

DOL Ends PAID Program: Creating a Catch-22 for Employers; Cross Your Fingers or Come Clean?

Article

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Following the anticipated agenda of the new Biden administration, on January 29, 2021, the Department of Labor immediately ended the Payroll Audit Independent Determination program (the “PAID Program”) first launched in 2018 by the Department’s Wage and Hour Division. Ending the PAID Program signals that, under the new administration, the Wage and Hour Division will be increasingly focused on payroll policies and practices and will seek to penalize employers without first providing an opportunity to self-report and remedy mistakes.

Employers who fail to comply with the minimum wage and overtime provisions of the Fair Labor Standards Act (FLSA) expose themselves to liability for payment of any back wages owed, which are then doubled as liquidated damages, plus certain costs and fees, including attorney fees an employee incurs in pursuing an action against the employer. The PAID Program provided employers potential relief from the significant penalties resulting from a minimum wage or overtime violation, which often happens without any intent or malice on the employer’s part. Under the program, employers could audit their minimum wage and overtime payroll practices, and if such an audit uncovered any FLSA violations, the employer could self-report the same and work with the Department of Labor to ensure all back wage payments were made. Upon doing so, the employer would obtain a release of any FLSA claims relating to the error and avoid potential liability for liquidated damages, other civil penalties, and employees’ attorney fees.

With the PAID Program cancelled, employers who discover minimum wage and overtime violations are left with difficult choices as to remedying such violations. This cancellation, in fact, creates a catch-22 situation for employers—does the employer cross its fingers and hope the violation is never uncovered, or does it come clean and pay its employees back wages, only to signal the violation and open the door for a lawsuit and the associated liquidated damages, penalties and employee attorney fees? While individual circumstances would dictate how the employer should react, of course, losing the opportunity to remedy the situation, make the employees whole, and avoid multiplied liability is an

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unfortunate development for employers.

As the cancellation of the PAID Program is a likely harbinger of the Biden administration's treatment of wage and hour issues, now is a good time to review your payroll policies to ensure compliance with the FLSA. This is particularly important for employers who offer pay differentials or other bonus-type payment programs, including those who provide such payments as a reward to their employees for in-person work during the COVID-19 pandemic.

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