

## **CAN YOU REIMBURSE ME NOW?**

### **Employees' Use of Personal Cellular Phones for Business Purposes**



By Bryan S. Owens, J.D., LL.M. in Taxation

Being a train commuter myself, I use my personal cellular telephone to access wi-fi while on the train, to perform work while on the go, to call clients, and to research case law and statutes while sitting in court. I am, however, not alone in my use of a personal cellular device for business purposes. A recent Software Advice survey found that about 39% of workplaces have a Bring Your Own Device (“BYOD”) or Bring Your Own Technology (“BYOT”) policy.

#### **California Labor Code, Section 2802**

California Labor Code, section 2802(a) provides that “[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 employer’s failure to reimburse its employees for a necessary expenditure subjects the employer to payment of interest (currently at 10% per annum) from the date of the expense until the date of payment, and oftentimes requires that the employer pay its employees’ attorneys’ fees in collecting the reimbursement.

#### ***Cochran v. Schwan’s Home Service, Inc.***

In *Cochran v. Schwan’s Home Service, Inc.* (2014) 228 Cal.App.4th 1137, the plaintiff filed a class action lawsuit against his employer alleging that customer service managers were not reimbursed for work-related expenses incurred when they used their personal cellular phones.

The trial court denied the certification of a class action, finding that the issues were not common because there was a question as to whether the employee or his girlfriend paid the cellular phone bill and a question as to how the employees’ damages would be calculated when employees may have unlimited plans.

The Court of Appeal reversed the trial court’s order denying the class action. In so doing, the Court of Appeal examined whether an employer who requires its employees use their personal cellular phones must reimburse its employees. The Court answered this question by providing, “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.” The Court found that compliance with Labor Code, section 2802 requires that the employer pay “some reasonable percentage of the employee’s cell phone bill.”

The Court of Appeal reversed the order denying certification of the class action, but ordered the trial court to reconsider the motion for certification of the class action without relying on the issues of who paid the cellular phone bill or what plans the employees had chosen.

## **How Does This Affect California Employers**

Based on the *Cochran* Court's holding, where the employee's use of a cellular phone is mandatory, an employer is responsible for reimbursing its employees "some reasonable percentage" of their cellular phone bill. Whether or not employees will be able to proceed as a class action where the employer does not do so is still up in the air and we will continue to track the *Cochran* case to see whether the trial court certifies a class action and whether appellate courts uphold the certification.

It is important to note that the *Cochran* case is a California Court of Appeal case, and so could be overturned by the Supreme Court. As of the date of this writing, there does not appear to be a petition to the California Supreme Court.

## **Our Recommendation as to How Employers Proceed in Light of *Cochran***

In light of the *Cochran* decision, employers who require that their employees use cellular phones for business purposes should either: (1) provide company-issued cellular phones for its employees' use, or (2) reimburse its employees for a reasonable percentage of their cellular phone bill.

By now you are likely asking, "What is 'reasonable percentage'?" While this is a difficult question to answer, California authority concerning mileage reimbursement should lend a hand. Generally, cases interpreting employers' responsibility to reimburse employees for mileage have held that where the employer creates a mileage rate – say \$0.50 per mile – after examining the actual expenses incurred, such rate will comply with California Labor Code, section 2802(a) unless an employee can show that the actual expenses are more than the rate chosen by the employer. Based on these holdings, we recommend that each employer should examine the average percentage of use of personal cellular phones in their business and come up with a percentage applied to all employees' cellular phone bills. In line with the case authority on mileage rates, should any employee be able to show the employer that his or her business use is greater than the average, that employee must be reimbursed at the higher rate.

It is important to note that the *Cochran* holding will be interpreted much more broadly than to telephone use. It seems likely that employees will seek to include data usage and text messaging charges that they use for the employer's benefit as reimbursable expenses. It would be wise for an employer who requires the use of the use of text messaging or data services to consider these costs when determining reimbursement rates.

Whether the employer chooses to provide employees with cellular phones or to reimburse employees for the use of their personal cellular phones, there are significant potential impacts in other areas of employment law, such as employee privacy, retention of company assets, and disclosure of trade information. As such, we recommend that employers have their employee manuals reviewed and modified at least yearly to keep abreast of any current legal issues in these areas to ensure the maximum protection. Callahan, Thompson, Sherman & Caudill, LLP assists

many employers in ensuring that they have policies and handbooks in place that protect employers and employees.

*About the Author: Bryan S. Owens is an associate at Callahan, Thompson, Sherman & Caudill, LLP and focuses on all areas of corporate law, business litigation, and class action litigation. Bryan S. Owens has handled matters including company formation, company dissolution, company/asset sales, handbook writing, contract drafting and disputes, disputes between owners, disputes with employees and employment litigation, workers' compensation defense, business litigation, and business bankruptcies.*