

Sixth Circuit Throws Out Minimum Wage Standards for Employees Who Drive Their Own Vehicles for Work

By Barry Y. Freeman

Last week, the U.S. 6th Circuit Court of Appeals, which covers Michigan, Ohio, Kentucky & Tennessee, turned minimum wage law for employees who drive their personal vehicles for work on its head. While the decision specifically addressed pizza delivery drivers, the implications extend to all employees who drive their own vehicles for work and are compensated at or slightly above minimum wage.

The issue was straightforward: Were pizza delivery drivers being paid minimum wage when they used their own vehicles to deliver pizzas? In these cases, the applicable minimum wage was the reduced rate for tipped employees, set at \$2.13 per hour (\$7.25 federal minimum wage, minus the \$5.12 per hour tip credit.) Instead of reimbursing drivers based on the IRS mileage rate, the employers reimbursed on either 28 cents per mile or \$1-\$1.50 per delivery, regardless of mileage.

Why does it matter? Because employees who drive their own cars but are not fully reimbursed effectively subsidize the employer's business expenses out of their own wages. At some point, non-reimbursed expenses drop employees below minimum wage, and it becomes an illegal failure to pay minimum wage. Therefore, if an employer requires employees to drive their own car (or provide other tools of the trade), the expense, if deducted from the wages paid, cannot reduce them below minimum wage.

Plaintiffs claimed unless they were paid the full IRS reimbursement rate, they were effectively "kicking-back" money and being paid less than minimum wage. Defendants claimed so long as they reimbursed a reasonable estimate of drivers' expenses, there was no minimum wage violation. The Court rejected both arguments.

On Plaintiffs' theory, the Court held the IRS rate is just a nationwide estimated average. As an estimated nationwide average, it likely overstated Plaintiffs' actual vehicle expenses given:

- Vehicle costs in the Midwest are likely lower than the national average – vs. higher vehicle costs in states like California.
- Depreciation is higher for newer vehicles, and pizza delivery drivers tend to drive older vehicles – further overstating actual costs by using the IRS mileage rate.
- Every vehicle's actual cost will further depend on its MPGs and depreciation idiosyncrasies.

On Defendants' theory, the Court held a subjective, good faith estimate cannot suffice. Paying minimum wage or more is a statutory requirement – no ifs, ands or buts. Paying a good faith estimate of minimum wage will not suffice. Legally, the Court explained Defendants were relying on the law for estimating expenses for overtime purposes, which can't hurt employees if the estimated expenses are too low. That is because expense reimbursements do not count as wages. Employees will still be paid 150% of their hourly rate. In contrast, if reimbursements are too low, the lack of sufficient reimbursement will drag employees below their entitled minimum wage.

For example, a non-tipped employee is making \$7.25 hour. Regardless of how much they get reimbursed (enough or not enough), their overtime pay will be \$10.88/hr. But for minimum wage, if they are reimbursed \$50 and their actual expenses are \$100, they aren't being paid minimum wage.

So, what did the Court decide was correct? It didn't. Instead, it suggested a three-step process but no firm answer: (1) Employees bear the burden to make a prima facie case of inadequate reimbursement; (2) Employers then bear the burden of showing the reimbursement bore a demonstrable relationship to the driver's actual costs; and (3) Plaintiffs then bear the burden to prove the employer's reasoning was wrong. Incredibly, after laying out that possible 3-step process, the Court then said perhaps that test might not be appropriate. (Gee, thanks for the help!)

So, what can employers do? The easiest thing is to simply use the IRS rate – since the Court held the IRS rate will overcompensate Midwest drivers' expenses.

Unfortunately, that may not a viable option for those in the food delivery business. After all reimbursement is a genuine cost for employers that either has to be passed on to customers or (figuratively) eaten by the employer. For those employers, the best option is probably to put the burden on drivers: Ask THEM to provide their vehicle expenses attributed to work and require documentation. Many drivers will likely underestimate (often greatly) their expenses by not including repairs and depreciation (though repairs and depreciation will be requested from drivers in writing).

The cases are *Parker v. Battle Creek Pizza, Inc.* and *Bradford v. Team Pizza, Inc.*, 6th Circuit Case No. 22-2119 (March 12, 2024).

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