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1. Nichols v. Reliance Std. Life Ins. Co., 924 F.3d 802, 805 (5th Cir. 2019).

2. Nichols v. Reliance Std. Life Ins. Co., 2018 U.S. Dist. LEXIS 109526, \*3 (S.D. Miss. June 29, 2018) (noting the factory was consistently kept at forty degrees Fahrenheit).

3. Nichols, 924 F.3d at 805; Nichols, 2018 U.S. Dist. LEXIS 109526 at \*34.

4. Nichols, 924 F.3d at 805.

5. Id. at 806 n.1.

6. Id. at 806.

7. Id.

8. Id.

than a duty of her ‘regular occupation’ as ‘sanitarian.’”<sup>9</sup>

Nichols sued reliance under the Employee Retirement Income Security Act (ERISA), which creates a private right of action to recover insurance benefits.<sup>10</sup> Though the district court sided with Nichols,<sup>11</sup> the Fifth Circuit ultimately held Reliance made a “fair and reasonable” determination.<sup>12</sup> Nichols appealed, but the Supreme Court denied certiorari this fall.<sup>13</sup>

This Note argues the terms “regular occupation” and “own occupation” in long-term disability insurance policies must be defined with reference to all of the material duties and conditions of a worker’s job. Part I explains the purpose and structure of long-term disability insurance. Part II details the circuit split over how to define “regular occupation” in cases like Nichols’. Part III presents the shortcomings of defining “regular occupation” in general terms and explains the importance of resolving the split in favor of a more specific definition. Finally, Part IV proposes several solutions to standardize the definition of “regular occupation” and bring administration of long-term disability insurance policies back into alignment with ERISA’s goals.

## I. WHAT IS LONG-TERM DISABILITY INSURANCE?

Disability insurance protects future earnings.<sup>14</sup> Many employers provide both short- and long-term disability insurance.<sup>15</sup> Short-term disability insurance pays workers a portion of their salary when they are temporarily disabled from doing their job.<sup>16</sup> Benefits are typically limited to three to six months and are used to compensate workers for income loss due to injuries like broken bones or other inherently temporary disabling conditions.<sup>17</sup>

Long-term disability insurance kicks in after short-term benefits run out.<sup>18</sup> Despite its name, long-term disability insurance typically only provides benefits for two to five years.<sup>19</sup> It is designed to be temporary: the policies are intended to provide much-needed financial support while a worker retrains and searches for a

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9. *Nichols*, 2018 U.S. Dist. LEXIS 109526 at \*5.

10. 29 U.S.C. § 1132(a)(1)(B).

11. *Nichols*, 2018 U.S. Dist. LEXIS 109526, at \*11–12.

12. *Nichols*, 924 F.3d at 810.

13. *Nichols v. Reliance Std. Life Ins. Co.*, 140 S. Ct. 186 (2019).

14. TAMRA L. BARRACLOUGH ET AL., *THE ADVISORS GUIDE TO DISABILITY INSURANCE* 8 (2016).

15. *Id.* at 59.

16. James Passamano, Beth Sufian & Karey Sopchak, *Protecting Income and Health Coverage When a Worker Becomes Disabled*, 55 HOUSTON LAWYER 16, 18 (2018).

17. BARRACLOUGH ET AL., *supra* note 14 at 60.

18. *Id.*

19. *Id.* at 63.

new job.<sup>20</sup>

Typically, insurers offer two types of long-term disability insurance: “any occupation” and “regular occupation.” “Any occupation” disability insurance provides protection when a worker is disabled from doing *any* job.<sup>21</sup> “Regular occupation” or “own occupation” insurance, on the other hand, provides benefits when the worker can no longer perform their particular job.<sup>22</sup>

## II. THE COURTS OF APPEALS DO NOT AGREE ON HOW TO DEFINE “REGULAR OCCUPATION.”

Disagreement over how to define “regular occupation” has divided the courts of appeals for two decades.<sup>23</sup> The Second and Third Circuits have long held “regular occupation” must be defined with reference to the actual requirements of a worker’s job.<sup>24</sup> The Fifth, Sixth, and Eighth Circuits, however, accept more generic characterizations of jobs, even when those definitions do not capture all facets of a worker’s role.<sup>25</sup> The following sections illustrate the different approaches to defining “regular occupation” by summarizing emblematic cases on each side of the circuit split.

### *A. The Second and Third Circuits Define “Regular Occupation” in Terms of Workers’ Actual Job Requirements.*

Martha Kinstler was the director of nursing services at a small healthcare facility.<sup>26</sup> Her role required her to stand approximately twenty-five percent of the work day and perform clinical duties for forty percent of the work day.<sup>27</sup> Kinstler purchased a long-term disability insurance policy through her employer that

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20. *Id.* at 61.

21. 4 Law of Life and Health Insurance § 8.03[1] (“Any occupation” disability insurance is also called “general disability” insurance.)

22. *Id.* at § 8.02[1]. “Own occupation” and “regular occupation” are interchangeable in the context of disability insurance policies. *See* *Patterson v. Aetna Life Ins. Co.*, 763 Fed. Appx. 268, 271–72 (3d Cir. 2019) (“equat[ing] ‘own occupation’ with . . . ‘regular occupation.’”); *Osborne v. Hartford Life & Accident Ins. Co.*, 465 F.3d 296, 300 (6th Cir. 2006) (stating the “relatively minor difference in language” between “own occupation” and “regular occupation” “does not warrant a different result.”).

23. *See* *Kinstler v. First Reliance Std. Life Ins. Co.*, 181 F.3d 243, 249 (2d Cir. 1999); *see also* *Darvell v. Life Ins. Co. of N. Am.*, 597 F.3d 929, 935 (8th Cir. 2010) (acknowledging “[t]he circuits are split . . . on this issue”).

24. *See, e.g.*, *Lasser v. Reliance Std. Life Ins. Co.*, 344 F.3d 381, 386 (3d Cir. 2003); *Kinstler*, 181 F.3d at 252–53.

25. *See* *Darvell*, 597 F.3d at 935; *House v. Am. United Life Ins. Co.*, 499 F.3d 443, 452 (5th Cir. 2007); *Osborne v. Hartford Life & Accident Ins. Co.*, 465 F.3d 296, 299 (6th Cir. 2006).

26. *Kinstler*, 181 F.3d at 245.

27. *Id.* at 246.

provided benefits when the “[i]nsured cannot perform the material duties of his/her regular occupation.”<sup>28</sup>

After injuring her knee in a car accident, Kinstler sought disability benefits under the policy. Though Kinstler’s physician said she could “not work in any capacity where she [was] expected to walk distances more than 50 feet repeatedly[,] carry loads, lift or climb,”<sup>29</sup> Kinstler’s insurer relied on the opinion of a different doctor who determined Kinstler would be able to work so long as she was sedentary.<sup>30</sup>

After determining the scope of Kinstler’s limitations, the insurance company turned to the DOT, which, as noted above, is a reference manual that catalogs jobs and their corresponding duties. The company categorized Kinstler’s occupation as “Director of Nursing.” Because the job duties associated with “Director of Nursing” in the DOT were largely sedentary and did not include direct patient care, Kinstler’s insurer refused to pay her benefits.<sup>31</sup> The insurer argued that although Kinstler’s job required she perform direct patient care, those tasks were not an essential function of a “director of nursing” according to the DOT.<sup>32</sup>

On appeal, the Second Circuit rejected the insurer’s argument and held Kinstler was improperly denied benefits.<sup>33</sup> The Second Circuit recognized that although Kinstler’s job title was nominally the same as the job identified in the DOT, her “regular occupation” “must be defined as a position of the ‘same general character’ as her job, *i.e.*, a director of nursing at a small health care agency.”<sup>34</sup> Thus, “even though at a large hospital, a director of nursing might have only . . . sedentary tasks,” Kinstler’s position required more activity.<sup>35</sup> Under this understanding of “regular occupation,” the court reinstated Kinstler’s benefits.<sup>36</sup>

*B. The Fifth, Sixth, and Eighth Circuits Define “Regular Occupation” in General Terms.*

Decisions like *Kinstler* and others from the Second and Third Circuits are irreconcilable with decisions in the Fifth, Sixth, and Eighth Circuits. Take for example the case of Juanita Nichols, discussed in this Note’s introduction. As previously explained, Nichols’ insurer, Reliance, denied her benefits when Nichols was diagnosed with Raynaud’s disease. Nichols sued and the U.S. District Court

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28. *Id.*

29. *Id.*

30. *Id.* at 246–47.

31. *Id.* at 247.

32. *Id.*

33. *Id.* at 252–53.

34. *Id.* at 253.

35. *Id.*

36. *Id.*

for the Southern District of Mississippi reversed Reliance's determination, noting the insurer ignored "both common sense and the record evidence" when it denied Nichols benefits. The court held it was unreasonable to define Nichols' occupation by relying solely on a single DOT entry that did not capture all of Nichols' job duties.<sup>37</sup>

The Fifth Circuit reversed, finding Reliance's definition of Nichols' regular occupation was supported by substantial evidence: the DOT.<sup>38</sup> The court held that even though Nichols paid for "regular occupation" disability insurance, "Reliance did not need to account for every task Nichols performed," it "merely needed to make a 'fair and reasonable' determination of whether Nichols' disability precluded her from performing the material duties of her regular occupation."<sup>39</sup>

Not everyone agrees with this approach. Judges on both the Fifth and Sixth Circuits have published dissents from cases like Nichols'.<sup>40</sup> These opinions echo the law in the Second and Third Circuits, explaining "regular occupation . . . in general[] means the individual insured's usual and customary means of earning a livelihood."<sup>41</sup> Moreover, one judge explains, "regular occupation" "does not permit the insurer to define [disability] at an unreasonably high level of generality so as to offer the insured no real protection."<sup>42</sup>

The issue is not simply one of contract interpretation. Though contract language may differ slightly across insurance companies and between policies,<sup>43</sup> the core question remains how an insurer (or court) should determine what, exactly, constitutes an applicant's "regular occupation." Juanita Nichols' policy states that her insurer, Reliance, would determine her "regular occupation" by referencing how "it is normally performed in the national economy, and not the unique duties performed for a specific employer or in a specific locale."<sup>44</sup> Requiring insurers define the demands of workers' occupations with reference to "the national economy" glosses over the central issue: Insurers can only identify how a job is performed in the national economy if it first identifies what the job is.

Put another way, when we talk about defining "regular occupation," we mean

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37. *Nichols v. Reliance Std. Life Ins. Co.*, 2018 U.S. Dist. LEXIS 109526, at \*11–12 (S.D. Miss. June 29, 2018).

38. *Nichols v. Reliance Std. Life Ins. Co.*, 924 F.3d 802, 810 (5th Cir. 2019).

39. *Id.* at 812.

40. *See, e.g., House v. Am. United Life Ins. Co.*, 499 F.3d 443, 456 (5th Cir. 2007) (Dennis, J., dissenting); *Osborne v. Hartford Life & Accident Ins. Co.*, 465 F.3d 296, 301 (6th Cir. 2006) (Cole, J., dissenting).

41. *House*, 499 F.3d at 462.

42. *Id.* at 462.

43. *Compare Nichols*, 924 F.3d at 806 n.2 (policy stated "regular occupation" determined in reference to how "it is normally performed in the national economy, and not the unique duties performed for a specific employer or in a specific locale") with *Kinstler*, 181 F.3d at 246 (policy did not state how "regular occupation" would be interpreted).

44. *Nichols*, 924 F.3d at 806 n.2.



both identifying the correct title and then, in turn, identifying the tasks and conditions necessary to do that job. For example, though Nichols' insurance policy allowed her insurer to define her "regular occupation" with reference to the national economy, Reliance defined the wrong occupation. It classified Nichols as a "sanitarian (*any industry*)."<sup>45</sup> Had Reliance looked at how *poultry* processors operate in the national economy, it would have determined cold exposure was, in fact, a necessary condition of Nichols' work.

*C. As a Result of the Split, Outcomes for Workers with Identical Jobs, Disabilities, and Insurance Policies Vary.*

Judicial disagreement about the meaning of "own occupation" and "regular occupation" has led to an intolerable difference in outcomes for disabled workers. Insurers routinely define claimants' regular occupations at a high level of generality, which allows them to deny benefits to people who are, in fact, disabled from doing their real-world jobs.<sup>45</sup> Though some courts reject insurers' interpretations of "regular occupation," others blindly accept them.

This practice can lead to disparate outcomes for workers with identical cases. Consider two large-animal veterinarians, each of whom has "regular occupation" disability insurance. Both suffer an injury that prevents them from the heavy lifting necessary to care for large animals. Insurers deny both veterinarians' disability claims because, though they can no longer work with large animals, they can do the work of a general veterinarian.<sup>46</sup> On appeals to the Second and Fifth Circuits, for example, the Fifth would uphold the insurer's determination denying benefits, but the Second would find the veterinarian must be classified as a *large-animal* vet and reverse. The circuit split means workers with identical jobs, identical disabilities, and identical policies do not experience identical protections nationwide. This disparity is especially problematic under ERISA, which is meant to standardize the provision of employment benefits to U.S. workers.

The veterinarian hypothetical closely resembles two actual cases involving lawyers. A trial lawyer and an environmental lawyer were disabled from working in their respective specialties.<sup>47</sup> The Fifth Circuit denied the trial attorney benefits,

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45. See, e.g., *Darvell v. Life Ins. Co. of N. Am.*, 597 F.3d 929, 934 (8th Cir. 2010) (insurer defined a door-to-door salesman as a sedentary "account executive" and denied benefits); *Lasser v. Reliance Std. Life Ins. Co.*, 344 F.3d 381, 386 (3d Cir. 2003) (insurer defined an orthopedic surgeon responsible for emergency surgery as a general surgeon and denied benefits); *Kinstler*, 181 F.3d at 247 (insurer defined a nurse as "director, nursing service" even though she had direct patient care duties and denied benefits).

46. See *DICTIONARY OF OCCUPATIONAL TITLES* § 073.061-010 (4th ed. 1991) (defining veterinarian without reference to animal size).

47. Compare *House*, 499 F.3d at 447, with *Doe v. Std. Ins. Co.*, 852 F.3d 118, 121 (1st Cir. 2017).

holding the “distinction between ‘trial lawyer’ and ‘lawyer’ [is] too fine under a common sense interpretation of ‘regular occupation.’”<sup>48</sup> The First Circuit, however, found it unreasonable to use the generic description of “lawyer,” “rather than a job description that fully . . . encompassed the material duties of [the lawyer’s] specialized area of legal practice”<sup>49</sup> and awarded the environmental lawyer benefits. This judicial inconsistency results in different outcomes for similarly situated workers.

### III. “REGULAR OCCUPATION” MUST BE DEFINED WITH REFERENCE TO A CLAIMANT’S ACTUAL JOB REQUIREMENTS.

There are two main problems with defining “regular occupation” without reference to the specific requirements of a person’s job. First, the main text on which insurers and courts rely when defining a worker’s “regular occupation” is deeply flawed. The DOT should not be used in benefit determinations. Its shortcomings are (at least) threefold: the DOT was not designed for use in disability determinations, it is based on flawed data, and it is obsolete. Blind reliance on the DOT distorts benefit determinations and makes it more likely a worker will be erroneously denied benefits.

Second, these inaccurate determinations jeopardize the welfare of millions of Americans and make it harder to recover after disability-related job loss. Conversely, accurate determinations—those based on job definitions that capture all of a worker’s duties—provide workers with much-needed financial support and, in turn, encourage long-term economic stability.

Legal intervention is necessary to remedy these problems. The insurers who draft and administer the policies at issue have an inherent conflict of interest: they have a fiduciary duty both to the beneficiaries of their plans and to their shareholders. Yet insurers consistently prioritize shareholders over workers by defining “regular occupation” broadly and denying otherwise viable claims. When courts allow insurers to define “regular occupation” generically, they tacitly endorse insurers’ refusal to balance these competing interests in good faith.

#### *A. The Dictionary of Occupational Titles Distorts the Adjudication of ERISA Disability Benefit Cases.*

As noted, some circuits rely on a single definition in the DOT to define a worker’s occupation.<sup>50</sup> But the definitions do not accurately describe workers’ jobs, so use of the book unfairly distorts benefits determinations. As we now

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48. *House*, 499 F.3d at 453.

49. *Doe*, 852 F.3d at 123–24.

50. *Nichols v. Reliance Std. Life Ins., Co.*, 924 F.3d 802, 811–12 (5th Cir. 2019).

explain, insurers' use and lower courts' acceptance of the DOT is misplaced for three reasons: The DOT was never intended for use in disability determinations, it is based on bad data, and it is outdated.

*1. The DOT was Not Designed for Disability Determinations.*

The DOT was designed to help place people in jobs, not for use in deciding whether someone is disabled. The DOT catalogs information about more than 12,000 occupations.<sup>51</sup> Each entry includes a job title and a non-comprehensive list of duties performed by individuals in that type of job.<sup>52</sup>

Until 1991, the DOT was used by employment counselors at the U.S. Department of Labor to match applicants with job openings.<sup>53</sup> Other government agencies, like the Veteran's Administration, also used the DOT to place workers in jobs.<sup>54</sup>

The DOT itself recognizes it is not designed for use in benefit determinations. Its introduction directs users to "supplement [the] data with local information detailing jobs within their community."<sup>55</sup> The DOT acknowledges that its definitions "reflect[] jobs as they have been found to occur, but they may not coincide in every respect with the content of jobs as performed in particular establishments or at certain localities."<sup>56</sup>

The Social Security Administration (SSA), which adjudicates thousands of disability benefit claims each year, has come to realize that the DOT is not appropriate for use in disability determinations. Though the SSA uses the DOT as an aid in its determinations, the agency cautions that a "job title is never sufficient to identify [a person's] occupation."<sup>57</sup> Instead, jobs are classified by "the title of the job as given by the claimant; possible alternative wording for the title; *major tasks in the job; and the industry of the job.*"<sup>58</sup>

Although the SSA and some courts<sup>59</sup> recognize that "occupation" must be defined in terms of a worker's actual job duties (not with single-minded obedience to the DOT), private insurers continue to use the DOT to define "occupation" in

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51. WORK, JOBS, AND OCCUPATIONS: A CRITICAL REVIEW OF THE DICTIONARY OF OCCUPATIONAL TITLES 1, 4 (Ann R. Miller et al. eds., 1980) [hereinafter WORK, JOBS, AND OCCUPATIONS].

52. *Id.* at 4–5.

53. *Id.* at 5.

54. *Id.* at 45, 258.

55. DICTIONARY OF OCCUPATIONAL TITLES vii (4th ed. 1991).

56. *Id.*

57. Soc. Sec. Admin., Past Relevant Work – The Particular Job or the Occupation as Generally Performed, SSR 82-61 (2017), <https://secure.ssa.gov/poms.nsf/lnx/0425005025> [<https://perma.cc/F3LW-9FZM>].

58. *Id.* (emphasis added).

59. *See, e.g., Lasser v. Reliance Std. Life Ins. Co.*, 344 F.3d 381, 387 n.5 (3d Cir. 2003).

general terms, harming disabled workers.

### 2. *The DOT is Based on Flawed Data.*

The data underlying the DOT's job definitions are flawed, so many of its job descriptions are inaccurate.<sup>60</sup> The data used to compile the DOT's job descriptions was primarily collected by field branches of the Department of Labor, which were staffed with employees from local state agencies.<sup>61</sup> This decentralized staffing caused data collection problems because the national office lacked effective control over the field offices and could not standardize the process.<sup>62</sup> For example, individual instructions from the national office on how to observe jobs "appear to have been insufficient and inadequate" as "[m]ajor steps in the job analysis process did not have sufficient guidance."<sup>63</sup>

Though insurers use the DOT as evidence of how jobs are performed nationwide, jobs were frequently observed in only one market, raising questions about whether industries or jobs were adequately researched.<sup>64</sup> Some states limited researchers' ability to travel outside of the state to observe jobs.<sup>65</sup> Definitions based on limited observations do not represent the universal conditions of doing a job (to the extent universal conditions exist in any job). All of these problems suggest the DOT's job descriptions do not reflect actual job duties and conditions in the real world.

Problems with the DOT's data go beyond its collection. When drafting the DOT, "definitions were written especially hurriedly, with the likely result that source data [was] not fully explored."<sup>66</sup> When updating the DOT for its fourth printing, significant time "was spent trying to verify or update third edition occupations." As a result, data collection may not have "adequate[ly] cover[ed] . . . newly emerging industries and occupations."<sup>67</sup> These problems, too, undermine the DOT's accuracy.

### 3. *The DOT is Obsolete.*

The DOT is badly out of date, yet insurers continue to rely on it, and some courts blindly accept its use. The DOT has not been updated since 1991 and is no

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60. WORK, JOBS, AND OCCUPATIONS, *supra* note 51, at 316.

61. *Id.* at 100–01.

62. *Id.* at 101.

63. *Id.* at 145.

64. *Id.* at 116, 147.

65. *Id.* at 113, 119.

66. *Id.* at 146.

67. *Id.*

longer published.<sup>68</sup> To make matters worse, more than a tenth of the job descriptions in the 1991 edition were not based on new data.<sup>69</sup> Instead, the definitions were carried over from the previous edition, for which data was collected in 1965.<sup>70</sup> These carry-over job descriptions are now fifty-five years old.

As noted, the SSA takes into account a claimant's actual job duties when using the DOT in disability determinations. The SSA recognizes the DOT is outdated because "[a] gradual change occurs in most jobs so that after 15 years it is no longer realistic to expect that skills and abilities acquired in a job . . . continue to apply."<sup>71</sup> The SSA has thus recognized the need to replace the DOT with a new system "to make accurate [benefit] decisions."<sup>72</sup>

Because the DOT is a snapshot in time—from 1991 at best—it will only become less and less relevant and cannot evolve alongside industry. Though jobs may not disappear completely, the tasks required to perform them may become automated. Thus, though "working with robots, rather than being replaced by them, is likely to become the norm," the DOT's manufacturing titles will never be updated to reflect the need to supervise automated manufacturing.<sup>73</sup>

The DOT's obsolescence is particularly evident in jobs that have changed in light of the internet. For example, the DOT definition of news editor refers only to print duties, though many news sites are now exclusively online.<sup>74</sup>

*B. Defining Occupations in General Terms Unfairly Jeopardizes Americans' Access to Disability Insurance Benefits.*

*1. Millions of Americans are Covered by Long-Term Disability Insurance Policies that Contain the "Regular Occupation" Language whose Meaning Underlies the Circuit Split.*

One in four Americans become disabled from doing their job before age sixty-five.<sup>75</sup> To protect against disability-related job loss, about ninety million

68. *Browning v. Colvin*, 766 F.3d 702, 709 (7th Cir. 2014).

69. WORK, JOBS, AND OCCUPATIONS, *supra* note 51, at 156.

70. *Id.*

71. 20 C.F.R. § 404.1565 (2012).

72. *The Need for Occupational Information*, Soc. Sec. Admin., [https://www.ssa.gov/disabilityresearch/occupational\\_info\\_systems.html](https://www.ssa.gov/disabilityresearch/occupational_info_systems.html) [<https://perma.cc/F3LW-9FZM>] (last visited Sept. 12, 2019).

73. See Jamie Condliffe, *The Week in Tech: Some Workers Hate Robots. Retraining May Change That*, N.Y. TIMES (July 19, 2019), <https://www.nytimes.com/2019/07/19/technology/amazon-automation-labor.html> [<https://perma.cc/R6MW-RUST>].

74. See *Popovich v. Met Life Ins. Co.*, 281 F. Supp. 3d 993, 1007–08 (C.D. Cal. 2017); DICTIONARY OF OCCUPATIONAL TITLES, § 132.067-026 (4th ed. 1991).

75. COUNCIL FOR DISABILITY AWARENESS, THE CRISIS OF DISABILITY COVERAGE IN AMERICA 3 (2018), [http://disabilitycanhappen.org/public\\_html/wp-content/uploads/2018/04/The-CDA-RealityCheckup-Media-Kit.pdf](http://disabilitycanhappen.org/public_html/wp-content/uploads/2018/04/The-CDA-RealityCheckup-Media-Kit.pdf) [<https://perma.cc/G4B8-XU8M>].

Americans pay for long-term disability insurance.<sup>76</sup> These policies are typically purchased by workers through their employers' benefit plans and are governed by ERISA.<sup>77</sup> Overall, forty-one percent of employers offer long-term disability insurance as part of their employee benefits packages; the proportion of large employers that offer it is much higher.<sup>78</sup>

Many of these policies contain the "own occupation" or "regular occupation" language at issue in the circuit split. For example, the nation's largest private-sector employer, Walmart, offers long-term "own occupation" disability insurance to its 2.2 million employees.<sup>79</sup>

Workers cannot avoid unfair benefit determinations under a "regular occupation" policy by shopping for a different policy with different language. Insurance markets are typically controlled by just a few providers; consumers generally have little choice and are subject to whatever policies those insurers offer. For example, employers purchase insurance plans for their employees through large-group insurance markets. In forty-three states, at least eighty percent of the large-group insurance market is controlled by just three insurers.<sup>80</sup> In at least twenty-six states, three insurers control ninety percent of the large-group insurance market.<sup>81</sup> Options for people seeking disability insurance in the individual market—that is, not through their employers—are similarly limited. In thirty-four states, a maximum of three insurers offer individual long-term disability policies.<sup>82</sup> In ten states, only one insurer offers individual coverage.<sup>83</sup>

As a practical matter, then, a consumer cannot choose to purchase insurance from an insurer that is willing to pay disability benefits for a "regular occupation" disability claim in light of the worker's actual job duties and conditions. Such a provider may not exist. Instead, a worker is likely stuck with insurers who define "regular occupation" in general terms, which leads to unjust benefit denials. If a

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76. See Fred Schott, *How Many Working Americans Have Adequate Disability Coverage?*, COUNCIL FOR DISABILITY AWARENESS (Apr. 26, 2018), <https://blog.disabilitycanhappen.org/how-many-americans-have-disability-coverage/> [<https://perma.cc/6ZSF-KEK5>].

77. *Id.*

78. See Michelle Andrews, *Why a Long-Term Disability Policy is More Important than Pet Insurance*, NPR (Oct. 11, 2017), <https://www.npr.org/sections/health-shots/2017/10/11/556946744/why-a-long-term-disability-policy-is-more-important-than-pet-insurance> [<https://perma.cc/8V2T-KB5X>].

79. *Fortune* 500, FORTUNE.COM, <https://fortune.com/fortune500/2019/search/?employees=desc> (last visited Sept. 20, 2019); Long-Term Disability, [https://one.walmart.com/content/usone/en\\_us/me/time/disability/long-term-disability.html](https://one.walmart.com/content/usone/en_us/me/time/disability/long-term-disability.html) [<https://perma.cc/Q4T7-QTTL>]. (last visited Sept. 20, 2019).

80. U.S. GOV'T ACCOUNTABILITY OFFICE, PRIVATE HEALTH INSURANCE, ENROLLMENT REMAINS CONCENTRATED AMONG FEW ISSUERS, INCLUDING IN EXCHANGES 67–68 (2019), <https://www.gao.gov/assets/700/697746.pdf> [<https://perma.cc/NS68-NAPD>].

81. *Id.*

82. *Id.* at 54–55.

83. *Id.* at 54–55.

worker is one of the relatively few who has the resources and wherewithal to appeal an unjust benefit determination, the worker must live in a circuit that defines “regular occupation” in terms of workers’ actual job requirements to have any hope of obtaining benefits.

*2. Defining Occupations in General Terms is Contrary to ERISA’s Goals and Flouts the purpose of Long-term Disability Insurance.*

Defining workers’ jobs at a high level of generality, regardless of actual job duties and conditions, runs afoul of two of ERISA’s main goals: protecting workers and establishing uniformity.

Congress enacted ERISA “to promote the interests of employees and their beneficiaries in employee benefit plans.”<sup>84</sup> Defining occupations at their highest level of generality does not protect workers’ interests. Just the opposite: The practice makes it easier to deny claims and robs workers of needed benefits for which they pay a premium.

ERISA also seeks to establish a uniform administrative scheme “to guide processing of claims and disbursement of benefits.”<sup>85</sup> The circuit split undermines uniformity. For example, as already explained, the Fifth Circuit allows insurers to interpret “regular occupation” generically and categorize workers according to DOT entries, but in the Second and Third Circuits, that approach is considered unreasonable. There, insurers must define “regular occupation” in terms more closely tied to a worker’s actual job responsibilities and conditions. This variation is a far cry from the “uniform administrative scheme” ERISA envisions.<sup>86</sup>

When courts define “regular occupation” and “own occupation” in general terms, they undercut the role of long-term disability insurance in rehabilitation and retraining. Despite its name, “long-term” disability insurance is designed to be temporary; it provides financial support between job loss and new work. Many policies provide benefits for only two to five years.<sup>87</sup> Workers rarely need longer. The average claim lasts just over two and a half years.<sup>88</sup>

The expectation is that while receiving benefit payments “the insured will

84. *Shaw v. Delta Air Lines*, 463 U.S. 85, 90 (1983).

85. *See Egelhoff v. Egelhoff*, 523 U.S. 141, 148 (2001).

86. *See id.*

87. *See, e.g., Long Term Disability Insurance*, METLIFE, <https://www.metlife.com/insurance/disability-insurance/long-term/> [<https://perma.cc/3AVX-6PHR>] (last visited Oct. 17, 2019). For example, the nation’s second-largest private-sector employer, Amazon, caps long-term disability coverage at two years. *See, e.g., Bigham v. Liberty Life Assurance Co.*, 148 F. Supp. 3d 1159, 1163 (W.D. Wash. 2015).

88. COUNCIL FOR DISABILITY AWARENESS, *The Average Duration of Long-Term Disability is 31.2 Months. Are You Prepared?* (Jan. 18, 2016), <https://blog.disabilitycanhappen.org/the-average-duration-of-long-term-disability-is-31-2-months/> [<https://perma.cc/F5FJ-BKXY>].

[make] the necessary adjustment to another line of work” or will qualify for continuing benefits under a general disability policy due to the severity of their impairment.<sup>89</sup> When courts generalize claimants’ job descriptions, they rob workers of much-needed financial assistance, making it harder to pursue training and pivot to a new line of work.

*C. Accurate Benefit Determinations Prevent Harm to Workers and Bolster Long-Term Economic Stability.*

*1. Disabled Workers who are Denied Benefits Face Drastic Financial and Health Consequences.*

When courts allow insurers to deny benefits arbitrarily, they sow chaos instead of providing financial stability. More than half of Americans struggle to make ends meet in the wake of economic shocks like job loss.<sup>90</sup> This is unsurprising given that almost half of Americans do not have enough savings to cover three months of living expenses.<sup>91</sup> A 2014 study of consumer bankruptcy filings found job loss and medical bills are the two most common reasons consumer debtors file for bankruptcy.<sup>92</sup> Disabled workers who are denied benefits face both.

The stakes associated with benefit denials are higher than financial instability alone. A 2015 survey conducted by the American Psychological Association (APA) found money to be the country’s number one stressor, with nearly a quarter of adults rating their money-related stress as “extreme.”<sup>93</sup> Financial uncertainty is correlated with depression, anxiety, and myriad other health concerns.<sup>94</sup>

Individuals low on funds are also less likely to go to the doctor, which exacerbates or prolongs workers’ disabling conditions. Twenty-one percent of APA survey respondents said their budgets were so tight they considered foregoing

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89. See *McFarland v. Gen. Am. Life Ins. Co.*, 149 F.3d 583, 587 (7th Cir. 1993).

90. PEW CHARITABLE TRUST, *THE ROLE OF EMERGENCY SAVINGS IN FAMILY FINANCIAL SECURITY: HOW DO FAMILIES COPE WITH FINANCIAL SHOCKS?* 2 (2015), [https://www.pewtrusts.org/~/media/assets/2015/10/emergency-savings-report-1\\_artfinal.pdf](https://www.pewtrusts.org/~/media/assets/2015/10/emergency-savings-report-1_artfinal.pdf) [<https://perma.cc/9YPC-X2XT>].

91. *Chances of Disability: Me, Disabled?*, COUNCIL FOR DISABILITY AWARENESS, <https://disabilitycanhappen.org/disability-statistic/> [<https://perma.cc/M7N2-DX7X>] (last visited Nov. 21, 2019).

92. Daniel A. Austin, *Medical Debt as a Cause of Consumer Bankruptcy*, 67 ME. L. REV. 1, 21 (2014).

93. AM. PSYCHOLOGICAL ASS’N, *STRESS IN AMERICA: PAYING WITH OUR HEALTH* 2 (Feb. 4, 2015), <https://www.apa.org/news/press/releases/stress/2014/stress-report.pdf> [<https://perma.cc/FEH7-8RBX>].

94. See Neal Gabler, *The Secret Shame of Middle-Class Americans*, THE ATLANTIC (May 2016), <https://www.theatlantic.com/magazine/archive/2016/05/my-secret-shame/476415/> [<https://perma.cc/BZ2X-TPSU>].



or did forego a doctor's visit in the last year.<sup>95</sup> For unemployed people with disabilities, the choice between saving money and seeing a doctor may be especially fraught.

Without access to benefits, disabled workers must find alternative sources of income. Ideally, they will retrain and reenter the workforce in jobs that provide pay comparable to their prior positions. Without the financial stability provided by long-term disability benefits, workers may be forced to seek new jobs—lower-paying, less-skilled jobs—because they need immediate income.<sup>96</sup> These lower-paying jobs consume time and energy a worker might otherwise devote to retraining. When workers are forced to take a job just to make ends meet, it becomes even less likely they will successfully recover from disability-related job loss.<sup>97</sup>

Unfairly denying benefits negatively affects the broader economy, too. When workers lose their jobs and lack sufficient savings, they suddenly need to cut back on spending, which removes money from the economy.<sup>98</sup>

*2. Defining Jobs Accurately Makes it Easier for Workers to Successfully Retrain and Go Back to Work.*

Workers are more likely to qualify for disability benefits when courts define their occupation consistently with the job's actual requirements. Disability insurance benefits typically provide approximately sixty percent of a worker's salary.<sup>99</sup> Though not sufficient to completely replace one's regular pay, the limited financial stability provided by disability benefits allows workers to pursue retraining.<sup>100</sup> Retraining is critical to successfully bridging the gap between former and new employment. Data show early interventions, like the awarding of benefits

95. AM. PSYCHOLOGICAL ASS'N, *supra* note 93, at 3.

96. See Jack Kelly, *The Frightening Rise in Low-Quality, Low-Paying Jobs: Is This Really a Strong Market*, FORBES (Nov. 25, 2019), <https://www.forbes.com/sites/jackkelly/2019/11/25/the-frightening-rise-in-low-quality-low-paying-jobs-is-this-really-a-strong-job-market/#3784e8cd4fd1> [<https://perma.cc/G5MQ-9G29>] (noting job seekers spend “an exceedingly long period of time searching for a suitable job [and receive] lackluster salary offers”).

97. See GOSTA ESPING-ANDERSEN ET AL., WHY WE NEED A NEW WELFARE STATE 111–12 (2002) (“Once people have entered low-skilled jobs they find far fewer opportunities for upgrading their skills than are available to people in more skilled work. As a result, over time, they are likely to suffer an accumulating skill deficit.”).

98. See Allison Schrager & Quartz, *The Growing Ranks of America's High-Earning Poor*, THE ATLANTIC (Nov. 3, 2015), <https://www.theatlantic.com/business/archive/2015/11/income-rich-asset-poor/413977/> [<https://perma.cc/CV4Q-W9ZP>].

99. Kristen Monaco, *Disability insurance plans: trends in employee access and employer costs*, U.S. BUREAU OF LABOR STATISTICS (Feb. 2015), <https://www.bls.gov/opub/btn/volume-4/disability-insurance-plans.htm> [<https://perma.cc/QX6X-CM76>].

100. See *McFarland v. Gen. Am. Life Ins. Co.*, 149 F.3d 583, 587 (7th Cir. 1993) (“[T]he insured will [make] the necessary adjustment to another line of work” while receiving benefit payments).

shortly after job loss, “may reduce the rate at which work limitations become career ending-disabilities.”<sup>101</sup>

The earlier a worker starts retraining, the better. As a practical matter, this usually means starting to retrain just after job loss, though workers benefit most when they begin retraining even before they have left their prior positions.<sup>102</sup> Even if overlap is impossible, quickly transitioning to a new job still matters. When people enroll in retraining programs within nine days of applying for unemployment benefits, they “end[] up working significantly more weeks, and earn[] more than workers who entered training a year or more after the job loss.”<sup>103</sup> Conversely, when there is delay in retraining of even one year, workers’ chances of finding new careers are often permanently hindered and their lifelong earnings limited.<sup>104</sup>

Long-term disability insurance thus plays a critical role in helping workers transition to new work after job loss. When courts construe the terms “regular occupation” and “own occupation” generally, workers who are disabled from doing the only jobs their training and experience enable them to perform are denied benefits. These unjust denials stymie workers’ ability to pursue retraining and get back to work. Defining a worker’s “regular occupation” in terms of their actual job requirements and conditions, on the other hand, ensures that deserving workers are able to pursue new work without crushing financial stress.

#### *D. Insurers Have Little Incentive to Make Accurate Benefit Determinations.*

Insurers have little incentive to accurately define “regular occupation.” As discussed above, they have conflicting fiduciary duties: under ERISA, insurers owe a fiduciary duty to beneficiaries when administering plans,<sup>105</sup> but, as a

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101. David Autor, Mark Duggan & Jonathan Gruber, *Moral Hazard and Claims Deterrence in Private Disability Insurance*, 6 AM. ECON. J.: APPLIED ECON. 110, 111 n.1 (2014).

102. Jeffrey Selingo, *The False Promise of Worker Retraining*, THE ATLANTIC (Jan. 8, 2018), <https://www.theatlantic.com/education/archive/2018/01/the-false-promises-of-worker-retraining/549398/> [<https://perma.cc/4KZF-AXPZ>]. There are a variety of factors other than timeliness of benefits that affect access to retraining and can temper its efficacy. *See generally id.* (explaining barriers to retraining). Addressing those challenges is beyond the scope of this Note (though the authors want to emphasize it is critically important to address the shortcomings of job retraining programs, particularly given that more than 120 million workers in the world’s twelve largest economies may need retraining in the next three years alone as a result of automation. *See ANNETTE LAPRADE ET AL., THE ENTERPRISE GUIDE TO CLOSING THE SKILLS GAP 2* (2019)). Though early retraining does not guarantee a successful career pivot, the fact remains the earlier workers receive benefits, the earlier they are likely to retrain and, thus, the likelier that retraining is to be successful.

103. Selingo, *supra* note 102.

104. *Id.*; *see also* Autor, Duggan & Gruber, *supra* note 101, at 111 n.1.

105. 29 U.S.C. § 1102(a)(1) (giving a fiduciary “authority to control and manage the operation and administration of [a] plan.”); 29 U.S.C. § 1133(2) (requiring a fiduciary to provide a “full and

corporation, they also owe a fiduciary duty to their shareholders to maximize profits.<sup>106</sup> An insurer is simultaneously “responsible for administering [benefit] plan[s] so that those who deserve benefits receive them” and has a duty “to pay as little in benefits as possible to plan participants because the less money the insurer pays out, the more money it retains in its own coffers.”<sup>107</sup>

Many insurance companies, including some of the largest in the world, have engaged in discriminatory denial of disability benefits.<sup>108</sup> Unum, the largest American insurer specializing in disability insurance, recently engaged in a deliberate program to deny meritorious benefit claims in bad faith.<sup>109</sup> At the end of each quarter, Unum required its claims managers to deny enough claims to meet financial goals, regardless of the merits of the claim.<sup>110</sup> Fraudulent denials disproportionately affected benefit determinations of “so-called subjective illnesses,” the type typically hardest to prove, such as “chronic pain, migraines, or even Parkinson’s.”<sup>111</sup> Numerous “scathing” opinions have similarly decried the practices of Reliance, a common litigant in these types of cases.<sup>112</sup> One court went so far as to catalog all the opinions in which courts rejected Reliance’s benefit determinations,<sup>113</sup> noting, “[t]hese opinions reveal that Reliance takes a range of extraordinary steps to deny claims for disability benefits.”<sup>114</sup>

This comes as no surprise. Insurers benefit when “regular occupation” is defined in general terms. ERISA provides a private right of action to recover benefits due under a worker’s plan and a mechanism to enforce rights under the terms of a plan.<sup>115</sup> ERISA does not, however, set out the standard of review for

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fair review” of the denial of benefits claimed under a plan); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 109 (1989) (“ERISA . . . imposes a duty of loyalty on fiduciaries and plan administrators”).

106. *See, e.g., Abatie v. Alta Health Ins.*, 458 F.3d 955, 966 (9th Cir. 2006).

107. *Id.*

108. *See, e.g., John H. Langbein, Trust Law as Regulatory Law: The Unum/Provident Scandal and Judicial Review of Benefit Denials Under ERISA*, 101 NW. U. L. REV. 1315, 1316–18 (detailing the systematic denial of ERISA administered disability benefits by Unum, one of the largest insurers).

109. *Id.*

110. *Id.* at 1318–19.

111. *Id.* at 1319.

112. *See Hoff v. Reliance Std. Life Ins. Co.*, 160 F. App’x 652, 654 (9th Cir. 2005) (holding that Reliance had “an illogical interpretation of [the claimant’s] policy and a corresponding failure to investigate the facts.”); *see also Lasser v. Reliance Std. Life Ins. Co.*, 146 F. Supp. 2d 619, 641 (admonishing Reliance for “a level of care which . . . cannot be squared with the sensitive inquiry these important [] cases require.”); *McDevitt v. Reliance Std. Life Ins. Co.*, 663 F. Supp. 2d 419, 423 (D. Md. 2009) (calling Reliance “blind or indifferent” to “the ultimate purpose of insurance . . . [which] is not to erect administrative barriers, increase transaction costs, or delay the payment of legitimate claims.”).

113. *Nichols v. Reliance Std. Life Ins. Co.*, 2018 U.S. Dist. LEXIS 109526 at \*15 n.79 (S.D. Miss. June 29, 2018).

114. *Id.* at \*18.

115. 28 U.S.C. § 1132(a)(1)(B); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 108

these actions.<sup>116</sup> The Supreme Court has held “a denial of benefits challenged under [ERISA] is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator . . . discretionary authority to determine eligibility for benefits or to construe the terms of the plan.”<sup>117</sup> Where the administrator retains authority to construe terms of the plan or determine benefits, as insurer-administrators often do, determinations are subject to an arbitrary and capricious standard of review.<sup>118</sup> Thus, insurers who make eligibility determinations likely receive a highly deferential standard of review in court. As a result, workers are unlikely to receive benefits because many courts blindly accept the DOT as reasonable evidence of a claimant’s job simply because insurers assert it is.<sup>119</sup> Indeed, plan administrator’s ability to “impose self-serving terms that severely restrict the ability of a reviewing court to correct a wrongful benefit denial” was part of the reason Unum was able to deny meritorious claims.<sup>120</sup>

Moreover, traditional contract interpretation principles do not help workers in these cases. The contract may not be construed against the drafter-insurer where the insurer retains the ability to interpret “ambiguous” terms of the plan.<sup>121</sup> When

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(1989).

116. *Firestone Tire & Rubber Co.*, 489 U.S. at 109.

117. *Id.* at 115.

118. *Id.* at 109–10.

119. *See, e.g., Darvell v. Life Ins. Co. of N. Am.*, 597 F.3d 929, 934 (8th Cir. 2010) (insurer defined a door-to-door salesman as a sedentary “account executive” and denied benefits); *Lasser v. Reliance Std. Life Ins. Co.*, 344 F.3d 381, 386 (3d Cir. 2003) (insurer defined an orthopedic surgeon responsible for emergency surgery as a general surgeon and denied benefits); *Kinstler v. First Reliance Std. Life Ins. Co.*, 181 F.3d 243, 247 (2d Cir. 1999) (insurer defined a nurse as “director, nursing service” even though she had direct patient care duties and denied benefits).

120. *See Langbein, supra* note 108, at 1316.

121. *Fleisher v. Standard Ins. Co.*, 679 F.3d 116, 124 (3d Cir. 2012) (“Notably, every Court of Appeals to have addressed the issue has concluded that a court reviewing a benefits decision for abuse of discretion cannot apply the principle that ambiguous plan terms are construed against the party that drafted the plan.”); *Marrs v. Motorola, Inc.*, 577 F.3d 783, 787 (7th Cir. 2009) (“[A]lthough, generally, ambiguities in an insurance policy are construed in favor of an insured, in the ERISA context in which a plan administrator has been empowered to interpret the terms of the plan, this rule does not obtain.”) (internal citation and quotation marks omitted); *D & H Therapy Assocs., LLC v. Boston Mut. Life Ins. Co.*, 640 F.3d 27, 35 (1st Cir. 2011) (“We have also noted that the doctrine of *contra proferentem* does not apply to review of an ERISA plan construction advanced by an administrator given authority to construe the plan.”) (internal citations omitted); *Carden v. Aetna Life Ins. Co.*, 559 F.3d 256, 260 (4th Cir. 2009) (holding that under circuit case law the court may not “curb the discretion given an administrator by a plan[.]”); *White v. Coca-Cola Co.*, 542 F.3d 848, 857 (11th Cir. 2008) (stating that “[w]e have rejected *contra proferentem* in ERISA appeals” because “arbitrary and capricious standard of review would have little meaning if ambiguous language in an ERISA plan were construed against the plan administrator.”) (internal citations and quotations omitted); *Lennon v. Metro. Life Ins. Co.*, 504 F.3d 617, 627 n.2 (6th Cir. 2007) (“Were this Court tasked with interpreting the language *de novo*, in view of the word’s apparent ambiguity, the rule of *contra proferentem* would apply.”); *Kimber v. Thiokol Corp.*, 196 F.3d 1092, 1100 (10th Cir. 1999) (“We now hold that when a plan administrator has discretion to interpret the plan and the

courts allow “regular occupation” to be defined generically, insurers can manipulate benefit determinations in whichever way they see fit. In short, when courts allow insurers to define “regular occupation” with reference to a single DOT title, they become complicit in insurance companies’ manipulation of the system and abdicate their role as a check on company power in consumer relationships.

*E. The Benefits of Defining “Regular Occupation” with Specificity Outweigh the Potential Costs.*

Though defining “regular occupation” narrowly will afford more workers better insurance coverage when they most need it, expanding benefits in this way has costs. For example, increasing the specificity with which insurers define “regular occupation” may lead to more frequent payouts under the policies at issue. This increase in payouts may, in turn, result in increased premiums. Defining “regular occupation” narrowly may render these policies too expensive for lower-income workers.

One possible solution: employers could subsidize any increase in rates. The benefits of shouldering this financial burden outweigh the costs. Companies often use strong(er) disability protection as an attractive benefit to entice employees, and insurers often market it as such.<sup>122</sup> Moreover, high-quality “regular occupation” insurance facilitates early intervention when tragedy strikes.<sup>123</sup> This early intervention in turn facilitates employees’ returns to the workforce and decreases dependence on other benefit programs like social security disability insurance.<sup>124</sup>

This cost-benefit analysis plays out the same way when conducted at the individual, corporate, and societal levels. The good that flows from defining

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standard of review is arbitrary and capricious, the doctrine of *contra proferentem* is inapplicable.”); *Winters v. Costco Wholesale Corp.*, 49 F.3d 550, 554 (9th Cir. 1995) (“[T]he Plan here states that the Plan Administrator [has the authority to construe provisions] . . . and the general rule of *contra proferentem* does not apply.”); *Pagan v. NYNEX Pension Plan*, 52 F.3d 438, 443 (2nd Cir. 1995) (“[A]pplication of the rule of *contra proferentem* is limited to those occasions in which this Court reviews an ERISA plan *de novo*.”).

122. *Voluntary Benefits*, RELIANCE STANDARD, <https://www.reliancestandard.com/home/products/voluntary-benefits/> [<https://perma.cc/KF3W-8PVQ>] (last visited Apr. 28, 2020) (describing voluntary benefits, like long-term disability insurance, as “high quality employee benefits programs [that] help attract and keep valuable employees.”); *Should You Offer Group Disability Insurance to Your Employees?*, THE HARTFORD, <https://www.thehartford.com/business-insurance/strategy/disability-insurance/offer-group-disability-insurance> [<https://perma.cc/3GBT-7KKQ>] last visited Apr. 28, 2020) (describing disability benefits as a “valuable addition to [] employee benefits package[s].”).

123. See Priyanka Anand & David Wittenburg, *An Analysis of Private Long-Term Disability Insurance Access, Cost, and Trends*, MONTHLY LAB. REV. (March 2017), <https://www.bls.gov/pub/mlr/2017/article/an-analysis-of-long-term-disability-insurance-access-cost-and-trends.htm> [<https://perma.cc/GC5K-5FGF>].

124. *Id.*

“regular occupation” with specific reference to a claimant’s actual job duties outweighs any second-order effects such an interpretation may have on the insurance markets.

#### IV. POSSIBLE SOLUTIONS

##### *A. The Judiciary Should Advance a Uniform Legal Rule.*

Distortion in the market precludes the possibility of effective consumer advocacy and disincentivizes insurers from self-regulating. Outside intervention is required to bring administration of long-term disability policies back into alignment with the goals of ERISA. The Second and Third Circuits have already recognized this and implemented legal rules mandating insurers look beyond the DOT and take a claimant’s actual job duties and conditions into account when making benefit determinations.<sup>125</sup> When the Supreme Court denied certiorari in *Nichols v. Reliance*,<sup>126</sup> it foreclosed (for now) the possibility of such a judicially-created rule on a national scale.

The onus is now on other circuit courts to recognize the fundamental mismatch between the goals of ERISA and purposes of long-term disability insurance on the one hand, and the way in which insurers currently manipulate disability benefits on the other. Absent intervention from the legal system, workers will continue experiencing unequal levels of protection under identical insurance policies. Courts should require insurers look beyond a single DOT definition when defining workers’ “regular occupation” in disability benefit determinations. Mandating insurers account for workers’ actual job requirements—by looking to an individual’s job description, multiple DOT definitions, or other sources of information outlining the worker’s responsibilities—will ensure workers get the benefit of their bargain, *i.e.*, insurance against loss of *their own, regular occupation*.

Unless and until the circuits align themselves with the approach articulated in the Third and Second Circuits, intolerable differences will remain in how workers are treated state to state. That said, given the intractable nature of debate in the circuits to date, judicial intervention seems to hinge on the Supreme Court granting cert in a future case.

##### *B. Congress Should Legislate a Uniform Rule.*

Because the Supreme Court recently denied certiorari in a case presenting the

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125. *See, e.g.,* Kinstler v. First Reliance Std. Life Ins. Co., 181 F.3d 243, 253 (2d Cir. 1999).

126. *Nichols v. Reliance Std. Life Ins. Co.*, 140 S. Ct. 186 (2019).

“regular occupation” question,<sup>127</sup> the legislature now appears best-positioned to take action. Congress should mandate insurers account for actual job responsibilities when administering “regular occupation” disability insurance.

ERISA has been amended a number of times since it was first enacted in 1974.<sup>128</sup> These amendments seek to control the actions of employers and plan administrators. For example, the Omnibus Budget Reconciliation Act of 1986 prohibited employers from limiting the participation of new employees close to retirement in retirement plans.<sup>129</sup> The same amendment also prohibited employers from freezing benefits for plan participants over sixty-five years old.<sup>130</sup> The Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) extended healthcare coverage for employees who had their benefits reduced.<sup>131</sup> The Health Insurance Portability and Accountability Act added additional responsibilities with respect to private health plans, including language dictating how insurers must treat mothers and newborn children.<sup>132</sup> Amending ERISA to define “regular occupation” fits neatly into this legislative history.

In fact, legislators have recently proposed major changes to ERISA.<sup>133</sup> ERISA reform could explicitly endorse the legal rule from the Second and Third Circuits: “regular occupation” must be defined by the work a claimant was doing prior to disability, with reference to the conditions of that work.<sup>134</sup> There is no doubt that such a rule would be administrable: it has worked for the past three decades in multiple circuits.<sup>135</sup> Federal legislation controlling “regular occupation” disability insurance would ensure uniformity and fairness in benefit determinations.

To ensure compliance and maximize effect, an ideal legislative solution would address the best practices for making benefit determinations, not just dictate what “regular occupation” means. Insurers should not be able to sidestep their duty to pay benefits owed under “regular occupation” plans simply by using language

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127. *Id.*

128. *See, e.g.,* Schmidt v. AK Steel Corp. Pension Agreement Plan, U.S. Dist. LEXIS 144792, at \*6 (S.D. Ohio Jan. 14, 2010) (explaining that “[w]hile ERISA has been amended several times since 1974, the cause of action and the right to recover has been an essential part of ERISA from the beginning.”).

129. *History of EBSA and ERISA*, EMPLOYEE BENEFITS SECURITY ADMINISTRATION, <https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/history-of-ebsa-and-erisa> [<https://perma.cc/35PT-4WPL>] (last visited Nov. 21, 2020).

130. *Id.*

131. *Id.*; *see generally* 29 U.S.C. § 1161 (2012).

132. 29 U.S.C. § 1185 (2012).

133. *See, e.g., Empowering American Workers and Raising Wages*, <https://elizabethwarren.com/plans/empowering-american-workers?source=soc-WB-ew-tw> [<https://perma.cc/CMY4-8Y65>]. (last visited Nov. 21, 2019).

134. *Lasser v. Reliance Std. Life Ins. Co.*, 344 F.3d 381, 386 (3d Cir. 2003) (citing *Kinstler v. First Reliance Std. Life Ins. Co.*, 181 F.3d 243, 253 (2d Cir. 1999)).

135. *See Kinstler*, 181 F.3d at 243.

other than “regular occupation” in their policies. That is, if the phrase “regular occupation” must be defined with reference to a claimant’s job responsibilities, an insurer should not be permitted to revise its policies and insert different language to escape accountability. A legislative amendment must consider the possibility that insurers will choose to write their contracts without reference to “own” or “regular occupation.” The best amendment to ERISA, then, would require insurers to look at the entirety of a worker’s job responsibilities, with reference to multiple sources, when determining whether a claimant is disabled from doing his or her job under long-term disability insurance policies.

#### CONCLUSION

There is an intractable circuit split over how to define the terms “regular occupation” and “own occupation” in long-term disability insurance policies. When courts allow insurers to define the terms generically, without reference to a worker’s actual job requirements, they flout the purposes of ERISA and jeopardize the welfare of millions of Americans. The DOT—the book on which courts and insurers rely when making these determinations—is ill-suited to the task. It was not designed for use in disability determinations, is “supported” by bad data, and is obsolete. In short, the current method of defining “regular occupation” in the Fifth, Sixth, and Eighth Circuits results in inconsistent and unjust benefit determinations.

Power imbalance in the insurance market prevents consumers from negotiating contracts that better reflect their needs. Relatedly, market conditions disincentivize insurers from defining “regular occupation” with any level of specificity. As a result, the market does not allow participants to correct the problem themselves. Outside intervention is required to bring administration of long-term disability policies back into alignment with ERISA.

Millions of Americans rely on long-term disability insurance to protect their income in the wake of unimaginable hardship. When insurers and courts refuse to deliver workers the benefit of their bargain, individuals, their families, and the larger economy suffer.

While the Supreme Court recently declined to correct the intolerable difference in law among the circuits, the legislature now has an opportunity to amend ERISA and mandate insurers define “regular occupation” with specificity.