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EMPLOYMENT LAW UPDATE

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Understanding California's Requirement to Reimburse Employees for Work-Related Expenses

Summary. California Labor Code Section 2802 requires that all employers reimburse employees for the necessary business expenses incurred by the employee in the course of his or her employment. Courts broadly interpret this statute to include many costs associated with the employee's work-related duties.

Discussion. California employers generally understand that they must reimburse employees for expenses incurred in the course of their employment, although many employers commonly overlook the extent of their reimbursement obligations. Understanding the implications of reimbursement law is becoming more important as employers can face severe penalties for failing to comply with Section 2802's obligations. For instance, in *Gattuso v. Harte-Hanks Shoppers, Inc.*, the California Supreme Court examined an employer's mileage reimbursement practice and held that the purpose of Section 2802 is to "prevent employers from passing their operating expenses on to their employees." Since *Gattuso*, California employers have faced a mounting wave of litigation from current and former employees seeking reimbursement for easily overlooked expenses, including cell phone expenses, home office expenses, car allowances, and mileage reimbursements that are lower than the IRS rate.

Labor Code Section 2802 requires an employer to "indemnify his or her employee for all necessary expenditures or losses incurred by the employee" that result from the employee's performance of his or her duties. Courts consider the following elements when determining which expenses employers must reimburse: (1) the employee made an expenditure; (2) the expenditure was incurred as a direct consequence of the performance of the employee's job duties; and (3) the expenditures or losses were necessary.

Employers avoid liability under Section 2802 by either reimbursing all necessary expenses or by providing the employee with the necessary equipment so that the employee does not incur any expense in the first place. Problems may arise, however, when employees seek reimbursement for trivial or unnecessary business expenses.

As held in *Cochran v. Schwan's Home Services*, employers cannot avoid liability under Section 2802 by claiming that the employee incurred no marginal cost in performing the task giving rise to the disputed expenditure. In *Cochran*, the court concluded that "[i]f an employee is required to make work-related calls [or send work-related e-mails] on a personal cell phone, then he or she is incurring an expense for the purposes of Section 2802." Some of the employees in *Cochran* were on unlimited cell phone plans and incurred no additional expense when making the occasional work-related phone call or e-mail. Nevertheless, the court's ruling was clear and precise: "[a]n 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." Notably, the decision limits employer reimbursement so that employers are only required to reimburse employees for "some reasonable percentage" rather than the full cost of their monthly cell phone bills.

The logic underlying the *Cochran* decision is not limited to cell phone reimbursement. We expect courts to apply the decision to a variety of overlooked costs incurred by employees, such as home telephone and internet access and other remote working costs. Employers should work with their legal counsel, human resources director, and supervisors to identify the resources employees use to perform existing jobs and to determine whether the company provides or reimburses those resources to employees. Given that Section 2802 provides for attorney's fees and interest, employers should ensure that they identify unreimbursed costs and review their reimbursement practices and policies.

Employer Liability for Denying Reimbursement Requests

A sound company reimbursement policy aims to control expenses and efficiently process reimbursement requests. Such policies usually require employees either to seek preapproval before incurring a work-related expense or to submit reimbursement requests within a certain period of time after the expense was incurred. Unfortunately, Section 2802 does not consider an employer's interest in limiting unauthorized or untimely requests. As a result, it is important to consult counsel on the feasibility of denying an unauthorized or untimely request, and to treat such failures as an employee disciplinary issue. Denying relatively minor costs may give rise to substantial liability.

Paid Sick Leave Effective July 1, 2015: *With limited exceptions, California employers must provide paid sick leave to their full-time, part-time, and temporary workers as of July 1, 2015. The new law contains various notice, accrual, usage, accounting, and wage statement requirements that companies must adhere to when implementing their paid sick leave policies.*

Labor Code Violations Subject to PAGA Penalties

Summary. The Private Attorneys General Act ("PAGA") was enacted in 2004 in response to the decline in staffing levels for state labor law enforcement agencies. PAGA authorizes aggrieved employees to act as a "private attorney general" to sue their former or current employers and collect civil penalties for violations of the Labor Code, regardless of how technical. Because penalties are awarded to each employee per violation per pay period, liability can be significant.

Discussion. Employees are able to sue on behalf of themselves and other employees for certain violations of the Labor Code. Generally, where the underlying Labor Code section does not already provide a civil penalty amount, the PAGA penalty for the violation is $100 per employee per pay period for the initial violation and $200 per employee per pay period for all subsequent violations. These penalties are in addition to attorney's fees and costs, which are available under the statute, and any other damages awarded to the employees for non-PAGA damages.

The following violations are among the hundreds of provisions subject to PAGA penalties: waiting time penalties, meal and rest break premiums, payment date and wage statement violations, recordkeeping requirements, employee reimbursement, seating requirements, working temperature provisions, and various health and safety violations. PAGA claims can exponentially increase an employer's liability. Even in a single plaintiff lawsuit, the addition of one PAGA claim extending over multiple pay periods can considerably increase the employee's potential damages.

Employees commonly bring PAGA claims for reimbursement of driving expenses under Section 2802. To avoid PAGA liability on these claims, employers can reimburse employees in three ways: (1) reimburse the employee for their actual driving costs, (2) pay the IRS standard business mileage rate, or (3) pay a single payment in the form of increased compensation intended to reimburse employees for their travel expenses. Regardless of the method of reimbursement used, the amount paid must always be enough to cover the employee's actual expenses.

Pregnant Employees Must Receive the Same Accommodations as Offered to Non-Pregnant Workers

Summary. The U.S. Supreme Court issued an important decision in *Young v. United Parcel Service, Inc.*, which clarified that the Pregnancy Discrimination Act (the "Act") requires that pregnant employees receive the same "light duty" accommodations as those offered to non-pregnant employees. The decision will have widespread implications on pregnancy leave and accommodation policies, as it applies to all employers with 15 or more employees.

Discussion. In the case, Ms. Young requested a light duty accommodation after she became pregnant and her doctor said she should no longer perform her duties as a UPS driver, which included lifting parcels weighing up to 70 pounds. UPS denied her light duty request because the company's collective bargaining agreement provided light duty accommodation only to drivers (1) injured on the job, (2) with a disability covered by the Americans with Disabilities Act, or (3) who had lost their Department of Transportation driving certification. Prior to the Supreme Court's decision in the case, UPS's denial would likely have been permissible because it was based on a legitimate, neutral, and non-discriminatory business reason. UPS presented evidence that it did not intentionally discriminate against Ms. Young because she was pregnant, but treated her the same as every other employee covered under the collective bargaining agreement.

The new standard set forth in *Young v. United Parcel Service* enables a plaintiff to prove unlawful pregnancy discrimination by showing that a company policy imposes a "significant burden" on pregnant workers and that the reasons for the policy are not "sufficiently strong to justify the burden." Stated simply, if an employer accommodates non-pregnant workers, it must grant the same accommodation to pregnant employees, unless it has an extremely compelling reason for treating pregnant employees different than non-pregnant employees. The Court stated that the greater expense of accommodating pregnant employees is not a "significant burden" sufficient to avoid liability under the Act.

This case significantly affects employer accommodation practices. Employers must ensure that their company policies, collective bargaining agreements, and informal practices do not grant pregnant employees lesser rights to light duty work, unless there is a clear and indisputable "significant burden" justification for doing so. The recent trend of state and federal pregnancy discrimination litigation shows that courts are using every opportunity to extend previously unavailable rights to pregnant workers. Considering the potential liability on these claims, employers should take preemptive action to review their policies and practices.

The Problem With Never-Ending Employee Leave

Twenty-three state and federal laws govern the right of employees to take leaves of absence and time-off in California. Each law mandates different employer coverage, employee eligibility standards, leave lengths, reinstatement rights, and notice requirements. For instance, the California Family Rights Act applies to employers with 50 or more employees and is available for 12 weeks, while the Americans with Disabilities Act applies to employers with 15 or more employees and does not set the maximum number

of weeks an employee is entitled to leave. When an employee takes time off for one reason or another, he or she is often taking leave pursuant to more than one state or federal statute. Thus, the employee is entitled to protection under each law.

Employers face problems with overlapping leave laws when employees seek multiple extensions to their leave or refuse to return from leave at a predetermined time. Employees may request light duty accommodation in lieu of leave or continue to send physician notices indicating that he or she is unfit to work. Although employers are oftentimes required to accommodate an employee's request for extended leave, the unpredictability of the employee's requests may be detrimental to the employer's operations. When an employee's request for leave or extension is never-ending, the employer may be faced with staffing problems, unmet business needs, and undue expenses.

Because of the litany of leave laws governing California employers, it is important to consult counsel prior to taking job action against an employee on indefinite leave. In many cases, counsel can work with employers to lawfully discharge the employee whose indefinite leave disrupts the business.

NLRB Issues General Counsel Guidelines

Last month the National Labor Relations Board ("NLRB") issued a memorandum in response to criticism over a number of its unprecedented decisions regarding employee handbook policies in unionized and non-unionized settings. Unfortunately, the report did nothing to ease many employers' concerns about the unpredictability of the NLRB's recent decisions.

Particularly, the report highlights that confidentiality rules set forth in handbooks or other company policies violate the National Labor Relations Act if employees understand the rules to prohibit discussions about personnel or employee information. The report stresses the importance for employers to define what constitutes confidential information.

Moreover, the memorandum covers other policies, including employee social media use, disciplinary offenses, and internal communications policies, and states that most handbook violations do not involve policies or provisions specifically intending to deter unionization or concerted activity. Rather, the violations involve policies of general application that could conceivably be read to deter unionization or concerted activity.

For instance, the General Counsel addresses recent NLRB cases regarding handbook provisions that prohibit disparaging, harassing, slanderous, or libelous comments about other employees. Employers often include provisions of this nature in their handbooks to foster a positive work environment. Nevertheless, the General Counsel warns against such provisions because the terms could be interpreted by employees to include comments and discussion among employees about working conditions.

The NLRB cited many other examples of common handbook policies that may violate the NLRA:

- Prohibiting false allegations against the Company or any employee or customer
- Barring employees from soliciting, collecting funds, or otherwise distributing information on company premises during work time and/or without company approval
- Prohibiting employees from walking off the job without authorization
- Disallowing employees from speaking to news media about company matters unless designated by the company's human resources department
- Policies encouraging employees to refrain from commenting on social media about the company's business, financial performance, strategies, clients, competitors or products
- Barring employees from using the company's logos, trademarks, or advertising materials of the company without express written consent

As the NLRB continues to shift positions on the legality of certain handbook policies, employers are advised to review their handbooks to ensure that they do not contain language that might be interpreted as hindering an employee's right to affect his or her working conditions.

This Update was sent to inform clients and interested parties of recent developments in employment law and should not be regarded as a substitute for comprehensive legal advice.

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