

12 DEPARTMENT OF LABOR

170 BUREAU OF LABOR STANDARDS

Chapter 9: RULES GOVERNING ADMINISTRATIVE CIVIL MONEY PENALTIES FOR LABOR LAW VIOLATIONS

Summary: The purpose of this chapter is to provide ~~procedural~~ parameters and procedures regarding the assessment of administrative civil money penalties for labor law violations. ~~This rule also sets forth the procedure for appealing administrative civil money penalties and the requirement that the Bureau of Labor Standards effectively deploys its resources in an evidence-based manner.~~

Section I: Definitions

As used in this chapter, unless the context otherwise indicates, the following terms have the following meanings.

- A. "Bureau" means the Bureau of Labor Standards, within the Department of Labor.
- B. "Bureau Director" or "Director" means the Director of the Bureau or Director's designee(s).
- C. "Business days" means calendar days excluding any Saturday, Sunday, or Maine state holiday.
- D. "Commissioner" means the Commissioner of Labor or the Commissioner's designee.
- ~~D. "Division" means the Division of Wage and Hour within the Bureau of Labor Standards, Department of Labor.~~
- ~~E. "Division Director" means the Director of the Division of Wage and Hour or Director's designee(s).~~
- F. "Qualified hearing officer" means an individual with background or experience with adjudicatory proceedings under the Administrative Procedure Act; a Hearing Officer within the Division of Administrative Hearings within the Bureau of Unemployment Compensation, Department of Labor; or an attorney.
- E. "Grave Violation" means a violation which relates to a hazardous occupation for minors as defined in 26 M.R.S. § 772, causes financial hardship for the employee,

is likely to deter the exercise of legal rights, or which results in differential treatment of any employee within a protected class listed in 5 M.R.S. § 4571.

F. “Proactive Enforcement” means investigations, inspections, and enforcement actions which are initiated at the direction of the Director, rather than in reaction to an complaint.

G. “Probable Violation” means a set of facts which likely constitutes a violation but which has not been determined as such by the Director nor adjudged as such by a court.

G H. "Violation" means a single breach of the law as determined by the Director. For failure to respond to the survey and, where otherwise appropriate, each day may be considered a separate violation.

~~H. A “willful” violation is committed when the employer knew or, due to experience or expertise, should have known the operative facts that made its actions a violation of the law. A ‘willful’ violation includes an employer’s intentional or reckless disregard of its obligations under the law.~~

Section II: Penalty Calculation

~~The penalty for a violation or set of violations must be based on the statutory penalty for the violation. The Division Director shall calculate the final penalty according to the following schedule.~~

This section applies to the assessment of administrative civil money penalties against employers determined to have violated Title 26, Chapter 7, subchapters I-IV.

A. ~~Penalty Calculation~~Adjustments for violations that have penalty ranges

~~The number of violations will be multiplied by the minimum penalty or lowest of any penalty range affixed in the statute \$1,000. The result will then be adjusted multiplied in consideration of by the severity and/or history of applicable factors as outlined below. Either the adjusted penalty or the statutory maximum penalty will apply, whichever is lower. No per violation penalty can exceed the statutory maximum or highest of the penalty range for that violation.~~

1. Severity	Multiplier
A minor was exposed to a hazardous Occupation; or the average underpayment was more than two weeks average pay for the affected employees; or the employer was in violation of 26 MRS §643 subsection 1, A	1.50

through E.

The average underpayment was more than one weeks average pay for the affected employees. 1.25

The average underpayment was more than one half weeks average pay for the affected employees. 1.10

2. History of Previous Violations Multiplier

The employer has been adjudged in violation of the labor laws as set forth in Sec. I, has entered into a settlement agreement or consent decree, and/or has been penalized under these rules for the same or similar violations. 2.0

The employer has previous violations of the same or similar nature that did not result in court action or penalty. 1.5

3. Repeat Violations Multiplier

First repeat violation 2.0
 Second through fourth repeat violation 5.0
 Fifth or greater repeat violation 10.0

4. Willful Violations Multiplier

If the Division Director determines, in accordance with Section II. H. above, that the violation is willful 2.0

B. Penalty Adjustments

The result of the above calculation will then be adjusted based upon the good faith and size of employer factors as outlined below.

1. Good Faith

An employer who makes timely restitution to affected employees and institutes procedural changes to reduce the likelihood of future violations will receive a reduction of 25%. An employer who had a multiplier of more than 1.0 under history of previous violations is not eligible for this adjustment.

2. Size of Employer

Number of Employees	Multiplier
1 - 20	.667
21 - 50	.850
51 - 100	.950
Over 100	1.000

1. Size of Employer

Number of Employees	Multiplier
1-10	.6
11-100	.8
Over 100	1.0

2. History of Previous Violations

The employer has never been adjudged in violation of Title 26, Chapter 7, Subchapters I-IV, has never entered into a settlement agreement or consent decree, and has never been penalized under these rules.

Multiplier – 0.8

If the employer is being penalized for multiple violations of the same statute, this multiplier is inapplicable.

If this multiplier is inapplicable for any reason, no further multipliers are applicable to the employer.

3. Gravity of the Violation

If the employer is being cited for a grave violation it is ineligible for this multiplier. If the employer is being cited for multiple violations, some of which are grave and others of which are not, the employer is ineligible for this multiplier. If the employer is being cited for a violation which is not grave, the employer is eligible for this multiplier.

Multiplier – 0.8

4. Good Faith

An employer demonstrates good faith if all of the below are applicable:

- i) The employer complies in a timely manner with all of the Director's requests for information and records. The employer's failure to comply with a reasonable and lawful request by the Director will render the employer ineligible for this multiplier;
- ii) If any wages are owed, the employer pays to the worker all wages owed, including applicable interest and all liquidated damages which would be recoverable in court under the statute;
- iii) The employer makes policy changes, institutes training, and/or modifies administrative procedures so as to satisfy the Director that a repeat violation is highly unlikely to occur; and
- iv) The employer demonstrates remorse for its actions, including by providing a written explanation to the worker recognizing the seriousness of the violations, apologizing for the same, and explaining any changes that were made pursuant to paragraph iii.

Multiplier - 0.8

C. Combining or grouping penalties for multiple violations

Where the penalty provision of the statutes allow, the Division Director may combine or group the penalty amounts for multiple violations of the statute.

Section III: Appeals

This section applies to appeals of assessments of administrative civil money penalties against employers determined to have violated Title 26, Chapter 7.

A. Notice of Penalty Assessment and Right to Appeal

The ~~Division~~ Director shall issue a Notice of Penalty Assessment in writing. Such notice must be sent by at least one of the following methods:

1. U.S. mail;
2. By hand; or
3. By email if the ~~Division~~ Bureau previously communicated with the employer by email.

The Notice of Penalty Assessment must state that the penalty may be appealed by making a written request for an appeal to the ~~Bureau Director~~ Commissioner. The employer may request the appeal by U.S mail, hand delivery or email. The request for an appeal must be received by the ~~Bureau Director~~ Commissioner within fifteen (15) business days from the date the Notice of Penalty Assessment was mailed or otherwise delivered.

B. Conduct of Hearing on Appeal to ~~Bureau Director~~ the Commissioner

1. The ~~Bureau Director~~ Commissioner may serve as the hearing officer or may assign the appeal to a qualified Hearing Officer.
2. The Hearing Officer may call upon the parties to appear telephonically for a pre-hearing conference to identify issues, witnesses, exhibits and such other matters that may aid in the conduct of the hearing.
3. The Hearing Officer shall establish a hearing date and provide notice to the parties at least 10 days in advance of the hearing.
4. A parties' failure to participate in a pre-hearing conference and/or to comply with requirements of a pre-hearing order, such as providing

witness and exhibit lists, may result in a default in accordance with 5 M.R.S. §9053(3).

5. The hearing will be conducted pursuant to the provisions of the *Administrative Procedure Act* governing adjudicatory proceedings, 5 M.R.S. §§ 9051-9064.
6. The hearing will be at the headquarters of the Bureau or at a place mutually agreeable to the parties. The hearing may be held telephonically or by remote video, at the discretion of the ~~Bureau Director~~ Commissioner.
7. The Hearing Officer may sequester witnesses, except a representative of the employer, the Director of the Bureau, and the Director of the Division of Wage and Hour. An employer who is represented by counsel may have a representative in addition to counsel present throughout the hearing. The parties may agree not to sequester witnesses.
8. Evidence shall be admitted if it is the kind of evidence upon which reasonable persons are accustomed to rely in the conduct of serious business.
9. All witnesses shall be sworn by the Hearing Officer.
10. The parties will have an opportunity to present evidence. Cross-examination of all witnesses shall be allowed.
11. The Hearing Officer decides the Order of Proceedings. The ~~Division Director~~ has the burden of production. The appellant has the burden of proof.
12. Within 30 days of the close of evidence, including any written closing statements or legal briefs, if allowed, the Hearing Officer shall issue a written Recommended Decision to the parties ~~and to the Bureau Director~~. The Recommended Decision may be issued by U.S. mail, hand delivery or by email. The Recommended Decision shall include findings of fact sufficient to apprise the parties of the basis for the recommendation.

13. The parties may submit written objections or other comments on the Recommended Decision to the ~~Bureau Director~~ Hearing Officer by U.S. mail, hand delivery or email within ten (10) business days after the Recommended Decision was issued.

C. Final Decision of the ~~Bureau Director~~

10. The ~~Bureau Director~~ Hearing Officer shall issue a Final Decision, setting out the reasoning for the decision. Which The Final Decision is final agency action within the meaning of 5 M.R.S. §11001. The Final Decision will be sent by U.S. mail, hand delivery or by email to all parties. The Final Decision of the ~~Bureau Director~~ Hearing Officer shall be subject to review by the Superior Court, pursuant to 5 M.R.S. §11001.

Section IV. Collections

Payment of any penalty is due to the Department of Labor within 30 business days after the issuance of the Notice of Penalty Assessment by the ~~Division~~ Director. Payment of the penalty is stayed during any appeal.

Section V: Annual Evaluation of Enforcement Effectiveness

1. By no later than April 1 of each legislative session, the Director shall produce a report evaluating the extent of labor law violations and probable violations in the state, the effectiveness of the Bureau's enforcement measures, and setting out an enforcement strategy for the forthcoming year. The report shall be supplied to the Joint Standing Committee on Labor and Housing as well as made available to the public.
2. The Director may draw on external expertise, and may partner with external organizations, for the purposes of developing a methodology to study the level of labor law violations and probable violations. The methodology shall be academically rigorous and aim to provide an overview of which types of violations and probable violations are occurring, in which economic sectors, and in which geographic areas. The study shall be capable of replication such that the first year provides a baseline against which subsequent years' studies can be compared.
3. The Director may partner with external organizations in administering the study.
4. When measuring the effectiveness of the enforcement regime, the Director shall consider in particular whether the fines and civil forfeitures provide enough of a deterrent effect to induce compliance with the law. The Director shall also consider the Bureau's strategy for the past year and assess which aspects of the strategy could be improved so as to generate further compliance.
5. When setting out an enforcement strategy for the forthcoming year, the Director shall focus in particular on how to most effectively use the Bureau's resources to ensure that

the maximum number of employers are complying with labor laws and the maximum number of workers are benefitting from the employment rights to which they are legally entitled. In designing such a strategy, the Director shall, among other considerations, take into account:

- a. Which sectors of the economy have the highest number of violations and probable violations;
 - b. Which workers are least likely to exercise a private right of action or make a complaint to the Bureau; and
 - c. Which workers are most vulnerable and in need of protection, for instance because of low pay, speaking English as a second language, multiple forms of discrimination, the inability to exercise a private right of action due to mandatory arbitration clauses, dependency on an employer for housing, transportation, or visa status, or the use of subcontracting or misclassification, among others.
6. The enforcement strategy shall set out a target for the proportion of enforcement resources allocated to proactive enforcement. The targeted proportion shall never be less than 40%.
 7. Nothing in this rule prevents the Director from modifying the enforcement strategy before the following year's annual report is due. The modified strategy shall be made publicly available.
 8. The first of these reports shall be due by April 1 of the 132nd Legislature.
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STATUTORY AUTHORITY:
26 M.R.S. §§ 42 and 53

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