

# United States Senate

WASHINGTON, DC 20510

August 21, 2018

The Honorable R. Alexander Acosta  
Secretary  
U.S. Department of Labor  
200 Constitution Ave. NW  
Washington, DC 20210

Dear Secretary Acosta,

On March 6, 2018, the Department of Labor (“the Department”) announced the launch of the Payroll Audit Independent Determination (PAID) program, a new six-month pilot program that will grant employers that steal their employees’ wages immunity from fines and lawsuits if they self-report minimum wage and overtime violations.<sup>1</sup> We were and continue to be deeply concerned about this program’s potential to both divert scarce resources from much-needed enforcement of our nation’s wage and hour laws and to eliminate the deterrent effect of federal sanctions for wage theft and seriously harm workers being cheated by their employers—while inducing workers to waive their rights under federal and state law in order to be reimbursed for stolen wages. The pilot program has now been in effect for more than five months, and we write to request additional information on its goals, implementation, and effectiveness.

Wage theft—the withholding of compensation that employers owe their employees—is a serious problem in the United States, especially among low-wage workers. Wage theft can manifest in a variety of ways, including minimum wage and overtime violations or the failure to pay workers at all. By one estimate, wage theft costs workers more than \$50 billion a year, several times more than the cost of robberies, motor vehicle thefts, burglaries, and larcenies combined.<sup>2</sup> Wage theft disproportionately affects vulnerable low-wage workers—including women, people of color, and immigrants—and is prevalent in part because wage-and-hour laws are egregiously under-enforced.<sup>3</sup> Though states are supposed to be the primary enforcement agents of wage-and-hour laws, a recent POLITICO investigation revealed that six states do not have a single investigator to address minimum-wage violations, and an additional 26 states have fewer than 10. Even when authorities discover wage theft and require employers to pay their employees back, 41% of those wages—\$94 billion over the past decade—were never recovered

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<sup>1</sup>U.S. Department of Labor, “U.S. Department of Labor announces new program to expedite payment to American worker,” press release, March 6, 2018, <https://www.dol.gov/newsroom/releases/whd/whd20180306>.

<sup>2</sup> Economic Policy Institute, “An Epidemic of wage theft is costing workers hundreds of millions of dollars a year,” Brady Meixell and Ross Eisenbrey, September 11, 2014, <https://www.epi.org/files/2014/wage-theft.pdf>.

<sup>3</sup> Economic Policy Institute, “Employers steal billions from workers’ paychecks each year,” May 10, 2017, David Cooper and Teresa Kroeger, <https://www.epi.org/files/pdf/125116.pdf>.

by the workers who earned them.<sup>4</sup> On the federal level, the Department has fewer investigators than it did 70 years ago, even though the country today has seven times as many workers.<sup>5</sup>

The Department's Wage and Hour Division (WHD) has the mandate to protect workers from federal wage-and-hour violations by requiring employers that committed wage theft to pay their employees the wages that were stolen, along with interest on that money or liquidated, or "double," damages. For repeated and/or willful violations, WHD may additionally assess civil monetary penalties.<sup>6</sup> The Department has previously noted that "[p]enalties help deter violations...which result in safer, more productive workplaces."<sup>7</sup> We agree. The Department's enforcement powers exist not simply to penalize offenders, but to improve working conditions through deterrence. In fact, a 2010 report that has informed the Department's enforcement strategies and priorities<sup>8</sup> noted that "[i]f employers see the likelihood of investigation as unlikely and/or the penalties of not complying low, noncompliance will result."<sup>9</sup> The federal government and many state governments are not doing enough to deter wage theft, which is why, this year, 13 Senators called for increased funding for the Wage and Hour Division, and 20 Senators are cosponsoring legislation that would increase paystub transparency, increase penalties for wage theft, and improve other tools for preventing and rectifying these abuses.<sup>10</sup>

Under the previous administration, the Department appropriately eliminated a practice that allowed companies to self-report violations, return the stolen wages, and in turn avoid paying damages or penalties and secure employee waivers of private action.<sup>11</sup> Unfortunately, the PAID program appears to resurrect this practice and significantly weaken wage-and-hour enforcement, undermining the Department's ability to fully compensate workers, penalize offenders, and deter future violations. For employers who qualify and choose to participate and report their own violations of wage-and-hour laws under this program, WHD will issue settlement terms to each affected employee requiring only that employers pay federally mandated back wages (that is, the federal minimum wage and/or the relevant overtime premium), with no additional penalties. These agreements will allow employers to avoid paying any liquidated damages or interest to the affected employees, and let them avoid paying any civil monetary penalty. In other words, this program appears to allow employers to steal from their workers knowing that if they report their violations before they get caught, they will owe no penalty as a result of their misdeeds.

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<sup>4</sup> Politico, "Behind the minimum wage fight, a sweeping failure to enforce the law," Marianne Levine, February 2, 2018, <https://www.politico.com/story/2018/02/18/minimum-wage-not-enforced-investigation-409644>.

<sup>5</sup> *Id.*

<sup>6</sup> U.S. Department of Labor Wage and Hour Division, Fact Sheet #44: Visits to Employers," <https://www.dol.gov/whd/regs/compliance/whdfs44.htm>.

<sup>7</sup> U.S. Department of Labor Wage and Hour Division, "Civil Money Penalty Inflation Adjustments," <https://www.dol.gov/whd/resources/cmp.htm>.

<sup>8</sup> U.S. Department of Labor, "FY 2017 Congressional Budget Justification Wage and Hour Division," p. 13, <https://www.dol.gov/sites/default/files/documents/general/budget/CBJ-2017-V2-09.pdf>.

<sup>9</sup> Boston University, "Improving Workplace Conditions Through Strategic Enforcement: A Report to the Wage and Hour Division," David Weil, May 2010, p. 49, <https://www.dol.gov/whd/resources/strategicEnforcement.pdf>.

<sup>10</sup> Wage Theft Prevention and Wage Recovery Act, S. 1652, <https://www.congress.gov/bills/115th-congress/senate-bill/1652>.

<sup>11</sup> Bloomberg News, "Labor Secretary Invites Businesses to Self-Report Wage Violations (1)," Ben Penn, March 6, 2018, <https://www.bna.com/labor-secretary-invites-n57982089527/>.

While we share the Department's goal of "help[ing] employees receive their overtime and minimum wages as quickly as possible,"<sup>12</sup> the PAID program appears to allow employers to avoid consequences for serious abuses of workers' rights and to undercompensate workers.

While WHD has indicated some limits on program eligibility (e.g., firms that have been found guilty of wage and hour violations in the past five years or are under litigation or investigation for such violations might not qualify),<sup>13</sup> there appear to be few other limits on participation. And while WHD has indicated in public statements that the Department "wants to work with good faith employers through the PAID program to resolve inadvertent violations of FLSA minimum wage and overtime requirements,"<sup>14</sup> there is no specific description of how the Department will distinguish "good faith employers" or "inadvertent violations" in administering the program,<sup>15</sup> meaning that for many employers, wage-and-hour laws' deterrent effects could be eliminated—a proposal that defies common sense.

The door therefore appears to be wide open for abuse, allowing employers to avoid paying interest or liquidated damages for wage theft and eliminating any deterrent effect that wage-and-hour laws have for employers that steal from workers, no matter the scale of the employers' theft. Illegally delaying or withholding wages from workers is wrong and unfair; for many low-wage workers living paycheck-to-paycheck, it can be devastating.

Furthermore, because employers participating in the PAID program could mislead employees to forgo their rights to seek further relief under local and state law, this program appears to interfere with state-level wage-and-hour enforcement. It contains no requirement that participating employers comply with more stringent state or local standards and the Department has not stated that, as part of PAID, it will inform workers in states with higher minimum wages that they are entitled to the higher minimum wage and could file a complaint with their state enforcement agency, prompting 11 state attorneys general to write to the Department expressing concern that "there is a significant danger that employers will abuse the PAID Program to pressure employees to broadly waive their rights under state labor laws ... [and] mislead employees into believing that they have no further legal recourse."<sup>16</sup>

This program has the potential to undermine many of WHD's cases, which have resulted in employers paying millions of dollars in liquidated damages and penalties after they were caught stealing wages. For example, a 2017 WHD case forced a manufacturing company to pay more than \$358,000 in back pay and an equal amount in liquidated damages for failing to meet federal wage standards.<sup>17</sup> In another, an owner of two Philadelphia restaurants agreed to pay over \$400,000 in back wages and an equal amount in liquidated damages, in addition to a \$10,000

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<sup>12</sup> U.S. Department of Labor, "Wage and Hour Division (WHD)," <https://www.dol.gov/whd/paid/paid-faq.htm>.

<sup>13</sup> U.S. Department of Labor, "Wage and Hour Division (WHD)," <https://www.dol.gov/whd/paid/paid-faq.htm>.

<sup>14</sup> U.S. Department of Labor Wage and Hour Division, "Questions and Answers About the PAID Program," <https://www.dol.gov/whd/paid/paid-faq.htm>.

<sup>15</sup> U.S. Department of Labor Wage and Hour Division "PAID Program," <https://www.dol.gov/whd/paid/>.

<sup>16</sup> Letter from 11 state Attorneys General to DOL Secretary Acosta, April 11, 2018, [https://ag.ny.gov/sites/default/files/program\\_multistate\\_letter\\_to\\_acosta.pdf](https://ag.ny.gov/sites/default/files/program_multistate_letter_to_acosta.pdf).

<sup>17</sup> U.S. Department of Labor, "Boise Manufacturer reaches agreement with US Labor Department on FLSA violations; agrees to pay \$717K in back wages, damages," press release, June 26, 2017, <https://www.dol.gov/newsroom/releases/whd/whd20170626-0>.

civil money penalty, for FLSA violations.<sup>18</sup> If these businesses qualified for the PAID program, they would only be required to pay what they should have initially paid their employees, and the additional damages and penalties would be eliminated.

While the Department has described this program as providing an opportunity for employers to correct non-compliant practices and return back pay to workers, the penalties that this program eliminates exist to ensure employers pay their workers correctly in the first place. The PAID program fails to hold them accountable for their unethical and illegal behavior. Letting violators off the hook for wage theft penalties tilts the economic playing field even further against workers and in favor of unethical corporations that break the law.

As the PAID program is a pilot, we fully expect the Department to stop the program at the conclusion of its six-month pilot period and perform a full assessment before deciding whether to continue it in some form. In order to address these concerns and gain a better understanding of the ongoing impacts of the PAID program, however, we ask that you provide answers to the following questions on September 6, 2018, and then again, within two weeks of the completion of the program:

1. How many WHD enforcement actions over the past five fiscal years required employers to pay liquidated damages or civil monetary penalties?
  - a. How much did WHD recover in liquidated damages for the past five fiscal years? How much of those damages were for overtime or minimum wage violations under the FLSA?
  - b. How much did WHD recover in interest on back wages for the past five fiscal years?
  - c. How much did WHD recover in civil monetary penalties for the past five fiscal years? How much of those penalties were for overtime or minimum wage violations under the FLSA?
2. How many employers submitted applications to participate in the PAID program?
3. How many employers were accepted to participate in the program?
4. How many were rejected from participating? For what reasons were those employers rejected?
5. How many investigations were closed through the PAID program? How many of those were solely minimum wage cases? How many were overtime?
6. How many of the closed cases were in states with a minimum wage higher than the federal minimum wage? What was the amount of back wages recovered for

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<sup>18</sup> U.S. Department of Labor, "Philadelphia restaurants to pay employees nearly \$830,000 to resolve federal wage violations," press release, November 28, 2017, <https://www.dol.gov/newsroom/releases/whd/whd20171128>.

those workers? What would the back wages owed have been if the state minimum wage was recovered for those individuals?

7. How many employees waived their rights to seek further relief under the PAID program? Were employees instructed, or will they be instructed, to consult counsel before accepting any settlement?
8. What is the mean and median number of employees who have received back wages and waived their rights to seek further relief for each individual employer accepted into the program?
9. How much money, in unpaid wages, did employees receive under the PAID program? How many employees received those payments?
10. What is the mean and median number of days that it has taken to conduct audits and resolve violations, including the back payment of wages, under the PAID program?
11. What is WHD doing to ensure that employers do not apply to participate in the PAID program merely as a means to forestall WHD enforcement that they believe may be forthcoming anyway? In other words, what is WHD doing to ensure that employers who apply to participate in the program are acting in "good faith"?
12. When an employee receiving unpaid wages waives his or her rights to seek further relief from an employer participating in the PAID program, will he or she also be waiving his or rights to recover relief under state or local law? If not, what will WHD do to prevent employers from requiring employees to also waive their rights under state and local law as a purported requirement to receive unpaid wages under the PAID program?
13. How is the Department informing workers of the potential impact of waiving their rights under state and federal law? If employees are not required to waive their rights under state and federal law, what is WHD doing to inform them that they may seek relief under state and local law (whether or not their employer is participating in the PAID program)?
14. Did WHD allow PAID program participation by employers that were under investigation by a state or local labor enforcement agency but did not have specific knowledge of complaints against them? If not, how did WHD know to exclude such employers from the program?
15. How does the Department plan to assess the efficacy of the PAID program? Please provide a detailed description of the types of data and outcomes that DOL will use to determine whether the PAID program pilot is successful.

16. What aspects of the current WHD enforcement regime led the Department to believe that the PAID program may improve it? To what extent do those aspects relate to a lack of resources? To what extent do they relate to limitations found in wage-and-hour statutes? Please explain in detail.
17. Did the Department establish a specific date of completion for the program beyond the six-month estimation noted in the announcement of the program?<sup>19</sup> If so, what was that date?
18. Will the Department pause the program at the end of the six-month period in order to conduct the evaluation? If not, what is the rationale for continuing the pilot program absent a full evaluation?
19. Did you or any other DOL official have any discussion about the program, before or after its commencement, with any individuals or groups outside of the Department? If so, please identify all such conversations, the date on which they occurred, and the nature of the conversation.
20. Please provide copies of all email or other communications between any DOL officials and any individuals or groups outside of the Department related to the creation and implementation of the PAID program.

Sincerely,

  
Elizabeth Warren  
United States Senator

  
Sherrod Brown  
United States Senator

  
Kirsten Gillibrand  
United States Senator

  
Chris Van Hollen  
United States Senator

  
Tammy Baldwin  
United States Senator

<sup>19</sup> U.S. Department of Labor, "U.S. Department of labor announces new program to expedite payment to American workers," press release, March 6, 2018, <https://www.dol.gov/newsroom/releases/whd/whd20180306>.