LABOR AND EMPLOYMENT BLOG

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DRIVERS DELIVERING A DOSE OF REALITY TO FLSA KICKBACK RULE

The nameless, smiling pizza delivery driver, now a TV icon, is quickly making a big name in the courtroom. Owners of Domino's and Papa John's franchises have been served with collective action complaints potentially involving upwards of thousands of drivers. Food delivery businesses rely on these hourly workers to bring their product to the customers and, in return, usually pay them minimum wage plus a small reimbursement for each delivery. However, if these employers don't reimburse their drivers' job-related expenses to the point where the drivers' net pay is the equivalent of the applicable minimum wage, they could be liable under the Fair Labor Standards Act--all because of a provision known as the "kickback rule."

Andrew P. Lee, a partner with the employee-side labor and employment firm Goldstein, Borgen, Dardarian & Ho in Oakland, Cal., recently spoke with Bloomberg BNA on this issue.

1. What are the elements that comprise the FLSA's "kickback rule"?

Under the FLSA and its accompanying regulations, an employer must pay minimum and overtime wages "unconditionally" and "free and clear" of any reductions. 29 C.F.R. § 531.35. The rule applies to situations in which an employee is required to "kick back" a portion of the employee's wages to the employer or another party for the employer's benefit.

In the context of expense reimbursement, the elements of an improper "kickback" include the following: 1) the employee incurs an expense necessary to the performance of the employee's duties; 2) the employer fails to reimburse the full amount of the expense; and 3) the unreimbursed expense reduces the employee's actual compensation below the required minimum or overtime wages.

2. Why is this rule in place for delivery drivers as opposed to merely requiring payment of the *proper minimum wage?*

The FLSA's kickback rule is in place for all non-exempt employees who are entitled to receive minimum and overtime wages, including delivery drivers.

The purpose of the rule is to ensure that non-exempt employees receive the full amount of minimum and overtime wages owed to them. If delivery drivers use their personal vehicles to perform delivery duties, they will necessarily incur some expenses related to the operation of their vehicles.

Where employers pay delivery drivers the minimum wage, or not much more than the minimum wage, the expenses associated with the operation of the drivers' personal vehicles may reduce their actual compensation below the required minimum wage. To the extent these employees work in excess of 40 hours in a workweek, any incurred expenses may also reduce their compensation below the required amount of overtime wages.

3. Are the payment structures for delivery drivers in cases where they receive a flat fee for each delivery violative of the FLSA in and of themselves? Why or why not?

No, flat sum reimbursement policies do not violate the FLSA in and of themselves. If the flat fee is sufficient to cover the expenses incurred, and the employer pays the correct minimum and overtime wages, no violation has occurred.

Employers run into trouble where the flat amount provided for expenses is insufficient. For example, in the two Domino's cases, the plaintiffs allege that they received $1 per delivery despite driving four to five miles on average for each delivery. If the plaintiffs' contentions are correct, Domino's reimbursement practice results in a per mile reimbursement of only .20¢-.25¢, which is well below IRS mileage rate.

Because Domino's pays them exactly the minimum wage, the unreimbursed mileage functions to reduce their actual compensation below the required minimum wage.

4. Under the FLSA, what expenses need to be reimbursed by employers to their delivery drivers?

Unlike some state wage and hour laws, the FLSA does not expressly require the reimbursement of expenses. However, as discussed above, any expenses that reduce employees' actual compensation below the required minimum and overtime wages must be reimbursed.

Employees who perform delivery duties with their personal vehicles must be reimbursed for fuel, insurance, repairs, maintenance, and depreciation.

The IRS mileage rate takes all of these expenses into account, and is generally accepted as presumptively reasonable. The 2015 IRS mileage rate is .575¢ per mile.

If employers require employees to use their mobile phones in performing delivery duties, the costs associated with mobile phone use should also be reimbursed.

5. How do most employers come up with their figure for the flat fee they pay their drivers?

When such a flat fee approach is used, employers tend to base the amount of reimbursement on the number of miles they expect employees to drive. Employers' expectations are sometimes inconsistent with the duties performed by employees and the number of miles actually driven.

This can lead to claims of under reimbursement, particularly where employees are precluded from seeking reimbursement over and above the fixed amount.

6. What is the primary reason that employers in this industry fail to prevent getting themselves into trouble in relation to FLSA requirements and delivery drivers?

I don't think there is a single reason employers run into problems with delivery drivers. The FLSA has been around since 1938 so employers should be well aware of their legal obligations to non-exempt employees such as delivery drivers.

One significant factor in the Domino's cases is that the delivery drivers receive only the minimum wage. Employers have little room for error when dealing with such low wage employees. Any mistake in recording compensable time or calculating wages could easily result in a minimum wage violation under the FLSA.

For example, if Domino's had paid the plaintiffs three to four more dollars per hour, which amounts to an hourly wage of $10.25-$11.25, the plaintiffs would have a much more difficult time demonstrating a minimum wage violation.

7. What effect, if any, do you believe that the recent filing of lawsuits involving high-profile employers will have on other employers with how they pay their drivers?

It should cause employers to scrutinize their reimbursement practices, especially with respect to minimum wage employees. Since the FLSA does not expressly require expense reimbursement, some employers may not realize that inadequate reimbursement practices may result in wage violations.

We may see employers conducting surveys and analyses to determine the proper amount of expense reimbursement, increasing the fixed amount provided for expense reimbursement, or changing their policies and practices to reimburse delivery drivers for the actual number of miles driven.

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