Department Of Labor Clarifies Reimbursement for Delivery Drivers

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Across the country, numerous class and collective actions have been filed against food delivery companies, especially pizza restaurants, by drivers claiming they are not paid enough for delivery-related expenses. The drivers' claims all revolve around the assertion they were not adequately reimbursed because they were not paid either their actual expenses or at the IRS business standard mileage rate. As a result, they contend they were not paid the minimum wage. On August 31, 2020, the U.S. Department of Labor (DOL) issued an Opinion Letter stating that delivery drivers do ***not*** have to be reimbursed at the IRS standard rate.

The FLSA's requirements for reimbursing employees

The Fair Labor Standards Act (FLSA) requires employers to pay nonexempt employees no less than the federal minimum hourly wage for all non-overtime hours actually worked in a given workweek. The cost an employee incurs for tools (for delivery drivers, this includes their vehicles), uniforms, or equipment required to perform his or her work cannot bring the employee's wages below the minimum wage. Therefore, employers must reimburse employees for business-related expenses to the extent those expenses would do so.

However, nothing in the FLSA or its regulations expressly requires that mileage expenses be reimbursed at the IRS mileage rate. Throughout these lawsuits, the source plaintiffs cite for their argument appears in the DOL's internal agency handbook for its investigators, the "Field Operations Handbook" (FOH). The FOH states that, "as an enforcement policy, the IRS standard business mileage rate found in IRS Publication 917, 'Business Use of a Car' may be used (in lieu of actual costs and associated recordkeeping) to determine or evaluate the employer's wage payment practices for FLSA purposes." Some courts have adopted plaintiffs' arguments and held that the FOH requires that employers choose between reimbursing delivery drivers' actual expenses or reimbursing at the IRS standard rate.

In the Opinion Letter, the DOL made clear its view that "the FOH does not establish a binding legal standard on the public and is not a device for establishing interpretive policy." The Opinion Letter, however, is not binding on the courts. Courts may find the Opinion Letter to be persuasive and adopt its reasoning and conclusions. On the other hand, it is possible that a court would disregard the DOL's reasoning and conclusions and continue to apply the language in the FOH. It is also possible that a court would review the applicable regulations and determine on its own that reimbursement at the IRS standard rate is "reasonable" and, therefore, required by the regulations.

Employers may reimburse a "reasonable approximation" of employee expenses

The DOL confirmed that "the plain language of [the] regulations permits employers to reimburse a reasonable approximation of expenses incurred for the employer's benefit rather than the actual amount of expenses incurred." An employer may use "any appropriate methodology" in order to do so. A reasonable approximation is important because "precise calculations may not be practical, or even possible, depending on the nature of the expense. For example, it may not be possible to calculate exact depreciation, fuel usage, etc., with precision – at least not without extraordinary effort – particularly with mixed [personal and business] usage." The DOL confirmed that nothing in the regulations require an employer to track the employee's actual expenses.

Employers may use the IRS business standard mileage rate, but are not required to do so

Next, the DOL confirmed that "the plain language of the regulations also allows employers to reasonably approximate an employee's expenses through methods other than the IRS business standard mileage rate —a rate that is itself only an approximation of the expenses incurred to operate a vehicle." The DOL explained that "a regulation that explicitly allows employers to approximate expenses at a rate *lower* than the IRS standard rate cannot be read to require employers to use the IRS rate." Therefore, the IRS rate is optional, not required.

Employee's fixed expenses are reimbursed if incurred primarily for the employer's benefit

Finally, the DOL also clarified the extent to which an employee's fixed and variable expenses must be reimbursed. For delivery drivers, a fixed expense is one that must be paid whether or not the vehicle was used to make delivery, like a vehicle registration fee. Variable expenses, on the other hand, would be the cost of gas used to make deliveries. The DOL explains that "generally, employers must reimburse expenses an employee incurs on its behalf or that an employee is required to expend primarily for the employer's convenience. It need not reimburse expenses normally incurred by the employee for his or her own benefit." This means, "when the employee's vehicle is not solely a tool of the trade, employers would be required to reimburse only the variable expenses attributable to the employee's use of the vehicle for the employer." For example, If an employee drives an extra 250 miles making work-related deliveries, the gasoline, maintenance, and depreciation costs attributable to those 250 miles are incurred primarily for the employer's benefit rather than for the employee's own benefit, and so must be reimbursed.

Conclusion

The Opinion Letter "is an official interpretation of the governing statutes and regulations by the Administrator of the WHD for purposes of the Portal-to-Portal Act." Because the Opinion Letter is an official interpretation, an employer may rely upon it as a defense to liability for FLSA claims premised on failure to properly reimburse employee expenses. However, the court would ultimately decide the parameters of any such defense. Contact your Vorys lawyer if you have questions about how this Opinion Letter applies to your business operations or about wage-hour compliance in general.