

## SUPPORTING STATEMENT FOR PAPERWORK REDUCTION ACT 1995 SUBMISSIONS

### **A. Justification.**

1. *Explain the circumstances that make the collection of information necessary. Identify any legal or administrative requirements that necessitate the collection. Attach a copy of the appropriate section of each statute and regulation mandating or authorizing the collection of information.*

Section 521 of ERISA, 29 U.S.C. 1151, provides that the Secretary of Labor may issue ex parte cease and desist orders when it appears to the Secretary that the alleged conduct of a multiple employer welfare arrangement (MEWA) under section 3(40) of the Act, 29 U.S.C. 1002(40), is fraudulent, or creates an immediate danger to the public safety or welfare, or is causing or can be reasonably expected to cause significant, imminent, and irreparable public injury. Section 521(b) provides that a person that is adversely affected by the issuance of a cease and desist order may request an administrative hearing regarding the order. The Department has promulgated a final regulation that is the subject of this information collection request, which describes the procedures before an administrative law judge (ALJ) when a person seeks an administrative hearing for review of such an order.

Under section 2571.3 of the rule, the party that is subject to a cease and desist order issued under ERISA section 521 has the burden to initiate an adjudicatory proceeding before an ALJ. Section 2571.3 governs the service of documents necessary to initiate ALJ proceedings by such a party on the Secretary of Labor and the ALJ. As discussed in Item 13, below, the Department expects that MEWAs contesting a cease and desist order will hire outside counsel to draft motions, petitions, pleadings, briefs, and other documents relating to the case. These are information collection requests (ICRs) subject to the Paperwork Reduction Act.

2. *Indicate how, by whom, and for what purpose the information is to be used. Except for a new collection, indicate the actual use the agency has made of the information received from the current collection.*

The information will be used by a party that is subject to a cease and desist order issued under ERISA section 521 to contest the order through an adjudicatory proceeding before an ALJ. Section 2571.3 governs the service of documents necessary to initiate ALJ proceedings by such a party on the Secretary of Labor and the OALJ. This section would apply in such cases in lieu of 29 CFR 18.3.

3. *Describe whether, and to what extent, the collection of information involves the use of automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses, and*

*the basis for the decision for adopting this means of collection. Also describe any consideration for using information technology to reduce burden.*

Due to the nature of the documents, being submitted, and the small number of expected appeals, the Department has not provided a process through which appeals can be made electronically.

4. *Describe efforts to identify duplication. Show specifically why any similar information already available cannot be used or modified for use for the purposes described in Item 2 above.*

As stated in Item 1 above, the Department's authority to issue cease and desist orders is new. The final regulation is necessary to implement this authority by describing the procedures that would apply when a party seeks an administrative hearing for review of a cease and desist order. These final regulations maintain the maximum degree of uniformity with rules of practice and procedure under 29 CFR Part 18 that generally apply to matters before ALJs. At the same time, these final regulations reflect the unique nature of orders issued under ERISA section 521, and are controlling to the extent they are inconsistent with 29 CFR Part 18.

5. *If the collection of information impacts small businesses or other small entities describe any methods used to minimize burden.*

According to 2012-2014 Form M-1 data, approximately 622 MEWAs exist. Of these 622 MEWAs, 102 (16 percent) are small. In order to minimize burden, the regulations maintain the maximum degree of uniformity with rules of practice and procedure under 29 CFR Part 18 that generally apply to matters before ALJs. At the same time, these final regulations reflect the unique nature of orders issued under ERISA section 521, and are controlling to the extent they are inconsistent with 29 CFR Part 18. Legal costs could be significant; however, cease and desist orders only are filed in exigent circumstances to protect participants and beneficiaries covered by MEWAs from irreparable harm.

6. *Describe the consequence to Federal program or policy activities if the collection is not conducted or is conducted less frequently, as well as any technical or legal obstacles to reducing burden.*

If this collection were not conducted or conducted less frequently, persons subject to cease and desist orders would not have a mechanism to exercise their statutory right to contest the order.

7. *Explain any special circumstances that would cause an information collection to be conducted in a manner:*
  - *requiring respondents to report information to the agency more often than quarterly;*

- *requiring respondents to prepare a written response to a collection of information in fewer than 30 days after receipt of it;*
- *requiring respondents to submit more than an original and two copies of any document;*
- *requiring respondents to retain records, other than health, medical, government contract, grant-in-aid, or tax records for more than three years;*
- *in connection with a statistical survey, that is not designed to produce valid and reliable results that can be generalized to the universe of study;*
- *requiring the use of a statistical data classification that has not been reviewed and approved by OMB;*
- *that includes a pledge of confidentiality that is not supported by authority established in statute or regulation, that is not supported by disclosure and data security policies that are consistent with the pledge, or which unnecessarily impedes sharing of data with other agencies for compatible confidential use; or*
- *requiring respondents to submit proprietary trade secret, or other confidential information unless the agency can demonstrate that it has instituted procedures to protect the information's confidentiality to the extent permitted by law.*

Not applicable. No special circumstances exist for this information collection.

8. *If applicable, provide a copy and identify the date and page number of publication in the Federal Register of the agency's notice, required by 5 CFR 1320.8(d), soliciting comments on the information collection prior to submission to OMB. Summarize public comments received in response to that notice and describe actions taken by the agency in response to these comments. Specifically address comments received on cost and hour burden.*

*Describe efforts to consult with persons outside the agency to obtain their views on the availability of data, frequency of collection, the clarity of instructions and recordkeeping, disclosure, or reporting format (if any), and on the data elements to be recorded, disclosed, or reported.*

*Consultation with representatives of those from whom information is to be obtained or those who must compile records should occur at least once every 3 years -- even if the collection of information activity is the same as in prior periods. There may be circumstances that may preclude consultation in a specific situation. These circumstances should be explained.*

The Department's notice soliciting public comment on the proposed extension of the information collection was published in the Federal Register on November 23, 2015 (80 FR 72990). It provided the public with 60 days to submit comments, and no comments were received.

9. *Explain any decision to provide any payment or gift to respondents, other than*

*remuneration of contractors or grantees.*

Not applicable. There will be no payments to respondents.

10. *Describe any assurance of confidentiality provided to respondents and the basis for the assurance in statute, regulation, or agency policy.*

No assurance of confidentiality has been provided.

11. *Provide additional justification for any questions of a sensitive nature, such as sexual behavior and attitudes, religious beliefs, and other matters that are commonly considered private. This justification should include the reasons why the agency considers the questions necessary, the specific uses to be made of the information, the explanation to be given to persons from whom the information is requested, and any steps to be taken to obtain their consent.*

Not applicable. This information collection asks no sensitive questions.

12. *Provide estimates of the hour burden of the collection of information. The statement should:*

- *Indicate the number of respondents, frequency of response, annual hour burden, and an explanation of how the burden was estimated. Unless directed to do so, agencies should not conduct special surveys to obtain information on which to base hour burden estimates. Consultation with a sample (fewer than 10) of potential respondents is desirable. If the hour burden on respondents is expected to vary widely because of differences in activity, size, or complexity, show the range of estimated hour burden, and explain the reasons for the variance. Generally, estimates should not include burden hours for customary and usual business practices.*
- *If this request for approval covers more than one form, provide separate hour burden estimates for each form and aggregate the hour burdens in Item 13.*
- *Provide estimates of annualized cost to respondents for the hour burdens for collections of information, identifying and using appropriate wage rate categories. The cost of contracting out or paying outside parties for information collection activities should not be included here. Instead, this cost should be included in Item 14.*

The Department estimates that, on average, a maximum of 10 MEWAs would initiate an adjudicatory proceeding before an ALJ to revoke or modify a cease and desist order. The Department expects MEWAs to use third-party service providers to contest cease and desist orders. Most of the factual information necessary to prepare the petition should be readily available to the MEWA and is expected to take approximately two hours of clerical time to assemble and forward to legal professionals and to perform associated recordkeeping functions, resulting in an estimated total hour burden of

approximately 20 hours, with an equivalent cost<sup>1</sup> of \$1,116 (10 MEWAs\*2 hours \*\$55.80).<sup>2</sup>

13. *Provide an estimate of the total annual cost burden to respondents or record keepers resulting from the collection of information. (Do not include the cost of any hour burden shown in Items 12 or 14).*

The Department believes that preparing and filing the petition will require 120 hours of an attorney's time, at \$496 per hour<sup>3</sup>, and that entities will purchase services to complete the petition from service providers rather than perform this work in-house. The majority of the time is expected to be associated with drafting motions, petitions, pleadings, briefs, and other documents relating to the case. The total estimated cost for an attorney's time is estimated to be approximately \$59,520 per petition filed. Additional costs are estimated at approximately \$50 per petition for materials and mailing costs. The total cost burden of the final regulation is expected to total \$595,700 annually. [(120 hours x \$496 for professional time) + \$50 materials] x 10 responses = \$595,700.

14. *Provide estimates of annualized cost to the Federal government. Also, provide a description of the method used to estimate cost, which should include quantification of hours, operational expenses (such as equipment, overhead, printing, and support staff), and any other expense that would not have been incurred without this collection of information. Agencies also may aggregate cost estimates from Items 12, 13, and 14 in a single table.*

Not applicable. ALJ costs would occur regardless of the existence of this regulation.

15. *Explain the reasons for any program changes or adjustments reporting in Items 13 or 14.*

The Department has updated its estimates to reflect updated wage rates and legal costs.

16. *For collections of information whose results will be published, outline plans for tabulation, and publication. Address any complex analytical techniques that will be used. Provide the time schedule for the entire project, including beginning and ending*

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1 The Department's estimated 2016 hourly labor rates include wages, other benefits, and overhead are calculated as follows: mean wage from the 2014 National Occupational Employment Survey (May 2014, Bureau of Labor Statistics [http://www.bls.gov/oes/2014/may/oes\\_nat.htm](http://www.bls.gov/oes/2014/may/oes_nat.htm)); wages as a percent of total compensation from the Employer Cost for Employee Compensation (June 2015, Bureau of Labor Statistics [http://www.bls.gov/news.release/archives/ecec\\_09092015.pdf](http://www.bls.gov/news.release/archives/ecec_09092015.pdf)); overhead is a flat \$60,500 annually converted to \$29.09 per hour based on EBSA's annual budget requests from past experience on overhead spending; annual inflation assumed to be 2.0 percent annual growth of total labor cost since 2014 (Employment Costs Index data for private industry, September 2015 [http://www.bls.gov/news.release/archives/eci\\_10302015.pdf](http://www.bls.gov/news.release/archives/eci_10302015.pdf)).

2 Secretaries, Except Legal, Medical, and Executive (43-6014): \$16.59(2014 BLS Wage rate)/0.676(ECEC ratio) +\$29.09(Overhead Load Factor) \*1.02(Inflation rate) ^2(Inflated 2 years from base year) = \$55.80

3 The Department's estimate for the attorney's hourly rate is taken from the Laffey Matrix which provides an estimate of legal service for court cases in the D.C. area. It can be found at <http://www.laffeymatrix.com/see.html>. The estimate is an average of the 4-7 and 8-10 years of experience rates for 6/1/15 to 5/31/16.

*dates of the collection of information, completion of report, publication dates, and other actions.*

This is not a collection of information for statistical use and there are no plans to publish the results of this collection.

17. *If seeking approval to not display the expiration date for OMB approval of the information collection, explain the reasons that display would be inappropriate.*

The Department associates no forms on which to publish the expiration date with this information collection.

18. *Explain each exception to the certification statement identified in Item 19, "Certification for Paperwork Reduction Act Submission."*

Not applicable; no exceptions to the certification statement.

**B. Collections of Information Employing Statistical Methods**

Not applicable. The use of statistical methods is not relevant to this collection of information.