

# COBRA Compliance: Are You Sure?



## Is the manner in which you are meeting your company's COBRA obligations compliant with all COBRA rules and regulations?

Chances are, it's not. In fact, the IRS estimates that 90% of all employers who self-administer their COBRA obligations are not compliant.

Choosing to self-administer COBRA obligations comes with a huge responsibility. In addition to being one of the federal government's most complex laws, COBRA regulations are among the most rigid. Requirements must be met exactly. Many employers who self-administer COBRA believe they are fully compliant, only to be faced with stiff penalties when audited.

Common actions by self-administering employers which are NON-COMPLIANT include:

- Initial Notices distributed via new-hire packets.
- Election Notices handed out during exit interviews.
- Notices that contain outdated language or otherwise do not reflect recent changes in laws and regulations.
- Accepting late payments, or worse, accepting them inconsistently (e.g., accepting late payments from some qualified beneficiaries, but not others).

## The Costs of Non-Compliance

The costs of failing to comply with COBRA can be staggering, including multiple, stacking penalties from governmental agencies as well as civil lawsuits from qualified beneficiaries.

Different consequences flow from different compliance failures and, of course, the amount of possible damages awarded in any particular case will depend on the circumstances of the qualified beneficiary (or beneficiaries) in the case.

Qualified beneficiaries under nongovernmental plans may sue to recover COBRA coverage under ERISA, and those under governmental plans may sue for similar recovery under PHSa. Such suits carry the potential for large damages, which, in the case of an insured plan, might not be covered by the plan's insurance.

In addition to the standard ERISA penalties outlined on the reverse, the failure to provide adequate initial and election notices by a nongovernmental plan can create exposure to "other relief," including extracontractual damages. As in all suits under ERISA, the court is also permitted to award attorney's fees and interests to the prevailing party.

## Let Us Handle Your COBRA Administration Burden

When it comes to COBRA, every single detail must be handled correctly the first time, everytime. Even one small mistake can spell disaster. Trust [NAME OF TPA] to handle your COBRA administration timely, accurately, and in compliance with all applicable laws and regulations.



## Relevant Citations

COBRA laws and regulations that may result in non-compliance issues among self-administering employers include, but are not limited to:

**IRS Code §4980B(e)(2)(B).** Excise tax penalties of up to \$200 per day may be assessed by the IRS for each day on which a plan fails to comply with COBRA. Excise taxes must be self-reported on IRS Form 8928.

**ERISA §502(c)(1)(a).** Statutory penalties of up to \$110 per day may be recovered under ERISA for failures by nongovernmental plans to provide an initial COBRA notice or an election notice on a timely basis under COBRA. The daily penalty amount originally was \$100, but was later increased to \$110. (DOL Reg. §2575.502c-1.)

**ERISA §502(c)(1)(a).** A plan administrator “who fails to meet the requirements of paragraph [(a)] (1) or (4) of section 606 ... with respect to a participant or beneficiary ... may in the court's discretion be personally liable to that participant or beneficiary in the amount of up to [\$110] per day.”

**ERISA §606(a)(1).** The group health plan must provide a notice of COBRA rights at the time of commencement of coverage under the plan.

**ERISA §606(a)(4).** The plan administrator must notify each qualified beneficiary who has had a qualifying event (and who has given any required notice of that event to the plan administrator) “of such beneficiary's rights under [COBRA].”

**BIRKHEAD V. ST. ANNE'S-BELFIELD, INC., 384 F.Supp. 2d 962 (W.D. Va.2005).** Court held that ERISA §606(a)(4) requires a plan administrator to provide a qualified beneficiary a notice of COBRA rights following the administrator's receipt of a notice of second qualifying event, and the court refused to dismiss action for statutory penalties.

**ERISA §606(a)(4).** The plan administrator must notify each qualified beneficiary who has had a qualifying event (and who has given any required notice of that event to the plan administrator) “of such beneficiary's rights under [COBRA].”

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