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Testing, Testing: The U.S. Department of Labor is Testing a Wage and Hour Self-Reporting Program

On March 6, 2018, the U.S. Department of Labor (DOL) announced a new pilot program, the Payroll Audit Independent Determination (PAID) program. The PAID program encourages employers to self-report inadvertent overtime and minimum wage violations under the Fair Labor Standards Act (FLSA). According to the DOL, the program's primary objectives are to resolve such claims expeditiously and without litigation, to improve employers' compliance with overtime and minimum wage obligations, and to ensure that more employees receive the back wages they are owedfaster.

The estimated start date for the PAID program is April of 2018. Here is what we currently know about the parameters of this new program:

1) To participate, employers must first review the requisite information about the program and compliance assistance materials, all of which will be available on the DOLs website.

2) After the review, employers must audit their compensation practices for potentially noncompliant practices.

3) If an employer discovers any noncompliant practices, or if an employer believes its compensation practices may be lawful but wishes to proactively resolve any potential claims anyway, the employer must then:

- Specifically identify the potential violations;
- Identify which employees were affected;
- Identify the timeframes in which each employee was affected; and
- Calculate the amount of back wages the employer believes are owed to each employee.

4) After taking the above steps, the employer would contact the DOL to discuss a resolution of the matter at hand. The employer will be required to submit specific information to the DOL, including the calculations described above, a concise explanation of the scope of the potential violations, and employer certifications about the information and the corrections made by the employer.

5) The DOL will then assess the information provided by the employer, issue a summary of unpaid wages, and issue forms describing the settlement terms. Employers will pay all back wages to the employee by the end of the next full pay period.

Because this is a pilot program, we do not yet know how this program will actually impact employees and employers. While the PAID program provides incentives for employers to participate (avoiding potential liquidated damages, civil penalties, and attorneys fees), the programs actual and full impact on employers remains unknown. For instance, while the program provides for an employer to obtain a release of FLSA claims from participating employees in exchange for payment from the employer, it is not clear whether the DOL will allow that release to be extended to encompass other claims, such as those that would exist under state wage payment and collection laws. If the state laws are not released, the employer may still be subject to additional liability risks. Additionally, there could be risks associated with providing noncompliance data to the DOL should the employers actions not result in a final settlement for some reason. Therefore, we recommend that employers who believe they may be out of compliance with the FLSA consult with counsel before considering and deciding on participation in the PAID program.