Podcast Transcript

Navigating Expense Reimbursement Amidst the New Work-From-Home Normal

Date: September 22, 2020

Guests: Shareef Farag and Carter Norfleet **Host:** Amy Kattman

Run Time: 12:18

For questions and comments contact:



Shareef Farag

Partner
Los Angeles
T: 310.979-8472 | sfarag@bakerlaw.com



Carter Norfleet

Associate
Los Angeles
T: 310.979.8410 | cnorfleet@bakerlaw.com

Kattman: In mid-March, much of the nation's workforce began working from home due to the COVID-19 pandemic. As a result, many employers had to rapidly adjust to utilizing a virtual workforce. With this unprecedented shift in working habits, employers may be overlooking business-related expenses being incurred by their employees. Just how are employers dealing with the expense reimbursements

amidst the new work from home normal? I'm Amy Kattman and you're listening to BakerHosts.

On today's episode we will provide a brief refresher regarding employer obligations with regard to expense reimbursement amidst the COVID-19 pandemic. Our guests today are Shareef Farag, a partner in BakerHostetler's Labor and Employment Practice and co-leader of the firm's Wage and Hour practice. And Carter Norfleet, an associate in the Labor and Employment practice. Welcome to the show, Shareef and Carter.

Norfleet: Thank you.

Farag: Thank you for having us.

Kattman: So today, we want to talk about how the new surge of employees working from home creates new challenges for our employers on a very old topic. Expense reimbursement, I mean personally, I know I now work remotely most of the time. And I haven't done an expense report in months, because usually I do them when I travel for work and well, that hasn't been happening. So Shareef, I'd like to start with you, will you set the stage for us? What were the rules of the road for expense reimbursement and at-home workers before COVID-19, and what has changed because of COVID-19?

Farag: Thanks Amy, I'm happy to. For most states that follow the Fair Labor Standards Act or the FLSA, the rules are pretty basic. The inquiry is whether a expense that is incurred by an employee takes their wages below minimum wage. So if, for example, you pay an employee $12 an hour, but they have an expense related to work that costs $5 an hour, they would only be earning in the aggregate, $7 an hour, which would be below the federal minimum wage that's set by the FLSA. However, in other states, such as California, Illinois, New York, Massachusetts, and many others, there is a separate independent obligation to reimburse employees for expenses that they incur as a reasonable and necessary part of the discharge of their duties.

So, if the employee has to incur some kind of expense, and we'll talk about examples, in doing their work, the employer has a separate independent obligation to pay that expense aside from the wages.

Kattman: So Carter, what are the important reimbursement differences when an employee chooses to work from home, versus being required to work from home because of COVID?

Norfleet: Yes, thanks Amy, I think the important thing for employers to remember is that they're not typically required to reimburse an employee for business-related expenses, when the employer is not requiring them nor encouraging that employee or employees to work from home. However, now given the shift to remote work due to the COVID-19 pandemic, employers will want to remain mindful of the ways in which their employees are working and incurring business-

related expenses because they might be a little bit different than they had been before the COVID-19 pandemic.

Kattman: What types of expenses are employers reimbursing, and has COVID added any new items to that list?

Farag: So Amy, that's an excellent question, I think part of your commentary at the beginning of the podcast gets to it. I think most employers are used to reimbursing things like mileage, travel expenses, per diem's when employees are traveling for work or meal expenses when employees are required to travel, but now that we've shifted to working from home for a lot of the nations workforce, employees may be incurring expenses that they previously didn't incur when they were working in the office. So for example, pens, paper, the use of home internet, the use of cell phones to make business-related telephone calls, printers, things of that nature that are normally at the ready when we're in an office or some other workplace setting are now being furnished by employees themselves as necessary tools or implements to do their jobs.

Kattman: That makes sense, but how does an employer determine a proper reimbursement amount?

Norfleet: An employer is likely not responsible for the entire bill. For instance, a cell phone bill or an internet bill from an employee working from home during COVID-19. However, they are going to be responsible for the reasonable amount of usage that employee is incurring that is related to their business activities associated with the company. What an employer will want to do is assess reimbursements and expenses on a case -by-case basis and really determine the proper level of reimbursement amount as to what the employee is claiming based off the receipts that they are submitting.

Kattman: So Shareef, can an employer pay a flat sum per month to employees for reimbursement purposes?

Farag: So, Amy, I think paying a flat sum as an employer is a probably an administratively much easier practice and it is probably acceptable, but there's a couple things that an employer should think about in setting a flat sum. So for example, if employees are required to use their cellphones for work purposes, as Carter was alluding to, the employer is likely not responsible for the entire cellphone bill, but some determination should be made as to what a reasonable and appropriate amount is to reimburse for the use of the phone by the employee as required for work purposes. So, you may want to look at what is a cost for a basic data plan and an unlimited call plan. Or what is a cost for an unlimited data plan and an unlimited call plan and set your reimbursement amount based on that. Similarly, for an expense like home internet, you know an employer doesn't have to pay for the Cadillac internet that allows an employee's kids to play Fortnite all day long or stream video all day long. But you may wanna look at what the minimum speeds required to perform the job function are, figure out what that might cost in your particular area, whether that's $40 a month or $25 a month, or $80 a month or whatever it might be, and set the reimbursement

accordingly, because then what the employer's done is they've made a reasonable attempt to figure out a quantify cost is and then go ahead and pay that flat sum based on each cost.

Kattman: So it sounds like you're doing a little bit of leg work in advance to make sure you're reimbursing the proper amount.

Farag: That's right. And I think what it does is, it allows the employer to be in a good position, should the amount be challenged down the road.

Kattman: What should an employer do if employees do not tell them about business-related expenses that they are incurring?

Norfleet: Yeah, thanks Amy. Unfortunately, an employer generally has the burden of making sure employees are getting reimbursed for business-related expenses. For example, in a FLSA jurisdiction, Fair Labor Standards Act jurisdiction, if a business-related expense would bring that employee's salary below minimum wage, an employer will be required to reimburse that employee for those expenses that do bring their wage below minimum wage. For instance, also in California, an employer, you know if they know that an employee or employees are incurring certain business-related expenses, they do have an obligation to go ahead and reimburse those, even if employees are not necessarily bringing forth the receipts for those reimbursements. The key here is, it is generally best practice to reimburse employees for business-related expenses if the employer knows that they are incurring those expenses.

Kattman: As we wrap up today's episode, I'd like to hear any closing thoughts or takeaways you have for our listeners on today's topic. Let's start with you Shareef.

Farag: Sure. So, I think getting back to the point Carter raised a moment ago, what an employer should be doing is one, looking at their expense reimbursement policy, making sure that policy is durable and addresses the reality that we're all facing now with respect to remote work. And then two, periodically reaching out to their employees to remind them to submit their expenses on a regular basis so that the employees are aware of (a) their ability to seek expense reimbursement and (b) reminded that they should do so and then, as the nation returns to work in a normal process, there's less of that latent risk out there of unreimbursed expenses coming back to bite the employer.

Kattman: Good advice. Carter?

Norfleet: Yeah Amy. I kind of echo what Shareef says, I think employers really just, during this time especially with the lockdowns and employees working from home, they need to be vigilant in sort of assessing the types of expenses that employees are incurring and making sure that employees are submitting those receipts for those expenses. It may take a little more tracking down and a little more effort on the part of the employer with the employees not physically in the office, however it could prevent some potential liability for employers going forward.

Farag: You know, one more thing I would add, Amy, before we wrap up is that, as various jurisdictions begin to reopen, it's important to keep in mind whether employees are being required to work from home. Meaning, your workplace is not allowed to reopen or not allowed to reopen in full capacity, or whether employees are simply choosing to work from home because they prefer that and you're allowing for that option. In the former circumstance, where the employees are required to work from home, those expenses are going to be mandatory or are going to be subject to the various rules that we've been discussing. In the latter circumstance, where employees are able to return to the office but are choosing to work from home and you're accommodating that, which is completely understandable, that may push an expense to more of a permissive type of categorization and therefore you may not be obligated to reimburse that expense. Obviously, it's something you wanna check closely, but keep that in mind as you begin to reopen.

Kattman: Thank you, Shareef and Carter. If you have any questions, their contact information is in the show notes. Also, check out our Employment Law Spotlight blog, where Shareef and Carter are regular contributors. As always, thank for listening to BakerHosts.

Kattman: Comments heard on BakerHosts are for informational purposes and should not be construed as legal advice regarding any specific facts or circumstances. Listeners should not act upon the information provided on BakerHosts without first consulting with a lawyer directly. The opinions expressed on BakerHosts are those of participants appearing on the program and do not necessarily reflect those of the firm. For more information about our practice and experience, please visit bakerlaw.com.