**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 parameters and procedures regarding the assessment of administrative civil money penalties for labor law violations, 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.

1. "Bureau" means the Bureau of Labor Standards, within the Department of Labor.
2. "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.

 **E**. “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.

 **F.** “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.

 **G.** “Proactive Enforcement” means investigations, inspections, and enforcement actions which are initiated at the direction of the Director, rather than in reaction to a complaint. This includes expanding the scope of a complaint-based investigation to include potential violations by the same employer against other employees, whether at the same business location or otherwise.

 **H.** “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.

 **I**. "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.

**Section II: Penalty Calculation**

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 Reductions**

 The number of violations will be multiplied by $1,000. The result will then be reduced in consideration ofthe applicable factors below. Either the reduced penalty or the statutory maximum penalty will apply, whichever is lower.

1. **Size of Employer**

 **Number of Employees** **Multiplier**

 1 - 20 .667

 21 - 50 .850

 51 - 100 .950

**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:

1. 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;
2. 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;
3. 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
4. The employer demonstrates remorse for its actions, including by posting a notice in the workplace, in a location visible to workers, stating that the employer was found by the Bureau to be in violation of the law, stating which statutes it violated, and explaining any changes that were made pursuant to paragraph iii. The notice must remain in place for a period of not less than 90 days.

Multiplier - 0.8

 B. **Combining or grouping penalties for multiple violations**

 Where the penalty provision of the statutes allow, the 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.

1. **Notice of Penalty Assessment and Right to Appeal**

The 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 Bureaupreviously 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 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 Commissioner within fifteen (15) business days from the date the Notice of Penalty Assessment was mailed or otherwise delivered.

1. **Conduct of Hearing on Appeal to the Commissioner**
2. The Commissionermay serve as the hearing officer or may assign the appeal to a qualified Hearing Officer.
3. The Hearing Officer may call upon the parties to appear telephonically or by remote video for a pre-hearing conference to identify issues, witnesses, exhibits and such other matters that may aid in the conduct of the hearing.
4. The Hearing Officer shall establish a hearing date and provide notice to the parties at least 10 days in advance of the hearing.
5. A party’s 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).
6. The hearing will be conducted pursuant to the provisions of the *Administrative Procedure Act* governing adjudicatory proceedings, 5 M.R.S. §§ 9051-9064.
7. 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 Commissioner.
8. 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. A party 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.
9. 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.
10. All witnesses shall be sworn by the Hearing Officer.
11. The parties will have an opportunity to present evidence. Cross-examination of all witnesses shall be allowed.
12. The Hearing Officer decides the Order of Proceedings. The Director has the burden of production. The appellant has the burden of proof.
13. 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. 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.
14. The parties may submit written objections or other comments on the Recommended Decision to the Hearing Officerby U.S. mail, hand delivery or email within ten (10) business days after the Recommended Decision was issued.
15. **Final Decision**

The Hearing Officershall issue a Final Decision**,** setting out the reasoning for the decision. The Final Decisionis 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 Hearing Officershall 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 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 partner with external individuals and/or organizations with relevant expertise for the purpose 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 if the Director reasonably believes that the organizations meet the following criteria:
	1. They possess relevant academic expertise or are likely to facilitate broader or more thorough participation of workers in the study; and
	2. Their involvement will not bias the results of the study towards a predetermined outcome.
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:
	1. Which sectors of the economy have the highest number of violations and probable violations;
	2. Which workers are least likely to exercise a private right of action or make a complaint to the Bureau; and
	3. 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, the use of subcontracting or misclassification, or the gravity of the violations to which they have been subjected, 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.

STATUTORY AUTHORITY:

 26 M.R.S. §§ 42 and 53

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