

## When Employers Must Pay For Tech Snafus, Travel & Makeup

By **Daniela Porat**

*Law360 (August 30, 2021, 1:13 PM EDT)* -- Remote work has spawned unique wage and hour conundrums when it comes to covering employee expenses like home internet and cellphone usage. With these new questions before employers, Law360 explores three novel expense reimbursement scenarios and asks: Who pays for that?

Real-life wage and hour issues are rarely cut and dry. Here, attorneys grapple with hypothetical situations that are rooted in the complications and nuances of real work.

### Using Personal Tech To Work From Home

An employee has been using her personal cellphone and computer to work from home since the beginning of the pandemic. While on a video call with her colleagues, her computer dies. She tries calling her boss on her cell, but, in her frazzled state, she accidentally drops it in her morning latte.

Is the employer on the hook for all or part of the bill to repair the computer and phone?

Under the Fair Labor Standards Act, an employer would only be on the hook to cover business expenses if the cost of such items, which are for the benefit of the employer, bring a worker below minimum wage, said Sally Abrahamson, a partner at worker-side firm Werman Salas PC.

Considering cellphones and computers are both expensive items, it's possible this scenario could become an issue under federal law, said Coby Marie Turner, a partner at management-side firm Seyfarth Shaw LLP.

As a declared national emergency, the COVID-19 pandemic also has implications for tax-free business expense reimbursements.

Employers can reimburse employees tax-free for expenses resulting from the suffering experienced during the pandemic, said Mary Hevener, a partner at management-side firm Morgan Lewis & Bockius LLP.

If an employee tells her employer that she needs another computer because she's working from home and her kids are using hers and she also can't go into the office, an employer can "absolutely" reimburse that worker for a computer tax-free, said Hevener.

"If you say well, I dropped my phone in the pool, and I dropped my phone in the pool because of a national emergency, that's a little harder. I'm not sure," she said.

Employers in California and Illinois, in particular, must be mindful because both states have business expense reimbursement laws.

In California, if this employee's home internet and cellphone are now being "co-opted" by her job, the employer has to pay a reasonable percentage of the bills, even if the employee hasn't personally incurred additional charges, Turner said.

Similarly, an Illinois employer with an employee using her own laptop and cell to work from home would likely have to cover some of the costs of the use of those items, said Michael Cramer, a Chicago-based shareholder for management-side firm Ogletree Deakins Nash Smoak & Stewart PC.

But under the state's law employers are not responsible for losses incurred through normal wear and tear or by the employee's own negligence, as might be the case when an employee plops her cellphone in coffee.

Since there is a lack of case law — the Illinois statute went into effect in 2019 — employers can approach such situations with practical questions, Cramer said.

"How important is it to us that she has a computer and she's using it right now today, this week, for the work that needs to get done?" he said. "Are we going to provide computers to people who we are either requiring or allowing to work from home? And if we're not going to be providing those computers, we may just want to pay for the repair of this person's computer so that she can work."

Normal wear and tear on devices might also look different for personal computers turned workhorses during the pandemic.

Prior to working from home, this employee may have only used her personal computer a couple hours a night to email and stream TV, Cramer said.

"If I were the employee and I'm now using my computer five times as much as I used to, I would say this is not normal wear, normal wear was an hour a day," he said. "I could certainly see a court supporting that."

### **When Makeup Is Required**

A broadcast journalist for a local TV news station is required to wear makeup for her on-air segments. While her male colleagues are also required to wear some face makeup, the female on-air reporters are encouraged to use foundation, blush, eyeshadow, mascara and lipstick.

When she first started, she was given a stipend for on-air clothing and those dresses and suits have lasted. Her personal makeup stash has not. Should the employer provide a makeup stipend? Should the amount be gender-based?

This scenario could be a hybrid discrimination and wage and hour issue, Abrahamson said.

"It reminds me a lot of the uniform claims in restaurant cases where if you have to get specific clothing

... it always brings waitstaff under the minimum wage because they're generally being paid sub-minimum wages," she said.

Under California and Illinois reimbursement laws, the employer would likely have to reimburse employees for the makeup — it's just a matter of how.

Cramer said under Illinois law, employers would have to reimburse on-air talent for mandatory makeup.

"If the people are using the makeup for their own purposes, too, then they're probably only required to pay for a reasonable amount," he said, "but this is not the area where I would choose to split hairs, if I were the employer."

An employer might, for example, choose to set a limit on the reimbursable amount, but employers should be cautious to not make the reimbursement limits or makeup requirements gender-based, Cramer said.

"You're just buying headaches if you set the limit at such a place where most of the women are not going to be able to cover their makeup expenses," he said.

For an employer in California with a policy in place requiring on-air makeup, the employer would also have to cover the cost.

The fuzzy question is how much should be covered, Turner said.

"The standard is reasonable and necessary, and obviously there's huge variation in the cost of makeup," Turner said. "The employer may say, no you don't need to buy this crazy expensive \$100 foundation."

Whether or not such reimbursements are tax-deductible and excludable from the employee's income may come down to the type of makeup required and whether they can be used in day-to-day life, Hevener said.

Hevener drew an analogy to professional garb, some of which, like a police officer's uniform, can be worn only on the job and is therefore deductible.

"If on your facts, the makeup that's being used is some particular type that can only be worn because it doesn't reflect camera glare or it's stronger or it does something, it wouldn't be the kind of stuff that you'd use normally, that kind of makeup might be something that's deductible by analogy to this uniform rule," she said.

### **Commuting To The Office From Your Home Office**

A company has offered its employees the choice of three return-to-work options: full-time remote, full-time in office, and hybrid half-remote and half in office. Employees who opt to be fully home-based employees will from time to time, however, be asked to go into the office for things like employee evaluations, team training and other tasks the company has deemed are better done on-site.

Does the employer need to pay for the time and expenses associated with commuting to the office for fully remote employees?

Distance and the specifics of an employer's remote work policy are what matter in this scenario.

If you have a remote worker exempt from overtime, the employer will not have to pay more for their time, but the employer would probably be on the hook for the travel expense, said Cramer.

That is not going to be a big deal if the employee is working remotely in the city. But if the employer is working remotely miles away, the employer has to think about possible plane, train and rental car costs, Cramer said.

Generally, an employer doesn't need to pay for an employee's transportation to and from work, but when your place of work is also your home the answer to this question is not black and white, Abrahamson said.

A detailed agreement including language that a worker might be required to go to the office from time to time would help, she said.

"I feel like that would probably insulate an employer from litigation, from liability," she said.

--Editing by Vincent Sherry.