

GIVE ME A BREAK! DO YOUR UNPAID ON-CALL SHIFTS REMAIN ALIVE AND WELL?

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There are a variety of situations that may require your employees to handle on-call shifts after finishing their regular shift, most commonly if you need to provide certain services at irregular frequencies and intervals. These could include emergencies such as road-side assistance for a customer who is away from home, or circumstances when a customer has a need for emergency in-home plumbing, appliance, or electrical repairs. Of course, you want to avoid having to pay your workers for the time they spend waiting for a situation requiring action, when they aren't actually performing services other than waiting, and you also want to avoid liability for possible meal and rest period violations during such times.

The good news is that unpaid on-call shifts are alive and well in California. Given recent decisions by the California Supreme Court, as long as you release such employees from certain restrictions and permit them to engage in personal activities while on call, and also relinquish all control over on-call employees during their meal and rest periods, you should be in a good position. In order to stay on the right side of the law, you may need to review the requirements set out by the state's highest court to ensure you are following the current standards.

ALL ABOUT "CONTROL"

When considering whether on-call time constitutes "hours worked," California courts have primarily focused on the extent of the employer's control: simply put, the level of control the employer has over its employees during the

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waiting times determines whether that time is considered hours worked. The general rule is such time will be compensable when an employer directs, commands, or restrains the employee from leaving the workplace to a degree that prevents the employee from using the time effectively for their own purposes. Depending on the level of control exerted, the employee will be either "waiting to be engaged," in which case the time is unpaid (uncontrolled standby), or "engaged to be waiting," in which case the time must be paid as hours worked (controlled standby).

Because the issue of control is often a matter of degree, courts have applied various factors to determine whether the assigned on-call shift time should be paid as hours worked. These include (1) whether there is an on-premises living requirement; (2) whether there are excessive geographical restrictions on employee's movements; (3) whether the frequency of calls is unduly restrictive; (4) whether a fixed time limit for response is 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 actually engages in personal activities during on-call time.

Two recent California Supreme Court decisions addressed the issue of on-call shifts. The first decision focused on general on-call time, while the second addressed rest periods taken during on-call shifts. Both cases shed light on the standards currently applicable to employers.

Mendiola v. CPS Security Solutions, Inc. (2015)

In *Mendiola*, the court held that waiting time spent by on-call security guards on the employer's premises was "hours worked" because the control exerted by the employer required the employees to both reside in their trailers and spend on-call hours either in their trailers or elsewhere at the worksite. They were obliged to respond, immediately and in uniform, if contacted by a dispatcher or if they became aware of suspicious activity. Further, the guards could not easily trade on-call responsibilities, requiring a request for relief to a dispatcher and then waiting to see if relief was actually available. If no relief could be provided, as happened on occasion, they could not leave the worksite. Even if relieved, guards had to report where they were going, were subject to recall, and could travel no more than 30 minutes away from the site.

Augustus v. ABM Security Services, Inc. (2016)

In another security guard case, a group of former employees brought suit against ABM Security Services alleging the company failed to properly relieve them of all duties during their legally mandated rest breaks. To be sure, ABM required its guards to remain “on call” even while on their rest breaks. The guards were required to keep their cell phones or pagers on during rest breaks in order to respond to certain situations, such as when a tenant wished to be escorted to the parking lot or if there was an emergency. According to ABM, however, guards were rarely interrupted to perform any of these tasks and were otherwise permitted to engage in various non-work activities during this time, including smoking, reading, making personal telephone calls, attending to personal business, and surfing the internet.

The court said that employers cannot satisfy their wage and hour obligations if they require their employees to remain on call during their rest breaks. In the court’s view, doing so would mean that such employees could not use the 10 minutes to take care of other personal matters in an uninterrupted fashion. In applying this standard, the court said that requiring the guards to carry pagers and respond when the employer sought contact during rest breaks would be “irreconcilable” with an employee’s right to be free “to use rest periods for their own purposes.”

The employer argued the plaintiffs’ position was unreasonable, contending that following their requested standard would mean California employers would need to categorically prohibit all employees from ever being recalled to work while they are on rest breaks, regardless of the exigency. The court flatly responded, “Not so.” It noted that several options remain available to employers who find it especially burdensome to relieve their employees of all duties during rest periods — including the duty to remain on call. Employers can provide employees with another rest period to replace one that was interrupted, or pay the one-hour premium pay set forth in Wage Order 4, subdivision 12(B) and section 226.7.

However, if an employer pays the one-hour premium to employees who are on call during a rest period, the question remains whether that would expose the employer to liability by employees seeking penalties and attorneys’ fees under the Private Attorneys General Act (PAGA). Avoiding or mitigating penalties may depend on whether the violation

was an integral part of a systematic policy that deprived employees of an off-duty rest period, or whether the violation was isolated, inadvertent, and did not reflect a willful violation.

YOUR UNPAID ON-CALL SHIFTS MAY BE LEGALLY PERMISSIBLE

In the face of these decisions, many employers are uncertain whether they can impose necessary restrictions on employees during on-call shifts – such as requiring cell phones – without facing liability for meal and rest period violations. Or worse, employers could face liability on a theory that the entire on-call shift should be paid working time by virtue of such control.

GENERAL CONSIDERATIONS REGARDING THE NATURE OF THE ON-CALL SHIFT

Although the two California Supreme Court cases discussed above did not fall in favor of the employers, the decisions did not invalidate all unpaid on-call shift arrangements. Many such arrangements include far less control over employees than was exhibited in the security-guard cases. For example, employers that permit workers to leave the worksite during the waiting periods of an on-call shift would be in a better position to defend their system.

Of course, even if your employees are free to spend their time away from the worksite during their on-call shift, you are not necessarily in the clear. Control may be evident from other factors you put in place, such as geographical restrictions, how quickly your employees are required to respond to calls, whether their responsibilities can be traded, and the number of calls made to employees during their on-call shifts. In any event, it will be important to be able to demonstrate that employees have actually engaged in personal activities during on-call shifts, such as shopping, house chores, recreation, and visits with family. Because the situations involving an intermediate level present gray areas that are not easily resolved, you should ensure your system is carefully reviewed by legal counsel.

MEAL AND REST PERIODS

Although the overall design of an on-call shift permits some degree of control to be exercised over an employee without

requiring the time to be paid, the California Supreme Court has made clear that such control must be completely relinquished during meal and rest periods. While the rules for providing break periods (one paid 10-minute rest period and one unpaid 30-minute meal period) are the same, the definition of what constitutes the prohibited degree of control may differ slightly. For example, employees can be required to stay confined to the employer's worksite during a 10-minute rest period.

A careful reading of the *Augustus* decision demonstrates that an employee working at least 3.5 hours during an on-call shift need only be authorized and permitted to take an off-duty rest period for every four hours of work or major fraction thereof, provided they are free from responding to or monitoring messages to return to work. Employees are free to waive the rest period altogether if they have not been pressured or coerced to do so, and if the rest period was not otherwise routinely scheduled in a manner that is not permitted by the regulations (for example, combining rest periods with meal periods, or scheduling them so as to shorten the work day or delay the timely rest period required by the Wage Orders). Similarly, employees entitled to off-duty meal periods to commence before working more than five or 10 hours each day, which can be waived only in narrow circumstances, generally should be free during such times from responding to or monitoring messages to return to work.

Although the possibility of a private PAGA lawsuit remains an open question, an employer may avoid liability if it provides a timely and lawful break to those employees whose breaks are interrupted, or alternatively, pays a one-hour premium.

HYPOTHETICAL EXAMPLE: JOHN THE PLUMBER

John Doe is a plumber assigned to a weekend on-call shift. His company requires him to carry a cell phone that generally must be activated at all times during his on-call shifts.

- Absent other factors showing undue control, such a requirement, standing alone, should not convert the on-call shift into paid working time.

- However, if his employer wants to avoid a claim that the unpaid meal or paid rest periods are actually “on-duty” by virtue of the fact that John is required to have an activated cell phone, the company policy should expressly provide that employees are not required to be responsive to cell phone calls during such times. Instead, they may turn off the cell phone during their meal and rest periods.
- The company policy should further provide that, if the employee turns on the cell phone for personal use during break times, they are free to ignore business-related calls without facing disciplinary action or pressure from the employer.
- Finally, the policy should state that if employees are interrupted during a meal or rest period, they will be provided with another timely break that complies with the law’s requirements or paid the one-hour premium as required by law.

CONCLUSION

As always, you should seek legal counsel before implementing any on-call shifts, taking into consideration all the factors necessary to avoid paying unnecessarily for controlled working time. Special consideration also should be taken with regard to relieving employees of all control during their meal and rest periods so that all active and passive duties are expressly suspended.

Accordingly, in order to comply with the two recent Supreme Court cases, you may wish to revise your written policies, handbooks, supervisor training sessions, and compensation plans. For example, you might want to revise your policy to require your on-call employees to sign periodic acknowledgments regarding their ability to enjoy meal and rest periods free of restrictions so that they can use such break time for their own purposes. This is just one example of a step you might consider implementing at your company; contact your California Fisher Phillips attorney for more practical guidance.

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