


MARCH 14, 2018 | WAGE & HOUR COMPLIANCE

DOL Announces FLSA Self-Audit Program

On March 6, 2018, the U.S. Department of Labor (“DOL”) announced that it would soon be implementing its  Payroll Audit Independent Determination (“PAID”) program, which will permit employers to self-report potential violations of the Fair Labor Standards Act (“FLSA”) without fear of exposure to liquidated damages. Although the DOL’s news release frames this program as a boon for employees as they can receive back wages without the substantial cost of litigation, the program could also be beneficial to certain employers. Indeed, the program is designed to encourage proactive resolution of potential minimum wage and overtime violations by limiting potential damages to solely the back wages owed. The DOL’s Wage and Hour Division (“WHD”) intends to employ the PAID program nationwide for 6 months, at which time it will evaluate the effectiveness of the program and its future options.

Under the FLSA, an employee may be entitled to penalties and liquidated damages if she can successfully show that her employer failed to pay the required minimum wage or make overtime payments. The FLSA establishes that liquidated damages are equal to the amount of back wages owed. In other words, an employer could be required to pay double the employee’s back pay. Courts have generally held there is a presumption in favor of liquidated damages unless the employer can show (1) it acted in good faith; and (2) it had reasonable grounds to believe it was complying with the law. This puts a burden on the employer to provide evidence that substantiates both these elements. If it cannot present such evidence, the employer faces a substantial financial burden in damages owed, particularly in the case of a collective action – a very common occurrence under the FLSA.

Pursuant to the PAID program, however, the WHD will only require participating employers to pay back wages due pursuant to a resolution of failures to properly pay minimum wage and/or overtime. The WHD will not impose liquidated damages or any other civil penalties. Moreover, the PAID program also allows employers to avoid the often significant costs associated with litigation of FLSA claims. As part of the resolution of the compensation issues identified by the employer’s self-audit, employees who accept payment release all claims related to the identified violations of the FLSA for the time period for which back wages are paid.

But, it is important to note that an employee to whom it is determined back wages are owed does not have to accept payment of the back wages due and release her private right of action. She can choose not to participate and pursue any minimum wage or overtime claims through litigation after being notified by the WHD of the back wages owed. This would be particularly problematic if multiple employees are implicated in the audit and several of them decide not to participate in the WHD-coordinated settlement of these claims, instead pursuing a

collective action. In addition, the settlement orchestrated by the WHD includes a limited release of claims – limited to the non-compliant practices identified in the audit and the time period for which back wages are calculated. Whereas, an employer can include a general release of FLSA claims in a privately-negotiated settlement to avoid future litigation on FLSA issues with the employee.

To participate in the PAID program, an employer must audit its current compensation practices to determine whether any of its practices are non-compliant. During this audit, the employer must (1) specifically identify potential violations; (2) identify the employees affected; (3) identify the relevant time periods in which the employees were affected; and (4) calculate the amount of back wages owed. Then, the employer must contact the WHD to discuss the findings of its audit and, if accepted into the PAID program, provide all of the aforementioned information to the WHD for purposes of resolving the issues of non-compliance. The WHD will perform its own calculation of back wages owed and, once that amount is confirmed, it will issue a summary of unpaid wages and settlement terms. For each employee that signs the settlement, the employer must provide all back wages owed by the end of the next full pay period after receiving the summary of unpaid wages.

There are some limitations on which employers can participate in the PAID program. For example, the WHD will not permit employers to use this process if the WHD is already investigating the employer for the issues identified or if litigation on these issues is ongoing. Additionally, the PAID program cannot be used to resolve issues on which an employee's representative or attorney has already contacted the employer to express an interest in litigating or settling. Finally, an employer will not be permitted to repeatedly pursue resolution of the same types of issues through the program.

Proactively self-reporting violations to a federal agency has its drawbacks, particularly where, as here, employees are able to forgo the proposed settlement and still pursue their own claims. Nevertheless, the program provides another potential avenue for resolution of FLSA wage claims that avoids the cost of litigation and very real risk of being required to pay double the wages owed. For example, if an employer becomes aware of significant non-compliant pay practices that create considerable liability for the Company, it may be advantageous to participate in this program, prior to initiation of a WHD investigation or collective action that could be costlier. Prior to participating in the PAID program, employers may want to first review the benefits and drawbacks in more detail with legal counsel based on their specific circumstances.