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Department of Labor Substantially Increases Penalties for ERISA Violations

The Department of Labor (the “Department”) issued an interim final rule on July 1, 2016 (the “Interim Final Rule”) that substantially increases the civil penalty amounts for various violations of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”).¹ The Interim Final Rule is effective August 1, 2016, and the increased civil penalty amounts apply to penalties assessed after that date even if the associated violations occurred prior to August 1, 2016. As noted below, some penalties have sharply increased, such as the daily penalty for Form 5500 failures which has increased from a maximum of \$1,100 to \$2,063.

I. Background

The Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (the “Act”), enacted into law on November 2, 2015, requires federal agencies to increase civil monetary penalties in order to adjust the penalty amounts for inflation and improve their deterrent effect. The Act requires agencies to increase penalty amounts by an initial “catch-up” amount to make up for several years of modest or no penalty increases, and to make annual adjustments for inflation moving forward. Agencies were required to publish interim final rules with the “catch-up” amounts by July 1, 2016.

The Act provides a specific formula that agencies must use for determining the amount of the penalty adjustment. Since the calculation is statutorily provided, the Department has little if any discretion over setting adjusted penalty amounts. For this reason, the Department published the new penalty amounts without advance notice and comment.

Notably, while the Interim Final Rule is effective August 1, 2016, the increased penalties will apply to violations that occurred prior to the effective date but after November 2, 2015 as long as the penalties are assessed after the effective date. The Interim Final Rule also provides that, moving forward, penalties will be adjusted annually for inflation and published in the Federal Register by January 15 every year.

II. Penalties Increased for ERISA Violations

The Interim Final Rule increases various penalties for violations of ERISA, in many cases by considerable amounts. The following chart summarizes the affected violations, the current penalty amounts (as of November 2015), and the new penalty amounts effective August 1, 2016.

¹ Department of Labor Federal Civil Penalties Inflation Adjustment Act Catch-Up Adjustments, 81 Fed. Reg. 43,430 (July 1, 2016) (amending 29 CFR Part 2560, 2575, 2590).

Violation	Current Penalty	New Penalty
ERISA § 209(b) Per participant penalty for failure to furnish certain reports to participants or failure to maintain records.	\$11	\$28
ERISA § 502(c)(2) Daily penalty for failure to file required annual reports, including Form 5500 and required certification by multiemployer plan of endangered or critical plan status.	\$1,100	\$2,063
ERISA § 502(c)(4) Daily penalties for: <ul style="list-style-type: none"> • Failure to notify participants of certain benefit restrictions and/or limitations under Internal Revenue Code § 436. • Failure to furnish certain multiemployer plan financial and actuarial reports upon request under ERISA § 101(k). • Failure to furnish estimate of withdrawal liability upon request under ERISA § 101(l). • Failure to furnish automatic contribution arrangement notice under ERISA § 514(e)(3). 	\$1,000	\$1,632
ERISA § 502(c)(5) Daily penalty for failure of multiple employer welfare arrangement ("MEWA") to file required report under ERISA § 101(g).	\$1,100	\$1,502
ERISA § 502(c)(6) Daily penalty for failure to furnish information requested by the Secretary of Labor under ERISA § 104(a)(6).	\$110 but not to exceed \$1,100 per request	\$147 but not to exceed \$1,472 per request
ERISA § 502(c)(7) Daily per recipient penalty for failure to: <ul style="list-style-type: none"> • Furnish blackout notice under ERISA § 101(i), or • Furnish notice of right to divest employer securities under ERISA § 101(m). 	\$100	\$131
ERISA § 502(c)(8) Daily penalty for failure by a plan sponsor for a: <ul style="list-style-type: none"> • Multiemployer plan in endangered status to adopt funding improvement plan or failure (for plans other than a seriously endangered plan) to meet benchmark by end of funding improvement period, or • Multiemployer plan in critical status to adopt rehabilitation plan. 	\$1,100	\$1,296
ERISA § 502(c)(9)(A) Daily per employee penalty for failure by employer to inform employees of Children's Health Insurance Program ("CHIP") coverage opportunities.	\$100	\$110
ERISA § 502(c)(9)(B) Daily per participant penalty for each failure by plan administrator to timely provide a state with any information required to be disclosed under ERISA § 701(f)(3)(B)(ii) regarding coverage coordination.	\$100	\$110

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Violation	Current Penalty	New Penalty
ERISA § 502(c)(10)(B)(i) Daily per participant penalty for certain failures by plan sponsors of group health plans or health insurance issuers offering insurance in connection with the plan for non-compliance with ERISA provisions on non-discrimination and pre-existing conditions relating to genetic information.	\$100	\$110
ERISA § 502(c)(10)(C)(i) Minimum penalty for certain de minimis failures relating to genetic information that are not corrected prior to notice from the Secretary of Labor.	\$2,500	\$2,745
ERISA § 502(c)(10)(C)(ii) Minimum penalty for certain failures relating to genetic information that are not de minimis and not corrected prior to notice from the Secretary of Labor.	\$15,000	\$16,473
ERISA § 502(c)(10)(D)(iii)(II) Cap on penalties for unintentional failures relating to genetic information.	\$500,000	\$549,095
ERISA § 502(m) Per distribution penalty for improper distributions.	\$10,000	\$15,909
ERISA § 715 Penalty for failure to provide Summary of Benefits Coverage under Public Health Services Act.	\$1,000	\$1,087

The Interim Final Rule does not affect the penalties that may be assessed under ERISA’s criminal provisions, such as the penalty under ERISA § 501 for willful violations of ERISA’s reporting and disclosure requirements, or the penalty that may be assessed for failures to provide certain ERISA disclosures within 30 days of request under ERISA § 502(c)(1).

III. Department to Accept Comments on Interim Final Rule

While the new penalties are effective August 1, 2016, the Department will accept comments on the Interim Final Rule until August 15, 2016. Since the Interim Final Rule and the penalty fee adjustments are statutorily mandated, it is unclear what if any action the Department may be able to take in response to industry comments.

Please contact a Groom Law Group attorney if you have any questions about how the Interim Final Rule will affect you or your organization, or if you would like to submit a comment letter to the Department.