JONES DAY

COMMENTARY

OCTOBER 2018

Department of Labor Extends PAID Program for Resolving Employer FLSA Violations

IN SHORT

The Situation: After a six-month pilot, the U.S. Department of Labor ("DOL") confirmed continuation of its Payroll Audit Independent Determination ("PAID") program, which is a voluntary supervised settlement program of Fair Labor Standards Act ("FLSA") overtime and minimum wage violations run by the DOL's Wage and Hour Division.

The Result: Through the continued pilot of the PAID program, employers can self-identify FLSA violations to the DOL, work with the DOL to determine the back wages owed, directly pay back wages to employees, get a release of those FLSA claims, and avoid paying liquidated damages, civil monetary penalties, and plaintiffs' attorney fees.

Looking Ahead: The PAID program will continue at least until March 2019.

The DOL confirmed that after an initial six-month pilot, the Payroll Audit Independent Determination program, known as the PAID program, will continue for another six months. The DOL designed the PAID program to facilitate resolution of potential overtime and minimum wage violations under the FLSA by giving employers the option to disclose violations without fear of liquidated damages, civil monetary penalties, or plaintiffs' attorney fees.

Before the rollout of the PAID program, if an employer uncovered violations of federal overtime or minimum wage laws, it could not simply pay the employee to correct the mistake and avoid penalties assessed by the government. With limited exceptions, there have historically been only two ways to obtain a release of FLSA claims—a DOL supervised release (now seemingly recast as the PAID program) or a settlement approved by a court. The PAID program appears to be a return to a prior DOL Wage and Hour Division ("WHD") practice of supervised settlements that stopped during the Obama Administration, where an employer approached the DOL about unpaid wages, the DOL investigated, the employer paid a back pay amount agreed to by the parties, and the employer received a release of the FLSA claims.

Employers may avail themselves of the PAID program to cover potential FLSA violations based on alleged "off-the-clock" work, failures to properly pay overtime, and misclassification of employees as exempt from the FLSA's minimum wage and overtime requirements.

> “ The PAID program gives employers the option to disclose violations without fear of liquidated damages, civil monetary penalties, or plaintiffs' attorney fees. ”

To participate in the PAID program, an employer must:

1. Review compliance-assistance material on the PAID program website;
2. Self-audit its compensation practices;
3. Identify the potential wage claims that it wants to resolve, which cannot include claims already being investigated by the DOL, litigated, arbitrated, or if plaintiff's counsel has already expressed an interest in litigating or settling the wage dispute;
4. Gather information about the type of potential wage violation, employees affected, time frames, and the amount of back wages owed for each claim;
5. Communicate with the WHD and submit evidence of back wage calculations, a statement of the scope of the potential violations for inclusion in the liability release, and certifications that: (i) the employer reviewed the compliance materials; (ii) the claims are not being litigated or arbitrated; and (iii) the employer will adjust its practices to avoid the same potential violations in the future.

Unless the WHD denies the employer's request to participate in the PAID program at the outset (e.g., because the employer is acting in bad faith or repeatedly trying resolve the same violations), the WHD will: (i) assess the back wages due; (ii) issue a summary of unpaid wages; and (iii) issue forms to the employee describing the settlement and release, which the employee can sign upon receipt. The employer must then pay all back wages due directly to the employee by the end of the next full pay period and provide payment proof to the WHD.

The PAID program offers employers a potential swift resolution to known FLSA violations. But employers should consult their counsel and weigh their options before participating in the program because it does not guarantee all potential claims will be extinguished. For example, under the program, employees are not required to surrender any rights and can choose whether or not to accept the payment of back wages due. And while employees who choose to accept the payment grant a release of the claim for which the employer is paying the back wages under federal law, many states and local governments have enacted their own wage and hour laws with different requirements and rights of action from the FLSA. For example, California requires daily overtime for hours worked in excess of eight, but the FLSA does not mandate daily overtime; Chicago has an ordinance setting minimum wage at $12/hour, whereas the FLSA's minimum wage is $7.25/hour. Thus, a PAID program release may not cover potential state and local claims.

THREE KEY TAKEAWAYS

1. Employers can self-identify only potential FLSA violations that are not already being investigated by the DOL, litigated, or arbitrated. If plaintiffs' counsel has already expressed an interest in litigating or settling the wage dispute, the claim is ineligible for resolution through the PAID program.

2. The benefits to an employer of participating in the program include obtaining a release of the FLSA claim for which the employer is paying the back wages and avoiding liquidated damages, civil monetary penalties, and plaintiffs' attorney fees.

3. Employers should consult their counsel and weigh their options before participating in the PAID program because it does not guarantee all potential claims will be extinguished.


Lindsay A. Hedrick
Dallas


E. Michael Rossman
Chicago


Wendy C. Butler
New York


Elizabeth B. McRee
Chicago

YOU MIGHT BE INTERESTED IN: Go To All Recommendations >>

"Me Too" Movement Triggers Legislation in New York State and City

Brexit and German Employment Law—A New Type of Interaction

SUBSCRIBE SUBSCRIBE TO RSS

Jones Day is a global law firm with more than 2,500 lawyers on five continents. We are One Firm Worldwide℠.