

## DOL, PBGC and HHS Increase Penalties for Violations

The DOL, PBGC, and HHS have announced annual inflation penalty adjustments. Employers should pay careful attention to compliance deadlines to minimize any potential liability for violations.

### Background

The Federal Civil Penalties Inflation Adjustment Act of 1990 (Inflation Adjustment Act) established a mechanism for federal agencies to make inflation adjustments to various penalties to maintain their deterrent effect, but the adjustments were historically infrequent because of certain rounding rules. In 2015, the Federal Civil Monetary Penalties Inflation Adjustment Act Improvements Act (Improvements Act) required federal agencies to make a “catch-up” inflation adjustment, replace the previous rounding convention for penalty inflation adjustments with rounding to the nearest dollar for all penalty amounts, and adjust penalties annually based on fluctuations in the Consumer Price Index for all Urban Consumers. The DOL, PBGC, and the Department of Health & Human Services (HHS) issued initial catch-up adjustments in mid-2016. See our [July 18, 2016](#) and [May 17, 2016](#) *For Your Information* publications.



The penalties listed below represent the maximums and minimums stated in associated laws and may not represent the penalty applied under administrative protocols established by an agency. For example, PBGC is authorized to impose a penalty of 100% of the basic premium owed if not timely paid, but has adopted reduced late premium payment penalties as described in our [September 22, 2016](#) *For Your Information*.

### Adjusted Penalties

Below are the newly adjusted [DOL](#), [PBGC](#), and [HHS](#) maximum civil penalties. The DOL increases apply to penalties assessed after January 13, 2017 for violations occurring after November 2, 2015. The PBGC increases apply to penalties assessed after January 31, 2017. The HHS increases apply to penalties assessed on or after February 3, 2017 for violations occurring after November 2, 2015.

| Agency  | Civil Penalty Monetary Penalty Violation/Penalty Section  | Prior Maximum Penalty                                   | New Maximum Penalty                                     |
|---|---|---|---|
| DOL's Employee Benefits Security Administration | Failure to furnish statement of benefits to former retirement plan participants and beneficiaries or failure to maintain records for a retirement plan. ERISA Section 209(b)  | \$28 per employee                                       | \$28 per employee                                       |
|   | Failure or refusal to file annual report (Form 5500). ERISA Section 502(c)(2)   | \$2,063 per day   | \$2,097 per day   |
|   | Multiemployer defined benefit (DB) plan's failure to certify endangered or critical status. ERISA Section 502(c)(2)   | \$2,063 per day   | \$2,097 per day   |
|   | Failure to notify single employer DB plan participants of certain benefit restrictions and/or limitations arising under Code Section 436. ERISA Section 502(c)(4)   | \$1,632 per day   | \$1,659 per day   |
|   | Failure to furnish certain multiemployer DB plan financial and actuarial reports upon request by participant, beneficiary or employee representative. ERISA Section 502(c)(4)   | \$1,632 per day   | \$1,659 per day   |
|   | Failure of multiemployer DB plan to furnish estimate of withdrawal liability upon request to participating employer. ERISA Section 502(c)(4)  | \$1,632 per day   | \$1,659 per day   |
|   | Failure to furnish of automatic contribution arrangement notice to defined contribution (DC) plan participants. ERISA Section 502(c)(4)   | \$1,632 per day   | \$1,659 per day   |
|   | Failure of Multiple Employer Welfare Arrangement (MEWA) to file required report (M-1). ERISA Section 502(c)(5)  | \$1,502 per day   | \$1,527 per day   |
|   | Failure to furnish employee benefit plan documents to DOL upon request (including plan and trust documents, summary plan description, summary of material modifications collective bargaining agreement). ERISA Section 502(c)(6) | \$147 per day (but no greater than \$1,472 per request) | \$149 per day (but no greater than \$1,496 per request) |
|   | Failure to furnish blackout notice or notice of right to divest employer securities to participants and beneficiaries in DC plans. ERISA Section 502(c)(7)  | \$131 per day per required recipient                    | \$133 per day per required recipient                    |

| Agency | Civil Penalty Monetary Penalty Violation/Penalty Section   | Prior Maximum Penalty   | New Maximum Penalty  |
|--------|--|---|--|
|        | Failure of multiemployer DB plan sponsor to adopt a funding improvement plan for plan in endangered status (or failure to adopt a rehabilitation plan for plan in critical status). Also applies to failure to meet benchmark by end of funding improvement period for endangered plans (that are not seriously endangered plans). ERISA Section 502(c)(8) | \$1,296 per day   | \$1,317 per day  |
|        | Failure by employer to inform employees of Medicaid/CHIP coverage opportunities. ERISA Section 502(c)(9)(A)  | \$110 per day per employee  | \$112 per day per employee   |
|        | Failure of group health plan's plan administrator to provide state with timely coverage coordination disclosure form for Medicaid/CHIP eligible individuals. ERISA Section 502(c)(9)(B)  | \$110 per day per participant or beneficiary  | \$112 per day per participant or beneficiary   |
|        | Genetic Information Nondiscrimination Act (GINA) violation by group health plan sponsor/health insurance issuer. ERISA Section 502(c)(10)  | \$110 per day per participant or beneficiary if not corrected before notice of violation is received – subject to <u>minimum</u> of \$2,745 per day per participant or beneficiary for <i>de minimis</i> violations or \$16,473 per day per participant or beneficiary for violations that are not <i>de minimis</i> ; <u>maximum</u> of \$549,095 for unintentional failures | \$112 per day per participant or beneficiary (if not corrected before notice of violation is received – subject to <u>minimum</u> of \$2,790 per day per participant or beneficiary for <i>de minimis</i> violations or \$16,742 per day per participant or beneficiary for violations that are not <i>de minimis</i> ; <u>maximum</u> of \$558,078 for unintentional failures |
|        | Failure of a Cooperative and Small Employer Charity Act (CSEC) DB plan sponsor to establish or update a funding restoration plan. ERISA Section 502(c)(12)   | \$100 per day   | \$102 per day  |
|        | Prohibited payment from DB plan during period when plan has a liquidity shortfall. ERISA Section 502(m)  | \$15,909 per prohibited payment   | \$16,169 per prohibited payment  |

| Agency  | Civil Penalty Monetary Penalty Violation/Penalty Section  | Prior Maximum Penalty  | New Maximum Penalty  |
|---|---|--|--|
|   | Failure to provide Summary of Benefits Coverage to participant or beneficiary of group health plan. ERISA Section 715   | \$1,087 per participant or beneficiary   | \$1,105 per participant or beneficiary   |
| DOL's Wage and Hour Division                        | Repeated or willful violation of DOL's federal minimum wage or overtime requirements. 29 CFR Section 578.3(a)   | \$1,894 per violation  | \$1,925 per violation  |
|   | Willful failure to post notice explaining the provisions of the Family Medical Leave Act and providing information for filing complaints of violations with DOL's Wage and Hour Division. 29 CFR Section 825.300(a)(1)  | \$163 per offense  | \$166 per offense  |
| DOL's Occupational Health and Safety Administration | Serious, other-than-serious, and posting the Occupational Safety & Health Act (OSHAct). 29 CFR Section 1903.15(d)(4)  | \$12,471 per violation   | \$12,675 per violation   |
|   | Failure to abate OSHAct violations. 29 CFR Section 1903.15(d)(5)  | \$12,471 per violation   | \$12,675 per violation   |
|   | Willful or repeated violations of OSHAct. 29 CFR Section 1903.15(d)(2)  | \$8,908 minimum (for willful violations only); \$124,709 maximum                                     | \$9,054 minimum (for willful violations only); \$126,749 maximum                                     |
| PBGC  | Failure to timely provide PBGC with required information. ERISA Section 4071  | \$2,063 per day  | \$2,097 per day  |
|   | Failure to provide certain multiemployer plan notices. ERISA Section 4302   | \$275 per day  | \$279 per day  |
| HHS   | Failure to report certain active covered individuals with employer-sponsored coverage who may be Medicare eligible and for whom Medicare would pay secondary under the Medicare secondary payer rules. Medicare, Medicaid, and SCHIP Extension Act of 2007, Section 111 | \$1,138 per day of noncompliance per each individual for whom information should have been submitted | \$1,157 per day of noncompliance per each individual for whom information should have been submitted |

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|--------|--|---|---|
|        | Covered Entity or Business Associate did not know, and by exercising reasonable diligence would not have known, that a violation of the privacy and security rules occurred. HHS reg. Section 60.404(b)                                | \$110-\$55,010 per violation; \$1,650,300 for all such violations of an identical provision in a calendar year    | \$112-\$55,910 per violation; \$1,677,299 for all such violations of an identical provision in a calendar year    |
|        | Privacy and security violation due to reasonable cause and not willful neglect. HHS reg. Section 160.404(b)  | \$1,100-\$55,010 per violation; \$1,650,300 for all such violations of an identical provision in a calendar year  | \$1,118-\$55,910 per violation; \$1,677,299 for all such violations of an identical provision in a calendar year  |
|        | HIPAA privacy and security violation due to willful neglect, and timely corrected (generally within 30 days after the Covered Entity or Business Associate knew or should have known about the violation). HHS reg. Section 160.404(b) | \$11,002-\$55,010 per violation; \$1,650,300 for all such violations of an identical provision in a calendar year | \$11,182-\$55,910 per violation; \$1,677,299 for all such violations of an identical provision in a calendar year |
|        | HIPAA privacy and security violation due to willful neglect, but not timely corrected. HHS reg. Section 160.404(b)   | \$55,010 per violation; \$1,650,300 for all such violations of an identical provision in a calendar year          | \$55,910 per violation; \$1,677,299 for all such violations of an identical provision in a calendar year          |

## In Closing

Although the agencies typically do not assess the maximum penalty permissible under the law, the threat of larger penalties may provide employers, plan sponsors and administrators with stronger incentives to pay careful attention to compliance obligations and applicable deadlines.

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