

Security Guards' Weekend On-Call Time was Non-Compensable Sleep Time, California Court Rules

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Security guards who worked 24-hour weekend shifts were not entitled to compensation for eight hours of sleep time, the California Court of Appeal has ruled. *Mendiola v. CPS Security Solutions, Inc.*, No. B240519 (Cal. Ct. App. July 3, 2013). Reversing a preliminary injunction ordering the employer to compensate its guards for all nightly on-call time, the Court found that excluding eight hours of sleeping time during weekend shifts from the guards' compensation was proper under California law. However, the Court found the guards' weekday nightly on-call hours were compensable.

Background

CPS Security Solutions, Inc. provides security services at construction sites. Services provided include "trailer guards," who spend the night at the jobsite in residential trailers. Trailer guards investigate alarms and other suspicious circumstances; their presence helps to prevent vandalism and theft. Tim Mendiola worked as a trailer guard for CPS.

When he was hired by CPS, Mendiola signed an "on-call" agreement outlining his hours of work. The agreement designated eight hours per weekday, from 9:00 p.m. to 5:00 a.m., as "on-call" hours. On weekends, trailer guards worked 24-hour shifts; 16 hours of active patrol, from 5:00 a.m. to 9:00 p.m., and eight hours of on-call time, from 9:00 p.m. to 5:00 a.m. CPS compensated the guards for on-call time spent responding to alarms and conducting investigations. However, if a guard worked for at least three hours during the on-call period, the trailer guard would be paid for the entire eight hours.

The agreement also provided that, if a trailer guard wanted to leave the jobsite, he or she must notify a dispatcher, provide information on his or her whereabouts, carry a pager or cell phone and respond to any calls from CPS, and stay within a 30-minute radius of the jobsite. Guards could engage in personal activities while on-call in the trailers; however, children, pets, and alcohol were not permitted, and adult visitors were permitted only if authorized by the clients.

Mendiola, on behalf of himself and others, sued CPS for alleged unpaid wages and overtime, claiming that the employer's on-call policy violated the California Labor Code and Industrial Welfare Commission Wage Order No. 4-2001. The trial court issued a preliminary injunction ordering CPS to pay the trailer guards for all on-call time. CPS appealed.

Applicable Law

Under California law, "hours worked" is defined 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." Cal. Code Regs., tit. 8, § 11040, subd. (2)(K). Whether on-call time constitutes "hours worked" depends on the level of the employer's control over its employees. *Gomez v. Lincare, Inc.*, 173 Cal. App. 4th 508 (Cal. Ct. App. 2009).

In addition, when an employee works a 24-hour shift, the employer and employee may agree to exclude up to eight hours for sleep time, if the employer provides adequate sleeping facilities and the employee has the opportunity to get at least five hours of uninterrupted sleep. *Seymore v. Metson Marine, Inc.*, 194 Cal. App. 4th 361 (Cal. Ct. App. 2011).

Compensable On-Call Time

CPS argued that the trailer guards' on-call hours were not compensable because they were free to engage in personal activities during that time and because the hours were sleep time. In analyzing whether the on-call time was compensable, the appellate court distinguished between the trailer guards' weekday and weekend schedules.

The Court found the guards' weekday on-call time was compensable because CPS exercised significant control over their activities. The guards were required to live onsite, expected to respond promptly to alarms, and limited in their ability to leave the premises. In addition, the Court found they did "not enjoy the normal freedoms of a typical off-duty worker, as they are forbidden to have children, pets or alcohol in the trailers and cannot entertain or visit with adult friends or family without special permission."

However, the Court agreed with CPS that the weekend on-call time constituted sleep time that was not compensable. It noted that most employees would be sleeping for a similar period every day, whether on duty or not, and the compensation provided for the other 16 hours, which included considerable overtime, ensured that the guards receive an adequate wage. The Court noted that, although the on-call agreement did not specifically reference "sleep time," the designated on-call period occurred at night, when most people were likely to be asleep. The agreement also provided that the guards would be compensated for all time their sleep was interrupted due to alarms or investigations. The Court also found significant that on any night a guard did not receive at least five hours of uninterrupted free time, the entire eight hours would be compensated. Accordingly, the Court reversed the order requiring CPS to pay for the weekend on-call time.

Mendiola and the earlier *Seymore* decisions show the California courts are following the federal Fair Labor Standards Act's approach to sleep time where employees work 24-hour shifts. *Mendiola's* general analysis of the compensability of on-call time also is instructive for employers. Employers should evaluate their on-call practices for California employees in light of this decision. In addition, employers should consider periodic audits of their payroll records to ensure employees are properly compensated in compliance with the law.

If you have any questions about this or other workplace developments or need assistance in drafting employment agreements or auditing your compensation systems, please contact Jamerson "Jamie" Allen, at (415) 394-9400 or AllenJ@jacksonlewis.com, Mark S. Askanas, at (415) 394-9400 or AskanasM@jacksonlewis.com, or the Jackson Lewis attorney with whom you regularly work.

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