

Employer Required to Reimburse Employees for Personal Cell Phone Use Despite Unlimited Minutes Plans

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Cell phones are ubiquitous. At some companies, employees use their personal phones to make business calls. Does an employer need to “pay” for that use of the phone, even if the employee did not incur any extra expenses for doing so? Yes, according to an appellate court in a recent California case, *Cochran v. Schwan’s Home Service, Inc.*, Court of Appeal of California, Second Appellate District, Division Two, No. B247160 (August 12, 2014). Colin Cochran worked as a customer service manager for Schwan’s Home Service, Inc., a food delivery provider. As part of his job, he used his personal cell phone to make business calls. The company did not reimburse him for the use of his phone.

Cochran claimed that the company was required to reimburse him for the use of his cell phone, even though he had a plan with his service provider giving him “unlimited minutes” of calling time and did not incur additional out-of-pocket expenses related to the business calls. (The court also noted that the trial court had indicated that Cochran did not pay his phone bill, but rather that his significant other did.) Cochran filed a putative class action against Schwan’s on behalf of 1,500 customer service managers who were not reimbursed for expenses pertaining to the work-related use of their personal cell phones. He alleged causes of action for violation of California Labor Code section 2802, among other claims. Labor Code section 2802(a) requires employers to reimburse employees for business-related expenses. Specifically, it provides: “[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[.]” The trial court refused to certify the class. The court found that a class action was unmanageable because too many individualized issues existed. While it was possible that some employees did, in fact, incur added expenses, this might not have been true of all 1,500 class members. For example, some employees had unlimited minutes plans, while others did not. Knowing that they would use their phone

for work, some employees might have purchased a costlier plan with more prepaid minutes. Some employees paid their own bills, while others were part of family plans and/or did not pay their own bills.

On appeal, a Second Appellate District panel reversed the trial court's ruling, finding that the class should have been certified. The appellate court held that employers must *always* reimburse employees for the mandatory use of personal cell phones. The court wrote:

The threshold question in this case is this: 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.

Rather than focus on the employee's out-of-pocket expenses, the court took a novel approach by considering the employer's benefit. The court wrote that if it were to rule otherwise, "the employer would receive a windfall because it would be passing its operating expenses onto the employee." The court did not specify how much an employer must pay an employee for his or her cell phone use. The court wrote that to be in compliance with section 2802, "the employer must pay some reasonable percentage of the employee's cell phone bill." The appellate court left it to the trial court to sift through the various cell phone plans and calculate the reimbursement owed to each employee.

Practical Considerations

Because it defies common sense, this ruling will catch many California employers off guard. Prudent employers will reevaluate their policies and practices related to the use of personal phones.

What is "Mandatory"?

Note that the court's ruling addresses the "mandatory" use of personal cell phones for business purposes. Where an employer does not mandate the use of personal phones, reimbursement for incidental business use may be unnecessary. It seems, however, that the definition of "mandatory" may be pliable. Certainly it includes a direct instruction to use personal phones. Employee advocates may argue that the word also contemplates circumstances in which an employee is expected to make telephone calls at times and places where a company-issued phone is not available. For example, an employee who is required to make a call while traveling may not have any other practical choice but to use his or her own phone.

Calculate Reimbursement.

In light of this ruling, California employers "mandating" the use of personal cell phones ought to formulate a reimbursement plan. Unfortunately, the court did not provide any guidance on how to do this when employees do not incur an actual expense. The court requires the employer to "pay some reasonable percentage" of the bill. The decision makes passing reference to Schwan's earlier practice of paying employees \$2 per day, but the court did not express an opinion on the propriety of that practice.

Issue Company Equipment.

One way to avoid the Labor Code section 2802 quandary is to issue company cell phones to employees, while at the same time prohibiting the use of personal phones. According to [Lara C. de Leon](#), a shareholder in the Orange County office of Ogletree Deakins, “The court’s ruling is a stark reminder that the realities of modern-day living do not always fit easily with the requirements of the Labor Code. The lessons here are manifold: If an employer’s policy or practice requires employees to use their personal cell phones for business purposes, it must reimburse them for that usage. There are a number of alternative methods of reimbursement to consider, including offering a set stipend, reimbursing per actual use, or even taking responsibility for the entire bill. Whichever method is chosen, an employer should make sure it is reasoned and supported by adequate analysis to ensure that employees are being reimbursed adequately. Additionally, employers should provide employees an avenue to claim additional reimbursement in the event that their actual usage exceeds the reimbursed amount. This decision may also have implications beyond personal cell phones and could apply to other technologies such as smartphones, tablets, and laptops. Employers would be wise to take a holistic view of the personal devices employees are required to use for their work and tailor their policies accordingly.”

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