

# Missed delivery on wages

By James A. Wahl and Ryan R. Palmer

## Domino's delivery case challenges employers who use employees to deliver.

If you deliver, do you adequately reimburse your delivery drivers for the travel expenses they incur in making deliveries? Domino's Pizza has been sued by a group of its current and former delivery drivers in Minnesota federal district court. The drivers primarily asserted that Domino's failed to adequately reimburse them for their travel-related expenses, which resulted in the drivers being paid less than the federal minimum wage and the Minnesota minimum wage.

The drivers' allegations against Domino's have legal implications that could affect delivery businesses throughout Minnesota and in other states as well. In the June 21, 2010 ruling, the Luiken court granted conditional class certification. This allows the plaintiffs to proceed with a class action, bringing in claims on behalf of Domino's drivers located in any state except New York and California. In addition, similar cases have been filed relating to other restaurant systems and in other states. Cases involving Pizza Hut operations have been filed in Kansas and Minnesota. Although the complaints in these actions have been dismissed, it is likely that similar claims will be filed.

Following is a summary of the drivers' claims against Domino's in the Luiken case and the court's treatment of those claims. We also offer practical advice on how to ensure you are in compliance with both federal and state employment law.

**1. Domino's was not entitled to notice of insufficient reimbursement before the drivers' claims could be asserted.**

Domino's paid its drivers a "flat rate" for reimbursement of the automobile expenses the drivers incurred on a per delivery basis. The drivers argued that the

reimbursement was insufficient, and, as a result, Domino's was paying its drivers less than the statutory minimum wage in violation of the Fair Labor Standards Act (FLSA) and the Minnesota Fair Labor Standards Act (MFLSA). Domino's argued that the drivers should have been required to give Domino's notice of the insufficient reimbursement or provide Domino's with documentation that quantified their excess expenses before being able to file the lawsuit. However, the court determined that neither FLSA nor MFLSA required the drivers to give Domino's notice of their insufficient reimbursement and wages prior to filing suit.

**Advice to Minnesota delivery business clients:** If you are paying your delivery drivers a flat rate for automobile expenses on a per delivery basis, you may not be sufficiently reimbursing your delivery drivers for the expenses they have actually incurred. As a result, you may be exposing yourself to potential claims for minimum wage violations under FLSA and MFLSA. Since your delivery drivers are not required to give you notice of the allegedly insufficient reimbursement before pursuing state and federal claims against you, it is important for you to be proactive.

Talk to your delivery drivers, find out the actual amount of their automobile expenses, and set your flat rate at a level that adequately reimburses these expenses. To ensure your delivery drivers are being reimbursed for any expenses they incur above the flat rate, you may want to consider establishing a policy to allow for additional reimbursement. By requiring delivery drivers who claim expenses in excess of the flat rate to submit documentation quantifying these expenses, you can make sure your delivery drivers are being sufficiently reimbursed, and you can reduce the potential for minimum wage violation claims.

**2. Be aware that a "Delivery Charge" may be considered a "Gratuity," which, under Minnesota law, belongs to the drivers.**

The drivers also argued that they were not being paid minimum wage because

Domino's was unlawfully retaining the "delivery charge" that Domino's itemizes on its receipts and charges to all pizza delivery customers. The drivers argued that the "delivery charge" should belong to them because, under Minnesota law, employers are prohibited from requiring employees to contribute or share a "gratuity" with the employer. Domino's argued that the "delivery charge" was not a "gratuity" under Minnesota law that belonged solely to the drivers, but rather, was a "service charge" under federal law that belonged exclusively to Domino's.

The court found that, if Domino's was giving its customers sufficient notice that the "delivery charge" was being paid to Domino's and not to the drivers, Domino's could lawfully retain the "delivery charge" under Minnesota law. However, without sufficient notice, the "delivery charge" would be considered a "gratuity" that Domino's must pay to the drivers, in addition to Minnesota's mandatory minimum wage.

**Advice to Minnesota delivery business clients:** If you are charging a "delivery charge" to your customers and you want to retain this amount rather than having your delivery drivers claim they are entitled to it as a "tip" or a "gratuity," you need to take steps to put your customers (and your delivery drivers) on notice that the "delivery charge" is payable to you and not the individual delivery driver. By simply including a clear and conspicuous notice on the receipt, such as, "THE DELIVERY CHARGE IS PAYABLE TO [INSERT COMPANY NAME] AND NOT THE DELIVERY DRIVER," you significantly decrease the risk that your delivery drivers can claim a right or entitlement to the delivery charge under Minnesota law.

**3. Travel expenses may be included in the \$50 unreimbursed deductions limit under Minnesota law.**

The court left open the issue of whether the net effect of unreimbursed travel expenses could result in the drivers' wages falling below the minimum wage. The drivers argued that they were being paid less than minimum wage because

their travel expenses, which Domino's failed to reimburse, exceeded \$50. Under Minnesota law, the first \$50 of employment-related expenses in a given pay period do not have to be reimbursed by the employer. Domino's argued that "travel expenses" were not subject to the \$50 threshold for "uniform or equipment," and that, in any event, expenses from "a motor vehicle...which may be used outside the employment" were specifically excluded. The court found that, since the drivers alleged that the lack of reimbursement for their travel expenses resulted in their wages falling below minimum wage, the drivers were allowed to pursue their claim against Domino's.

**Advice to Minnesota delivery business clients:** While the courts have not finally decided the issue, be mindful of the \$50 limitation on unreimbursed expenses and pay attention to whether your drivers' out-of-pocket employment-related expenses are causing their wages to fall below the minimum wage. Make sure you are maintaining accurate records of your delivery drivers' employment-related expenses that you are not reimbursing, such as the costs of uniforms or specially-designed clothing, equipment, supplies, and travel expenses. While Minnesota law does not require you to maintain records of your delivery drivers' actual travel expenses, it may be worthwhile to do so. As noted in Section 1 above, paying your drivers' travel expenses may make the most sense to protect against claims similar to the ones made against Domino's.

Contact your legal advisor to make sure you understand your legal obligations. Be aware of employment issues faced by other delivery businesses, so that you don't drive employee compensation below the minimum wage. **FSN**

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