



USDOL Self-Report PAID Program: Benefits TBD (Updated 04 03 18)

Insights

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UPDATED 04 03 18: The USDOL has launched its PAID pilot program. In addition to providing information about initiating the process, the agency has scheduled an April 10, 2018 webinar for employers interested in learning more about the program. Again, we would encourage employers to seek legal counsel before deciding whether to contact the USDOL with any questions or to participate in the program.

Last week the U.S. Department of Labor (USDOL) announced its Payroll Audit Independent Determination (PAID) pilot program to mixed reactions. The PAID program is meant to provide a framework for employers to proactively resolve potential federal Fair Labor Standards Act (FLSA) claims. In a nutshell, an employer will be able to self-report potential violations to USDOL and attempt to resolve the issues efficiently and under the agency's "supervision," as outlined on its [website](#).

While one can speculate as to what the full terms of the forthcoming pilot program will be, and most likely employers will find them preferable to litigation, thus far the benefits and risks are not particularly distinguishable from an investigation.

Who Can Participate?

All FLSA-covered employers are eligible to participate in the pilot, however, an employer cannot initiate the process with respect to an issue for which it currently is being investigated, sued, or otherwise faced with a legal challenge where the employee is represented.

- *Is this new? Not really.* These issues already arise within USDOL investigations where employees seek assistance from multiple sources. The nuance is that the employer must voluntarily put itself on the agency's radar before finding out whether it can even participate.

What Claims Are Covered?

The program covers FLSA minimum wage and overtime requirements, including "violations based on alleged 'off-the-clock' work" and "misclassification of employees as exempt" that, presumably, underpin minimum wage and/or overtime pay violations.

- *Is this new? Not really.* If anything, the scope might be more limited in that the PAID program is reported to enable employers to resolve *inadvertent* violations. Moreover, an employer "cannot use the program to repeatedly resolve the same violations", which determination necessarily would come after it already has self-reported the allegedly "repeated" one. There is no suggestion whatsoever of a guarantee that the agency will not (i) take a different approach with respect to violations it deems not to be "inadvertent", let alone ones it deems "repeated" for these purposes, and/or (ii) expand the scope of the matter based on its own observations in reviewing the self-audit information. It also remains to be seen whether an employer could voluntarily include back wages for violations that occurred outside of the two-year statute of limitations.

What Will An Employer Owe?

The employer will owe 100% of the back wages. The initial overview from USDOL provides that the program will not require "additional payment of liquidated damages or civil money penalties".

- *Is this new? Not really.* These perceived benefits assume that the agency is authorized to do either in the first place. In actuality, the agency does not have authority to assess liquidated damages (indeed one would hope that it would end this improper practice that began under the prior administration) and only can assess civil money penalties in limited circumstances.

Can This Be Done Quickly, Efficiently, Cost-Effectively?

The agency intends for the program to facilitate quick resolutions, and no litigation.

- *Is this new? Not really.* USDOL typically resolves investigations without litigation, and more quickly than many private lawsuits. Whether employers can "expeditiously" resolve issues through the program as compared to an investigation, however, is another matter given that the self-audit stage could be extensive and the agency might significantly lengthen the process at the review stage. There is no particular reason at this point to anticipate that the process will be less burdensome than an investigation. Indeed, the only aspect guaranteed to move quickly is the payment of back wages, which are due "by the end of the next full pay period after receiving the summary of unpaid wages". This is a much shorter timeframe than historically permitted in investigations, and simply might not be feasible.

Can The Employer Move Forward With Certainty Of A Clean Slate?

As the agency acknowledges in its announcement, individuals are not required to accept payment and are free to pursue their own claims. Even if all goes well and the payments are accepted and corresponding forms completed, some concerns have been raised regarding similar state law claims. There also is the matter of what information is now at the disposal of USDOL for future use (agency waives no rights), any other federal or state agencies with which it has agreements, and any member of the public pursuant to a FOIA request.

- *Is this new? Not really.* These risks are worthy of consideration, but they are not unique to the program. Indeed, they exist in all USDOL investigations, and particularly those in which an employer takes a more proactive role. Perhaps one saving grace is that the agency "will not

employer takes a more proactive role in helping the earning process that the agency, "that not distribute the back wages" and that "employees may sign [a form] to receive payment", which should mean that if an employee does not execute the form for payment (though obviously not the desired result) at least the employer does not have to pay the back wages to the employee or the government for later distribution as required to conclude an investigation.

The Bottom Line

USDOL's proposal to provide a less adversarial avenue for employers to achieve compliance is a welcome one, and it might be very tempting to employers who have struggled with resolving claims outside of court. Unfortunately, while in many ways preferable to private litigation, the benefits of the program are to be determined still.

The proposed six-month pilot period does not provide an employer with much time to contemplate whether to participate in the program before needing to initiate the self-audit process. Nevertheless, employers should proceed with caution and consult with legal counsel experienced in USDOL investigations before even considering the PAID program.

In the meantime, hopefully the government also will consider alternatives that would allow parties to resolve potential FLSA minimum wage and overtime claims on their own *like most employment matters*.