DOL Gives Employers Options for Reimbursing Delivery Drivers

By Allen Smith, J.D.
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The IRS business standard mileage rate is optional, not required by the Fair Labor Standards Act (FLSA), when reimbursing delivery drivers, the Department of Labor (DOL) stated in an Aug. 31 opinion letter, one of four recently issued.

"We have seen a surge in delivery of all types in 2020," Kathleen Caminiti, an attorney with Fisher Phillips in Murray Hill, N.J., and Hagood Tighe, an attorney with Fisher Phillips in Columbia, S.C., said in a joint e-mail. "As a result, this opinion letter has an enormous impact on how companies should reimburse their employees for the use of personal vehicles to make deliveries."

The other three opinion letters concerned:

- The scope of the "retail or service establishment" exemption.
- The applicability of the learned professional exemption and highly compensated employee test (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/highly-compensated-employees-overtime-rule.aspx) to part-time corporate trainers.
- The fluctuating workweek method (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/labor-department-expands-fluctuating-workweek-overtime-rule.aspx) of calculating overtime.

[SHRM members-only toolkit: Understanding Overtime Exemptions Under the FLSA (www.shrm.org/resourcesandtools/tools-and-samples/toolkits/pages/understanding-overtime-exemptions-.aspx)*]*

Reimbursement

Pizza delivery drivers don't have to be reimbursed for actual expenses, but instead may be paid a reasonable approximation of the costs of using their personal vehicles for a business, the DOL said in FLSA2020-12 (https://www.dol.gov/sites/dolgov/files/WHD/opinion-letters/FLSA/2020_08_31_12_FLSA.pdf). The IRS annual standard mileage rates are not the only way for employers to determine the reasonably approximate expenses, the DOL stated.

Courts are split on whether employers may deviate from the IRS reimbursement rate or actual expenses and instead use other methods so long as they reasonably approximate costs, noted Jeffrey Brecher, an attorney with Jackson Lewis in Melville, N.Y.

A reasonable approximation may be important because "precise calculations may not be practical, or even possible, depending on the nature of the expense," the department said. For example, it may not be possible to calculate exact depreciation or fuel usage, particularly when a car is driven for personal and business purposes.

The IRS business standard mileage rate is not legally mandated by DOL regulations but is presumptively reasonable, the DOL stated.

The department noted that the IRS standard is only an approximation of the expenses incurred to operate a vehicle. Moreover, the regulations explicitly let employers approximate expenses at a lower rate than the IRS standard rate.

The employer seeking an opinion from the DOL suggested several different methods that might be reasonable approximations of a delivery driver's actual expenses:

- A flat rate per delivery based on the average miles driven per dispatch and the average vehicle expenses per mile.
- A mileage rate customized to the employer and averaging costs among that employer's drivers.
- A fixed and variable allowance, which is used by the IRS and is based on fixed and variable payments calculated from local data.
- A percentage of the net sales of a driver's deliveries.

The DOL declined to approve any of these methods but said "to the extent that some or all of these methods may reasonably approximate actual business expenses incurred by employees under certain expenses, they will comply with the act."

Nonetheless, the DOL said a percentage of the net sales of a driver's deliveries is unlikely to be a bona fide reasonable approximation. "A driver's net sales amount appears to have no bearing on the vehicle expenses that [a] driver incurs to deliver orders," the department stated.

This opinion letter may be relevant for certain expenses incurred by employees who work from home and use the Internet for work due to the COVID-19 pandemic. "It would likely be difficult, if not impossible, for employees to exactly apportion the amount of Internet usage for work and personal use," said Jeffrey Ruzal, an attorney with Epstein Becker Green in New York City. "Accordingly, employers can craft policies that provide for a reasonable approximation as reimbursement for work-related Internet usage," except perhaps in states such as California and Illinois, where a greater degree of precision in determining reimbursements may be required.

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Other Opinion Letters

In 2020-11 (https://www.dol.gov/sites/dolgov/files/WHD/opinion-letters/FLSA/2020_08_31_11_FLSA.pdf), the department said a private "oilfield service company" that provides waste-removal services for oilfield operators may qualify as a retail or service establishment. Therefore, the company may be eligible to claim the FLSA's Section 7(i) exemption for certain truck drivers. The department noted that until recently its regulations included "waste removal contractors" in a list of establishments that could not qualify as a retail or service establishment under any circumstance.

Many courts found the list "nonsensical" and the DOL withdrew it in May, Brecher said.

Prior to then, the non-exhaustive list mentioned 89 types of establishments that the DOL viewed as unable to fit within the exemption. This opinion letter "gives hope, and arguments, to other waste removal contractors, not to mention the other 88 establishment types that had been categorically excluded" to claim this exemption, noted Keith Kopplin, an attorney with Ogletree Deakins in Milwaukee.

In 2020-13 (https://www.dol.gov/sites/dolgov/files/WHD/opinion-letters/FLSA/2020_08_31_13_FLSA.pdf), the DOL said part-time corporate trainers likely perform learned professional duties. But their flat daily rate of $1,500 does not constitute payment on a salary basis, as it does not—without a guaranteed weekly minimum—satisfy the federal salary threshold of $684 per week. In addition, the part-time employees did not qualify as exempt even if their pay for the number of weeks worked was proportional to the minimum annual amount required under the highly compensated employee test: $107,432. That test also requires at least the minimum salary level of $684 per week on a salary or fee basis.

In 2020-14 (https://www.dol.gov/sites/dolgov/files/WHD/opinion-letters/FLSA/2020_08_31_14_FLSA.pdf), the department determined that an employee's work hours do not have to fluctuate above and below 40 per workweek for an employer to be able to use the fluctuating workweek method of calculating overtime pay.