

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

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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

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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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