# Delivery Drivers Do Not Need to Be Reimbursed at the IRS Mileage Rate, per DOL Opinion

Insights
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The U.S. Department of Labor, Wage and Hour Division (DOL) issued an Opinion Letter on August 31 concluding that, under the Fair Labor Standards Act (FLSA) and its implementing regulations, employers are permitted to reimburse employees who use their personal vehicle for work at a "reasonable approximation of actual expenses incurred." This means that employers do *not* need to reimburse employees at the IRS mileage rate to meet their obligations under federal wage and hour laws. Given the surge of deliveries of all types of goods in 2020 and the abundance of litigation alleging under-reimbursement of driving expenses, this significant Opinion Letter provides guidance for companies reimbursing their employees for the use of personal vehicles.

## FLSA Requirements

The FLSA requires that non-exempt employees be paid minimum wage for all non-overtime hours worked in a given workweek. These wages must be provided "free and clear" of any deductions that would reduce pay below the federal minimum wage, such as the costs incurred that are primarily for the benefit of the employer. When employees are required to use their own vehicle for deliveries, an employer may violate the FLSA if the unreimbursed associated costs (such as gas) reduce the employee's wages below minimum wage.

## Recent Litigation

Over the last several years, there has been an influx of litigation, predominately in the pizza delivery driver context, on the issue of the proper method of reimbursing vehicle expenses. In these lawsuits, delivery drivers frequently assert class and collective action claims alleging that because they were not reimbursed at the IRS mileage rate, their wages were reduced below minimum wage. Fisher Phillips has extensive experience defending against these class and collective action claims. In these cases, the drivers were typically reimbursed based on reasonable approximation of the drivers' expenses, usually based on factors such as fluctuating gas prices and other geography-specific considerations. Some employers utilized a third-party consultant to determine a reasonable approximation of expenses for reimbursement purposes.

There is a split among the federal District Courts as to what method of reimbursement for vehicle expenses is necessary for employers to comply with their obligations under the FLSA. Most federal courts have concluded that employers are not required to reimburse at the IRS rate and that a reasonable approximation of expenses is permissible under the FLSA. However, a couple of courts

have concluded that employers must either reimburse the driver's actual total costs or at the IRS rate, relying on the DOL's Field Operations Handbook.

**Opinion Letter's Conclusions**

Without endorsing any specific method of reimbursement, the DOL confirmed that federal law permits reimbursement of a reasonable approximation of employee's vehicle and driving expenses. In reaching this conclusion, the DOL explained: "[o]ne reason a reasonable approximation may be important is that 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 [business and personal] usage."

The DOL also explained how reimbursing a reasonable approximation of costs is supported by the FLSA's recordkeeping requirements concerning deductions. Employers are required to keep a record of "the dates, amounts, and nature of the items" that make up additions or deductions from wages. Employers are also required to keep records that were used to determine "the original cost, operating and maintenance cost, and depreciation and interest charges" if those costs are involved in the additions or deductions. However, there is no requirement to keep track of employees' actual expenses, as it is the employee, and not the employer, who has control over this record.

The Opinion Letter further explains that the IRS business standard mileage is optional because the plain language of the regulations permits employers to reasonably approximate an employee's expenses through methods other than the IRS rate. "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." The DOL dismissed the argument that the Field Operations Handbook holds otherwise, explaining that it is merely an "operations manual" for DOL investigators and staff and neither "establish[es] a binding legal standard on the public" nor is a "device for establishing interpretive policy." According to the DOL, courts that relied solely upon the Field Operations Handbook to require reimbursement at the IRS rate ignored the applicable regulations.

Finally, the DOL clarified the extent to which fixed and variable expenses must be reimbursed. In the delivery driver context, a fixed expense would be vehicle registration fees – the delivery driver must pay such fees regardless of whether the vehicle was also used to make deliveries. A variable expense would be the cost of gas in relation to miles driven making deliveries. Employers are only required to reimburse for such expenses incurred on the employer's behalf or for the employer's convenience.

While employers are required to reimburse variable expenses attributable to the employee's use of the vehicle for the employer, employers are not required to reimburse costs normally incurred by the employee for his own benefit. Therefore, the DOL concluded that "reimbursement would include only costs that vary with the amount the employee uses or distance the employee drives the car. These costs might include, for instance, the cost of gasoline; the cost of periodic maintenance, such

as oil changes and tire rotations and replacement; and the depreciation of the vehicle's value attributable to the employee's trips." However, employers "are expected to reimburse employees for fixed vehicle expenses only to the extent the employee uses the vehicle as a tool of the trade, i.e., primarily for the benefit of his or her employer."

**Practical Implications**

By asserting that employers may use the reasonable approximation method to reimburse vehicle expenses and concluding that employers are not required to reimburse expenses at the IRS business mileage rate, the DOL has answered a pivotal question facing employers. While the Opinion Letter is not binding on courts or arbitrators, it is highly persuasive authority that will likely be relied upon by judges presented with mileage reimbursement litigation.

The implications of this Opinion Letter extend far beyond litigation and will shape the reimbursement practices of employers, both of traditional delivery drivers and in other emerging delivery services. Due to the COVID-19 pandemic, deliveries of goods and services are on the rise as the population is quarantining, social distancing, and avoiding shopping in stores. Businesses that did not offer or regularly provide delivery services, like retail stores and pharmacies, have commenced or increased their delivery services. These businesses must now reconsider the appropriate means to reimburse employees for the expenses incurred in delivering goods with their personal vehicles. While the IRS rate may be an easy reimbursement tool, it is now clear that other methods may be used to reasonably approximate the expenses of using a personal vehicle to make deliveries and properly reimburse non-exempt employees so that they are paid their wages free and clear.

For more information about how the Opinion Letter impacts your wage and hour practices, contact your Fisher Phillips attorney or any attorney in our Wage and Hour Law Practice Group.

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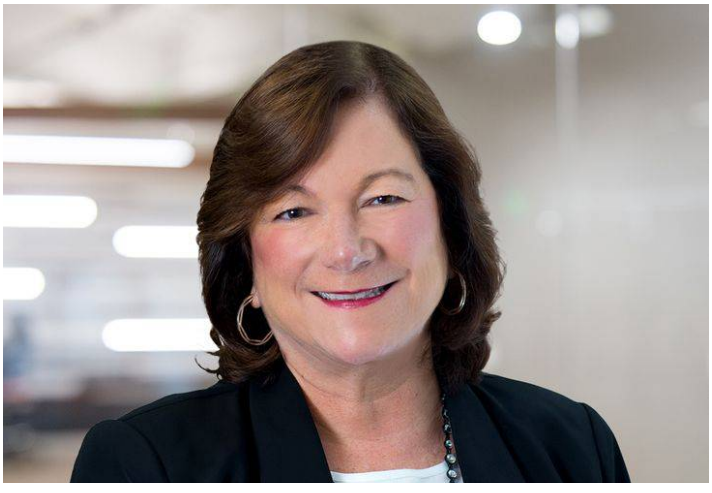

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