It's Payback Time: Reimbursement Of Employee Expenses Is A Hot Issue In California

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As class actions continue to plague employers in California, one area that is often overlooked is expense reimbursement. The California Labor Code makes clear that employers must indemnify employees for all necessary expenditures or losses incurred as a direct consequence of discharging their duties, or obedience to the directions of the employer. This is so even if the duty is unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful.

The statute defines "necessary expenditures or losses" to include "all reasonable costs…." The intent of this law is to prevent employers from passing their operating expenses on to their employees.

The kinds of reimbursements included in this employer obligation extend to expenditures incurred by employees during the normal course of their personal life, which nonetheless may incidentally include necessary contributions at work. Employers may directly reimburse for such expenses or provide reimbursement through enhanced salaries or commission rates as long as the part designed to reimburse expenses is specifically identifiable so that employees can determine whether the increased compensation is sufficient to fully reimburse the employee for "all expenses actually and necessarily incurred."

There are obstacles for obtaining releases from employees. The Labor Code prohibits waiver of an employee's right to reimbursement. It therefore becomes vital that you have a carefully drafted reimbursement policy.

Cell Phone Usage
Many employees use personal items for a business purpose. If you require your employee to use a cell phone for business purposes, you must reimburse the employee for a portion of the expense incurred for the cell phone usage, whether or not the employee's plan has unlimited minutes.

A recent opinion held that the amount owed by the employer would be "a reasonable percentage of their cell phone bills." (*Cochran v. Schwan's Home Service, Inc.*). In that case, the question was whether reimbursement of reasonable expenses were always required for mandatory cell phone usage, or whether required only if the employee incurred an extra expense that would not have been incurred but for the employment.

The court ruled that reimbursement was *always* required; otherwise, the employer would experience a windfall "because it would be passing its operating expenses onto the employee." The court further ruled that it was irrelevant whether the cell phone bill was paid by a third party.

To establish liability, employees need only show that 1) they were required to use the personal cell phone for work-related calls; 2) they were not reimbursed for such usage; and 3) the extent of the damages incurred for the non-reimbursed phone usage. Unfortunately, an employer faces potential barriers in defending the extent of damages incurred. For example, the court noted that employers are not permitted to delve into the details of cell phone plans or the private lives of employees in defending what reimbursement was actually necessary or reasonable.

Other Big Ticket Items

Contributions required of employees may go well beyond the mandatory use of a cell phone. A recent federal class action involving state law, *Trosper v. Stryker Corporation et al*., was filed on behalf of sales representatives who, according to their complaint, frequently worked from home and incurred expenses for use of their vehicles, mobile phones, fax machines, landlines, office space, offices supplies, Internet storage, and for Internet access. The sales representatives also incurred expenses for entertainment, dining with clients, and other travel expenses (air fare, lodging, and local transportation) they claimed.

The employer allegedly did not have a uniform or well-defined expense reimbursement policy. The employee contended that he and his coworkers were not reimbursed for expenses during the class period unless "explicitly authorized" by the employer. The employer contended that reimbursement was achieved through increased commissions, although the employee denied knowledge of this arrangement.

The court certified the class, finding that there was a common issue whether the employer had a uniform policy of *not* reimbursing for such expenses necessarily incurred, or whether the alleged policy of reimbursing the expenses through increased commissions adequately apportioned the amount attributed to such expenses so that it could be determined whether the sales representatives were fully compensated for their expenditures.

Lessons For Employers

Our advice? Take proactive measures to monitor the reimbursement process. Make sure that all expenses are fully reimbursed, whether the method for reimbursement is by monthly allowance, increased wages, or direct reimbursement for actual costs.

Create written policies regarding reimbursement, which include the methods of reimbursement and define a procedure whereby employees can submit evidence challenging the amount allocated to expense reimbursement as insufficient to fully compensate the employee for his or her actual expenses. Remember that, upon a proper showing that additional reimbursement is warranted, you are required to supplement any partial reimbursement to achieve full reimbursement of such expenses.

expenses.

Inform employees of any equipment or tools that the company furnishes. This will defeat any reasonable expectation by the employee to acquire or use them on the job. For example, if hand tools are routinely required on a job, the applicable Wage Order requires that these items must be furnished and maintained by the employer unless the employee is paid at least twice the minimum wage (currently $9.00 x 2 = $18.00) for performing the work. The policies also should identify which expenses are subject to reimbursement and which are not. This should put employees on notice when expenses are incurred.

In drafting such policies, rely on legal counsel, in part because some categories of reimbursement cannot reasonably be excluded when considering the nature of the work. For example, an employer hiring outside sales representatives covering a large service area cannot reasonably advise the sales representatives that they will not be reimbursed for travel involved in meeting with customers.

But an employer can define in its policies the types of approved travel, specify standardized vehicle types for mileage reimbursement rates for use of a personal vehicle, determine approved lodging rates, and fix levels of reimbursement for other standardized equipment required for the job. Drawing the lines in the sand for what expenses are "necessarily" and "reasonably" incurred, would prevent employees from seeking reimbursement for use of luxury automobiles, first-class air travel, or incurring expenses for extravagant food or lodging.

In short, a well-written expense reimbursement policy drafted on advice of legal counsel can go far to define what expenses will reasonably be reimbursed, help prevent expensive class litigation, and keep your accounts well-funded for reimbursing an employee's necessary business expenses.

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