

# **Time Is Money: A Quick Wage-Hour Tip on ... Recovering Amounts Owed by a Departing Employee: You Know You Probably Cannot Deduct From Final Wages, but Can You Withhold Reimbursements for Expenses?**

Article By:

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In employment, as in life generally, breaking up can be hard to do. This is particularly so when a departing employee owes the employer money. Most employers understand that applicable law often prohibits simply deducting such debts from an employee's final paycheck. Consider, for example, a recently terminated employee who refuses to return a \$500 printer the employer provided to allow the employee to work from home. In most states, absent an agreement in writing, wage payment laws prohibit the employer from deducting \$500 from the employee's final paycheck to recover the cost of the printer. A small claims lawsuit may be the only available way to recover the \$500 owed, but that is not likely to be worth the time or money.

But what about business expenses the employer ordinarily reimburses to the employee – e.g., airfare, hotel, and meal expenses for work-related trips, or, during these pandemic times, monthly cell phone and internet service? Continuing with our example, if the employee has properly submitted for reimbursement of expenses (meaning complied with policy requirements) in an amount equal to or greater than the \$500 cost of the printer, may the employer refuse to reimburse the employee for \$500 in expenses, and call it even? This potential offset strategy faces several potential hurdles.

## **The First Hurdle: Are Reimbursable Expense “Wages”?**

### **The FLSA: Reimbursable Expenses Are Not “Wages,” But Beware Minimum Wage and Salary Basis Traps**

Withholding expense reimbursements will not work as an offset strategy if the expense reimbursements qualify as “wages” under applicable law. The FLSA's definition of “wages” does not include business expense reimbursements. See 29 U.S.C. § 203(m). And the FLSA's definition of “regular rate” for purposes of calculating overtime specifically excludes reimbursable business expenses, such as “reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of the employer's interests and properly reimbursable by the employer.” 29 U.S.C. § 207(e)(2). However, beware the minimum wage requirement. Withholding an expense reimbursement can give rise to a minimum wage violation under the theory of an indirect

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wage deduction, if the employee's earnings are reduced below the required minimum wage. The DOL highlighted this prohibition against unlawful "kickbacks" as part of its COVID-19 guidance, which we explained [here](#). Similarly, plaintiffs' lawyers may argue that withholding an expense reimbursement affects an exempt employee's salaried compensation for the final week of work.

### **State Wage Payment Laws: Definitions Differ**

State wage payment laws, unfortunately, provide differing answers. On one hand, the District of Columbia Court of Appeals recently analyzed this question under Washington D.C.'s wage payment law, concluding that "expense reimbursements" are not "wages." *Sivaraman v. Guizzetti & Assocs.*, 2020 WL 3088865, — A.2d. — (D.C. June 11, 2020) (reviewing dictionary definitions, applying statutory interpretation canons, and relying upon Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012)). On the other hand, states like New York specifically define "wages" to include "reimbursement for expenses." See N.Y. Labor Law §§ 190(1), 198c(2). Consequently, the operative state's definition of "wages" may pose an insurmountable hurdle to the expense reimbursement offset strategy.

### **A Second Hurdle: Many States' Laws Specifically Govern Expense Reimbursements**

California's well-known Labor Code § 2802 provides that an employer "shall indemnify" employees "for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties[.]" The mandatory "shall indemnify" language precludes an employer from refusing to pay an otherwise proper expense reimbursement. Consequently, § 2802 prohibits the potential expense reimbursement offset strategy.

Illinois passed a [similar law governing expense reimbursements](#) that became effective in 2019, which has received considerable attention during the COVID-19 pandemic.

And several other states have laws on the books regulating payment of expense reimbursements, including Pennsylvania, Montana, Iowa, and New Hampshire. The full text of these laws is set out below. These laws vary somewhat in scope, but generally require reimbursement of expenses, particularly when the employer maintains an expense reimbursement policy. Consequently, state laws like these probably prohibit withholding otherwise valid expense reimbursements to offset separate amounts owed to the employer.

### **A Third Hurdle: Your Reimbursement Policy**

If the relevant state neither defines "wages" to include expense reimbursements nor regulates expense reimbursements, the offset strategy faces a third hurdle: your expense reimbursement policy. Specifically, your expense reimbursement policy may not permit offsetting otherwise proper expense reimbursements to repay separate amounts owed. In reality, your policy drafter was probably not thinking about the interplay of offsets and expense reimbursements when creating your policy. Consequently, it seems unlikely the company will have a contractual right to refuse to pay an otherwise valid request for reimbursement. However, the offset strategy may create the practical outcome the offset strategy seeks. The employee may not be incentivized to pursue a \$500 expense reimbursement claim in small claims court knowing he or she has wrongfully retained the \$500 printer.

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In sum, when time is money, companies must carefully, and quickly, weigh the risks of taking action against an employee. Before refusing an otherwise proper request to reimburse expenses to offset a separate debt, carefully analyze the governing state's laws governing wages and expense reimbursements, and the language of your specific policy.

## **State Expense Reimbursement Laws**

### **California, Cal. Lab. Code § 2802:**

(a) An 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, even though unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful.

(b) All awards made by a court or by the Division of Labor Standards Enforcement for reimbursement of necessary expenditures under this section shall carry interest at the same rate as judgments in civil actions. Interest shall accrue from the date on which the employee incurred the necessary expenditure or loss.

(c) For purposes of this section, the term "necessary expenditures or losses" shall include all reasonable costs, including, but not limited to, attorney's fees incurred by the employee enforcing the rights granted by this section.

(d) In addition to recovery of penalties under this section in a court action or proceedings pursuant to Section 98, the commissioner may issue a citation against an employer or other person acting on behalf of the employer who violates reimbursement obligations for an amount determined to be due to an employee under this section. The procedures for issuing, contesting, and enforcing judgments for citations or civil penalties issued by the commissioner shall be the same as those set forth in Section 1197.1. Amounts recovered pursuant to this section shall be paid to the affected employee.

### **Illinois, 820 ILCS 115/9.5L**

(a) An 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. As used in this Section, "necessary expenditures" means 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. An employer is not responsible for losses due to an employee's own negligence, losses due to normal wear, or losses due to theft unless the theft was a result of the employer's negligence. An employee shall submit any necessary expenditure with appropriate supporting documentation within 30 calendar days after incurring the expense, except that an employer may provide additional time for submitting requests for reimbursement in a written expense reimbursement policy. Where supporting documentation is nonexistent, missing, or lost, the employee shall submit a signed statement regarding any such receipts.

(b) An employee is not entitled to reimbursement under this Section if (i) the employer has an established written expense reimbursement policy and (ii) the employee failed to comply with the written expense reimbursement policy. An employer is not liable under this Section unless the employer authorized or required the employee to incur the necessary expenditure or the employer failed to comply with its own written expense reimbursement policy. If the written expense reimbursement policy of an employer establishes specifications or guidelines for necessary

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expenditures, the employer is not liable under this Section for the portion of the expenditure amount that exceeds the specifications or guidelines of the policy so long as the employer does not institute a policy that provides for no reimbursement or de minimis reimbursement.

(c) To ensure consistency with federal law, any rules adopted by the Department and interpretation of this Section shall be consistent and not in conflict with federal regulations and guidelines regarding employer requirements for reimbursement of employee expenses.

**Iowa, Iowa Code §91A.3(6):**

Expenses by the employee which are authorized by the employer and incurred by the employee shall either be reimbursed in advance of expenditure or be reimbursed not later than thirty days after the employee's submission of an expense claim. If the employer refuses to pay all or part of each claim, the employer shall submit to the employee a written justification of such refusal within the same time period in which expense claims are paid under this subsection

**Montana, Mont. Code Ann. § 39-2-701:**

(a) An employer shall indemnify an employee, except as prescribed in subsection (2), for all that the employee necessarily expends or loses in direct consequence of the discharge of duties as an employee or of the employee's obedience to the directions of the employer, even though unlawful, unless the employee at the time of obeying the directions believed them to be unlawful.

(b) An employer is not bound to indemnify an employee for losses suffered by the employee in consequence of the ordinary risks of the business in which the employee is employed.

(c) An employer shall in all cases indemnify an employee for losses caused by the employer's want of ordinary care.

**New Hampshire, N.H. Rev. Stat. § 275:57:**

(a) An employee who incurs expenses in connection with his or her employment and at the request of the employer, except those expenses normally borne by the employee as a precondition of employment, which are not paid for by wages, cash advance, or other means from the employer, shall be reimbursed for the payment of the expenses within 30 days of the presentation by the employee of proof of payment.

(b) Enforcement and administration of this section by the department shall be as provided for wage claims under RSA 275:51

(c) An action by an employee to recover unreimbursed expenses may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or herself, or themselves, or such employee or employees may designate an agent or representative to maintain such action.

(d) An employer who willfully violates the provisions of this section may be assessed interest and a civil penalty of up to \$1,000 per violation, which shall be deposited into the department of labor restricted fund established in RSA 273:1-b.

(e) The commissioner shall adopt rules under RSA 541-A necessary for the administration of this

section.

**Pennsylvania, 43 Pa. Stat. Ann § 260.3:**

(a) Wages other than fringe benefits and wage supplements. Every employer shall pay all wages, other than fringe benefits and wage supplements, due to his employees [sic] on regular paydays designated in advance by the employer. Overtime wages may be considered as wages earned and payable in the next succeeding pay period. All wages, other than fringe benefits and wage supplements, earned in any pay period shall be due and payable within the number of days after the expiration of said pay period as provided in a written contract of employment or, if not so specified, within the standard time lapse customary in the trade or within 15 days from the end of such pay period. The wages shall be paid in lawful money of the United States or check, except that deductions provided by law, or as authorized by regulation of the Department of Labor and Industry for the convenience of the employee [sic], may be made including deductions of contributions to employee [sic] benefit plans which are subject to the Employee Retirement Income Security Act of 1974 ...

(b) Fringe benefits and wage supplements. Every employer who by agreement deducts union dues from employees' [sic] pay or agrees to pay or provide fringe benefits or wage supplements, must remit the deductions or pay or provide the fringe benefits or wage supplements, as required, within 10 days after such payments are required to be made to the union in case of dues or to a trust or pooled fund, or within 10 days after such payments are required to be made directly to the employee, or within 60 days of the date when proper claim was filed by the employee in situations where no required time for payment is specified.

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