



## On whose dime? Court rules California employers must pay employee cell phone expenses

### Employment Alert

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In a world where mobile devices outnumber both personal computers and humans, it's not surprising that we use our mobile devices for both business and pleasure. In a published opinion sure to wreak havoc with workplace bring your own device programs (BYOD), the California Court of Appeal has now told employers that if California employees *must* use their cell phones for work-related calls, they *must* be reimbursed a reasonable portion of their cell phone bills for that use. *Colin Cochran v. Schwan's Home Service, Inc.*, Court of Appeal (August 12, 2014) ( **"An employee need only show that he or she was required to use a personal cell phone to make work-related calls, and he or she was not reimbursed"**).

This ruling applied to a class action by service managers seeking reimbursement of work-related cell phone expenses, but will also apply to smart phones used to access business data in the Cloud and on network servers.

To date, the biggest challenges with BYOD policies have related to device security and protection of confidential information, with many employers putting constraints on the use of a device as a tradeoff for remote access. The

question of who pays now moves to center stage. Under *Cochran*, **California employers that require employees to use their personal devices to conduct business as a condition of employment will need reimbursement plans or face litigation risk.**

Section 2802 of the California Labor Code requires employers to reimburse employees for expenses “necessarily incurred” with the stated purpose of “prevent[ing] employers from passing their operating expenses on to their employees.” Lest anyone think this issue can be resolved with a waiver of the right to reimbursement, Labor Code section 2804 prohibits waivers of an employee’s rights to reimbursement.

### **So what’s an employer to do?**

Some employers provide a lump sum allowance for service charges based on average use or surveys of the cost of basic data plans. Others provide, or reimburse for, both the phone and the cost of a data plan. Employers who want or need more control over information maintained on an employee’s mobile device (think financial services and healthcare) are more likely to pay for the device and service charges and to require employees to agree to detailed usage terms.

Other employers don’t reimburse for phone expense when the employee has already purchased the phone and a data plan and incurs nominal or no incremental cost for additional use on an employer’s behalf. Will these approaches withstand litigation?

The only appellate case other than *Cochran* to address cell phone expenses denied the certification of a class of employees seeking reimbursement of costs for use over and above the 1,500 monthly minutes provided to program participants for personal and business use, concluding that the plan “would violate the law only if it were insufficient to provide full reimbursement for expenses necessarily incurred.” *DeLeon v. AirTouch Cellular*, Court of Appeal, February, 2013 (unpublished).

In the context of reimbursement for automobile expenses, the California Supreme Court discussed three permissible methods: actual expense, mileage reimbursement and lump sum. *Gattuso v. Harte Hanks Shoppers*, 42 Cal. 4th 554 (2007). Recognizing that the actual expense method is both accurate and costly, *Gattuso* held that the mileage reimbursement and lump sum methods were also acceptable so long as “the amount paid is sufficient to provide full reimbursement for actual expenses necessarily incurred.” *Gattuso* also held that the employer “must provide some method or formula to identify the amount of the combined employee compensation payment that is intended to provide expense reimbursement.”

The question of when an expense is “necessarily incurred” has gotten little attention from the California courts. In *Gattuso*, the employer had argued (unsuccessfully) that it was not required to reimburse sales employees for routine expenses of employment, such as car expenses. The court did acknowledge that the employee’s choice of automobile would affect the costs of operation, insurance and depreciation, concluding that the “exercise of judgment” by employer and employee would be needed “to determine whether the expenses incurred were reasonable and therefore necessary.”

Presumably a similar analysis would apply to whether an employee needed a flip phone and basic service or the latest smartphone with a full data plan and unlimited texting. At least one California federal court has held that phone and Internet expenses incurred by employees who choose to telecommute are not “necessarily incurred” and thus need not be reimbursed. *Novak v. Boeing*, 2011 WL 9160940 (C.D. 2011). Expect more litigation about when an expense triggers the employer’s statutory reimbursement obligation.

### **Consider these factors when building a compliant reimbursement policy**

In the meantime, employers should review and update existing BYOD and/or mobile device policies. Many factors go into BYOD policies, but expense reimbursement terms raise the greatest risk of class litigation, so the non-exhaustive list of factors below should be addressed as part of building a compliant reimbursement policy:

- Is a mobile device necessary for an employee to perform the job?
- Are employees expected to respond to email, texts and phone calls from outside the office?
- Do employees use a remote assignment, reporting or timekeeping system?
- If so, what level of technology and service is required?
- Is the employee given the choice of using personal equipment or a company provided device?

- Will expense reimbursement bring an employee's compensation below minimum wage?
- Are loaner phones available for international travel?
- If using a lump sum program, is there a mechanism for employees to be reimbursed for expenses necessarily incurred above the lump sum amount?
- How will the employer deal with replacements for lost, stolen or damaged phones?
- Are reimbursement payments for phone expenses separately broken out on wage statements?

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