

Cell Time

by: [Andrew K Jacobson](#)

Employers have long known that they have to reimburse employees for out-of-pocket expenses like mileage or meals with clients. Now employers can add cell phone costs, when an employee uses his or her own cell phone and plan.

Employers have long provided landlines and cell phones to their employees. However, cell phones are already in nearly every pocket or backpack.. Employers are increasingly relying on the employees' personal phones for contact, even if the employee is not regularly out in the field.

Cal. Lab. Code [§ 2802](#)(a) states:

“An employer shall 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”

Cal. Lab. Code § 2802(c) defines “necessary expenditures” as “all reasonable costs, including, but not limited to, attorney's fees incurred by the employee enforcing the rights granted by this section.”

In August, 2014, the Second District Court of Appeals in California ruled that employers have to reimburse employees who use their own cell phones as part of their job. In [Cochran v. Schwan's Home Service](#), 2014 Cal. App. LEXIS 724, 2014 WL 3965240, the appellate court found that

“The threshold question in this case is this: Does an employer always have to reimburse an employee for the reasonable expense of the mandatory use of a personal cell phone, or is the reimbursement obligation limited to the situation in which the employee incurred an extra expense that he or she would not have otherwise incurred absent the job? ***The answer is that reimbursement is always required.*** Otherwise, the employer would receive a windfall because it would be passing its operating expenses onto the employee. Thus, to be in compliance with section 2802, the employer must pay some reasonable percentage of the employee's cell phone bill.”

(Emphasis added). This ruling applies even if the employee is not personally liable for the costs of the cell phone plan – for example, when the employee's parent pays for the cell phone plan.

Employers can avoid looking at this as yet another burden placed upon them, and instead look at this as an opportunity to provide a tax-free fringe benefit to their employees. The [Internal Revenue Service](#) has already clarified the tax treatment of cell phone reimbursements. The [Small Business Jobs Act](#) of 2010 removed employer-provided cell phones from the roll of “listed property,” which normally requires extra recordkeeping. Employer-provided cell phones are no longer taxable to the employee if they are for business purposes. Similarly, reimbursements for business-related cell phone use will be treated as a *de minimis* fringe benefit that does not have to be reported as part of the employee's income.

Employers may consider the question of cell phone usage reimbursement itself of minimal interest. However, under Cal. Lab. Code § 2802, employees can sue for up to three years of past reimbursement, *and* be awarded their attorneys' fees and costs. For a company with fifty employees using their own cell phones, the three years' past usage (at \$50/month) would quickly rise to \$90,000 – and attorneys' fees could be twice that. This will be a lucrative area for employees' lawyers. Employers will be wise to develop a policy that avoids a lawsuit. The *Cochran* court left the question of what a reasonable percentage of a cell phone plan is for another day, leaving employers to decide a reasonable reimbursement. Spending a little time now, putting a good reimbursement policy in place, can pay off for a long time into the future, while improving employee morale.