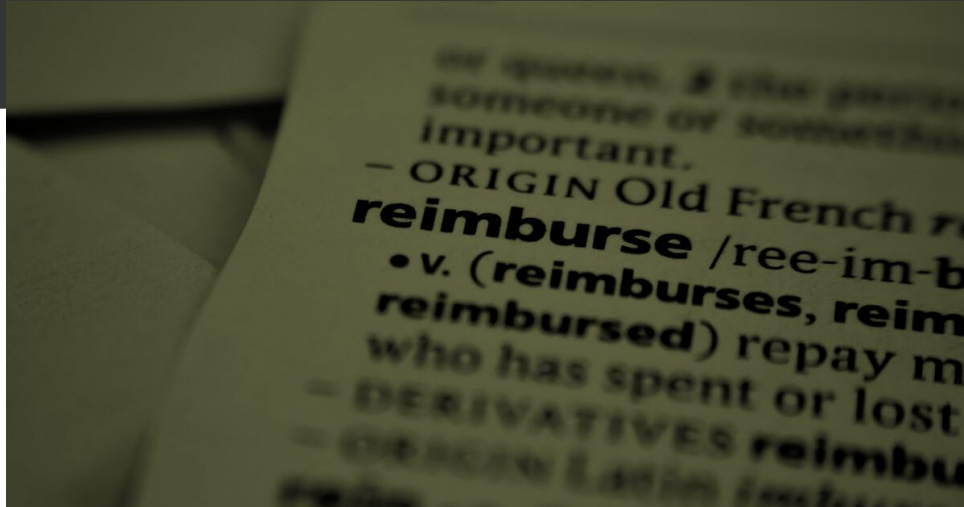




FPLG: COVID-19

Remote-Work Costs: Must Nonprofits Reimburse?

06.05.20 | Linda J. Rosenthal, JD



Remote work is among the many adjustments that employers – including nonprofits – have had to make during the COVID-19 pandemic. The emergency has resulted in an abrupt switch for most or all of the employees, which includes making sure that everyone in the workforce has needed hardware, software, and internet and phone connectivity.

California is among the jurisdictions that initiated early and mandatory stay-at-home orders for a large portion of the population and economy. There have been important exceptions for essential workers – and the nonprofit sector includes many of these people – to remain on the job but even those cases have often involved making new and special arrangements to interact with the communities and beneficiaries they serve.

In these circumstances, it's almost a no-brainer to conclude that employer should supply or reimburse workers for the special off-site, remote-work, needs. Happily, in California, there was already a labor law in place to address the many pre-COVID-19 situations in which an employer mandated or strongly encouraged remote operation. So at least until and if California offices can open fully, without restriction, and without being a hazard to workers' health, the answer in this state is clearly a "yes": employers must reimburse their workers.

Is it "... just a California thing?" To a large extent, yes, but a few other states including Illinois, Montana, New Hampshire, North Dakota, and South Dakota have reimbursement laws for remote work in place to one degree or another but the case law interpreting the statutes in those other states is not as clear as California's. Workers in the remaining U.S. jurisdictions must rely on a miserably weak protection tied to the woefully inadequate federal minimum-wage law amount.



California Remote-Work Reimbursement

“California has been at the forefront of reimbursement law” for remote work. Under California Labor Code section 2802, employers must reimburse an employee for the reasonable and “necessary expenditures or losses incurred ... in direct consequence of the discharge of his or her duties...” The statute’s purpose is “to prevent employers from passing their operating expenses on to their employees.” See *Gattuso v. Harte- Shoppers, Inc.*, 42 Cal. 4th 554, 562 (2007).

And Labor Code section 2804 prevents a heavy-handed end-run around this labor protection: Any purported waiver of this rule is invalid.

Accordingly, an employer must reimburse “all ‘necessary’ and ‘reasonable’ expenses incurred by employees in direct consequence of discharging their duties or at the direction or request of their employer.”

Which Expenses to Reimburse?

“Whether an expense is ‘necessary’ turns on the reasonableness of the employee’s choices under the circumstances — expenses incurred voluntarily need not be reimbursed by the employer.”

Accordingly, employers should pay workers for at least a portion of remote-work or home-office, expenses including, for instance:

- Cell phone or landline plan
- Home internet plan
- Personal computer or tablet
- Fax machine
- Teleconferencing software or hardware

This reimbursement is required even when an employee incurs no additional remote-work expenses over and above what that worker was planning to pay anyway. For example, this might include payment for a portion of the personal cell phone bill, even if a worker normally absorbs the entire bill. See *Herrera v. Zumiez, Inc.*, _ F.3d __, 2020 WL 1301057 (9th Cir. Mar. 19, 2020).

What will generally *not* be subject to the reimbursement obligation are expenses incurred for the convenience of the employee; for instance, higher-speed internet than usual or ergonomic chairs.

Conclusion

Of course, there’s no reason that an employer – nonprofit or otherwise – cannot voluntarily choose to the right thing; that is, to voluntarily reimburse for these remote expenses even at a time when a formal government stay-at-home order is lifted but the workforce is kept remote for a certain additional length of time out of an abundance of caution for their safety and well-being.