



No Sleeping Time Exclusion During 24-Hour Shifts When Employer Exercises Significant Control

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In *Mendiola v. CPS Security Solutions, Inc.*, the California Supreme Court held that security guards working 24-hour shifts **have to be paid for all 24 hours** without carving out eight hours of sleeping time – meaning the entire 24-hour shift was compensable time.

Security guards employed by CPS Security Solutions filed a wage and hour class action alleging CPS failed to pay them for all their on-call hours. The security guards lived on the job site in CPS-provided residential trailers. During the week, the security guards were scheduled for 16 hour shifts – an eight hour shift of active patrol and an eight hour shift of on-call time. On the weekends, the security guards were scheduled for 24-hour shifts, 16 hours of active patrol and eight hours of on-call time (9 p.m. to 5 a.m.). The security guards were not paid for on-call hours **unless** they were actually required to perform work during those hours. However, CPS placed restrictions on the security guards' activities during on-call hours; e.g., remain within a 30 minute radius of the job site; be available via pager/radio telephone; and no children/pets/alcohol on site.

In finding in favor of the security guards, the California Supreme Court rejected prior California case law which had relied upon 29 CFR 785.22, a federal regulation which permits employees who are required to be on duty for 24-hours to enter into agreements to exclude up to eight hours of regularly scheduled sleep time from hours worked. See *Seymore v. Metson Marine*, which we previously reported on. The Court underscored that California law, unlike federal law, focuses on **the extent of employer control** over an employee to determine whether the employee's time must be compensated. Because the trailer guards were substantially restricted in their use of the on-call time for personal pursuits, they were under sufficient employer control to make all of the time compensable as hours worked. The fact that the trailer guards were working a 24-hour shift and could sleep part of the time was basically irrelevant.

Caveat

This analysis was limited to Wage Order 4 which is silent as to on-call agreements; whereas other wage orders such as Wage Order 9 – applicable to ambulance drivers and attendants – would require a different result because it allows for employers to exclude eight hours of sleep time from compensable hours worked in a 24-hour shift in certain circumstances.

What is also particularly painful here is that CPS had previously obtained an endorsement from a former California Labor Commissioner on the legality of their on-call policy and subsequently entered into a Memorandum of Understanding effectively agreeing that CPS' policy was lawful. However, the California Supreme Court held that the Labor Commissioner's view was not entitled to deference.

Best Practices

Employers should audit/review their on-call policies, what they consider compensable time and their pay practices to ensure that their on-call policies comply with this new decision, particularly employers who exercise significant control. Keep in mind that the Court did not reject or modify the multiple factor test for on-call employees who are not required to live or sleep on premises.