

## 4 Questions About DOL's Self-Audit Plan For Wage Violations

By **Vin Gurrieri**

*Law360 (March 7, 2018, 10:38 PM EST)* -- Although a newly announced U.S. Department of Labor self-audit program is winning plaudits from employers for giving companies a path to stave off litigation by voluntarily reporting Fair Labor Standards Act violations, experts say that numerous questions, like whether employees' participation would abrogate potential state law claims, remain unanswered.

Announced Tuesday, the DOL Wage and Hour Division's Payroll Audit Independent Determination, or PAID, program, will allow employers to quickly pay back wages to workers in full for accidental overtime and minimum wage violations under the FLSA, thereby avoiding fines and litigation expenses.

Other aspects of the pilot program, which will be re-evaluated after six months, include that the scope of any settlements will be limited only to the potential violations at issue, and that employers who participate must carefully audit their pay practices with an eye toward the Wage and Hour Division's compliance assistance materials before reporting a violation and agree to correct faulty practices going forward after the matter has been resolved.

Alfred Robinson of Ogletree Deakins Nash Smoak & Stewart PC, a former acting administrator of the WHD, said the program means employees can receive back wages there due from businesses' inadvertent wage violations faster than they would through private litigation or arbitration, and employers gain an opportunity to correct mistakes and come into compliance.

"This is a program that will facilitate compliance and that's what [the WHD] ultimately is seeking — for employers to comply with the FLSA," Robinson said. "I hope that after the pilot phase is completed, they'll be even more convinced that it benefits both employees and employers and will continue that practice."

A representative for the DOL did not immediately respond to a request seeking additional details about the program.

### **What happens with potential state law violations?**

The Labor Department on Tuesday said the PAID program ensures that workers will receive unpaid wages faster than they would through litigation without having to pay any litigation expenses or attorneys' fees.

The DOL noted that employees will have a choice of whether to accept the payment of back wages due. If they agree, those workers would be required to sign releases that take away their ability to sue over "the identified violations and time period for which the employer is paying the back wages."

But one aspect of many wage-and-hour lawsuits is that plaintiffs often bring claims of state law violations based on employers' alleged wage violations along with their FLSA claims.

Sachin S. Pandya, a professor at the University of Connecticut School of Law, said that language used by the DOL leaves open the question of whether the releases cover only claims that arise under FLSA or whether they will cover any and all claims arising from an employer's alleged wage underpayment, which could include state law claims.

"This is just a question mark in my head that the [DOL] website and guidance didn't clearly address," Pandya said.

If the program only releases the employer from the FLSA claim, Pandya said it would still be possible for the employee to sue that employer under state law, meaning that an employer "might want to think twice about how beneficial the program is."

"On the other hand, if it requires the employee to release all legal claims, including state wage-and-hour claims an employee might have, then the benefit that the employer has is much greater," Pandya said.

Robinson said his understanding of the form that employers would have to use under the program would only be directed toward the alleged FLSA violation and not any underlying state law violation, but added that he is "not sure the materials released so far totally answers that."

"My impression is it's only going to address any FLSA violations," Robinson said. "In the big scheme of things, the underlying possible state claims is a risk that an employer would want to assess in deciding whether or not to participate in the PAID program. Their exposure under state law is something will have to weigh as well."

### **Will employees participate?**

Once a potential violation is reported by a business under the PAID program, the WHD would oversee resolution of that violation by assessing the employer's calculation of the amount of wages due and supervising payment to employees. In exchange for voluntary participation in the program, the WHD said it won't impose fines or any liquidated damages.

Pandya noted that the FLSA separately authorizes damages for back pay and liquidated damages; a plaintiff who successfully sues an employer is entitled to liquidated damages equal to the amount of back pay he or she receives. Hypothetically, an employee who is entitled to \$100 in back wages because of an employer's violations would also be entitled to another \$100 in liquidated damages if he or she were to win a lawsuit and the employer can't prove it had a good faith belief that it wasn't violating the law.

"If you are an employee and you participate in the DOL's PAID program, the idea is that you would be paid the unpaid wages that the employer owes you ... but as part of that, you would sign a release releasing any claims you would otherwise have to go to court to bring a lawsuit under the statute against the employer," Pandya said.

Robinson said that even though the FLSA allows for liquidated damages, the WHD as a rule doesn't seek such damages in every case it investigates, and that courts in FLSA cases have discretion over whether to award liquidated damages.

"The way I see this program as outlined is in keeping with [WHD] practices over time, and that has been that liquidated damages is not the norm, it's the exception," Robinson said. "If [the WHD] felt as if an employer should be assessed liquidated damages, they could not let them participate because they don't think they're the right candidate for this program."

### **Can a well-timed lawsuit end a PAID program proceeding?**

Under the PAID program, employers can't participate if they are already in litigation or are currently being investigated by the agency for wage theft and can't use the program to resolve the same potential violations multiple times, according to the DOL.

But Russell Bruch of Morgan Lewis & Bockius LLP said it is not yet apparent from the materials the DOL has released about the program what would happen if an employer reports a violation and, while it is still in the process of resolving it under the DOL's supervision, workers file a lawsuit.

"In terms of the timing, it's also unclear if you're in the audit program and say you voluntarily submitted this information to the Department of Labor ... and then you get a private lawsuit that comes in. Is there any way that it would be preempted if the [DOL] has jurisdiction over it?" Bruch said. "That's not clear and is something I'd want to see the Department of Labor address eventually."

### **Will employers want to let WHD look around?**

Being a voluntary program, employers will have to choose on their own accord to conduct self-audits and then go to the DOL with their findings if potential wage violations are found.

Meghaan Madriz of Haynes and Boone LLP said she would be surprised if the program ended up proving to be popular with employers given that they would essentially be inviting the federal government in for a look at their pay practices.

"Essentially, you're asking the DOL to come in and find a potential violation, and now you're on the DOL's radar that you essentially have [wage] violations," she said. "Generally speaking, companies don't like to self-report violations and have the government come knocking down your door. If possible, you try to resolve them, if you can, quietly."

Madriz pointed out that not all employers want to make a payment of back wages, and that many of them "instead take the gamble to see if employees are going to make a claim and, if so, handle when and if they arrive."

But Madriz said employers are likely to use the program in "narrowly tailored" situations in which they realize a violation has occurred, they commit to fixing it and go to the DOL to bless its calculation of the back wages the company believes it owes.

"A situation where an employer would want to basically open its doors to a government agency to come in and look at its practices would be in a very narrow situation where the employer has identified a FLSA

violation ... [and] has also made the decision that they want to go ahead and pay back wages to correct that problem," Madriz said.

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