

Do We Have to Pay for That? Part 3—Employee Expenses

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In this blog series, we look at a variety of activities and items and discuss whether an employer has an obligation to pay for them (or the time employees spend in them). In [our first installment of this series](#), we looked at the compensability of time spent by employees in COVID-19 vaccination, testing, and screening activities. In our [second installment](#), we considered commute and travel time in a post-pandemic world. Today, we're looking at employee expenses—out-of-pocket costs employees incur in order to do the work they were hired to perform.

Fair Labor Standards Act

The FLSA does not require an employer to pay for or reimburse employee expenses, regardless of whether those expenses are necessary for the performance of the employee's job duties or otherwise incurred for the benefit of the employer. That said, the FLSA requires covered employers to pay non-exempt (*i.e.*, overtime-eligible) employees [no less than the minimum hourly wage](#) for all non-overtime hours actually worked in a workweek, and [not less than one and one-half times](#) the "regular rate at which [the employee] is employed" for each hour in excess of 40 in a workweek. U.S. Department of Labor rules state that employees must receive these wages "free and clear"—a requirement that can be undermined by the employee's incurrence of certain job-related expenses, [as the agency explains](#):

[I]f 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 [FLSA] 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 [FLSA].

State Law

As with all wage and hour issues, state law may impose obligations on employers where federal law does not. Many states' laws track the FLSA with respect to an employer's obligation to reimburse an employee's work-related expenses (*i.e.*, only where and to the extent those expenses cut into the employee's minimum wage or overtime pay), with the caveat that an employer's policy, promise, or agreement may give rise to a common law obligation to reimburse independent of wage and hour statutes. For example, under [New York law](#), "[t]he minimum wage shall not be reduced by expenses incurred by an employee in carrying out duties assigned by an employer."

Other state laws are more stringent. For example, under [California law](#), "[a]n employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer[.]" California statutes do not define "necessary expenditures or losses."

Similarly, under [Illinois law](#), "[a]n employer shall reimburse an employee for all necessary expenditures or losses incurred by the employee within the employee's scope of employment and directly related to services performed for the employer." Illinois legislation defines "necessary expenditures" as "all reasonable expenditures or losses required of the employee in the discharge of employment duties and that inure to the primary benefit of the employer." In [rule amendments](#) adopted earlier this year, the Illinois Department of Labor listed the following factors as relevant to whether an expense is to the employer's "primary benefit":

- Whether the employee has any expectation of reimbursement;
- Whether the expense is required or necessary to perform the employee's job duties;
- Whether the employer is receiving a value that it would otherwise need to pay for;
- How long the employer is receiving the benefit; and
- Whether the expense is required of the job.

In certain states, if an employer promises to reimburse an employee's expenses, the employee would have not only a common law remedy for an employer's failure to reimburse but a statutory remedy as well. For example, under New York law, "[wages](#)" includes (for certain employees) "benefits or wage supplements," and "[benefits or wage supplements](#)" includes "reimbursement for expenses"—provided the employer has agreed to reimburse expenses. Absent such an agreement, there would be no statutory basis to seek reimbursement.

A number of states that do not require reimbursement of employee expenses nonetheless prohibit employers from recovering non-reimbursable expenses from an employee's paycheck. Other states require the employer to follow certain notice and/or other procedures prior to recouping non-reimbursable expenses from a paycheck. The issue can arise, for example, in the context of an unauthorized expense on a company credit card.

When the federal rules on "tools of the trade" was published in 1967, the "tools" included "[miners' lamps \[and\] dynamite caps](#)"—examples that remain in the regulations today. In the modern day, depending on the jurisdiction, "tools of the trade" might include automobiles, bicycles, motorcycles, and mopeds, as well as technological expenses such as computers and mobile phones (if and to the extent employees are required to possess and utilize them in the course of their employment). Depending on the jurisdiction, the laws governing employee reimbursement may extend to other remote work expenses, the costs of acquiring and maintaining uniforms, or [the costs and expenses of vaccination, testing, and screening](#).

Particularly in the post-pandemic era, when many employees continue to work remotely, employers should review their policies on employee expense reimbursement to ensure they comply with the laws of the jurisdiction where the work is performed, as well as to consider any limitations that are permitted under those laws (e.g., requiring substantiation of expenses, requiring reimbursement requests to be submitted on a timely basis, etc.). While we discuss the guiding principles, employers should always seek counsel on how to apply those principles to their specific facts.

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