



USDOL Promotes Continuation of PAID Program

Insights

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Earlier this year we shared that the U.S. Department of Labor (USDOL) was launching its Payroll Audit Independent Determination (PAID) program. This month the program was extended and the agency wasted no time beginning its efforts to further educate employers and attorneys about the program. As a recent presentation in greater-Atlanta confirmed, the public still is skeptical. Nonetheless, PAID might just have a place.

PAID Refresher

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 now it is a formalized process that provides an employer 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 the findings to the agency. That isn't to say there will never be further discussion of a 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 payments in a similar fashion and will tailor its documentation, including the scope of the release language, to the circumstances. Unlike in litigation or, apparently, in an investigation though, the employer will not have to dispute liquidated damages (let alone attorneys' fees).

Loose Ends – Not a New Dilemma

It seems that some of the biggest concerns expressed regarding PAID relate to loose ends after a matter is closed. Much has been made by some state officials about unresolved state law claims. To the extent that this is even an issue (after all, sometimes resolving FLSA issues concurrently resolves non-federal ones), it exists in every resolution of FLSA claims and is of concern to *all* parties. Indeed, sometimes *employers* raise it within USDOL investigations and (being beyond the agency's jurisdiction to enforce) separately make an, essentially, voluntary payment based on state law. From the employee's perspective, the release for the FLSA claim is entirely separate from any other claims, and the same would be true for the FLSA portion supervised by the USDOL within a PAID case. So, while it might not be realistic to expect *all* state law claims to be resolved at the same time, the PAID program would leave them intact. Given that, certainly the employee would prefer to receive at least the FLSA back wages as soon as possible.

There also is the, not unreasonable, concern from the employer's perspective that it will go through the process only to have an employee reject the payment in favor of litigation, or some other employee not entitled to back wages hears of the payment and goes to an attorney. But these are risks that employers weigh all the time when considering how one might make a back-wage payment outside of an investigation or litigation.

An employer really only has one other avenue to resolve a violation: pay the employee and hope for the best. Unfortunately, the same loose ends can apply and, should there be a further dispute, an employer making the payment completely on its own cannot say that the USDOL supervised the payment. Accordingly, an employer should at least consider whether it is eligible for the PAID program when determining a course of action.

The Bottom Line

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. While PAID will not always be the right fit, it provides a variation on the employer-initiated resolution that at least will be a good fit for some. Nevertheless, an employer faced with a violation should consult with legal counsel experienced in FLSA matters and discuss whether PAID might be the right fit for the particular circumstances.