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August 22, 2014

California Appellate Court Broadly Interprets Employee Reimbursement Statute Regarding Cell Phone Usage

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Earlier this month a panel of the California Court of Appeals for the Second District issued an opinion concerning Section 2802 of the California Labor Code, as applicable to employees who are required to use personal cell phones for performance of their work duties. *Cochran v. Schwan's Home Service, Inc.*, No. B247160, --- Cal. Rptr. 3d ---, 2014 WL 3965240 (Cal. Ct. App. Aug. 12, 2014). Section 2802 directs that 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 his or her obedience to the directions of the employer…"

In *Cochran*, the California appellate court reversed a trial court denial of class certification, and broadly pronounced that "when employees must use their personal cell phones for work-related calls, Labor Code Section 2802 requires the employer to reimburse them." The court indicated that this would apply (i) without regard to whether an employee's phone is paid for by a third party (*e.g.*, where a live-in girlfriend pays for the employee's phone service), and (ii) without regard to the details of an employee's cell phone plan (*i.e.*, the reimbursement requirement applies even where an employee has a flat-rate plan). Employers are thus obligated to pay a "reasonable percentage" of an employee's cell phone bill, even where the employee does not actually incur any expense, as the court stated:

> 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.
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> If an employee is required to make work-related calls on a personal cell phone, then he or she is incurring an expense for purposes of section 2802. It does not matter whether the phone bill is paid for by a third person, or at all. . . . It is irrelevant whether the employee changed plans to accommodate worked-related cell phone usage.

The ruling seems somewhat at odds with the express language of Section 2802. It is not completely clear that reimbursement should be mandated under the statute, which references

"expenditures or losses incurred *by the employee*," where a third party incurs the cost of a cell phone use. Also, in reversing the denial of class certification, the opinion does not seem to adequately address the need for an individualized showing of necessity by an employee, and the statute provides only for reimbursement of "necessary" expenditures or losses.

Although it remains to be seen how broadly the opinion issued in *Cochran* will be accepted and adopted by other courts, employers should consider whether this opinion will trigger similar developments in the area. Mobile device usage (including Bring Your Own Device "BYOD") policies may need to be revisited, especially where employees who need to use mobile devices for their jobs are not provided with an employer-paid option. Notably, several other states have laws similar to Section 2802 of the California Labor Code. *See* MONT. ADMIN. R. § 24.16.2519; N.H. REV. STAT. ANN. § 275:57; N.D. CENT. CODE, § 34-02-01; S.D. CODIFIED LAWS § 60-2-1.

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