# Answering The Call

Insights
4.01.15

California leads the nation in vigilantly regulating the conditions which constitute "hours worked." Definitions are established, modified, and expanded by the California Labor Code, its Wage Orders, and decisions by appellate courts. The California Supreme Court recently made clear that California's standard defining "hours worked" is more protective of employees than the rules set forth under the federal Fair Labor Standards Act (FLSA).

In *Mendiola v. CPS Security Solutions*, the court held, rejecting federal interpretations, that on-call time of a group of security guards scheduled on 24-hour shifts constituted "hours worked" within the meaning of Wage Order 4, and therefore, ruled that such time was subject to the Wage Order's minimum wage and overtime provisions. In reaching this conclusion, the court rejected the employer's attempt to apply federal regulations broadly.

**Origin Of California Wage Orders**
The Wage Orders are promulgated by the Industrial Welfare Commission (IWC), a five-member appointive board initially established by the Legislature in 1913. The Wage Orders initially protected the wages, hours, and working conditions of women and children only, but later extended the protections to all employees in California. If employers in California didn't already have enough to worry about, this decision is a reminder that employers must be familiar with the Labor Code, Wage Orders, and cases interpreting them, or face potentially disastrous consequences.

The Wage Orders regulate either specific occupations or all occupations within an industry. There are four occupational Work Orders (4, 14, 15, and 16), twelve industry Wage Orders (1, 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, and 13), and one miscellaneous Wage Order (17). The IWC has determined that "industry" orders will apply "vertically" to every classification of employees within a particular industry "regardless of the type of work" the employee is performing.

Employees not covered by an industry Wage Order may be covered by an "occupational" Wage Order. It still may be unclear which Wage Order applies to a particular employer. Understanding the differences between the Wage Orders could save employers money because expensive litigation can result from applying the wrong one or interpreting the Wage Order itself incorrectly.

**Hours Worked – Exceptions From California Law Are Narrowly Construed**
Most Wage Orders (including Wage Order 4 at issue in *Mendiola*) define hours worked as "the time

during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so." By contrast, federal law defines hours worked differently as only the time during which an employee is "suffered or permitted to work" for an employer, "whether or not required to do so." Under the federal definition, the "control" element is lacking.

The employer in *Mendiola,* whose employees were regulated by Wage Order 4, opted for a broader interpretation of "hours worked" for security guards who were required to reside in trailers. The employer, CPS, relied in part on the broader provisions of Wage Order 5 (Hospitality). Wage Order 5 covers, among other things, the healthcare industry, which defines "hours worked" for healthcare industry employees "in accordance with the provisions of the [federal] Fair Labor Standards Act." With regard to hospitality employees required to reside on the premises, Wage Order 5 further defines hours worked to include only the "time spent carrying out assigned duties."

The court rejected a similar broad application of Wage Order 4's definition of hours worked to cover CPS's security guards, reasoning that any intent by the IWC to deviate from California's more restrictive rules would require express reference to the exception, just as the IWC did in Wage Order 5. Lacking this specific carve-out language, the court found that no such exception existed.

**Factor Test Still Relevant**

Employers often are required to schedule "on-call" shifts whereby employees are not required to engage in active work duties but nonetheless must be available to respond to the employer's need to engage the employee. Importantly, *Mendiola* does not require that all time spent during on-call periods must be compensable working time. Rather, the courts are first required to look to the totality of circumstances, which generally involves an inquiry into the following factors: 1) whether there was an on-premises living requirement; 2) whether there were excessive geographical restrictions on employee's movements; 3) whether the frequency of calls was unduly restrictive; 4) whether a fixed time limit for response was unduly restrictive; 5) whether the on-call employee could easily trade on-call responsibilities; 6) whether use of a pager could ease restrictions; and 7) whether the employee had actually engaged in personal activities during call-in time.

The court applied the above factors in determining whether the time spent by the CPS security guards was compensable. CPS argued that the time was not compensable in part because the on-call guards had actually engaged in personal activities during their on-call shifts, including "sleeping, showering, eating, reading, watching television, and browsing the Internet." The court considered, but rejected, this argument, noting that the existence of other control factors rendered such "circumscribed personal time" as compensable along with the other on-call time.

For example, as a condition of employment, the guards were required by CPS to "reside" in their trailers and to spend their on-call hours in their trailers "or elsewhere at the worksite." Their duties required them to respond immediately, clothed in their uniforms, if they were contacted by a dispatcher or if they became aware of any suspicious activity. The court further observed that the CPS guards could not easily trade off their on-call responsibilities. Rather, they were only permitted

by CPS to request relief from a dispatcher to see if a reliever was available. The guards were not permitted by CPS to leave the worksite if such relief could not be obtained, which the court noted did occur at times.

The court also reasoned that CPS exercised control over the guards in a variety of other ways, such as being required by CPS to report precisely where they were going if they were relieved, being subject to calls back to work at any time while on relief, and being prohibited by CPS from enjoying relief time away from the work site for more than 30 minutes. CPS also imposed additional restrictions on the security guards related to nonemployee "visitors, pets, and alcohol use."

**Decision Does Not Invalidate All On-Call Programs**

The *Mendiola* decision does not invalidate all on-call programs. Many on-call programs put in place by employers create far less control over their employees, permitting them to leave the worksite for the entire on-call period unless they happen to be called back to work. Although the degree to which employees are relatively free to engage in personal activities during the on-call shift is an important consideration, the other factors remain relevant.

Of course, even if employees are free to spend their time away from the work site during the on-call shift, control may be evident from other factors such as the geographical restrictions imposed by the employer, how quickly the employees are required to respond to calls, whether responsibilities can be traded, and the number of calls being made during the on-call shift. In any event, it will be important to be able to demonstrate that employees have actually engaged in personal activities such as shopping, house chores, recreation, and visits with family during on-call shifts.

In short, although it may be relatively easy to decide whether the time spent on call is working time when relevant factors show a high or low degree of control, many situations showing only intermediate levels of control on some factors present gray areas that should be reviewed carefully.

**Sleep Time**

The lower appellate court in *Mendiola* had applied the federal regulation regarding sleeping time to all Wage Orders, including Wage Order 4. The federal regulations provide that "[w]here an employee is required to be on duty for 24 hours or more, the employer and the employee may agree to exclude . . . a bona fide regularly scheduled sleeping period of not more than 8 hours from hours worked, provided adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night's sleep. . . . Where no expressed or implied agreement to the contrary is present, the 8 hours of sleeping time . . . constitute hours worked."

As with the "hours worked" issue, the State Supreme Court rejected this and another appellate court's expansive application of the federal regulation, declaring that Wage Order 4 had not expressly adopted the federal sleeping time regulation, noting that the IWC had done so in specific situations addressed in other Wage Orders (referring to Wage Order 5 [employees with direct responsibility for children who are receiving 24-hour residential care] and Wage Order 9 [ambulance drivers and attendants working 24-hour shifts]).

[ambulance drivers and attendants working 24-hour shifts]].

Acknowledging that the California Labor Commissioner's interpretation on the sleep-time issue was "vacillating and contradictory," the court concluded that there was no evidence that the IWC intended to incorporate federal law into Wage Order 4. Consequently, much like other "circumscribed personal time," the court determined that all of the sleeping time of the guards, during which time they were under the control of CPS, should have been counted as "hours worked," even though the employees had expressly agreed that such sleep time could be excluded from their hours worked.

**Taking Action**

The Supreme Court ruled that its decision had retroactive effect. That means that you should carefully evaluate your on-call programs to make sure that they are structured and staffed in such a way to avoid a determination that the time spent by employees during on-call shifts is "hours worked." You should also take steps to monitor timekeeping and other activities that could impact the validity of on-call programs, such as how to compensate employees who respond during on-call shifts.

As in other instances, it will be important to seek legal counsel in interpreting whether the applicable Wage Order permits or excludes counting sleep time as hours worked. This also may be the time to update and improve compensation plans and employee handbooks to make sure that all provisions are worded correctly to avoid a legal challenge to the requirement that all hours worked be recorded accurately and paid.

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