

New Threat to “Bring Your Own Device” Policies: Employer Required to Reimburse Personal Cell Phone Expenses

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In a far-reaching decision, the California Second District Court of Appeal held in Cochran v. Schwan’s Home Serv., Inc., Cal. Ct. App. No. B247160, (August 12, 2014) that California Labor Code section 2802 requires employers always to reimburse employees who are required to use personal cell phones for work-related calls for a reasonable percentage of their cell phone bills, even when employees have cell phone plans with unlimited minutes or the plans are paid for by third parties.

As technology has become affordable and ubiquitous, employers have allowed, and with more frequency required, employees to use their own electronic devices—cell phones, laptops, tablets, home computers, etc.—and their personal service plans in the performance of their jobs. This approach simplifies the lives of employees who don’t have to carry and manage multiple devices, and it saves employers the cost of providing devices and service plans. However, it raises serious data security and intellectual property issues. Now it may also create unexpected liability for California employers.

California 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, or of his or her obedience to the directions of the employer.”

Employers are used to reimbursing employees under this section for mileage, travel costs and other direct expenses that employees incur solely as a result of their work. In *Cochran*, the appellate court held that the reimbursement obligation under this section is also triggered when employees must use their personal cell phones for work but do not incur any additional expense.

The plaintiff in *Cochran* filed a putative class action against Home Service, Inc., a grocery delivery company, on behalf of 1,500 customer service managers who allegedly used their personal cell phones for work-related calls. As is common, the employer did not reimburse these employees for any portion of their personal cell phone bills. The trial court denied class certification, holding that *Cochran* could not prove liability on a class-wide basis because many of the customer service managers would likely have cell phone plans with unlimited minutes or plans paid for by others. The trial court concluded that these customer service managers would not have actually incurred any “loss” when they used their cell phones for work-related purposes and that the employer would therefore have no reimbursement obligation to these employees.

The appellate court disagreed and held that reimbursement is always required, and that to comply with section 2802 the employer must pay a “reasonable percentage” of the employee’s cell phone bill.

The court stated very starkly:

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. In other words, it is no concern to the employer that the employee may pass on the expense to a family member or friend, or to a carrier that has to then write off a loss. It is irrelevant whether the employee changed plans to accommodate worked-related cell phone usage. Also, the details of the employee’s cell phone plan do not factor into the liability analysis. Not only does our interpretation prevent employers from passing on operating expenses, it also prevents them from digging into the private lives of their employees to unearth how they handle their finances vis-à-vis family, friends and creditors. **To show liability under section 2802, an employee need only show that he or she was required to use a personal cell phone to make work-related calls, and he or she was not reimbursed.**

Unanswered Questions and Recommendations for Employers

Cochran leaves many questions unanswered:

- What does it mean for an employee to be “required” to use a personal cell phone? For example, can employers avoid liability by offering employees the choice of using their personal devices and plans, or devices and plans provided by the employer?
- How is an employer to determine what is a “reasonable percentage” of each employee’s monthly cell phone bill? The *Cochran* Court expressly stated that determining damages raises “complicated” issues, but did not attempt to resolve these issues.
- Does *Cochran* apply to other services such as a data plan for a tablet or the employee’s home Internet plan or home telephone bills? The Court’s reasoning would appear to be equally applicable to these types of expenses.
- Does the reasoning in *Cochran* extend to the cost of purchase of the cell phone or other device? There is no obvious reason it should not.
- What other expenses will plaintiff’s attorneys try to fit under *Cochran*? For example, could the reasoning in *Cochran* also extend to a reasonable percentage of the rent or mortgage payment of an employee who is required to work from home?

We have no clear answers to these questions. The *Cochran* decision radically expands the employers' obligation to reimburse employees and does so without any significant support outside of the court's own thinking. The court did not cite other judicial decisions addressing this issue nor any academic research. Nor did the court explore the broader implications of its holding in the analysis of the issue. Thus, employers are left with little but speculation as to how the law will develop. Despite this uncertainty, there are steps an employer can, and should, take.

- **Reconsider requiring or allowing employees to use personal devices for work.** In addition to the reimbursement questions raised by *Cochran*, employers need to be concerned about data security and IP issues when employees use their own devices.

Employees often have less sophisticated anti-hacking, anti-virus and encryption software on their personal devices. There is a risk of those devices being lost without the employee informing the employer. Employees also tend to be less than rigorous in backing up the data on personal devices. All of this means that data is more vulnerable to loss and systems are more vulnerable to damage when employers allow or require employees to use their own devices.

Equally important is what happens to important and sensitive information when the employee leaves. If the information is on a personal device, getting control of that device in order to transfer or delete the information is often much more difficult than it would be if the employer owns the device and the service contract. This increases the difficulty of preventing intentional misappropriation of sensitive information or simply loss of valuable information that sits on the ex-employee's device.

- **If you are going to require or permit the use of personal devices, develop robust policies for addressing these issues.** These policies should include registration of all personal devices used for work, procedures for verifying the quality of (and updating) the security software on those devices, regular backup of company information on personal devices to company systems, and provisions that address the employee's expectation of privacy with respect to information on the devices, including a clear agreement that the company has the right to inspect and transfer or delete data on the devices both during employment and at termination. The policies should also have enforcement mechanisms that are reasonable and easy to implement, such as a provision that if the policy is violated, the company may shut down the employee's access to its data.
- **Ensure that non-exempt employees do not use the devices for business purposes outside of regular working hours.** Your policy should state that the non-exempt employees are not allowed to use the device for business purposes outside of regular working hours unless the employee receives prior permission to do so. Failure to take reasonable steps to prevent non-exempt employees from accessing and utilizing the work-related data could result in overtime liability to the employer.
- **Carefully evaluate which employees will and will not use personal devices such as cell phones, tablets, laptops and home computers for work.** For those employees who do not need to use personal devices, clearly communicate this to the employees and document the communication.
- **Offer employees the option of using company-provided devices.** Although this issue was not expressly addressed in *Cochran*, the court's holding was limited to employees "required" to use their own devices. If you provide an option, it will be much harder for an employee to argue that he or she was required to use a personal device. If you have a preference for employees using their own devices, payment of some portion of the cost of the personal device would promote that choice without necessarily having to meet the *Cochran* court's "reasonable percentage" requirement.

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- **If you do not offer company-provided devices, document a good-faith effort to provide reimbursement of a reasonable percentage of the cost of the employees' devices.** At a minimum, this should include a reasonable percentage of the employees' monthly voice and/or data plans for cell phones, tablets and laptops using the cellular network. If an employee regularly works from home other than for his or her own convenience, it should also include a percentage of the cost of the home Internet connection and potentially the cost of the home phone. The conservative approach would be also to include in the monthly reimbursement an amount attributed to the cost of the devices themselves.

Cochran offers no guidance on the methodology to be used for arriving at the reimbursement rate. The analysis might involve review of personal versus business usage by a statistically significant number of employees in each job category, review of published data on the percentage of business usage of personal devices, or just an exercise of reasonable judgment based on articulated factors. The employer could also request that the employee submit a reimbursement request showing the amount of usage, similar to mileage reimbursement requests, although this would likely be deemed burdensome to both employees and the company. Each employer will need to evaluate the level of risk it faces and what it is willing to spend on the analysis to alleviate that risk. What we can say for certain is that the risk of liability will be significantly reduced if the employer is providing reimbursement and can show a good-faith effort to set a reasonable rate for the reimbursement.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or one of the attorneys below.

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