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MCIE Self-Study:

When Remote-Work Expenses Must Be Reimbursed Under Labor Code Section 2802

By Sebastian Miller

Remote work is a fact of life for many exempt employees. Employers expect them to be available by phone and email on short notice, and often ask that they use computers to perform work late at night and on weekends. Employees must have cell phones with data plans, home internet access, and a laptop or similar device in order to meet these demands. This article addresses when and to what extent California Labor Code section 2802 requires that employers reimburse employees for these sorts of remote-work expenses.

Elements of a Claim for Remote-Work Reimbursement

Labor Code section 2802 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.” An employer generally satisfies this obligation by either reimbursing a given expense or providing the employee with the equipment necessary to ensure he or she does not incur the expense in the first place.¹ In *Gattuso v. Harte-Hanks Shoppers, Inc.*, the California Supreme Court confirmed that the purpose of the statute is to “prevent employers from passing their operating expenses on to their employees.”²

But when has an employer passed an operating expense onto

an employee? When the following elements are met: “(1) the employee made expenditures or incurred losses; (2) the expenditures or losses were incurred in direct consequence of the employee’s discharge of his or her duties, or obedience to the directions of the employer; and (3) the expenditures or losses were necessary.”³

Expenses Incurred in “Direct Consequence” of an Employee Discharging Job Duties

For most remote work, an employee will have little difficulty satisfying the first and second elements above. For example, the employee may show that he or she regularly received calls and responded to emails outside of normal business hours using his or her smartphone. He or she might also prove that he or she regularly complied with weekend requests to quickly edit and resend documents using his or her home internet connection. In these instances, the phone bill and/or archived email will provide clear documentary evidence that the employee incurred expenses “within the course and scope of employment.”⁴

The recent court of appeal decision in *Cochran v. Schwan’s Home Services* ensures that employers cannot avoid liability by claiming that the employee incurred no marginal cost in performing the remote work.⁵ The decision in

Cochran arose from the appeal of a trial court’s order denying class certification to a 1,500-member class that sought reimbursement for using personal cell phones to perform job duties. The trial court concluded that the class could not show commonality, based, primarily, on its belief that the following individual issues would have to be resolved before the class members could establish that the employer was liable under section 2802:

- whether the employee was motivated to purchase a different cell phone or minute plan because he or she anticipated working remotely;
- whether the employee directly paid the cell phone expenses or if they were paid by another person under a “family plan” or similar arrangement; and
- whether a common cell-phone plan or payment method existed among the class.⁶

In other words, the trial court interpreted Labor Code section 2802 to require that the employee show he or she incurred some marginal cost as a result of the employer’s remote work requirement (i.e. he or she purchased more minutes or a more expensive plan for his or her cell phone) before the employer would be held liable under the statute. The court of appeal rejected this sort of

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“but for” causation test, ruling that an expense is “in direct consequence” of the employee’s duties and reimbursable under the statute even if it was initially incurred for reasons wholly unrelated to the employer’s directions.⁷

The court of appeal reasoned that limiting expense reimbursement to marginal costs would allow an employer to get something for nothing (in this case, an employee who is able to take calls remotely). So adopting the trial court’s view would permit precisely what the statute is designed to prevent—the employee bearing operating expenses that the employer would otherwise incur to ensure the employee’s ability to work remotely.

Hence, an employee’s fixed-cost, remote-work expenses must be reimbursed even if, irrespective of his or her employer’s demands, the employee would have incurred the expense anyway (for example, by purchasing a personal cell phone, paying for data and minute plans, or having internet access at home). Furthermore, questions concerning the amount of reimbursement owed concern damages, not liability. Those questions therefore do not preclude class certification.⁸

Recent Cases Concerning Whether Remote Work Was a “Necessary Expenditure”

Assuming an employee’s remote work both benefits his or her

employer and is actually related to the employee’s job, the reasoning in *Cochran* leaves employers with very few grounds to argue that a given expense was not “in consequence of the employee’s duties.” Accordingly, employers defending remote-work section 2802 claims may seek to argue that the expenses should not be reimbursed because they were incurred for employee convenience rather than for the benefit of the employer.

To this end, some employers may point out that their offices were accessible to a given employee on a 24-hour basis. Those offices contained phones, computers, and internet access for employee use. The employee could have returned to the office to use those facilities; thus, remote-work was not “necessary” under the statute. Such argument, however, appears to be inconsistent with the case law.

Labor Code section 2802(c) states that “all reasonable costs” are “necessary expenditures” subject to reimbursement. Although few citable decisions have considered whether particular remote-work expenses were reasonable or necessary, the common theme among those that have is that remote-work expenses should be reimbursed when they were reasonable under the circumstances and the employer had some advance knowledge that they would be incurred. This conclusion is consistent with existing case law that holds an expense must

be reimbursed “once an employer knows or has reason to know that the employee has incurred [it.]”⁹

At least two decisions use a variant of this “knows or has reason to know” test for whether an expenditure was necessary. In the first case, *Aguilar v. Zep, Inc.*, an employer was required to reimburse certain outside sales employees for cellular phone and personal internet expenses because they “were a foreseeable and clearly anticipated cost of doing business.”¹⁰ There, the employer admitted having expected employees to use personal cell phones and home internet connections to perform work for the employer, and penalized them if they did not. Nevertheless, the employer sought summary judgment, arguing that the plaintiffs could not distinguish between expenses allocable to business and personal uses of their cell phones and home internet. The court rejected this argument, finding that some reimbursement was required, and the precise amount went to the issue of damages, not liability.

The second case, *Lindell v. Synthes USA*, arose in a slightly different context than *Aguilar*. The plaintiff and class members in *Lindell* were outside sales consultants who were paid exclusively with commissions and were not reimbursed for any of their costs (including travel, personal phones, and internet connections). In opposing class certification, *Synthes* claimed that variances in the amount and circumstances of certain expenses required individual inquiries into whether an expense was reasonable and necessary. The court dismissed this argument and recommended class certification. In doing so, it formulated the following test for a reimbursement obligation:

Under Plaintiff’s theory that *Synthes* does not reimburse any expenses, liability

attaches for the entire Expense Class if Plaintiff can show Expense Class members all incurred a type or category of expenses, e.g., phone, automobile or home office. Once the category of expenses is established, the degree or amount to which these expenses were incurred concern damages, not liability.¹¹

Remote Work Benefits Employers

Requiring that an expense be foreseeable conforms to the underlying purpose of California Labor Code section 2802—precluding employers from passing their operating expenses to their employees. Many employers are aware that occasional remote work happens and benefit from it in two respects.

First, allowing employees to work remotely should increase the pool of qualified candidates for a given position. Employers who prohibit remote work and require employees to return to the office at all hours of the day and night in order to perform a given task will almost certainly draw candidates from a narrower geographic area than those that permit remote work. Beyond attracting candidates who would otherwise not apply due to their long commutes, an option to work remotely also attracts candidates who, for one reason or another, are unwilling to spend long hours inside an employer's office but will agree to be available to work from home as needed, on short notice.

Academic literature has confirmed that applicants prefer jobs that offer the option of working remotely.¹² In addition, basic economic theory suggests that if remote work increases the supply

of qualified candidates for a given position, then this larger pool of qualified candidates reduces the amount of compensation the employer must offer to fill it.¹³

Permitting remote work may also allow employers to avoid having to offer “relocation allowances” to candidates who live relatively far away from the office. The requirement that all employees return to their office on short notice in order to respond to urgent requests makes, in the author's experience, any job less attractive. Candidates potentially subject to this requirement may expect to receive a relocation allowance sufficient to enable the candidate to live near their office. Indeed, a dispute over an employer's promise that an employee would be permitted to frequently work remotely following an initial period during which the employee received a relocation allowance has already played out in federal court.¹⁴

Similarly, if employers really expect employees to do all of their work from their office, then one might expect them to provide employment agreements stipulating that employees live within a certain distance of the office. But few employment agreements contain any “location” or “relocation” clause. This strongly suggests that employers expect their employees to engage in remote work, at least in part because it obviates the need to pay relocation expenses and/or offer increased compensation to employees whose residences are not already near the office.

Questions Remain About the Amount of Reimbursement Required for a Given Expense

No published decision has provided definitive guidance on the amount that must be paid to reimburse any particular remote-work expense. *Cochran*, citing the

differences in cell phone plans and work-related scenarios, stated only that “some reasonable percentage” of the expense must be reimbursed, leaving that calculation to the trial court.¹⁵ *Lindell* also punted, stating that if “liability is established (the required use of a phone that was never reimbursed or indemnified), it does not matter if the telephone was used for [the employer's] business 99% or 1% of the time.”¹⁶ So did *Aguilar*, which found that differences between class members with respect to “what it would have cost to make other arrangements to meet these company-imposed obligations or exactly what percentage of their cell phone and internet use was for personal rather than business use” are insufficient to deny class certification.¹⁷

The cases do, however, suggest that courts will consider two different standards. One approach is to require the employer to bear all expenses up to a given floor. *Aguilar* described this threshold as the employer's cost to make other arrangements. To this end, the court would ask what it would have cost the employer to provide the employee with the ability to work remotely to the employer's satisfaction. For example, the employer would pay for the least expensive home internet plan sufficient to satisfy the employer's periodic demands. Any expenses above this amount (i.e. faster internet service or a larger data plan) would not be “necessary” and therefore the employer would not be liable for them.

The alternative approach would be to allocate the total expense incurred by the employee between personal and work-related usage. For example, if an employee used 1,000 cell phone minutes in a month and 250 of those minutes were to make calls for his or her employer and the other 750 were personal, then the employer would be required to reimburse 25% of the total cell phone

bill (assuming the total amount of the bill was reasonable).

Although this allocation method is intuitive in certain respects, it quickly becomes quite complicated in both the single-plaintiff and class-action contexts. For instance, in order to arrive at a denominator for the allocation method, a factfinder must account for the cell phone and internet plans different employees actually use, which may vary widely in price and reasonableness. In addition, the allocation method requires individualized determinations with respect to the numerator of the reimbursement calculation (i.e. the amount of each employee's monthly usage for work-related tasks).

Furthermore, unlike the floor method, allocating an expense in line with usage does not tether the amount of the reimbursement to any particular operating expense avoided by the employer. Requiring the employer to pay a reimbursement equal to the cost it would have incurred in order to enable employees to effectively work while away from the office not only conforms with the statute's underlying purpose, it also allows for more uniformity in calculating the amount of reimbursement. In particular, the parties can reference historical pricing data concerning minimally sufficient phone and internet services. Though there may be disagreements concerning the sufficiency or availability of a given alternative, the issue will likely be resolved on a class-wide basis once it is settled.

**Rule s of Thumb Reg arding
C l a s s C e r t i f i c a t i o n
f o r R e m o t e - W o r k
R e i m b u r s e m e n t**

Like remote work itself, class actions concerning remote-work reimbursement are relatively nascent.

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To date, the cases have generally concerned cell phone usage rather than all of the costs that employees incur to work remotely. But several principles have emerged that apply to all remote work cases.

First, individualized damages do not defeat certification.¹⁸

Second, notwithstanding individualized issues about whether particular expenses were necessary, common questions will almost certainly predominate where "there is a commonly applicable expense reimbursement, common duties among putative class members, and expenses common to the class."¹⁹ The issue is murkier when there is no written policy, but performing remote work is a *de facto* requirement for many employees.

Third, the existence of different practices among managers with respect to expense reimbursement is not a basis to refuse certification when it is undisputed that the employer's generally-applicable policy was to not provide reimbursement.²⁰ Whether courts will extend this holding to find that variances among the frequency and types of remote work do not defeat certification is an open question.

Last, common questions may not predominate when the employer provided employees with a remote-work setup, but employees still incurred remote-work expenses because the setup provided was allegedly inadequate. So certification may not be appropriate if, for example, the employer

provided employees an old laptop computer but some employees still bought their own device because the employer provided them with equipment that was insufficient to allow them to work effectively.²¹

Conclusion

Assuming that courts continue to follow the logic of *Cochran*, and that employers continue to require remote work but fail to fully reimburse employees for it, we will see many more class actions seeking reimbursement under California Labor Code section 2802. This article attempts to address some of the key issues, but many others remain. As larger class actions are filed against companies with significant numbers of white-collar employees (e.g. financial firms, technology companies, providers of professional services), we will surely see many cases examine the propriety of certification when an employer's company-wide policies are silent on remote work and individual managerial practices vary widely. How judges rule on cases involving the intersection of these concepts will determine the viability of large class actions under section 2802. But, at least for the time being, the pendulum has swung in favor of employees and class-wide resolutions. Given that the statute provides for attorneys' fees and interest, employers would be wise to err on the side of providing sufficient reimbursement. ☞

ENDNOTES

1. See, e.g., *Grissom v. Vons Cos., Inc.*, 1 Cal. App. 4th 52, n.3 (1991) (referring to dictionary definition of “indemnify”).
2. 42 Cal. 4th 554, 562 (2007) (internal quotation marks omitted).
3. *Cassady v. Morgan, Lewis & Bockius LLP*, 145 Cal. App. 4th 220, 229-30 (2006).
4. *Id.*
5. 228 Cal. App. 4th 1137 (2014).
6. *Id.* at 1141-42.
7. *Id.* at 1140.
8. *Id.* at 1144-45.
9. *Stuart v. RadioShack Corp.*, 641 F. Supp. 2d 901, 905 (N.D. Cal. 2009).
10. Case No. 13-cv-00563 WHO, 2014 WL 4245988 (N.D. Cal. Aug. 27, 2014).
11. Case No. 11-cv-02053-LJO-BAM, 2014 WL 841738 (E.D. Cal. Mar. 4, 2014).
12. Rebecca J. Thompson, Stephanie C. Payne, and Aaron B. Taylor, *Applicant attraction to flexible work arrangements: Separating the influence of flextime and flexplace*, J. OCCUP. AND ORG. PSYCHOLOGY 1 (2014).
13. Furthermore, case law and social science have shown that allowing employees to work remotely may actually save some employers money. See *Caire v. Conifer Value Based Care, LLC*, 982 F. Supp. 2d 582, 587 (D. Md. 2013) (noting that defendant “routinely encouraged and allowed employees to telecommute as a cost-saving measure”); FREDRIC R. VAN DEUSEN, JACQUELYN B. JAMES, NADIA GILL, AND SHARON P. McKECHNIE, OVERCOMING THE IMPLEMENTATION GAP: HOW 20 LEADING COMPANIES ARE MAKING FLEXIBILITY WORK (BOSTON COLLEGE CENTER FOR WORK & FAMILY 2008). More generally, courts have recognized that due to “the advance of technology in the employment context,” remote work is a commonplace and necessary attribute of today’s employment milieu because “the ‘workplace’ is anywhere that an employee can perform her job duties.” *EEOC v. Ford Motor Co.*, 752 F.3d 634, 641 (6th Cir. 2014), *vacated by, stay granted by, reh’g en banc granted by, EEOC v. Ford Motor Co.*, 2014 U.S. App. LEXIS 17252 (6th Cir., Aug. 29, 2014).
14. *Munson v. Splice Commc’ns, Inc.*, Case No. 12-cv-05089-JCS 2013, WL 6659454 at *4, 9, 19 (N.D. Cal., Dec. 16, 2013) (Munson claimed that his employer breached an agreement concerning how frequently he would be permitted to work remotely and stated that he would not have accepted the job without that agreement. Consistent with this claim, Munson was paid a significant relocation allowance for the six-month period of time his ability to work remotely was restricted).
15. *Cochran v. Schwan’s Home Serv., Inc.*, 228 Cal. App. 4th 1137, 1144 (2014).
16. *Lindell*, 2014 WL 841738, at *10.
17. *Aguilar*, 2014 WL 4245988, at *17.
18. *Dalton v. Lee Publ’ns, Inc.*, Case No. 3:08cv1072-GPC-NLS, 2013 WL 5887872, at * 2 (S.D. Cal., Oct. 31, 2013) (citing *Leyva v. Medline Indus., Inc.*, 716 F.3d 510, 513 (9th Cir. 2013)).
19. *Hopkins v. Stryker Sales Corp.*, Case No. 5:11-CV-02786-LHK, 2012 WL 1715091, at *11 (N.D. Cal., Mar. 14, 2012).
20. *Trosper v. Stryker Corp.*, Case No. 13-CV-0607-LHK, 2014 WL 4145448, at *14-15 (N.D. Cal., Aug. 21, 2014).
21. A number of cases have dealt with this issue in the context of mechanics and laborers who purchased tools to use at work. Although their employer provided them with a variety of equipment, some employees felt that their particular allotment was inadequate to do the job and chose to purchase additional tools in order to supplement what their employer had already provided to them. The general result has been that individualized issues with respect to whether a given employee’s purchase of a tool was “necessary” will predominate. See *Tokoshima v. The Pep Boys*, Case No. C-12-4810-CRB, 2014 WL 1677979, at *9-10 (N.D. Cal., Apr. 28, 2014) (collecting cases); *but see Arredondo v. Delano Farms Co.*, Case No. 1:09-cv-01247 MJS, 2014 WL 710945, at *43 (E.D. Cal., Feb. 20, 2014) (certifying tool class when what the employer provided was inadequate).



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