In the United States District Court
for the Southern District of Ohio
Western Division

Derrick Thomas,	
On behalf of himself and those similarly situated,	Case No. 1:17-cv-411
Plaintiff,	Judge Michael R. Barrett
v.	
Papa John's International, Inc., *et al*	
Defendants.	

Plaintiff's Response in Opposition to Defendants' Motion to Compel Discovery and Cross-Motion for Protective Order

Plaintiff hereby responds in Opposition to Defendants' Motion to Compel Discovery (ECF # 85, 86) and makes a Cross-Motion for Protective Order. Like two other cases currently pending before this Court—*Bradford v. Team Pizza, Inc.*, No. 1:20-cv-60, and *Bailey v. Six Slice*, No. 1:20-cv-432—the parties' dispute requires the Court to determine the proper legal standard that applies to this case in order to determine whether Defendants' requested discovery is relevant.

Defendants have two choices when reimbursing their minimum wage delivery drivers: "(1) track and pay delivery drivers' actual expenses or (2) pay the mileage reimbursement rate set by the Internal Revenue Service." *Hatmaker v. PJ Ohio, LLC*, No. 3:17-cv-146, 2020 WL 1129325, at *1 (S.D. Ohio Mar. 6, 2020). Since Defendants concede they have not tracked actual expenses, the question is whether they reimbursed at the IRS rate. This question can be answered by reference to Defendants' records. Whatever piecemeal records of actual expenses the delivery drivers' might have are irrelevant to this question and, therefore, outside the proper scope of discovery.

Respectfully submitted,

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DOL Field Operations Handbook § 30c07 .... 27, 41
Gerald Mayer, Benjamin Collins, and David H. Bradley, Cong. Research Serv., *The Fair Labor Standards Act (FLSA): An Overview*, Cornell U. ILR Sch., 1 (2013) 11
https://exchange.aaa.com/wp-content/uploads/2019/09/AAA-Your-Driving-Costs-2019.pdf (accessed Sept. 4, 2020) 29
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https://www.merriam-webster.com/dictionary/establish (accessed Sept. 5, 2020) 27
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Memorandum in Opposition to Defendants' Motion to Compel and in Support of Plaintiff's Motion for Protective Order

1. Introduction

Defendants demand that Plaintiff, all 117 opt-in Plaintiffs, and over 600 putative Rule 23 class members respond to detailed document requests and interrogatories relating to the individual vehicle costs those workers incurred while completing deliveries for Defendants' Papa John's stores. The goal of this inquiry is for Defendants to eventually argue that whatever they reimbursed the drivers exceeded the "actual expenses" for which the drivers happened to have kept records. *See* Motion to Compel, ECF # 85, Page ID 1483. In other words, the minimum wage workers lose unless they can produce comprehensive vehicle cost records that they "likely no longer have and had no reason or duty to keep." *Hatmaker v. PJ Ohio, LLC*, No. 3:17-cv-146, 2020 WL 1129325, *4 (S.D. Ohio Mar. 6, 2020) ("*Hatmaker II*").

Defendants' proposed discovery, and the unfounded legal arguments that will inevitably follow, flip the FLSA's recordkeeping burden upside down. As Plaintiff will detail herein, it is the employer who must keep records relating to their workers' renumeration, not the workers themselves. And, if the employer chooses not to or fails to do so—as Defendants have here—the employer is not permitted to profit from this failure. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946).

In the pizza delivery context, this principle manifests in a standard first articulated 20 years ago by the Department of Labor in its Field Operations Handbook and recently adopted by other courts in the Southern District of Ohio:

> As a matter of law, [] the proper measure of minimum wage compliance for pizza delivery drivers is to either (1) track and pay delivery drivers' actual expenses or (2) pay the mileage reimbursement rate set by the Internal Revenue Service.

Hatmaker v. PJ Ohio, LLC, No. 3:17-cv-146, 2019 WL 5725043, at *7 (S.D. Ohio Nov. 5, 2019) ("*Hatmaker I*"); *see also* Department of Labor Field Operations Handbook § 30c15(a) (2000); *Brandenburg v. Cousin Vinny's Pizza*, No. 3:16-CV-516, 2018 WL 5800594, at *4 (S.D. Ohio Nov. 6, 2018) (granting Rule 23 class certification and holding "Because the vehicles owned by the delivery drivers are considered 'tools of the trade,' 29 C.F.R. § 531.35, and required by Cousin Vinny's as a condition of being hired as a delivery driver, there needed to be an adequate reimbursement rate, using either the IRS mileage rate or actual reimbursement of cost, in order to avoid a decrease in the minimum wage and overtime paid.").

Under the standard announced in the Department of Labor Handbook, "[d]iscovery … should be a straightforward process, focused mainly on the records Defendants are required to keep under the FLSA and Ohio law." *Hatmaker II*, 2020 WL 1129325, at *3 (granting motion for protective order in a nearly identical situation).

As this Court is aware, despite the well-reasoned and consistent precedent in the Southern District of Ohio, this issue is popping back up in nearly every pizza delivery driver case in the District, including two other matters pending before this Court.[1] The reason for the pizza industry's newfound hope is a Department of Labor ("DOL") Opinion Letter, adopted on August 31, 2020.

[1] *Bradford v. Team Pizza, Inc.*, No. 1:20-cv-60, ECF # 30, 31, 38, and 39 (legal standard issue fully briefed), and *Bailey v. Six Slice*, No. 1:20-cv-432, ECF Docket Entry, Nov. 9, 2020 (order staying certain discovery pending decision in *Bradford*).

At the behest of an unidentified pizza company that was supposedly not involved in litigation, the DOL published an "Opinion Letter" on August 31, 2020 that adopted the pizza industry's favored "approximation" standard. In doing so, the DOL did not reject its prior interpretation contained in the Field Operations Handbook. Instead, the DOL said that, although the Handbook appears to give a binary choice, it really allows for any reimbursement standard as long as it is "reasonable" (a wholly undefined term). "For the pizza delivery industry, which …had not been faring well when making this same argument to federal judges, the Opinion Letter was exactly what it had been looking for from federal judges but not having much success in obtaining." *Ely v. PJ Cheese*, AAA Case No. 01-19-0004-1722, p. 7 (Lightmas, Jr. Nov. 30, 2020) (rejecting Opinion Letter) (attached as Exhibit 1).

As evidenced by their Motion, Defendants are now in a hurry to revert to the opaque "reasonable approximation" standard by deploying one of its hallmarks: weaponized discovery, designed to shift the recordkeeping burden improperly onto the delivery drivers[2] and to seek dismissal of any driver who does not respond fully in discovery.[3] The goal of Defendants' proposed discovery is to impose an extreme discovery burden on the workers and their counsel, as well as to perhaps justify the company's reimbursement practice, *ex post facto*, with information they never maintained nor were ever previously interested in.

[2] *Hatmaker v. PJ Ohio, LLC,* 2020 WL 1129325, at *1 (*Hatmaker III*) ("Defendants' position is that the Court's order did not address the threshold issue of whether Plaintiffs actually incurred costs. Plaintiffs must prove that they actually incurred costs to establish liability. The fact that the parties agree that motor vehicles were used to deliver the pizzas suffices to prove that costs were incurred in their delivery. The pizzas were not walked to homes and we are not dealing with bicycle delivery. The parties agree that cars were used. The Court thus dispenses with Defendants' position that 'If Plaintiffs did not actually incur costs, they cannot have been 'under-reimbursed.'" ECF 131, PageID 2183."); *see also* ECF # 85, Page ID 1483 (explaining that Defendants intend to compare the drivers' records of actual expenses with the reimbursements they paid to determine if there is a kickback).

[3] *See, e.g., Perrin v. Papa John's Int'l*, Inc., 2014 WL 4749547, at *1 (E.D. Mo. Sept. 24, 2014) (*Perrin II*); *Sullivan v. PJ United, Inc.*, No. 7:13-CV-01275-LSC, 2017 WL 10575860, at *8 (N.D. Ala. Oct. 16, 2017).

For multiple independently sufficient reasons, the DOL Letter is not entitled to deference. It is not the type of interpretation typically afforded deference, does not call on the agency's substantive expertise, and, in any event, is not a reasonable interpretation of the FLSA and its regulations. Finally, as noted by an arbitrator on November 30, 2020, the Letter has come about under "troubling" circumstances, as it appears to adopt the pizza delivery industry's legal position, in a non-adversarial setting, without disclosing who is asking for the opinion or what facts were considered.

> [T]he lack of transparency behind the Opinion Letter is troubling. Prior to the issuance of the Opinion Letter on August 31, 2020, as reflected by the cases cited by the parties, the pizza industry appears to have been on a losing streak as federal courts considering this issue sided more often with Claimant's position than Respondent's. More specifically, since the Sullivan decision was issued in 2018, it appears that no fewer than six or seven federal courts considered the issue and consistently ruled in favor of the position taken by Claimant and against the position taken by the pizza delivery industry. When viewed in this light, it appears that the request that resulted in the Opinion Letter may well have been the result of an effort by the pizza delivery industry to seek a more favorable forum than a federal district court.
>
> It is also troubling that just six days prior to issuing the Opinion Letter, in a brief filed by [the] DOL in support of a motion for partial summary judgment, the DOL referenced multiplying the daily average mileage driven by drivers by the IRS standard business mileage rate and cited in support of that point one of the cases cited by Claimant that held that "pizza delivery drivers are owed the difference between the reimbursements provided and the IRS rate when the employer fails to keep records of their actual expenses."

Ely, pp. 8-10.

The Court is now asked to determine the legal standard that applies to this case, which will determine what information is relevant in discovery. At issue is whether a remedial statute, designed to protect employees, operates under a standard where low-wage workers are punished if they do not have relevant employment records, and need to hire an expert just to figure out if they were paid *minimum* wage. Considering the nature of the FLSA itself, the statutory language, the regulatory language, as well as the persuasive and rational approach of the DOL handbook, such an outcome runs afoul of the purpose and intent of the FLSA.

The reality is that the Letter changes nothing, nor does it have the power to do so. Moreover, a DOL Opinion Letter has no power to overrule Judge Rose's decision interpreting the law and accompanying regulations. The Court should affirm that the Handbook standard applies in this case and issue an order prohibiting Defendants from seeking discovery related to the drivers' individualized expenses.

2. Factual and Procedural Background

Plaintiff Derrick Thomas is a former pizza delivery driver at a Papa John's franchise store in Cincinnati, Ohio. On June 16, 2017, Plaintiff filed this lawsuit alleging Papa John's violated state and federal minimum wage law because they failed to adequately reimburse their minimum wage pizza delivery drivers for the costs associated with providing their automobiles to make Defendants' deliveries. ECF #1.

On September 29, 2019, the Court granted Plaintiff's Motion for Conditional Certification. ECF # 51. In late 2019 and early 2020, notice was distributed to approximately 700 delivery drivers. 117 delivery drivers opted into the case for FLSA purposes.

On September 29, 2020, Defendants emailed Plaintiff's counsel, attaching a proposed discovery stipulation and a proposed discovery "questionnaire". *See* ECF # 81-3, Defendants' Proposed Stipulation; Ex. 2, Defendants' Proposed Discovery Questionnaire. Defendants claim that "rather than propound requests for production and interrogatories, the Stipulation proposes a user-friendly questionnaire." ECF # 85, Page ID 1476. But Defendants' "questionnaire" contains detailed questions (*i.e.*, interrogatories), and requests all documents relating to compensation paid, vehicle costs, and any documents that relate to Defendants' interrogatory questions (*i.e.*, requests for production). *See* Ex. 2. The questionnaire document explicitly states that "[Defendants] serve this Discovery Questionnaire under Rule 33 and 34 of the Federal Rules of Civil Procedure." *Id.*

Defendants ask that the Court order this document be completed by the over 700 delivery drivers—including over 600 people who have not responded to the FLSA collective action notice—despite the fact that it is information the drivers "likely no longer have and had no reason or duty to keep." *Hatmaker II*, 2020 WL 1129325, at *4. Defendants' stipulation also contemplates Defendants taking 30 depositions of opt-in plaintiffs.

During phone calls on October 21 and October 27, 2020, Plaintiff's counsel explained to counsel for PJI and counsel for the It's Only Defendants that Plaintiff would not enter into the discovery stipulation because the information sought is irrelevant to any viable claim or defense raised in this lawsuit. *See* Ex. 3, Letter from Plaintiff's counsel, Nov. 4, 2020 (detailing these conversations). On October 26, 2020, Plaintiff provided formal written objections to Defendants' discovery questionnaire. Ex. 4, Plaintiff's Objections to Defendants' Questionnaire. Thereafter, Defendants filed their Motion to Compel.

Plaintiff now responds in Opposition to Defendants' Motion to Compel and also cross-moves for his own discovery order. Plaintiff seeks a protective order prohibiting Defendants from asking for irrelevant vehicle cost information. *See, e.g., Hatmaker II*, 2020 WL 1129325, *4 (granting plaintiff's motion for protective order in nearly identical scenario against another Papa John's franchise).

3. Applicable Discovery Standards

"[D]iscovery, like all matters of procedure, has ultimate and necessary boundaries." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 352 (1978), *quoting Hickman v. Taylor*, 329 U.S. 495, 501 (1947). "Determining the proper scope of discovery falls within the broad discretion of the trial court." *Noble v. Ruby Tuesday's Restaurants, Inc.*, No. 2:06-cv-259, 2007 WL 3125131, at *1 (S.D. Ohio Oct. 23, 2007), *citing Lewis v. ACB Bus. Servs. Inc.*, 135 F.3d 389, 402 (6th Cir. 1986).

3.1. Discovery must be relevant to a cognizable claim or defense.

Rule 26(b)(1) defines the scope of discovery as follows:

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

For discovery into a certain subject to be proper, it must be relevant to a claim or defense raised in the lawsuit. Inherent in the words "claim or defense" is the prerequisite that the claim or defense be legally cognizable. It is therefore necessary for a court to determine whether a claim or defense is cognizable when considering whether to allow discovery into that claim or defense. *See, e.g., Goro v. Flowers Foods,* No. 17-cv-02580, 2018 WL 9515178, *3 (S.D. Cal. Dec. 11, 2018) ("District courts have broad discretion to determine relevancy for discovery purposes and to limit the scope of discovery."); *Raiser v. City of Temecula,* No. 5:17-cv-00217, 2018 WL 6016285, at *1 (C.D. Cal. Aug. 17, 2018) (courts have an "obligation to limit the scope of discovery to what is relevant and proportional to the needs of the case."). "If the information sought is deemed by the court to be irrelevant, the court should restrict discovery to protect a party from "annoyance, embarrassment, oppression, or undue burden or expense[.]" *EEOC v. U.S. Bakery,* No. 3:03-cv-00064, 2004 WL 1307915, at *2 (D. Or. Feb. 4, 2004).

Defendants, as the parties moving to compel discovery, bear the initial burden of proving the relevance of the information sought. *Martinez v. First Class Interiors of Naples, LLC,* No. 3:18-cv-00583, 2020 U.S. Dist. LEXIS 223020, at *6 (M.D. Tenn. Nov. 30, 2020)*, citing Gruenbaum v. Werner Enters., Inc.*, 270 F.R.D. 298, 302 (S.D. Ohio 2010); *see also* Fed. R. Civ. P. 26(b)(1) advisory committee's note to 2015 amendment ("A party claiming that a request is important to resolve the issues should be able to explain the ways **in** which the underlying information bears on the issues as that party understands them.").

Plaintiff, as the party seeking the protective order, bears the burden to show good cause "with a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements." *Serrano v. Cintas Corp.*, 699 F.3d 884, 901 (6th Cir. 2012) (quoting *Nemir v. Mitsubishi Motors Corp.*, 381 F.3d 540, 550 (6th Cir. 2004)).

"To determine relevance, the Court must look to the claims and defenses asserted." *Clark v. Hercules, Inc.,* No. 2:13-cv-794, 2017 WL 3316311, at *12 (M.D. Fla. Aug. 3, 2017).[4] Of course, in evaluating this question, the Court is not making a determination regarding whether a party *prevails* on the merits of a claim or defense. The question at this stage is whether a party has

[4] *See also, e.g., Food & Water Watch, Inc. v. U.S. EPA,* 302 F.Supp.3d 1058, 1070 (N.D. Cal. Feb. 7, 2018) (deciding on the scope of discovery "[g]iven the elements of the claim"); *Gibson v. Wetzel,* No. 2:11-cv-04550, 2016 WL 1273626, at *2 (E.D. Pa. Mar. 31, 2016) ("Before addressing the scope of discovery entitled to Petitioner, the Court first must identify the essential elements of the claim upon which the petition is based."); *FDIC v. Killinger,* No. 2:11-cv-00459, 2011 WL 4440410, at *1 (W.D. Wash. Sept. 21, 2011) ("A protective order can be properly issued where the discovery requests seek information that is not relevant."); *Grae v. Corr. Corp. of Am.*, 326 F.R.D. 482, 485-486 (M.D.Tenn.2018) (interpreting Rule 26(b)'s relevance requirement by reference to F.R.E. 401).

articulated a claim or defense that is legally cognizable and, thus, whether discovery on the claim or defense may proceed.

Here, to determine whether Defendants' requests are within the scope of discovery, the Court must determine what legal standard applies to the drivers' claims. Under the proper legal standard, pizza companies who require minimum wage workers to use their own cars to make deliveries have two options when ensuring their automobile expense reimbursement payments are sufficient to meet the requirements of the FLSA's anti-kickback rule: they can either (1) reimburse for actual expenses, with associated recordkeeping of those expenses, or (2) reimburse at the IRS standard business mileage rate. Franchisee owner James Phelps acknowledged that Defendants require drivers to provide their own cars, pay drivers a tipped minimum wage rate, and do not track and reimburse based on the drivers' actual expenses. Ex. 5, Transcript of James Phelps Deposition (hereinafter Phelps Dep.), at p. 84 ("Q. Are delivery drivers at the Hutmier Group required to provide a car to use at work? A. Yes."); p. 61 (acknowledging that the pay range for delivery drivers begins at "minimum wage," and is a "tipped wage rate"); and p. 84 ("Q. Does the Hutmier Group collect records of the delivery drivers' automobile expenses? A. No."). The only question remaining is whether their delivery drivers received at least the IRS mileage rate for each mile they drove making deliveries. The documents and information requested by Defendants will not help to answer that question.

3.2. Plaintiff is not obligated to enter a discovery stipulation because other delivery driver plaintiffs voluntarily entered such a stipulation.

Defendants repeatedly suggest that the delivery drivers in this case should be required to agree to the same discovery that other delivery drivers in other cases represented by different counsel have agreed to provide. Specifically, Defendants make the point that their proposed stipulation "largely tracks the procedures used in [*Perrin v. Papa John's* and *Durling v. Papa John's*]." ECF # 85, Page ID 1477.

Perrin and *Durling* involved *stipulations*. *See* Ex. 6, Stipulations from *Durling* and *Perrin*. In other words, both parties agreed to send out the questionnaires. This is not proof of anything other than that other counsel, who are not representing the Plaintiff delivery drivers, might take a different approach than Plaintiff's counsel. Further, both cases came about before the recent decisions adopting the DOL Handbook standard and involved plaintiffs who were also advocating for the "reasonable approximation" standard. Certainly, Plaintiff is not obligated to provide irrelevant discovery because drivers before him have done so voluntarily.

4. Argument

This case addresses a pay practice so ubiquitous that most people rarely give it a second thought: pizza delivery drivers use their own cars to deliver their employer's pizzas.

Providing those vehicles is no small expense. The vehicles require fuel, maintenance, registration fees, and insurance. As a type of driving, pizza delivery is particularly deleterious to a car's condition and value because of the frequent starts and stops and premium on speedy service. These are costs that companies, like Defendants, shift onto their minimum wage workers.

Plaintiff and the drivers argue that they should be reimbursed for the expense of having to use their cars for their employer's benefit. And, to the extent that their employer fails to do so, the unreimbursed expenses reduce the drivers' effective wage rates. Because pizza companies almost invariably pay barely minimum wage (or, most often, the even lower "tipped minimum wage"), this reduction drops the drivers' wage rates below the legally-mandated floor.

The question is how much must an employer reimburse a pizza delivery driver to cover the driver's vehicle-related costs? With an answer to this question, one can easily compare an employer's reimbursement to the appropriate measure of vehicle-related costs in order to determine whether a shortfall exists.

Unfortunately, the applicable law—the Fair Labor Standards Act ("FLSA")—is a complex weave of statutes, regulations, and judicial and agency interpretations. Until recently corrected by several discerning courts, savvy pizza company litigants have leveraged this complexity against low-wage drivers to generate a judicially-created legal standard that is profitable to the companies and detrimental to the drivers. To fully explain the law in this area, Plaintiff will discuss some basic FLSA principles then address why the Handbook standard applies and the Letter does not.

4.1. Relevant FLSA Rules and Principles

4.1.1. The Fair Labor Standards Act is a remedial statute, designed to protect workers.

No discussion of the FLSA can begin without recognizing that it is a remedial statute designed to protect workers from "substandard labor conditions." *Powell v. U.S. Cartridge Co.*, 339 U.S. 497, 510 (1950). The FLSA's purpose is to "as rapidly as practicable [] eliminate [] conditions" "detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. 202(a) and (b).

The FLSA was part of an economic response to the Great Depression, but its principle of a fair day's wage for a fair day's work applies as much today as it did then. *See* Gerald Mayer, Benjamin Collins, and David H. Bradley, CONG. RESEARCH SERV., *The Fair Labor Standards Act (FLSA): An Overview*, CORNELL U. ILR SCH., 1 (2013). Congress found that "substandard wages caused a decrease in wages within [] respective industries" which then "caused one-third of the U.S. population to be 'ill-nourished, ill-clad, and ill-housed.'" *Id.* (quoting U.S. CONG. S. COMM. ON EDUC. AND LAB., 75TH CONG., 1ST SESSION, FAIR LABOR STANDARDS ACT, REPORT TO ACCOMPANY S. 2475, Report No. 884, 1 (1937)).

At its core, the statute is designed to combat the unequal bargaining power between employer and employee that at one time resulted in the endangerment of national health and efficiency on a scale sufficient to require corrective legislation. Because the FLSA's provisions are "remedial and humanitarian in purpose," the statute "must not be interpreted or applied in a narrow, grudging manner." *Monroe v. FTS USA, LLC*, 860 F.3d 389, 396 (6th Cir. 2017), *quoting Herman v. Fabri-Centers of Am., Inc.*, 308 F.3d 580, 585 (6th Cir. 2002).

4.1.2. Employers and employees cannot contract around the FLSA.

Employees cannot waive their FLSA rights, nor can they contract away FLSA rights. *Craig v. Bridges Bros. Trucking, LLC* 823 F.3d 282, 388 (6th Cir. 2016); *see generally D.A. Schulte, Inc., v. Gangi*, 328 U.S. 108 (1946); *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697 (1945). An employer cannot argue that an employee's actions, or even inaction, can cause the employee to lose or waive their FLSA rights. The "obligation [for FLSA compliance] is the employer's and it is absolute. He cannot discharge it by attempting to transfer his statutory burdens of accurate record keeping, 29 U.S.C.A. 211(c), and of appropriate payment to the employee." *Caserta v. Home Lines Agency, Inc.*, 273 F. 2d 943, 946 (2nd Cir. 1959).

4.1.3. Employers must pay FLSA-mandated wages "free and clear."

Under the FLSA, employers must pay employees a wage of at least $7.25 per hour. 29 U.S.C. 206(a). Alternatively, employers may pay a lesser "tipped wage" if the employer meets certain requirements. 29 U.S.C. 203(m)(2). Either way, employers must pay wages "free and clear," *i.e.*, employers cannot force employees to return a portion of their wages to the employer.

For example, consider an employer that pays an employee $7.25 per hour but requires the employee to reimburse the employer $3.00 per hour. In FLSA terminology, this is a "kick-back." The kick-back reduces the employee's effective wage below minimum wage and, accordingly, the employer has failed to meet its burden to pay minimum wage.

The result is the same if, instead of imposing a direct tax on a worker, an employer requires the worker to bear a cost that the employer would ordinarily bear. There "is no legal difference between deducting a cost directly from a worker's wages and shifting a cost." *Hatmaker v. PJ Ohio, LLC*, No. 3:17-cv-146, 2019 WL 5725043, *7 (S.D. Ohio Nov. 5, 2019) ("*Hatmaker I*"), *quoting Arriaga v. Florida Pacific Farms, L.L.C.*, 305 F.3d 1228, 1237 (11th Cir. 2002). This concept is known as a "*de facto* deduction." *De Luna-Guerrero v. N. Carolina Grower's Ass'n, Inc.*, 338 F.Supp.2d 649, 656 (E.D.N.C. 2004).

The "Free and Clear" regulation describes this principle: "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 him under the Act." 29 C.F.R. 531.35.

The text of the regulation indicates that an employer must repay the precise amount that an employee paid for a tool. 29 C.F.R. § 531.35 ("…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 him under the Act"). Such a standard is consistent with the

FLSA's objectives. "As a general principle, employers are not permitted to 'guess' or 'approximate' a minimum wage employee's expenses for purposes of reimbursing the expenses. This would result in some employees receiving less than minimum wage, contrary to the FLSA mandate. Instead, as a general proposition, the FLSA requires employers to pay back the actual expenses incurred by the employees." *Hatmaker I*, 2019 WL 5725043, at *3. It is also consistent with the fact that an employer must prove that any wage deductions "did not enrich" the employer at the worker's expense. *Myers*, 192 F.3d at 555.

4.1.4. Employers must maintain records of any "additions to or deductions from" an employee's wages.

In order to ensure FLSA compliance, the FLSA imposes strict recordkeeping requirements on employers. 29 U.S.C. 211(c). Specifically, employers must "make, keep, and preserve such records of persons employed by him of the wages, hours, and other conditions and practices of employment maintained by him." *Id.* Employers are required to keep records of the "[t]otal additions to or deductions from wages." 29 C.F.R. 516.2(a)(10). With respect to deductions, employers must keep "[a]ll records used by the employer in determining the original cost, operating and maintenance cost, and depreciation and interest charges, if such costs and charges are involved in the additions to or deductions from wages paid." 29 C.F.R. 516.6(c)(2).

4.1.5. An employer can never be rewarded for failing to keep proper records.

Generally, an employee has the burden to prove that he or she "performed work for which he was not properly compensated." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946) (*superseded by statute on other grounds*, *Integrity Staffings Solutions, Inc. v. Busk*, 574 U.S. 27, 36-37 (2014)). To meet that burden, an employee must be able to rely upon the employer's records to prove his or her entitlement to wages. "When the employer has kept proper and accurate records[,] the employee may easily discharge his burden by securing the production of those records." *Mt. Clemens Pottery Co.*, 328 U.S. at 687.

When an employer has *not* maintained proper and accurate records, the scofflaw employer should not be rewarded, nor should employees be punished. *Tyson Foods, Inc. v. Bouaphakeo*, ___ U.S. ___, 136 S.Ct. 1036, 1047 (2016). "Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employees' labors without paying due compensation as contemplated by the [FLSA]." *Mt. Clemens Pottery Co.*, 328 U.S. at 687. To avoid this nonsensical and inequitable result, the employee may prove his claim "as a matter of just and reasonable inference." *Tyson Foods Inc.*, 136 S.Ct. at 1047.

Further, while *Mt. Clemens* places the ultimate burden of proof on the employee at trial, certain aspects of the FLSA shift the burden of proof to the employer. The Sixth Circuit held that employers that take wage deductions from tipped workers bear the burden of proving any deductions "did not enrich [the employer], but instead, at most, merely restored it to the approximate financial posture it would have occupied." *Myers v. Copper Cellar Corp.*, 192 F.3d 546, 555 (6th Cir. 1999).

4.2. Employers must reimburse drivers for their vehicle-related expenses if the failure to do so reduces the drivers' effective wage below the statutory minimum.

Pizza companies need vehicles to transport pizzas to customers. Rather than purchasing and maintaining a fleet of cars themselves, pizza companies require delivery drivers to provide vehicles for the companies' food delivery. In practice, the companies shift this expense onto their minimum-wage drivers, resulting in *de facto* wage deductions. Because there is little dispute that the drivers' cars are "tools of the trade,"[5] most pizza companies reimburse the drivers *something*. Plaintiff contends, however, that Defendants' reimbursement payments did not fully reimburse the drivers for the use of the drivers' cars. This shortfall triggers a minimum wage violation.

The question is how to calculate the amount that pizza companies must reimburse delivery drivers. Once that number is determined, Plaintiff "may easily discharge his burden [of proving his unpaid wages] by securing the production of [Defendants'] records." *Mt. Clemens Pottery Co.*, 328 U.S. at 687. From there, simple math will allow the Court to calculate the amount of the under-reimbursement.

4.2.1. Courts have considered two different regulations with respect to vehicle expenses, neither of which provide any method for valuing vehicle expenses.

The FLSA is silent with respect to calculating vehicle expenses. Because of this, courts have considered two regulations as sources of guidance with respect to vehicle expenses. Neither regulation, however, describes how to calculate the value of an employee-provided vehicle.

The first regulation is 29 C.F.R. § 531.35, the FLSA's "Free and Clear" regulation, which sets forth the principle that an employer must reimburse for "tools of the trade" that reduce an employee's wages below the minimum. The "Free and Clear" regulation "does not set forth a methodology for calculating mileage rates, or provide any other guidance as to how to determine or put a value on the expenses related to operating an automobile for work. Thus, there is ambiguity as to how to calculate the mileage rate." *Hatmaker I,* 2019 WL 5725043, at *4.

[5] *See Hatmaker I*, 2019 WL 5725043, at *5-6, quoting *Brandenburg v. Cousin Vinny's Pizza, LLC*, No. 3:16-cv-516, 2018 WL 5800594, at *4 (S.D. Ohio Nov. 6, 2018) (vehicles are required "as a condition of being hired as a delivery driver") ("*Brandenburg I*").

The second regulation is 29 C.F.R. § 778.217, the confusingly-named "Reimbursement of Expenses" regulation. In the context of calculating "regular rates" for overtime purposes, Section 778.217 provides examples of situations where employers have reimbursed a "reasonably approximate amount." Some courts have mistakenly taken these examples to mean that employers, for *all* FLSA purposes, can reimburse a "reasonably approximate amount" for expenses.[6] *See Kennedy v. Mountainside Pizza, Inc.*, No. 1:19-cv-01199, 2020 WL 5075756, at *3-4 (D. Colo. Aug. 26, 2020). Aside from relying on the wrong regulation, the phrase "reasonably approximate amount" is still ambiguous as applied to vehicle expenses. The language in 778.217, much like the "Free and Clear" regulation, "does not set forth a methodology for calculating mileage rates, or provide any other guidance as to how to determine or put a value on the expenses related to operating an automobile for work."[7] There is still ambiguity as applied to vehicle expenses.

The Supreme Court recognized that a lack of regulatory guidance for specific, real world scenarios is a "familiar problem in administrative law." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2410, 204 L. Ed. 2d 841 (2019). Regulations may be "genuinely ambiguous" because they do not "directly or clearly address every issue" or "when applied to some fact patterns, they may prove susceptible to more than one reasonable reading." *Id.* Moreover, the "subject matter of a rule 'may be so specialized and varying in nature as to be impossible'—or at any rate impracticable—to capture in its every detail." *Id.*, *quoting SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947).

[6] As explained in greater detail below, this regulation does not properly apply to the vehicle expense question when determining minimum wage compliance. *Infra*, Sec. 11.2 (discussing that the regulation is limited to "regular rate" calculations for overtime purposes). As explained in this section, however, the Court does not need to reach that question to arrive at the proper conclusion.

[7] *Hatmaker I,* 2019 WL 5725043, at *4.

In *Kisor*, the Supreme Court provided five examples of ambiguity that arise when a regulation is applied to a particular factual scenario. *Id.* at 2410. Given how analogous those examples are with respect to this case, they are provided below:

- In a rule issued to implement the Americans with Disabilities Act (ADA), the Department of Justice requires theaters and stadiums to provide people with disabilities "lines of sight comparable to those for members of the general public." 28 C.F.R. pt. 36, App. A, p. 563 (1996). Must the Washington Wizards construct wheelchair seating to offer lines of sight over spectators when they rise to their feet? Or is it enough that the facility offers comparable views so long as everyone remains seated? See *Paralyzed Veterans of Am. v. D. C. Arena L. P.*, 117 F.3d 579, 581–582 (CADC 1997).

- The Transportation Security Administration (TSA) requires that liquids, gels, and aerosols in carry-on baggage be packed in containers smaller than 3.4 ounces and carried in a clear plastic bag. Does a traveler have to pack his jar of truffle pâté in that way? See *Laba v. Copeland*, 2016 WL 5958241, *1 (WDNC, Oct. 13, 2016).

- The Mine Safety and Health Administration issues a rule requiring employers to report occupational diseases within two weeks after they are "diagnosed." 30 C.F.R. § 50.20(a) (1993). Do chest X-ray results that "scor[e]" above some level of opacity count as a "diagnosis"? What level, exactly? See *American Min. Congress v. Mine Safety and Health Admin.*, 995 F.2d 1106, 1107–1108 (CADC 1993).

- An FDA regulation gives pharmaceutical companies exclusive rights to drug products if they contain "no active moiety that has been approved by FDA in any other" new drug application. 21 C.F.R. § 314.108(a) (2010). Has a company created a new "active moiety" by joining a previously approved moiety to lysine through a non-ester covalent bond? See *Actavis Elizabeth LLC v. FDA*, 625 F.3d 760, 762–763 (CADC 2010); Tr. of Oral Arg. 12, 35.

- Or take the facts of *Auer* itself. An agency must decide whether police captains are eligible for overtime under the Fair Labor Standards Act. According to the agency's regulations, employees cannot receive overtime if they are paid on a "salary basis." 29 C.F.R. § 541.118(a) (1996). And in deciding whether an employee is salaried, one question is whether his pay is "subject to reduction" based on performance. *Ibid.* A police department's manual informs its officers that their pay might be docked if they commit a disciplinary infraction. Does that fact alone make them "subject to" pay deductions? Or must the department have a practice of docking officer pay, so that the possibility of that happening is more than theoretical? *Auer v. Robbins*, 519 U.S. at 459–462, 117 S.Ct. 905.

Kisor, 139 S.Ct. at 2410–11.

In these examples, "interpreting the regulation involves a choice between (or among) more than one reasonable reading. To apply the rule to some unanticipated or unresolved situation, the court must make a judgment call." *Id.*

The vehicle cost question in this case is of the same nature as the *Kisor* examples. It is a factual scenario that requires a decision regarding how to value the vehicles that employees provide to their companies. The words "reasonable" and "approximation" are both ambiguous as applied to vehicle costs. "Neither the regulations nor the FLSA define what constitutes a reasonable approximation." *Perrin v. Papa John's Intern., Inc.*, 114 F.Supp.3d 707, 712 (E.D. Mo. 2015) ("*Perrin III*"). The phrase begs the question—a reasonable approximation of which costs? Recall that there are numerous costs involved with operating vehicles—gas, wear and tear, depreciation, insurance, interest/financing, repairs, etc. How are those costs measured? For example, is it measured by the value that the employer received; *i.e.*, what would it cost the employer to rent or purchase a vehicle to make its deliveries? Is it measured by the specific costs an employee incurred? Numerous costs go into vehicles, and there are various ways of calculating them.[8] Simply saying that a company must "reasonably approximate" expenses is no guidance at all.

4.2.2. When regulations are ambiguous, courts should defer to an agency's reasonable interpretation.

In situations like this, the Supreme Court instructed courts to defer to "agencies' reasonable readings of genuinely ambiguous regulations." *Kisor*, 139 S. Ct. at 2408. This is commonly referred to as "*Auer* deference." *Id.*, *citing Auer v. Robbins*, 519 U.S. 452 (1997).

[8] For example, companies often dispute whether they should reimburse "fixed costs" like insurance and registration fees. *See, e.g.*, *Benton v. Deli Mgmt., Inc.*, 396 F. Supp. 3d 1261, 1271–72 (N.D. Ga. 2019).

Auer deference is based on the "presumption that Congress would generally want the agency to play the primary role in resolving regulatory ambiguities," rather than the courts. *Kisor*, 139 S. Ct. at 2412. After all, the "agency that 'wrote the regulation' will often have direct insight into what the rule was intended to mean." *Id.*

More importantly, resolving regulatory ambiguities "often 'entail[s] the exercise of judgment grounded in policy concerns.'" *Id.* at 2413, *quoting Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994). Congress "is attuned to the comparative advantages of agencies over courts in making such policy judgments." *Id.* Agencies, unlike courts, often have unique scientific or technical expertise, especially as related to the agency's specific realm of administration, and "can conduct factual investigations, can consult with affected parties, [and] can consider how their experts have handled similar issues." *Id.*

Moreover, the presumption in favor of agency deference "reflects the well-known benefits of uniformity in interpreting genuinely ambiguous rules," particularly in areas that are "complex and highly technical" in nature. *Id.* at 2413–14. *Auer* deference "imparts 'predictability to the administrative process.'" *Id.*, *quoting Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 158, n. 17 (2012).

4.2.3. Comparison Between *Kisor* and *Kennedy*.

It is worth comparing the Supreme Court's instructions with the incorrect approach recently taken in *Kennedy v. Mountainside Pizza, Inc.*, 2020 WL 5076756, in the District of Colorado, which Defendants cite in their Motion. *Kennedy* held that the "term 'reasonable' allows the Court the discretion to tailor the regulation to the circumstances before it." *Id.* at *5. *Kennedy*'s approach is the opposite of that set forth in *Kisor*. Although courts *can* interpret what is "reasonable," such interpretation *should* be left to agencies in situations involving issues like calculating vehicle expenses. *Kisor*, 139 S. Ct. at 2412–14.

The Supreme Court itself turns to agencies when it must interpret phrases involving "reasonableness." In *Kisor*, Justice Kavanaugh recognized that "[t]o be sure, some cases involve regulations that employ broad and open-ended terms like 'reasonable,' 'appropriate,' 'feasible,' or 'practicable.' Those kinds of terms afford agencies with broad policy discretion, and courts allow an agency to reasonably exercise its discretion to choose among options allowed by the text of the rule." *Kisor*, 139 S. Ct. at 2448 (Kavanaugh concurring); *see also, e.g., City of Arlington, Tex. V. F.C.C.*, 569 U.S. 290, 311 (2013) (Breyer concurring) (finding that the phrase "within a reasonable period of time after" was "open-ended—*i.e.*, 'ambiguous,'" and, "in context, is complex, likely making the agency's expertise useful in helping to answer the 'reasonableness' question that the statute poses."); *Regions Hosp. v. Shalala*, 522 U.S. 448, 453, 458 (1998) (the phrase "costs 'recognized as reasonable'" is ambiguous). In the context of vehicle expenses, at least one court found itself "left a little at sea" in trying to figure out what costs are reimbursable. *Benton*, 396 F. Supp. 3d at 1272.

To avoid agency deference (and to avoid overturning prior rulings in that court), *Kennedy* found that the term "reasonably" in Section 778.217 was "vague" but not "ambiguous." *Kennedy*, 2020 WL 5076756, at *4. The *Kennedy* court reasoned that if a term is "vague" rather than "ambiguous," then *Auer* deference would not apply. *Id.* As noted above, the Supreme Court has found the term "reasonable" to be ambiguous. That aside, *Kennedy*'s semantic distinction misreads READING LAW,[9] which used narrower definitions for "vague" and "ambiguous."[10] *See id.*

With no justification, *Kennedy* assumed that *Kisor* intended these constrictive definitions found in READING LAW. *Kennedy*, 2020 WL 5076756, at *4. By doing so, *Kennedy* ignored that "[w]ords are to be understood by their ordinary, everyday meanings—unless the context indicates that they bear a technical sense." READING LAW at p. 69. "[T]he loose norm is to refer to all uncertainties of meaning as ambiguities." *Id.* at p. 31. Given this "loose norm," the term "ambiguity" in *Kisor* means any uncertainty unless context dictates otherwise.

It is clear that *Kisor* uses the "loose norm" of referring to uncertainties as "ambiguities." The Supreme Court defines "genuinely ambiguous" regulations as those that "may not directly or clearly address every issue; when applied to some fact patterns, they may prove susceptible to more than one reasonable reading." *Kisor*, 139 S. Ct. at 2410. This explanation is described as "vagueness" by READING LAW. READING LAW at pp. 31, 32. *Kisor* also provides examples of "genuine ambiguity," all of which describe vagueness under the READING LAW definition. *Kisor*, 139 S. Ct. at 2410–11. Following those examples, *Kisor* noted that "[t]o apply the rule to some unanticipated or unresolved situation, the court must make a judgment call." *Id.* at 2411. Again, this is vagueness in READING LAW.

Put plainly, "vagueness," as defined in READING LAW, is encompassed in *Kisor*'s "loose norm" use of ambiguity. *Kennedy*'s finding that the regulation is "vague" should have triggered *Auer* deference. *Kennedy*'s failure to do so was error and should not be relied upon in this case.

[9] Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS, 33 (2012).

[10] "Ambiguity" is when words can have two or more different meanings. "For example, *post* can refer to a piece of timber set upright, a position of employment, or mail." READING LAW, p. 31. "Vagueness" is when a word or phrase's "unquestionable meaning has uncertain application to various factual scenarios." *Id.* at p. 32.

Moreover, "[m]ost interpretive canons apply to both ambiguity (as narrowly defined) and vagueness." Reading Law at p. 33. Thus, even if *Kisor* did not use the terms interchangeably, *Kisor*'s judicially-created cannon of interpretation (defer to agency interpretation when a regulation is ambiguous) would still apply to vague regulations.

4.2.4. Agency deference is limited to agency positions that have not changed, particularly in the context of adopting a new "litigation position."

Although *Auer* deference is useful, it is not without limits. As already noted, it is only to be used when, after exhausting the normal modes of regulatory interpretation, a regulation remains genuinely ambiguous as to a specific scenario. *Kisor* at 2414–15. Even then, the agency's interpretation must be "reasonable." *Id.* at 2415–16.

Assuming the agency's interpretation is reasonable, it must also "be one actually made by the agency. In other words, it must be the agency's 'authoritative' or 'official position,' rather than any more ad hoc statement not reflecting the agency's views." *Id.* at 2416. "Authoritative" has a broad meaning and can cover even "official staff memoranda." *Id., citing Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566, n. 9 (1980). In contrast, ad hoc statements that do not warrant deference include speeches from mid-level officials, informal memorandum recounting telephone conversations, and a "guide" that specifically states that compliance with the guide is not required. *Id.* at 2416–17 (citing cases).

Next, the agency's interpretation must "implicate its substantive expertise." *Id.* at 2417. The further the subject matter is from the agency's area of expertise, the less deference an agency's interpretation warrants. *Id.*

Finally, an agency's interpretation must reflect "fair and considered judgment."

> [A] court should decline to defer to a merely "convenient litigating position" or "*post hoc* rationalizatio[n] advanced" to "defend past agency action against attack." And a court may not defer to a new interpretation, whether or not introduced in litigation, that creates "unfair surprise" to regulated parties. That disruption of expectations may occur when an agency substitutes one view of a rule for another. We have therefore only rarely given *Auer* deference to an agency construction "conflict[ing] with a prior" one.

Id. at 2417–18 (internal citations removed). Put simply, courts should generally not defer to an agency that suddenly reverses course with a new rule. *Id.*

4.3. The DOL Handbook resolves the regulatory ambiguity by giving employers two commonsense options to reimburse vehicle costs.

The FLSA regulations are ambiguous as to how employers must reimburse vehicle expenses as "tools of the trade." Twenty years ago, the DOL resolved this regulatory ambiguity in its Field Operations Handbook (the "Handbook"). Section 30c15 of the Handbook states:

> **Car expenses: employee's use of personal car on employer's business.**
>
> In some cases it is necessary to determine the costs involved when employees use their cars on their employer's business in order to determine minimum wage compliance. For example, car expenses are frequently an issue for delivery drivers employed by pizza or other carry-out type restaurants.
>
> (a) *As an enforcement policy*, the IRS *standard business mileage rate* found in the IRS Publication 917, "Business Use of a Car" may be used (in lieu of actual costs and associated recordkeeping) to determine or evaluate the employer's wage payment practices for FLSA purposes. The IRS standard business mileage rate (currently 28 cents per mile) represents depreciation, maintenance and repairs, gasoline (including taxes), oil, insurance, and vehicle registration fees. In situations where the IRS rate changes during the investigation period, the applicable rates should be applied on a pro-rate basis.
>
> (b) The IRS standard business mileage rate may be used in lieu of actual costs for FLSA purposes *whether or not* the employee will be able to take a deduction on his or her tax return for the business use of the employee's car.

DOL Field Operations Handbook 30c15 (emphasis in original).

The Handbook recognizes that, as "a general principle, employers are not allowed to 'guess' or 'approximate' a minimum wage employee's expenses for purposes of reimbursing the expenses." *Hatmaker I*, 2019 WL 5725043, at *3. The Handbook, however, grants employers an easier option: reimburse delivery drivers at the widely-used IRS rate.

The Handbook gives *only* these two alternatives. The default is to track and reimburse each driver's actual expenses. *Id.* "In lieu" of this method, employers may reimburse drivers at the IRS rate. *Id.* In other words, Option 1 or, in lieu of Option 1, Option 2. *See, e.g.*, DOL Field Operations Handbook § 30c07 (using "in lieu" to denote the employer has only two options); *see also Salmon v. Glass Family Pizza, Inc.*, AAA Case No. 01-19-0001-9554 (attached as Exhibit 7); *Ely*, AAA Case No. 01-19-0004-1722.

Using the IRS rate as a proxy for an employee's actual expenses is a reasonable interpretation of the FLSA's requirements:

> The IRS mileage rate is a data-driven and systematic methodology for estimating the cost of driving a mile. The IRS mileage rate is:
>
> a rate determined by the IRS that a taxpayer can deduct per mile driven for business, charitable activities, moving or medical purposes. The standard mileage rate changes regularly to keep up with inflation.... The IRS bases these rates on cost data and analysis compiled every year by Runzheimer International, an independent research firm that contracts to the IRS. Runzheimer International uses data from across the country and measures auto insurance premiums, gas prices, maintenance costs, depreciation and other costs that go into operating a vehicle.
>
> Julia Kagan, Standard Mileage Rate, Investopedia, (June 13, 2018).
>
> "Since 1980, the IRS has worked with Runzheimer to calculate the business mileage deduction rate, using a consistent method and statistical analysis of vehicle cost components.... [The rate] reflect[s] the movement of prices in the marketplace." *IRS Announces 2018 Business Mileage Rate of 54.5 Cents-Per-Mile with Cost Data and Analysis by Runzheimer*, Business Wire, (December 14, 2017, 3:13 PM). The IRS mileage rate is the real cost of driving a vehicle. It does not include any cost components that are inapplicable to the costs that the pizza delivery drivers

> incur. There is no reason not to use the IRS mileage rate in this case; it is neither plainly erroneous nor inconsistent with the regulation.

Hatmaker I, 2019 WL 5725043, at *5.

The Handbook provides a standard that allows both the drivers and the companies to know—before litigation ever commences—whether the employer is properly reimbursing the drivers. Further, the Handbook standard eliminates any argument for the pizza company's now-weaponized discovery—if the pizza companies did not track and pay the drivers' actual expenses, then the company's compliance is measured against the IRS mileage rate. *Hatmaker III*, 2020 WL 1129325, at *4. If the pizza companies did track and pay the actual expenses, then they can produce those records and the onus is on the driver to dispute those records. This is exactly how the Supreme Court held that FLSA cases should proceed. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946).

4.3.1. The Field Operations Handbook is authoritative.

Courts have repeatedly deferred to the Field Operations Handbook as authoritative. *Hatmaker I*, 2019 WL 5725043, at *4; *Marsh v. J Alexander's LLC*, 905 F3d 610, 616 (9th Cir. 2018) (deferring to the DOL's interpretation found in the Handbook); *Flores v. HMS Host Corp.*, 2019 WL 5454647, at *7 (D. Md. Oct. 23, 2019) (rejecting a 2018 DOL Opinion Letter and, instead, deferring to a long-established rule from the Handbook); *Stein v. HHGREGG, Inc.*, 873 F.3d 523, 532 (6th Cir. 2017) (finding the Handbook to be "persuasive authority"); *Fast v. Applebee's Int'l, Inc.*, 638 F.3d 872, 880–81 (8th Cir. 2011) (deferring to the Handbook); *Klinedinst v. Swift Investments, Inc.*, 260 F.3d 1251, 1255 (11th Cir. 2001) (finding the Handbook "persuasive"). The Handbook is not, as the Supreme Court warned against in *Kisor*, a mere "ad hoc statement" that does not warrant deference. *Kisor*, 139 S. Ct. at 2416–17.

Some courts, however, have erroneously held that the Handbook is not authoritative because the Handbook's preface states that it "is not used as a device for establishing interpretive policy." *See, e.g.*, *Kennedy*, 2020 WL 5076756, at *5. Focusing on this sentence ignores the two preceding sentences:

> The FOH was developed by the WHD under the general authority to administer the laws that the agency is charged with enforcing. The FOH reflects policies established through changes in legislation, regulations, significant court decisions, and the decisions and opinions of the WHD Administrator.

https://www.dol.gov/agencies/whd/field-operations-handbook (accessed Dec. 6, 2020).

"The provisions of a text should be interpreted in a way that renders them compatible, not contradictory." READING LAW at p. 180. Here, harmonizing the three sentences is easy. The first two sentences confirm that the Handbook reflects the Wage and Hour Division's authoritative policy guidance, developed by synthesizing "legislation, regulations, significant court decisions, and the decisions and opinions of the WHD Administrator." In plain language, the Handbook represents what the law *is*. The third sentence means that the WHD does not use the Handbook to ***establish***[11]—*i.e.*, to institute—*new* policies.

In analyzing this language, one judge (in the same District as *Kennedy*) observed that the DOL itself has argued that the Handbook is interpretative guidance:

> Although the introduction to the FOH contains this language, the context makes clear that it states this, because the DOL may not immediately update the FOH "through changes in legislation, regulations, significant court decisions, and the decisions and opinions of the WHD administrator." Field Operations Handbook, https://www.dol.gov/whd/foh (last visited June 1, 2017). Furthermore, the FOH provides links to "*other* interpretive guidance," which supports the notion that the DOL treats the FOH as interpretative guidance. *Id.* (emphasis added). ***The DOL has also consistently taken the position in its amicus briefs, including the brief filed in this case, that the FOH is interpretive guidance.*** *See* Br. for the Secretary of

[11] "Establish" means "to institute (something, such as a law) permanently by enactment or agreement." https://www.merriam-webster.com/dictionary/establish (accessed Sept. 5, 2020).

> Labor as *Amicus Curiae* in Support of Plaintiff–Appellant at 19, *Romero v. Top–Tier Colo., LLC*, 849 F.3d 1281 (10th Cir. 2017) (No. 16–1057) ("Opinion letters, FOH provisions, and amicus briefs have been among the Department's tools for issuing interpretations of regulations to which *Auer* deference is due."). Therefore, contrary to Defendants' contention, ***the DOL has made clear that it treats the FOH as interpretive guidance.***

Romero v. Top-Tier Colorado LLC, 274 F. Supp. 3d 1200, 1207 (D. Colo. 2017) (emphasis added).

4.3.2. The Handbook's approach is consistent with the FLSA's remedial purposes and the Supreme Court's instructions in *Anderson v. Mt. Clemens Pottery Co*.

The Handbook's approach is a reasonable interpretation on its face, and it embodies the Supreme Court's instructions in *Mt. Clemens* on how an FLSA case should proceed. *Mt. Clemens Pottery Co.*, 328 U.S. at 687. This corroboration further supports the Handbook's approach. Consistent with *Mt. Clemens*, the Handbook sets forth two approaches based on the level of records that an employer has kept.

First, the Handbook allows a diligent employer to maintain records of each employee's actual expenses and reimburse those amounts.[12] No one disputes that this is a proper method of reimbursement. This "actual expenses plus recordkeeping" approach is identical to the situation described in *Mt. Clemens* where an employer has kept "proper and accurate records." In that scenario, an employee can secure those records and easily check them against his or her own records. *Mt. Clemens Pottery Co.*, 328 U.S. at 687.

Second, the Handbook addresses what happens if an employer has not maintained records of each employee's actual expenses. Under *Mt. Clemens*, an employer's failure to maintain proper records allows an employee to prove "the amount and extent" of his work as "a matter of just and

[12] Employers must keep "[a]ll records used by the employer in determining the original cost, operating and maintenance cost, and depreciation and interest charges, if such costs and charges are involved in the additions to or deductions from wages paid." 29 C.F.R. 516.6(c)(2).

reasonable inference." *Id.* at 687–88. This is critical to avoid punishing an employee or creating impossible hurdles for the employee to prove his or her case after an employer has shirked his or her duties, a result that would be antithetical to the purpose of the FLSA. *Tyson Foods*, 136 S.Ct. at 1047.

In the context of unrecorded work time, an employee can prove his or her case by their own testimony. But what about when it comes to a complex issue like vehicle-related expenses?

It is unrealistic to require an employee to be able to testify about an issue like the depreciation of his or her vehicle. Such a standard would create the "impossible hurdle" that *Mt. Clemens* warns about. After all, experts spend substantial time and effort calculating the "true cost of ownership" and expenses-per-mile.[13] Similarly, it would amount to an improper waiver of FLSA rights if the standard required employees to produce "information the drivers likely no longer have and had no reason or duty to keep." *Hatmaker II*, 2020 WL 1129325, at *4. Recordkeeping is the employer's responsibility under the FLSA; lack of diligence on the employer's part does not waive a right for or impose a duty upon the employee.

Moreover, the employer has the duty to prove that wage deductions did not enrich it. *Myers*, 192 F.3d at 555. An employer would normally substantiate compliance of this duty through recordkeeping. *See, e.g.*, 29 C.F.R. 516.6(c)(2); *see also Mt. Clemens Pottery Co.*, 328 U.S. at 687–88. A standard requiring such information from the *employee* subverts and contravenes the intent of the FLSA.

[13] *See, e.g.*, https://exchange.aaa.com/wp-content/uploads/2019/09/AAA-Your-Driving-Costs-2019.pdf (accessed Sept. 4, 2020).

The DOL solved this issue by stating that the IRS rate could be used in situations where employers did not track and pay each employee's actual expenses. This is a proper approach, leading to a fair and equitable result utilizing a practical and workable methodology.

> A neutral arbiter—the IRS—creates, monitors, and updates the rate, and it favors neither employers nor employees. Both employers and employees can readily access the rate. Moreover, employers, employees, and courts can precisely determine whether an employer is complying with the employer's minimum wage obligations. This can be done at relatively low litigation cost, likely through a motion for judgment on the pleadings or at summary judgment.

Hatmaker I, 2019 WL 5725043, at *6. The Handbook's approach is consistent with the Supreme Court's instructions in *Mt. Clemens* and the FLSA's remedial purposes.

4.4. A Brief History of Pizza Delivery Driver Litigation.

Considering the legal standards and Supreme Court precedent outlined above, one would expect that courts and litigants relied upon the DOL's commonsense approach in the Handbook. Had pizza companies done so, FLSA violations (and lawsuits) related to those standards would be rare. Unfortunately, that is not what has happened.

Until recently, savvy pizza company litigants have leveraged the FLSA's complexity to generate a judicially-created legal standard that is profitable to the companies and detrimental to the driver-employees. Pizza companies insist they have the option to reimburse a "reasonable approximation" of vehicle-related expenses. The ambiguous "reasonable approximation standard" has allowed pizza companies to pay anything they want and, *ex post facto*, justify it in litigation. It has also resulted in discovery tactics, like those adopted by Defendants in this case, that are contrary to the FLSA and *Mt. Clemens*. To understand the flawed logic behind this approach, it is important to understand its origins.

4.4.1. Until recently, litigants and courts ignored the DOL's Handbook and created a new "reasonable approximation" standard.

One of the first pizza delivery driver cases arose about ten years ago in the District Court of Kansas. *Wass,* 688 F.Supp.2d 1282. In *Wass*, the plaintiffs argued that the pizza companies were required to reimburse the drivers' actual expenses, whereas the defendants argued that they could "reasonably approximate" the expenses. *Id.* at 1284. Although the DOL's Handbook predated *Wass* by at least a decade, neither party apparently addressed the Handbook. *See generally id.* Indeed, the *Wass* court noted:

> Finally, in their briefs, the parties have discussed whether defendant must or should use an IRS-approved rate for its reimbursement of vehicle expenses. Because plaintiffs have not referred to any IRS rate in the complaint, but instead have pleaded a violation based on a failure to pay actual expenses incurred, the Court does not address this issue.

Id. at 1287. Seemingly in the absence of proper briefing and preservation, the *Wass* court followed a trail of regulatory breadcrumbs to arrive at an erroneous conclusion.

Wass started in the right place—the "Free and Clear" regulation. *Id.* at 1285. That is where the analysis should have ended because the "Free and Clear" regulation is the only applicable regulation to this situation. Instead, *Wass* held that, because the "Free and Clear" regulation references the "Other Facilities" regulation (Section 531.32(c)), the "Other Facilities" regulation must be relevant to the instant question of reimbursement. *Id.* This was error. *Infra* Sec. 11.1.

Wass compounded this initial error by moving to the "Reimbursement of Expenses" regulation, Section 778.217. *Id. Wass* held that, because *that* regulation uses the words "reasonable approximation" to describe whether an expense reimbursement affects an employee's regular rate for overtime purposes, an employer must be allowed to "reasonably approximate" vehicle expenses for all purposes under the FLSA. *Id.* In other words, the *Wass* Court mistakenly moved from the "Free and Clear" regulation to the "Other Facilities" regulation, which then led the Court to another regulation, Section 778.217, which describes, in a completely different context, expenses that were "reasonably approximated." *Wass* applied *that* standard to the original, unrelated regulation. This was also in error. *Infra* Sec. 11.2.

Although the DOL Handbook standard existed at the time, *Wass* did not consider—because the plaintiffs did not present the argument—whether to defer to the DOL Handbook pursuant to *Auer v. Robbins*. This was also error.

After *Wass*, a line of cases adopted the "approximation" standard based on either *Wass* or because *the plaintiffs* proposed the *Wass* standard.[14] Seemingly none of these cases considered whether to defer to the DOL Handbook. Thus, an erroneous standard became a precedent, despite its contextual inaccuracy and fallacy.

4.4.2. As applied, the "reasonable approximation" standard punishes the workers the FLSA is designed to protect.

Even if a court were to mistakenly rely on Section 778.217 and hold that employers may "reasonably approximate" vehicle expenses, Section 778.217 is ambiguous as applied to valuing vehicle costs. *Supra* Sec. 4.2.1. Under *Kisor*, courts and litigants should *still* have deferred to the DOL's Handbook. Instead of following this approach, however, the courts that went this route

[14] *See, e.g.*, *Darrow v. WKRP Mgmt. LLC*, No. 09-cv-01613, 2011 WL 2174496, at *3–4 (D. Colo. June 3, 2011) (citing *Wass*); *Smith v. Pizza Hut, Inc.*, No. 09-cv-01632, 2011 WL 2791331, at n. 4 (D. Colo. July 14, 2011) (citing *Darrow*); *Perrin III*, 114 F.Supp.3d at 721-22 (citing *Wass*, *Darrow*, and *Smith* and stating that plaintiffs argued for an approximation standard base on an expert's estimates); *Tyler v. JP Operations, LLC*, 342 F. Supp. 3d 837, 848 (S.D. Ind. 2018) (citing *Perrin III*); *see also Tyler*, Plaintiff's Memo in Opp. and for Partial Summary Judgment, Dkt. 71, PAGEID 1272 (plaintiff argues that an employer can pay actual expenses or "reasonably approximate" the expenses); *see Sullivan v. PJ United, Inc.*, 362 F. Supp. 3d 1139, 1153 (N.D. Ala. 2018), *opinion vacated in part on reconsideration* (Aug. 7, 2018) ("*Sullivan II*"); *see also Sullivan*, No. 7:13-cv-01275 Plaintiffs' Motion for Summary Judgment, Doc. 235, p. 63–64 (N.D. Ala. Dec. 20, 2017).

adopted an ambiguous "approximation" standard with no further guidance. The results have multiplied the litigation in this area.

The phrase "reasonable approximation" *sounds* fair; after all, "reasonable" is in the name of it. But, upon a moment's consideration, this vague phrase has little real meaning. Pizza companies argue that "reasonable approximation" means whatever the pizza companies want it to mean. The pizza company's "approximation" standard imposes an enormous burden on low-wage pizza drivers in FLSA violation cases, the likes of which could never have been envisioned by the FLSA's drafters. Courts, including the Supreme Court, have repeatedly found the term "reasonable" or "reasonably" to be ambiguous. *See, e.g., Kisor*, 139 S. Ct. at 2448 (Kavanaugh concurring) ("To be sure, some cases involve regulations that employ broad and open-ended terms like 'reasonable,' 'appropriate,' 'feasible,' or 'practicable.' Those kinds of terms afford agencies with broad policy discretion, and courts allow an agency to reasonably exercise its discretion to choose among options allowed by the text of the rule.").

Under the *Wass* "approximation" standard, no one knows what the proper reimbursement rate is until a jury determines it. It is difficult enough for a driver to understand the numerous hidden costs he or she incurs in having to use his or her own vehicle. On top of that, the pizza companies advocate for a completely opaque reimbursement "standard." No reasonable person could conclude that this system complies with the FLSA's remedial purposes.

Once a driver finally recognizes that they are being under-reimbursed, the pizza companies argue that *they* should be able to determine what a "reasonable approximation" is, *ex post facto* through hired "experts." In doing so, the companies ask courts to ignore the neutral IRS's approximation and replace it with the pizza companies' expert-bought approximation. The pizza companies' "approximation," unsurprisingly, supports the pizza companies' reimbursement rate, no matter what it happens to be in any particular case. This is the approach the Court can expect if it permits Defendants to seek vehicle cost information from the drivers.

Moreover, once in litigation, pizza companies have used their vague legal standard as a discovery weapon, just as Defendants seek to do here. In numerous cases, the companies demand that huge groups of low-wage workers respond to detailed discovery requests. *See e.g.*, *Hatmaker II,* 2020 WL 1129325, at *1. But, these cases are not advanced by the pizza companies' burdensome discovery requests, the companies use the requests to either argue that a failure to respond should result in dismissal[15] or that a failure to provide documentation for each vehicle-related expense means the worker did not incur the expense at all.[16] Never mind that the companies paid the same or similar rate to all of the drivers, without any regard to the drivers' individualized expenses at the time of reimbursement.[17]

None of this—not the unknowable standard, not the weaponized discovery, not the onslaught of litigation—is consistent with the FLSA's remedial and humanitarian purposes.

[15] *See, e.g.*, *Perrin II*, 2014 WL 4749547, at *1; *Sullivan v. PJ United, Inc.*, No. 7:13-CV-01275-LSC, 2017 WL 10575860, at *8 (N.D. Ala. Oct. 16, 2017) ("*Sullivan I").*

[16] *Hatmaker II*, 2020 WL 1129325, at *1 ("Defendants' position is that the Court's order did not address the threshold issue of whether Plaintiffs actually incurred costs. Plaintiffs must prove that they actually incurred costs to establish liability. The fact that the parties agree that motor vehicles were used to deliver the pizzas suffices to prove that costs were incurred in their delivery. The pizzas were not walked to homes and we are not dealing with bicycle delivery. The parties agree that cars were used. The Court thus dispenses with Defendants' position that 'If Plaintiffs did not actually incur costs, they cannot have been 'under-reimbursed.'")

[17] *See, e.g., Perrin v. Papa John's Int'l, Inc.*, No. 4:09CV01335 AGF, 2013 WL 6885334, at *7 (E.D. Mo. Dec. 31, 2013) ("*Perrin I*") ("Defendants' assertion that individualized showings of each Plaintiff's vehicle expenses will be required to prove Plaintiffs' claims is without merit. Defendants' own reimbursement methodology does not depend upon the drivers' actual expenses and the regulatory framework does not require that reimbursement be based on actual expenses. Nowhere do Defendants argue that if Plaintiffs prevail on their theory of liability, Defendants will not be able to determine each class member's damages by using computer data readily available to Defendants.")

4.4.3. Once litigants properly put the Department of Labor's approach before a federal court, the court adopted the approach.

Once plaintiffs started to properly argue for the Handbook standard, things changed. On November 5, 2019, with the benefit of full briefing on agency deference and the applicability of the Field Operations Handbook, Judge Thomas Rose held that:

> [T]he IRS standard business mileage rate set forth in the [DOL]'s Field Operations Handbook properly applies when enforcing the minimum wage requirements of the FLSA. It 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. As a matter of law, that the proper measure of minimum wage compliance for pizza delivery drivers is to either (1) track and pay delivery drivers' actual expenses or (2) pay the mileage reimbursement rate set by the Internal Revenue Service.

Hatmaker I, 2019 WL 5725043, at *7 (granting plaintiff's motion for partial summary judgment). A year before that, in deciding a contested Rule 23 motion for class certification, Judge Rice reached the same conclusion. "Because the vehicles owned by the delivery drivers are considered 'tools of the trade,' 29 C.F.R. § 531.35, and required by Cousin Vinny's as a condition of being hired as a delivery driver, there needed to be an adequate reimbursement rate, using either the IRS mileage rate or actual reimbursement of cost, in order to avoid a decrease in the minimum wage and overtime paid." *Brandenburg*, 2018 WL 5800594, at *4. A number of other courts and arbitrators have since endorsed the Handbook standard.[18]

[18] *Arp v. Hohla & Wyss*, No. 3:18-cv-119, 2020 WL 6498956, *1 (S.D. Ohio Nov. 5, 2020) (granting settlement approval and stating, "[h]ere, the Department of Labor's Field Operations Handbook gives employers two options: track and pay each driver's actual expenses or reimburse each driver at the IRS business mileage rate."); *Orth v. J&J&J Pizza, Inc.,* No. 19-cv-10709, 2020 WL 1446735, *3 (D. Mass. Mar. 25, 2020) ("[c]ourts have regularly found that, consistent with the [U.S. Department of Labor] Handbook, an employer must provide reimbursement at the IRS rate when they do not keep records of employees' actual vehicle expenses" and recognizing that the Handbook is "persuasive authority"); *Jiao v. Kitaku Japanese Rest., Inc.,* No. 16-cv-2694, 202 WL 2527588, *14 (E.D.N.Y. Mar. 13, 2020) ("[s]tandard reimbursement rates may be used in FLSA cases for determining employees' vehicle expenses where an automobile is a 'tool of the trade,'" but applying "Motorcycle Reimbursement Rates from the United States General Services Administration (GSA)," because the workers drove motorcycles); *Young v. Rolling in the Dough, Inc.,*

The Handbook standard embodies the *Mt. Clemens* approach as applied to vehicle-related expense reimbursement. It also comports with *Kisor*'s instructions regarding agency deference. The DOL's "approach to mileage is consistent with the FLSA's remedial goals." *Id.* at *6. "To meet that goal, both employees and employers must have clear rules to follow. The [FLSA]'s remedial goals are defeated if employees have no way of knowing whether they are being paid properly." *Id.* (citing the FLSA's tip credit notice rules in 29 U.S.C. 203(m) as an example).

In a later order, the *Hatmaker* court applied its holding to discovery:

> Defendants will not be permitted to put Plaintiffs through the trouble, effort, and expense required by demanding that drivers produce information the drivers likely no longer have and had no reason or duty to keep. If Defendants claim they paid the drivers' actual expenses, then Defendants must produce evidence that they "tracked and paid" those expenses. "[A] reasonably diligent employer must in some manner maintain records of vehicle costs, even if the FLSA and Regulations did not already require the employee to do so." ECF 124, PageID 1946.
>
> Because Defendants have not tracked and paid the drivers' actual expenses, the drivers' individual vehicle expenses (if maintained at all by the drivers) are irrelevant. Defendants may measure their minimum wage compliance against the IRS mileage rate. ECF 124, PageID 1947.

No. 1:17-cv-07825, 2020 WL 969616, *1 (N.D. Ill. Feb. 26, 2020) ("As a matter of law, the proper measure of minimum wage compliance for pizza delivery drivers is to either (1) track and pay delivery drivers' actual expenses or (2) pay the mileage reimbursement rate set by the Internal Revenue Service."); *Burton v. DRAS Ptnrs., LLC,* No. 2019-cv-02949, 2020 WL 5800594, *2-3 (N.D. Ill. Oct. 27, 2019) ("Based on the DOL Handbook, district courts and arbitrators repeatedly hold that pizza delivery drivers are owed the difference between the reimbursements provided and the IRS rate when the employer fails to keep records of their actual expenses."); *Brandenburg v. Cousin Vinny's Pizza, LLC*, No. 3:16-cv-3716199, 2019 WL 6310376, *1 (S.D. Ohio Nov. 25, 2019) ("there needed to be an adequate reimbursement rate, using either the IRS mileage rate or actual reimbursement of cost.") ("*Brandenburg II*"); *Lin v. New Fresca Tortillas, Inc.*, No. 18-cv-3256, 2019 WL 3716199, *5 (E.D.N.Y. May 1, 2019) (recognizing that "[s]tandard reimbursement rates may be used in FLSA cases for determining employees' vehicle expenses where an automobile is a 'tool of the trade,'" but applying "Motorcycle Reimbursement Rates from the United States General Services Administration (GSA)," because the workers drove motorcycles); *Zellagui v. MCD Pizza, Inc.*, 59 F.Supp.3d 712, 716 (E.D. Pa. 2014) ("Because Domino's failed to keep detailed contemporaneous records of its delivery drivers' actual expenses, Plaintiff and the [opt-ins] are entitled to be reimbursed at the IRS rate."); *Salmon*, AAA Case No. 01-19-0001-9554 (employers must either track and reimburse actual vehicle costs or reimburse at the IRS rate); *Ely*, AAA Case No. 01-19-0004-1722 (adopting *Hatmaker*).

Hatmaker II, 2020 WL 1129325, at *4. The order quashed an attempt to weaponize discovery against low-wage workers, as had been erroneously permitted in other pizza driver lawsuits. *See, e.g.*, *Perrin II*, 2014 WL 4749547, at *1; *Sullivan I*, 2017 WL 10575860, at *8.

4.4.4. Rather than reimburse pizza delivery drivers at the same rate that most other workers are reimbursed, pizza companies sought, and obtained, the DOL's intervention.

After *Hatmaker I* and *Hatmaker II*, it became apparent that the law was moving in a direction that favored a clear standard for reimbursing pizza delivery drivers. To maintain an ambiguous "approximation" standard, and greater profits associated with the shadowy standard, the pizza industry sought help from another source—an activist DOL.

At the behest of a pizza company allegedly not involved in litigation, the DOL issued an Opinion Letter on August 31, 2020 that adopted the pizza company's "approximation" standard. U.S. DEP'T. OF LAB., FLSA 2020-12 (Aug. 31, 2020). The DOL's flip-flop is particularly troublesome because the DOL itself argued for the Handbook standard in active litigation as recently as ***six days*** before publishing its Letter.[19]

At this point, it is unknown what facts and legal arguments an employer made—or *did not* make—to the DOL. Based on that one-sided, non-adversarial process, the Letter claims that, contrary to the Handbook and court holdings, pizza companies *can* reimburse a "reasonable approximation" of drivers' expenses. The Letter does little to define this nebulous standard, leaving employees, once again, in the dark as to what rights they have.

[19] *Scalia v. Arizona Logistics, Inc.,* Case No. 2:15-cv-04499-DLR, ECF # 203 at p. 13, fn. 20 (D. Ariz. Jul. 8, 2020), DOL's Motion for Summary Judgment (calculating the plaintiff-delivery drivers' damages by multiplying the daily average mileage by the IRS rate); *Id.*, ECF # 214 at p. 19, fn. 11 (D. Ariz. Aug. 25, 2020), Response to Defendants' Motion (arguing that defendants' reimbursement of $.44 per mile was insufficient because it was less than the approximate IRS rate of $.55 per mile).

The Letter rejects *Hatmaker* (and another case) as "distinguishable." *Id.* at 3, n.4. In other words, an agency purports to overrule a court's decision on what the law is. This is contrary to the FLSA's regulations that state that the "ultimate decisions on interpretations of the act are made by the courts." 29 C.F.R. 785.2.

The only explanation the DOL gives for its attempt to usurp judicial power is the DOL's claim that *Hatmaker* did not consider "29 C.F.R. § 778.217, let alone analyze[] how the [DOL Handbook] may be interpreted to support that regulatory text." *Id.* The DOL is wrong. *Hatmaker* ***did*** consider that regulation, as it featured prominently in the parties' briefing in that case. *See, e.g., Hatmaker v. PJ Ohio, LLC* No. 3:17-cv-146, ECF # 117, pp. 19–21, ECF # 120, pp. 11–14, ECF # 121, pp. 20–23. Although the DOL can issue interpretive guidance on specific factual issues, the DOL has *no* power to tell courts which regulations to apply to a particular situation.

The Letter clarifies nothing, fails to address the ambiguity in the regulations, and endorses a standard that is, itself, ambiguous. The letter does state, however, that the IRS rate is "presumptively reasonable." *Id.*

4.5. The DOL Letter is not entitled to deference under *Kisor*.

The Letter fails virtually every *Kisor* requirement, making it unworthy of deference for multiple, independently sufficient reasons.

Before delving into the specifics of the letter, it is important to note that the Letter is not entitled to deference because (1) it does not resolve the regulatory ambiguity at issue, and (2) it simply paraphrases a regulation. Put simply, although an agency's interpretation may be useful in applying a regulation to a factual scenario, an agency has no ability to instruct courts to apply one regulation over another.

To be worthy of deference, an agency's interpretation must fill in the gaps of the regulatory ambiguity. *Kisor*, 139 S. Ct. at 2416. This means that the interpretation must be "within the zone of ambiguity the court has identified after employing all of its interpretive tools." *Kisor*, 139 S. Ct. at 2416. The ambiguity in this case is not which regulation to apply. The ambiguity is how to value vehicle expenses, *regardless* of which regulation the Court applies.

On this point, the Letter does not address this ambiguity in a meaningful way. Instead, the Letter elects to apply one regulation over another, which is a legal determination. In doing so, the Letter chooses an interpretation that does not clarify the relevant ambiguity—how are vehicle expenses valued for minimum wage purposes?

Moreover, the Letter simply adopts Section 778.217 and paraphrases its "reasonable approximation" language. In doing so, the DOL provides no methodology that would resolve any regulatory ambiguity. The Supreme Court "has denied *Auer* deference when an agency interprets a rule that parrots the statutory text." *Kisor*, 139 S. Ct. at 2417, n.5. An agency "gets no 'special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected to merely paraphrase the statutory language.'" *Id.*, *quoting Gonzales v. Oregon*, 546 U.S. 243, 257 (2006).

4.5.1. The Letter is not the type of interpretation afforded deference under *Kisor*.

Kisor describes a specific kind of agency interpretation that is entitled to deference: applying a regulation to a factual scenario that requires a policy judgment, usually resting on expertise in a technical or complex area. *Kisor,* 139 S. Ct. at 2410–11. This is *not* what the Letter is. Instead, the Letter makes flawed *legal* judgments rather than applying policy to a specific factual scenario.

First, the Letter follows a trail of regulatory breadcrumbs to move from the applicable "Free and Clear" regulation to an inapplicable regulation that deals only with how reimbursements affect someone's "regular rate" for overtime purposes. Letter at p. 2. The Letter acknowledges that the regulation, 29 C.F.R. § 778.217, concerns only overtime calculations, but inexplicably applies it to minimum wage compliance anyway. *Id.* at p. 2, n.2. This is an erroneous legal determination.

The Letter attempts to overrule or distinguish this Court's decision in *Hatmaker I* by claiming that the Court did not consider Section 778.217 in *Hatmaker*. *Id.* at p. 3, n.4. The Letter is wrong. The Court ***did*** consider that regulation, as it featured prominently in the parties' briefing in *Hatmaker*. *See, e.g., Hatmaker v. PJ Ohio, LLC* No. 3:17-cv-146, ECF # 117, pp. 19–21, ECF # 120, pp. 11–14, ECF # 121, pp. 20–23. The Court did not apply 29 C.F.R. § 778.217 because that regulation has nothing to do with minimum wage compliance.

Second, the Letter concludes that employers have no duty to keep records of an employee's vehicle expenses. Despite coming to this conclusion, the Letter concedes that 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 employee's wages." Letter, p. 3, *citing* 29 C.F.R. 516.2(a)(10). The Letter also agrees that those records include "'the original cost, operating and maintenance cost, and depreciation and interest charges' if those costs are involved in the additions or deductions." *Id.*, *citing* 29 C.F.R. 516.6(c)(2). Even though the listed items sound exactly like the records of an employee's actual vehicle expenses, the Letter concludes that employers have no duty to keep records of an employee's vehicle expenses *even when* the employer knows that such expenses factor into the employee's wage. *Id.* Again, this is an erroneous legal conclusion. As this Court held in *Hatmaker*:

> Because employee-incurred expenses affect "total wages," this provision also requires employers to maintain records of delivery drivers' vehicle expenses.
>
> In the pizza delivery driver context, a reasonably diligent employer must in some manner maintain records of vehicle costs, even if the FLSA and Regulations did not already require the employee to do so. See *Craig v. Bridges Bros. Trucking LLC*, 823 F.3d 382, 389 (6th Cir. 2016) (requiring the exercise of reasonable diligence to determine whether a worker is working uncompensated hours. C.F.R. § 516.6(c) requires the employer to maintain the records for at least two years. The "obligation of [FLSA compliance] is the employer's and it is absolute. He cannot discharge it by attempting to transfer his statutory burdens of accurate recordkeeping, 29 U.S.C. § 211(c), and of appropriate payment, to the employee." *Caserta v. Home Lines Agency, Inc.*, 273 F.2d at 946.

Hatmaker I, 2019 WL 5725043, at *7.

Third, the Letter interprets the Handbook to allow not just two options, as this Court previously held, but (apparently) an infinite amount of reimbursement options. Letter, p. 4. This is contrary to any reasonable reading of the Handbook's language. The Handbook gives only two alternatives. The default is to track and reimburse each driver's actual expenses. *Id.* "In lieu" of this method, employers may reimburse drivers at the IRS rate. *Id.* In other words, Option 1 or, in lieu of Option 1, Option 2. *See, e.g.*, DOL Field Operations Handbook § 30c07 (using "in lieu" to denote the employer has only two options); *see also Salmon v. Glass Family Pizza, Inc.*, AAA Case No. 01-19-0001-9554 (the Handbook provides for only two possibilities, no more); *Ely*, AAA Case No. 01-19-0004-1722, pp. 8-10 ("the FOH in plain language provides two, and only two, alternatives for reimbursement.").

Fourth, the Letter attempts to disclaim the Handbook as authoritative. Letter, p. 4. This ignores that courts have repeatedly deferred to the Handbook as authoritative or persuasive, as described in Section 4.3.1., *supra*. The DOL itself has argued that the Handbook is authoritative. *Id*.

The Handbook and the Letter stand in stark contrast. On one hand, the Handbook reflects a reasoned determination that the IRS mileage rate is an appropriate proxy for reimbursement when an employer fails to keep records. This is exactly the type of fact-specific issue that *Kisor* endorses as a proper area for agency interpretation. On the other hand, the Letter focuses on *legal* judgments that are contrary to established law.

Although the DOL can issue interpretive guidance on specific factual issues, the DOL has no power to tell courts which regulations to apply to a particular situation, the scope of a reasonably diligent employer's recordkeeping duties, or whether a regulation is "ambiguous." The "ultimate decisions on interpretations of the act are made by the courts." 29 C.F.R. 785.2. An agency's attempt to replace court decisions with its own legal judgments is agency overreach and not entitled to any deference under *Kisor*.

4.5.2. The Letter's interpretation is not reasonable.

Even if the Letter's interpretation was the type that *could* be entitled to deference, the interpretation is not reasonable. There are multiple, independently-sufficient reasons to find that the Letter's interpretation is not reasonable.

First, as described above, the Letter misconstrues the law. Even if an agency could interpret the law (rather than provide guidance on applying ambiguous regulations to a specific factual scenario), the DOL's interpretation is wrong and contrary to the Court's holding in *Hatmaker I*.

Second, the Letter's "interpretation" provides no guidance at all. *Ely*, AAA Case No. 01-19-0004-1722, p. 8. The Letter simply states that pizza companies can "approximate" expenses.

Given the complexity of valuing vehicle expenses (consider depreciation, wear and tear, maintenance, financing, insurance, registration, etc.), this means virtually nothing and, as a result, is unreasonable. To meet the FLSA's remedial goals, "both employees and employers must have clear rules to follow. The Fair Labor Standards Act's remedial goals are defeated if employees have no way of knowing whether they are being paid properly." *Hatmaker I*, 2019 WL 5725043, at *6; *Ely*, AAA Case No. 01-19-0004-1722, p. 9 ("Employees and employers must have clear rules to follow, and the standard set forth in the Opinion Letter fails to provide that.").

> The Department's rule for pizza delivery drivers results in clarity for both delivery drivers and their employers. Employers can choose to take on the task of tracking delivery drivers' actual expenses or pay a set per-mile reimbursement rate. A neutral arbiter—the IRS—creates, monitors, and updates the rate, and it favors neither employers nor employees. Both employers and employees can readily access the rate. Moreover, employers, employees, and courts can precisely determine whether an employer is complying with the employer's minimum wage obligations. This can be done at relatively low litigation cost, likely through a motion for judgment on the pleadings or at summary judgment.

Hatmaker I, 2019 WL 5725043, at *6.

Hatmaker is consistent with the FLSA, the Supreme Court's instructions in *Mt. Clemens*,[20] and commonsense. In contrast, the Letter takes away any semblance of certainty and adopts the standard the *Hatmaker* defendants argued for—that employers can "approximate" expenses. Under the "approximation" standard, no one knows what the proper reimbursement rate is until a jury determines it. No reasonable person could conclude that this system complies with the FLSA's remedial and humanitarian purposes. Essentially, for all of the reasons the Handbook's approach is reasonable, the Letter's approach is unreasonable.

[20] *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946).

Third, the Letter claims that employers need not necessarily reimburse drivers for fixed expenses like insurance and registration fees. Letter, pp. 6–7. These expenses, however, are for the employer's benefit and can be easily prorated—as the IRS rate does—on a per mile basis. Thus, employers can reimburse only for the portion of fixed costs that benefit the employer. The Letter conflicts with the Handbook, which includes these items as reimbursable costs because they are included in the IRS rate.

4.5.3. The Letter does not implicate the DOL's "substantive expertise."

The Letter does not "implicate [the DOL's] substantive expertise." *Kisor*, 139 S. Ct. at 2417. As discussed above, the Letter is simply an agency's attempt at rewriting the law rather than using the DOL's technical expertise to apply a regulation to a factual scenario. In contrast, the Handbook reflects a reasoned determination that the IRS mileage rate is an appropriate proxy for reimbursement when an employer fails to keep records.

4.5.4. The Letter simply adopts the pizza industry's litigation position rather than reflecting the DOL's "fair and considered judgment."

Finally, the Letter does not reflect the agency's "fair and considered judgment." *Kisor*, 139 S. Ct. at 2417–18. Under *Kisor*, courts should not defer to an agency's interpretation when it is merely a "convenient litigating position." *Id.* Here, the agency has endorsed the pizza industry's litigating position—in the midst of numerous lawsuits on this very issue. *See, e.g., O'Neal v. Denn-Ohio, LLC*, No. 3:19-cv-280, 2020 WL 210801, at *7 (N.D. Ohio Jan. 14, 2020) (refusing to defer to the DOL's new interpretation of the Handbook's "20% rule" and calling it a "convenient litigating position").

A mere two months before the DOL suddenly changed course in the Letter, the DOL *itself* argued for relying upon the Handbook's vehicle expense provision. In the DOL's Motion for

Summary Judgment, they argued:

> Here, [the defendant's] designed routes averaged 150 daily miles. Multiplying this daily average mileage by the IRS mileage reimbursement rate provides the daily cost Drivers pay to provide the car and fuel required to make the deliveries commanded by [the defendant]. *See Burton v. DRAS Partners, LLC*, No. 2019-cv-02949, 2019 WL 5550579, at *2 – 4 (N.D. Ill. Oct. 27, 2019) (IRS mileage rate is an appropriate method to determine minimum wage violations under FLSA kickback theory where employer failed to maintain detailed records of employees' expenses (collecting cases); Wage & Hour Div., Dep't of Labor, Field Operations Handbook at 30c15 *available at* https://www.dol.gov/agen-cies/whd/field-operations-handbook/Chapter-30#B30b15 (last visited June 18, 2020). The IRS mileage reimbursement rate for business travel varied slightly during the liability period from $0.535 per mile to $0.58 per mile. For the calculations herein, the Secretary applies $0.55 per mile (*i.e.*, $0.55 * 150 = $82.50).

Scalia v. Arizona Logistics, Inc., Case No. 2:15-cv-04499-DLR, DOL's Motion for Summary Judgment, ECF # 203 at p. 13, n.20 (D. Ariz. Jul. 8, 2020). The DOL maintained this position a month later in its responsive filing. *Id.*, Response to Defendants' Motion, ECF # 214 at p. 19, n.11 (D. Ariz. Aug. 25, 2020) (arguing that defendants' reimbursement of $.44 per mile was insufficient because it was less than the approximate IRS rate of $.55 per mile).

This is a situation where an agency adopted, used, and advocated for its longstanding interpretation as recently as August 25, 2020. Six days later, the agency reversed course and issued guidance that contradicted its prior interpretation.

In other words, from 2000 until August 25, 2020, the DOL prescribed a binary choice for minimum wage compliance. As of August 31, 2020, the DOL suddenly announced that it permits a third, ambiguous standard for compliance. "In the face of such longevity and consistency, we are mindful that the Supreme Court requires compelling justification for such a dramatic shift in agency interpretation." *Sicklesmith v. Hershey Entm't & Resorts Co.*, 440 F. Supp. 3d 391, 403 (M.D. Pa. 2020) (addressing the DOL's change to the dual jobs regulation).

However, there is no such "compelling justification" here. Instead, when the Letter is viewed in context, "it appears that the request that resulted in the Opinion Letter may well have been the result of an effort by the pizza delivery industry to seek a more favorable forum than a federal district court." *Ely*, AAA Case No. 01-19-0004-1722, at pp. 8-10.

An agency interpretation that "conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 447 n.30 (1987), *quoting Watt v. Alaska,* 451 U.S. 259, 273 (1981); *NRDC v. U.S. EPA,* 526 F.3d 591, 602 (9th Cir. 2008). The Supreme Court has "declined to follow administrative guidelines in the past where they conflicted with earlier pronouncements of the agency." *Gen. Elec. Co. v. Gilbert,* 439 U.S. 125, 143 (1976). Likewise, "unfair surprise" warrants a court's rejection of new agency guidance. *Kisor*, 139 S. Ct. at 2417–18.

In any case, the Letter, if afforded any deference at all, should not apply retroactively. "When … an administrative rule is at issue, the inquiry is two-fold: whether Congress has expressly conferred power on the agency to promulgate rules with retroactive effect and, if so, whether the agency clearly intended for the rule to have retroactive effect." *Elim Church v. Harris,* 722 F.3d 1137, 1141 (9th Cir. 2013) (citing *Durable Mfg. Co. v. U.S. Dep't. of Labor,* 578 F.3d 497, 503 (7th Cir. 2009)); *Bowen v. Georgetown Univ. Hosp.,* 488 U.S. 204 (1988) (holding that the Medicare Act did not grant agency the authority to promulgate retroactive cost limits). There is no authority for retroactive application of a DOL opinion letter. *Berger v. Perry's Steakhouse of Ill.,* 430 F.Supp.3d 397, 412-13 (N.D. Ill. 2019).

4.5.5. Courts have rejected the DOL's recent attempts to rewrite the FLSA.

In recent times, the DOL has taken an activist approach to weaken the FLSA's protections. Courts have rejected the DOL's attempts to legislate or overrule judicial decisions.

For example, the DOL recently attempted to rewrite the FLSA's dual jobs rule. *See, e.g., O'Neal*, 2020 WL 210801, at *4. The DOL sought to remove any "limitation on the amount of related duties that a tipped employee can perform" and still be paid a tipped wage; *i.e.*, this would enable employers to pay workers a tipped wage for non-tipped duties. *Id.* at 5. In *O'Neal*, the court found that the "timing of the New Guidance casts further doubt on its interpretive integrity." *Id.* at *7. *O'Neal* held that if "the DOL believes the dual jobs regulation does not appropriately carry out the FLSA because it has been applied inconsistently by courts, it remains free to implement a new regulation through the appropriate procedures, but it may not circumvent those procedures by distorting the meaning of an existing regulation." *Id.* Numerous other courts rejected the DOL's legislative overtures. *Flores v. HMS Host Corp.*, 2019 WL 5454647, at *7 (D. Md. Oct. 23, 2019) (citing cases from district courts in Pennsylvania, Arkansas, Missouri, and Ohio).[21]

More recently, the DOL attempted to rewrite the "joint employer" rules in a way that would make it more difficult for an employee to prove that a person or entity jointly employed the worker. In a detailed opinion, a district court in New York struck down the DOL's new rule, holding:

> the Department must do better than this. Any future rulemaking must adhere to the text of the FLSA and Supreme Court precedent. If the Department departs from its prior interpretation, it must explain why. And it must make more than a perfunctory attempt to consider important costs, including costs to workers, and explain why the benefits of the new rule outweigh those costs.

[21] *See also Berger*, 430 F. Supp. 3d at 412 ("Here, and without warning, the DOL's new interpretation directly contradicts the 80/20 rule adopted over 30 years ago, causing unfair surprise. * * * Further, the DOL's new interpretation runs contrary to the remedial purpose of the FLSA—to ensure a fair minimum wage.").

New York v. Scalia, No. 1:20-cv-1689, 2020 WL 5370871, at *33 (S.D.N.Y. Sept. 8, 2020).

This new Letter appears to be the DOL's latest attempt to rewrite the law and its own guidance through administrative opinion rather than legislative change. And it was done at the behest of a pizza company and in the midst of numerous lawsuits on this issue.

As this Court knows, the pizza delivery industry is facing a substantial amount of litigation regarding its reimbursement practices. These lawsuits are self-inflicted: "Defendants, knowing they would ask their employees to incur substantial expenses on their behalf, could have paid a wage rate safely above minimum wage. In such a circumstance, their reimbursement policy might never come into question. Defendants also could have paid the workers their actual costs for delivering pizza. Again, Defendants chose not to." *Hatmaker I*, 2019 WL 5725043, at *5.

A bright-line rule, like that in the Handbook, would rapidly correct this situation. But, it would also require pizza companies to reimburse at the IRS mileage rate, cutting into profits. Apparently, pizza companies would rather rely on a "standard" that they argue permits them to set whatever reimbursement rate they want. To challenge such a "standard," workers must incur substantial litigation expenses and spend years proving their case. And that is *if* a worker can figure out that they are being under-reimbursed in the first place.

The Letter looks a lot like the DOL's attempt to bolster the pizza industry's defenses, *i.e.*, adopt the industry's "litigation position." This makes the Letter suspect, even putting aside its substantive flaws. *See, e.g., O'Neal*, 2020 WL 210801, *7.

The framework for the Letter also makes it suspect. The only background the DOL gives is that a company employing delivery drivers using personal vehicles for delivery requested guidance. The DOL does not explain what information this company provided, does not explain any factual investigation it may have taken, nor does it even reasonably address the legal implications or process in its decision. *Ely*, p. 9. Instead, the Letter adopts the pizza industry's litigation position with no explanation as to its reasoning or context. As Arbitrator Lightmas explained, "it appears that the request that resulted in the Opinion Letter may well have been the result of an effort by the pizza delivery industry to seek a more favorable forum than a federal district court." *Ely*, p. 9. As in *New York*, the DOL must "do better" if it wants to drastically alter the rules, particularly in a way that defeats the FLSA's purposes. *New York*, 2020 WL 5370871, at *33.

4.5.6. On September 28, 2020, Judge Rose declined to defer to the Letter and held, even under the Letter's standard, individualized vehicle discovery targeted at plaintiffs is improper.

On September 3, 2020, the defendants in *Hatmaker* filed the Letter as supplemental authority. *Hatmaker*, No. 3:17-cv-146, ECF # 162. Judge Rose then issued a decision that considered the Letter in the context of the *Hatmaker* defendants' demand to depose plaintiffs regarding the delivery drivers' "individual vehicle expenses or whether Defendants 'reasonably approximated' those expenses." *Hatmaker v. PJ Ohio, LLC*, No. 3:17-CV-146, 2020 WL 6390657, *1 (S.D. Ohio Sept. 28, 2020) ("*Hatmaker III*"). Judge Rose's decision is notable for two reasons.

First, Judge Rose declined to defer to the Letter or change his prior ruling deferring to the Handbook. He held that the defendants are still prohibited from propounding discovery related to individual vehicle expenses or the defendants' theory that they are permitted to "reasonably approximate" those expenses. *Id.* Indeed, Judge Rose went so far as to warn the defendants that their continued litigation of this issue "may lead to sanctions." *Id.*

Second, Judge Rose reviewed the standards espoused in the Letter. *Id.* He held that, even under the Letter, all of the relevant information will be in the employer's possession. *Id.* Thus, there is no reason to burden the employees with needless discovery requests. Moreover, if, under the Letter's standard, an employer did not maintain at least "records of the method" the employer used to approximate expenses, "Plaintiffs may use the IRS rate to prove damages." *Id.*

In other words, very little changes under the Letter. If the employer did not maintain records of the method they used to calculate "a reasonable approximation of actual expenses," then the Letter's presumption in favor of the IRS rate applies. *Id.*, interpreting Letter, p. 7.

4.5.7. An Arbitrator recently rejected the Letter.

To Plaintiff's knowledge, the first and only tribunal to have ruled on the issue since the Opinion Letter was issued is Arbitrator Frank A. Lightmas, Jr. in *Ely v. PJ Cheese*. Arbitrator Lightmas rejected the Letter on a number of grounds.

First, Arbitrator Lightmas found that the "trend in the law" was to adopt the Handbook standard. *Ely*, p. 8. He also found the reasoning of the Handbook standard "to be more persuasive than the reasoning supporting [Defendants'] position." *Id.*

Second, Arbitrator Lightmas rejected the Letter's suggestion that the Handbook allows for other methods of compliance in addition to the IRS rate or actual expenses. *Id.* "Had WHD wanted to make it clear that any 'reasonable approximation of expenses' was permissible under the FOH, it easily could have stated so but did not." *Id.*

Third, Arbitrator Lightmas explained that the Letter does not provide any meaningful guidance:

> [T]he 'standard' set forth in the Opinion Letter—a 'reasonable approximation of expenses'—is really no standard at all. Importantly, it provides no meaningful

> guidance for employees or employers and makes it impossible for an employee to determine whether the employee is being paid the minimum wage. The FOH is more consistent with the FLSA's remedial goal of protecting 'all covered workers from substandard wages and oppressive working hours." *Id.* (citations omitted). Employees and employers must have clear rules to follow, and the standard set forth in the Opinion Letter fails to provide that. The standard in the FOH does provide one, however. As the court stated in Hatmaker, the FLSA's 'remedial goals are defeated if employees have no way of knowing whether they are being paid properly.' 2019 WL 5725043, *4.

Id. at 8-9.

Fourth, as detailed above, the arbitrator found the circumstances under which the Letter came about—in the midst of a "losing streak" for the pizza industry—was "troubling." *Id.* at 9.

Finally, Arbitrator Lightmas found it likewise troubling that the DOL used the Handbook standard in litigation just six days before issuing their Letter rejecting it. *Id.* at 9.

Ultimately, the arbitrator granted the driver's motion for summary judgment that the Handbook standard applied.

4.5.8. The Proper Standard in Pizza Delivery Driver Lawsuits.

The above was an in-depth look at this area of law. Given the confusion surrounding FLSA's complexities, it is necessary. In the end, however, these cases are straightforward in how they should proceed under the *Mt. Clemens* framework, in light of recent case law and consistently-held DOL guidance. The discovery decision in *Hatmaker* is instructive:

> In the delivery driver context, "the proper measure of minimum wage compliance for pizza delivery drivers is to either (1) track and pay the delivery drivers' actual expenses or (2) pay the mileage reimbursement rate set by the Internal Revenue Service." Id. at PageID 1947. As this Court held on summary judgment:
>
> > The Department [of Labor's] rule for pizza delivery drivers results in clarity for both delivery drivers and their employers. Employers can choose to take on the task of tracking delivery drivers' actual expenses or pay a set per-mile reimbursement rate. A neutral arbiter—the IRS—creates, monitors, and updates the rate, and it

> favors neither employers nor employees. Both employers and employees can readily access the rate. Moreover employers, employees, and courts can precisely determine whether an employer is complying with the employer's minimum wage obligations. This can be done at relatively low litigation cost, likely through a motion for judgment on the pleadings or at summary judgment.

Id. at 1944.

An employer's own records will answer the question of whether the employer complied with minimum wage laws. Thus, the case can be resolved "at relatively low litigation cost" by examining those records. Doc 124, PageID 1944. The first question is whether Defendants tracked and reimbursed the delivery drivers' actual expenses. Only Defendants can answer this question. If Defendants did track and reimburse the drivers' actual expenses, then Defendants will have records to demonstrate their compliance. If Defendants did not track and reimburse actual vehicle expenses, then Defendants' records will show whether Defendants reimbursed the drivers at the IRS standard business mileage rate. To determine this, Plaintiffs can seek from Defendants records of any reimbursements Defendants paid; and delivery records, which will show, or can be used to determine, the miles the drivers drove.

With this information, one can calculate how much Plaintiffs should have been reimbursed (miles driven × IRS Rate), how much Plaintiffs were actually reimbursed per mile (reimbursements paid ÷ miles driven), and whether the difference dropped Plaintiffs below minimum wage in any specific week (((wages paid each week – under-reimbursement each week) ÷ hours worked each week) = net hourly wage). There is no information that an opt-in plaintiff can provide that will bear on these issues. All necessary information is in Defendants' possession. Discovery in this case should be a straightforward process, focused mainly on the records Defendants are required to keep under the FLSA and Ohio law.

* * *

Defendants will not be permitted to put Plaintiffs through the trouble, effort, and expense required by demanding that drivers produce information the drivers likely no longer have and had no reason or duty to keep. If Defendants claim they paid the drivers' actual expenses, then Defendants must produce evidence that they "tracked and paid" those expenses. "[A] reasonably diligent employer must in some manner maintain records of vehicle costs, even if the FLSA and Regulations did not already require the employee to do so." ECF 124, PageID 1946.

Because Defendants have not tracked and paid the drivers' actual expenses, the drivers' individual vehicle expenses (if maintained at all by the drivers) are

> irrelevant. Defendants may measure their minimum wage compliance against the IRS mileage rate. ECF 124, PageID 1947.

Hatmaker II, 2020 WL 1129325, at *3–4.

It is that simple—which is exactly the result that the FLSA's complexity is designed to achieve. Minimum wage workers should be able to readily understand when and if they are underpaid and, if they are, they should be able to simply and cost-efficiently resolve their claims. Anything less defeats the FLSA's purpose.

5. Under the proper legal standard, Defendants' discovery requests are irrelevant.

In light of all of the above, Defendants' proposed discovery is irrelevant and unnecessary. Defendants' discovery questionnaire asks for two categories of information: first, basic employment and contact information that Defendants already have or do not need; and second, information relating to the drivers' vehicle costs.

Specifically, questions 1 and 2 seek basic information that Defendants either already have or do not need. Question 1 asks for basic contact information despite the fact that Defendants should be communicating with these individuals through counsel (and, in many cases, already have this information). Question 2 asks for the store address where the driver worked, their employee ID, their dates of employment, and the name of each driver's supervisor. All of this information is already in possession of Defendants, and none of this information is in dispute in this case.

Questions 3 through 9 seek detailed information about each delivery driver's individual vehicle and associated costs.[22] Question 10 asks for all documents related to individualized vehicle costs, compensation, or otherwise related to the interrogatory questions.

[22] Some of the vehicle cost-related information is already in Defendants' possession as well. For example, they have records of the cars and insurance used by delivery drivers during their employment because they collect it upon hire.

As detailed above, none of this information is relevant to any question that still needs to be answered in this case. Defendants were required to either track and reimburse for the delivery drivers' actual expenses or reimburse at the IRS standard business mileage rate. Defendants have already conceded that they have not tracked and reimbursed for the delivery drivers' actual expenses. *See* Phelps Dep. at 84, 92-94, 109-10. The only question that remains, then, is whether they reimbursed at the IRS standard business mileage rate, or more, for each mile driven by the delivery drivers. None of the information sought by Defendants in their questionnaire has any relevance to that mathematical calculation. Defendants should be prohibited from seeking vehicle cost information, and the delivery drivers should be protected from having to provide it. *Hatmaker II*, 2020 WL 1129325 (granting protective order in nearly identical situation).

Defendants will claim that the drivers must provide this information because they believe it is the drivers' burden to show they incurred expenses in the first place. But, as Judge Rose explained, "[t]he fact that the parties agree that motor vehicles were used to deliver the pizzas suffices to prove that costs were incurred in their delivery. The pizzas were not walked to homes and we are not dealing with bicycle delivery. The parties agree that cars were used. The Court thus dispenses with Defendants' position that 'If Plaintiffs did not actually incur costs, they cannot have been 'under-reimbursed.''" *Id.* at *1.

Instead of indulging Defendants' burdensome and irrelevant requests, the Court should hold, as Judge Rose did in Hatmaker, that Plaintiff can prevail by reference to Defendants' records, using a mathematical formula. *Id.* at *3–4.

Here, as in *Hatmaker*, Defendants do not claim that they collected and reimbursed for actual expenses. The only question that remains is whether they reimbursed at the IRS rate. The delivery drivers' incomplete records of expenses will not help the Court answer that question.

6. Defendants' requests are unduly burdensome and designed to harass and intimidate.

Defendants argue that their proposed questionnaire is "user-friendly" because it "asks about car mileage, not GPS mechanics." ECF # 85, Page ID 1481. However, Defendants' "questionnaire" includes formal requests for production and interrogatories served pursuant to the Federal Rules. It will be necessary for Plaintiff's counsel to walk through each question with each responding delivery driver to ensure they understand what is being asked of them and respond appropriately. This will likely take well over 1,000 hours for Plaintiff's counsel to complete. And to what end? Because Defendants did not collect these records themselves, they are irrelevant to any cognizable claim or defense. If the Court rules Defendants were permitted to "reasonably approximate," their expert will likely use aggregated data rather than the incomplete information they might receive from the delivery drivers. *Perrin II*, 2014 WL 4749547, at *4 (refusing to require all FLSA opt-ins to respond to question because it was "unduly burdensome, unnecessary, and likely to undermine efficiency interests.").

Defendants' true purpose in seeking this information from the drivers—other than pursuing an unfounded legal defense—is to create an immense burden on each of the minimum wage delivery drivers, and to attempt to punish them if they do not fully respond with information they were never required to maintain in the first place. "When a discovery request 'approach[es] the outer bounds of relevance and the information requested may only marginally enhance the objectives of providing information to the parties or narrowing the issues, the Court must then weigh that request with the hardship to the party from whom the discovery is sought." *Priest v. Rotary*, 98 F.R.D. 755, 761 (N.D. Cal. 1983), *quoting Carlson Cos., Inc. v. Sperry & Hutchinson Co.*, 374 F.Supp. 1080, 1088 (D. Minn. 1974). The Civil Rules prohibit the use of discovery that is out of proportion to the case's needs—even if the discovery is otherwise relevant. Fed. R. Civ. P. 26(b)(1). The proportionality analysis includes the parties' resources.[23] Here, Defendants seek to impose a substantial burden on minimum wage workers.

7. Even if Defendants were permitted to reimburse based on an approximation, Defendants' discovery would still be inappropriate.

Even if the Court holds that Defendants were permitted to reimburse delivery drivers based on a reasonable approximation of delivery drivers' expenses, which it should not, Defendants' proposed discovery would still be irrelevant and out of proportion with the needs of the case. Under their proposed standard, Defendants will retain an expert to argue that their reimbursement rate "reasonably approximated" the delivery drivers' expenses using aggregated data and estimates. To rebut the reasonableness of Defendants' approximation, Plaintiffs will *not* be required to provide records of their actual expenses that add up to more than the reimbursements they received from Defendants. Instead, they too will be permitted to retain an expert and use an approximate rate that applies across the board. As the District of Missouri explained in a similar case against PJI back in 2013, long before any court had adopted the Handbook standard:

[23] Defendants seem to suggest that the fact that they have produced more sheer pages of discovery than Plaintiff is relevant to the inquiry before the Court. But, Defendants' suggestion misconstrues the proportionality requirement, which recognizes the possibility for one side providing more discovery than the other. See Note on Amendment to Rule 26 ("Some cases involve what often is called "information asymmetry." One party—often an individual plaintiff—may have very little discoverable information. The other party may have vast amounts of information, including information that can be readily retrieved and information that is more difficult to retrieve. In practice these circumstances often mean that the burden of responding to discovery lies heavier on the party who has more information, and properly so.").

> Defendants' assertion that individualized showings of each Plaintiff's vehicle expenses will be required to prove Plaintiffs' claims is without merit because Defendants' own reimbursement methodology does not depend upon the drivers' actual expenses and the regulatory framework does not require that reimbursement be based on actual expenses.

Perrin I, 2013 WL 6885334, at *8.[24]

Because Defendants do not claim to have relied on the delivery drivers' actual expenses in setting the reimbursement rate, there is no reason for them to rely on those records in trying to prove that their reimbursement rate was reasonable. At the very least, as discussed below, a representative sampling should be selected to provide whatever records they might have. But certainly, even under a reasonable approximation standard, the delivery drivers should not be punished for not having records that Defendants, not the drivers, were required by the FLSA to keep.

8. Defendants' proposed discovery is not relevant or proportional to any questions about willfulness or joint employer liability.

Defendants argue that the requested discovery is relevant to issues of willfulness and joint employer liability. *See* ECF # 85, PageID 1487-88 and ECF # 86, PageID 1506. However, first, their proposed questionnaire is focused on the delivery drivers' individualized vehicle costs. Ex. 2. The requested information is not relevant to the question of whether Defendants themselves acted willfully in setting their compensation policies. Likewise, vehicle cost information is not relevant to the question of whether PJI is an employer of the delivery drivers. To avoid this

[24] *See also, e.g., Smith v. Pizza Hut, Inc.*, No. 09-cv-01632, 2011 WL 2791331, at *3-5 (D. Colo. July 14, 2011) ("[T]he Court finds, … that Plaintiff may rely on a reasonable estimate of his vehicle-related expenses without knowing his exact expenses."); *Sullivan v. PJ United, Inc.*, No. 7:13-cv-01275, 2017 WL 10575860, at *7 (N.D. Ala. Oct. 16, 2017) ("courts addressing minimum wage claims relating to vehicle expenses have held that plaintiffs may reasonably approximate expenses and *need not prove actual expenses*." (emphasis added)); *Wass v. NPC Int'l, Inc.*, 688 F.Supp.2d 1282, 1284-87 (D. Kan. 2010).

inconvenient truth, Defendants focus in this section on their request to conduct depositions, claiming that they will ask questions related to the joint employer question. However, preliminarily, Defendants have not noticed any depositions. Thus, hypothetical depositions are not at issue. Second, Plaintiff's theory against PJI does not rely on each delivery driver having individually been terminated or hired by a PJI representative, for example. As detailed in his Complaint, Plaintiff's allegations against PJI focus on the control they exert on the delivery drivers through their relationship with the *franchisees*. *See, e.g., New York*, 2020 WL 5370871, at *20-29 (vacating revised joint employer regulations relating to "vertical joint employer liability" and explaining the expansive nature of "employer" under FLSA). As such, while some limited depositions of the named Plaintiff, and perhaps some opt-in plaintiffs, may be appropriate on the employer question when the parties reach the liability stage of the case, the drivers will not have much to contribute to this question either. On the question of class certification, anecdotal evidence from one driver or another is completely irrelevant.

There is no reason for any depositions of opt-in Plaintiffs prior to class certification. *See, e.g., Hatmaker III*, 2020 WL 6390657, at *1 (denying defendants' request to take depositions of plaintiffs and stating, "Again, discovery of this information can be had from Defendants. Defendants are not required to use the IRS rate; they are required to keep records of the method they did use. If Defendants have kept none of this, Plaintiffs may use the IRS rate to prove damages. Discovery of miles entailed can be had from Defendants.").

9. Even if the Court determines that some discovery should take place, it should be limited to a representative sampling of opt-in delivery drivers.

As discussed above, none of Defendants' proposed foray into the histories of the drivers' individual vehicle expenses is relevant. For the sake of completeness, however, even in situations where opt-in class members and putative class members may have relevant information, a representative sampling of FLSA opt-in Plaintiffs is appropriate. *Smith v. Lowe's Home Centers, Inc.*, 236 F.R.D. 354, 356 (S.D. Ohio May 5, 2006).

"While it is true that Opt-In Plaintiffs are 'party plaintiffs' as they affirmatively consented to opt into the class, [ ] [it is] incorrect [to state] that all opt-in plaintiffs are subject to full discovery." *Kutzback v. LMS Intellibound, LLC*, No. 2:13-cv-02767, 2020 WL 1317345, at *9 (W.D. Tenn. Mar. 17, 2020). To hold otherwise negates the very efficiencies gained by the collective action mechanism and "would undermine the purpose and utility of both class and collective actions." *Smith*, 236 F.R.D. at 356; *see also Gentrup v. Renovo Servs., LLC*, No. 1:07-cv-430, 2010 WL 6766418, at *7 (S.D. Ohio Aug. 17, 2010) (While "[d]efendants have legitimate interests in obtaining sufficient discovery to support their defenses, … these rights must be balanced against other important policy considerations, including imposing such burdens on the class as to make collective actions impractical."). It likewise ignores Civil Rule 26(b)(1)'s proportionality analysis.

Thus, if the Court were to hold that any of Defendants' proposed discovery is relevant, a representative sampling is appropriate here.[25] Plaintiffs ask that the parties confer regarding a proper representative sampling that is consistent with the mandates of Rule 26(b)(1). The parties can then present their proposals or an agreement to the Court.

Last, any sampling should consist of only FLSA opt-in Plaintiffs, and not any absent,

[25] *See also, e.g., Scott v. Bimbo Bakeries, USA, Inc.*, No. 10-cv-3154, 2012 WL 61517354 (E.D. Pa. Dec. 11, 2012) (permitting written discovery to 10% of collective members, and depositions of 20 of 650 collective action members); *Halleen v. Belk, Inc.*, No. 4:16-cv-55, 2017 WL 1495085 (E.D. Tex. Apr. 26, 2017) (permitting defendants to depose and take written discovery from 6.8% of the 363 opt-in plaintiffs); *Lloyd v. JP Morgan Chase*, Nos. 11-cv-9305, 12-cv-2197, 2015 WL 1283681 (S.D.N.Y. Mar. 20, 2015)(limiting paper discovery to 10% of the collective and deposition discovery to 2% of collective).

putative Rule 23 class members. *Rosenbohm v. Cellco P'ship*, No. 2:17-CV-731, 2019 WL 2141901, at *3–4 (S.D. Ohio May 16, 2019). As explained in *Rosenbohm*, "the putative Ohio class, brought under Fed. R. Civ. P. 23, differs from the conditionally-certified FLSA class, brought under the collective action provisions of 29 U.S.C. § 216, in important respects." *Id.* Magistrate Judge Vascura went on to explain why discovery from absent Rule 23 class members is only appropriate in rare circumstances:

> First, no certification of the Ohio class has yet occurred. At present, Plaintiff Rosenbohm is the only member of the putative Ohio class that is currently before the Court. Further, the absent Ohio class members have not yet been notified of the potential class action and will not be notified unless and until the Court certifies a class under Rule 23. And even if they are notified in the future, they will not be required under Rule 23 to affirmatively opt in to the Ohio class as were the FLSA class members; rather, upon class certification, they will automatically become members of the Rule 23 class unless they affirmatively opt out. Fed. R. Civ. P. 23(c)(2)(B). As explained by the United States Supreme Court:
>
> > Unlike a defendant in a normal civil suit, an absent class action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection. In most class actions an absent plaintiff is provided at least with an opportunity to "opt out" of the class, and if he takes advantage of that opportunity he is removed from the litigation entirely.
>
> *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810 (1985). As a result, "[r]equiring absent class members to respond to discovery threatens to turn a class suit into an 'opt in' procedure rather than an 'opt out' mechanism, an approach the Supreme Court has squarely rejected." 3 Newberg on Class Actions § 9:11 (5th ed.) (citing *Phillips*, 472 U.S. at 812–13). Accordingly, "[d]iscovery from absent members of a class should be sharply limited and allowed only on a strong showing of justification." *J.B.D.L. Corp. v. Wyeth-Ayerst Labs., Inc.*, No. C-1-01-704, 2004 WL 7081790, at *4 (S.D. Ohio June 7, 2004); *see also Hurt v. Commerce Energy, Inc.*, No. 1:12-CV-758, 2014 WL 3615807, at *5 (N.D. Ohio July 21, 2014) ("Generally, absent class members in a Rule 23 class action are not subject to discovery.").
>
> Although some showing of need is uniformly required before permitting discovery of absent class members, the courts in the Sixth Circuit have yet to arrive at a consensus as to what showing defendants must make. *See*, *e.g.*, *Garden City Employees' Ret. Sys. v. Psychiatric Sols., Inc.*, No. 3:09-00882, 2012 WL 4829802, at

> *2–3 (M.D. Tenn. Oct. 10, 2012) (To demonstrate discovery of absent Rule 23 class members is warranted, the defendant must make "a strong showing" that "the information sought (1) is not sought with the purpose or effect of harassment or altering membership of the class; (2) is directly relevant to common questions **and unavailable from the representative parties;** and (3) is necessary at trial of issues common to the class.") (emphasis in original); *Groth v. Robert Bosch Corp.*, No. 1:07-CV-962, 2008 WL 2704709, at *1 (W.D. Mich. July 9, 2008) ("The court should only allow discovery of absent class members upon a showing of 'particularized need,' which generally requires a demonstration that the discovery is addressed to common issues (as opposed to individual issues), that it is not designed to force class members to opt out, and that it would not impose an undue burden or require the deponent to seek legal or technical assistance to respond.") (citation omitted); *In re Polyurethane Foam Antitrust Litig.*, No. 1:10 MD 2196, 2014 WL 764617, at *2 (N.D. Ohio Feb. 26, 2014) (endorsing the Manual for Complex Litigation's "particularized need" rule).

Rosenbohm, 2019 WL 2141901, at *3-4. Here, Defendants have not provided a sufficient showing that they need any discovery from any absent Rule 23 class member.

10. Defendants' Request for Attorneys' Fees and Expenses should be denied.

Defendants ask this Court to grant fees and costs associated with their Motion to Compel because Plaintiff would not agree to enter Defendant's proposed stipulation. ECF # 85, Page ID 1478. This request is baseless.

First, if there are valid reasons to oppose discovery, or a reasonable belief in entitlement to relief from the requested discovery, attorneys' fees and expenses are not appropriate. *See ARB, Inc. v. E-Systems, Inc.*, 663 F.2d 189, 200 (D.D.C. 1980). Where the entitlement to discovery is "far from clear" and there is a question as to the proper "scope of the discovery," then there are no indicators of "bad faith" or "culpability" that would necessitate the award of fees and expenses. *See Canter v. Alkermes Blue Care Elect Preferred Provider Plan*, Case No. 1:17-cv-399, 2019 WL 1760175, at *3 (S.D. Ohio Apr. 22, 2019). As explained above, earlier this year, another Southern District of Ohio court granted the precise relief Plaintiff requests here—an order prohibiting

Defendants from seeking discovery into vehicle costs from FLSA opt-in plaintiffs. *See Hatmaker II*, 2020 WL 1129325, at *4. Obviously, Plaintiff has a valid basis for his objections. Under these circumstances, sanctions are not appropriate.

Second, Defendants themselves took the position that they had not actually served discovery requests but that they had instead simply proposed a discovery plan and questionnaire. Under this view, if anything, Defendants were premature in filing their Motion to Compel. Further, Defendants themselves defied the Court's Standing Orders on Civil Procedures in filing their Motion to Compel rather than requesting a conference with the Court. *See* Barrett Standing Order on Civil Procedures, I.D. During a meet-and-confer about Defendants' proposed discovery plan, and in a letter recounting part of the conversation, Plaintiff's counsel noted that he believed the Court's standing orders required a conference prior to Defendants filing their Motion to Compel, but Defendants indicated they did not believe that would be necessary given the parties' positions. Ex. 3, p. 3. Despite the Court's Procedures, Defendants went ahead with their Motion to Compel.

Defendants' request for attorneys' fees and costs is inappropriate and should be denied.

11. Supplemental Briefing Regarding Two Additional Regulations.

Before concluding, Plaintiff seeks to provide further briefing on two additional regulations that employers and the DOL Letter look to in resolving the reimbursement standard. As discussed above, the only regulation that applies to "tools of the trade" expenses is the "Free and Clear" regulation, 29 C.F.R. § 531.35. In spite of this, some courts (starting with *Wass*) followed references within the regulations to two other regulations. Neither regulation is relevant to reimbursing expenses for minimum wage purposes. But, because the regulations have apparently confused some courts, Plaintiff addresses them below.

In the end, whether the Court follows *Hatmaker* and relies upon the Section 531.35 (the correct approach) or adopts *Wass* and relies upon the Section 778.217, the result is the same: the regulations remain ambiguous as applied to valuing vehicle expenses. Still, for the sake of completeness, Plaintiff provides this additional briefing on § 531.32 and § 778.217.

11.1. The "Other Facilities" Regulation, 29 C.F.R. § 531.32.

The "Free and Clear" regulation states that, if a worker provides tools of the trade, then the cost of those tools act as a deduction from the worker's effective wages. The "Free and Clear" regulation then states "See also in this connection, § 531.32(c)." What is the connection and is it relevant to this case?

To understand 29 C.F.R. § 531.32, one must first understand what "other facilities" means. Under the FLSA, "wage" generally means the cash wage paid to an employee. An employer can also count a small measure of tip money toward the employer's wage obligation. 29 U.S.C. 203(m)(2). Similar to tips, employers can count the "reasonable cost" of board, lodging, or "other facilities" toward an employer's wage obligation. 29 U.S.C. 203(m)(1). The rule is that, if an employer provides items to an employee for the *employer's* benefit, the items are *not* wages. If an employer provides items to an employee for the *worker's* benefit, the items *are* wages.

"Other facilities" are things "like board or lodging." 29 C.F.R. 531.32(a). Because "other facilities" has a broad meaning, it is important to know when the cost of "other facilities" counts toward an employer's wage obligation and when it does not. Section 531.32 becomes relevant in that analysis as it provides examples of items that are either for the employer's or worker's benefit.

Other facilities "which are primarily for the benefit or convenience of the employer **will not** be recognized as reasonable and may not therefore be included in computing wages." 29 C.F.R. 531.32(c) (emphasis added).

These examples are the connection between the "Free and Clear" and the "Other Facilities" regulations. The examples may be of some use if someone is unsure whether a particular item is for the worker's or the employer's benefit. If an employer provides an item that is for the employer's benefit, it does not count as wages. However, if the item is for the worker's benefit, it may count as wages. Thus, differentiating between the beneficiary of these items is integral to calculating wages. The "Other Facilities" regulation itself has no bearing on reimbursement. Instead, if an employer and worker argue as to who primarily benefitted from the item in question,[26] the Other Facilities regulation might provide insight, hence, therefore, the reference. Its implication begins and ends at this inquiry.

In simpler terms, the connection is this: the "Free and Clear" regulation states that tools provided for the employer's benefit reduce an employee's effective wage. The "Other Facilities" regulation lists examples of those types of tools as a guide for when a dispute on that topic arises. Here, however, no one disputes that drivers' vehicles are used for the employer's benefit. Accordingly, 29 C.F.R. 531.32(c) provides no relevant guidance, nor does it impact a claim brought under the free and clear principle.

[26] *See, e.g., De Leon-Granados v. Eller & Sons Trees, Inc.*, 581 F.Supp.2d 1295, 1300-01 (N.D. Ga. 2008).

11.2. The Reimbursement for Expenses Regulation, 29 C.F.R. § 778.217.

The next regulation is deceptively titled "Reimbursement for Expenses." By its title, it would seem like 29 C.F.R. § 778.217 would have something to do with the issue in this case. As discussed below, however, it does not.

This regulation is part of the C.F.R.'s section on overtime rules. The entirety of Part 778, of which Section 778.217 is a part, has to do with *overtime compensation* (indeed, that is the title), not minimum wage.[27] In contrast, the "Free and Clear" regulation is in Part 531. Part 531 deals with *both* overtime and minimum wage and how payments are to be made. The "Reimbursement" regulation must be understood within that context.[28]

The FLSA requires employers to pay an overtime rate of "one and one-half times the ***regular rate*** at which he is employed." 29 U.S.C. 207(a)(1) (emphasis added). In order to calculate overtime wages, one has to first calculate an employee's regular rate. Section 207(e) *excludes* certain types of remuneration from an employee's "regular rate." Calculating a "regular rate" is usually straightforward: determine the employee's normal hourly rate. But what happens when an employer reimburses an employee for expenses? Section 778.217 answers this question.

[27] Section 778.1(a), the "Introductory Statement," states that "[t]his part contains the Department of Labor's general interpretations with respect to the meaning and application of the maximum hours and overtime pay requirements contained in section 7 of the Fair Labor Standards Act."

[28] "Although 'it has long been established that the title of an Act 'cannot enlarge or confer powers,' 'the title of a statute or section' can aid in resolving an ambiguity in the legislation's text.'" Larry M. Eig, *Statutory Interpretation: General Principles and Recent Trends*, Congressional Research Service, 7-57000, 35 (2014) (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 19, n.14 (1981) (quotations and citations omitted) and *INS v. National Center for Immigrants' Rights*, 502 U.S. 183, 189-90 (1991) (citations omitted)). Thus, "a heading may shed light on the section's basic thrust, or on ambiguous language in the text," although such a heading cannot be interpreted to contradict the actual language of the statute. Here, these particular regulations are intended to be used in calculating and determining issues as to overtime compensation only.

First, Section 778.217 provides the general rule: reimbursement for expenses "is not compensation for services rendered by the employees." So long as the reimbursement "reasonably approximates the expense incurred," it is "not included in the employee's regular rate." 29 C.F.R. 778.217(a). This is important because unscrupulous employers sometimes try to ***overpay*** for expenses, or designate what are actually regular wages as "reimbursements" or other forms of pay, in order to exclude those payments from someone's "regular rate," thereby reducing the employer's obligation to pay overtime wages.[29] The inquiry into reasonableness is to determine only whether the expenses were actually reimbursements or whether they are wages masquerading as another form of payment, which would then need to be considered for purposes of calculating overtime.

Second, Section 778.217 provides "illustrations" of expenses that will not be part of an employee's regular rate, including the following:

> (1) The actual amount expended by an employee in purchasing supplies, tools, materials, cell phone plans, or equipment on behalf of his employer…
>
> (3) The actual or reasonably approximate amount expended by an employee, who is traveling "over the road" on his employer's business, for transportation (whether by private car or common carrier) and living expenses away from home, other travel expenses, such as taxicab fares, incurred while traveling on the employer's business.

29 C.F.R. 778.217(b).

[29] *See, e.g., Gagnon v. United Technisource, Inc.*, 607 F.3d 1036, 1041 (5th Cir. 2010). There, UTI paid Gagnon $5.50 per hour for "straight time" and $20.00 per hour for overtime, a fee remote from all other hourly wages in UTI contracts. *Id.* at 1039. UTI also paid Gagnon $12.50 per hour (in addition to the straight time fee), with certain restrictions, which they called a "per diem." *Id.* Thus, according to UTI, Gagnon's "regular rate" was $5.50, making his "overtime rate" of $20 perfectly acceptable under FLSA standards. But, the company's mathematical calculations were a fallacy. Normally, a "per diem" would be excluded from the "regular rate" of pay, but when the "per diem varies with the amount of hours worked, the per diem payments are part of the regular rate in their entirety." *Id.* at 1041. In other words, by designating part of Gagnon's wages as a "per diem," their overtime payment ultimately saved them $7 per hour for Gagnon's overtime (UTI paid him $20 for overtime; his regular rate was actually $5.50 + $12.50 per hour, which is $18 per hour. One and a half times $18 = $27 per hour for overtime.).

Section 778.217 does not create, impose, or even define reimbursement obligations in the context of calculating minimum wage obligations. Instead, Section 778.217 provides examples of scenarios of reimbursements that either would or would not be includable in an employee's "regular rate" when calculating overtime pay. In that context, the regulation seeks to ensure that a reimbursement is not too high or "disproportionately large" for the policy described above: employers cannot be permitted to disguise wages as something else to receive a premium discount on an employee's overtime rate.

This is further made clear in division (c), which "caps" reimbursements for purposes of determining an employee's "regular rate." 29 C.F.R. 778.217(c)(2). In other words, if an employer reimburses an employee equal-to-or-less-than a specified amount, the employer can safely exclude the reimbursement from the employee's "regular rate." In contrast, if a reimbursement appears to be "disproportionately large," 29 C.F.R. § 778.217(c)(1), then that excess must be included in the "regular rate" to prevent employers, again, from manipulating employee payments to their own purpose and improperly reduce overtime pay. The application of the regulation in determining overtime pay is reasonable and even-handed.

But consider this "cap" as applied to minimum wage. By its text, it allows employers to reimburse *nothing*. This cannot apply to minimum wage compliance, which requires employers to fully reimburse employees if the failure to do so would drop an employee's effective wage below minimum wage. The Sixth Circuit's instructed that deductions can, "at most" restore an employer to the financial posture it would have otherwise had. *Myers*, 192 F.3d at 555. In other words, an employer can always err in favor of an employee for minimum wage purposes, but it can never err in favor of the employer. It would be nonsensical to *cap* the amount of reimbursement in the context of minimum wage obligations.[30] And, yet, if a reimbursement "cap" applies to minimum wage, that is exactly what it would allow. Clearly, two regulations should not be interpreted to contradict each other within the same regulatory scheme.[31]

Expense reimbursements serve two different purposes, depending on whether the employer is calculating a regular rate for overtime or complying with minimum wage rules. The chart below summarizes the differences.

	Minimum Wage Compliance	**Regular Rate Calculation**
Purpose	Ensure wages are paid free and clear of any kick-back.	Ensure reimbursements are truly reimbursements rather than disguised "wages" and are not attempts to decrease overtime obligations.
Rule	Reimbursements must be equal to or **greater than** an amount necessary for the regular wages to be at least minimum wage. Anything less triggers a minimum wage violation.	Reimbursements must be equal to or **less than** the expense. Anything more is a "disproportionately large" and must be included in an employee's "regular rate" and, thus, overtime wages.

Section 778.217 has intruded upon this discussion because Section 531.32, the "Other Facilities" regulation, references Section 778.217. Section 531.32(c) states, in part:

> Items in addition to those set forth in § 531.3 which have been held to be primarily for the benefit or convenience of the employer and are not therefore considered to be "facilities" within the meaning of section 3(m) include: [examples]. On the other hand, meals are always regarded as primarily for the benefit and convenience of the employee. For a discussion of reimbursement for expenses such as "supper money," "travel expenses," etc., see § 778.217 of this chapter.

Although Section 531.32(c) refers to Section 778.217, it is clear that Section 778.217 has nothing to do with determining how or how much an employer must reimburse employees for expenses to

[30] It is telling that the DOL's Letter takes this "cap" to indicate that reimbursement at the IRS rate is some sort of maximum. This interpretation makes no sense in the context of minimum wages (but does in the context of overtime wages).

[31] *See United States v. Lizardi-Maldonado*, 275 F.Supp.3d 1284, 1297 (D. Utah 2017) ("statutory construction also requires the Court to read the provisions of a statute in harmony with each other.") (citing *Oakley v. City of Longmont*, 890 F.2d 1128, 1132-33 (10th Cir. 1989)).

comply with minimum wage rules. Instead, it simply directs employers who are reimbursing expenses to ensure compliance with the overtime regulations (*i.e.*, make sure reimbursements are reasonable rather than attempts at reducing overtime pay rates).

12. Conclusion

Plaintiff respectfully asks the Court to deny Defendants' Motion to Compel, and grant Plaintiff's Motion for Protective Order. Defendants should be prohibited from seeking discovery from Plaintiff, FLSA opt-in Plaintiffs, or Rule 23 class members relating to vehicle costs because the delivery drivers' knowledge or records of their individual expenses is not relevant to any claim or defense in this case. The parties can adjudicate this case by determining the reimbursement rate Defendants paid to their delivery drivers and comparing that rate to the IRS standard business mileage rate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the Defendants.

/s/ Andrew Kimble
Andrew Kimble