

LEGAL UPDATES

Employment Law Updates

On-Call/Standby Time: Do We Really Have to Pay Employees When They Are Not Working?

In California, the state's Wage Orders generally define an employee's hours of work 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."

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In California, the state's Wage Orders generally define an employee's hours of work 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." Although this basic rule appears relatively straightforward on its face, disputes regarding whether employees are entitled to be paid for time spent engaged in certain activities are increasingly common, and claims alleging that employees should be paid for time spent "on call" or "on standby" are prime examples.

Yes, Employees May Be Entitled to Pay Even When Not Actually Working

According to California's Division of Labor Standards Enforcement, "an employee who has the choice of being available or not available to respond to a request by the employer to return to work for an emergency may be on uncontrolled standby if the employee is completely unrestricted to use his or her time for their own purposes." Such "free" standby time is not controlled by the employer and, thus, it does not count as hours worked for payroll purposes. In contrast, when an employee is "controlled" by the employer during on-call time, the time counts as hours worked and is compensable.

Employers may pay "controlled" standby time at a rate different than the employee's usual base hourly rate as long as the employee is paid at least the minimum wage. Employers must also consider all compensation paid to employees when they are on-call, whether controlled or not, when determining the so-called "regular rate" used to calculate overtime wages.

What does "control" mean in the context of on-call time?

In a 2015 case, *Mendiola v. CPS Security Solutions, Inc.*, the California Supreme Court set forth various factors that courts should consider to determine whether an employer exerts sufficient control over an employee during "on call" or "standby" time to make the time compensable:

- whether the employee is required to live on the premises or work site,

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- whether there are excessive geographical restrictions on the employee's movements while on call,
- whether the frequency of calls back to work are unduly restrictive,
- whether the employee's required time for responding to calls is unduly restrictive,
- whether the employee could easily trade on-call responsibilities with a coworker,
- whether using a pager would ease the restrictions,
- whether the employee actually engaged in personal activities during the time spent on-call, and
- whether the employee's time on call is primarily spent for the employer and its business.

The California Supreme Court stated that none of these factors are dispositive, but greater restrictions to employee movement or time generally signal a greater degree of control.

Requiring employees to confirm "on-call" shifts may trigger reporting time pay

In addition to assessing whether on-call time is "controlled" or "uncontrolled," employers must also be cautious about requiring employees to call in prior to the start of a shift to learn if work is available. In 2019, a California Court of Appeal decided that, under certain circumstances, an employee may be considered as having "reported to work," and therefore entitled to reporting time pay, if the employer requires the employee to call in before their shift to see if they are needed.

Calculation of hours worked is a seemingly basic step in the payroll process. Many mistakes result from misunderstanding the rules relating to "on call" time, however. Whether "on call" or "standby" time should be treated as compensable hours worked can be a complex question that must be answered on a case-by-case basis rather than by mechanically applying a set of rigid rules.

What should employers do now?

- Review the extent to which employees on call are restricted – Employers should carefully, and realistically, evaluate whether employees are able to enjoy the normal freedoms of an off-duty employee while on call. In most cases, employers should confer with counsel in the analysis. To the extent that employees are subject to meaningful restrictions while on call, employers should consider whether to loosen those restrictions (thereby strengthening the argument that on-call time should not be compensable), pay employees for time spent on call, pay employees for their time on call, or accept some degree of risk.
- Pay employees properly if they are called to perform any actual work when on call – If a non-exempt employee is actually required to report to work when "on call" during a day he or she was not otherwise regularly scheduled to work, the employer's payment obligation varies depending on the number of hours worked. If the employee works more than half of his or her usually-scheduled day of work, the employer must pay the employee for all hours worked. If the employee works less than half of his or her usually-scheduled day of work, the employee is entitled to be paid half of the wages earned on a usual day, provided that the amount paid shall be equivalent to no less than two hours of pay and no more than four hours of pay. If an employee is required to report to work for the second time in a single day (regardless of whether the employee was regularly scheduled to work on that day or not) and works less than two hours after reporting for the second time in the day, the company must pay the employee for a minimum of two hours of work.
- Include pay for on-call/standby time when computing the regular rate for overtime – Compensation paid to employees when they are on-call, whether controlled or not, must be accounted for when calculating overtime wages.



If you have questions about employees compensable hours, or any other issue relating to employment law, please contact one of our attorneys: