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ADVANTAGE

Expense Reimbursements for Work-from-Home Arrangements during COVID-19

The coronavirus (COVID-19) outbreak has presented a myriad of business, legal and operational issues across all industries. Nowhere is that more visible than employers transitioning — what seems like overnight — their employees to working from home. Among the technology and privacy issues that need to be addressed, employers also need to be mindful of the labor & employment considerations as well.

Davis & Gilbert attorneys **Jessica Golden Cortes**, **Judith Kong** and **Rachel Rosenberg** address key questions related to Work from Home Arrangements (WFH). If you have any additional questions on WFH arrangements or any other labor and employment issues, please contact them or the D&G attorney with whom you have regular contact.

FOR MORE INFORMATION

Jessica Golden Cortes

Partner
212.468.4808
jcortes@dglaw.com

Judith Kong

Associate
212.468.4851
jkong@dglaw.com

Rachel Rosenberg

Associate
212.468.4913
rrosenberg@dglaw.com

or the D&G attorney
with whom you have
regular contact.

Q: As an employer, am I required to reimburse expenses incurred by my employees if they are working from home and/or remotely due to COVID-19?

A: It depends. If the WFH arrangement is voluntary (e.g., an employer offers the employee the option to work-from-home due to COVID-19), the employer likely does not have an obligation to reimburse the employee for costs associated with such an arrangement — even in states that have laws requiring reimbursement of certain expenses (see below). If, however, it is mandatory (e.g., the employee is complying with a stay-at-home order and/or has been advised to quarantine or self-isolate due to COVID-19-related reasons), employers in some states may be required to reimburse expenses associated with the arrangement.

Certain states and jurisdictions — including **California**, **Illinois**, the **District of Columbia** and **Montana** — have laws requiring employers to reimburse employees for certain expenses incurred in connection with their employment.

Q: What types of expenses are typically reimbursed as part of a WFH arrangement due to COVID-19?

A: The most common expenses employers offer reimbursement for are equipment (e.g., additional monitors, printers), office supplies, and a portion of the employee's monthly Internet bill and/or mobile device data plan. If the employee is working in a state where reimbursement is required for "necessary" expenses, other expenses may be reimbursable as well, depending on the employee's duties and whether the expense was necessary for the employee to perform those duties remotely.

Q: Can I set parameters for my WFH expense reimbursement policy, such as requiring employees to submit requests for reimbursement within a certain number of days, or putting a cap on the amount that will be reimbursed?

A: Yes, but be aware that certain states have laws surrounding such parameters. For example, in **California**, the employer may institute a policy setting forth such limits; however, the employer may still be required to reimburse an employee who does not adhere to the policy if the employer knows or has reason to know that the expense was incurred. Conversely, in **Illinois**, the employer may set such parameters — including caps on how much the employee will receive in reimbursement — as long as the cap or guideline does not result in zero or a "de minimis" reimbursement to the employee. Additionally, if the employee fails to comply with the expense reimbursement policy, the employer may deny reimbursement.

Q: What should employers be aware of if they have employees that work in a state with an expense reimbursement law?

A: Each state's law has its own quirks. For example, **California** requires employers to reimburse employees for "all necessary expenditures or losses incurred by the employee as a direct consequence of the discharge of his or her duties," or to comply with the directives of the employer. California's law has been interpreted to require reimbursement of a "reasonable percentage" of an employee's monthly bill for Internet or mobile device data plan, even if the employee does not incur any additional cost for using the Internet or mobile device for work (e.g., unlimited data plan).

Illinois' law requires reimbursement for "all reasonable expenditures or losses required of the employee in the discharge of employment duties and that inure to the primary benefit of the employer." Although similar to California's law, the Illinois law gives the employer a bit more flexibility in terms of setting — and enforcing — limits on what will be reimbursed and under what circumstances. As mentioned above, Illinois employers can set clear guidelines and/or caps in their policy in terms of what will be reimbursed; if the employee fails to adhere to the policy's guidelines, the reimbursement may be denied. The Illinois law also requires employers to give employees at least 30 days to submit supporting documentation for any expenses for which they are requesting reimbursement, and allows employees to submit a signed, written statement in lieu of such documentation (for example, if the documentation was lost).

Washington, D.C.'s law requires the employer to pay for the cost of "purchasing and maintaining any tools required of the employee in the performance of the business of the employer." Therefore, to the extent it is necessary for an employee to purchase supplies or equipment in connection with a mandatory WFH arrangement, DC employers are likely required to reimburse the employee for those expenses.

Q: What if the state in which our company and/or employees operate(s) does not have an expense reimbursement law?

A: Under such circumstances, there is likely no obligation to reimburse employees for expenses incurred in connection with a WFH arrangement (particularly if such an arrangement is voluntary). However, employers should keep in mind that under federal law, employers may not require employees covered under the Fair Labor Standards Act to incur costs for business expenses of the employer if doing so would reduce the employee's earnings below the required minimum wage or overtime compensation (this rule would likely only impact low-wage employees).

Employers who are getting requests or questions from employees regarding expense reimbursement in connection with a WFH arrangement should consider instituting a policy so that requests for reimbursement are handled consistently across the board.

Q: In addition to work-related costs, can an employer provide reimbursement for other COVID-19 disaster-related expenses incurred by employees?

A: Yes. Under Section 139 of the U.S. Internal Revenue Code (Section 139), employers may provide “qualified disaster relief payments” to employees on a tax-free basis. “Qualified disaster relief payments” include reasonable and necessary personal, family, living, or funeral expenses incurred as a result of a qualified disaster, provided such expenses are not covered by insurance or otherwise compensated or reimbursed. IRS guidance indicates that the COVID-19 crisis is a qualifying disaster, opening up the potential for these payments to be made on a tax-free basis to employees. Payments under Section 139 are not subject to payroll or income tax withholding and are also not subject to IRS nondiscrimination testing requirements. Employers have some flexibility under Section 139 in determining the types of costs and expenses they may wish to cover for employees. Some examples of qualified disaster relief payments may include WFH expenses, dependent care expenses, unreimbursed medical expenses and funeral expenses. Employers who are considering providing disaster relief assistance under Section 139 should consider formalizing a plan or policy with respect to these arrangements.