



## LEGISLATIVE ALERT: Bills Threaten More FLSA Penalties (Updated 05/14/10)

Insights

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Lurking in [Senate](#) and [House](#) "misclassification" bills are expansive changes in the Fair Labor Standards Act's civil money penalties. The impact of these revisions would extend far beyond U.S. Labor Department investigations involving independent-contractor status.

Today, the FLSA permits DOL to impose a civil penalty of up to \$1,100 for each violation of the minimum-wage or overtime provisions, but only if the violation was either repeated or willful. The law currently authorizes penalties for "each such violation". DOL tends to apply these on a per-employee basis, and the total fines can be more than the wage underpayments. If the pending proposals are adopted, the potential exposure will broaden substantially.

For one thing, fines of up to \$1,100 could be imposed for violations that are *neither* repeated *nor* willful. That is, infractions would be punishable in this way even if the employer had never before violated the FLSA and had the best of intentions. Furthermore, any question about the proper multiplier would be resolved: The employer would be exposed to the penalty "for each employee or other individual who was the subject of" a violation. If violations were repeated or willful, then the per-person penalty ceiling would jump to \$5,000.

And for the first time, civil penalties would apply to violations of DOL's recordkeeping requirements. The DOL investigator says that employees' time records are not accurate, but you say they are? Can't meet an investigator's demand to get two years' worth of payroll records from Los Angeles to Nashville within 72 hours? Don't have the time, staff, or resources to "make such extension, recomputation, or transcription of the records" a DOL investigator says you must? Didn't put a "symbol, letter or other notation" on the pay records to show that certain employees were paid in a particular way (even though it was obvious how they were paid)? Employees sometimes forgot to punch in or out? Didn't record the birthdate of every employee under 19 years old? Numerous situations could put an employer to the choice between paying or fighting substantial fines, *even if the recordkeeping violation resulted in no FLSA wage underpayments or child-labor problems*.

When one's chosen tool is a hammer, everything looks like a nail. This will be particularly apt here, where the law calls for penalties collected to be used to fund more DOL enforcement. Employers should do all they can to avoid having these changes swept through under the radar.

**UPDATE (05/14/10):** Fisher Phillips has now called these proposed changes to the attention of Georgia Senator Johnny Isakson, a member of the Senate's Committee on Health, Education, Labor and Pensions.

[Letter To Senator J. Isakson.pdf \(131.87 kb\)](#)