Feds Ratchet Up Employer Penalties, Effective Later This Summer

Insights
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While most employers were preparing for the long holiday weekend, the U.S. Department of Labor (USDOL) announced a series of civil penalty increases that will impact the nation's employers in the very near future. On June 30, the USDOL announced that the vast majority of penalties associated with wage and hour, safety, and benefits compliance matters will soon increase, as will certain penalties associated with immigration matters.

The agency reminded employers that penalties exist in order to "encourage greater compliance" with federal law, but pointed out that they are less effective if they haven't been raised for decades to keep pace with inflation. The new civil penalty amounts will be applicable only to penalties assessed after August 1, 2016, but will apply to violations that occurred after November 2, 2015. In order to steer clear of these costly new consequences, we recommend you review some of the more significant penalty increases and evaluate your compliance efforts with a critical eye.

FLSA's Civil Money Penalties To Increase
The USDOL announced that it will substantially increase the civil money penalties it can impose for certain violations of the federal Fair Labor Standards Act (FLSA) and related regulations. Although the agency has solicited public comments on the changes by August 15, 2016, the new penalties will take effect on August 1. As noted above, these new penalty amounts can be applied to any FLSA violations that occurred after November 2, 2015.

Minimum Wage and Overtime Penalties

The USDOL is currently authorized to impose a monetary penalty of up to $1,100 for each repeated or willful violation of minimum-wage or overtime requirements. Starting August 1, the maximum per-violation penalty for repeated or willful violations will jump by $794, or about 72%, to $1,894.

The assessment is normally a per-person charge based upon the number of employees who were unlawfully paid. An employer's transgression can be considered a "repeated" violation for penalty purposes even if it is not factually or legally the same as an earlier one. For example, a minimum-wage violation found in a preceding USDOL investigation can be the predicate for a penalty in a subsequent investigation that uncovers overtime violations. Also, the USDOL can assert a penalty for willfulness if the employer knew that it was in violation or acted with reckless disregard for whether it was.

Child Labor Penalties

The FLSA also currently permits USDOL to assess a monetary penalty of up to $11,000 for each worker under 18 years old who was employed in violation of the FLSA's child-labor restrictions. Later this summer, this sum will increase by $1,080 to $12,080.

Child labor violations that result in a minor's serious injury or death are currently punishable by a penalty of up to $50,000. Under the new rule, this maximum will jump to $54,910, an increase of $4,910. The FLSA calls for doubling the penalty imposed as the result of a repeated or willful violations of this kind, meaning that the revision could generate an assessment of as much as $109,820.

Conclusion

Presumably, final regulations will be forthcoming at some point after the comment period closes on August 15. The final versions of these FLSA penalties are not likely to differ from the proposed rules. Employers who wish to take exception to FLSA penalty assessments must respond in prescribed ways within a short period of time. If you want to seek assistance in this matter, it is imperative to do so well in advance of the deadline.

OSHA Announces Massive Penalty Increases

The penalty increases for the Occupational Safety and Health Administration (OSHA) are just as dramatic, if not more so. Beginning August 1, OSHA's maximum penalties will increase by 78%.The top penalty for serious violations will rise from $7,000 to $12,471, and the maximum penalty for willful or repeated violations will increase from $70,000 to $124,709. Again, while the penalty increases will be effective later this summer, they will be retroactively applied to ongoing inspections as far back as November 2, 2015 if the citations end up being issued after August 1.

Many employers have rarely been inspected by the federal agency or have only received modest citations and penalties. As a result, most employers do not worry much about OSHA exposure. However, there have been a series of recent changes that suggest it is time to evaluate both your compliance efforts and your safety and health culture and programs.

For example, OSHA recently announced that it will implement an Electronic Recordkeeping Rule, beginning in 2017, which will require that many employers electronically report their injury and illness data. This information will be publically posted on OSHA's website (read more here). Under this Rule, OSHA will consider the following employer practices to be retaliatory beginning August 2016 (because OSHA believes that they discourage employees from reporting injuries):

- maintaining incentive programs which reward employees for experiencing no recordable workplace injuries and illnesses;
- maintaining rules requiring disciplining employees who do not immediately report workplace

injuries; and
- automatically conducting post-accident drug testing of injured employees.

This is just one in a series of recent changes that should galvanize your resolve to improve the safety culture of your workplace. The good news is that many employer responses may not only strengthen your safety efforts but also improve quality and efficiency.

We recommend that you consider taking certain actions in response to these changes. For example, you should immediately determine if your "Safety Program" is simply an impressive document which may not reflect actual practices, or may not be followed at all locations. Also, ask yourself whether your safety committee actually does anything. For a full list of recommendations, visit our Workplace Safety and Health Blog, which can be found at WorkplaceSafetyAndHealthLaw.com.

Numerous ERISA Penalty Increases Included In USDOL Rules

Similar to the above mentioned penalty increases, the USDOL has increased civil penalties issued under the Employee Retirement Income Security Act (ERISA). In fact, a good deal of the increases listed in the new rules apply to ERISA violations. These penalties apply to assessments made on or after August 1, 2016, and can apply to violations occurring after November 2, 2015.

Failures to Provide Information to Participants and Beneficiaries

A number of the penalty increases for ERISA violations are for failures to provide information to participants and beneficiaries. While some of these increases do not appear significant, they can compound rapidly because each day that this information is late to each participant can result in an additional penalty.

For example, if you provide each of your 100 participants notice of a blackout period for their 401(k) or the right to divest employer securities, but provide them one week late, you could owe a total close to $100,000 (7 days x 100 participants x $131 penalty = $91,700).

The penalties described below are all maximums per participant per day penalties. For health plans, failure to inform employees of Children's Health Insurance Program (CHIP) opportunities will increase to $110 from $100, while failure to provide summary of benefits and coverage (SBC) to affected individuals will increase to $1,087 from $1,000. SBC must be provided to participants, beneficiaries, and prospective enrollees.

For retirement plans, failure to furnish reports to certain participants and beneficiaries (such as annual benefit statements) will increase to $28 from $10, while failure to inform single-employer plan participants of funding based limitations on forms of benefit distribution will increase to $1,632 from $1,000. Meanwhile, failure to provide notices to participants notice regarding automatic contribution arrangements will increase to $1,632 from $1,000. These notices must inform participants of their right to opt out or change their contribution amount, among other things.

For multiemployer plans, failure to provide plan information upon request will increase to $1,632 from $1,000. Plans must provide requested information not only to participants and beneficiaries, but also employee representatives and employers. Also, failure to inform employers of withdrawal liability upon request will increase to $1,632 from $1,000.

Failures to provide information to the government

A number of the penalty increases apply to failures to timely file information with the government. These penalties are also assessed daily:

- failure or refusal to file the Form 5500 Annual Return/Report of Employee Benefit Plan will increase to $2,063 day from $1,100 a day;

- failure or refusal to file the Form M-1 for Multiple Employer Welfare Arrangements will increase to $1,502 a day to $1,100 a day; and

- failure to provide the Secretary of Labor requested documentation will increase to $147 a day to $110 and the maximum per request will increase to $1,472 from $1,110.

Failures with respect to genetic information

Increases for penalties for plans that discriminate based on participants or beneficiaries genetic information or require genetic testing prior to coverage will increase to $110 from $100 for each participant or beneficiary denied coverage during the period of non-compliance. This means plans may not refuse to offer coverage or charge increased premiums to individuals on the basis of genetic information.

The minimum de minimis penalty for such violations will increase to $2,745 from $2,500, and similarly the minimum for non de minimis penalty will increase to $16,473 from $15,000. If there is an unintentional failure related to the above violation, the maximum penalty will increase to $549,095 from $500,000.

Failures that apply to poorly funded plans

Finally, a number of these penalty increases involve violations that can only be incurred by poorly funded plans. Although this may not apply to many readers, these penalties will likely be especially burdensome because these plans already have financial troubles.

For example, failure by an endangered multiemployer plan to adopt funding improvements or meet benchmarks will rise to $1,296 from $1,100 per failure, and failure by a critical status multiemployer plan to adopt a rehabilitation plan will increase to $1,296 from $1,100 per failure. Also, failure to properly distribute defined benefits by single employer plans that have minimum funding standards will increase to $15,909 from $10,000.

Immigration-Related Violations Part Of Sweeping Penalty Increases

At the same time as the other penalty increases were announced, the USDOL and the U.S. Department of Homeland Security (DHS) jointly announced interim final rules increasing the amounts of civil penalty amounts for certain violations of the Immigration and Nationality Act (INA), certain nonimmigrant visa programs, and the Migrant and Seasonal Agricultural Worker Protection Act. Just as with the others listed above, these penalties will go into effect on August 1, and are retroactive for designated ongoing inspections.

Employment-Related Violations under the INA

The INA provides for civil penalties for unlawful acts relating to the Form I-9 employment eligibility verification process (i.e., failure to comply with the Form I-9 completion requirements) and the knowing employment of unauthorized workers. Immigration and Customs Enforcement (ICE) assesses fines for these employment-related violations.

The civil penalties for a substantive or technical violation in connection with the completion of the Form I-9 identity and employment eligibility verification provisions will increase to a minimum of $216 and a maximum of $2,156 per form. Knowingly hiring, recruiting, referring, or retaining an unauthorized worker (hired after November 6, 1986) will result in civil penalties as follows:

- first offense = $539 to $4,313 per unauthorized alien;
- second offense = $4,313 to $10,781 per unauthorized alien; and
- subsequent offenses = $6,469 to $21,563 per unauthorized alien.

Nonimmigrant Visa Program Violations

The H-1B visa program allows for the employment of foreign workers in specialty occupations. The penalty for unlawful conduct under this visa category (e.g., misrepresentations on the labor condition application or requirements that the employee pay certain fees) will increase to a fine of not more than $1,782 per violation. More serious conduct (e.g., willful failures pertaining to wages or working conditions, willful representations on the labor condition application, or discrimination against an employee) will soon carry a penalty of not more than $7,251 per violation.

Finally, where an employer displaces a U.S. worker during a period beginning 90 days before and ending 90 days after the filing of an H-1B petition in conjunction with other willful violations or willful misrepresentations, it will be liable for a penalty not to exceed $50,758 per violation – a significant increase from the former maximum penalty of $35,000 per violation.

The H-2B visa allows for the temporary employment (seasonal, peak load or a one-time occurrence) of workers in a non-agricultural capacity. The maximum penalty for H-2B program violations will increase to $11,940 per violation.

The H-2A visa program provides for the employment of seasonal agricultural workers. Violations of the work contract or of the H-2A program's statutory or regulatory requirements will now carry a penalty of $1,631 per violation. Penalties for willful violations of the work contract, the program's statutory or regulatory requirements, or for discrimination will increase to no more than $5,491 per violation.

For violations related to a violation of the housing or transportation safety and health provisions that proximately cause the death or serious injury of any H-2A worker, an employer could be fined up to $54,373 per worker. In the event of willful or repeated violations that result in serious injury or death, an employer could be assessed penalties up to $108,745 per worker. Failure to cooperate in an investigation could result in a penalty of up to $5,491 per violation. In addition, if an employer lays off, displaces, or improperly rejects a U.S. worker, the penalty could be a maximum of $16,312 per violation per worker.

Penalties for violations of the D-1 visa program (which permits entry into the U.S. for a crewperson serving in any capacity required for normal operation on board a vessel, such as a cruise ship or aircraft) will increase to $8,908 per violation. The Migrant and Seasonal Agricultural Worker Protection Act, which establishes employment standards for migrant and seasonal agricultural workers, formerly carried a penalty of not more than $1,000 for each violation. The new maximum penalty will be $2,355.

In sum, while certain increases may seem modest, these are per-violation penalty maximums, and the aggregation of the assessed penalties at their increased amounts can quickly result in high-dollar liability. These increases are a call to action for employers to examine their compliance in all areas of employment law and take steps to strengthen policies and procedures.

Conclusion

There were other penalty increases not described here, either because they were not terribly significant (such as the increased FMLA penalty from $110 to $163) or because they were highly technical (such as penalty increases for the Black Lung Benefits Act or the Longshore and Harbor Workers' Compensation Act). For a comprehensive chart summarizing all penalty increases, click here.

If you have any questions about these increased penalties, please contact your Fisher Phillips attorney, or any attorney in our Wage and Hour Law Practice Group, Workplace Safety and Catastrophe Management Practice Group, Employee Benefits Practice Group, or Global Immigration Practice Group.

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