

Your Guide To ERISA Penalties: How To Get Up To \$110 A Day From Your Employee Benefit Plan

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If you have benefits through your employer—like health, life, or disability insurance—you can potentially get up to \$110 for each day your plan administrator fails to give you certain documents. It can add up quickly. Say they should have given you a document 180 days ago. A judge could give you up to \$19,800, plus court costs and attorney’s fees. Stretch it to one year, and it’s \$40,150 (although you might not get the full penalty).

The federal law that allows penalties is known as ERISA (pronounced “uh-riss-uh”). It stands for the “Employee Retirement and Income Security Act.” ERISA applies to most benefits provided by private employers in the U.S., but not benefits provided to government workers and some other employees.

There are two main situations when you can collect penalties under ERISA: (1) for not receiving copies of plan documents after you request them; and (2) for not receiving a notice of your COBRA rights after certain events. Here is a step-by-step guide for each situation.

Penalties For Not Receiving Plan Documents

ERISA requires plan administrators to give certain people copies of plan documents if they request them. These people include the employee, other family members enrolled in the insurance, such as a spouse or children, and even life insurance beneficiaries. The idea is that insurance companies have to play fair, so you have a right to know everything they do about your benefits. And if they don’t play fair and give you all the documents you are entitled to, they have to pay you up to \$110 a day for each violation.

Here’s how to make a claim for penalties (you can do this for each separate benefit plan you are enrolled in through your employer).

1. Find out who your “Plan Administrator” is.

Usually, you can only get penalties from the “plan administrator.” There may be an exception or two, but those are rare and difficult to prove. The plan administrator is listed in the summary plan description for your benefits. If you don’t have your summary plan description, that’s fine. The plan administrator is almost always your employer or the insurance company providing the insurance. So you can just send your request to both of them. You might call your employer or insurer to get the addresses to send the request to. They might tell you which one of them is the administrator, but **NEVER RELY ON THEIR ORAL REPRESENTATIONS**. They could be wrong or lying, and if you send your request to the wrong company, you probably can’t get penalties. So send your request to both unless you have an official, current plan document telling you which one is the plan administrator.

2. Draft a written request.

You need to ask for documents they have to give you under the law. That law is 29 U.S.C. § 1024(b)(4). It says:

The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated.

Ask specifically for all of the underlined items. If you are also applying for benefits—for example, long-term disability benefits—or appealing a denial, you should also ask for all past documents that might affect your claim. For example, if you were originally granted long-term disability benefits in 2005, but they were terminated in 2009, you will want documents from 2005 through 2009. That way, you can get all the documents that might impact your claim.

3. Send the request to the plan administrator.

Penalties are assessed per day, so dates are very important. You need to be able to prove when your request was sent and when it was received by the plan administrator. A fax is good if you keep the confirmation page. Certified mail is good if you get a confirmation or return receipt. But make sure you keep a copy of your request and the proof it was received someplace safe.

Can the plan administrator make me sign a release? No. Once they receive your request, they may try to insist that you sign something. Some insurance companies have been trying this recently. **DO NOT SIGN ANYTHING WITHOUT TALKING TO AN ATTORNEY.** As a participant or beneficiary under the Plan, you have an unconditional right to these documents. They cannot force you to do anything—let alone sign away your rights—before giving you the documents.

Can they make me pay for copies? Yes. Plan administrators can make a “reasonable charge” for giving you copies of documents. At the most, it will be 25 cents per page plus mailing costs.

4. Wait 30 days, then figure out what they did not give to you.

They have 30 days to give you all the documents you requested. After that, penalties start. But figuring out what they did not give you can be difficult. The documents can be complex. The plan administrator may have given you incomplete copies of documents, or outdated documents, or documents from the wrong plan entirely. Discovering this will require patience and the ability to interpret contracts. Your safest option is to have an attorney do this for you.

5. Sue for penalties, plus costs and attorney’s fees.

They will not voluntarily give you penalties. You have to sue them. Although you could try to do so on your own, the best option is to get an attorney.

Will an attorney take my case? If you already have an attorney bringing a lawsuit because you were denied benefits, he or she can also sue for penalties. Otherwise, you may be able to pay an attorney hourly. If you don't have the money for that, an attorney might take it on a contingent fee. This means they will get a certain percentage of any amount you win, but nothing if you don't.

It can be risky for an attorney, because they don't know how much, if anything, a judge will award in penalties. But even if the penalties aren't that great, the court might give you more money to cover some of your attorney's fees. Plus, a claim for penalties is relatively easy to bring. The issues are very simple: what did you request; when did you request it; what did they give you; and when did they give it to you. There are no jury trials or complex facts to deal with.

How strong is my claim for penalties? \$110 a day is the maximum. A judge has to decide how much your claim is worth. Here is what a judge will look at:

- *Harm.* This is the most important factor. It is not a requirement, but you are far more likely to get good penalties per day if you were “prejudiced”—something bad happened to you—because you did not get the documents. For example, you missed a deadline to apply for benefits that is stated in the documents, or you lost an appeal because you did not have crucial documents describing your rights. The worse the harm, the better for your penalties claim.
- *Bad intent.* You get higher penalties per day if the plan administrator denied documents intentionally or in “bad faith.” This means they chose not to give you the documents either for no good reason, or for a very bad reason, like trying to keep you from getting benefits. That type of behavior can be punished by the court by awarding higher penalties.
- *Important documents withheld.* It is better for penalties if they failed to give you something containing important information, like the plan contract that states all your rights and the limitations on them. But if they keep something insignificant from you, like a plan amendment that corrected a typo, you are not very likely to get high penalties.
- *Long delay.* The longer the delay, the better for your claim.
- *Multiple requests.* The more requests you make, the worse their refusal looks, and the higher the penalty. So it can be beneficial to send additional requests if they fail to respond after the first one.

Do they have any defenses? Just one: if their failure “results from matters reasonably beyond the control of the administrator.” This is a very difficult standard to meet (think fires and floods that destroy requested documents), so you should not generally worry about it.

Penalties For Not Receiving a COBRA Notice

COBRA is the “Consolidated Omnibus Budget Reconciliation Act of 1985.” It sometimes lets you keep your health coverage for a limited time (18 or 36 months) when you would otherwise lose it. You still have to pay for the coverage. But plan administrators have to notify you of your COBRA rights at certain times. If they don’t, you can collect up to \$110 a day. Here’s how to do it.

1. Provide any required notice within 60 days.

You are entitled to a COBRA notice when certain things happen. Those things are called “qualifying events.” For three of them, you have to notify the plan administrator that they happened within 60 days. These three events occur anytime a person loses health coverage because:

- The covered employee (the family member with the primary coverage who enrolls his or her dependents) divorces his or her spouse;
- The covered employee legally separates from his or her spouse; or
- A dependent child loses dependent child status. This usually occurs when the child is too old to be covered under the plan.

For example, consider a wife who has health insurance through her work, and her husband is enrolled as a dependent. If they get divorced, the husband can no longer be enrolled as a dependent, so he would normally lose coverage. But COBRA gives him the right to keep the coverage for a limited time (36 months in that case). And if he notifies the plan administrator of the divorce within 60 days, they will have to notify him of his COBRA rights.

How should I notify the plan administrator? As with requests for plan documents, make sure you notify the plan administrator of a qualifying event in writing and you can prove the notice was sent and received. Faxes and certified mail with confirmations or return receipts work great. And again, keep the request and proof it was received in a safe place.

For what qualifying events do I NOT have to notify the plan administrator? Six events trigger an automatic right to a COBRA notice; you don’t have to notify anyone of anything. First, you must always receive a notice of your COBRA rights at that time your coverage starts. The other five events occur whenever a person loses coverage because:

- The covered employee dies;
- The covered employee loses his or her job (but is not fired for “gross misconduct”);
- The covered employee has his or her hours reduced;
- The covered employee gets Medicare; or
- The employer providing the benefits files for bankruptcy.

With these events, you don't have to do anything. Rather, it is *your employer* who must notify the plan administrator of the qualifying event within 30 days. The employer will know about these events on their own, so you don't have to tell them about it.

What is a "loss of coverage?" Remember, you have to "lose coverage" because of qualifying event to be entitled to notice of your COBRA rights. You lose coverage not just by losing coverage entirely, but also whenever the terms and conditions of your insurance change. For example, if your hours are reduced and your deductible goes up, or you have to pay higher premiums, or you have to pay more to enroll your spouse and dependents, then you have "lost coverage." You still have coverage, but it's changed, and that's enough.

2. See if they notify you of your COBRA rights on time.

Once the plan administrator receives notice of a qualifying event, they must notify you of your COBRA rights within 14 days. If your spouse is enrolled and affected, he or she must also usually receive the notice. They don't have to send notices to dependent children.

For example, if you notify the plan administrator of a divorce 60 days later (the last possible day you can provide notice), they have fourteen additional days to give you a COBRA notice, which is 74 total days after the qualifying event.

For automatic qualifying events, plan administrators potentially have up to 44 days following the qualifying event to give you notice. By law, when your employer *is* the plan administrator, they have 44 days.

If they don't send the notice, then penalties begin.

What does the notice have to say? The notice has to adequately inform you of your rights. It must tell you the coverage you are allowed to continue and how much you have to pay to do so. Other information may be required depending on the circumstances, such as the qualifying event that triggered the notice.

3. Sue for penalties for each violation, plus costs and attorney's fees.

You can sue for penalties for each participant in the health plan who does not receive the required notice. To illustrate, if your child ages out of your health plan as a dependent, and they fail to give you notice of his or her COBRA rights, both you and your child can collect up to \$110 a day in penalties.

How strong is my claim for penalties? The same factors described above apply. Again, the most important factor is whether or not you were harmed by the failure to receive notice. For example, you should get higher penalties if you never received notice of your rights, weren't able to stay enrolled in the health insurance, and ended up with large medical bills as a result.

Do they have any defenses? Yes, they have one main defense. Some courts will not award penalties so long as the plan administrator "took steps reasonably calculated to give the required

notice.” In other words, if they tried hard enough to give you a notice, you don’t get penalties. For example, if they can prove they placed a notice in the mail to your last known address, that is good enough, even if you never actually received the notice. It stinks, but that’s the law in most places.

Conclusion

If you get benefits through your job, federal law lets you collect up to \$110 for every day your plan administrator fails to provide you certain documents. You can also get reasonable costs and attorney’s fees. Although it depends a lot on the circumstances, you could end up recovering a lot of money. Plus, if you are also appealing a denial of benefits, the penalties claim can give you a valuable bargaining chip.