

Blog Post

The Nation's Employers Just Got PAID

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Employers who would like to work with the Department of Labor to correct potential wage and hour violations before they get sued may get their wish: the DOL has launched a Payroll Audit Independent Determination (PAID) program. The agency has invited all employers covered by the Fair Labor Standards Act to consider participating in this six-month pilot program. However, is it worthwhile?

To participate in PAID, the DOL still requires the employer to undertake its own internal assessment of its compensation practices and how those practices have been applied to employees. For instance, if an employer suspects that employees have worked off the clock, the employer first must determine: (i) which employees are affected; (ii) the time period for which the employees' hours are short; and (iii) the amount of back wages owed to the affected employees. Then, prior to making payment, the employer submits the information for each such violation to the DOL for the agency to determine whether it agrees with the calculations. The agency will examine the employer's records to verify the information and the calculations submitted, and review whatever other information it deems necessary to confirm the back wages due, and then issue a summary of unpaid wages. Employers will need to have their checkbooks ready, as all back wages must be paid by the end of the next full pay period after receiving the summary of unpaid wages.

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The advantage of proceeding with DOL oversight: the DOL will supervise the settlement of the back wages and *will not assess liquidated damages* or fines in any PAID-administered settlements. By comparison, in a court proceeding brought by private counsel or the DOL, the employer would face liability for both the back wages *and an equal amount as liquidated damages*, unless the employer could show that it acted in good faith and had reasonable grounds for believing that its actions were not in violation of the FLSA.

Employers who currently are involved in litigation or are under investigation for their compensation practices are not eligible to participate in the PAID program for any practices at issue in the litigation or open DOL investigation.

But employers should be cautious. If the DOL discovers additional wage and hour issues outside the scope of the employer's proposal, it will explore those and attempt resolve them as part of the audit. If the employer declines to pay the wages DOL claims are due, DOL "may use its enforcement authority to recover those wages."

Importantly, settlement agreements negotiated through the PAID program will not include a general release of all FLSA claims, but instead will be tailored to release only claims relating to the specific violations for which the settlement payments are being made. That means employees could accept settlements for federal violations and then turn around and pursue separate claims under state law, such as claims concerning premium pay relating to meal breaks, claims relating to spread of hours, or claims for overtime compensation after a specified number of hours worked in a day.

If the DOL declines to allow an employer to participate in PAID, the agency claims that the employer's request to participate will not serve as the basis for a future investigation, unless it "has

reason to believe that health or safety are at risk (for example, if there are child labor violations.)”

PAID remains in its infancy, and it is too early to tell how it will work in practice. Before participating, employers should consider whether it will place them on the DOL’s radar for further agency-initiated wage and hour investigations, the precise scope of any releases of claims and the efficacy of same, as well as what impact such a settlement might have on the same or similar issues being litigated under state law. Regardless of whether they participate in PAID, employers would do well to routinely audit their compensation practices for compliance with all applicable wage and hour laws, and take steps internally to correct any non-compliance, especially if an employee complains. While employers might not get an effective release of FLSA claims if they make wage corrections without court or DOL approval, there are circumstances in which an employer should still do so. Savvy employers may want to first consult with experienced Labor and Employment counsel to assist with auditing and advice on pay practices before going to the DOL.

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