



DEPARTMENT OF HOMELAND SECURITY

[CIS No. 2585-16]

RIN 1615-AC10

DEPARTMENT OF LABOR

Wage and Hour Division

29 CFR Part 503

RIN 1235-AA15

**Department of Homeland Security and Department of Labor Federal Civil Penalties
Inflation Adjustment Act Catch-Up Adjustments for the H-2B Temporary Non-
agricultural Worker Program**

AGENCY: Department of Homeland Security; Wage and Hour Division, Department of Labor.

ACTION: Interim final rule.

SUMMARY: The U.S. Department of Homeland Security (DHS) and the U.S. Department of Labor (DOL) (collectively, “the Departments”) are jointly issuing this interim final rule to adjust the amounts of civil monetary penalties assessed or enforced in connection with the employment of temporary nonimmigrant workers under the H-2B program. 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. The Departments are required to calculate the catch-up and subsequent annual adjustments based on the Consumer Price Index for all Urban Consumers. The Departments must publish the interim final rule by July 1, 2016, and the new penalty levels must be effective no later than August 1, 2016. The increased penalty levels will apply to all penalties assessed after the effective date, August 1, 2016, for associated violations that occurred after November 2, 2015, as discussed below.

DATES: This interim final rule is effective August 1, 2016. The adjusted civil penalty amounts are applicable only to civil penalties assessed after August 1, 2016, whose associated violations occurred after November 2, 2015, the date of enactment of the Inflation Adjustment Act. Therefore, violations occurring on or before November 2, 2015, as well as assessments made prior to August 1, 2016 whose associated violations occurred after November 2, 2015, will continue to be subject to the civil monetary penalty amounts currently set forth in the regulations in 29 CFR part 503 (2015).

Interested persons are invited to submit written comments on this interim final rule on or before [INSERT DATE 45 DAYS AFTER PUBLICATION OF THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by Regulatory Information Number (RIN) 1235-AA15, by either of the following methods:

Electronic Comments: Comments may be sent via <http://www.regulations.gov>, a Federal E-Government Web site that allows the public to find, review, and submit comments on documents that agencies have published in the Federal Register and that are open for comment. Simply type in “Department of Homeland Security and Department of Labor Federal Civil Penalties Inflation Adjustment Act Catch-Up Adjustments” (in

quotes) in the Comment or Submission search box, click Go, and follow the instructions for submitting comments.

Mail: Address written submissions to Robert Waterman, Compliance Specialist, Wage and Hour Division, U.S. Department of Labor, Room S-3510, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

Instructions: Please submit only one copy of your comments by only one method. All submissions must include the agencies' names and the RIN 1235-AA15. Please be advised that comments received will become a matter of public record and will be posted without change to <http://www.regulations.gov>, including any personal information provided. Comments that are mailed must be received by the date indicated for consideration.

Docket: For access to the docket to read background documents or comments, go to the Federal e-Rulemaking Portal at <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Pamela Peters, Program Analyst, U.S. Department of Labor, Room S-2312, 200 Constitution Avenue, N.W., Washington, D.C. 20210; telephone: (202) 693-5959 (this is not a toll-free number). Copies of this interim final rule may be obtained in alternative formats (large print, Braille, audio tape or disc), upon request, by calling (202) 693-5959 (this is not a toll-free number). TTY/TDD callers may dial toll-free 1-877-889-5627 to obtain information or request materials in alternative formats.

SUPPLEMENTARY INFORMATION

I. Regulatory Information

The U.S. Department of Homeland Security (DHS) and U.S. Department of Labor (DOL) (collectively, “the Departments”) are promulgating this interim final rule to ensure that the amount of civil penalties assessed or enforced in our joint rules reflect the statutorily mandated maximum as adjusted for inflation. Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (“Inflation Adjustment Act”), the Departments are required to promulgate a “catch-up adjustment” through an interim final rule. Pursuant to the Inflation Adjustment Act and 5 U.S.C. § 553(b)(3)(B), the Departments find that good cause exists for issuance of this interim final rule without prior notice and comment. By operation of the Inflation Adjustment Act, the Departments 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 the agencies little room for discretion. Both because of the requirement for action by July 1 of this year, and because of the mechanistic nature of the rulemaking, the Departments find that notice and comment prior to issuing the inflation adjustment would be impracticable and unnecessary, respectively, in addition to being contrary to the language of the Inflation Adjustment Act.

II. Background

Inflation Adjustment Act

On November 2, 2015, the President signed into law the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Pub. L. 114-74, § 701 (“Inflation

Adjustment Act”), which further amended the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. 101-410, as previously amended by the 1996 Debt Collection Improvement Act (collectively, the “Prior Inflation Adjustment Act”), to improve the effectiveness of civil monetary penalties and to maintain their deterrent effect. The Inflation Adjustment Act requires agencies to: (1) adjust the level of civil monetary penalties with an initial “catch-up” adjustment through an interim final rulemaking; and (2) make subsequent annual adjustments for inflation.

The method of calculating inflation adjustments in the Inflation Adjustment Act differs substantially from the methods used in past inflation adjustment rulemakings conducted pursuant to the Prior Inflation Act. Previously, adjustments to civil penalties were conducted under rules that required significant rounding of figures. For example, a penalty increase that was greater than \$1,000, but less than or equal to \$10,000, would be rounded to the nearest multiple of \$1,000. While this allowed penalties to be kept at round numbers, it meant that penalties would often not be increased at all if the inflation factor was not large enough. Furthermore, increases to penalties were capped at 10 percent. Over time, this formula caused penalties to lose value relative to total inflation.

The Inflation Adjustment Act has removed these rounding rules; now, penalties are simply rounded to the nearest \$1. This rounding ensures that penalties will be increased each year to a figure commensurate with the actual calculated inflation, and ensures that penalties are more easily and consistently updated. Furthermore, the Inflation Adjustment Act “resets” the inflation calculations by excluding prior inflationary adjustments under the Prior Inflation Act, which contributed to a decline in the real value of penalty levels. To do this, the Inflation Adjustment Act requires agencies to identify,

for each penalty, the year and corresponding amount(s) for which the maximum penalty level or range of minimum and maximum penalties was established (i.e., originally enacted by Congress or by regulation) or last adjusted other than pursuant to the Prior Inflation Act.

Pursuant to the Inflation Adjustment Act, the Departments have reviewed the civil penalties for the H-2B program that are enforced by the Department of Labor. This interim final rule sets forth the initial “catch-up” adjustment only for these civil penalties. As required by the Inflation Adjustment Act, these civil penalties levels will subsequently be adjusted annually for inflation.

DOL’s Enforcement Authority in the H-2B Program

The Immigration and Nationality Act (INA) establishes the H-2B nonimmigrant classification for a non-agricultural temporary worker “having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform . . . temporary [non-agricultural] service or labor if unemployed persons capable of performing such service or labor cannot be found in this country.” 8 U.S.C. 1101(a)(15)(H)(ii)(b), INA section 101(a)(15)(H)(ii)(b). DHS, which is charged with administration of the H-2B program, may grant a petition for an H-2B nonimmigrant worker “after consultation with appropriate agencies of the Government.” 8 U.S.C. 1184(c)(1), INA section 214(c)(1). DHS regulations therefore provide that an H-2B petition for temporary employment in the United States must be accompanied by an approved temporary labor certification from DOL. 8 CFR 214.2(h)(6)(iii)(A) and (iv)(A). The temporary labor certification serves as DHS’s consultation with DOL with respect to whether a qualified U.S. worker is available to fill the petitioning H-2B

employer's job opportunity and whether a foreign worker's employment in the job opportunity will adversely affect the wages or working conditions of similarly employed U.S. workers. See 8 CFR 214.2(h)(6)(iii)(A) and (D).¹

The INA also authorizes DHS to impose appropriate remedies, including civil monetary penalties, against an employer for a substantial failure to meet the terms and conditions of employing an H-2B nonimmigrant worker, or for a willful misrepresentation of a material fact in a petition for an H-2B nonimmigrant worker. 8 U.S.C. 1184(c)(14)(A), INA section 214(c)(14)(A). The INA expressly and specifically authorizes DHS to delegate to DOL the aforementioned H-2B enforcement authorities. 8 U.S.C. 1184(c)(14)(B), INA section 214(c)(14)(B). DHS has delegated this authority to DOL, including authority over the civil monetary penalty established by law at associated 8 U.S.C. 1184(c)(14)(A)(i), INA section 214(c)(14)(A)(i). See DHS, Delegation of Authority to DOL under Section 214(c)(14)(A) of the Immigration and Nationality Act (Jan. 16, 2009) (available in the online docket for this Interim Final Rule at <http://www.regulations.gov>, in the Supporting Documents section); see 8 CFR 214.2(h)(6)(ix) (stating that DOL may investigate employers to enforce compliance with the conditions of, among other things, an H-2B petition and a DOL-approved temporary labor certification). Consistent with 8 CFR 214.2(h)(6)(ix) and DHS's delegation of statutory enforcement authority, DOL has authority to independently set, adjust, and impose civil monetary penalties under 8 U.S.C. 1184(c)(14)(A)(i), INA section 214(c)(14)(A)(i), and the Inflation Adjustment Act, amending the Prior Inflation Act.

¹ DHS requires DOL to structure this consultative process by issuing regulations. Id. (requiring the Secretary of Labor "to separately establish for the temporary labor program under his or her jurisdiction, by regulation at 20 CFR 655, procedures for administering that temporary labor program under his or her jurisdiction").

Joint Issuance

On April 29, 2015, following a court's vacatur of nearly all of DOL's H-2B regulations, the Departments jointly promulgated an interim final rule governing DOL's role in enforcing the statutory and regulatory rights and obligations applicable to employment under the H-2B program. See Temporary Non-Agricultural Employment of H-2B Aliens in the United States, 80 FR 24,042 (Apr. 29, 2015) (codified at 8 CFR part 214, 20 CFR part 655, and 29 CFR part 503) ("2015 H-2B IFR"). These regulations include a provision regarding the assessment of civil monetary penalties by the Department of Labor. See 29 CFR 503.23.

As explained in the 2015 H-2B IFR, following conflicting legal decisions about the Department of Labor's authority to independently issue legislative rules to carry out its duties for the H-2B program under the INA, the Departments jointly issued the 2015 H-2B IFR "to ensure that there can be no question about the authority for and validity of the regulations in this area." See 80 FR 24,045; see also 24,044-47. The Departments further explained that by issuing the 2015 H-2B IFR jointly, "the Departments affirm that this rule is fully consistent with the INA and implementing DHS regulations and is vital to DHS's ability to faithfully implement the statutory labor protections attendant to the program." Id.

Litigation on these and related matters is ongoing. Accordingly, notwithstanding that DOL has authority to independently issue this inflation adjustment, and to ensure that there can be no question about the authority underlying this action, DHS and DOL are

jointly issuing this Interim Final Rule.² The Interim Final Rule implements the Federal Civil Penalties Inflation Adjustment Act's requirements with respect to the civil monetary penalty provisions found at 29 CFR 503.23.

III. Analysis

Section 214(c)(14) of the INA, 8 U.S.C. 1184(c)(14), provides for the imposition of civil money penalties for a substantial failure to meet the terms and conditions of employing an H-2B nonimmigrant worker, or for a willful misrepresentation of a material fact in a petition for an H-2B nonimmigrant worker. This civil money penalty appears in regulation at 29 CFR 503.23. Applicable violations include those related to wages, impermissible deductions, prohibited fees and expenses, and improper refusal to employ or hire U.S. workers, among others. Existing § 503.23(b), (c), and (d) provide for a civil money penalty not to exceed \$10,000 per violation. The maximum penalty amount last established by statute or regulation other than the Inflation Adjustment Act was \$10,000 in 2005 and is the same as the existing maximum penalty amount. See Save Our Small and Seasonal Businesses Act of 2005, Title IV of Pub. L. 109-13, § 404 (May 11, 2005).

To adjust the existing civil money penalty for this section, the Departments multiplied that maximum penalty amount by the inflation adjustment factor for 2005 of 1.19397, which resulted in a penalty of \$11,940. The amount of the increase from \$10,000 to \$11,940 is \$1,940, which is less than the statutory cap of 150% of the existing \$10,000 penalty, which is \$15,000; accordingly, the amount of the increase is not limited by the

² Consistent with DOL's delegated authority under 8 U.S.C. 1184(c)(14), INA section 214(c)(14) and the Federal Civil Penalties Inflation Adjustment Act, DOL will make future adjustments to the civil monetary penalty.

statutory cap. Consequently, § 503.23(b), (c), and (d) are revised to increase the maximum penalties for these violations from \$10,000 to \$11,940 per violation.

The Departments invite comments on the calculations outlined in this interim final rule.

IV. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires that the Departments consider the impact of paperwork and other information collection burdens imposed on the public. The Departments have determined that this interim final rule does not require any collection of information.

V. Executive Orders 12866: Regulatory Planning and Review; and Executive Order 13563: Improving Regulation and Regulatory Review

Executive Order 12866 requires that regulatory agencies assess both the costs and benefits of significant regulatory actions. Under the Executive Order, a “significant regulatory action” is one meeting any of a number of specified conditions, including the following: Having an annual effect on the economy of \$100 million or more; creating a serious inconsistency or interfering with an action of another agency; materially altering the budgetary impact of entitlements or the rights of entitlement recipients, or raising novel legal or policy issues.

The Departments have determined that this interim final rule is not a “significant” regulatory action and a cost-benefit and economic analysis is not required. This regulation merely adjusts civil monetary penalties in accordance with inflation as required by the Inflation Adjustment Act, and has no impact on disclosure or compliance costs. The benefit provided by the inflationary adjustment to the maximum civil

monetary penalties is that of maintaining the incentive for the regulated community to comply with the laws enforced by the Departments, and not allowing the incentive to be diminished by inflation.

Executive Order 13563 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility to minimize burden.

As provided by Section 701(b)(1)(A) of the Inflation Adjustment Act, the Departments considered whether to publish a notice of proposed rulemaking to explore whether increasing the civil monetary penalty by the otherwise-required amount will have a negative economic impact or whether the social costs of increasing the civil monetary penalty by the otherwise required amount outweighs the benefits. The Departments determined that no such proposed rule is necessary given the modest increases to statutory penalties provided by the Inflation Adjustment Act, especially given the statutory cap.

In that context, Congress has already determined that any possible increase in costs is justified by the overall benefits of such adjustments. This interim final rule makes only the statutory changes outlined herein; thus there are no alternatives or further analysis required by E.O. 13563.

VI. Regulatory Flexibility Act and Small Business Regulatory Enforcement Fairness Act

The Regulatory Flexibility Act, 5 U.S.C. 601 et seq. (RFA), imposes certain requirements on Federal agency rules that are subject to the notice and comment requirements of the APA, 5 U.S.C. 553(b), and that are likely to have a significant economic impact on a substantial number of small entities. This interim final rule is exempt from the notice and comment requirements of the APA because the Inflation Adjustment Act directed agencies to issue an interim final rule. Moreover, pursuant to the Inflation Adjustment Act and 5 U.S.C. 553(b)(3)(B), the Departments find that good cause exists for issuing this interim final rule without prior notice and comment. By operation of the Inflation Adjustment Act, the Departments must publish the catch-up adjustment by July 1, 2016, and the rule must be effective no later than August 1, 2016. Additionally, the Inflation Adjustment Act provides a clear formula for adjustment of the civil penalties, leaving the agencies little room for discretion. For these reasons, the Departments find that providing notice and comment before issuing the IFR would be impracticable and unnecessary in this situation and contrary to the language of the Inflation Adjustment Act.

Therefore, 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, the Departments are 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. Indeed, the rule only adjusts for the effects of inflation.

VII. Other Regulatory Considerations

A. The Unfunded Mandates Reform Act of 1995

Because the interim final rule simply adjusts for inflation, it does not include any Federal mandate that may result in increased expenditures by State, local, or tribal governments; nor does it increase private sector expenditures by more than \$100 million annually; nor does it significantly or uniquely affect small governments. Accordingly, the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1501 et seq.) requires no further agency action or analysis.

B. Executive Order 13132: Federalism

This 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, Executive Order 13132, Federalism, requires no further agency action or analysis.

C. Executive Order 13175, Indian Tribal Governments

This interim final rule does not have “tribal implications” because it does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes. Accordingly, Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, requires no further agency action or analysis.

D. The Treasury and General Government Appropriations Act of 1999:

Assessment of Federal Regulations and Policies on Families

This interim final rule will have no effect on family well-being or stability, marital commitment, parental rights or authority, or income or poverty of families and children. Accordingly, section 654 of the Treasury and General Government Appropriations Act of 1999 (5 U.S.C. 601 note) requires no further agency action, analysis, or assessment.

E. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

This interim final rule will have no adverse impact on children. Accordingly, Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks, as amended by Executive Orders 13229 and 13296, requires no further agency action or analysis.

F. Environmental Impact Assessment

This action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This action is therefore categorically excluded from further review under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321-4375.

G. Executive Order 13211, Energy Supply

This interim final rule has not been identified to have impacts on energy supply. Accordingly, Executive Order 13211 requires no further Agency action or analysis.

H. Executive Order 12630, Constitutionally Protected Property Rights

This interim final rule will not implement a policy with takings implications. Accordingly, Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights, requires no further agency action or analysis.

I. Executive Order 12988, Civil Justice Reform Analysis

This interim final rule was drafted and reviewed in accordance with Executive Order 12988, Civil Justice Reform. This interim final rule was written to provide a clear legal standard for affected conduct and was carefully reviewed to eliminate drafting errors and ambiguities, so as to minimize litigation and undue burden on the Federal court system. The Departments have determined that this interim final rule meets the applicable standards provided in section 3 of Executive Order 12988.

List of Subjects in 29 CFR Part 503

Administrative practice and procedure, Aliens, Employment, Housing, Immigration, Labor, Penalties, Transportation, Wages.

Accordingly, for the reasons stated in the preamble, 29 CFR part 503 is amended as follows:

PART 503—ENFORCEMENT OF OBLIGATIONS FOR TEMPORARY
NONIMMIGRANT NON-AGRICULTURAL WORKERS DESCRIBED IN THE
IMMIGRATION AND NATIONALITY ACT

1. The authority citation for part 503 is revised to read as follows:

AUTHORITY: 8 U.S.C. 1101(a)(15)(H)(ii)(b); 8 U.S.C. 1184; 8 CFR 214.2(h); 28 U.S.C. § 2461 note (Federal Civil Penalties Inflation Adjustment Act of 1990); Pub. L. No. 114-74 at § 701.

2. Amend § 503.23 by revising paragraph (b), the first sentence of paragraph (c), and paragraph (d) to read as follows:

§ 503.23 Civil money penalty assessment.

(b) Upon determining that an employer has violated any provisions of § 503.16 related to wages, impermissible deductions or prohibited fees and expenses, the Administrator, WHD, may assess civil money penalties that are equal to the difference between the amount that should have been paid and the amount that actually was paid to such worker(s), not to exceed \$11,940 per violation.

(c) Upon determining that an employer has terminated by layoff or otherwise or has refused to employ any worker in violation of § 503.16(r), (t), or (v), within the periods described in those sections, the Administrator, WHD may assess civil money penalties that are equal to the wages that would have been earned but for the layoff or failure to hire, not to exceed \$11,940 per violation. ***

(d) The Administrator, WHD, may assess civil money penalties in an amount not to exceed \$11,940 per violation for any other violation that meets the standards described in § 503.19.

Signed at Washington, D.C. this 28th day of June, 2016

Jeh Charles Johnson,

Secretary of Homeland Security

Signed at Washington, D.C. this 23 day of June, 2016

Thomas E. Perez,
Secretary of Labor

[FR Doc. 2016-15679 Filed: 6/30/2016 8:45 am; Publication Date: 7/1/2016]