



## Employers and Civil Penalties for Not Providing ERISA Plan Documents

By: J.S. "Chris" Christie, Jr.

In *Mondry v. American Family Mut. Ins. Co.*, 557 F.3d 781, 795-803 (7<sup>th</sup> Cir. 2009), the Seventh Circuit of Appeals held that a plaintiff could claim ERISA statutory civil penalties from the employer based on the failure to produce documents that the employer never had in its possession. This decision should serve as a wake up call for employers as to their duties to respond to ERISA plan participants' requests for employee benefit plan documents.

Pursuant to ERISA § 104(b)(4), 29 U.S.C. § 1024(b)(4), the administrator of a plan must provide a plan participant certain documents when the participant requests the documents in writing. Congress gave teeth to this disclosure requirement by providing a statutory claim for civil penalties to claimants. Under ERISA § 502(c)(1)(B), 29 U.S.C. § 1132(c)(1)(B), a plan participant can sue an administrator who, within 30 days of the request, fails to provide requested plan documents. By regulation, the maximum penalty under § 502(c)(1) is \$110 per day. 29 C.F.R. § 2575.502c-3.

Prior to *Mondry*, federal courts had held that only the administrator as defined in ERISA § 3(16)(A), 29 U.S.C. § 1002(16)(A), can be liable under § 502(c)(1) for civil penalties, rejecting arguments that other parties, including insurance companies and claims administrators, can be held liable for failing to provide a participant with the plan documents. See, e.g., *Thorpe v. Retirement Plan of Pillsbury Co.*, 80 F.3d 439, 444 (10<sup>th</sup> Cir.1996) ("ERISA requires plan administrators to respond to informational requests by plan participants. . . . Such causes of action may be brought only against designated plan administrators, rather than against the plan itself or the employer. . . . The language of [§ 502(c)] . . . is unambiguous and admits of no other interpretation.").

For single employer plans, the "administrator" definition almost always results in the employer being the plan administrator, because the employer is the plan sponsor and the plan documents usually do not name another entity as the plan administrator. See ERISA § 3(16)(B), 29 U.S.C. § 1002(16)(B) (defining the term "plan sponsor" as being the person who established or maintains the plan as the employer). Therefore, for most employers' benefit plans, ERISA places both the duty to provide plan documents and the liability for failing to provide plan documents on the "administrator" and that administrator is the employer.

The Seventh Circuit's recent *Mondry* opinion illustrates a problem that can arise when a claimant seeks penalties under § 502(c) penalty. In *Mondry*, the disability insurer for the employer's plan denied the plaintiff's claim for disability plan benefits, expressly relying on the insurer's internal guidelines. For sixteen months, the plaintiff asked the employer, which was the plan administrator, and asked the insurer, which was the claim administrator, for those guidelines. When the relevant documents were finally produced, it was "patently clear that the provisions of these documents were inconsistent with" the governing plan language and the insurer as claim administrator had inappropriately denied the claim. The plaintiff then filed suit for § 502(c) penalties against the employer and the insurer.

First, the Seventh Circuit held that only the employer as the administrator, not the insurer who was the claim administrator, could be liable under § 502(c) for statutory penalties. As to internal guidelines used by the disability insurer to decide the claim, the Seventh Circuit held that the employer as the plan administrator could be liable under § 502(c) for not furnishing the guidelines. The Seventh Circuit "assume[d], without deciding, that had the [insurer as claim administrator] privately relied on the [guidelines] as reference materials to guide its interpretation and application

February 2010

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been out on worker's compensation leave. Another similar principle is terminating someone who went out on worker's comp and the injury they sustained prevents them from doing their job—you are not terminating them because they filed a claim, you are terminating because he cannot perform his job. Although a termination in these situations due to leave exhaustion or for injury may be permissible as far as worker's compensation is concerned, they may be prohibited under the federal Americans with Disabilities Act. Under the ADA options for a reasonable accommodation, such as extending the leave, or in the case of a permanently restricted employee looking for an open alternative job, will have to be evaluated before termination.

Claims of worker's compensation retaliation will invoke nuances with each state's laws. If you have a prospective termination that involves an individual with a recently-filed worker's compensation claim, take time to consider how that termination will stand up when scrutinized, but do not immediately waive the white flag as there may be viable options to support the termination.

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