

118TH CONGRESS
1ST SESSION

S. 122

To establish the Payroll Audit Independent Determination program in the Department of Labor.

IN THE SENATE OF THE UNITED STATES

JANUARY 26, 2023

Mr. BRAUN introduced the following bill; which was read twice and referred to the Committee on Health, Education, Labor, and Pensions

A BILL

To establish the Payroll Audit Independent Determination program in the Department of Labor.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Ensuring Workers Get
5 PAID Act of 2023”.

6 **SEC. 2. FINDINGS.**

7 Congress finds the following:

8 (1) In 2018, the Department of Labor launched
9 the nationwide Payroll Audit Independent Deter-

1 mination pilot program (referred to in this section as
2 “PAID pilot program”).

3 (2) The Secretary of Labor, acting through the
4 Administrator of the Wage and Hour Division, es-
5 tablished the PAID pilot program to complement en-
6 forcement and compliance assistance tools under-
7 taken by the Wage and Hour Division of the De-
8 partment of Labor.

9 (3) The Secretary has a longstanding practice
10 of providing self-audit and office audit programs, as
11 noted by Secretary Marty Walsh in a response for
12 the record following a hearing before the Committee
13 on Education and Labor of the House of Represent-
14 atives on June 9, 2021.

15 (4) The Wage and Hour Division, through the
16 PAID pilot program, worked with employers on a
17 voluntary basis to remedy unintentional violations of
18 the Fair Labor Standards Act of 1938 (29 U.S.C.
19 201 et seq.), which is the Federal statute estab-
20 lishing minimum wage, overtime pay, recordkeeping,
21 and youth-employment requirements affecting em-
22 ployees in the private sector and in Federal, State,
23 and local governments.

24 (5) The PAID pilot program yielded positive re-
25 sults for employers and employees. Between April 1,

1 2018, and September 15, 2019, the Wage and Hour
2 Division concluded 74 PAID pilot program cases,
3 representing less than one percent of all compliance
4 actions under the Fair Labor Standards Act of
5 1938, with a total of \$4,131,238 in back wages paid
6 to 7,429 employees through such PAID pilot pro-
7 gram cases.

8 (6) Self-audits through the PAID pilot program
9 by employers returned more back wages to employ-
10 ees in less time than compliance actions overall. In
11 fact, during the period described in paragraph (5)—

12 (A) the average back wages paid per case
13 for PAID pilot program cases (\$55,828) were
14 more than 4 times the average back wages paid
15 per compliance action (\$11,355);

16 (B) the average back wages paid per en-
17 forcement hour for PAID pilot program cases
18 (\$2,864) was more than 10 times greater than
19 the average back wages paid per enforcement
20 hour for compliance actions (\$279);

21 (C) on average, nearly 10 times more em-
22 ployees received back wages in each PAID pilot
23 program case than in investigations conducted
24 using traditional methods;

1 (D) self-audits through the PAID pilot
2 program averaged 19 hours per case as com-
3 pared to 41 hours per case for the Secretary
4 conducted using traditional methods; and

5 (E) self-audits through the PAID pilot
6 program reached employers that the Wage and
7 Hour Division would not typically prioritize for
8 enforcement, including government establish-
9 ments and industry sectors with higher wage
10 occupations.

11 **SEC. 3. DEFINITIONS.**

12 In this Act:

13 (1) **AFFECTED EMPLOYEE.**—The term “af-
14 fected employee” means an employee affected by a
15 violation of a minimum wage or overtime hours re-
16 quirement of the Fair Labor Standards Act of 1938
17 (29 U.S.C. 201 et seq.), excluding any employee
18 subject to prevailing wage requirements under the
19 H–1B, H–2B, or H–2A visa programs, subchapter
20 IV of chapter 31 of title 40, United States Code
21 (commonly referred to as the “Davis-Bacon Act”),
22 or chapter 67 of title 41, United States Code (com-
23 monly known as the “Service Contract Act”).

1 (2) ADMINISTRATOR.—The term “Adminis-
2 trator” means the Administrator of the Wage and
3 Hour Division of the Department of Labor.

4 (3) EMPLOYEE.—The term “employee”—

5 (A) has the meaning given such term in
6 section 3 of the Fair Labor Standards Act of
7 1938 (29 U.S.C. 203); and

8 (B) with respect to an employer, includes
9 a former employee of such employer.

10 (4) EMPLOYER.—The term “employer” has the
11 meaning given such term in section 3 of such Act.

12 (5) GOOD FAITH.—The term “good faith”
13 means, with respect to an employer applying for par-
14 ticipation in the Payroll Audit Independent Deter-
15 mination program established under section 4, that
16 such employer is not, at the time such employer sub-
17 mits an application for such program—

18 (A) under investigation by the Secretary
19 for an alleged violation of a minimum wage or
20 overtime hours requirement of the Fair Labor
21 Standards Act of 1938 (29 U.S.C. 201 et seq.);
22 or

23 (B) subject to a lawsuit related to an al-
24 leged violation of such a requirement.

1 (6) SECRETARY.—The term “Secretary” means
2 the Secretary of Labor.

3 (7) SELF-AUDIT.—The term “self-audit” means
4 an audit conducted by an employer to resolve inaccuracies by the employer in the computation of
5 wages and overtime compensation required under
6 the Fair Labor Standards Act of 1938 within the
7 statute of limitations described in section 6(a) of the
8 Portal-to-Portal Act of 1947 (29 U.S.C. 255(a)).
9

10 **SEC. 4. PAYROLL AUDIT INDEPENDENT DETERMINATION**
11 **PROGRAM.**

12 (a) PROGRAM ESTABLISHMENT.—The Administrator
13 shall establish a Payroll Audit Independent Determination
14 program (referred to in this section as the “program”)
15 to foster collaboration with employers that inadvertently
16 violate the Fair Labor Standards Act of 1938 (29 U.S.C.
17 201 et seq.) to voluntarily remedy, within the statute of
18 limitations described in section 6(a) of the Portal-to-Portal
19 Act of 1947 (29 U.S.C. 255(a)), unpaid minimum
20 wages or overtime compensation owed to any affected em-
21 ployee under the Fair Labor Standards Act of 1938.

22 (b) APPLICATION REQUIREMENTS.—

23 (1) RESOURCES FOR COMPLIANCE ASSIST-
24 ANCE.—Not later than 30 days after the date of en-
25 actment of this Act, the Administrator shall make

1 available to employers resources for assistance in
2 complying with the Fair Labor Standards Act of
3 1938, including content regarding wage and hour re-
4 quirements, which shall be offered online, through
5 printed materials, and through other outreach activi-
6 ties.

7 (2) APPLICATION.—An employer seeking to
8 participate in the program shall submit an applica-
9 tion to the Administrator that includes—

10 (A) materials related to and the results of
11 a self-audit, including—

12 (i) an identification of any practice of
13 such employer identified in a self-audit
14 that may violate a minimum wage or over-
15 time compensation requirement of the Fair
16 Labor Standards Act of 1938; and

17 (ii) a list of each employee who may
18 be an affected employee with respect to
19 such violation, including—

20 (I) the period of time such em-
21 ployee would have been affected by
22 such violation;

23 (II) payroll records related to
24 such employee for such period with in-

1 formation on the hours of work per-
2 formed by such employee;

3 (III) calculations of unpaid min-
4 imum wages or overtime compensation
5 owed to such employee under the Fair
6 Labor Standards Act of 1938 with a
7 description of the methodology of such
8 calculation and supporting evidence;
9 and

10 (IV) contact information for such
11 employee;

12 (B) an explanation of the scope of poten-
13 tial violations of a minimum wage or overtime
14 compensation requirement of such Act for inclu-
15 sion in a release of claims under subsection (d);

16 (C) an assurance that any practice of such
17 employer that violates a minimum wage or over-
18 time compensation requirement of the Fair
19 Labor Standards Act of 1938 that is identified
20 in the self-audit has been corrected to comply
21 with such Act;

22 (D) an assurance that such employer has,
23 prior to submitting such application, reviewed
24 the compliance assistance resources made avail-

1 able under paragraph (1) and all program in-
2 formation, terms, and requirements;

3 (E) an assurance that, on the date of sub-
4 mission of such application, such employer—

5 (i) is not involved in any litigation re-
6 garding any practice of such employer that
7 is identified in the self-audit; and

8 (ii) has not received any communica-
9 tions from an employee or a representative
10 of an employee seeking to litigate or settle
11 claims related to any such practice; and

12 (F) an assurance that no employee listed
13 in subparagraph (A)(ii) is subject to a pre-
14 vailing wage requirement under the H-1B, H-
15 2B, or H-2A visa programs, subchapter IV of
16 chapter 31 of title 40, United States Code
17 (commonly referred to as the “Davis-Bacon
18 Act”), or chapter 67 of title 41, United States
19 Code (commonly known as the “Service Con-
20 tract Act”).

21 (c) APPLICATION REVIEW AND APPROVAL.—

22 (1) REVIEW AND AMENDMENT.—The Adminis-
23 trator shall review each application submitted by an
24 employer under subsection (b)(2). As part of such
25 review, the Administrator shall—

1 (A) as necessary, consult with such em-
2 ployer regarding—

3 (i) the self-audit and supporting mate-
4 rials submitted in the application; and

5 (ii) the process for approval of such
6 application and settlement of unpaid min-
7 imum wages or overtime compensation
8 owed to any affected employee under the
9 Fair Labor Standards Act of 1938 (29
10 U.S.C. 201 et seq.);

11 (B) inform such employer in a timely man-
12 ner and prior to a determination on the ap-
13 proval of the application if additional informa-
14 tion is needed to assess the unpaid minimum
15 wages or overtime compensation owed to any
16 affected employee for the violations of such Act
17 identified in the application through the self-
18 audit; and

19 (C) provide such employer an opportunity
20 to amend such application to revise the scope of
21 the practices of such employer that violate a
22 minimum wage or overtime compensation re-
23 quirement of the Fair Labor Standards Act of
24 1938 that are identified in the application
25 through self-audit, to update the list of affected

1 employees with respect to the practices at issue
2 in the self-audit, and to update the calculations
3 of unpaid minimum wages or overtime com-
4 pensation owed to any affected employee as a
5 result of such violations.

6 (2) APPROVAL.—

7 (A) IN GENERAL.—If the conditions under
8 subparagraph (B) are satisfied with respect to
9 an application submitted under subsection
10 (b)(2), the Administrator shall—

11 (i) approve the application—

12 (I) in the case the application
13 has not been amended under para-
14 graph (1)(C), not later than 30 days
15 after such submission; or

16 (II) in the case the application
17 has been amended under paragraph
18 (1)(C), not later than 30 days after
19 the date of submission of such amend-
20 ed application; and

21 (ii) supervise the settlement under
22 subsection (d), including the payment of
23 any unpaid minimum wages or overtime
24 compensation under the Fair Labor Stand-

1 ards Act of 1938 (29 U.S.C. 201 et seq.)
2 required through such settlement.

3 (B) CONDITIONS FOR APPROVAL.—An ap-
4 plication submitted under subsection (b)(2)
5 shall be approved under subparagraph (A) if—

6 (i) within the scope of the violations
7 identified by the employer through the ap-
8 plication or an amendment to the applica-
9 tion under paragraph (1)(C), the Adminis-
10 trator verifies that the self-audit and cal-
11 culation of unpaid minimum wages or over-
12 time compensation owed to any affected
13 employee under the Fair Labor Standards
14 Act of 1938 submitted in such application
15 or amendment are accurate; and

16 (ii) the employer submitting the appli-
17 cation—

18 (I) is determined to be acting in
19 good faith regarding violations of the
20 Fair Labor Standards Act of 1938
21 identified in such application or
22 amendment;

23 (II) has not been found by the
24 Administrator or any court of law to
25 have violated a minimum wage or

1 overtime compensation requirement of
2 such Act during the 5 years imme-
3 diately preceding submission of such
4 application; and

5 (III) has not been approved for
6 participation in the program prior to
7 the submission of such application,
8 unless—

9 (aa) such participation was
10 for a distinct violation of the
11 Fair Labor Standards Act of
12 1938 than the practice identified
13 in the self-audit under subsection
14 (b)(2); and

15 (bb) such employer has sub-
16 mitted the necessary materials
17 for the Administrator to verify
18 that such employer is not engag-
19 ing in the practice addressed by
20 the previous participation of the
21 employer in the program.

22 (d) SETTLEMENT.—

23 (1) IN GENERAL.—For each employer that sub-
24 mits an application under subsection (b)(2) that is

1 approved under subsection (c)(2), the Administrator
2 shall—

3 (A) provide to the employer a description
4 of the scope of the potential release of claims
5 for violations of minimum wage or overtime
6 compensation requirements of the Fair Labor
7 Standards Act of 1938 (29 U.S.C. 201 et seq.)
8 and a summary of any unpaid minimum wages
9 or overtime compensation owed to each affected
10 employee under such Act for such violations;
11 and

12 (B) issue a release form to each affected
13 employee of such employer that describes the
14 settlement terms, which shall include a written
15 explanation of—

16 (i) the waiver under paragraph
17 (2)(B); and

18 (ii) the right of the affected employee
19 receiving the offer for settlement to decline
20 the offer for settlement and preserve any
21 private right of action of the employee to
22 recover any unpaid minimum wages or
23 overtime compensation owed to the em-
24 ployee under the Fair Labor Standards
25 Act of 1938 as a result of such violations.

1 (2) ACCEPTANCE OF SETTLEMENT.—

2 (A) IN GENERAL.—An affected employee
3 offered a settlement through a release form
4 under paragraph (1)(B) may accept or decline
5 the offer.

6 (B) WAIVER OF PRIVATE RIGHT OF AC-
7 TION.—The acceptance by an affected employee
8 of an offer of settlement under subparagraph
9 (A) shall, upon payment in full of any amounts
10 owed to the employee under the settlement, con-
11 stitute a waiver by such employee of any right
12 such employee may have under section 16 of
13 the Fair Labor Standards Act of 1938 (29
14 U.S.C. 216) to a private right of action to re-
15 cover unpaid minimum wages or overtime com-
16 pensation, including any liquidated damages,
17 for the violations addressed by the settlement.

18 (3) PAYMENT OF SETTLEMENT.—For each af-
19 fected employee that accepts a settlement through a
20 release form under paragraph (1)(B), the employer
21 shall—

22 (A) pay such employee the full amount of
23 unpaid minimum wages or overtime compensa-
24 tion owed to such employee under the Fair
25 Labor Standards Act of 1938 (29 U.S.C. 201

1 et seq.) for the violations addressed in the set-
2 tlement; and

3 (B) submit proof of payment of such full
4 amount to the Administrator.

5 (e) ADDITIONAL REQUIREMENTS.—

6 (1) DENIALS.—In the case of an application
7 submitted by an employer under subsection (b)(2)
8 and not approved under subsection (c)(2), the Ad-
9 ministrator may not—

10 (A) use information submitted in the appli-
11 cation in an investigation against the employer;

12 (B) use the fact such employer applied to
13 the program as a basis for any future investiga-
14 tion, except in a case in which the Adminis-
15 trator has reason to believe that the health and
16 safety of an employee is at risk due to an al-
17 leged violation related to a requirement en-
18 forced by the Secretary involving child labor,
19 agricultural worker protections, or housing or
20 transportation requirements under the H-2A or
21 H-2B visa programs; or

22 (C) communicate to any affected employee
23 of such employer in response to receipt of such
24 application to notify such employee of the pri-
25 vate right of action of such employee to resolve

1 potential violations of the Fair Labor Standards
2 Act of 1938 (29 U.S.C. 201 et seq.), particu-
3 larly with respect to the wage practices at issue
4 in the self-audit.

5 (2) EXPANSION OF SCOPE.—The Administrator
6 may not expand the scope of the violations to be in-
7 vestigated or settled through an employer’s partici-
8 pation in the program beyond the violations identi-
9 fied by the employer in the application submitted by
10 the employer under subsection (b)(2) or the amend-
11 ed application submitted by the employer under sub-
12 section (c)(1)(C).

13 (3) NO PAYMENTS REQUIRED.—The Adminis-
14 trator may not require any form of payment by an
15 employer to apply, qualify, or participate in the pro-
16 gram.

17 (4) EXEMPTION FROM DISCOVERY.—Any infor-
18 mation submitted in an application to the program
19 under subsection (b)(2), or an amendment to such
20 application under subsection (c)(1)(C), may not be
21 subject to discovery in a Federal or State court pro-
22 ceeding without the consent of the employer that
23 submitted the application.

24 (f) RETALIATION.—Section 15(a)(3) of the Fair
25 Labor Standards Act of 1938 (29 U.S.C. 215(a)(3)) is

1 amended by inserting before the semicolon the following:
2 “, or has accepted or declined to accept an offer for settle-
3 ment under section 4(d) of the Ensuring Workers Get
4 PAID Act of 2023”.

○