

§ 160.316 Refraining from intimidation or retaliation.

A covered entity may not threaten, intimidate, coerce, harass, discriminate against, or take any other retaliatory action against any individual or other person for—

(a) Filing of a complaint under § 160.306;

(b) Testifying, assisting, or participating in an investigation, compliance review, proceeding, or hearing under this part; or

(c) Opposing any act or practice made unlawful by this subchapter, provided the individual or person has a good faith belief that the practice opposed is unlawful, and the manner of opposition is reasonable and does not involve a disclosure of protected health information in violation of subpart E of part 164 of this subchapter.

Subpart D—Imposition of Civil Money Penalties

SOURCE: 71 FR 8426, Feb. 16, 2006, unless otherwise noted.

§ 160.400 Applicability.

This subpart applies to the imposition of a civil money penalty by the Secretary under 42 U.S.C. 1320d-5.

§ 160.401 Definitions.

As used in this subpart, the following terms have the following meanings:

Reasonable cause means circumstances that would make it unreasonable for the covered entity, despite the exercise of ordinary business care and prudence, to comply with the administrative simplification provision violated.

Reasonable diligence means the business care and prudence expected from a person seeking to satisfy a legal requirement under similar circumstances.

Willful neglect means conscious, intentional failure or reckless indifference to the obligation to comply with the administrative simplification provision violated.

[74 FR 56130, Oct. 30, 2009]

§ 160.402 Basis for a civil money penalty.

(a) *General rule.* Subject to § 160.410, the Secretary will impose a civil money penalty upon a covered entity if the Secretary determines that the covered entity has violated an administrative simplification provision.

(b) *Violation by more than one covered entity.* (1) Except as provided in paragraph (b)(2) of this section, if the Secretary determines that more than one covered entity was responsible for a violation, the Secretary will impose a civil money penalty against each such covered entity.

(2) A covered entity that is a member of an affiliated covered entity, in accordance with § 164.105(b) of this subchapter, is jointly and severally liable for a civil money penalty for a violation of part 164 of this subchapter based on an act or omission of the affiliated covered entity, unless it is established that another member of the affiliated covered entity was responsible for the violation.

(c) *Violation attributed to a covered entity.* A covered entity is liable, in accordance with the federal common law of agency, for a civil money penalty for a violation based on the act or omission of any agent of the covered entity, including a workforce member, acting within the scope of the agency, unless—

(1) The agent is a business associate of the covered entity;

(2) The covered entity has complied, with respect to such business associate, with the applicable requirements of §§ 164.308(b) and 164.502(e) of this subchapter; and

(3) The covered entity did not—

(i) Know of a pattern of activity or practice of the business associate, and

(ii) Fail to act as required by §§ 164.314(a)(1)(ii) and 164.504(e)(1)(ii) of this subchapter, as applicable.

§ 160.404 Amount of a civil money penalty.

(a) The amount of a civil money penalty will be determined in accordance with paragraph (b) of this section and §§ 160.406, 160.408, and 160.412.

(b) The amount of a civil money penalty that may be imposed is subject to the following limitations:

§ 160.406

(1) For violations occurring prior to February 18, 2009, the Secretary may not impose a civil money penalty—

(i) In the amount of more than \$100 for each violation; or

(ii) In excess of \$25,000 for identical violations during a calendar year (January 1 through the following December 31);

(2) For violations occurring on or after February 18, 2009, the Secretary may not impose a civil money penalty—

(i) For a violation in which it is established that the covered entity did not know and, by exercising reasonable diligence, would not have known that the covered entity violated such provision,

(A) In the amount of less than \$100 or more than \$50,000 for each violation; or

(B) In excess of \$1,500,000 for identical violations during a calendar year (January 1 through the following December 31);

(ii) For a violation in which it is established that the violation was due to reasonable cause and not to willful neglect,

(A) In the amount of less than \$1,000 or more than \$50,000 for each violation; or

(B) In excess of \$1,500,000 for identical violations during a calendar year (January 1 through the following December 31);

(iii) For a violation in which it is established that the violation was due to willful neglect and was corrected during the 30-day period beginning on the first date the covered entity liable for the penalty knew, or, by exercising reasonable diligence, would have known that the violation occurred,

(A) In the amount of less than \$10,000 or more than \$50,000 for each violation; or

(B) In excess of \$1,500,000 for identical violations during a calendar year (January 1 through the following December 31);

(iv) For a violation in which it is established that the violation was due to willful neglect and was not corrected during the 30-day period beginning on the first date the covered entity liable for the penalty knew, or, by exercising reasonable diligence, would have known that the violation occurred,

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(A) In the amount of less than \$50,000 for each violation; or

(B) In excess of \$1,500,000 for identical violations during a calendar year (January 1 through the following December 31).

(3) If a requirement or prohibition in one administrative simplification provision is repeated in a more general form in another administrative simplification provision in the same subpart, a civil money penalty may be imposed for a violation of only one of these administrative simplification provisions.

[71 FR 8426, Feb. 16, 2006, as amended at 74 FR 56130, Oct. 30, 2009]

§ 160.406 Violations of an identical requirement or prohibition.

The Secretary will determine the number of violations of an administrative simplification provision based on the nature of the covered entity's obligation to act or not act under the provision that is violated, such as its obligation to act in a certain manner, or within a certain time, or to act or not act with respect to certain persons. In the case of continuing violation of a provision, a separate violation occurs each day the covered entity is in violation of the provision.

§ 160.408 Factors considered in determining the amount of a civil money penalty.

In determining the amount of any civil money penalty, the Secretary may consider as aggravating or mitigating factors, as appropriate, any of the following:

(a) The nature of the violation, in light of the purpose of the rule violated.

(b) The circumstances, including the consequences, of the violation, including but not limited to:

(1) The time period during which the violation(s) occurred;

(2) Whether the violation caused physical harm;

(3) Whether the violation hindered or facilitated an individual's ability to obtain health care; and

(4) Whether the violation resulted in financial harm.