

PENALTIES FOR FAILURE TO SUBMIT CLAIM FILES AS REQUIRED

A. INTRODUCTION

Chapter 43.371 RCW contains several statutes that direct the Office of Financial Management (OFM) to establish and adopt rules related to a statewide All Payer Claims Database (WA-APCD).¹

Paper 2 provides background information for the rule required in RCW 43.371.070(1) (c)—penalties for failure to submit claim files as required. OFM researched penalty structures in selected Washington state agencies and, in particular, penalties imposed by two agencies that have data submission requirements: the Employment Security Department and the Office of the Insurance Commissioner. OFM also reviewed APCD penalty provisions in other states.

Paper 2 is divided into the following sections:

- A. [Introduction](#)
- B. [What is a penalty?](#)
- C. [Examples of penalties imposed by selected Washington state agencies](#)
- D. [Penalties in other states for failure to meet APCD data submission requirements](#)
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For additional input on penalties for failure to submit claim files as required, see page 7 of the paper “Washington Health Alliance All-Payer Claim Database Data Policy Advisory Committee Summary of Recommendations” at <http://www.ofm.wa.gov/healthcare/pricetransparency>.

B. WHAT IS A PENALTY?

A penalty is a punishment imposed by statute as a consequence of the commission of a certain specified offense. A penalty includes both fines and forfeiture. A fine is a pecuniary penalty. A forfeiture is a penalty by which one loses rights and interest in one’s property.²

Penalties are divided into two categories: criminal and civil (non-criminal). Civil penalties are fines or surcharges imposed by government agencies to enforce laws and regulations such as late payment of taxes, failure to obtain a permit, etc. The penalty for failure to file claim files as required is classified as a civil penalty and imposed by a government agency.

Civil penalties can be quite significant and result in the penalty recipient losing rights and property, such as losing a license or registration to do business in a state. Before imposing a penalty, the government agency must ensure that the subject of the penalty is afforded due process of law³. Government agencies provide due process by following an administrative

¹ In preparation for rule making, OFM posted background papers on the WA-APCD website at <http://www.ofm.wa.gov/healthcare/pricetransparency>.

² Definition of “penalty” from Black’s Law Dictionary.

³ The Fifth and Fourteenth Amendments of the United States Constitution state that no one shall be “deprived of life, liberty, or property without due process of law.” This is known as the Due Process Clause. Article 1, Section 3 of the

process, such as that set forth in the Administrative Procedures Act, Chapter 34.05 RCW. Steps taken prior to assessing a penalty may include the following:

1. Provide a warning notice outlining the violation(s) and the possible penalties.
2. Allow a time period for the subject to correct the violation(s).
3. Provide an opportunity for the subject to respond to the penalty assessment, including an opportunity to present extenuating circumstances that prevent compliance.
4. Allow a penalty waiver or extension for payment for extenuating circumstances.

C. EXAMPLES OF PENALTIES IMPOSED BY SELECTED WASHINGTON STATE AGENCIES

In Washington, many state agencies are statutorily authorized to impose civil penalties for violations of the laws and rules under their jurisdiction. The penalty details are either written in statute or adopted in rule. Funds collected from penalties are deposited in the state General Fund unless otherwise specified in statute.

The civil penalties that are pecuniary are structured in a variety of ways, including:

- A fixed dollar amount.
- Maximum and minimum dollar amounts.
- A schedule of escalating penalties to address additional or more severe violations.
- A percentage of remittance due plus interest (usually used for late tax payments).

Before imposing penalties, state agencies follow an administrative process to provide due process and may allow for extenuating circumstances to mitigate the penalty assessed. Some agencies also allow for good behavior to mitigate the penalty. For example, if a previously penalized entity is compliant for a period of time, the state agency may waive the penalty on the next occurrence of noncompliance.

Two examples of Washington state agencies that impose penalties for failure to submit data as required are the Employment Security Department (ESD) and the Office of the Insurance Commissioner (OIC).

ESD requires employers to file the tax and wage reports in a specific data format. A tax and wage report is considered incomplete or having an incorrect format if:

- A required element is not reported (Social Security number, name, hours worked or wages paid).
- A significant number of employees are not reported.
- A significant number of any given element is not reported; for example, missing Social Security numbers, names, hours or wages.
- Either the ESD number or Unified Business Identifier number is not included with the tax or wage report.
- The report includes duplicate Social Security numbers or impossible Social Security numbers as shown by the Social Security Administration.

Washington State Constitution provides that no person shall be “deprived of life, liberty, or property, without due process of law.”

ESD sends the employer a warning letter the first time the employer is noncompliant and allows the employer time to comply. If the employer does not comply, ESD imposes monetary penalties as outlined in Table B1.

Table B.1 ESD Penalties for Not Filing Tax and Wage Reports as Required

IF THE TAX AND WAGE REPORTS ARE:	PENALTY IF NO TAX IS DUE
Filed late	\$25 for each report
Not complete or in the required format the 1 st occurrence	No monetary penalty but a warning letter
Not complete or in the required format the 2 nd occurrence	\$75
Not complete or in the required format the 3 rd occurrence	\$150
Not complete or in the required format the 4 th and subsequent occurrences	\$250

ESD waives penalties for extenuating circumstances if the business requests a waiver in writing and provides documentation. Extenuating circumstances include:

- An ESD employee provided incorrect information to the employer.
- A death or serious illness, before the filing deadline, of the employer, a member of the employer’s immediate family, the employer’s accountant or a member of the accountant’s immediate family.
- Unavoidable absence of the employer or key employee before the filing deadline.
- Accidental destruction of the employer’s place of business or business records.
- Fraud, embezzlement, theft or conversion by the employer’s employee or other persons contracted with the employer, which the employer could not immediately detect or prevent. The employer must have had reasonable safeguards or internal controls in place.
- The employer can demonstrate that the incomplete or incorrectly formatted report was not due to the fault of the employer.
- Good behavior. If a previously penalized employer goes five years without an occurrence, the employer receives a warning letter instead of a penalty on the next occurrence.

OIC regulates insurance companies that do business in Washington state⁴. OIC requires insurance companies to file documents on a regular basis and in a required format. Failing to do so may result in:

- A fine.
- Revoking, suspending or refusing to accept or renew registration.
- Levying a fine in addition to or in lieu of revocation, suspension or refusal to renew registration.
- Ordering the insurer to stop doing business in the state.

⁴ OIC regulates the insurance companies that are mandated to supply claims data to the Washington state APCD.

OIC sends a warning letter to companies that violate the statute and provides time to comply. If the companies do not comply, the OIC penalty committee reviews the violations and decides the appropriate penalties based on the following criteria:

- Consistency of the penalty with other enforcement actions.
- Impact of violations on consumers, the marketplace, etc.
- Frequency, severity and extent of violations.
- Extent to which a violator gained a competitive advantage through the violation(s).
- Prior conduct of company.
- Statutory maximums/minimums.
- Whether violations were intentional, grossly negligent or negligent.
- Whether the enforcement action contemplated is likely to be viewed as reasonable by respected elements of the industry when all the facts are known.
- Financial stability of the company.
- Policy implications.
- Company's cooperation with regulators. For example, did the company bring the problem to regulator's attention?
- What is company's commitment to compliance and what demonstrated steps has it taken toward achieving compliance?
- Did the company tell regulators the truth about a situation during the investigative phase or at the time of the occurrence?
- Cost to OIC of investigation and enforcement action.

OIC publishes all its enforcement orders, administrative orders and general orders on the OIC website under the tab Disciplinary and General Orders.

See <http://www.insurance.wa.gov/orders/enforcement.asp>. A review of the Disciplinary and General Orders from 2005 to 2015 shows that the common violations that resulted in fines include:

- Late filing.
- Failing to timely file a required document in the proper form (e.g., annual financial statement or calendar year loss ratios).
- Omitting required paperwork within a filing (e.g., the signatory page for audited financial statements).
- Using unapproved forms.
- Failure to file accurate reports.
- Failure to respond to requests for information.

Fines vary according to the facts of the case. For example, in 2014, the fines for one of the filing violations — failure to timely file annual reports — ranged from \$500 to \$1,250.

D. PENALTIES IN OTHER STATES FOR FAILURE TO MEET APCD DATA SUBMISSION REQUIREMENTS

Nine states — Colorado, Connecticut, Maine, Massachusetts, Oregon, Tennessee, Utah, Vermont and West Virginia — have statutes that authorize penalties for failure to meet APCD data submission requirements.

The states detail the data submission requirements in rule or in a data submission guide. Violations of data submission requirements include the following:

- Failure to comply with health care data files requirements such as:
 - ▶ An unapproved claims file layout.
 - ▶ A data element in an unapproved format.
 - ▶ Unapproved coding.
 - ▶ Omission of a data element.
- Failure to comply with health care claims data submission requirements such as:
 - ▶ Not submitting test files as specified by the data vendor.
 - ▶ Submitting files late.
 - ▶ Transmitting health care claims data files using an unapproved process.
- Failure to correct errors.
- Submission of health information for an excluded line of business.
- Failure to submit claims at all when required to do so by law.

The states structure their APCD penalties as a dollar amount per day or a dollar amount per week. A penalty may be assessed for each violation or for general noncompliance. In some states, the penalties have a maximum dollar amount. If the violation is severe, such as not submitting required data at all, monetary penalties may be substantial and supplemented with administrative action such as revoking the data supplier's license. See Table A1 for a summary of the APCD penalties by state.

TABLE A.1 APCD PENALTIES IN OTHER STATES

STATE	DOLLAR AMOUNT	TIME FRAME OR TERM OF PENALTY	MAXIMUM DOLLAR AMOUNT
Colorado	\$1,000	Per week of noncompliance	Up to \$50,000
Connecticut	\$1,000	Per each day of noncompliance	No maximum
Maine	\$100 \$250 \$500 \$1,000	Per day for 1 st week of noncompliance Per day for 2 nd week Per day for 3 rd week Per day for 4 th week	\$25,000 per any one occurrence
Massachusetts	\$1,000	Per week of noncompliance	\$50,000
Oregon	Not to exceed \$500. Actual amount determined by severity of violation.	Per day for each failure to comply within 30 calendar days of written notification	\$500 per day
Tennessee	\$100 \$100	Per day for delinquent claims submissions Per day for rejected files not resubmitted within 10 business days	No maximum
Utah	Not to exceed \$10,000 per violation \$250 ⁵	For each day of non-compliance: (1) not to exceed the sum of \$10,000 per violation (2) each day of violation is a separate violation Per day for missing any deadline. Escalates if carrier misses more than one deadline.	\$10,000 per violation
Vermont	Not more than \$1,000 Not more than \$10,000	Per violation Per willful violation	\$1,000 per violation \$10,000 per violation
West Virginia	Not to exceed \$100 Not to exceed \$500	Per day for the first 2 weeks of non-compliance Per day thereafter	\$25,000 per any single occurrence

The states provide due process before imposing penalties. They send a noncompliant data supplier a warning letter that outlines the violation(s) and allows time to correct the problem(s). The data supplier can request an extension in writing if there is a problem meeting the submission deadline. The letter must explain the reasons for the extension request.

⁵ Utah APCD implemented in July 2015 a new penalty for missing deadlines.

In some cases, a state may grant a waiver for data submission requirements based on extenuating circumstances. For example, the Tennessee Department of Commerce and Insurance has the authority to delay, reduce or waive any penalty for not correcting any particular data element for any of the following:

- Correcting the failure would be excessively onerous for the health insurance issuer on technical grounds such as the health insurer does not gather the particular data element.
- The health insurer is working diligently to correct the failure.
- Failure is due to force majeure or other events of extraordinary circumstances beyond the control of the health insurance issuer.

OFM contacted the states about their experiences with imposing their penalties and asked the questions listed below. Four states submitted the following responses.

Has your state imposed a penalty for failure to submit claims as required? If so, how often?

Vermont is the only state that has imposed the penalty and it has done so twice. The first time was on a national carrier that refused to submit data at all. The state imposed the fine, and the fine was published in a national publication that identified the insurer as being non-compliant. The company promptly paid the fine and has regularly submitted data as required.

The second was for a local regional insurer that did not submit data for several months. This adversely affected the state APCD's quarterly refreshed data extracts. Despite assurances that the filing was in the works, there was no action. The state finally levied the fine, calculating the amount to be \$10,000 for every file for every month in arrears. The insurer promptly paid and has been compliant since.

Does a warning letter typically take care of noncompliance?

The states shared the following comments:

- Our state sends a firmly worded warning letter followed by discussions with the data supplier to resolve the issues. Up to this point, issues have been resolved and penalties have never been imposed.
- In our state, the data vendor follows up with late submissions to ensure compliance. If there are still issues, an email or letter is sent to the data supplier with a reminder that the data supplier is mandated to report by statute and that there is a penalty. We have to send at least one warning letter every submission period. The reminder prompts the data supplier to either submit data or submit an exception request.
- In our state, warning letters are almost always sufficient, except when there are technical problems. In those cases, we have used an "extension request" process requiring them to disclose what issues they are facing and what their time frame for addressing them is, and submit monthly updates on their progress.
- In our state, an email to an identifiable compliance contact with a subject line that reads "Notification of Non-Compliance" elicits a rapid response and resolution of the problem. To maintain timely contact information, we require an annual online

registration of all insurers (including carriers, third party administrators and pharmacy benefit managers) that includes fields for collecting contact information for compliance and legal matters.

Do you think your penalty is an effective deterrent?

- While I think the threat of the very large penalty is effective, we are actually going through a process to officially update our policy relating to fines. The proposed policy will include automatic penalties for a carrier that is late and has not been granted an extension.
- Our state imposed penalties in the beginning and appears to have sent a message. It has been at least four years since the last penalty was levied. It is more important to develop a good working relationship with the data submitters, and a lot of this depends on the professionalism and tact of how your data intake vendor works with you. If a data submitter is pleading a hardship due to a change in company circumstances or a major server migration and information technology upgrades, we have teleconferences with them and work out a reasonable schedule. This has been very successful and for the most part, the insurers appreciate our willingness to work with them.

The state agency responsible for the APCD can impose and enforce the penalties. Or the state agency can sign an interagency agreement with another state agency, such as the insurance company regulator, to impose and enforce the penalties. For example, in Colorado, the Department of Health Care Policy and Financing, the APCD oversight agency, contracts with the Center for Improving Value in Health Care to operate the state APCD. The Department of Health Care Policy and Financing has an interagency agreement with the Colorado Division of Insurance to impose and enforce APCD penalties.

States deposit funds from APCD penalties into the state general fund unless the state statute specifies the funds be deposited in a dedicated APCD account.

E. DESIGNING THE WA-APCD PENALTY STRUCTURE

To be effective, the WA-APCD penalties must be:

- Clearly understood. Data suppliers need to clearly understand the violations and the penalties they can expect if they do not comply with claims file submission requirements.
- Deterrents. The penalties should match the severity of the violation.
- Fairly administered.
 - ▶ Address violations in a timely and consistent manner.
 - ▶ Provide due process.
 - ▶ Be consistent. Criteria that are used to apply a penalty or grant a penalty waiver must be consistent across all data suppliers.

Table E1 identifies the considerations and related questions and issues that will be discussed in the rule-making process for rules related to penalties. This list is by no means exhaustive, and OFM welcomes input from stakeholders.

Table E1: Considerations for penalties for failure to submit claim files as required

Consideration	Questions/Issues
Violations	<ul style="list-style-type: none"> ▪ Penalize each violation? ▪ Penalize all the violations per data submission period? ▪ Should penalty be for the length of time of the noncompliance? If so, should penalty be applied by the day or the week? ▪ Should penalties be correlated to degree of severity?
Amount of monetary penalty	<ul style="list-style-type: none"> ▪ Should the monetary penalty be a flat dollar amount? ▪ Tiered dollar amount? ▪ Up to a maximum dollar amount? ▪ Up to a maximum dollar amounts with a minimum due? ▪ Is tiered amount tied to the severity of the violation?
Nonmonetary penalties	<ul style="list-style-type: none"> ▪ What noncompliant activities would lead to referral to the OIC for more severe penalties? ▪ Should penalties be published on website?
Imposing the penalty	<ul style="list-style-type: none"> ▪ Should there be automatic penalties such as late penalties unless an extension is granted? ▪ Should there be a penalty committee like OIC has? ▪ What should be the administrative process for imposing the penalty?
Penalty waiver	<ul style="list-style-type: none"> ▪ Determine extenuating circumstances to waive a penalty. ▪ Process to apply for a penalty waiver.
Collecting the penalty	<ul style="list-style-type: none"> ▪ Who collects the penalty? ▪ Who follows up if penalty is not paid? ▪ Penalty deposited in state General Fund.
Reporting/evaluating the penalty	<ul style="list-style-type: none"> ▪ Include penalties assessed in report to the Legislature. ▪ Does the penalty deter noncompliance?

F. REFERENCES

1. Colorado:

Statute:

http://www.leg.state.co.us/CLICS/CLICS2010A/csl.nsf/fsbillcont3/7772EFE1E998E627872576B700617FA4?Open&file=1330_enr.pdf

Rule: <http://www.civhc.org/getmedia/2a315773-cbcd-4f75-805a-759d3cf96888/Rules-Governing-Data-Submissions-to-APCD-2011-08-24.pdf.aspx/>

2. Connecticut

Statute: <http://www.cga.ct.gov/2012/ACT/Pa/pdf/2012PA-00166-R00HB-05038-PA.pdf>

3. Maine

Statute: <http://www.mainelegislature.org/legis/statutes/22/title22sec8703.html>

Rules: <https://mhdo.maine.gov/claims.htm>

4. Massachusetts

Statute: <http://chiamass.gov/relevant-regulations-5>

Rules: <http://chiamass.gov/assets/docs/g/chia-regs/957-8.pdf>

5. Oregon

Statute: <http://www.oregon.gov/oha/ohpr/Pages/Statutes-Health%20Care%20Data%20Reporting.aspx>

Rules: http://www.oregon.gov/oha/OHPR/rulemaking/notices/409-025_PermComplete_2.1.13.pdf

6. Tennessee

Statute: <http://state.tn.us/sos/acts/106/pub/pc0611.pdf>

Rules: <http://www.state.tn.us/sos/rules/0780/0780-01/0780-01-79.20100908.pdf>

7. Vermont

Statute:

<http://www.leg.state.vt.us/statutes/fullsection.cfm?Title=18&Chapter=221&Section=09410>

Rules: http://gmcboard.vermont.gov/sites/gmcboard/files/REG_H-2008-01.pdf

8. West Virginia

Statute:

http://www.legis.state.wv.us/bill_status/bills_text.cfm?billdoc=SB350%20SUB1.htm&yr=2011&sesstype=RS&i=35

Rules:

<http://www.wvinsurance.gov/LinkClick.aspx?fileticket=Xa1RjFZ6Cw%3d&tabid=329&mid=889>