

DOL Hikes FLSA and Other Employer Penalties

The DOL has announced it will significantly increase the civil monetary penalties for violating federal minimum wage, overtime, posting and safety requirements, effective August 1. The increases will apply to penalties assessed after that date for FLSA, FMLA, and OSHAct violations that occurred after November 2, 2015. To minimize potential liability, employers should review their pay practices, postings and safety protocols to ensure compliance.

Background

The Federal Civil Penalties Inflation Adjustment Act of 1990 allowed federal agencies to make certain inflation adjustments to civil monetary penalties that could be imposed under laws they enforce. The Federal Civil Penalties Inflation Adjustment Act of 2015 (Inflation Adjustment Act) amended the law to require agencies to make an initial catch-up inflation adjustment by August 1, 2016, capped at 150% of the penalty in effect on November 2, 2015. Subsequent cost-of-living adjustments, determined by fluctuations in the Consumer Price Index for all Urban Consumers (CPI-U), are to be issued by January 15, 2017 and in each successive year. Adjusted penalty levels will apply to any penalties assessed after the effective date of any increase.



Adjusted Penalties

On July 1, the DOL issued an interim final [rule](#) that significantly increases penalties under the Fair Labor Standards Act (FLSA), the Family and Medical Leave Act (FMLA), the Occupational Safety & Health Act (OSHAct) and other laws its agencies enforce. The increases will apply to penalties assessed after August 1 for violations that occurred after November 2, 2015 — the date the Inflation Adjustment Act was enacted. Penalties assessed on or before August 1 will be subject to the civil penalty amounts currently in place.

FLSA

The FLSA and applicable DOL regulations provide for the assessment of civil monetary penalties for any person who repeatedly or willfully violates federal minimum wage or overtime requirements. Last adjusted for inflation in

2001, the current maximum penalty is \$1,100 per violation. Under the interim final rule, the penalty for repeated and willful violations of the FLSA's minimum wage and overtime provisions will increase by roughly 72% to \$1,894.

Comment. Because penalties are normally assessed on a per-employee basis, employer liability may escalate quickly if noncompliant pay practices affect a number of workers.

FMLA

Every employer covered by the FMLA is required to conspicuously post a notice explaining the statute's provisions and providing information for filing complaints of violations with the DOL's Wage and Hour Division. Currently, an employer that willfully violates the posting requirement may be assessed a civil money penalty of up to \$110 for each separate offense. The DOL is increasing the maximum penalty for violation of the FMLA's posting requirement to \$163 for each separate offense.

Comment. The EEOC also made an inflation adjustment to the maximum penalty for violating notice-posting requirements under Title VII, the ADA and GINA. The EEOC more than doubled the penalty per violation, effective July 5, 2016. (See our [June 20, 2016 For Your Information.](#))

OSHAct

Because penalties under the OSHAct were previously excluded from automatic inflation-adjusted increases, they have not gone up since 1990. With the Inflation Adjustment Act's elimination of the exclusion, the penalties are now subject to the 2016 catch-up adjustment and the maximum penalties will increase dramatically — by 78%.

The maximum penalty for serious, other-than-serious, and posting violations will rise from \$7,000 to \$12,471 for each violation. The maximum penalty for failure to abate violations will rise from \$7,000 to \$12,471 per day. The maximum penalty for willful or repeated violations will increase from \$70,000 to \$124,709. With the exception of penalties for willful violations, minimum penalties are not affected. The minimum penalty for willful violations will increase from \$5,000 to \$8,908.

State Plans

While the OSHAct allows states to assume responsibility for their own occupational safety and health standards, applicable regulations require state plan standards and enforcement programs to be at least as effective as federal OSHA's. As the interim final rule confirms, state plans will be required to adopt penalty amounts that are at least level with the new federal penalties.

Comment. While the DOL's interim final rule does not address whether the increased penalties will apply to inspections that began prior to August 1, 2016, OSHA's [website](#) says that any citations it issues after that date will be subject to the new penalties if the related violations occurred after November 2, 2015.

In Closing

Significantly increased penalties for violations of the FLSA, FMLA and OSHAct that occurred after November 2, 2015 will apply to amounts assessed by the DOL after August 1, 2016. Although the DOL has invited comments by August 15, the final regulations are unlikely to materially change from the interim final rule. Employers should review their pay practices, postings and safety protocols to ensure compliance.

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