FAQs On The PAID Program's One-Year Anniversary

Insights
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After a year-long pilot, the Department of Labor's employer-self-audit initiative is apparently here to stay. Which begs the question: should you participate? Let's look at the most common questions and provide some answers.

What Is The PAID Program?
The Payroll Audit Independent Determination (PAID) is a formal program run by the U.S. Department of Labor (USDOL) providing an avenue for employers to achieve compliance, pay back wages, and move forward with a reasonable level of certainty that it has resolved wage and hour issues without the time and effort necessary to do so in the litigation context or even an agency initiated audit. While it is a solution that is not without risks, employers, attorneys, and the public at large have to consider it in conjunction with an employer's other options—or lack thereof.

What's An Employer To Do?
Sometimes employers uncover errors—whether in understanding, application, or computation—that have caused violations under the federal Fair Labor Standards Act (FLSA) or similar state or local laws. This can create a quandary because, no matter what the employer decides to do, there is an element of risk.

Option No. 1: Ignorance Is Bliss...Unless Things Fester

There are instances where you might weigh various factors and make the business decision not to address the violation proactively. For example, perhaps you already discontinued the practice for other reasons, it is not clear that the practice is a violation under the circumstances, or there is minimal risk involved and significant administrative burden in ensuring compliance.

Option No. 2: Fix It Prospectively Only (The "Stop The Bleeding" Approach)

You might decide that, whether the violation is clear or not, it is best to change the practice prospectively to eliminate the risk of liability going forward. There are different approaches to consider with varying levels of risk that someone will detect the past violation.

Option No. 3: Fix It Prospectively—And Tend The Wound

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Employers' reactions to this option are all over the map, and literally might depend on where you are on the map because there are state and local laws to consider as well. On the whole though, you might be surprised how many employers detect an FLSA problem and, on their own accord, want to fix it both prospectively and retroactively.

Where Does PAID Fit In Here?

From the outset, it is important to understand that PAID is unlikely a good fit if you are set on Option No. 1 (no fix) or Option No. 2 (prospective only). Nonetheless, there are many other instances where you decide to adopt Option No. 3 (prospective fix, retroactive resolution) at least with respect to certain violations (for example, those due to typographic-like errors). When it comes to resolving the past though, employers are stuck between a rock and a hard place due to restrictive statutory language in the FLSA (and the Equal Pay Act) as compared to other federal employment laws.

Specifically, outside of obtaining court approval, parties cannot fully resolve FLSA claims without the "supervision of" the USDOL. Accordingly, the USDOL is providing the PAID program as an official tool for those employers considering Option No. 3 and, generally speaking, not involved in litigation or an investigation with respect to the claim at hand. In other words, PAID only should be compared to an employer independently making payouts, *i.e.*, using the "Traditional Approach."

Option No. 3A: Traditional Approach

For decades, employers and employees, current and/or former, have chosen to resolve FLSA disputes independent of agencies, courts, or even attorneys.

Option No. 3B: The PAID Approach

The PAID program is meant to provide a framework for employers to proactively resolve potential FLSA claims. In some ways it is not new, but it is now a formalized process that provides you with some assurances going into it. And while employers understandably would prefer more, some are assurances that the agency simply cannot be expected give.

At its core, the program entails a limited FLSA review where the employer controls the scope, performs the related calculations, and presents your findings to the agency. That isn't to say there will never be further discussion of a specific point, but an employer participating will likely have handled at the outset any issues that normally would arise at this juncture in an FLSA investigation.

Once finalized, the agency will supervise the necessary payments in a similar fashion and will tailor its documentation, including the scope of the release language, to the circumstances. Unlike in litigation or an investigation, though, you would not have to dispute liquidated damages (let alone attorneys' fees).

Putting aside litigation matters concluding with a court-approved settlement, participation in the PAID program is at least on par, if not better than, any alternative resolution.

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So Why Are Employers Hesitant To Participate?
Let's face it—there is something intrinsically odd about suddenly self-reporting potential legal violations to the federal government, and there may remain an uninformed fear that a PAID matter will leave a black mark on your record or even evolve into an investigation on the spot. It is reported, though, that these matters are separately maintained such that (1) if another issue comes to USDOL's attention during the process, it will promote but not demand resolution; and (2) in most circumstances, a prior PAID matter should only reflect *favorably* on an employer should it subsequently receive an employee complaint that necessitates investigation.

Though it does not come up often, you might make an independent payout and still face a challenge for various reasons. We have no reason to expect the risk of a subsequent challenge to increase if you go through PAID, but in reality this even happens occasionally after an investigation (or, though even less often, post-litigation). In other words, to the extent that risks remain with respect to federal, state, or local law claims after the conclusion of a PAID matter, you are generally speaking on at least the same footing as after an investigation, and better footing than after an independent settlement.

What Are My Next Steps?
You can familiarize yourself with the structure of the program on the Department of Labor's website, and, indeed, register as a participant before deciding whether to proceed. However, this is an area where we would recommend that even the most sophisticated employers contact outside legal counsel at the outset. Such a consultation would be to your benefit, not only for consultation purposes, but for any exchange of information with USDOL (which the attorney initially can do without identifying the client) and to help control the scope throughout the PAID matter.

The PAID program is almost certainly a win for the USDOL, the judiciary, and taxpayers generally. For employers and employees, the answer inevitably will vary depending on the circumstances, but we would recommend at least considering it if facing or anticipating a challenge (outside of current litigation or an investigation). While PAID is not always the ideal solution, it is the best tool that USDOL can offer employers for proactively resolving matters.

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