

COVID-19 LITIGATION IS TESTING THE LIMITS OF CALIFORNIA EXPENSE REIMBURSEMENTS – IS YOUR BUSINESS SAFE?

Insights
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With well over [1,600 COVID-19-related employment lawsuits already having been filed nationwide](#) and over 350 in California alone, employers need to keep abreast of ongoing issues that impact the physical and remote workplace. With many California offices closed and employees performing their jobs remotely, one area where you need to be mindful is in the context of reimbursing your employees for their necessary business expenses. For example, in today's remote environment, you may wonder whether you must reimburse remote employees for the use of their internet, utility bills, and the various items they have purchased for their new home offices. By examining some recent COVID-19 employment litigation filed in California, you can get a better picture of the risks that accompany remote work – and adjust your practices accordingly.

Examples of Recent Cases

Recent California class and collective lawsuits are starting to reveal a particular trend of litigation where employees are claiming unreimbursed work-related expenses. For instance, a Private Attorneys General Act (PAGA) action filed on January 15 in the Superior Court of Merced alleges that Foster Farms failed to provide and reimburse employees for the cost of personal

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protective equipment (PPE). Specifically, the employees allege that they were forced to purchase PPE such as masks, gloves, and hand sanitizer without reimbursement. In their complaint, the employees argue that California case law requires employers to provide their employees with PPE, at the employer's expense, and employees must be reimbursed for any such materials that the employees purchase if the employer fails to do so.

In another recent 2021 lawsuit, a class action filed in Orange County Superior Court, the employee alleges that Anyone Home, Inc. failed to provide reimbursement for her and other similarly situated employees' home internet, home telephone, personal cell phone, personal computer, utility costs, office furniture, and insurance from July 2019. Interestingly, the lawsuit alleges that, in December 2020, Anyone Home sent the employee \$225 as reimbursement for past business expenses and provided that they would begin paying her a recurring stipend of \$25 per month.

In both of these cases, the employees allege they were required to purchase alleged necessary business expenses but not reimbursed for these purchases. Both cases are at their infancy, and no court has made a ruling on the merits of the allegations raised in either case. Of course, the mere fact that an allegation occurs does not mean that any laws were actually violated, or that the allegations have any merit. However, the fact that claims following a similar pattern are being filed in such a short period of time indicates that California employers should be on guard for such claims in their workforces.

California Requires Employers To Reimburse For Reasonable Necessary Business Expenses

California Labor Code § 2802 explicitly requires employers to reimburse their employees for the necessary business expenses that they incur. Specifically, employees must be reimbursed for expenses that are *necessarily* incurred in direct consequence of their job duties or in complying with an

employer's directions. In general, the law only requires reimbursement of necessary and reasonable expenses; unnecessary or unreasonably exorbitant expenses need not be reimbursed.

Traditionally, most remote work expenses have not been reimbursable because most employers' telecommuting and remote work programs were typically voluntary and not required. However, in today's COVID-19-regulated environment, remote work has become mandatory for many industries, therefore changing certain employers' reimbursement obligations. When remote work is mandatory – even if ordered by California or local authorities – employees must be reimbursed for the necessary expenses they incur while working at home. The issue of whether certain expenses were “necessarily incurred” by an employee is subject to court scrutiny and various employer defenses.

Regrettably, the California Labor Commissioner's office has failed to issue COVID-specific expense reimbursement guidance to aid employers in navigating this new vast remote work environment. However, prior court decisions provide direction and insight.

For instance, one court decision addressed whether employees must be reimbursed when they are *required* to use their personal cell phones for work purposes. The court ruled that employees must be reimbursed for a *reasonable percentage* of their bill and it is irrelevant whether the business use of their cell phones increases their usual, flat monthly rate bill. This case provides valuable guidance on how to calculate expenses for which the employee may already be paying on their own. The appellate court reasoned, in part, that reimbursement was required in all fairness because otherwise, employers would receive an undue windfall from employees providing their cellphones for business use gratuitously. Following this court's ruling, you should consider reimbursing employees for a reasonable percentage of their phone, internet, and utility bills.

In another decision, the court dismissed the employee's claim for reimbursement of his home internet because the employer provided him with a mobile hot spot. The employee argued that the superior speed and convenience of his home internet created an obligation to reimburse, but the court was not swayed. In this case, it said, the employee was not required to use his home internet. The employer provided mobile internet, and therefore the use of his home internet was not necessary.

What Employers Should Do To Avoid Reimbursement Claims

In light of the recent spike of reimbursement claims brought about by today's business environment, you should consider adopting the following recommendations (in consultation with your employment counsel).

1. Implement A Clear Written Expense Reimbursement Policy

You should consider what supplies and equipment are necessary for employees to carry out their job duties. You should then adopt and implement a clear, written policy that clearly outlines what are considered reasonable necessary business expenses and how employees should submit their reimbursement requests.

Remember, you are only required to reimburse for necessary expenses. So, if an employee would *prefer* to have an extra monitor or a top-of-the-line \$400 ergonomic chair, these expenses are likely not reimbursable (unless they qualify as a reasonable accommodation). A clear policy will avoid any confusion and also deter employees from submitting unreasonable or extravagant requests.

For instance, you may want to include the following in your policy:

- Set clear expectations and guidelines for what a reasonable necessary business expense is. This will help avoid unreasonable expenditures and a possible dispute over whether it is legally reimbursable. For instance, an employee may require a printer – however, the \$999 laser printer is likely not necessary.
- Require employees to get advance approval before purchasing any items for their remote work, especially if an expense exceeds a certain amount.
- Require employees to submit substantiation of the expenses, including the purchase date, the item, and the purchase amount. This can be through a receipt, shipping invoice, copy of their credit card statement, or screen shot of a mobile application. Along with documented proof, you may also consider requiring the employee to explain why the expense was necessary. You should take steps to safeguard an employee's private records submitted in support of expenses.
- Require that employees submit requests within a certain time frame, for example 30 days after incurring the cost. However, this should not be a bright line rule and exceptions should be made. The best practice is to accept submission regardless of timing.
- Finally, the policy should include who reimbursements should be submitted to, and who will approve the expenses. You will also want to ensure that employees cannot approve their own expenses to avoid any potential abuse of the system.

2. Implement Automatic Stipends

Of course, for some reimbursements, you will be unable to determine the precise portion of an employee's work-related expense. In these instances, you may want to consider deciding on a flat-rate amount that you believe reasonably covers the work-related expense associated with that expense. For fixed

recurring expenses, you may also consider implementing the stipend automatically.

For instance, many employers implement monthly recurring phone and internet use stipends. If you decide to implement a stipend, it is essential that you clearly communicate to your employees, preferably in writing, what the stipend is for. You should also inform employees that they may submit their actual expenses for reimbursement if they believe the stipend is insufficient to cover their work-related expenses. You may then consider whether additional reimbursement is required or decline the employee's claim. Whether an employer merely provides an allowance or adopts a case-by-case reimbursement procedure for each expense incurred, a leading California Supreme Court decision acknowledges the possibility that reimbursement may fall short and therefore requires this interactive process between employees and employers to make sure aggrieved employees come forward and are reimbursed for actual expenses "necessarily incurred."

3. Allow Employees To Temporarily Bring Company Equipment Home

You can limit or avoid the need for employee expense reimbursements by providing employer-owned supplies and equipment for use at a remote location. You should consider whether allowing employees to take office supplies and equipment home on a temporary basis is a better option for your business.

For instance, computers, phones, monitors, keyboards, computer mice, printers, printer paper, notepads, printer ink, pens, mobile hot spots can all likely be brought to the employee's residence from the workplace. Of course, you should ensure that you implement a check-out protocol and policy to safeguard the return of these items.

4. Allow Employees To Submit Requests For Specific Items That They Need

Another option is to have employees submit requests for specific items that they need. This prevents situations where employees are required to buy items they do not need and there is no need for an expense reimbursement. It also allows an employer the opportunity to prospectively assess whether this is a reimbursable necessary expense. Additionally, it gives an employer control over what item is actually purchased, allowing the employer to control the price point.

These Lawsuits Are Likely The First of Many

There is no doubt that plaintiffs' attorneys will continue to file lawsuits against employers, including class and PAGA actions, alleging that businesses did not comply with their expense reimbursement obligations. As a result, all employers requiring employees to work remotely need to be cognizant and proactive about the types of expenses their remote workers are incurring and issue reimbursements when required.

If, while reading this article, you have made the realization that you may be in danger and at risk of legal action, you can always issue retroactive reimbursements for prior months to mitigate and alleviate your risk. However, you must ensure that the retroactive reimbursements cover the reasonable expenses incurred by the employee – and you should always do so in coordination with your employment counsel.

Employers in California and across the country should be aware of the lawsuits that may be coming in the states where you are operating. The plaintiffs' bar will no doubt take advantage of this opportunity and will file similar lawsuits. For further information about COVID-19-related litigation being filed across the country, you can visit our [COVID-19 Employment Litigation Tracker](#). Our [COVID-19 Employment Litigation and Class & Collective Actions section](#) also has a listing of our litigation-related alerts and team members handling these types of cases.

Fisher Phillips will continue to monitor the rapidly developing COVID-19 situation and provide updates as appropriate. Make sure you are subscribed to [Fisher Phillips' Alert System](#) to get the most up-to-date information. For further information, contact your Fisher Phillips attorney. You can also review our [FP BEYOND THE CURVE: Post-Pandemic Back-To-Business FAQs For Employers](#) and our [FP Resource Center For Employers](#).

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