

# COVERT COSTS OF THE COVID-19 PANDEMIC: EXPENSE REIMBURSEMENT FOR REMOTE WORKERS

Insights  
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Employers across the nation have faced swift and dramatic changes to business operations as states and local municipalities have issued “stay-at-home” orders and imposed other restrictions in the hopes of stymying the spread of COVID-19. One of consequences has been that many employers have transitioned to remote work overnight without the benefit of detailed plans and policies. The shift to remote work, even though crucial in these unprecedented times, has placed additional obligations on some employers who may now be on the hook for teleworking expenses incurred by employees. A frequent question is whether a company is required to reimburse its employees their expenses for remote work, including cell phone and internet usage.

## **BOTH FEDERAL AND STATE LAW COME INTO PLAY**

Under federal law, you are generally obliged to reimburse expenses incurred by your employees only to the extent that those expenses “cut into” the minimum wage. Under the Fair Labor Standards Act (FLSA) and corresponding regulations, if an employee incurs expenses on the employer’s behalf for the convenience of the employer, the employee is entitled to reimbursement to the extent their earnings would otherwise fall below the federal minimum wage.

Practically, as many remote workers earn wages above the federal minimum (\$7.25 per hour), affected employers typically face limited risk of running afoul of FLSA’s reimbursement obligations in that context. You should be on

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alert though for any employee subject to (1) the overtime requirement (also protected wages) working more than 40 hours worked in a workweek or (2) a particular pay threshold to meet an exemption from overtime. There are, however, greater risks in some states where the minimum wage has risen in recent years to \$12 or even \$15 per hour, daily or other forms of premium pay have been enacted, or exemptions call for a higher pay threshold than federal law.

More significantly, several states have enacted their own expense reimbursement laws in an effort to prevent or limit employers from passing some or all of their operating expenses on to employees. For instance, California has been at the forefront of reimbursement law. It has long required employers to reimburse all “necessary” and “reasonable” expenses incurred by employees in direct consequence of discharging their duties or at the direction or request of their employer. Whether an expense is “necessary” turns on the reasonableness of the employee’s choices under the circumstances — expenses incurred voluntarily need not be reimbursed by the employer.

These heightened laws require that mandatory expenses, however, must be reimbursed regardless of whether the employee would have incurred the expense absent their job. Expenses like personal cell phone or data charges for internet service fall within that category. However, expenses that are merely at the convenience of the employee – such as higher-speed internet, additional monitors, specific type of office supplies, or an ergonomic chair – are generally are not reimbursable.

This is not just a “California thing.” Other states, such as Illinois, Montana, New Hampshire, North Dakota, and South Dakota, have reimbursement laws similar to California, and the law in some states is a bit vague. Meanwhile, some states like Illinois expressly permit employers to adopt written policies designed to reasonably control employees’ job-related expenses – which is a good practice to consider.

## **THE NEW NORMAL BRINGS NEW REIMBURSEMENT CHALLENGES**

In “normal” circumstances, when an employee is neither required nor encouraged to work from home, you would not typically be required to provide reimbursement for any related expenses. However, these are not “normal” times. With many businesses having shifted to remote work during

the COVID-19 pandemic, you may be required to reimburse your employees, at least to some extent, for expenses incurred in the discharge of their duties.

These expenses may include a portion of the employees' cell phone charges, landline "phone bill," internet or data plan charges, costs attributable to plan overage charges, the use or purchase of a computer or laptop, teleconferencing software or hardware, postage costs, a fax machine, or other services or equipment required for the job.

Notably, a company usually is not on the hook for *all* expenses incurred by its employees, but rather a "reasonable" reimbursement amount or "some reasonable percentage" attributable to the use of equipment or data for work is required. This analysis is specific to the facts and circumstances of each employer and employee and the rationale supporting the reimbursement decisions should be documented.

## **WHAT SHOULD EMPLOYERS DO?**

Moving forward, this is good time for all employers to establish specific legally compliant and reasonable reimbursement policies. This is especially true if you operate in any of the states with express reimbursement laws. A proactive employer will be in a better position to justify its expense policies and control costs.

When drafting policies, you should consider allowing employees to submit requests for additional reimbursement if they believe the amount provided is insufficient. Such a program would be helpful if a dispute should arise. An employee's failure to request additional reimbursement despite having the ability to do so could be used to support the reasonableness of the reimbursement provided and otherwise demonstrate compliance with state reimbursement law.

You should also review your expense reimbursement practices over the last few months to minimize any existing liability. Now is the time to take steps to correct unintended violations. One option would be for you to make reimbursement payments retroactively, an action which can be used to demonstrate good faith. When it comes to wage and hour violations, the old adage "better late than never" often holds true.

## CONCLUSION

Given the wide range of considerations and potential pitfalls, you are encouraged to review the laws pertaining to expense reimbursement in the states where your employees work. 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, any attorney in our [Wage and Hour Law Practice Group](#), or any member of [our Post-Pandemic Strategy Group Roster](#). 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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