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We Have to Pay for What? A California Court of Appeal Issues Expansive Expense Reimbursement Ruling

By Diane Kimberlin

A California Court of Appeal recently issued a short decision in *Cochran v. Schwan's Home Services, Inc.*, B247160 (Aug. 12, 2014) that took an expansive view of an employer's obligation to reimburse employees for business expenses. In light of this decision, employers should conduct a careful and wide-ranging review of their reimbursement policies and take a hard look at what actually happens "in the field."

The plaintiff, who worked as a customer service manager, sued his employer to recover expenses for the work-related use of his personal cell phone. The plaintiff asked the court to certify his case as a class action. The trial judge denied class certification on the ground that individualized inquiries about the class members' cell phone plans would overwhelm common issues. In effect, the trial court determined that no "expense" was incurred, and no reimbursement owed, unless the employee had to pay something out of pocket, above and beyond the expense to maintain the cell phone for personal use. The appellate court disagreed, finding that an employer is obligated to reimburse an "expense," even if the employee has incurred no additional cost associated with the business use of the phone. Because this error was the basis for the trial court's decision to deny certification, the court reversed that decision and sent the case back to the trial court.

The Obligation to Reimburse Business Expenses

California Labor Code section 2802 obligates employers to reimburse employees for "all necessary expenditures or losses inczurred by the employee in direct consequence of the discharge of his or her duties, …" The *Cochran* decision posed, and answered, the "threshold question" presented on appeal as follows:

> Does an employer always have to reimburse an employee for the reasonable expense of the mandatory use of a personal cell phone, or is the reimbursement obligation limited to the situation in which the employee incurred an extra expense that he or she would not have otherwise incurred absent the job? The answer is that reimbursement is always required. Otherwise the employer would receive a windfall because it would be passing its operating expenses onto the employee.

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Based on this interpretation of section 2802, the *Cochran* court found the trial court erred when it determined that the obligation to reimburse would depend on (1) whether the employee had a plan allowing unlimited use; and (2) whether the employee or a family member paid the bill. Instead, it held that when an employee "must" use his personal cell phone for work-related calls, the employer must reimburse him and that the "reimbursement owed is a reasonable percentage of the cell phone bills."

The court's language strongly suggests that an employer must reimburse an employee any time the employee is required to provide a benefit to the employer that could fall into the category of "operating expenses." This is true whether the benefit is provided directly by the employee (his own cell phone which he pays for himself) or by a third party (a family member who pays the bill).

Indeed, the court pointed out that its broad interpretation of section 2802 not only prevents employers from passing on operating expenses, but also "prevents them from digging into the private lives of their employees to unearth how they handle their finances vis-à-vis family, friends and creditors," making clear its dismissal of the theory that "who paid the bills" is of any consequence.

The case most heavily relied upon by the *Cochran* court was its own prior decision in a case involving reimbursement for business use of an employee's car.[1] In calculating the appropriate amount of reimbursement in that case, the court recognized that the employee was not just buying gas for the car, but the car itself, which had to be insured, and was subject to wear and tear, resulting in diminished value.

Arguably, the principles derived from prior cases may not work well when applied to reimbursement for the use of other kinds of employee property. A cell phone is not analogous to a car. The employee's car is, in a real sense, a consumable asset; his cell phone much less so. The "asset" of home access to the Internet, to support use of a tablet or computer, is not in the least diminished by its use, although data usage caps may apply. The different quality of the various personal assets that may be used for a business purpose may call for a more nuanced approach to sensibly fulfill the purpose of section 2802: to forbid employers the "windfall" of passing on their operating costs to their employees. It seems certain that *Cochran* will generate its share of litigation.

The Class Action Ruling

Notably, the *Cochran* appellate court did not order the trial court to certify the class. Rather, it ordered the trial court to reconsider the motion, to apply the rulings on the proper interpretation of section 2802, and apply the principles recently announced by the California Supreme Court in *Duran* regarding statistical sampling.[2] It specifically provided that the plaintiff could revise his motion and the defendant could respond. Perhaps the parties and the trial court will take the opportunity to examine whether common questions are outweighed by individual issues needed to prove whether use of personal cell phones for work calls was a "must" (i.e., required by the employer), or just the employee's choice.

The decision suggests that the court may have recognized the need to develop the factual record and/or the trial court's analysis of the very open question of when an employee's use of a personal cell phone becomes a "must." While the court announced sweeping principles that come into play when an employee "must" use a personal cell phone (or other items) for the employer's benefit, it offered neither information nor analysis about what evidence will be enough to prove that the use of a personal asset for business purposes is a "must."

Moreover, the court noted that, in making decisions about reimbursement of expenses, employers may consider "not only the actual expenses that the employee incurred, but also whether each of those expenses was 'necessary,' which in turn depends on the reasonableness of the employee's choices." (Emphasis added.)

In the absence of a direct employer mandate to use personal cell phones or furnish other items for the employer's benefit, this standard may well require examination of a wide range of individualized factors in order to determine whether the employer is obligated to reimburse a particular employee for any particular business expense. That could be an alternate reason, not cited by the trial court, for a determination that class certification of the plaintiff's claims was not appropriate.

1 *Gattuso v. Harte-Hanks Shoppers, Inc.*, 42 Cal. 4th 554 (2007).

2 *See* Kevin Lilly, *California Supreme Court Stabilizes the Law in California Misclassification Class Action Cases*, Littler ASAP (Jun. 2 2014).

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The Take-away

The principles announced in *Cochran* are not limited to personal cell phones. They may apply, with equal force, to many other "personal" items that stock most modern households. Personal laptops, "tablets," the Internet connections to use them, and even the humble dinosaur of a home land-line phone, could all, at least theoretically, be the subject of claims for reimbursement under these principles.

Employers should very carefully review their policies and practices regarding reimbursement of business expenses. They should determine how their managers and supervisors communicate with employees and what "expectations" are set, not just by written policies, but in practice. Employers should consider making those expectations concrete by putting them in writing. They should make sure their managers, supervisors, and employees all understand the reasons for the policies and the consequences of not following them.

If cell phone communications are required, employers should consider supplying company-owned phones. Doing so will make it clear that use of personal phones is not mandatory. It will also minimize the court's concerns about intrusion into employee privacy. If the employer owns the phone and maintains appropriate policies on the use of electronic media, it will also maximize its rights to monitor cell phone usage.

Of course, the same principle applies if an employer requires its employees to have access to a computer or tablet device away from its premises. It is well-established that, subject to proper policies, an employee does not have a reasonable expectation that what he or she creates, stores, receives, or sends from a company-owned computer is private and can be kept from the gaze of the company.

If access to a computer at the employee's home is required on a frequent basis, employers may wish to consider providing an employer-owned mobile "hot spot" available to its employees to avoid a claim that the employer must pay for some ill-defined percentage of the cost of the employee's choice in home Internet access.

Employers should also think about their workplace practices to identify any sort of personal assets that employees may use for their jobs in order to make reasoned decisions about how to manage the issues raised by *Cochran*.

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