UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT PARKER, et al.,

Plaintiffs,

v.

BATTLE CREEK PIZZA, INC., et al.,

Defendants.
_____/

Case No. 1:20-cv-277

HON. JANET T. NEFF

**OPINION AND ORDER**

Plaintiffs filed this action alleging that Defendants paid their pizza delivery drivers less than minimum wage in violation of federal and state law. Pending before the Court are the parties' cross motions for partial summary judgment on the issue of what legal standard applies to reimburse a delivery driver for vehicle expenses (ECF Nos. 100 and 104). The parties have also filed multiple supplements to their motions (ECF Nos. 114, 115, 116, 137, 140, 141, and 144). Plaintiffs have moved to strike one of Defendants' supplements (ECF No. 121) and requested a status conference (ECF No. 131). For the reasons stated below, the Court grants Plaintiffs' motion for partial summary judgment, grants Plaintiffs' motion to strike, denies Plaintiffs' motion for a status conference, and denies Defendants' motion for partial summary judgment.

## I. BACKGROUND

This is the latest in a series of cases alleging that pizza delivery drivers are not properly compensated for vehicle expenses.[1] Plaintiffs are current or former pizza delivery drivers

[1] *See, e.g.*, *Bradford v. Team Pizza, Inc.*, __ F. Supp. 3d __, 2021 WL 4860600, at *1 (S.D. Ohio 2021); *Waters v. Pizza to You, LLC*, 538 F. Supp. 3d 792 (S.D. Ohio 2021); *Kennedy v*

employed by Defendants. Defendants paid each driver $1.00 per delivery from 2017 to 2019 and $1.50 per delivery in 2020. Defendants did not keep track of the delivery drivers' actual vehicle expenses or reimburse them at the IRS mileage reimbursement rate.[2] Plaintiffs allege that the low per-delivery payments resulted in Defendants paying the delivery drivers less than minimum wage in violation of the Fair Labor Standards Act (FLSA) 29 U.S.C. § 201 *et seq*., (Count I); the Michigan Work Force Opportunity Wage Act, Mich. Comp. Laws § 408.414 *et seq.,* (Count II); and the Indiana Wage Payment Statute, Ind. Code § 22-2-5 (Count III). Plaintiffs also assert unjust enrichment claims under Michigan and Indiana state law (Counts IV and V).

In response to the parties' Joint Motion (ECF No. 92), this Court ordered the parties to brief the reimbursement rate issue—what standard should apply to an employer's reimbursement of vehicle expenses incurred by pizza delivery drivers under the FLSA (ECF No. 96). The parties agree that an employer can reimburse a delivery driver by tracking and paying the actual vehicle expenses. The parties disagree, however, on the appropriate method for an employer to reimburse a delivery driver when the employer does not keep track of the actual expenses. Plaintiffs argue that the FLSA regulation is ambiguous in this context and that the Court should adopt the Department of Labor (DOL) Handbook approach, which requires employers to pay the mileage reimbursement rate set by the Internal Revenue Service. *See* U.S. Dep't of Labor, *Field Operations Handbook* § 30c15(a) (2000). Defendants argue that the regulation is unambiguous and that they are required to reimburse the delivery drivers a "reasonably approximate" amount,

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*Mountainside Pizza, Inc*., No. 19-CV-1199, 2020 WL 5076756, (D. Colo. Aug. 26, 2020); *Hatmaker v. PJ Ohio, LLC*, No. 3:17-CV-146, 2019 WL 5725043 (S.D. Ohio, Nov. 5, 2019).

[2] The IRS mileage reimbursement rate between 2016 and 2020 ranged from $0.535 per mile to $0.58 per mile. *See* https://www.irs.gov/tax-professionals/standard-mileage-rates.

which is consistent with an August 31, 2020 Opinion Letter.[3] *See* 29 C.F.R. § 531.32(c); U.S. Dep't of Labor, Wage & Hour Div., *Opinion Letter* (Aug. 31, 2020), 2020 WL 5296626.

## II. MOTION STANDARD

"A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought." FED. R. CIV. P. 56(a). "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id.* The court must consider the evidence and all reasonable inferences in favor of the nonmoving party. *Burgess v. Fischer*, 735 F.3d 462, 471 (6th Cir. 2013); *U.S. S.E.C. v. Sierra Brokerage Servs., Inc.*, 712 F.3d 321, 327 (6th Cir. 2013). The moving party has the initial burden of showing the absence of a genuine issue of material fact. *Jakubowski v. Christ Hosp., Inc.,* 627 F.3d 195, 200 (6th Cir. 2010). The burden then "shifts to the nonmoving party, who must present some 'specific facts showing that there is a genuine issue for trial.'" *Id.* (quoting *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986)).

## III. ANALYSIS

"'Congress passed the FLSA with broad remedial intent' to address 'unfair method[s] of competition in commerce' that cause 'labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.'" *Monroe v. FTS USA, LLC*, 860 F.3d 389, 396 (6th Cir. 2017) (quoting *Keller v. Miri Microsystems LLC,* 781 F.3d 799, 806 (6th Cir. 2015) and 29 U.S.C. § 202(a)); *see also Powell v. U.S. Cartridge*

[3] According to Defendants' expert, the drivers were reimbursed at an average rate of $0.25 per mile from 2017 to 2019, and at an average rate of $0.31 per mile in 2020 (ECF No. 105-2 at PageID.1214). Defendants' expert further opines that the average actual vehicle expense incurred by the drivers ranged from $0.21 to $0.29 per mile (*id.*).

*Co.*, 339 U.S. 497, 510 (1950) (stating that the purpose of the FLSA "was to eliminate, as rapidly as practicable, substandard labor conditions throughout the nation"). One way the FLSA protects workers is that it mandates that employers pay employees a minimum wage. *See* 29 U.S.C. § 206. "The DOL regulations require that the minimum wage be paid 'finally and unconditionally' or 'free and clear.'" *Stein v. hhgregg, Inc.,* 873 F.3d 523, 530 (6th Cir. 2017) (citing 29 U.S.C. § 206(a) and 29 C.F.R. § 531.35). Relevant to this case, the anti-kickback regulation provides:

> 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. This is true whether the "kick-back" is made in cash or in other than cash. For example, if it is a requirement of the employer that the employee must provide tools of the trade which will be used in or are specifically required for the performance of the employer's particular work, there would be a violation of the Act in any workweek when the cost of such tools purchased by the employee cuts into the minimum or overtime wages required to be paid [to] him under the Act. See also in this connection, § 531.32(c).

29 C.F.R. § 531.35.

The principle is relatively simple: employers cannot shift business expenses to their employees if doing so drops the employees' wages below minimum wage. "In the pizza delivery context, the cost associated with delivering food for an employer is a 'kickback' to the employer that must be fully reimbursed, lest a minimum wage violation be triggered." *Hatmaker,* 2019 WL 5725043, at *2.

The narrow issue before the Court is what standard applies for calculating reimbursements of vehicle expenses in the pizza delivery driver context. The Court first looks to the text of the regulation and must apply the standard canons of construction. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019). If the regulation's meaning is plain, "the court must give it effect, as the court would any law." *Id.* If the regulation is genuinely ambiguous, the Court must defer to the agency's

reasonable interpretation of its own regulations. *Id.*

Applying these rules, the Court finds that the text of the regulation is generally ambiguous as applied to delivery drivers who use their own cars because it does not address how to calculate vehicle costs. There is nothing in the anti-kickback regulation that provides a methodology for calculating mileage rates. *Waters*, 538 F. Supp. 3d at 792. Nor is there anything in that regulation that provides any guidance on calculating vehicle expenses in general. *Id.*

Defendants argue that the cross-references in the anti-kickback regulation clear up any ambiguity. The last sentence of the regulation references 29 C.F.R. § 531.32(c), which in turn references 29 C.F.R. § 778.217. Section 778.217 provides that an employer may reimburse an employee the "reasonably approximate amount expended by an employee . . . ." 29 C.F.R. § 778.217. But it is not entirely clear that 29 C.F.R. § 778.217 applies in this context. The regulation governs how reimbursements are treated when calculating overtime rates. It allows an employer to exclude the "actual or reasonably approximate amount expended by an employee" for travel expenses when calculating overtime pay. Applying this regulation in the context of calculating vehicle expenses for reimbursements arguably conflicts with the remedial purpose of the FLSA. *See Monroe*, 860 F.3d at 396; *Powell*, 339 U.S. at 510.

Nonetheless, even assuming 29 C.F.R. § 778.217 applies in this context, the "reasonably approximate" standard itself is ambiguous. What is a reasonably approximate amount of vehicle expenses? Does it include fuel, depreciation, insurance, interest, registration fees, storage, and/or repairs? Is it measured by the specific costs the employee incurred? Unlike other expenses with a finite value, such as a construction tool or a uniform, vehicle expenses are difficult to calculate and contain multiple variables. The FLSA does not provide any guidance on how to calculate vehicle expenses.

In *Kennedy*, the district court addressed the same issue and determined that the term "reasonably" was "vague, but not ambiguous." 2020 WL 5076756. at *5. The court reasoned that "[t]he term 'reasonable' allows the [c]ourt the discretion to tailor the regulation to the circumstances before it, and [the court] routinely applies statutory standards of reasonableness without finding ambiguity." *Id.* This Court respectfully disagrees. Although a court may be able to interpret the term "reasonable" in one context, the term may still be ambiguous in other contexts. For example, the Sixth Circuit has determined that the phrase "reasonable period" can be generally ambiguous when "it is neither defined in the statute nor the regulation itself." *Fras Abdul Kazem Audi v. Barr*, 839 F. App'x 953, 962 (6th Cir. 2020). The same is true in the instant case. The reasonably approximate standard is not defined and has no discernable limits. It is more than simply vague. Telling a company to reimburse a delivery driver a "reasonably approximate" amount for vehicle expenses amounts to no standard at all.

Because the Court finds that the regulation is generally ambiguous in this context, the Court may defer to the agency's interpretations to resolve the ambiguity, so long as it is reasonable. *See Kisor*, 139 S. Ct. at 2422. The Court should consider (1) whether the interpretation is the agency's "authoritative" or "official position," (2) whether the interpretation implicates the agency's "substantive expertise," and (3) whether the interpretation reflects the agency's "fair and considered judgment" and is not just a "convenient litigating position." *Id.* at 2415-17.

As the parties point out, there are two agency approaches to consider in this case. First, the DOL addressed the ambiguity in the Field Operations Handbook. According to the Handbook, employers can either (1) keep records of delivery drivers' actual expenses and reimburse for them or (2) reimburse drivers at the IRS standard business mileage rate. *See* Dep't of Labor, *Field Operations Handbook* § 30c15(a) (2000). Second, the Wage and Hour Division of the DOL issued

an Opinion Letter addressing this situation on August 31, 2020. U.S. Dep't of Labor, Wage & Hour Div., *Opinion Letter* (Aug. 31, 2020), 2020 WL 5296626. The Letter says that an employer can either (1) keep records of delivery drivers' actual expenses and reimburse for them, or (2) use a "reasonable approximation" of expenses. While the Letter recognizes that the IRS mileage rate is not required under the reasonable approximation standard, the Letter does not further define the standard and refuses to approve or disapprove various other methods.

Having considered each interpretation, the Court adopts the DOL Handbook's approach to calculating vehicle expenses. "The Handbook reflects a reasoned determination that the IRS mileage rate is an appropriate proxy for reimbursement when an employer fails to keep records." *Waters*, 538 F. Supp. 3d at 798. "The IRS mileage rate is a data-driven and systematic methodology for estimating the cost of driving a mile." *Id.* at 794. More importantly, the Handbook's approach is consistent with the FLSA's remedial purpose. "The Handbook's methodology 'provides employers with a clear directive for minimum wage compliance and allows them to avoid the substantial costs of keeping records of their employees' actual expenses. It likewise provides employees a clear understanding of how the minimum wage laws apply to them." *Id.* at 795-96 (quoting *Hatmaker*, 2019 WL 5725043, at *7). "The Fair Labor Standards Act's remedial goals are defeated if employees have no way of knowing whether they are being paid properly." *Hatmaker*, 2019 WL 5725043, at *6.

In *Waters*, the district court held that "[t]he Letter fail[ed] the *Kisor* requirements, making it unworthy of deference for multiple, independently sufficient reasons." 538 F. Supp. 3d at 798. Those reasons included: (1) the Letter relied on the language in 29 C.F.R. § 778.21, despite that language concerning only overtime calculation and not minimum wage; (2) the Letter is an attempt to replace court decisions with the agency's own legal judgments; (3) the Letter does not implicate

the agency's "substantive expertise;" and (4) the Letter conflicts with the agency's previous interpretation. *Id.* at 400. Furthermore, the Letter "does little to define [reasonably approximate] standard, leaving employees in the dark as to what rights they have." *Waters*, 538 F. Supp. 3d at 797. This Court adopts the same reasoning and will not defer to the Letter's interpretation because it does not satisfy the *Kisor* requirements.

Accordingly, this Court holds that to comply with the minimum wage regulations in the pizza delivery driver context, employers can either (1) keep records of delivery drivers' actual expenses and reimburse for them, or (2) reimburse drivers at the IRS standard business mileage rate. The Court, therefore, grants Plaintiffs' motion for partial summary judgment and denies Defendants' motion for partial summary judgment.

Finally, the Court must address Defendants' various supplements and Plaintiffs' motion to strike. The parties jointly requested to brief the narrow reimbursement rate issue (ECF No. 92). This Court's order limited the briefing to the reimbursement rate issue (ECF No. 96). Defendants' first supplement (ECF No. 116) has no bearing on this limited issue. Although Defendants may be able to raise those arguments in another motion, they are not properly before the Court at this time. Accordingly, the Court grants Plaintiffs' motion to strike.

## IV. CONCLUSION

For the foregoing reasons,

**IT IS HEREBY ORDERED** that Plaintiffs' Motion for Partial Summary Judgment (ECF No. 100) is GRANTED.

**IT IS FURTHER ORDERED** that Defendants' Motion for Partial Summary Judgment (ECF No. 104) is DENIED.

**IT IS FURTHER ORDERED** that Plaintiffs' Motion to Strike (ECF No. 121) is

GRANTED. Defendants' supplemental filing (ECF No. 116) is STRICKEN from the record.

**IT IS FURTHER ORDERED** that Plaintiff's Motion for Status Conference on Motion to Strike (ECF No. 131) is DENIED as MOOT.

**IT IS FURTHER ORDERED** that within twenty-eight days of today's date, the parties shall file a Joint Notice advising the Court whether:

1. the parties have reached a resolution of this case, including an estimated time for filing dismissal papers;

2. this matter may be re-submitted to facilitative mediation, including an estimated time for completion; or

3. further proceedings are necessary, including a proposed plan to move this case toward conclusion.

Dated: April 28, 2022

/s/ Janet T. Neff
JANET T. NEFF
United States District Judge