

## Client Alert

### **U.S. Department of Labor Announces Self-Audit Amnesty Program to Address Wage and Hour Violations Prior to Litigation**

April 13, 2018 – The U.S. Department of Labor’s (DOL) Wage and Hour Division unveiled its new Payroll Audit Independent Determination (PAID) program on March 6, 2018, which began a six-month trial run on April 3, 2018. PAID is aimed at expeditiously resolving inadvertent overtime and minimum wage violations under the Fair Labor Standards Act (FLSA).

Under the program, FLSA-covered employers will be able to self-audit their pay practices, self-report potential FLSA violations and pay back wages to affected employees, while avoiding fines and threatened litigation. Employers may not use PAID, however, to resolve pending litigation or arbitration, or matters where the DOL is already investigating the employer. Furthermore, employers with a history of wage and hour violations may not participate in the PAID program.

Those employers admitted to the program must first audit their compensation practices for any potential FLSA violations. If the employer uncovers a potential violation, or wishes proactively to resolve potential claims emanating from what it believes to be a lawful practice, it must then submit specific information, including (i) whether the violation or practice involves a misclassification or failure to pay overtime; (ii) the identity of the affected employees; (iii) the duration of the violation or practice; and (iv) the amount of back wages owed. The employer must also submit various certifications, including committing to adjust its audit and pay practices going forward to avoid future wage and hour violations.

In the event the DOL determines that an overtime or minimum wage violation has occurred and issues a summary of unpaid wages to the employer, the employer will be obligated to pay all back wages owed to the affected employees by the end of the next full pay period. In return for the employer’s voluntary cooperation, the DOL will not require the employer to pay the otherwise mandatory liquidated damages or other monetary penalties associated with wage and hour violations. The DOL will also issue forms describing the settlement terms for each employee, which employees will be required to sign in order to receive payment in exchange for a release of federal wage and hour claims. The scope of these settlement and release agreements will be strictly limited to wage and hour claims arising under the FLSA. In other words, the releases will have no impact on employees’ potential state law wage and hour claims. Moreover,

the employer's submission to the DOL will not be protected by the attorney-client privilege and information provided to the DOL may be subject to Freedom of Information Act requests by third-parties.

By its publication of its "[Questions and Answers About the PAID Program](#)," the DOL has expressed its belief that the program will be beneficial to employees and employers alike. When implemented by affected employers, employees will receive all back wages owed to them faster and without the need for hiring attorneys and engaging in litigation. Conversely, employers can swiftly resolve potential wage and hour violations without penalties and without having to defend costly wage and hour litigation. However, there still remain various questions and concerns surrounding the PAID program.

First, not all employers will be eligible to participate. Those employers who are currently being sued or investigated for wage and hour violations or have had repeated minimum wage and overtime violations in the past will not be eligible to participate in the program. The DOL also reserves the right to reject cases where it believes an employer should be assessed liquidated damages and/or penalties for systematic and egregious wage and hour violations. One of the other concerns being voiced by various Attorneys General, including New York AG Eric Schneiderman, is that the PAID program deprives employees of their right to liquidated damages, interest and other penalties associated with wrongfully withholding wages from an employee. The AGs are also concerned that employers will use settlements arising out of the PAID program to pressure employees into waiving their separate state-law wage and hour claims even though those claims are not covered under the PAID program. Such waivers may be ineffective, however, as many state labor law claims are subject to lengthier statutes of limitation than their federal counterparts (*e.g.* New York Labor Law claims are subject to a 6 year statute of limitations, while FLSA claims are only subject to 2 and 3 year limitations periods), and may also be deemed void as against public policy.

Second, at present, it is unclear whether an employer is insulated from liability once it initiates a PAID program proceeding, or only after it has resolved all of its FLSA violations with the DOL. In addition, nothing in the materials released by the DOL to date indicates what would happen should an employer report a violation and, during the process of resolving it with the DOL, an employee files a federal wage and hour action against the employer. The potential for added exposure would obviously discourage employers from reporting potential violations, especially if the resolution process is less expedient than as advertised by the DOL.

The biggest risk for employers, however, may be voluntarily disclosing a potential violation to the federal government. History has shown that businesses generally avoid self-reporting and inviting the DOL to investigate their pay practices, on the "sleeping dog" theory or the oft used adage that "no good deed goes unpunished." Understandably, employers are always wary that volunteering too much information to the DOL could result in the government uncovering further related or unrelated violations, and potentially demonstrating that the self-reporting company is an egregious or repeat offender. Self-reporting also exposes employers to the risk of viable state law claims, especially where those claims are subject to limitations periods longer than their federal counterparts. Employers may thus opt to use the program only in narrow situations where they have identified a specific FLSA violation and seek the DOL's blessing in

their calculation of back wages paid to the affected employees in order to avoid an almost certain problem later. Under these circumstances, the PAID Program should reduce the risk of potential FLSA actions and undercut potential state law claims (regardless of additional waivers).

If you require any additional information concerning the PAID program or how to conduct a self-audit or address any potential FLSA violations or have any other employment-related questions, please feel free to contact:

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