

## Altshuler and Spiro

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Leo Altshuler  
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**To: Business Owner Clients of Altshuler and Spiro and Accountants:**

**From: Bruce J. Altshuler**

**Date: August 19, 2014**

**Re: Warning: Required Reimbursement For Employee Cell Phones In California**

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Dear Clients and Affiliated CPA's:

I am enclosing a news article from the Metropolitan News dated August 13<sup>th</sup> reporting an important employer-employee case that may affect some or many of you who have employees who are required to have a cell phone for their jobs with your company. The case is *Cochran v. Schwan's Home Service, Inc.* decided by the Court of Appeals last week. The news article is enclosed which is easier for you to read than the lengthy court opinion.

**To summarize:** This was a class action brought seeking to obtain reimbursement from the employer to reimburse its employees for their cell phone expenses. The employees asserted that the customer service managers were required to use their own personal cell phones for business usage. The employer Schwan's denied that was a requirement. 1500 managers were affected.

The class action was dismissed by the trial court because some class members did not pay their own cell phone bill or had unlimited minute plans. The Court of Appeal reinstated the class action holding that it was irrelevant that some employees suffered no direct cost if the employer requires them to use their own cell phones for work. Even those employees are entitled to reimbursement.

As part of the reasoning, the Court of Appeal said that the employer could *not even inquire* as to the nature of the employee's own cell phone plan if they require the employee to use his or her own cell phone at work, or even if the cell phone costs the employee nothing to use it at work.

Although the Court of Appeal decision is not yet Final, I expect that this decision will not be overturned by the California Supreme Court. So, we have to abide by it.

Therefore, here is a summary of my recommendations.

1. For those employers who issue company cell phones for its employees to use at work, this decision will not affect you.

2. If you require cell phones of your employees, you had better initiate a reimbursement procedure and perhaps negotiate with the employee. Error on the side of absorbing the cost. If you have outside sales reps who you regularly contact on their own cell phones while in the field, you should assume that a cell phone is required for his or her job and just issue them a cell phone from the company or arrange to reimburse the employee on a fair basis for business use. The formula, according to the Opinion is "... a reasonable percentage of their cell phone bills."

3. If you do not require employees to use cell phones for work, you are not free from liability, as the employer in the *Cochran* case denied any such requirement. To protect yourselves from a claim, you may wish to notify all of your employees as follows:

"To: Employees of XYZ, Inc. This is to advise you that you are not required to use your own personal cell phones for your position. If you believe that using a cell phone for your job is required, please discuss this with management and if your use is required for your job, we will issue you a cell phone limited to company business at our cost."

4. The same rule is likely to apply to an employee's use of his or her own computer or IPAD or lap top, so the same procedure should clearly apply to the employees' computer used for work at home or on the road. You may wish to review computer usage to anticipate a logical application of this rule.

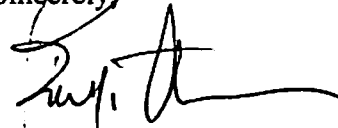
As I have noted before, the number of lawyers specializing in pursuing creative wage and hour labor class actions is growing fast as some of our own clients hit with wage and hour class actions would verify. What is scary is that California labor laws are so favorable to employees, that it is almost impossible for even the most diligent employer to be fully compliant with all California and US labor laws.

All of my various employer and business bulletins on past employment issues can be downloaded and reviewed from our website at [AltshulerandSpiro.com](http://AltshulerandSpiro.com). Look under "Bruce Altshuler's Client Memos", and copy these and you will be up to date. Some of these memos are 2-3 years old, but they still remain valid.

I reiterate that if you have not done so yet, you should obtain coverage for employee claims, as covered by my Bulletin dated July 24, 2013. The premiums for this coverage have decreased markedly over the past 4-5 years. The primary benefit of this coverage is having the insurer provide a defense to the claim or class action less your deductible. The costs of defending a class action or any wage and hour claims can be staggering without this coverage. Not all claims will be covered, and sometimes only a defense will be provided. If there is liability for the unpaid wages, most policies will not pay the claim. However, these policies also cover most discrimination claims.

Finally, our associate Jamie Kleinman will arrange to visit your office and discuss with management your wage and hour practices on a variety of issues at a reasonable flat fee quote as a form of a wage and hour audit. She has developed expertise in wage and hour matters and can advise you on changes you can make to become as compliant as possible once she becomes aware of your practices. Her audit covers overtime, family leave, meal and rest breaks, time records, employee loan documentation, and other topics.

Sincerely,

A handwritten signature in black ink, appearing to read 'Bruce J. Altshuler', with a long horizontal flourish extending to the right.

BRUCE J. ALTSHULER

BJA:dh

Metropolitan News-Enterprise

Wednesday, August 13, 2014

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**Court of Appeal Revives Class Action Over Employee Cellphone Use***Div. Two Says Employer Must Reimburse All Workers Required to Use Own Phones for Business*

By KENNETH OFGANG, Staff Writer

Employees who are required to use their personal cellphones for business are entitled to reimbursement, regardless of whether they have limited or unlimited minutes, the Court of Appeal for this district ruled yesterday.

Div. Two reinstated a putative class action brought on behalf of 1,500 employees of Schwan's Home Service, Inc.

The plaintiff claims that the company required its customer service managers to use their personal cellphones for business, but does not provide reimbursement. Schwan's contends that there was never any such requirement.

"We hold that when employees must use their personal cell phones for work-related calls, Labor Code section 2802 requires the employer to reimburse them," Justice Judith Ashmann-Gerst wrote, referring to the statute requiring an employer to "indemnify his or her employee for all necessary expenditures...incurred...in direct consequence of the discharge of his or her duties."

The justice continued:

"Whether the employees have cell phone plans with unlimited minutes or limited minutes, the reimbursement owed is a reasonable percentage of their cell phone bills."

**Restitution Sought**

The plaintiff, Colin Cochran, is seeking restitution for class members under §2802 and the Unfair Competition Law, as well as penalties under the Labor Code Private Attorneys-General Act of 2004. Los Angeles Superior Court Judge Teresa Sanchez-Gordon denied class certification on the ground that some class members would not be entitled to reimbursement because they did not pay their own bills or because of the nature of their plans, and that those determinations would predominate over questions common to the class.

Cochran argued that a measure of reimbursement common to the class could be established through statistical evidence and representative testimony. He offered a

declaration by an expert in economics and statistics, who suggested either assuming that each class member averaged \$2 per day in employer-required cellphone use—because the company at one time paid reimbursement in that amount—or using a survey to more accurately peg the amount.

The declaration included a 22-question draft survey and a proposed methodology for conducting the inquiry.

Ashmann-Gerst cited *Duran v. U.S. Bank National Assn.* (2014) 59 Cal.4th 1, which held that “sampling may provide an appropriate means of proving liability and damages” in a class action, and said reversal was required because of erroneous legal assumptions by the trial judge.

### **Trial Judge’s Assumptions**

Sanchez-Gordon, the justice explained, assumed that it mattered whether the employee or someone else—such as the plaintiff’s girlfriend—paid the cellphone bill, and that it mattered whether the applicable cellphone plan had unlimited or limited minutes. Ashmann-Gerst said those inquiries are irrelevant because an employee who is required to use a cellphone for business is “always” entitled to have a reasonable portion of his or her phone bill reimbursed by the employer, even if the employer’s requirements did not increase the amount of the bill.

“It does not matter whether the phone bill is paid for by a third person, or at all,” the appellate jurist wrote. “In other words, it is no concern to the employer that the employee may pass on the expense to a family member or friend, or to a carrier that has to then write off a loss. It is irrelevant whether the employee changed plans to accommodate worked-related cell phone usage. Also, the details of the employee’s cell phone plan do not factor into the liability analysis. Not only does our interpretation prevent employers from passing on operating expenses, it also prevents them from digging into the private lives of their employees to unearth how they handle their finances....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.”

The court sent the case back to the trial court with directions to reconsider the motion.

Attorneys on appeal were Kevin T. Barnes, Gregg Lander, and Bruce Z. Kokozian for the plaintiff and Kutak Rock’s Matthew C. Sgnilek and Alan L. Rupe for the defendant.

The case is *Cochran v. Schwan’s Home Service, Inc.*, 14 S.O.S. 3376.