

PUBLICATION

The DOL Isn't Done Yet and Non-Compliance is Getting More Expensive Than Ever

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Employers around the country are busy trying to keep up with the fast and furious rule-making from the Department of Labor. From OSHA reporting requirements, the persuader and fiduciary rules and the new overtime regulations, this unprecedented activity from the DOL has kept employers scrambling to understand the current law and stay in compliance. But the DOL isn't done yet.

On June 30, 2016, on the heels of a holiday weekend, the DOL quietly, and without much fanfare, issued an interim final rule (IFR) that significantly increases their fines and civil penalties the Department assesses for violations of ERISA, FLSA, FMLA and OSHA. The increased amounts, which have been adjusted for inflation pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended, apply to penalties assessed on and after August 1, 2016. "Civil penalties should be a credible deterrent that influences behavior far and wide," Secretary of Labor Thomas E. Perez said in a press release. "Adjusting our penalties to keep pace with the cost of living can lead to significant benefits for workers and can level the playing field [for] responsible employers who should not have to compete with those who don't follow the law."

ERISA

Beginning in 2017, the DOL Employee Benefit Security Administration (EBSA) will adjust the new ERISA Title I penalty amounts annually for inflation no later than January 15 of each year. For example, by January 15, 2017, the DOL-EBSA will adjust penalty amounts to reflect any increase in inflation from October 2015 to October 2016, and will post any changes to the penalty amounts on its website. Some examples of the increases penalties (as they related to Health & Welfare plans):

- *Failure to file a Form 5500*: The current penalty of up to \$1,000/day for failing to timely file a Form 5500 will increase almost 100 percent to \$2,063/day.
- *Failure to file a Form M-1 Multiple Employer Welfare Arrangements (MEWAs)*: The current penalty for not including a Form M-1 with the annual Form 5500 will increase from up to \$1,100 per day to a maximum of \$1,502 per day.
- *Failure to provide documents requested by the DOL*: \$147/day subject to a \$1,472 maximum. (up from \$110 per day subject to a \$1,100 maximum)
- *Failure to comply with the Genetic Information Nondisclosure Act*: \$110/day/person (up from \$100/day/person) subject to a minimum \$2,745/day/person (up from \$2,500/day/person) for *de minimis* violations and \$16,473/day/person (up from \$15,000/day/person) for violations that are more than *de minimis*
- *Willful failure to provide a Summary of Benefits and Coverage*: \$1,087 per failure (up from \$1,000 per failure).

FLSA

Section 16(e)(2) of the FLSA and the regulations at 29 CFR 578.3(a) provide for assessment of civil money penalties for any person who repeatedly or willfully violates FLSA Sections 6 (minimum wage) or 7 (overtime). The interim final rule increases the maximum penalty for a repeated or willful violation of Sections 6 or 7 from \$1,100 to \$1,894 per violation. The DOL's regulations define a "willful" violation of the minimum wage and overtime provisions as one in which the employer either knew that its conduct was prohibited by law, or

showed a "reckless disregard" for the requirements of the law. While there is no bright-line test on what qualifies as a willful violation, a federal court has ruled that an employer committed a willful violation of the FLSA by failing to keep adequate records of extended hours worked by an employee. Importantly, the DOL assesses this penalty in addition to any actual back wages owed to the employee(s). Plus, section 16(a) of the FLSA authorizes criminal sanctions against any person who is shown to have violated the FLSA intentionally, deliberately and voluntarily, or with reckless indifference to or disregard for the law's requirements. The interim final rule also increases the child labor penalties from \$11,000 per violation to \$12,080.

FMLA

Section 109(b) of the FMLA, as amended, and existing 29 CFR 825.300(a)(1) provide for assessment of a civil money penalty for each willful violation of the FMLA's posting requirement. Section 825.300(a)(1) is revised by the interim final rule to increase the penalty for violations from \$110 to \$163 for each separate offense.

OSHA

Under a new interim final rule, OSHA's maximum civil penalties will increase by 78 percent. According to DOL, OSHA's maximum penalties have not been raised since 1990. Section 17(a) of the OSH Act, 29 U.S.C. 666(a), provides civil penalties for employers that willfully or repeatedly violate Section 5 requirements, any standards, rules or orders promulgated under Section 6, or applicable regulations. The interim final rule adjusts the penalty of not more than \$70,000 for each violation, but not less than \$5,000 for each willful violation, to a maximum penalty of \$124,709 for willful and repeated violations, and the minimum penalty to \$8,908 for willful violations. The updates are set out in Section 1903.15(d)(1) and (2). The interim final rule also makes these adjustments:

- *For serious violations under Section 17(b)*, which provides that employers who have received a citation for a serious violation of Section 5 requirements, any standard, rule or order promulgated under Section 6, or applicable regulations, the maximum civil penalty is increased from \$7,000 per violation is increased to \$12,471.
- *For other-than-serious violations under Section 17(c)*, which provides that employers who have received a citation for a violation Section 5 requirements, any standard, rule or order promulgated under Section 6, or applicable regulations, where the violation is determined not to be of a serious nature, the maximum civil penalty is increased from \$7,000 for each violation to \$12,471 for each day during which such failure or violation continues.
- *For violations under Section 17(d)*, which provides that any employer who fails to correct a violation for which a citation has been issued under Section 9(a) within the period permitted for the correction, the maximum civil penalty is increased from \$7,000 for each day during which such failure or violation continues, to a maximum penalty of \$12,471.
- *For violations of a posting requirement under Section 17(i)*, the maximum civil penalty of \$7,000 for each violation is increased to \$12,471.

Now is the time to conduct self or third-party audits to ensure compliance with the various employment laws enforced by the DOL. Non-compliance is getting more expensive than ever.