

PAID: A New Approach to FLSA Violations

The United States Department of Labor recently launched PAID to proactively address FLSA violations without expensive class action litigation. [PAID](#) is a nationwide, pilot program that is designed to bring employers in compliance with the FLSA as it seeks to put back-wages in the hands of employees quicker.

Any size employer can participate in PAID. It may be the best and most cost-effective way for resolving troublesome FLSA situations in certain situations.

The PAID program is designed to address FLSA violations that trip-up even the best employers, issues like: “off-the-clock” work, misclassification of employees, and failure to correctly calculate an overtime rate when a bonus, commission, or a shift differential is involved.

PAID cannot be used to resolve any issues where the DOL is already investigating an employer, nor can it be used if an employer is sued in court or arbitration.

Why Might an Employer Participate in this Program?

PAID is a pilot program. It may not survive the current presidential administration and it may not work. Nevertheless, over the years, we have counseled many employers who know that they are violating the FLSA yet want to fix the violation without paying liquidated damages or their employees’ attorney’s fees. Until now, all an employer could do was unilaterally make a payment to employees for back-pay owed, and then “hope for the best.” PAID will offer employers something more.

Under PAID, employers can get a valid, enforceable release for FLSA wage violations that they fix. Outside of litigation, such a release is not otherwise obtainable.

What are the Mechanics of the PAID Program?

If an employer wants to participate in PAID they can sign up online. Thereafter, an employer is charged with: identifying any potential violations to the DOL, identifying which employees are affected, identifying the time frames involved, and calculating the amount of back-pay that might be owed.

Assuming an employer is allowed into the program, the DOL will seek additional information from the employer, such as:

- An explanation of the employer's back pay wage calculations
- An explanation of the scope of the violation so that the scope of the violation is reflected in the release
- A certification from the employer that it reviewed all DOL information
- A certification from the employer that the matter is not being litigated in court or in arbitration, and
- A certification from the employer that it will adjust its practices to avoid future violations.

Open Questions

The March 6, 2018 DOL announcement of PAID is a mere two pages long and there remain many open questions. Three questions loom in our minds. First, although PAID may result in a valid federal release under the FLSA, many wage and hour violations are illegal under state law as well. Employers will be much more likely to participate in PAID if they know that they will obtain a release of state claims as well.

Second, if an employer is rejected from participating in the PAID program, will that result in that employer being more likely to be investigated by the DOL? This perverse result will discourage employers from participating in PAID. Finally, what criteria will the DOL use when accepting or rejecting employers into the PAID program?

Conclusion

The FLSA is 80 years old and yet it reaches almost every aspect of our 21st Century economy. The DOL is to be commended for trying a new

approach to achieve enforcement of the FLSA through PAID. Like all legal matters, however, the “devil will be in the details.”

If you have any questions about the matters addressed in this *CCM Alert*, please contact the following CCM author or your regular CCM contact.

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