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B-328264

July 18, 2016

The Honorable Lamar Alexander
Chairman
The Honorable Patty Murray
Ranking Member
Committee on Health, Education, Labor, and Pensions
United States Senate

The Honorable John Kline
Chairman
The Honorable Robert C. "Bobby" Scott
Ranking Member
Committee on Education and the Workforce
House of Representatives

Subject: *Department of Labor, Employment and Training Administration, Office of Workers' Compensation Programs, Office of the Secretary, Wage and Hour Division, Occupational Safety and Health Administration, Employee Benefits Security Administration, Mine Safety and Health Administration: Department of Labor Federal Civil Penalties Inflation Adjustment Act Catch-Up Adjustments*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Department of Labor (Labor), Employment and Training Administration, Office of Workers' Compensation Programs, Office of the Secretary, Wage and Hour Division, Occupational Safety and Health Administration, Employee Benefits Security Administration, Mine Safety and Health Administration entitled "Department of Labor Federal Civil Penalties Inflation Adjustment Act Catch-Up Adjustments" (RIN: 1290-AA31). We received the rule on July 1, 2016. It was published in the *Federal Register* as an interim final rule; request for comments on July 1, 2016. 81 Fed. Reg. 43,430.

The interim final rule adjusts the amounts of civil penalties assessed or enforced in Labor's regulations. The Federal Civil Penalties Inflation Adjustment Act of 1990 as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Inflation Adjustment Act) requires agencies to adjust the levels of civil monetary penalties with an initial catch-up adjustment, followed by annual adjustments for inflation. Labor is required to calculate the catch-up and subsequent annual adjustments based on the Consumer Price Index for all Urban Consumers. Labor must publish the interim final rule by July 1, 2016, and the new penalty levels are effective no later than August 1, 2016.

The Congressional Review Act (CRA) requires a 60-day delay in the effective date of a major rule from the date of publication in the *Federal Register* or receipt of the rule by Congress, whichever is later. 5 U.S.C. § 801(a)(3)(A). This final rule has a stated effective date of August 1, 2016. We received the rule on July 1, 2016. It was published in the *Federal Register*

as an interim final rule; request for comments on July 1, 2016. Therefore, the final rule does not have the full required 60-day delay in its effective date. The 60-day delay in effective date can be waived, however, if the agency finds for good cause that delay is impracticable, unnecessary, or contrary to the public interest, and the agency incorporates a statement of the findings and its reasons in the rule issued. 5 U.S.C. §§ 553(d)(3), 808(2). Labor stated that good cause exists for issuing this interim final rule without prior notice and comment. By operation of the Inflation Adjustment Act, Labor must publish the catch-up adjustment by July 1, 2016, and the rule must be effective no later than August 1, 2016. The Inflation Adjustment Act further provides that the increased penalty levels apply to any penalties assessed after the effective date of the increase. Additionally, the Inflation Adjustment Act provides a clear formula for adjustment of the civil penalties, leaving little room for discretion. For these reasons, Labor found that notice and comment would be impracticable and unnecessary in this situation and contrary to the language of the Inflation Adjustment Act. Therefore Labor found good cause to waive the provisions of notice and comment, but did not address the 60-day delay in effective date for these provisions.

Enclosed is our assessment of Labor's compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. Our review of the procedural steps taken indicates that Labor complied with the applicable requirements.

If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to the subject matter of the rule, please contact Shirley A. Jones, Assistant General Counsel, at (202) 512-8156.

signed

Robert J. Cramer
Managing Associate General Counsel

Enclosure

cc: Sharon Block
Principal Deputy Assistant Secretary
for Policy
Department of Labor

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
DEPARTMENT OF LABOR,
EMPLOYMENT AND TRAINING ADMINISTRATION,
OFFICE OF WORKERS' COMPENSATION PROGRAMS,
OFFICE OF THE SECRETARY,
WAGE AND HOUR DIVISION,
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION,
EMPLOYEE BENEFITS SECURITY ADMINISTRATION,
MINE SAFETY AND HEALTH ADMINISTRATION
ENTITLED
"DEPARTMENT OF LABOR FEDERAL CIVIL PENALTIES
INFLATION ADJUSTMENT ACT CATCH-UP ADJUSTMENTS"
(RIN: 1290-AA31)

(i) Cost-benefit analysis

The Department of Labor (Labor) provided a cost-benefit analysis of the interim final rule. Labor considered two potential effects of the increased penalties mandated by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, (Inflation Adjustment Act): (1) increased transfers from employers and others who violate the law (and therefore pay penalties) to the government; and (2) the benefits to workers, retirees, and responsible employers and others of increased penalties that will encourage greater compliance with the laws that Labor enforces. Each of these effects is discussed in the interim final rule and Labor included summary tables of the estimated transfers. Labor considered the total dollar amount of penalties collected under each affected penalty over the immediately preceding three complete fiscal years (2013, 2014, and 2015) to calculate the average total penalties collected under each statute. Then Labor projected how the amount collected under each statute would increase if it did so in proportion to the percentage increase of the maximum penalty for that statute. Labor concluded that the result would be that approximately \$140 million in additional transfers from the regulated community to the government each year would occur. Labor suggested, however, that due to additional factors, the amount of the transfers from the regulated community to the government is likely to be lower than the \$140 million projected. The Occupational Safety and Health Administration (OSHA) will require State Plans to increase their penalties to reflect the federal penalties increases at the state levels in order to maintain this "at least as effective" status. According to Labor, if every State Plan state increases its own penalties in line with the federal increases, using the same methodology that Labor used, the additional transfer from employers to OSHA State Plans would be \$57.1 million

Labor states that the Inflation Adjustment Act's penalty increase will have significant benefits for workers, retirees, and responsible employers and others in the regulated community. According to Labor, while most employers play by the rules, there are too many cases where workers are cheated out of their hard-earned wages or retirement benefits or forced to endure an unsafe workplace. By deterring violations and promoting compliance, more workers and retirees will benefit from the core employment law protections that Labor administers and enforces. Furthermore, Labor states that responsible employers and others who remain in compliance with laws will face less competition from the minority of employers who make a calculated decision to save money by eschewing compliance with these laws, and that those who follow

the law will essentially benefit from a more level playing field when competing with those who do not. Labor was unable to quantify these benefits.

(ii) Agency actions relevant to the Regulatory Flexibility Act (RFA), 5 U.S.C. §§ 603-605, 607, and 609

Labor states that the interim final rule is exempt from the requirements of the Administrative Procedure Act because the Inflation Adjustment Act directed Labor to issue an interim final rule. Therefore, according to Labor, the requirements of the RFA applicable to notices of proposed rulemaking, 5 U.S.C. § 603, do not apply to this interim final rule. Accordingly, Labor states that it is not required to either certify that the interim final rule would not have a significant economic impact on a substantial number of small entities or conduct a regulatory flexibility analysis.

(iii) Agency actions relevant to sections 202-205 of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. §§ 1532-1535

Labor estimates that the interim final rule may result in transfers of up to \$140 million per year, and acknowledges that this interim final rule may yield effects that make it subject to UMRA requirements. Therefore, Labor carried out the requisite cost-benefit analysis for the interim final rule.

(iv) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 et seq.

Labor states that pursuant to the Inflation Adjustment Act and 5 U.S.C. 553(b)(3)(B), it found that good cause exists for issuing this interim final rule without prior notice and comment. By operation of the Inflation Adjustment Act, Labor must publish the catch-up adjustment by July 1, 2016, and the rule must be effective no later than August 1, 2016. The Inflation Adjustment Act further provides that the increased penalty levels apply to any penalties assessed after the effective date of the increase. Additionally, the Inflation Adjustment Act provides a clear formula for adjustment of the civil penalties, leaving little room for discretion. For these reasons, Labor found that notice and comment would be impracticable and unnecessary in this situation and contrary to the language of the Inflation Adjustment Act. The interim final rule also invited interested persons to submit written comments on the interim final rule on or before August 15, 2016.

Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501-3520

Labor has determined that this final rule does not require any collection of information.

Statutory authorization for the rule

The interim final rule was promulgated under the authority of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Pub. L. No. 114-74, 129 Stat. 599, sec. 701 (Inflation Adjustment Act), as amended, (Nov. 2, 2015). 28 U.S.C. § 1 note, and 28 U.S.C. § 2461 note.

Executive Order No. 12,866 (Regulatory Planning and Review)

According to Labor, the interim final rule's increases in the maximum civil money penalties that agencies are authorized to assess for violations of laws they administer are required by the statutorily-mandated provisions of the Inflation Adjustment Act, which was enacted by Congress as part of the Bipartisan Budget Act of 2015. This interim final rule is a significant regulatory action because Labor's analysis shows that it could potentially have an annual effect on the economy of more than \$100 million.

Executive Order No. 13,132 (Federalism)

According to Labor, section 18 of the Occupational Safety and Health (OSH) Act (29 U.S.C. § 667) requires OSHA-approved State Plans to have standards and an enforcement program that are at least as effective as federal OSHA's standards and enforcement program. The existing regulation at 29 C.F.R. part 1902.4(c)(2)(xi) provides that in order to satisfy this requirement of effectiveness, State Plans must have effective sanctions, such as those prescribed in the OSH Act. Similarly, 29 C.F.R. part 1902.37(b)(12) requires State Plans with final approval to propose penalties in a manner at least as effective as under the federal program. This interim final rule amends 29 C.F.R. part 1902.4(c)(2)(xi) to clarify that State Plans must provide sanctions as effective as those set forth in the OSH Act and in 29 C.F.R. part 1903.15(d).

Labor states that in accordance with Part 1953, State Plans are required to adopt penalty changes that are at least as effective as federal OSHA, within 6 months after publication of the Labor's interim final rule amending OSHA's penalties. Thereafter, OSHA penalties will be increased by the cost-of-living adjustment for every subsequent year by January 15th. State Plans will also be required to increase their penalties regularly in the future to maintain at least as effective penalty levels.

State Plans are not required to impose monetary penalties on state and local government employers. See § 1956.11(c)(2)(x). Five states and one territory have State Plans that cover only state and local government employees: Connecticut, Illinois, New Jersey, New York, Maine, and the Virgin Islands. Therefore, the requirements to increase the penalty levels do not apply to these State Plans. Twenty-one states and one U.S. territory have State Plans that cover both private sector employees and state and local government employees: Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and Wyoming. These states must increase their penalties for private-sector employers.

Labor states that other than as that as described above, the interim final rule does not have federalism implications because it does not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Accordingly, Labor states that Executive Order 13,132 requires no further agency action or analysis.