Don't Let Offering Delivery During COVID-19 Kick-Back Your Business

By: Theresa Nelson on October 14, 2020 on graydon.law

As a result of COVID-19 restrictions limiting in-person dining and shopping, many restaurants and shops are offering customers the opportunity to receive food and goods via delivery. Whether you are a traditional restaurant offering delivery (such as pizza, sandwiches or other carry-out), or new to the delivery scene because of COVID-19, businesses offering delivery options need to make sure their employee delivery drivers are being properly compensated and are not 'kicking-back' any amount.

The Fair Labor Standards Act, and corresponding state wage and hour laws, require employees receive no less than minimum wage for all hours worked "free and clear." When an employee "kicks-back," directly or indirectly, all or part of those wages (whether in cash or not in cash) to the employer or to another person for the employer's benefit, the employee has not received their wages free and clear. Car expenses are frequently an issue for delivery drivers employed by pizza or other carry-out type restaurants. Any business that offers delivery through their employees using their personal vehicles and incurring expenses as a result must properly reimburse employees for such costs to avoid any improper "kick-back."

There are two ways to calculate the reimbursement rate for an employee's use of their personal vehicle for the employer's benefit: take the number of work-related miles driven by the employee and multiply it by either 1) the standard IRS mileage rate; or 2) the actual amount expended by an employee.

Using the standard IRS mileage rate is simple because the IRS publishes the standard mileage rate each year. For 2020, the standard rate is 57.5 (last reviewed, October 13, 2020). The use of the IRS standard rate is optional, not mandatory. **Find the IRS issued standard mileage rates for 2020 here.**

The more complicated and variable reimbursement calculation is the employee's actual expenses. The use of a personal vehicle for business involves numerous expenses that may be fixed, such as the annual cost of insurance or registration costs. But, it also involves many costs that may be impossible or impractical to calculate exactly, such as depreciation. The fact that delivery employees also use their vehicles for personal use makes the exact calculation of all expenses even more complicated. Thankfully, the U.S. Department of Labor recently offered some clarification on how employers can calculate an employee's actual expense reimbursement rate in an opinion letter (FLSA 2020-12).

The Department of Labor Opinion Letter provides that an employer is permitted to calculate reimbursement rates through the **reasonable approximation** of employee's expenses rather than requiring an exact precise amount of all expenses incurred.

Accurate records, including tracking mileage and the bases for the reasonable approximation of expenses, must be maintained regardless of whichever method employers chose to use to calculate their delivery driver employee's proper reimbursement rate.

If you have any questions regarding compliance with wage and hour laws, contact your Graydon attorney or any member of Graydon's Labor & Employment Group to review your employment policies and ensure compliance with the most recent legal developments in employment law.