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Are You “Doing Enough” to Avoid ERISA Statutory Penalties?

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Clients often are surprised to learn they are liable for ERISA statutory penalties associated with participant document requests even though they have retained an independent third party to administer their ERISA welfare benefits plans (such as disability, life, and health plans). It is fairly well established in most of the federal circuits that only the plan administrator, as defined by ERISA, can be penalized for failure to respond to document requests. In virtually all circumstances, the plan administrator will be the employer/plan sponsor or a particular employee of the plan sponsor. Many employers, by handing off plan administration to an insurer or other third-party administrator – arrangements usually handled by their insurance broker, assume they have what amounts to a “turnkey” plan, and that mundane plan chores, such as responding to participant document requests, are not any concern of theirs. Members of the ERISA plaintiff’s bar are well aware of this dangerous complacency among many uninformed employers and are ready, willing, and able to take advantage of it.

The issue commonly arises when a plaintiff’s attorney addresses a letter requesting copies of plan documents to both the employer and the plan insurer. The insurer usually knows it has no liability for ERISA statutory penalties, and may simply ignore the request. Meantime, the employer assumes the insurer is taking care of things and also ignores the letter.

BAM! – the employer is served with a lawsuit demanding ERISA statutory penalties, and possibly consequential damages. The penalties, alone, can run as high as $110.00 per day, with no statutory outer limit to the total accrued amount. The clock starts ticking 30 days after the date of the request and will continue ticking for however many weeks, months, or even years it takes for the plaintiff to finally receive the requested documents. Further, if the insurer denies the plaintiff’s benefit claim because the claim was untimely, or for some other reason the plaintiff could have avoided but did not know about because he did not have the plan document containing the necessary information, the plaintiff may seek to charge the employer with the value of the lost benefits as a remedy that is within the “such other relief” the court may grant in its discretion under the ERISA penalty statute.

What if the document sought by a plaintiff was not created or maintained by the employer, but is a proprietary internal document created by the plan’s insurer or third-party administrator – is an employer liable for ERISA penalties if the insurer or administrator refuses to produce such a document?

The Seventh Circuit Court of Appeals thinks so. That Court has sustained an award of substantial daily penalties, and interest on delayed payment of health benefits imposed upon the plan sponsor of a health plan for failure to produce proprietary documents created, and owned by, its third-party claims administrator. There, the health plan was funded entirely by the employer. However, to ensure against even the appearance of a conflict of interest, the employer retained an insurance company to act as claims administrator, ceding complete and final authority to the insurance company for all claim decisions. The claims administrator initially denied the plaintiff's claim for speech therapy benefits, relying upon certain "Resource Tools" it had developed internally for evaluation of speech therapy claims. After the claims administrator refused the plaintiff's requests for copies of the Resource Tools, she went to the employer for help. However, the claims administrator also refused to provide these documents to the employer, advising, among other reasons, that the documents were proprietary. The claims administrator eventually relented, after over 300 days, and Plaintiff's counsel submitted an appeal letter arguing that the Resource Tools contained requirements not specified in the plan documents. The claims administrator reversed its decision and paid the claim. The plaintiff then sued the employer, seeking $1,000,000.00 in statutory penalties for failure to provide the Resource Tools, and other documents, within 30 days of the plaintiff's request.

After seven years of litigation, including two trips to the Court of Appeals, the employer was ultimately slapped with a penalty of almost $10,000.00, plus an award of interest to compensate for the claims administrator's delay in paying the health benefit claim. The latter relief arose from a finding that the employer's failure to provide the requested documents not only violated the penalty provision, ***but it was also a separately compensable breach of fiduciary duty***. The also ordered the employer to pay almost $40,000.00 towards the plaintiff's attorneys' fees and costs.

Significantly, the Court of Appeals conceded the fact that the claims administrator created, owned, and had sole possession of the Resource Tools may have presented "a bit of a challenge" to the employer. The Court concluded, however, "[a]ny dilemma this may have posed for [the employer] did not excuse its statutory obligation to [the plaintiff]" to respond to lawful document requests. The Court noted it was the employer's decision to engage a third party to administer claims as its agent. The Court concluded the employer could have, and should have, ensured its contract with the claims administrator gave the employer the right to require the production of "internal documents" when necessary to respond to ERISA document requests. The Court remanded to the district court for the determination of the amount of penalties and damages to award.

On remand, the district court recognized the employer "made many efforts" to assist the plaintiff, "both to improve her chances of persuading [the claims administrator that the] speech therapy was medically necessary as well as to obtain the documents she wanted." Ultimately, however, the court concluded the employer "***could have done more***" to assist the plaintiff to obtain copies of the Resource Tools timely, and awarded penalties at a rate of $30.00 per day for 309 days.

Determining how to ensure one is "doing enough" to comply with the "could have done more standard" is a daunting task. But for a start, employers must consciously accept there is no such thing as a "turnkey" ERISA plan. Insurers or third-party administrators will rarely assume certain basic legal, fiduciary responsibilities placed upon the Plan Administrator by ERISA, such as responding to document requests. This fact, in our experience, is often not appreciated by employers or the insurance brokers employers often rely upon to set up their benefit plans. Before signing up for such plans, ask your benefits lawyer to review the proposed contract or service agreement.

And never, ever, ignore a letter asking for plan documents.

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