



Client Alert

The Department of Labor is Actively Enforcing the “Kickback” Rule

WHEN EMPLOYERS MUST REIMBURSE EMPLOYEES FOR MILEAGE AND EXPENSES

The Department of Labor is actively conducting compliance investigations in many “low-wage” businesses as they define them. Two (2) of these sectors are being hard hit which includes pizza/restaurant delivery and home care as both of these sectors require employees to provide their own transportation to perform assigned duties. The question of whether employers must reimburse their employees for work related expenses is becoming a hot topic – a very expensive topic! Although the answer is not cut and dry, **the FLSA does not require employers to reimburse for mileage or other expenses -- unless it affects the employee’s minimum wage.**

Even though mileage and expense reimbursement is not mandated by the FLSA, sometimes reimbursement is necessary in order to remain compliant with minimum wage as the regulations state, ***“wages must be paid free and clear of impermissible deductions – such as the cost of operating the vehicle or traveling on the road – that would reduce pay below the federal minimum wage.”***

What this means is that an employee must make minimum wage after any business related expenses are paid (provided) by the employee. For example, if an employee works full-time, making \$7.25 per hour (minimum wage) but spends \$20.00 per week on gas, then the real wage is \$6.75 per hour and thus a compliance violation is created.

When an employee spends his or her own money on work related expenses, it is called a **kickback** (to the employer). Essentially, an employee is kicking back money from their own pocket to the employer. When you think about it like that, it seems a little absurd that an employee would, essentially, pay their employer. It should be the other way around. But anyway, no one is fighting against the kickback per se, just when the kickback brings the employee’s total wage below the federal or state minimum.

Mileage Kickback (Employees Operating Their Personal Vehicle for Work)

The most common concern or issue in terms of compliance violations revolves around mileage and mileage kickbacks. As stated, an employer is not required to compensate an employee by the mile or other expenses. What the Fair Labor Standards Act and the Department of Labor requires is that the employee receive at least minimum wage for all hours worked. The kickback rule basically says that there is a value placed on an employee’s personal vehicle (or other tools, equipment and supplies in some cases) that must be considered in computing earnings and thus minimum wage. The value of one’s vehicle and transportation is typically based upon the IRS mileage rate which is \$.54 an hour. Again, employers do not have to reimburse an employee a portion of or all of the IRS mileage rate, but must consider each mile driven when computing minimum wage. Please consider the following examples:

Scenario 1 – Employee makes \$7.50 per hour in delivering pizza. The employee works 40 hours for a total paycheck = \$300 for the week. (This is normally where it ends for most employment relationships.) However, the DOL is now actively pursuing the value of the employee’s personal vehicle and transportation at the current IRS rate at \$.54 per mile. Thus, the employer must then consider the following:

221 miles driven during the week x \$.54 per mile = \$119.34 (value of transportation to the employer – kickback to employer)

\$300 - \$119.34 = net pay of \$180.66 ÷ 40 hours = \$4.52 per hour – not minimum wage of \$7.25 (federal basis). Back wages due for this week would be \$109.34.

For the year (52 weeks) = \$5,685.68

Scenario 2 – Employee makes \$9.50 per hour in providing home care services. The employee works 40 hours for a total paycheck = \$380 for the week.

Employer reimburses the employee at \$.28 per mile x 211 miles driven for the week = \$59.08 (mileage pay)

Total pay = \$439.08

Value of car \$.54 (IRS mileage rate) - \$.28 mileage reimbursement = \$.26 value of transportation (kickback) x 211 miles = \$54.86

Total compensation \$439.08 - \$54.86 (kickback) = \$384.22 (net compensation) ÷ 40 hours worked = \$9.61 – no violation as minimum wage (\$7.25) is met.

In summary, for mileage kickbacks, an employer must consider \$.54 per mile or \$.54 minus mileage reimbursement rate as the value or kickback per mile. The value or rate then is multiplied by total miles driven on behalf of the employer for the week. This amount of kickback or value of the transportation then is subtracted from the employee's gross earnings and the difference must yield minimum wage (federal \$7.25) for each hour worked during that workweek.

Employers who require employees to operate their personal vehicles for work or may require employees to purchase their own tools, equipment or materials, must consider the cost of these expenses or the value thereof against the employee's compensation to ensure that these expenses and values do not cut across the required minimum wage for each hour worked.

As the Department of Labor has targeted low-wage sectors, SESCO strongly recommends that you conduct an assessment of your compensation practices to determine compliance. SESCO can conduct these assessments either through a monthly service agreement starting at \$40.00 per month or on a flat fee of \$500 or greater based on size of employer. Please contact SESCO to schedule your compliance assessment.



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