**EMPLOYMENT ALERT**

**Second Appellate District Rules that Employers Are Required to Reimburse Employees for Personal Cell Phones Also Used for Work Purposes**
*December 2014*

On August 12, 2014, California's Second Appellate District issued a far-reaching opinion in the case of *Cochran v. Schwan's Home Service, Inc.,* Court of Appeal of California, Second Appellate District, Division Two, No. B247160 (August 12, 2014), that calls into question many employers' policies regarding employee reimbursement.

Plaintiff filed a putative class action against Home Service on behalf of 1,500 customer service managers who were not reimbursed for expenses pertaining to the work-related use of their personal cell phones. Plaintiff alleged a cause of action for violation of California Labor Code Section 2802, among various other causes of action.

Labor Code Section 2802 states in relevant part:

> "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, even though unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful."

The trial court found that Labor Code 2802 only requires an employer to reimburse an employee for an *actual* loss or expenditure, essentially requiring that the employee suffer a financial injury for the employer to be liable. In the context of an unlimited cell phone plan, the trial court's holding meant that an employee who purchases an unlimited cell phone plan for his or her personal use, regardless of his or her employment, incurs no expense in making a phone call for work, and therefore, is not entitled to reimbursement. The trial court declined to certify the class based on a lack of commonality, reasoning that individual issues predominate regarding whether an employee incurred an additional *actual* expense when using his or her personal cell phone for work purposes.

On appeal, however, California's Second Appellate District reversed the trial court's order denying class certification. The Appellate Court found that Labor Code Section 2802 requires employers to reimburse employees for the *mandatory* use of a personal cell phone regardless of whether the employee incurred an additional *actual* expense by using their cell phone for work purposes. Whether employees have cell phone plans with unlimited minutes, and notwithstanding whether the phone bill is paid for by a third person, or at all, employers must reimburse employees a "reasonable percentage" of their cell phones. The Second Appellate District left the calculation of a "reasonable percentage" to the trial court and to be determined by the parties on a case by case basis.

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In its opinion, the Second Appellate District focused on the purported benefit to employers, reasoning that employers would receive a "windfall" if the law did not require reimbursement because their operating expenses would be passed on to their employees. It does not matter if that "benefit" was conferred by the employee, a relative or friend who paid the employee's cell phone bill, or the cell phone carrier who bears the cost in situations of unpaid bills. To show liability under § 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.

The employer appealed this decision to the California Supreme Court, but the Supreme Court denied review in November 2014. Thus, employers should review their cell phone policies in light of this decision, and consider what need they have, if any, for the "mandatory" use of cell phones by their employees. In situations where it is unavoidable for employees to use cell phones in furtherance of their duties, employers should reimburse employees a "reasonable percentage." Alternatively, employers may wish to issue company cell phones for work-related purposes, but should understand related issues with this approach prior to doing so.

Employers must also understand that the implications of the *Cochran* decision are widespread, and not necessarily limited to their employees' cell phone use. The same reasoning can be applied to any employee property that is used for business purposes (personal computers, personal tablet devices, home internet access, access to work-related apps, etc.).

For assistance with this issue or any other labor and employment or legal matter, please contact rseroussi@newhouselawgroup.com or mnewhouse@newhouselawgroup.com.