



Employers Must Pay for Employees' Work-Related Personal Cell Phone Use

MSK Alert by [Suzanne Steinke](#) and [Justine Lazarus](#)
August 2014

On August 12, 2014, the California Court of Appeal held that, when employees must use their personal cell phones for work-related calls, their employer is required to reimburse a reasonable percentage of their cell phone bills, regardless of whether the employees have cell phone plans with limited or unlimited minutes or whether they changed their cell phone plans to accommodate work-related usage.

In *Cochran v. Schwan's Home Service, Inc.*, the Court of Appeal reversed the trial court's order denying certification to a class of 1,500 customer service managers seeking reimbursement of work-related cell phone expenses pursuant to California Labor Code Section 2802. This provision requires an employer to 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." In *Cochran*, the employer had argued, and the trial court ruled, that if the employees do not actually incur an expense because of their work calls, e.g., because the employees have unlimited data plans, there can be no liability under Section 2802.

The Court of Appeal found that the trial court had made some erroneous assumptions in denying class certification, namely that an employee does not suffer an expenditure or loss under Section 2802 if his or her cell phone charges were paid for by a third party or if the employee did not purchase a different cell phone plan because of cell phone usage at work and that liability thus could not be determined without an individual inquiry into the specifics of each class members' cell phone plan and payments. The Court of Appeal considered the question of whether an employer always has to reimburse an employee for the reasonable expense of the mandatory use of a personal cell phone or whether the employer must only reimburse an employee for *any extra expense* that he or she would not have incurred otherwise. It held that reimbursement for work-related usage is always required because, otherwise, the employer would be improperly passing its operating expenses onto the employee.

The Court of Appeal remanded to the trial court to reconsider the class certification motion in light of its interpretation that liability under Section 2802 requires an employee to show only that he or she was required to use a personal cell phone for work-related calls and was not reimbursed. The Court recognized that due to differences in cell phone plans and usage, the calculation of reimbursement must be left to the trial court and parties, but that such damages calculations would not impede class certification. The Court further noted that in calculating the reimbursement amount due under Section 2802, the employer may consider not only the employee's actual expenses incurred, but also whether such expenses were necessary, which in turn depends on the reasonableness of the employee's choices.





ASK MSK

Q: What actions should employers take in light of *Cochran*?

A: Employers should revisit their expense reimbursement policies and practices. First, employers should determine whether they want to allow employees to use their personal cell phones for work-related calls at all and whether to require employees to obtain approval before using their personal cell phones for work. Next, employers should consider how much to reimburse their employees. For example, they might reimburse employees for actual expenses incurred or pay a reasonable fixed amount for the required use of a personal cell phone for work based on each employee's actual or anticipated job duties.

Q: How does an employer determine what is a reasonable percentage of an employee's cell phone bill for purposes of reimbursement?

A: In *Cochran*, the California Court of Appeal provides little guidance regarding what amount of reimbursement might be "reasonable," stating that, because of differences in cell phone plans and work-related scenarios, the calculation of reimbursement must be left to the parties in each particular case. In determining what is reasonable for purposes of reimbursement, employers may want to consider factors such as the nature of particular employees' job duties and how often an employee uses his or her cell phone for work-related purposes. For example, employers may choose to reimburse employees for actual expenses incurred for work-related usage (e.g., per call). This option, however, would likely be more tedious for employers and employees and would require employers to ask employees about the specifics of their cell phone plans and perhaps maintain different practices for those employees with limited data plans and those with unlimited plans. Employers could also pay a specified percentage of employees' personal cell phone bills based on the employees' estimates of personal versus work usage. Although not discussed in *Cochran*, employers will also want to consider whether the reimbursement amount should cover more than just usage of the cell phone, but wear and tear on the phone as well.

