

Know Before You Go: Does The DOL's New PAID Program Pay Off For Employers?

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Complying with the spider web of statutes, regulations, and DOL opinion letters regarding the FLSA can be a nightmare for employers. Certainly, many of you may recall the furor that resulted just a little over a year ago when the DOL rolled out an update to the salary basis test. Employers across the country scrambled to make sure they could hit the DOL's new deadlines and requirements, only to have the rug pulled out at the last moment by court order when the regulations were stopped in their tracks. While the salary basis update likely won't actually see the light of day, the fact the issue still has not been resolved says everything the reader needs to know about how contentious and confusing complying with the FLSA can be. For those employers who fret about wage and hour compliance, the DOL has rolled out the Payroll Audit Independent Determination (PAID) pilot program where, over the next six months, employers who are concerned about potential violations can self-report the issues to the Wage and Hour Division of the DOL. The idea is to encourage employers to come forward and present potential issues so the DOL can resolve them quickly, quietly and without the need for extensive litigation. All FLSA covered employers are eligible to participate in the project – except those currently under investigation or who already are embroiled in an FLSA lawsuit with an employee. All FLSA related claims, including the classics such as minimum wage and overtime issues, off-the-clock work, and misclassifying employees, qualify for the program. The PAID program benefits employers by providing an opportunity for an agency review that – if all goes well – may yield a Good Housekeeping Seal of approval by the DOL. On the other hand, if things don't go so well (meaning the agency concludes the company did something wrong), PAID says employers will be responsible for paying all back wages owed to employees. However, violators will not be responsible for paying liquidated damages or other penalties (such as attorney's fees). This could be significant as liquidated damages (and attorney's fees) could multiply a company's exposure. Of course, sometimes things seem too good to be true and that goes for PAID as well. The program operates between an employer and the agency. Nothing binds individual employees to the program. Accordingly, if the DOL finds a violation resulting in a back-pay determination, nothing requires the employee to accept the result. This means the employee still has the option to pursue their own claims, including under comparable state wage laws (which separately may include liquidated damages and other penalties). Worse, by submitting the issue to the DOL, an employer essentially is confessing that they feel there could be a FLSA violation, and if the DOL determines that the company did something wrong, the employee (and their lawyer) will not really need to do much to prove their case since the agency will have done most of the heavy lifting for them. In short,

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participating in the PAID program could provide solace for employers who are concerned about possible violations, but it potentially could backfire big time. Employers should weigh all the risks and benefits of going forward before proceeding with signing up for the PAID program.