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## CALIFORNIA COURT WARNS EMPLOYERS TRYING TO PASS THE BUCK THROUGH BYOD

By Christine E. Lyon and Mary Race

California employers hoping to save money through a bring-your-own-device (BYOD) program should think twice about that objective, based on a recent California appellate decision. In *Cochran v. Schwan's Home Service*,[1] the California Court of Appeal held that employers must reimburse employees for required work-related use of personal cell phones—regardless of whether they incur any additional out-of-pocket expense from that work-related use. While this decision raises more questions than it answers, it sounds a cautionary note for employers considering BYOD as a potential cost-savings measure.

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### *Cochran v. Schwan's*: What did the court decide?

This case began with Colin Cochran, a consumer service manager working for a food delivery provider, who needed to use his personal cell phone to make work-related calls. His employer, Schwan's Home Service ("Schwan's"), did not reimburse him for using his cell phone for work purposes. Cochran filed a class action lawsuit on behalf of all customer service agents who were not reimbursed for their work-related cell phone expenses. He claimed that Schwan's was required to reimburse these expenses under California Labor Code section 2802 ("Section 2802"), which requires an employer to reimburse an 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."

Schwan's argued that the court should deny class certification because the potential class members' expense reimbursement claims were too different to be litigated together. After all, some employees incurred no additional expense for the work-related use: Some had unlimited minutes, while others did not pay for their own cell phone coverage because they participated in a family member's plan. The trial court agreed with Schwan's that there could be no liability under Section 2802 unless a class member incurred actual costs due to the work-related cell phone use.

The Court of Appeal disagreed, finding that the lower court had made "erroneous legal assumptions" regarding Section 2802. According to the Court of Appeal:

> If an employee is required to make work-related calls on a personal cell phone, then he or she is incurring an expense for the purposes of section 2802. It does not matter whether the phone bill is paid for by a third person, or at all... It is irrelevant whether the employee changed plans to accommodate work-related cell phone usage... To show liability under section 2802, an employee need only show that he or she was required to use a personal cell phone to make work-related calls, and he or she was not reimbursed.[2]

The court proceeded to explain that Section 2802 is not limited to reimbursing employees for incremental out-of-pocket expenses, but is intended to prevent employers from shifting their costs of business to employees:

> 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.[3]

This suggests an unusually expansive reading of Section 2802 that goes beyond reimbursing employees for actual out-of-pocket expenses. Yet this guidance leaves employers pondering the obvious questions: how to structure their BYOD programs to avoid or limit reimbursement obligations under Section 2802 and, if Section 2802 applies, how to calculate the reimbursements owed.

### *Cochran v. Schwan's*: What the court didn't decide

In many respects, what the *Cochran* ruling didn't decide is as significant as what it did. It is important to remember that the court only addressed the threshold standard for certification of a class action; the court did not reach the issue of how to calculate an employer's actual monetary liability. While *Cochran* lowers the bar for bringing a class action claiming reimbursement based on required cell phone use, the court acknowledged that the question of damages remains highly complicated.

**When is BYOD a "necessary" expenditure?** The *Cochran* case assumed for purposes of its analysis that the employees needed to use a personal cell phone for work-related purposes. The decision does not discuss when use of a personal device will be considered necessary, however. For example, if an employer issues a company-provided device to an employee but the employee chooses to use a personal device instead as a matter of personal convenience, an employer might reasonably assert that the employee's use of the personal device was not necessary. In comparison, if an employer requires an employee to be available by cell phone but does not supply a mobile device, the employer likely will be subject to Section 2802.

**What is a "reasonable" reimbursement?** The Court of Appeal explained that, when an employee does need to use a personal cell phone for work purposes, "the employer must pay some *reasonable percentage* of the employee's cell phone bill."[4] What, then, is a "reasonable" percentage? It is difficult to tell. The court noted that unlimited and limited phone and data plans should be treated the same for reimbursement purposes, but did not go into further detail. It punted the issue back down to the lower court: "Because of the


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differences in cell phone plans and worked-related scenarios, the calculation of reimbursement must be left to the trial court and parties in each particular case."[5]

**Can an employer provide a fixed monthly sum rather than reimbursing actual costs?** The Court of Appeal stated that the employer must pay a "reasonable percentage of the employee's cell phone bill" for required work-related use, which suggests that the reimbursement would be calculated individually for each employee. Would this preclude employers from paying a fixed monthly sum, assuming the sum would be sufficient to cover the "reasonable percentage"?

The *Cochran* case did not address the possibility of providing a fixed monthly sum. However, some limited guidance may be found in the 2007 California Supreme Court decision of *Gattuso v. Harte-Hanks Shoppers, Inc.*,[6] which dealt with automobile reimbursement expenses under Section 2802. In *Gattuso*, the court held that because calculation of actual expenses can be burdensome, an employer may be permitted to use a lump-sum payment method to reimburse employees, provided the amount paid is sufficient to fully reimburse employees for the actual expenses necessarily incurred. If the lump-sum payment is inadequate, however, the employer must make up the difference to fully reimburse employees for all expenses actually incurred.

*Gattuso* is not entirely on point because there is a special method for calculating automobile reimbursement expenses, due to the fixed IRS mileage reimbursement, but its general reasoning suggests that a fixed monthly sum might be used as reimbursement as long as (1) it is sufficient to cover the employee's actual reimbursable costs and (2) employees can request reimbursement for actual costs incurred in excess of that fixed monthly sum. Ultimately, however, the courts will make the final determination as to how the reimbursement should be calculated.

**How does this apply to other types of work-related expenses?** The *Cochran* case addressed cell phone call costs but the reasoning would appear to extend to other types of expenses, such as data plan costs for smartphones or smart devices used for work purposes.

**Can an employer avoid reimbursing employees for personal device use if employees do not need to use personal devices for work purposes?** As discussed above, Section 2802 only requires employers to reimburse employees for "necessary" work-related expenditures, and *Cochran* only addressed necessary or mandatory use of personal cell phones. Accordingly, if an employee's use of a personal device for work-related purposes is entirely voluntary, an employer may not need to provide any reimbursement under its BYOD policy. Employers taking this approach will want to structure their BYOD policies to support the voluntary nature of participation, and make sure that employees who do need a mobile device for work purposes have the option of using a company-issued device.

**What now?**

Although many open questions remain after *Cochran*, there are immediate steps employers can take to manage their BYOD programs under Section 2802:

- Identify which employees need a cell phone or other mobile device to do their jobs. Do they need cell phones for their jobs? Are they expected to respond to calls/emails/texts while outside of the office or while traveling?
- Assess whether you offer company-issued devices to all employees who need them for work purposes, and whether the use of personal devices is truly voluntary.
- If your BYOD program is not voluntary, develop a defensible way to reimburse employees:
    - Confirm that an employee's actual expenses will be adequately reimbursed.
    - Have a policy/plan in place to reimburse employees for required personal device use (similar to mileage/travel reimbursement).
    - Require employees to track and account for personal cell phone expenses so as to provide an adequate amount of reimbursement.
    - If you seek to provide a lump-sum payment rather than reimbursing itemized expenses, make a good-faith, transparent effort to reimburse a reasonable amount and provide a method for employees to seek reimbursement of any actual costs in excess of this amount.

Given the potential for class actions, this is an issue that California employers will want to continually monitor.

**Christine E. Lyon is a partner in Morrison & Foerster's Palo Alto office, and can be reached at (650) 813-5770 or clyon@mofo.com.**

**Mary Race is an associate in Morrison & Foerster's Palo Alto office, and can be reached at (650) 813-5609 or mrace@mofo.com.**

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1 *Cochran v. Schwan's Home Service, Inc.*, 228 Cal.App.4th 1137 (August 12, 2014) ("*Cochran*") (emphasis added). http://www.courts.ca.gov/opinions/documents/B247160.PDF.

2 *Id.* at 1144-45.

3 *Id.* at 1144.

4 *Id.* at 1140.

5 *Id.* at 1144.

6 *Gattuso v. Harte-Hanks Shoppers, Inc.*, 42 Cal.4th 554, 169 P.3d 889 (2007).

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Blair Forde | Morrison & Foerster LLP
12531 High Bluff Drive, Suite 100 | San Diego, California 92130
bforde@mofo.com

 