

state approval. The final rule makes no change to the scope of the reporting requirement because the purpose of the Form M-1 filing requirement is largely to evaluate compliance with part 7 of ERISA. The evaluation of part 7 compliance requires a determination that the group health plan is in compliance both on the face of the plan documents (including the plan's insurance policy) and in operation. The Form M-1 requires the administrator of the MEWA to answer as to whether the coverage it provides is in compliance with part 7. The answer to this question should address compliance both on the face of the documents and in operation. This evaluation is as important for fully-insured arrangements as it is for self-insured arrangements.

Moreover, as noted earlier, the Form M-1 reporting requirement is an important enforcement tool for the Department and state insurance departments. While, in part, this reporting requirement serves as a vehicle for reviewing compliance with the requirements of part 7 of ERISA, the Form M-1 also serves as the only national registry of MEWAs operating throughout the United States. For this reason, it is important that fully-insured MEWAs continue to file the Form M-1.

One commenter asked what authority the Department has to ask about compliance with part 7 by insured group health plans, presumably because of the fact that section 502(b)(3) of ERISA provides that the Secretary is not authorized to enforce any requirement of part 7 against a health insurance issuer offering health insurance coverage in connection with a group health plan. The Secretary does, however, have authority to enforce the requirements of part 7 against all group health plans, whether insured or self-insured.

Several comments on the MEWA/ECE reporting requirement were also received from representatives of Professional Employer Organizations (PEOs). In general, PEO representatives have argued that, for a variety of reasons, they should be treated as "co-employers" and, accordingly, their group health plans should not be considered MEWAs. While PEOs have sought to distinguish themselves from employee leasing companies on the basis of a "co-employer" relationship with employees, the Department is unable to conclude that the group health plans maintained by PEOs, like the plans maintained by employee leasing companies, do not cover the employees

of more than one employer.³ For this reason the final regulation does not create an exception from the filing requirement.

The Department recognizes that other arguments were also made on behalf of PEOs to support either a complete or limited exception from the requirement to file a Form M-1. However, this registration regulation allows the Department to collect information to facilitate compliance with the requirements of part 7. As noted earlier, it is also an important enforcement tool for the Department and state insurance departments and serves as the only national registry of MEWAs operating throughout the United States. It also responds to the GAO's recommendation in its 1992 GAO report entitled "States Need Labor's Help Regulating Multiple Employer Welfare Arrangements," where the GAO detailed a history of fraud and abuse by MEWAs and recommended a federal MEWA registration requirement. GAO/HRD-92-40, March 1992.

(3) Extensions

An extension may be granted for filing reports if the administrator complies with the extension procedure prescribed in the Instructions to the Form M-1.

One commenter argued that the extension of time to file should be longer than the 60 days provided in the Instructions to the Form M-1 in certain special circumstances. Specifically, the commenter stated that the 60-day period is not adequate for a merger or acquisition context. This comment has been addressed in the final regulation by creating an exception from the filing requirement for a MEWA that is created by a change in control of businesses and is temporary in nature. (This exception to the reporting requirement is discussed above, under the discussion of Persons Required to Report).

(4) Civil Penalties and Procedures

Paragraph (g) of the final rule contains a cross-reference for civil penalties and procedures. The penalty and procedure regulations are being published

³ The Department has issued a number of advisory opinions over the years under which an arrangement providing benefits for medical care and sponsored by an employee leasing company was found to be a MEWA. See, e.g., Advisory Opinion 91-17A to L.J. Darter, III (April 5, 1991); Advisory Opinion 91-47A to Lee P. Jedziniak (December 20, 1991); Advisory Opinion 92-04A to Sandra Milburn (January 27, 1992); Advisory Opinion 92-05A to Chuck Huff (January 27, 1992); Advisory Opinion 92-07A to Lee P. Jedziniak (February 20, 1992); Advisory Opinion 93-29A to Alfred W. Gross (November 2, 1993); Advisory Opinion 95-22A to Dale Robison (August 25, 1995); and Advisory Opinion 95-29A to Kevin W. Ahern (December 7, 1995).

separately in this issue of the **Federal Register**.⁴ In this regard, ERISA section 502(c)(5), as amended by HIPAA, provides for the assessment of a penalty for the failure or refusal to file a report pursuant to section 101(g) of ERISA, as amended by HIPAA. The penalty and procedure regulations are designed to parallel the procedures set forth in 29 CFR 2560.502c-2 regarding civil penalties under section 502(c)(2) of ERISA relating to reports required to be filed under ERISA section 101(b)(4). In general these regulations provide that, in the event of no filing, an incomplete filing, or a late filing, a penalty may apply of up to \$1,000 a day (or a higher amount if adjusted pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Debt Collection Improvement Act of 1996) for each day that the administrator of a MEWA or ECE fails or refuses to file a complete report. For information relating to administrative hearings and appeals in connection with the assessment of civil penalties under section 502(c)(5) of ERISA, see 29 CFR 2570.90 through 2570.101 (published in this issue of the **Federal Register**).

C. Regulatory Impact Analysis

The total cost of the reporting requirement as implemented by this final rule is estimated to be \$403,000, or about \$200 for each of the 2,000 entities expected to be required to file the annual reporting form for MEWAs, the Form M-1. No additional cost is attributable to the clarifying changes made in this final rule. Although the benefits have not been quantified, EBSA believes that the cost of the filing requirement is more than justified by the benefits associated with ensuring uniform adherence to the requirements and protections added to ERISA by HIPAA, MHPA, the Newborns' Act, and WHCRA. HIPAA amended ERISA to add section 101(g), which authorizes the Secretary of Labor to require reporting by MEWAs that are not group health plans for the purpose of determining their compliance with part 7 of ERISA. The principal intent of Congress in enacting this provision was to ensure that all participants and beneficiaries of such arrangements receive these health care protections.

The reporting requirement implemented by this final rule provides the most cost effective means of facilitating compliance with part 7 of ERISA, as well as with the full range of other Federal and State requirements

⁴ Moreover, other relevant criminal penalties may apply. See, e.g., ERISA § 501 and 18 U.S.C. 1021, 1027, and 1035.