

PUBLICATION

DOL Increases Civil Penalty Amounts (Again)

Authors: Laura Elizabeth Carlisle

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Last month, the U.S. Department of Labor announced increases in the civil penalty amounts that may be imposed on employers under several federal employment laws. On January 2, 2018, the DOL rolled out increases to the civil penalties available under a number of laws it enforces, is tasked with enforcing, including the Fair Labor Standards Act (FLSA), the Family Medical Leave Act (FMLA), the Employment Retirement Income Security Act of 1974 (ERISA), and the Occupational Safety and Health Act of 1970 (OSHA), among others. The increases apply to penalties assessed after January 2, 2018 for violations occurring after November 2, 2015.

By way of background, the Federal Civil Penalties Inflation Adjustment Act of 1990 authorized federal agencies to make certain inflation adjustments to civil monetary penalties available under the laws they enforce. Designed to further strengthen civil penalties and their deterrent effect, the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 amended the law to require agencies to make initial "catch-up" adjustments by August 1, 2016, to keep pace with inflation, and thereafter to make annual adjustments for inflation. The law requires the DOL and other agencies to issue annual adjustments by January 15 each year, with adjusted penalties to be assessed after the effective date of each increase.

On July 1, 2016, the DOL issued its initial "catch-up" adjustment, increasing significantly the civil penalties available under the laws it enforces, including the FLSA, FMLA, ERISA, and OSHA. The agency made further adjustments upward in January 2017 and then, most recently, last month. The new civil penalty levels reflect approximately a two percent increase above the levels established in 2017.

Effective January 2, 2018, the maximum civil penalty amounts that can be imposed under the major laws enforced by the DOL include:

FLSA	
Repeated or willful violation of minimum wage or overtime requirements	Up to \$1,964 per violation
Violation of child labor standards	Up to \$12,529 per person subject to the violation
Violation of child labor standards causing death or serious injury to a minor	Up to \$56,947, but doubled to \$113,894 for a repeated or willful violation
Violation of homeworker regulations	\$1,026 per violation

FMLA	
Willful failure to post FMLA general notice	Up to \$169 per offense
OSHA	
Violation of posting requirement	Up to \$12,934 per violation
Other-than-serious violation	Up to \$12,934 per violation
Serious violation	Up to \$12,934 per violation
Willful or repeated violation	\$9,239 – \$129,336 per violation
Failure to correct cited violation	Up to \$12,934 per day until corrected
ERISA and Employee Benefits	
Failure to file annual report (Form 5500)	Up to \$2,140 per day
Failure to file multiple employer welfare arrangement (MEWA) annual report (Form M-1), as applicable	Up to \$1,558 per day
Failure to furnish plan-related information requested by the DOL	Up to \$152 per day, but not to exceed \$1,527 per request
Failing to provide annual notice regarding CHIP coverage opportunities	Up to \$114 per day, per employee
Failure to provide 401(k) blackout notice or notice of right to divest employer securities	Up to \$136 per day
Failure to provide Summary of Benefits and Coverage (SBC)	Up to \$1,128 per failure
Other Statutes	
Violations of the Employee Polygraph Protection Act	Up to \$20,521 per violation

(EPPA)	
Knowing employment of persons under age 16 or labor by incarcerated persons in the performance of a public contract (Walsh-Healey Public Contracts Act)	Up to \$26 per violation
Violations of Migrant and Seasonal Agricultural Worker Protection Action (MSPA)	Up to \$2,443 per violation
Violations of Immigration & Nationality Act (H-1B)	Up to \$1,848 – \$52,641 per violation, depending on the severity and willful nature of the violation
Violations of Immigration & Nationality Act (H-2A)	\$1,692 – \$112,780 per violation, depending on the violation and repeated or willful nature of the violation
Violations of Immigration & Nationality Act (H-2B)	Up to \$12,383 per violation
Violations of Immigration & Nationality Act (D-1)	Up to \$9,239 per violation
Violation of Contract Work Hours and Safety Standards Act (CWHSSA) overtime requirements	Up to \$26 per violation

While the above figures reflect fairly modest increases, represent the maximum that can be imposed, and individual penalties in isolation can appear almost nominal, the civil penalties available for certain violations – e.g., child labor violations, OSHA violations, and violations of the Immigration & Nationality Act – can be significant. And, in the case of the FLSA, it is possible that the civil penalty imposed for a given violation might exceed any underlying back pay or overtime pay owed. In short, it is always a best practice to review pay practices, postings, notices, and safety protocol to ensure compliance. Employers can also expect the costs of non-compliance to continue to rise steadily.