

## COME TO WORK AND...GET SOME SLEEP?

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Once upon a time, falling asleep at work was one of the best ways to get fired. Now, however, snoozing employees may not just have to be tolerated, they may need to be paid as well! How did we get to such an absurd point?

First was through the courts' interpretations of the Americans with Disabilities Act. That law has been applied not just to substantial disabilities but to many common health conditions as well, such as sleep apnea. It also has been applied to the side effects of medications taken for disabilities such as depression and other mental disorders.

In addition, several courts have held that misconduct caused by a disability must be accommodated, at least where it does not involve a direct threat to the health or safety of the employee or others. Therefore, an employee with sleep apnea, or whose sleep cycle is affected by anti-depressant medication, cannot simply be fired for nodding off at work in most jobs.

This is not to say that an employer must provide pillows and blankets to sleepy workers. Rather, the employer must engage in an interactive process with any employee (when they wake up) to determine if they fell asleep on account of a medical condition and, if so, if a reasonable accommodation is available. If no medical condition is involved and the employee fell asleep simply because he or she was out too late the night before, discipline or termination may be appropriate.

But if the employee identifies a medical condition as the cause of the desktop naps, you must explore possible

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accommodations. You would not have to tolerate sleeping on the job as an accommodation, but you would have to explore whether a modified work schedule or a leave of absence while the employee adjusts to medication might be a reasonable accommodation.

Second, you might actually have to pay employees for sleeping, at least in California. This rule only applies to employees who are required to live or stay on the employer's premises. Under federal law, such employees may agree with the employer that meal times and eight hours of sleeping time may be unpaid unless the employee is required to work during those times.

But in a ruling earlier this year, the California Supreme Court rejected this "sleeping time" exception for most California employees outside of ambulance attendants and some employees in the hospitality and healthcare industries. Its rationale was that such employees are always "on call" such that their time is not their own even if they are sleeping.

For employees who must remain on the employer's premises 24/7, paying them for sleeping time may be unavoidable. Others, such as apartment managers who live on the employer's property but need not remain there at all times, should be instructed that the time they are not on duty is their own time to do with as they like and they need not remain on the employer's property when not working. Documentation of such instructions may be essential toward avoiding claims from such employees for the time they spent in dreamland.

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