

ALERT EMPLOYMENT & LABOR



Wage Hour Division Announces PAID Program to Assist with FLSA Compliance

On March 6, 2018, the Wage and Hour Division of the U.S. Department of Labor (WHD) announced a new pilot program, the Payroll Audit Independent Determination (PAID) program, which is intended to encourage employers to identify and correct potentially non-compliant practices.

According to DOL's Q&A page on the PAID program (<https://www.dol.gov/whd/PAID/#4>) "The PAID program provides a framework for proactive resolution of potential overtime and minimum wage violations under the FLSA. The program's primary objectives are to resolve such claims expeditiously and without litigation, to improve employers' compliance with overtime and minimum wage obligations, and to ensure that more employees receive the back wages they are owed—faster."

PAID will cover potential violations of the FLSA's overtime and minimum wage requirements, including violations based on alleged "off-the-clock" work, failures to pay overtime at one-and-one-half times the regular rate of pay, or misclassification of employees as exempt from the FLSA's minimum wage and overtime requirements. Under the program, employers may self-audit their FLSA compliance, and where violations are discovered it must:

- i. specifically identify the potential violations,
- ii. identify which employees were affected,
- iii. identify the timeframes in which each employee was affected, and
- iv. calculate the amount of back wages the employer believes are owed to each employee.

Once these calculations are concluded, the employer will contact WHD to discuss the issues for which it seeks resolution. Unless WHD denies the employer's request to participate in the program at the outset (which could happen, for example, if the employer is already engaged in litigation over a challenged pay practice), WHD will then inform the employer of the manner in which the employer must submit required information, including the following:

- i. each of the calculations described above—accompanied by both evidence and explanation concerning how the calculations were made;
- ii. a concise explanation of the scope of the potential violations for possible inclusion in a release of liability;

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- iii. a certification that the employer reviewed all of the information, terms, and compliance assistance materials;
- iv. a certification that the employer is not litigating the compensation practices at issue in court, arbitration, or otherwise, and likewise has not received any communications from an employee's representative or counsel expressing interest in litigating or settling the same issues; and
- v. a certification that the employer will adjust its practices to avoid the same potential violations in the future.

After WHD assesses the back wages due, it will issue a summary of unpaid wages. WHD will also issue forms describing the settlement terms for each employee, which employees may sign to receive payment. The release of claims provided in the form will match the previously agreed-upon language and, again, must be limited to only the potential violations for which the employer had paid back wages. Employers are responsible for issuing prompt payment; WHD will not distribute the back wages.

The benefit to employers of engaging in the PAID program is that it enables employers to expeditiously resolve inadvertent minimum wage and overtime violations without litigation. Additionally, although WHD will require payment of all back wages due, WHD will not require additional payment of liquidated damages or civil monetary penalties when employers choose to participate in the program and proactively work with WHD to fix and resolve the compensation practices at issue.

There is a downside, however: employees are not required to waive their private enforcement rights unless they accept payment from their employer, and employers are prohibited from retaliating against the employee for his or her choice (as they are under current law). If the employee chooses to not accept the payment, the employee will not release any private right of action. Employees therefore remain free to pursue legal action to recover liquidated damages in addition to any unpaid overtime or minimum wage claim. Additionally, if the employee chooses to accept the payment, the employee will not grant a broad release of all potential claims under the FLSA. Rather, the releases are tailored to only the identified violations and time period for which the employer is paying the back wages.

Thus, employers that participate in the PAID program run the risk of alerting employees to potential claims, thereby triggering the litigation they hoped to avoid. But on the assumption that most employees do not actually relish the prospect of suing their employer, the PAID program may offer an attractive and cost-effective method to resolve wage and hour issues.

For more information about the PAID program, or for assistance with a self-audit, contact John A. McCreary, Jr. at (412) 394-6695 or jmccreary@babstcalland.com, Stephen A. Antonelli at (412) 394-5668 or santontelli@babstcalland.com, or Molly E. Meacham at (412) 394-5614 or mmeacham@babstcalland.com.

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