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Labor and Employment Alert: Department of Labor Encourages Employers to Self-Report Their Wage-Hour Violations

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The U.S. Department of Labor's Wage and Hour Division (WHD) recently announced a pilot program to encourage employers to self-report their wage-hour violations. The "Payroll Audit Independent Determination" (PAID) program is intended to proactively resolve potential overtime and minimum wage violations of the Fair Labor Standards Act (FLSA). The Department of Labor (DOL) expects the program will resolve violations "expeditiously and without litigation," "improve employers' compliance with overtime and minimum wage obligations" and "ensure that more employees receive the back wages they are owed—faster."

Employers that are the subject of a WHD investigation, are already in litigation, or have been contacted by an employee's representative or counsel regarding litigation or settlement may not participate in the PAID program concerning the matters at issue. It is unclear what happens if the employer is resolving the issue with WHD and the employees then send a demand letter or file suit.

Otherwise, to participate, employers must review WHD's compliance assistance materials and carefully audit their pay practices for potentially non-compliance practices. If the employer discovers any non-compliant practices, or if the employer believes its compensation practices may be lawful but wishes to proactively resolve any potential claims anyway, the employer must then: (1) specifically identify the potential violations (2) identify which employees were affected; (3) identify the timeframes in which each employee was affected; and (4) calculate the amount of back wages the employer believes are owed to each employee.

The employer then contacts WHD to discuss the issues for which it seeks resolution. WHD will then inform the employer of what must be submitted for the matter to be resolved:

1. The back wage calculations accompanied by both evidence and explanation concerning how the calculations were made;

2. A concise explanation of the scope of the potential violations for possible inclusion in a release of liability;
3. A certification that the employer reviewed all of the information, terms, and compliance assistance materials;
4. A certification that the employer is not litigating the compensation practices at issue in court, arbitration, or otherwise, and has not received any communications from an employee's representative or counsel expressing interest in litigating or settling the same issues; and
5. A certification that the employer will adjust its practices to avoid the same potential violations in the future.

WHD will evaluate the information in order to assess the back wages due for the identified violations. WHD will then issue a summary of unpaid wages and settlement agreements for each employee. Employers are responsible for issuing prompt payment by the end of the next full pay period after receiving the summary of unpaid wages and providing proof of payment to WHD. WHD will not distribute the back wages.

By allowing employers to participate in the PAID program, WHD does not waive its right to conduct any future investigations of the employer, and employers cannot use the program to repeatedly resolve the same violations. Although WHD will require payment of all back wages due, WHD will not require additional payment of liquidated damages or civil monetary penalties.

According to the DOL, employees will receive 100% of the back wages paid, without having to pay any litigation expenses or attorneys' fees. But they will not receive liquidated (double) damages, which may deter employee participation in the program. Also, employees may refuse to accept the payment of back wages (thereby retaining their rights to sue the employer under the FLSA), and employers are prohibited from retaliating against the employee for his or her choice. If the employee chooses to accept the payment, the employee does not broadly release all potential claims under the FLSA. Rather, the releases are tailored to only the identified violations and time period for which the employer is paying the back wages. Therefore, employers may still have exposure under state wage-hour laws for the same violations even if the FLSA claim is resolved.

The DOL intends to implement this pilot program nationwide for approximately six months. At the end of the pilot period, the program's effectiveness will be reviewed to determine its next steps. Contact your Vorys lawyer if you have questions about the PAID program or otherwise auditing your wage-hour practices.