Voluntary Correction Program (VCP) Equivalent to Fix Violations Under the Fair Labor Standards Act (FLSA)

The Internal Revenue Service has created an Employee Plans Compliance Resolution System (EPCRS) for correcting qualified plan (e.g., Defined Benefit and Defined Contribution) errors, including Self-Correction Program (SCP), Voluntary Correction Program (VCP), and the Audit Closing Agreement Program (Audit CAP), to expedite the resolution of fixing certain operating mistakes. These plans have been widely used and benefit employers (and employees) in creating an acceptable correction process. This started out in a very narrow fashion and then, ultimately, expanded into what exists today.

In a somewhat similar manner, the Wage and Hour Division (WHD) of the Department of Labor (DOL) has announced a new nationwide pilot program, the Payroll Audit Independent Determination (PAID) program, to facilitate the resolution of potential overtime and minimum wage issues under the FLSA. Like the mirror program, also created by the IRS, this program's primary objective is to resolve claims quickly, without litigation. The WHD will implement this pilot program nationwide and evaluate the effectiveness of the program after, approximately, six months.

Advantages and Disadvantages of Participation for Employers

- The only payment due is for all back wages, without additional payment of liquidated damages or civil monetary penalties.
- It is purely the employee's choice whether to accept the payment of back wages due, and employers are prohibited from retaliating against the employee for his or her choice.
- If the employee chooses to not accept the payment, the employee will not release any private right of action.
- If the employee chooses to accept the payment, the employee will *not* grant a broad release of all potential claims under the FLSA, as the releases are only tailored to the identified violations and time period for which the employer is paying the back wages.
- The WHD does not waive its right to conduct any future investigations of the employer.
- It appears that, once the WHD makes its assessment, an employer must accept the method and amount.
- It does not appear that making an anonymous filing (John Doe) will be accepted by the WHD during this pilot program. The benefit of a John Doe filing is to gauge the potential cost of a corrective action, in a non-binding manner.
- PAID does not resolve state issues related to pay, and several states have longer statutes of limitation than the FLSA. Therefore, employers will still be subject to state DOL compliance; that does not mean that an agreement couldn't be reached similar to the federal agreement.

This may be a valuable approach to correcting an FLSA defect for overtime and/or minimum wage violations, if the benefits are greater than the risks. We will continue to monitor these developments and provide additional updates.

Employers are encouraged to continue to evaluate their pay programs to insure compliance with a variety of federal and state regulations, including internal and external pay equity.

Please share your thoughts!

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