CLIENT ALERT: Pizza Delivery Drivers May Proceed With Minimum Wage Class Action Claim Based On Employer's Allegedly Inadequate Auto Mileage Reimbursements

A Federal district court in Colorado has authorized Pizza Hut delivery drivers to proceed with a wage-hour collective action lawsuit based on their allegation that their employer failed to provide sufficient reimbursements for private automobile expenses. The employer reimbursed drivers between $0.75 and $1.00 per delivery for vehicle expenses incurred to make deliveries. The drivers claim that this represented a policy and practice to unreasonably estimate employees' automotive expenses for reimbursement purposes, which caused them and other similarly situated individuals to be paid less than the federal minimum wage and state minimum wage in violation of the FLSA.

In denying the employer's motion to dismiss the case, the court indicated that an employee may claim he was paid less than the minimum wage when he is under-reimbursed for work-related vehicle expenses. Courts "will look to the Department of Labor regulations to determine whether, under the FLSA, an employee may claim that his wages are reduced below the minimum wage when he is under-reimbursed for vehicle-related expenses." Under 29 C.F.R. § 531.35, "the wage requirements of the [FLSA] will not be met where the employee 'kicks-back' directly or indirectly to the employer or to another person for the employer's benefit the whole or part of the wage delivered to the employee." A kickback occurs when the cost of tools specifically required for the performance of the employee's particular work "cuts into the minimum or overtime wages required to be paid him under the Act." *Id*. The regulations further provide that

> [w]here an employee incurs expenses on his employer's behalf or where he is required to expend sums solely by reason of action taken for the convenience of his employer, section 7(e)(2) [which provides that employee's regular rate does not include travel or other expenses incurred in furtherance of the employer's interest] is applicable to reimbursement for such expenses. Payments made by the employer to cover such expenses are not included in the employee's regular rate (if the amount of the reimbursement reasonably approximates the expenses incurred). Such payment is not compensation for services rendered by the employees during any hours worked in the workweek.

29 C.F.R. § 778.217(a).

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." However, if the employer makes an unreasonable approximation, the employee can claim that his wage rate was reduced because of expenses that were not sufficiently reimbursed.

The court held that the drivers could proceed based on their theory that their under-reimbursed vehicle expenses constituted a kickback to the Pizza Hut franchisee because the employer failed to reasonably approximate the drivers' vehicle-related expenses and the employees were specifically required to use and maintain a vehicle to benefit franchisee's business. If they succeed at trial, the drivers may recover based on the employer's effective reduction of the drivers' wages to a level below the applicable federal and state minimum wage. The drivers could be entitled to pursue overtime claims as well.

Employers should exercise care when designing expense reimbursement polices for employees who are earning an hourly rate close to or at the applicable state or Federal minimum wage.

The case is *Darrow v. WKRP Management, LLC,* 09-cv-01613-CMA-BNB (D. CO., June 3, 2011).

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