UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

LAURIE NICHOLSON, individually and on behalf of herself and all others similarly situated, Plaintiff, vs. Franciscan Missionaries of Our Lady Health System, Franciscan Missionaries of Our Lady Health System Investment Committee, and John Does 1-20, Defendants.	**No.: 3:16-cv-00258-SDD-EWD**

PLAINTIFF'S SUPPLEMENTAL SUBMISSION IN FURTHER SUPPORT OF FINAL APPROVAL OF SETTLEMENT AND TO ADDRESS SETTLEMENT CLASS MEMBER TAMMY LEE HILL'S REQUEST TO SPEAK AT THE FINAL FAIRNESS HEARING

Plaintiff Laurie Nicholson ("Named Plaintiff" or "Plaintiff"), on behalf of herself and all others similarly situated, submits this Supplemental Memorandum of Law in support of her Motion for Final Approval of Class Action Settlement (Dkt. No. 94) and her Motion for Award of Attorneys' Fees, Reimbursement of Expenses, and Case Contribution Awards (Dkt. No. 95), and specifically to address the letter from Ms. Tammy Lee Hill.[1]

On or about January 22, 2018, the undersigned received a letter from Ms. Hill noting that she is requesting to speak at the fairness hearing on February 6, 2018. *See* Exhibit A. The next

[1] Pursuant to the schedule set by the Court in the Order Preliminarily Approving Settlement, Notice Procedures, and Confirming Final Settlement Hearing, any responses to objections by the Settlement Class must be filed with the Court no later than January 30, 2018 (seven (7) days before the Fairness Hearing). Dkt. No. 83 at ¶ 6. As discussed herein, although Ms. Hill's letter does not purport to be an objection, it seeks relief not encompassed by the Settlement. For purposes of addressing the concern raised by Ms. Hill herein, Class Counsel treats her letter as an objection and assumes she is a Settlement Class Member.

day, on January 23rd, the undersigned and other Class Counsel spoke with Ms. Hill to get a better understanding of her position. Class Counsel explained to Ms. Hill the nature of the lawsuit and the terms of the Settlement, including the fact that she was a member of a preliminarily approved non-opt out Settlement Class. Following the discussion, Ms. Hill indicated she still planned to attend the Fairness Hearing on February 6th to request ERISA and EBSA civil monetary damages per her letter.

Ms. Hill's letter indicates that she is requesting to speak at the Fairness Hearing regarding "ERISA and EBSA civil monetary damages from Franciscan Missionaries for breach of fiduciary duties by not providing an annual statement concerning my pension plan since August 5, 1985, when my employment began." Ms. Hill is entirely correct that ERISA authorizes the Court to award civil penalties to plan participants when ERISA plan fiduciaries fail to provide annual statements; in fact, this claim was included in Plaintiff's complaint. Dkt. No. 1 at ¶ 95 (citing ERISA § 502(a)(1)(A), 29 U.S.C. 1132(a)(1)(A)). However, for the reasons discussed below, Plaintiff strongly believes that the Settlement is fair, reasonable and adequate even though it does not include the award of civil penalties as a component.

Civil monetary damages can only be awarded if the Court finds that the Plans[2] are governed by ERISA. This is, of course, the major point of contention between the Parties, as Defendants have maintained, and continue to maintain, that the Plans are "church plans" and thus exempt from ERISA.

While Plaintiff believes she has strong arguments for why the Plans are not "church plans" and thus should be operated pursuant to ERISA, recent case law has weakened this position. First,

[2] "Plans" refers to the Retirement Plan of Our Lady of the Lake Hospital and Affiliated Organizations, the Pension Plan for Employees of Our Lady of Lourdes Regional Medical Center, Inc., and the Retirement Plan for Employees of St. Francis Medical Center, Inc.

the Supreme Court in *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652 (2017), held that an employee benefit plan does not need to be established by a church to qualify for ERISA's "church plan" exemption and that plans maintained by certain organizations controlled by or associated with a church may qualify. *Advocate*, 137 S. Ct. at 1663. While *Advocate* did not resolve all issues in this case, the decision undercut one of the primary arguments Plaintiff pled in the Complaint for why the Plans do not qualify for the church plan exemption. More recently, the Tenth Circuit issued its decision in *Medina v. Catholic Health Initiatives*, 877 F.3d 1213 (10th Cir. 2017), which rejected several other theories of ERISA liability urged by Plaintiff in this case. Thus, recent case law has made Plaintiff's legal arguments more susceptible to attack.

Any litigation involves risk, and any settlement necessarily involves a compromise by both sides. Mindful of the opposition to Plaintiff's arguments, Class Counsel believe the proposed Settlement is in the best interests of Plaintiff and the Settlement Class. In particular, the Settlement requires the Operating Entities to contribute $125 million in the aggregate to the Plans over the next 5 years, with $35 million contributions in each of the next three years and $10 million in both the fourth and fifth year following the Effective Date of the Settlement. *See* Settlement Agreement § 8.1. This gives the Plans significant financial stability. Moreover, the Operating Entities guaranteed the payment of accrued benefits to the Plans' participants for the next fifteen years. *See* Settlement Agreement § 9.2. As part of the compromised Settlement, Defendants do not admit that the Plans are ERISA plans, rather the Plans will continue to be operated as ERISA-exempt "church plans." Accordingly, there is no possibility of the civil monetary penalties Ms. Hill discusses in her letter.

It is also important to note that an award of civil penalties would be wholly discretionary even if Plaintiff continued the litigation and prevailed on the merits in full. *See* ERISA § 502(c)(1),

29 U.S.C. 1132(c)(1) (fiduciary who fails to provide required annual statements "may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure . . . ."). Factors courts consider in determining whether to impose civil penalties for violations of this section include "bad faith or intentional conduct on the part of the administrator . . . ." *Zann Kwan v. Andalex Grp. LLC*, 737 F.3d 834, 848 (2d Cir. 2013) (internal citations and quotations omitted). Here, that showing would be complicated because Defendants had received private letter rulings from the IRS indicating that the Plans were covered by the church plan exemption and thus not subject to ERISA's reporting requirements. *See* Dkt. Nos. 28-2, 28-3 and 28-4. Even if Plaintiff successfully convinced the Court that it should not defer to these interpretations, their existence would have complicated any argument that the Court should impose civil penalties. This very point was highlighted during oral argument in *Advocate* before the Supreme Court. *See* Transcript of Oral Argument at 35, *Advocate Health Care Network v. Stapleton*, No. 16-74 (U.S. Mar. 27, 2017), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2016/16-74_p8k0.pdf (in response to questioning by Justice Alito, counsel arguing on behalf of plaintiffs admitted "nobody has ever – no court has ever, I don't think, issued – had an ERISA penalty close to that [sought by the plaintiffs]"). Indeed, Justice Alito's reluctance to the idea of civil penalties led him to pose the question to the attorney for the plaintiffs if he was "willing on behalf of your clients to disavow any requests for penalties." *Id.* at 36.

Because the Settlement provides real and substantial relief to the Class by providing significant financial stability to the Plans' trust funds coupled with a fifteen-year guarantee of continuing payments, Class Counsel believe that the Settlement is a very good result for the Class. In light of recent trends in the case law, as well as the problematic and discretionary nature of any

civil penalties claim under the specific facts of this case, Class Counsel do not believe that Ms. Hill's letter undermines the case for approval the Settlement.

The objection deadline elapsed on January 23, 2018 (*see* Dkt. No. 83 at ¶ 6), and no objection or other response to the Settlement has been received. This is strong evidence of the fairness, reasonableness, and adequacy of the Settlement. *See, e.g.*, *In re Waste Mgmt., Inc. Sec. Litig.*, No. 99-cv-2183, 2002 WL 35644013, at *21 (S.D. Tex. May 10, 2002), *amended*, No. 99-cv-2183, 2003 WL 27380802 (S.D. Tex. July 31, 2003) (noting single objection filed, and reasoning "[t]his lack of objection strongly suggests that the settlement is fair and should be approved.") (citing *In re Beef Indus. Antitrust Litig.*, 607 F.2d 167, 180 (5th Cir. 1979) (appeal challenging partial settlement dismissed because, among other reasons, there were "virtually no objections from members of the settlement class")); *In re Pool Prod. Distribution Mkt. Antitrust Litig.*, MDL No. 2328, 2016 WL 235781, at *10 (E.D. La. Jan. 20, 2016) (noting "a small number of objectors suggests support for settlement") (collecting cases).

Class Counsel consider the Settlement to be an excellent result for the Settlement Class as it secures a meaningful result, especially in light of the current legal landscape. Class Counsel thus respectfully submit that the Settlement is fair, reasonable, and adequate, and should be finally approved.

Dated: January 30, 2018

Respectfully submitted,

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Counsel for Plaintiff and the Settlement Class

CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2018, a true and correct copy of the foregoing document was filed with the Court utilizing its ECF system, which will send notice of such filing to all counsel of record.

/s/ Mark K. Gyandoh
Mark K. Gyandoh

EXHIBIT A

To: Mark K. Gyandoh
Julie Siebert-Johnson
Kessler Topaz Meltzer & Check LLP
280 King of Prussia Road
Radnor, PA 19087

Re: Nicholson v Franciscan Missionaries of our Lady Health System
Case No 16-cv-258

My Name is Tammy Lee Hill.
This letter is to inform all parties that I am requesting to speak at the Fairness hearing on February 6, 2018. I am requesting this opportunity in accordance with ERISA and EBSA civil monetary damages from Franciscan missionaries for breach of fiduciary duties by not providing an annual statement concerning my pension plan since August 5, 1985, when my employment began. Enclosed are documents supporting my request for said civil penalties.

Thank you

From: (337) 258 5887
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Tammy Hill
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Lafayette, La 70506

Tammy Hill

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SOCIETY FOR HUMAN RESOURCE MANAGEMENT

DOL Increases Penalties for ERISA Compliance Violations

FLSA and FMLA penalties are also adjusted higher

By By Fred Farkash and Marjorie Martin, © Xerox HR Services
Jul 21, 2016

The U.S. Department of Labor (DOL) announced increased penalty amounts for violations of the Employee Retirement Income Security act (ERISA) effective Aug. 1, 2016. Inflation adjustments to these penalties will now be announced annually, no later than Jan. 15.

The new penalty rates were specified in an interim final rule published in the *Federal Register* (https://www.gpo.gov/fdsys/pkg/FR-2016-07-01/pdf/2016-15378.pdf) on July, 1, 2016.

Background

The Employee Benefit Security Administration (EBSA) enforces ERISA's fiduciary, reporting and disclosure provisions, which provide that civil monetary penalties can be assessed for various compliance failures.

The Federal Civil Penalties Inflation Adjustment Act of 1990 (Inflation Adjustment Act) established a mechanism for updating various penalties to reflect inflation in an effort to maintain their deterrent effect, but adjustments were historically infrequent because of certain rounding rules. On Nov. 2, 2015, Congress enacted the Federal Civil Monetary Penalties Inflation Adjustment Act Improvements Act to require federal agencies to make a "catch-up" inflation adjustment. The catch-up increase, effective for penalties assessed after Aug. 1, 2016, is capped at 150 percent of the Nov. 2, 2015 level. The Improvements Act also replaced the previous rounding convention for penalty inflation adjustments with rounding to the nearest dollar for all penalty amounts.

DOL will issue subsequent cost-of-living adjustments under the Improvements Act, determined by fluctuations in the Consumer Price Index for all Urban Consumers (CPI-U).

DOL Interim Final Rule with Inflation "Catch-up" Adjustment Amounts

The interim rule specifies that the catch-up inflation adjustments will apply to penalties DOL assesses after Aug. 1, 2016, if the associated violation occurred after Nov. 2, 2015. Violations that occurred on or before Nov. 2, 2015, and assessments made on or before Aug. 1, 2016, will be subject to the old penalty amounts in effect prior to the inflation catch-up adjustment.

Civil Penalty/Monetary Penalty Description and ERISA Penalty Statute Section	Current Maximum Penalty	New Maximum Penalty Effective Aug. 1, 2016
Failure to furnish statement of benefits to former retirement plan participants and beneficiaries or failure to maintain records for a retirement plan. Section 209(b)	$11/employee	$28/employee
Failure or refusal to file annual report (Form 5500). Section 502 (c)(2)	$1,100/day	$2,063/day
Multiemployer defined benefit (DB) plan's failure to certify endangered or critical status. Section 502(c)(2)	$1,100/day	$2,063/day
Failure to notify single employer DB plan participants of certain benefit restrictions and/or limitations arising under Code Section 436. Section 502(c)(4)	$1,000/day	$1,632/day
Failure to furnish certain multiemployer defined benefit plan financial and actuarial reports upon request by participant, beneficiary or employee representative. Section 502(c)(4)	$1,000/day	$1,632/day
Failure by plan sponsor or plan administrator of multiemployer DB plan to furnish estimate of withdrawal liability upon request to participating employer. Section 502(c)(4)	$1,000/day	$1,632/day
Failure to furnish of automatic contribution arrangement notice to defined contribution (DC) plan participants. Section 502(c)(4)	$1,000/day	$1,632/day
Failure of Multiple Employer Welfare Arrangement (MEWA) to	$1,100/day	$1,502/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). Section 502(c)(6)	$110/day (but no greater than $1,100 per request)	$147/day (but no greater than $1,472 per request)
Failure to furnish blackout notice or notice of right to divest employer securities to participants and beneficiaries in DC plans. Section 502(c)(7) $131/day/required recipient	$100/day/required recipient	$131/day/required recipient
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). Section 502(c)(8)	$1,100/day	$1,296/day
Failure by employer to inform employees of Medicaid/CHIP coverage opportunities. Section 502(c)(9)(A)	$100/day/employee	$110/day/employee
Failure of group health plan's plan administrator to provide state with timely coverage coordination disclosure form for Medicaid/CHIP eligible individuals. Section 502(c)(9)(B)	$100/day/participant or beneficiary	$110/day/participant or beneficiary
Genetic Information Nondisclosure Act (GINA) violation by group health plan sponsor/health insurance issuer. Section 502(c)(10)	$100/day/participant or beneficiary (if not corrected before notice of violation is received—subject to minimum of $2,500/day/participant or beneficiary for de minimis violations or $15,000/day/participant or beneficiary for violations that are not de minimis; maximum of $500,000 for unintentional failures)	$110/day/participant or beneficiary (if not corrected before notice of violation is received—subject to minimum of $2,745/day/participant or beneficiary for de minimis violations or $16,473/day/participant or beneficiary for violations that are not de minimis; maximum of $549,095 for unintentional failures)

Failure of a Cooperative and Small Employer Charity Act (CSEC) DB plan sponsor to establish or update a funding restoration plan. Section 502(c)(12)	$100/day	$100/day
Prohibited payment from DB plan during period when plan has a liquidity shortfall. Section 502(m)	$10,000/prohibited payment	$15,909/prohibited payment
Failure to provide Summary of Benefits Coverage to participant or beneficiary of group health plan. Section 715	$1,000/participant or beneficiary	$1,087/participant or beneficiary

Annual Adjustments to Penalties Starting in 2017

After this initial catch-up adjustment, agencies must adjust their civil monetary penalty amounts annually for inflation. The inflation adjustment will be determined from October to October using CPI-U, and the adjusted penalty amounts will be announced on the agency's website no later than the following Jan. 15. Annual inflation adjustments will not be subject to the usual regulatory agency notice and rulemaking process.

In Closing

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

Marjorie Martin, EA, FSPA, MAAA, is a principal at Xerox HR Services' Knowledge Resource Center. *Fred Farkash, CEBS, Fellow-ISCEBS, is a senior consultant at the firm. This article originally appeared in the July 18, 2016 issue of* For Your Information (https://hrlaws.services.xerox.com/wp-content/uploads/sites/2/2016/07/hrc_fyi_2016-07-18.pdf), *produced by Xerox HR Services' Knowledge Resource Center.* *© 2016 Xerox Corp. All rights reserved. Republished with permission.*

DOL Hikes FLSA and FMLA Penalties

The Department of Labor's July 1 interim final rule (https://www.gpo.gov/fdsys/pkg/FR-2016-07-01/pdf/2016-15378.pdf) also significantly increases penalties under the Fair Labor Standards Act (FLSA), the Family and Medical Leave Act (FMLA), and other laws its agencies enforce. Here, too, the increases will apply to penalties assessed after Aug. 1 for violations that occurred after Nov. 2, 2015—the date the Inflation Adjustment Act was enacted.

Penalties assessed on or before Aug. 1 will be subject to the civil penalty amounts currently in place.

FLSA

The FLSA and applicable DOL regulations provide for the assessment of civil monetary penalties for any person who repeatedly or willfully violates federal minimum wage or overtime requirements. Last adjusted for inflation in 2001, the current maximum penalty is $1,100 per violation. Under the interim final rule, the penalty for repeated and willful violations of the FLSA's minimum wage and overtime provisions will increase by roughly 72 percent to $1,894.

Because penalties are normally assessed on a per-employee basis, employer liability may escalate quickly if noncompliant pay practices affect a number of workers.

FMLA

Every employer covered by the FMLA is required to conspicuously post a notice explaining the statute's provisions and providing information for filing complaints of violations with the DOL's Wage and Hour Division. Currently, an employer that willfully violates the posting requirement may be assessed a civil money penalty of up to $110 for each separate offense. The DOL is increasing the maximum penalty for violation of the FMLA's posting requirement to $163 for each separate offense.

Although the DOL has invited comments by August 15, the final regulations are unlikely to materially change from the interim final rule. Employers should review their pay practices, postings and safety protocols to ensure compliance.

-- By Nancy Vary, JD, director of the Knowledge Resource Center at Xerox HR Services, and Abe Dubin, JD, a consultant at Xerox HR Services. This content is excerpted from the July 14 issue of For Your Information (https://hrlaws.services.xerox.com/wp-content/uploads/sites/2/2016/07/hrc_fyi_2016-07-14.pdf), produced by Xerox HR Services' Knowledge Resource Center. *© 2016 Xerox Corp. All rights reserved. Republished with permission.*

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Fact Sheet

U.S. Department of Labor
Employee Benefits Security Administration
June 30, 2016

INTERIM FINAL RULE ADJUSTING ERISA CIVIL MONETARY PENALTIES FOR INFLATION

The Department of Labor published in the Federal Register on June 30, 2016, an interim final rule to adjust for inflation the civil monetary penalties enforceable by the Department of Labor. This Fact Sheet describes the adjustments made to the civil monetary penalties enforced by the Employee Benefits Security Administration (EBSA) under the Employee Retirement Income Security Act of 1974 (ERISA).

Background

- EBSA is responsible for administering and enforcing the fiduciary, reporting, and disclosure provisions of Title I of the Employee Retirement Income Security Act of 1974 (ERISA).
- The Federal Civil Monetary Penalties Inflation Adjustment Act of 1990 (the "Inflation Adjustment Act") required Federal agencies, including the Department of Labor (the "Department" or "DOL"), to adjust their civil monetary penalties for inflation.
- In 1997 and 2003, the Department adjusted a number of civil monetary penalties enforceable by the Department under Title I of ERISA for inflation.
- In 2015, the Federal Civil Monetary Penalties Inflation Adjustment Act Improvements Act of 2015 (2015 Inflation Adjustment Act) amended the Inflation Adjustment Act. On February 24, 2016, the Office of Management and Budget issued implementation guidance under OMB Memorandum M-16-06.
- The 2015 amendments to the Inflation Adjustment Act require federal agencies to issue an interim final rule by July 1, 2016, adjusting their civil monetary penalties for inflation through October of 2015. After this initial "catch-up" adjustment, the agencies must adjust their civil monetary penalties annually for inflation.
- On June 30, 2016, the Department published an interim final rule setting forth the catch-up adjustments for the penalties enforced by the various agencies in DOL, including EBSA.
- The rule's catch-up adjustments apply to penalties assessed after August 1, 2016, whose associated violations occurred after November 2, 2015, the enactment date of the 2015 Inflation Adjustment Act. Violations of Title I of ERISA occurring on or before November 2,

in the Department's existing regulations in 29 CFR part 2575 (or as established by statute if the penalty amount was never adjusted by regulation).

- Beginning in 2017, the Department will adjust the new ERISA Title I penalty amounts annually for inflation no later than January 15 of each year. For example, by January 15, 2017, the Department will adjust penalty amounts to reflect any increase in inflation from October, 2015, to October, 2016. EBSA will post any changes to ERISA Title I penalty amounts on its website. Annual inflation adjustments are not subject to notice and rulemaking.

- For more information on the calculation of the civil penalty adjustments, see the interim final rule at https://www.federalregister.gov/articles/2016/07/01/2016-15378/federal-civil-penalties-inflation-adjustment-act-catch-up-adjustments, the Department's Fact Sheet at https://www.dol.gov/sites/default/files/2016-inflation-factsheet.pdf and the Department's FAQs at https://www.dol.gov/sites/default/files/2016-inflation-faq.pdf.

New Penalty Amounts Adjusted For Inflation

The table below shows the current penalty amounts enforceable by EBSA and the inflation adjusted penalty that will go into effect for penalties assessed after August 1, 2016.

ERISA Penalty Statute	Description of ERISA Violations Subject to Penalty	Current Penalty Amount	New Penalty Amount
ERISA § 209(b)	Failure to furnish reports (e.g., pension benefit statements) to certain former participants and beneficiaries or maintain records.	Up to $11 per employee	Up to $28 per employee
ERISA § 502(c)(2)	• Failure or refusal to file annual report (Form 5500) required by ERISA § 104; and • Failure of a multiemployer plan to certify endangered or critical status under ERISA § 305(b)(3)(C) treated as failure to file annual report.	Up to $1,100 per day	Up to $2,063 per day
ERISA § 502(c)(4)	• Failure to notify participants under ERISA § 101(j) of certain benefit restrictions and/or limitations arising 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); and • Failure to furnish automatic contribution arrangement notice under ERISA § 514(e)(3).	Up to $1,000 per day	Up to $1,632 per day
ERISA § 502(c)(5)	Failure of a multiple employer welfare arrangement to file report required by regulations issued under ERISA § 101(g).	Up to $1,100 per day	Up to $1,502 per day
ERISA § 502(c)(6)	Failure to furnish information requested by Secretary of Labor under ERISA §104(a)(6).	Up to $110 per day not to	Up to $147 per day not to

ERISA § 502(c)(7)	Failure to furnish a blackout notice under section 101(i) of ERISA or notice of the right to divest employer securities under section 101(m) of ERISA.	Up to $100 per day	Up to $131 per day
ERISA § 502(c)(8)	Failure by a plan sponsor of a multiemployer plan in endangered status to adopt a funding improvement plan or a multiemployer plan in critical status to adopt a rehabilitation plan. Penalty also applies to a plan sponsor of an endangered status plan (other than a seriously endangered plan) that fails to meet its benchmark by the end of the funding improvement period.	Up to $1,100 per day	Up to $1,296 per day
ERISA § 502(c)(9)(A)	Failure by an employer to inform employees of CHIP coverage opportunities under ERISA § 701(f)(3)(B)(i)(I) – each employee a separate violation.	Up to $100 per day	Up to $110 per day
ERISA § 502(c)(9)(B)	Failure by a plan administrator to timely provide to any State the information required to be disclosed under ERISA § 701(f)(3)(B)(ii), regarding coverage coordination – each participant/beneficiary a separate violation.	Up to $100 per day	Up to $110 per day
ERISA § 502(c)(10)(B)(i)	Failure by any plan sponsor of a group health plan, or any health insurance issuer offering health insurance coverage in connection with the plan, to meet the requirements of ERISA §§ 702(a)(1)(F), (b)(3),(c) or (d); or § 701; or § 702(b)(1) with respect to genetic information.	$100 per day during non-compliance period	$110 per day during non-compliance period
ERISA § 502(c)(10)(C)(i)	Minimum penalty for de minimis failures to meet genetic information requirements not corrected prior to notice from Secretary of Labor.	$2,500 minimum	$2,745 minimum
ERISA § 502(c)(10)(C)(ii)	Minimum penalty for failures to meet genetic information requirements which are not corrected prior to notice from Secretary of Labor and are not de minimis.	$15,000 minimum	$16,473 minimum
ERISA § 502(c)(10)(D)(iii)(II).	Cap on unintentional failures to meet genetic information requirements.	$500,000 maximum	$549,095 maximum
ERISA § 502(c)(12)	Failure of CSEC plan sponsor to establish or update a funding restoration plan.	Up to $100 per day	Up to $100 per day
ERISA § 502(m)	Distribution prohibited by ERISA § 206(e) of ERISA.	Up to $10,000 per distribution	Up to $15,909 per distribution
ERISA § 715	Failure to provide Summary of Benefits Coverage under Public Health Services Act section 2715(f), as incorporated into ERISA section § 715 and 29 CFR 2590.715-2715(e).	Up to $1,000 per failure	Up to $1,087 per failure

The interim final regulation implements these changes by amending 29 CFR Part 2575 to delete sections 2575.100, 2575.209b-1, 2575.502c-2, 2575.502c-5, and 2575.502c-6 and add new sections 2575.1, 2575.2, and 2575.3. Minor conforming technical changes were also made to sections 2560.502c-2, 2560.502c-4, 2560.502c-5, 2560.502c-6, 2560.502c-7, and 2560.502c-8 of 29 CFR Part 2560 and section 2590.715-2715(e) of 29 CFR Part 2950.

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SOCIETY FOR HUMAN RESOURCE MANAGEMENT

DOL Increases Penalties for ERISA Compliance Violations

FLSA and FMLA penalties are also adjusted higher

By By Fred Farkash and Marjorie Martin, © Xerox HR Services
Jul 21, 2016

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Background

The Employee Benefit Security Administration (EBSA) enforces ERISA's fiduciary, reporting and disclosure provisions, which provide that civil monetary penalties can be assessed for various compliance failures.

The Federal Civil Penalties Inflation Adjustment Act of 1990 (Inflation Adjustment Act) established a mechanism for updating various penalties to reflect inflation in an effort to maintain their deterrent effect, but adjustments were historically infrequent because of certain rounding rules. On Nov. 2, 2015, Congress enacted the Federal Civil Monetary Penalties Inflation Adjustment Act Improvements Act to require federal agencies to make a "catch-up" inflation adjustment. The catch-up increase, effective for penalties assessed after Aug. 1, 2016, is capped at 150 percent of the Nov. 2, 2015 level. The Improvements Act also replaced the previous rounding convention for penalty inflation adjustments with rounding to the nearest dollar for all penalty amounts.

DOL will issue subsequent cost-of-living adjustments under the Improvements Act, determined by fluctuations in the Consumer Price Index for all Urban Consumers (CPI-U).

DOL Interim Final Rule with Inflation "Catch-up" Adjustment Amounts

The interim rule specifies that the catch-up inflation adjustments will apply to penalties DOL assesses after Aug. 1, 2016, if the associated violation occurred after Nov. 2, 2015. Violations that occurred on or before Nov. 2, 2015, and assessments made on or before Aug. 1, 2016, will be subject to the old penalty amounts in effect prior to the inflation catch-up adjustment.

Civil Penalty/Monetary Penalty Description and ERISA Penalty Statute Section	Current Maximum Penalty	New Maximum Penalty Effective Aug. 1, 2016
Failure to furnish statement of benefits to former retirement plan participants and beneficiaries or failure to maintain records for a retirement plan. Section 209(b)	$11/employee	$28/employee
Failure or refusal to file annual report (Form 5500). Section 502 (c)(2)	$1,100/day	$2,063/day
Multiemployer defined benefit (DB) plan's failure to certify endangered or critical status. Section 502(c)(2)	$1,100/day	$2,063/day
Failure to notify single employer DB plan participants of certain benefit restrictions and/or limitations arising under Code Section 436. Section 502(c)(4)	$1,000/day	$1,632/day
Failure to furnish certain multiemployer defined benefit plan financial and actuarial reports upon request by participant, beneficiary or employee representative. Section 502(c)(4)	$1,000/day	$1,632/day
Failure by plan sponsor or plan administrator of multiemployer DB plan to furnish estimate of withdrawal liability upon request to participating employer. Section 502(c)(4)	$1,000/day	$1,632/day
Failure to furnish of automatic contribution arrangement notice to defined contribution (DC) plan participants. Section 502(c)(4)	$1,000/day	$1,632/day
Failure of Multiple Employer Welfare Arrangement (MEWA) to file required report (M-1). Section 502(c)(5)	$1,100/day	$1,502/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). Section 502(c)(6)	$110/day (but no greater than $1,100 per request)	$147/day (but no greater than $1,472 per request)
Failure to furnish blackout notice or notice of right to divest employer securities to participants and beneficiaries in DC plans. Section 502(c)(7) $131/day/required recipient	$100/day/required recipient	$131/day/required recipient
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). Section 502(c)(8)	$1,100/day	$1,296/day
Failure by employer to inform employees of Medicaid/CHIP coverage opportunities. Section 502(c)(9)(A)	$100/day/employee	$110/day/employee
Failure of group health plan's plan administrator to provide state with timely coverage coordination disclosure form for Medicaid/CHIP eligible individuals. Section 502(c)(9)(B)	$100/day/participant or beneficiary	$110/day/participant or beneficiary
Genetic Information Nondisclosure Act (GINA) violation by group health plan sponsor/health insurance issuer. Section 502(c)(10)	$100/day/participant or beneficiary (if not corrected before notice of violation is received—subject to minimum of $2,500/day/participant or beneficiary for de minimis violations or $15,000/day/participant or beneficiary for violations that are not de minimis; maximum of $500,000 for unintentional failures)	$110/day/participant or beneficiary (if not corrected before notice of violation is received—subject to minimum of $2,745/day/participant or beneficiary for de minimis violations or $16,473/day/participant or beneficiary for violations that are not de minimis; maximum of $549,095 for unintentional failures)

Failure of a Cooperative and Small Employer Charity Act (CSEC) DB plan sponsor to establish or update a funding restoration plan. Section 502(c)(12)	$100/day	$100/day
Prohibited payment from DB plan during period when plan has a liquidity shortfall. Section 502(m)	$10,000/prohibited payment	$15,909/prohibited payment
Failure to provide Summary of Benefits Coverage to participant or beneficiary of group health plan. Section 715	$1,000/participant or beneficiary	$1,087/participant or beneficiary

Annual Adjustments to Penalties Starting in 2017

After this initial catch-up adjustment, agencies must adjust their civil monetary penalty amounts annually for inflation. The inflation adjustment will be determined from October to October using CPI-U, and the adjusted penalty amounts will be announced on the agency's website no later than the following Jan. 15. Annual inflation adjustments will not be subject to the usual regulatory agency notice and rulemaking process.

In Closing

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

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DOL Hikes FLSA and FMLA Penalties

The Department of Labor's July 1 interim final rule (https://www.gpo.gov/fdsys/pkg/FR-2016-07-01/pdf/2016-15378.pdf) also significantly increases penalties under the Fair Labor Standards Act (FLSA), the Family and Medical Leave Act (FMLA), and other laws its agencies enforce. Here, too, the increases will apply to penalties assessed after Aug. 1 for violations that occurred after Nov. 2, 2015—the date the Inflation Adjustment Act was enacted.

Penalties assessed on or before Aug. 1 will be subject to the civil penalty amounts currently in place.

FLSA

The FLSA and applicable DOL regulations provide for the assessment of civil monetary penalties for any person who repeatedly or willfully violates federal minimum wage or overtime requirements. Last adjusted for inflation in 2001, the current maximum penalty is $1,100 per violation. Under the interim final rule, the penalty for repeated and willful violations of the FLSA's minimum wage and overtime provisions will increase by roughly 72 percent to $1,894.

Because penalties are normally assessed on a per-employee basis, employer liability may escalate quickly if noncompliant pay practices affect a number of workers.

FMLA

Every employer covered by the FMLA is required to conspicuously post a notice explaining the statute's provisions and providing information for filing complaints of violations with the DOL's Wage and Hour Division. Currently, an employer that willfully violates the posting requirement may be assessed a civil money penalty of up to $110 for each separate offense. The DOL is increasing the maximum penalty for violation of the FMLA's posting requirement to $163 for each separate offense.

Although the DOL has invited comments by August 15, the final regulations are unlikely to materially change from the interim final rule. Employers should review their pay practices, postings and safety protocols to ensure compliance.

-- By Nancy Vary, JD, director of the Knowledge Resource Center at Xerox HR Services, and Abe Dubin, JD, a consultant at Xerox HR Services. This content is excerpted from the July 14 issue of For Your Information (https://hrlaws.services.xerox.com/wp-content/uploads/sites/2/2016/07/hrc_fyi_2016-07-14.pdf), produced by Xerox HR Services' Knowledge Resource Center. *© 2016 Xerox Corp. All rights reserved. Republished with permission.*

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