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Bulletins

A Practical (?) Approach to Reimbursing Employee Business Expenses

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Under California Labor Code section 2802, employers are obligated to indemnify employees for all expenses incurred in the course and scope of their employment. This obligation, though simple-sounding enough, has always raised issues concerning how employers might practically implement a reimbursement scheme for ordinary expenses such as personal vehicle use and travel costs. Some guidance was recently provided by two sources, a 2005 California appellate court decision, *Gattuso v. Harte-Hanks Shoppers, Inc.*, 133 Cal. App. 4th 495 (2005), *review granted*, 2006 Cal. LEXIS 2545 (Cal. Feb. 22, 2006), and the newly proposed regulations from the California Division of Labor Standards Enforcement. While neither source is currently binding, both offer possible frameworks — albeit imperfect — for approaching business expense reimbursements. In the age of the wage and hour class action, now is probably a good time to review your current policies.

Gattuso v. Harte-Hanks Shoppers, Inc.

In *Gattuso*, outside sales persons — who were expected to use their personal vehicles in the performance of their jobs — were paid more per hour and earned a higher rate of commission than inside sales persons — who were not expected to use their personal vehicles. The outside sales persons, however, were not specifically reimbursed for expenses related to the use of their cars. Inevitably, the outside sales persons filed suit alleging Harte-Hanks failed to indemnify them for all their business-related personal vehicle expenses. Harte-Hanks argued that the employees were de facto indemnified through their higher wage and commission rate. On appeal, the outside sales persons argued that Labor Code section 2802 did not permit employers to offset the expenses through higher pay or commission but rather required employers to indemnify the actual expenses incurred. In a decision now on review before the California Supreme Court, the appellate court rejected this argument, holding that employers could indemnify employees for expenses under Labor Code section 2802 through higher wages and commissions but only if the increased amount, after taxes, was *in fact* sufficient to cover the expenses actually incurred.

While a temporary “win” for Harte-Hanks, the appellate court decision is more problematic than practical. Though the court nominally approved of Harte-Hanks’s offset program, the caveats attached to its holding make it clear that the higher compensation and commissions fail to streamline any of the record-keeping obligations and, in fact, present significant compliance issues. First, the decision reaffirmed the basic obligation of the employer to track all business-related expenses regardless of the expectation that the higher pay/commissions will more than compensate for these costs. Second, the decision requires the employer to monitor its employees’ actual expenses and ensure that the higher compensation *after taxes* fully compensates the employees for all expenses incurred. In the event the employees’ expenses exceed the additional compensation after taxes, the employer would be required to reimburse the employees the additional amounts. Accordingly, Harte-Hanks’s program, presumably meant to streamline the reimbursement process, in the end — as approved by the *Gattuso* court — creates additional monitoring and record-keeping obligations.

Appeal Status

Although the *Gattuso* appeal has been fully briefed since June 2006, no date has been set for oral argument. Moreover, since the Supreme Court accepted review of *Gattuso*, the decision may no longer be cited as authority for the proposition that increased salary can satisfy an employer's section 2802 obligations.

Proposed Regulations

In late 2006, arguably in response to the reimbursement system proposed by the appellate court's decision in *Gattuso*, the Division of Labor Standards Enforcement (the "DLSE") proposed regulations implementing and interpreting employers' obligations under Labor Code section 2802 and its sister statute, Labor Code section 2804 (which prohibits employers/employees from waiving an employee's indemnification rights under section 2802) ("Proposed Regulations"). These Proposed Regulations, available at <http://www.dir.ca.gov/dlse>, cover four main topics: (1) Mileage Reimbursement, including the necessary costs incurred in operating vehicles provided by the employee; (2) Employer Provided Vehicle Costs; (3) Business Related Travel; and (4) Other Travel Related Expenses. Notably, the Proposed Regulations explicitly prohibit reimbursement schemes based on assertedly increased compensation, such as that permitted in *Gattuso*.

Mileage Reimbursement (Employee's Vehicle)

Reimbursement Standard. The Proposed Regulations provide two options for employers reimbursing employees for the business-related use of their personal vehicles: the employers can elect to reimburse employees based on either (1) the IRS mileage rate (48.5 cents per mile as of January 1, 2007) or (2) the actual costs associated with the business-related use. If the employer elects to reimburse the employees based on the actual costs *at a rate less than* the IRS mileage rate, the employer bears the burden of proving that the rate is reasonable based on the total vehicle expenses incurred during the preceding year. Similarly, if the employee contends the actual costs *are greater than* the IRS mileage rate, the employee bears the burden of showing the greater amount is reasonable based on the total vehicle expenses incurred during the preceding year. The actual costs of the business-related use include gas, oil, lease or purchase payments, garage rent, repairs, tires, and vehicle depreciation.

Record-Keeping. The employer is obligated to maintain records of the daily mileage in ink or other indelible form showing the day, month, and year for each daily total. Employers may require employees to record and submit this information. These records must be maintained for three years at either the place of employment or a central location in the State of California. The records must be made available for inspection by the employee and the DLSE upon reasonable request.

Payments. Under the Proposed Regulations, the mileage reimbursements must be made when wages are paid or at least once per calendar month, as determined by the employer. Any payment must be made no later than the end of the calendar month following the month in which the expenses were incurred.[[fn1](#)]Any payment processed on an employee's normal payroll check must reflect the reimbursement amount separately. Employers may not take any deductions from the reimbursement amount.

Itemized Statement. The reimbursement payment must be accompanied by an itemized statement of the computation of the mileage reimbursement, including the beginning and end of the reimbursement time period, the rate of reimbursement, and the number of miles being reimbursed.[[fn2](#)] In the alternative, employers may provide copies of the reimbursement requests, annotated to show any changes in the requested reimbursement as paid.

Employer-Provided Vehicle

Employers providing employees vehicles for business-related use must reimburse employees for all business-related expenses incurred with respect to the vehicles. These costs include gas, oil, lease or purchase payments, garage rent, repairs, tires, and vehicle depreciation. Employers must maintain all records in connection with employees' requests for expense reimbursements for a period of three years.

The other record-keeping, payment, and statement requirements outlined above with respect to Mileage Reimbursement applies here as well.

Business Related Travel

Employers must reimburse each employee for the purchase of meals, lodging, and other incidental expenses when the employer requires the employee to travel away from home on business. For meals and lodging, the employer has the option of reimbursing the actual costs or providing the employee with a per diem rate

equivalent to the standard IRS per diem rate for the location of travel. If the employer elects to provide the IRS per diem rate, it must make the employee aware of this policy before the business travel. Failure to do so will result in the employer being required to reimburse the employee for the actual costs, even if greater than the IRS per diem rate. Employers must also reimburse employees for the actual costs of all incidental travel expenses, such as tips. Employers reimbursing employees for the actual costs associated with business travel may require employees to submit receipts with all reimbursement claims.

The other record-keeping, payment, and statement requirements outlined above with respect to Mileage Reimbursement applies here as well.

Other Travel Expenses

The Proposed Regulations additionally require employers to reimburse the actual costs associated with:

- tolls
- parking (excluding the parking charges associated with the employee's normal commute to and from work)
- rental cars (employers can impose a reasonable cap on rental car costs, but that cap cannot be less than the actual cost of renting a vehicle at the relevant location)
- laundry, cleaning, and pressing of clothing
- mailing costs associated with filing travel vouchers and payment of employer-sponsored charge card billings
- telephone, fax, and email costs
- shipping costs (including the cost of shipping baggage)
- transportation costs, such as air, train, bus, car, boat, or otherwise (including transportation costs from and to the employee's home, place of business or lodging, or the airport)

Employers may adopt policies imposing a cap on such expenses, but the cap must be reasonable in light of actual costs in the relevant location. Employers who elect to have such a policy must make the employee aware of the policy in advance of any business travel. Otherwise, the employer is obligated to reimburse the employee for the actual expenses, even if greater than those permitted by the policy.

The other record-keeping, payment, and statement requirements outlined above with respect to Mileage Reimbursement applies here as well.

Enforcement Provisions

In addition to establishing reimbursement standards, the Proposed Regulations also provide additional remedies not otherwise expressly provided under Labor Code section 2802. First, the Proposed Regulations authorize the DLSE to accept and process expense reimbursement claims. Second, they authorize employees required to enforce their indemnification rights under Labor Code section 2802 — either in the courts *or in administrative proceedings* — to recover attorneys' fees and costs. This is the first time attorneys' fees and costs have ever been recoverable in a DLSE administrative proceeding, which by design is meant to facilitate the resolution of claims *without the need for attorney representation*. If this aspect of the Proposed Regulations is adopted, it will undoubtedly result in more claims being brought and a higher per-claim cost for resolution.

Regulations' Status

The public comment period for the Proposed Regulations ended February 7, 2007. The DLSE now has until December 22, 2007, to complete the regulatory process (one year following the announcement of the Proposed Regulations). Already, many business groups, including the California Chamber of Commerce, have come out against the Proposed Regulations on the grounds they are premature — in light of the pending Supreme Court decision in *Gattuso* — and they impose additional burdens beyond those necessary to comply with Labor Code section 2802.

What Should Employers Do Now?

While neither *Gattuso* nor the Proposed Regulations are currently binding on employers, the pending status of both will likely heighten scrutiny of employer reimbursement policies, which in turn will likely lead to additional wage and hour claims either individually or on a class basis. Accordingly, employers are advised to take this opportunity to review their current policies. In this regard, pending a final decision in *Gattuso* or the adoption or expiration of the Proposed Regulations, employers should exercise caution in implementing or continuing any policy that goes beyond using the IRS mileage rate and the reimbursement of actual expenses, which have

long been acceptable to the DLSE. In contrast to these relatively established reimbursement schemes, there has been little guidance from either the courts or the Labor Commissioner on the issue of per diem rates (including the IRS rate) for meals and lodging (though government employers have been using them for years with few problems). In this absence of guidance, the use of per diem rates may be riskier until there is definitive guidance from either the courts or the DLSE.

Footnotes

¹ If the employee fails to submit the necessary paper work on time, payment can be deferred until the month following the month in which the employee provides the records for the mileage claimed.

² Presumably, notwithstanding the Proposed Regulations' reference to a "written detachable part of the check," employers may process these reimbursements as direct deposits — with the employees' consent — provided the employers provide written documentation with the required information.