

WAGE AUDITS – CHALLENGES INVOLVING DRIVERS, TIPPED, AND MINIMUM WAGE EMPLOYEES

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Learning Objectives

- Train employers regarding wage and hour obligations
- Discuss litigation trends/unintentional violations
- Identify strategies to reduce liability

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What Should You Know About Wage and Hour Audits?

- The U.S. Department of Labor enforces compliance with the Fair Labor Standards Act (regarding minimum wage and overtime compliance)
- Audits are NOT Random
 - Complaint
 - Industry Specific Issue
- Two years of payroll records will be reviewed (TIP: MAKE SURE THE AUDIT IS NOT AT THE EMPLOYER'S OFFICE)
- Liability may include double damages for back pay and civil penalties.
- Common issues are improper classifications, unlawful deductions, insufficient wages, and failure to maintain accurate records
- The records need to be reviewed by a professional (lawyer/accountant) before the audit takes place

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What Are You Doing Now?

- Are you legally compensating your drivers?
- Are you using “Split Rate” pay?
- Do you need to track mileage?
- Are your drivers reporting tips?
- What are your responsibilities?

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What Is a “Tipped Employee”?

- Customarily and regularly receives more than \$30 per month in tips.
- Do not confuse income with reimbursement.
- Do not use tip income to cover mileage reimbursement.
- Do use tip income to satisfy the minimum wage requirement.

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What Do You Need To Do For Tipped Employees?

- Provide a written notice that the employee is being treated as a tipped employee. (Although oral notice is permissible, it is not recommended since it is harder to prove).
- Provide the IRS pamphlet to employees “Tips on Tips.”

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Sample Tipped Employee Letter

EMPLOYEE ACKNOWLEDGEMENT OF
EMPLOYER'S USE OF TIP CREDIT
(Revised May 2015)

The purpose of this form is to acknowledge—in compliance with federal law and regulations—that my employer has provided me with certain information as a tipped employee about tip credit toward minimum wage (which is allowed under federal law and in many, although not all, states) and tip pooling. Under federal law, tipped employees are those who customarily and regularly receive more than \$30 per month in tips. Tips are the property of the employee to whom they are given; however (unless prohibited under applicable law) an employer may require tip pooling or sharing amongst employees who customarily and regularly receive tips (co-workers who do not customarily and regularly receive tips may not participate in a tip pooling arrangement). An employer is prohibited from using an employee's tips for any reason other than as a credit against its minimum wage obligation to the employee (known as "tip credit") or in furtherance of a valid tip pool. Only tips actually received by the employee may be counted in determining whether the employee is a tipped employee and in applying the tip credit.

The federal Fair Labor Standards Act provides that my employer can take a tip credit toward its obligation to pay tipped employees the minimum wage required under applicable law, which currently is \$7.25 per hour under federal law. State or local law may require a higher minimum wage. The amount of the tip credit that can be taken by the employer is the difference between the applicable minimum wage (currently \$7.25 an hour under federal law) and the minimum cash wage that is paid by the employer, which must be at least \$2.13 per hour under federal law. Thus, the maximum tip credit available to an employer under federal law currently is \$5.12 per hour. However, the maximum tip credit, as well as the minimum wage and minimum cash wage payable by the employer, may be higher to reflect state or local requirements.

I have been informed by my employer that the amount of the cash wage that I will receive as a tipped employee will be \$_____ per hour and that my employer intends to take a tip credit of \$_____ per hour, not to exceed the amount of tips actually received by me. If my tips do not exceed the maximum tip credit that my employer may take, my employer must make up the difference to reach at least minimum wage. I also have been informed that all tips received by me are to be retained by me except for tips that are contributed to a valid tip pooling arrangement limited to myself and other employees who customarily and regularly receive tips. I have been informed that there is or is not a mandatory tip pool contribution of \$_____ n/a_____.

Federal regulations require that the employer cannot use the tip credit unless an employee has been informed of the above provisions and my signature below acknowledges that I have been informed of these provisions and understand that my tips will be used as described above or otherwise as allowed by applicable law.

Signature of Employee _____

Print Name: _____

Date Signed: _____

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IRS Publication: “Tips On Tips”

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What Is The Minimum Wage For Tipped Employees?

- Federal law requires \$2.13 per hour.
- State laws may be higher.
- Must use higher amount.
- Example: Michigan law requires \$3.10 (38% of Michigan Minimum Wage).
- Michigan minimum wage will increase:
- January 1, 2016, \$8.50 (\$3.23 tipped employees);
- January 1, 2017, \$8.90 (\$3.38 tipped employees);
- January 1, 2018, \$9.25 (\$3.52 tipped employees).

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You Must Notify Employees Of The Minimum Wage Increase

- Keep updated posters in your store
- Suggestions: www.laborlawcenter.com

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What Is The Tip Credit?

- Difference between required payment from the employer and the minimum wage.
- Example: Michigan requires the employer to pay a tipped employee \$3.10 per hour.
- The minimum wage is \$8.15 per hour.
- Accordingly the tip credit is \$5.05.
- If the tips plus the minimum hourly wage rate do not equal or exceed the minimum hourly wage, the employer is required to pay any shortfall.
- Tips in excess of the statutory tip credit may not be credited against mileage reimbursements.
- Tips cannot be credited against required reimbursements.

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What Are Split Wages?

When you pay a different hourly rate for different jobs.

Example:

A driver is only considered a tipped employee when they are on the road.

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Are Split Wages Permissible?

- Okay to pay a different wage for a different job.
- Do not take a tip credit for work unrelated to delivering or other tipped profession.
- Must provide written notification of your policy to employees. (Although oral notice is permissible, it is not recommended since it is harder to prove).

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Sample "Split Wage" Letter

MEMO

FROM: [ENTER COMPANY NAME HERE]
TO: DELIVERY DRIVERS
CC: ALL MANAGERS AND SUPERVISORS
SUBJECT: CHANGE TO "SPLIT PAY" WAGE SYSTEM
DATE:

The current Michigan minimum wage for tipped employees is \$ _____ per hour (or 38% of the current minimum wage). For non-tipped employees, the minimum wage is \$ _____ per hour.

We want to make sure that we are abiding by the law, and that any change will have a minimal impact on our team members and our business. We have analyzed all options including price increases, raising delivery fees, reducing hours, or reducing delivery service or drivers. We concluded that these ideas would not be in the best interest of our customers, employees or our business.

The best and fairest option for all parties is to follow many of our competitors and institute a "split rate" system. With a "split rate" system, drivers earn a higher wage for hours worked in store, and a different hourly rate while on the road and earning tips. Therefore, beginning _____, all delivery drivers will be converted to the new "split rate" system. This means that while working in the store, you will be paid the new increased minimum wage of \$ _____ per hour. However, while on the road, you will be paid \$ _____ per hour (which is \$ _____ above the state minimum wage for tipped employees). As is required by law, you must still report all tips at the end of each shift.

Our analysis indicates that these changes will not have a significant impact on the vast majority of our delivery drivers either positively or negatively. This means that you should not see much of an effect on your take home pay.

This split pay system will make it even more important that you follow the correct procedures and use the POS system to check out immediately prior to a delivery and check-in immediately after you return from a delivery.

Please feel free to contact your manager/supervisor should you have any questions or concerns. Thank you for your cooperation and understanding as we transition to this new system.

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Must I Reimburse For Expenses?

- Yes for company expenses incurred by employees receiving the minimum wage.
- Federal Fair Labor Standards Act does not specifically address this issue.
- Case law and DOL Field Operation Handbook requires reimbursement when business expenses incurred by an employee would result in an employee receiving below minimum wage during a pay period.
- Employers may not directly or indirectly avoid paying employees at least minimum wage.

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Tip Reporting

To all Drivers,

Pursuant to the Internal Revenue Code and regulations, employees are required to report all tips received as income. Effective immediately, you will be required to report all cash tips received at the end of each shift. Cash and credit card tips will be recorded as income, and taxed in accordance with Federal and State laws.

Section 6053(a) of the Code requires employees to report all tips received; (credit card and cash), to ensure total wages, and accurate FICA withholding are deducted in each pay period.

The IRS publishes a pamphlet for employees explaining how tips should be recorded and reported. A copy of the "Guide to Tip Income Reporting" for employees can be obtained at www.irs.gov/pub/irs-pdf/p3148.pdf

Please direct all questions to your Store Manager for further clarification.

ACKNOWLEDGEMENT OF RECEIPT

I _____, understand it is my responsibility to report all cash tips I receive daily at the end of each shift. I understand that all tips I receive, (cash and credit) will be reported as income, and taxed in accordance with all Federal and State Laws.

Signature _____

Date _____

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What Are The Requirements To Reimburse For Car Expenses?

Generally you must cover minimum wage employees costs incurred on behalf of the company for:

- Gasoline (including taxes)
- Maintenance and repairs
- Oil
- Insurance
- Vehicle registration fees
- Depreciation

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What Is The IRS Rate?

- Currently 57.5 cents per mile.
- DOL will use this as SAFE HARBOR.
- National rate developed by outside vendor for use by the IRS.
- May be much lower depending on where you are located.
- You do not have to use this, BUT you have to be able to prove by having a reasonable basis for the rate you adopt and the mileage your drivers actually drive per shift.

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What Are Your OPTIONS?

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Option 1:

Reimburse employees 57.5 cents per mile based upon the most efficient delivery route that company software calculates.

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Option 2:

- Retain an expert to calculate the actual average maintenance costs of vehicles in your area.
- Then reimburse on per mileage basis based upon the most efficient delivery route that company software calculates.
- Runzheimer International <http://pages.runzheimer.com/Contact-Us.html?source=website> specializes in making these calculations.
- Lesser rates may be acceptable depending on your location.

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Option 3:

- Internally calculate the actual average maintenance costs of vehicles relating to company business.
- Then reimburse on per mileage basis based upon the most efficient delivery route that company software calculates.
- Some good examples of calculations may be found at: <http://www.companymileage.com/howmileageratedetermined.html>, <https://turbotax.intuit.com/tax-tools/tax-tips/Small-Business-Taxes/Business-Use-of-Vehicles/INF12071.html>, or <http://www.smbiz.com/sbfaq024.html>.

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Option 4:

- Pay a flat delivery fee per delivery which is calculated to determine the average mileage per store over a 1 to 2 week period multiplied by 57.5 cents per mile (or whatever you use as a reasonable basis to calculate the expense as identified on Option 2 and Option 3).
- Re-calculate the average mileage at least annually.
- Create a policy that gives employees the ability to report deliveries that significantly exceed the average mileage calculations to minimize the likelihood that an employee files a complaint with the Department of Labor.

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Option 5:

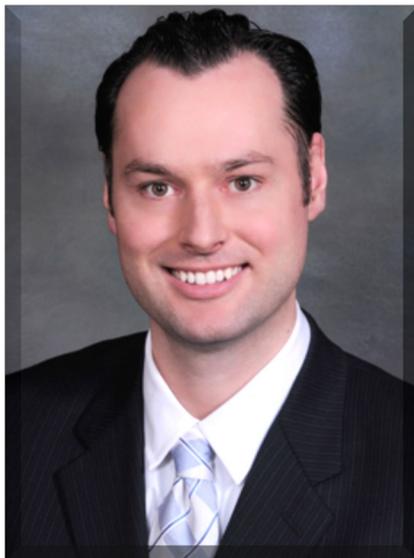
- Take advantage of the full tip credit (meaning pay the tipped employee minimum hourly wage rate) and pay more in mileage reimbursement or a higher flat delivery fee.
- This could be a win/win since the Employer and Employee will benefit from tax savings.
- Reimbursements are not taxable income.

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Option 6:

- Pay all delivery employees at least minimum wage plus tips and avoid any delivery fees/reimbursement obligations (assuming the tips cover same).
- As long as the employee is receiving at least non-tip minimum wage (\$7.25 per hour federal), reported tips received may be used to offset any costs of mileage reimbursement, etc.
- State minimum wage may be different.

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Employment lawyer partnering with HR execs to reduce liabilities,
improve employee relationships & enhance performance.

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