
Un-"PAID" is a Better Option

Last week the U.S. Department of Labor's Wage and Hour Division (WHD) unveiled its new Payroll Audit Independent Determination (PAID) program to facilitate resolution of potential overtime and minimum wage violations under the Fair Labor Standard Act (FLSA). Below you will find the highlights of the program and our advice and recommendations on compliance.

WHD will implement this "self-audit pilot program nationwide for approximately six months" to begin in April. At the end of the six month pilot period, WHD will determine whether to make the program permanent. In the meantime, as your team contemplates this opportunity, we recommend you keep WHD's stated goal in mind: "To ensure that more employees receive the back wages they are owed — faster."

All FLSA-covered employers are eligible to participate in the program on a voluntary basis. The program covers potential violations of the FLSA's overtime and minimum wage requirements including, for example, violations based on alleged "off-the-clock" work; failures to pay overtime at one-and-one-half times the regular rate of pay; misclassification of employees as exempt from the FLSA's minimum wage; and overtime requirements.

There are some attractive elements to the program. It enables employers to expeditiously resolve inadvertent minimum wage and overtime violations without litigation (perhaps—see below), without the payment of liquidated damages, and without civil monetary penalties. That certainly sounds attractive but there is a catch or two or three...

For many employers, the downside of this program will outweigh the upside. For example:

- This program does not require employees to surrender any rights.
- If an employee chooses not to accept back payment, the employee will not release any private right of action.
- If the employee chooses to accept the back payment, the employee will

not grant a broad release of potential claims under the FLSA.

- By allowing employers to participate in the program, WHD does not waive its right to conduct any future investigations of the employer.
- The participating employer must pay 100% of the calculated back wages immediately, no exceptions.
- An employer's DOL-supervised settlement under this program does not necessarily prevent state law wage claims.

All FLSA-covered employers nationwide confront the same critical question: Does the PAID program reduce risk or increase exposure for your company? Our experience tells us that many employers will be better off conducting their own Audit outside the PAID program and under the attorney/client protection. Certainly, it would be prudent for all employers to conduct an Audit of pay practices to assess compliance under the FLSA and state wage and hour laws. Our employment law crystal ball identified these issues a few years back and led us to develop our very popular **FLSA Wage and Hour and Timekeeping Audit Service** and our **Exempt or Non-Exempt Positions Classification Service**. You can achieve compliance without the PAID program pitfalls. Please let us know how we can help. www.foleylawpractice.com or call 508.548.4888