



FLSA2020-12

August 31, 2020

Dear **Name\***:

This letter responds to your request for an opinion concerning compliance with the Fair Labor Standards Act's (FLSA) minimum wage requirements when reimbursing hourly, nonexempt delivery drivers for business-related expenses incurred while using their personal vehicles during the course of employment. This opinion is based exclusively on the facts you have presented. You represent that you do not seek this opinion for any party that the Wage and Hour Division (WHD) is currently investigating or for use in any litigation that commenced prior to your request.

## **BACKGROUND**

Your company employs delivery drivers who use their personal vehicles to deliver pizza and other foods. You pose several related questions about options companies have to reimburse drivers for that use in compliance with the FLSA's minimum-wage requirements. First, you ask whether employers comply with those requirements by reimbursing the drivers for either actual expenses or a reasonable approximation of expenses incurred for the employer's benefit. Second, you ask whether the Internal Revenue Service's (IRS) annual standard mileage rates are the only way for employers to determine the "reasonably approximate" expenses for business use of the driver's personal vehicle.<sup>1</sup> Third and relatedly, you suggest alternative methods and data sources for reasonably approximating those expenses. Finally, you ask whether drivers who use their personal vehicles for deliveries may be reimbursed for only variable expenses, such as gas, oil, and routine maintenance and repairs, or must also be reimbursed for fixed vehicle expenses, such as registration fees, license fees, and insurance costs not required by the employer.

## **GENERAL LEGAL PRINCIPLES**

The FLSA requires covered employers to pay nonexempt employees no less than the federal minimum hourly wage for all non-overtime hours actually worked in a given workweek. 29 U.S.C. § 206. Employees must receive these wages "free and clear." 29 C.F.R. § 531.35. An employee's wages include the "reasonable cost" of "board, lodging, or other facilities" that primarily benefit the employee, and therefore the reasonable cost of such items count towards satisfying an employer's obligation to pay the minimum wage. 29 U.S.C. § 203(m). But the cost of "other facilities" that are primarily for the benefit or convenience of the employer cannot be counted as wages. 29 C.F.R. § 531.3(d). Those costs include tools of the trade, required

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<sup>1</sup> Each year, the IRS calculates and publishes optional standard mileage reimbursement rates for various types of entities. Businesses and employees may use these rates to compute the deductible costs of operating an automobile for business purposes. The IRS does not require employers to use the rates.

uniforms—or required use of a personal vehicle. An employer violates the FLSA “in any workweek when the cost of such tools” (and the like) “cuts into the minimum or overtime wages required to be paid...” *Id.* § 531.35. Therefore, an employer violates the FLSA if the employee’s wages, minus expenses, end up below the federal minimum wage for a given non-overtime workweek. *See id.*; *see also id.* §§ 531.3(d), 531.36(b).

A reimbursement to cover expenses incurred on the employer’s behalf or for the employer’s convenience is sufficient if it “reasonably approximates the expenses incurred.” *Id.* § 778.217(a).<sup>2</sup> A reimbursement amount based on IRS guidelines, including the annual standard mileage rates, “is per se reasonable.” *Id.* § 778.217(c).

While employers must keep records of “the dates, amounts, and nature” of items added to or deducted from each nonexempt employee’s wages, neither the FLSA nor WHD’s regulations require them to keep records of employees’ actual expenses. *Id.* § 516.2(a)(10). Employers are instead required to keep records that they used to determine the amount of additions to or deductions from wages paid. *Id.* § 516.6(c)(2).

## OPINION

### A. WHD Regulations Permit Reimbursement of a Reasonable Approximation of Employee Expenses

The plain language of WHD’s regulations permits employers to reimburse a reasonable approximation of expenses incurred for the employer’s benefit rather than the actual amount of expenses incurred. The regulation defining “other facilities,” 29 C.F.R. § 531.32(c), states that “reimbursement for expenses such as ... ‘travel expenses’” are addressed in 29 C.F.R. § 778.217. Section 778.217, in turn, states that reimbursements may be in an amount that “reasonably approximates the expense incurred[.]” *Id.* § 778.217(a). One of that regulation’s examples explicitly states that an employer can reimburse the “actual *or reasonably approximate* amount” of an employee’s expenses to travel “by private car[.]” *Id.* at § 778.217(b)(3) (emphasis added).<sup>3</sup> *See also Wass v. NPC Int’l, Inc.*, 688 F. Supp. 2d 1282, 1286 (D. Kan. 2010) (“[T]he applicable regulations ... permit an employer to approximate reasonably the amount of an employee’s vehicle expenses without affecting the amount of the employee’s wages for purposes of the federal minimum wage law.”). One reason a reasonable approximation may be important is that precise calculations may not be practical, or even possible, depending on the nature of the expense. For example, it may not be possible to calculate exact depreciation, fuel usage, *etc.*,

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<sup>2</sup> By itself, 29 C.F.R. § 778.217 concerns expense reimbursements that can be excluded from the “regular rate” of pay when determining an employee’s overtime rate. *Id.* (interpreting 29 U.S.C. § 207(e)(2)). As described in Opinion § A, however, it also sets forth the payments that are sufficient to meet the FLSA’s minimum-wage requirements because it is incorporated by reference into those requirements. 29 C.F.R. § 531.35, *incorporating id.* § 531.32(c), *incorporating in turn id.* § 778.217.

<sup>3</sup> As noted in footnote 2, this standard covers payments that can be excluded from an employee’s regular rate of pay when calculating overtime pay. A different standard, requiring a determination of “reasonable cost” and “fair value,” applies when employers claim that the value of facilities furnished primarily to benefit the employee should be credited toward the minimum wage. 29 U.S.C. § 203(m)(1); 29 C.F.R. §§ 531.2–531.5. *See also* WHD Opinion Letter FLSA-1336 (Jan. 21, 1997). Employers should be careful not to confuse these two different standards.

with precision—at least not without extraordinary effort—particularly with mixed usage. As the plain language of the regulation makes clear, a reasonable approximation is sufficient.

This plain reading is supported by WHD’s recordkeeping requirements. Employers are required to keep a record of “the dates, amounts, and nature of the items” that make up additions to or deductions from nonexempt employees’ wages, as well as all records they used to determine “the original cost, operating and maintenance cost, and depreciation and interest charges” if those costs are involved in the additions or deductions. 29 C.F.R. §§ 516.2(a)(10), 516.6(c)(2). But they are not required to keep track of employees’ actual expenses. It “would not make sense for the FLSA to impose on an employer the obligation to keep a record when control over that record is exercised by the employee, rather than the employer.” *Morangelli v. Chemed Corp.*, 922 F. Supp. 2d 278, 302 (E.D.N.Y. 2013). Indeed, we have previously advised that when employees purchase required uniforms on their own rather than through their employer, for example, “no record of such private transactions need be kept [by the employer] under the FLSA.” WHD Opinion Letter FLSA2008-10, 2008 WL 5483046, at \*3 (Oct. 24, 2008); *see also Sullivan v. PJ United, Inc.*, 362 F. Supp. 3d 1139, 1151 (N.D. Ala. 2018) (“Section 516.6(c)(2) does not purport to require that employers keep records of each employee’s expenses, but rather the methodology used to arrive at the additions or deductions from wages paid.”).

## **B. The IRS Business Standard Mileage Rate is Optional, Not Required**

### **1. The Regulations Specifically Allow Other Methods of Approximation**

The plain language of the regulations also allows employers to reasonably approximate an employee’s expenses through methods other than the IRS business standard mileage rate—a rate that is itself only an approximation of the expenses incurred to operate a vehicle. *See, e.g.*, 26 C.F.R. §§ 1.274-5(g), (j)(2) (permitting IRS Commissioner to establish mileage reimbursement rates of “general applicability”). A reimbursement for employee travel expenses qualifies as reasonable *per se* under 29 C.F.R. § 778.217(c)(2) as a payment that may be excluded from the regular rate if it satisfies two requirements. First, it must be a payment for expenses incurred “by reason of action taken for the convenience of his employer.” *Id.* § 778.217(a). Second, it must be “the same or *less than* the maximum reimbursement payment” permitted by the IRS rate. *Id.* § 778.217(c)(2)(i) (emphasis added). A regulation that explicitly allows employers to approximate expenses at a rate *lower* than the IRS standard rate cannot be read to require employers to use the IRS standard rate. *See also Sullivan*, 362 F. Supp. 3d at 1154–55, 1174; *Perrin v. Papa John’s Int’l, Inc.*, 114 F. Supp. 3d 707, 721–22 (E.D. Mo. 2015).<sup>4</sup>

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<sup>4</sup> The district court decisions in *Hatmaker v. PJ Ohio, LLC*, No. 3:17-CV-146, 2019 WL 5725043 (S.D. Ohio Nov. 5, 2019) and *Zellagui v. MCD Pizza, Inc.*, 59 F. Supp. 3d 712, 716 (E.D. Pa. 2014) are distinguishable. Those courts held that section 30c15 of WHD’s Field Operation’s Handbook (“FOH”) requires employers to choose between reimbursing actual expenses or reimbursing at the IRS standard rate. However, that would contradict the plain text of the regulations, and, in reaching their conclusions, neither court considered 29 C.F.R. § 778.217, let alone analyzed how the FOH may be interpreted to support that regulatory text.

## **2. The FOH Cannot Be Interpreted as Permitting the IRS Rate as the Sole Amount for Reimbursement**

You ask us to clarify the meaning of section 30c15 of WHD’s Field Operations Handbook (“FOH”), concerning an employee’s use of her personal car while on an employer’s business, in order to resolve whether employers are permitted to use methods other than the IRS standard rate to approximate delivery drivers’ reimbursable expenses. You refer to the FOH as “the only additional federal guidance” aside from applicable Department regulations and explain that courts have reached divergent conclusions in interpreting section 30c15, with some courts concluding that “the FOH gives employers only two choices”—reimbursement of total costs or at the IRS rate.

In responding to your inquiry, as an initial matter, the FOH does not establish a binding legal standard on the public and is not “a device for establishing interpretive policy.” *Field Operations Handbook*, U.S. DEP’T OF LABOR (last accessed July 10, 2020), available at <https://www.dol.gov/agencies/whd/field-operations-handbook>. Rather, the FOH is an “operations manual” that provides WHD investigators and staff with policies already “established through changes in legislations, regulations, significant court decisions, and the decisions and opinions of the WHD Administrator.” *Id.*; see also *Probert v. Family Centered Servs. of Alaska, Inc.*, 651 F.3d 1007, 1012 (9th Cir. 2011). Here, the Department has promulgated an applicable regulation, and the FOH reflects that regulation. Section 778.217(c) states that reimbursements at *the same or less than* the IRS rate can qualify as reasonable *per se*, or that employers may use the actual or a reasonable approximation of the expense. Section 30c15’s instruction that, “[a]s an enforcement policy,” the IRS rate “*may* be used (in lieu of actual costs and associated recordkeeping) to determine or evaluate the employer’s wage payment practices” is discretionary and consistent with the regulation: the FOH provides two means of calculation here, but that does not foreclose other methods, such as a reasonable approximation of expenses.

### **C. Other Ways to Reasonably Approximate Expenses**

WHD does not endorse particular methods of approximating employees’ expenses for reimbursement. The FLSA’s implementing regulations are flexible on this issue, requiring only that a method reasonably approximate employees’ actual expenses. Whether a particular method does so will depend on the circumstances in each case.

Your letter lists several different methods by which you suggest an employer might reasonably approximate 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; or
- A percentage of the net sales of a driver's deliveries.

You also ask that we “approve as reliable” these “and similar sources” that an employer might use as part of those methods:

- Data supplied by government agencies such as the Federal Highway Administration (average annual miles driven by age group and gender) and the U.S. Department of Energy's Office of Energy Efficiency & Renewable Energy (fuel economy information, including miles driven per gallon);
- Data supplied by insurers and other entities, such as Edmunds, that regularly study costs associated with operating motor vehicles (for example, national and state-by-state average gas prices; annual cost to own and operate an average vehicle);
- Vehicle expense reimbursement rates calculated by companies regularly engaged in the business of calculating such rates, such as Motus; and
- Periodically conducted surveys of a company's delivery drivers regarding actual expenses (on a national, regional, state, local, fleet, or facility level).

WHD neither approves nor disapproves of any of these methods or sources.<sup>5</sup> To the extent that some or all of these methods may reasonably approximate actual business expenses incurred by employees under certain circumstances, they will comply with the Act. To the extent that these methods fail to reasonably approximate such expenses, they will not. Neither the FLSA nor our regulations limits the sources an employer may consider or the methods it may use to determine whether a reimbursement reasonably approximates expenses. Whether particular information furnished by a specific source will enable a specific employer to reasonably approximate the expenses incurred to perform particular tasks at a particular site in a particular area depends on a myriad of particulars. For instance, since costs often vary significantly by region, a national average may be of little practical use. As another example, the average price of gasoline varies by regions and even among neighboring states. Ultimately, the FLSA and the regulations permit a reasonable approximation based on variable data sources without regard to the particular inputs, processes, formulas, or other methods from which the approximation is derived.

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<sup>5</sup> We note, however, that a percentage of the net sales of a driver's deliveries is unlikely to be a bona fide reasonable approximation of a driver's vehicle expenses. A driver's net sales amount appears to have no bearing on the vehicle expenses that driver incurs to deliver orders.

#### D. Reimbursement for Fixed and Variable Vehicle Expenses

Whether reimbursements must include fixed expenses depends on whether the expense is incurred primarily for the employer's benefit.<sup>6</sup> 29 C.F.R. § 531.32. Generally, employers must reimburse expenses an employee incurs on its behalf or that an employee is required to expend primarily for the employer's convenience. It need not reimburse "expenses normally incurred by the employee for his own benefit." *Id.* at § 778.217(d). Ultimately, the question is whether the employee owns, and thus incurs the expense to operate, his or her car primarily for the employee's own benefit or for the employer's. However, the regulations do not require employers to analyze each employee's personal practices to answer this question and determine individual reimbursement rates. Rather, section 778.217 allows an employer to reimburse a reasonable approximation of expenses an employee would normally—that is, would in expected, everyday life—incur. This is similar to the IRS standard rate, which does not particularize for different types of vehicles, different styles of driving, different types of traffic, different prices of fuel, or different vehicle-regulation regimes on an individualized basis. Instead, the IRS standard rate is an attempt to approximate the expenses normally incurred by a typical American taxpayer per mile of vehicle usage.

Employers are expected to reimburse employees for fixed vehicle expenses only to the extent that the employee uses the vehicle as a tool of the trade, *i.e.*, primarily for the benefit of his or her employer. In that sense, making this fact-specific determination regarding vehicles may be more analogous to required clothing than it is to, for example, an arc welder's torch, generator, and gas supply. That is, a required uniform is a tool of the trade; if an employer requires an employee to wear a particular uniform, it must either supply the uniform or reimburse the employee to the extent the cost cuts into the required minimum wage. On the other hand, an employer that requires a certain style of dress rather than a particular, specific uniform need not reimburse the employee if the required clothing allows for variations in the clothing's details and is more in the nature of street clothes that can be worn outside of the employee's job. In other words, the more distinctive the clothing and the more likely an employee would be to find it distasteful, uncomfortable, or inappropriate for everyday use, the more likely it is that the clothing would be found to be a uniform for which the employer would have to pay. *See, e.g.*, WHD Opinion Letter FLSA-827 (July 7, 1977); WHD Opinion Letter FLSA2004-1NA, 2004 WL 5303029 (Mar. 30, 2004). WHD has consistently allowed employers to require employees to wear, for example, white or blue button-down shirts with dark pants without being required to supply or reimburse the employees for those items. *See, e.g.*, WHD Opinion Letter FLSA2004-1NA; WHD Opinion Letter FLSA-462 (Oct. 7, 1992).

Therefore, when the employee's vehicle is not solely a tool of the trade, employers would be required to reimburse only the variable expenses attributable to the employee's use of the vehicle for the employer. We expect that in some cases, reimbursement would include only costs that vary with the amount the employee uses or distance the employee drives the car. These costs might include, for instance, the cost of gasoline; the cost of periodic maintenance, such as oil

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<sup>6</sup> Fixed expenses are costs that do not vary with the way or amount that an asset is used. You list as examples "depreciation or lease payments, insurance (unless the employer requires greater coverage than is required by state law or an insurance rider is required), sales and use taxes, vehicle registration and license fees, and driver's license fees."

changes and tire rotations and replacement; and the depreciation of the vehicle's value attributable to the employee's trips.<sup>7</sup> For example, if an employee drives an extra 250 miles at the employer's behest rather than for the employee's own benefit, the gasoline, maintenance, and depreciation costs attributable to those 250 miles are incurred primarily for the employer's benefit rather than for the employee's own benefit.

## CONCLUSION

For these reasons, WHD concludes that its regulations permit reimbursement of a reasonable approximation of actual expenses incurred by employees for the benefit of the employer by any appropriate methodology; the IRS business standard mileage rate is not legally mandated by WHD's regulations but is presumptively reasonable; and reimbursement for fixed and variable vehicle expenses hinges on whether the cost at issue primarily benefits the employer.

This letter is an official interpretation of the governing statutes and regulations by the Administrator of the WHD for purposes of the Portal-to-Portal Act. *See* 29 U.S.C. § 259. This interpretation may be relied upon in accordance with section 10 of the Portal-to-Portal Act, notwithstanding that after any such act or omission in the course of such reliance, the interpretation is "modified or rescinded or is determined by judicial authority to be invalid or of no legal effect." *Id.*

We trust that this letter is responsive to your inquiry.

Sincerely,



Cheryl M. Stanton  
Administrator

**\*Note: The actual name(s) was removed to protect privacy in accordance with 5 U.S.C. § 552(b).**

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<sup>7</sup> You additionally ask us to determine, in accordance with IRS reimbursement standards, that depreciation is a "fixed cost ... based solely on the age of the car and the number of years since purchase...." We decline to do so. The method by which the IRS permits taxpayers to claim a depreciation expense for tax purposes does not tell us how employees' vehicles can normally be expected to depreciate—that is, decline in fair market value—in the real world. *See* 29 C.F.R. § 778.217(d) (employer need not reimburse expenses "normally incurred" for employee's own benefit).