

Computing Hours for On-Call Workers

By Michelle MacDonald

Introduction

Generally, the computation of a worker's hourly wage and eligibility for overtime wages is a mathematical exercise - any hours in excess of 8 hours per day or 40 hours per week are computed at 1.5 times the base hourly wage, while a shift of more than 12 hours in a day is paid at twice the base hourly wage.

However, all work situations do not fall within these cut and dry rules, and there has been ambiguity in dealing with on-call workers - particularly those who are not subject to union collective bargaining agreements, which tend to spell out these requirements in detail. In the past, on-call employees tended to be health care workers, firefighters, police officers, and similar professionals who may be called upon to respond rapidly to unforeseen and life-threatening events. On a more prosaic level, several businesses, such as restaurants, towing services, retailers, and security guard providers, have chosen to classify their work force more and more as "active" and "on call" depending on the flow of business. The on-call worker then becomes a backup to the active shift and is intended to be pressed into service as needed. Depending on design, on-call shifts can exceed a 24-hour day and even encompass sleep time.

On Call Workers Entitled to Overtime Wages

The instance of when an on-call employee is entitled to overtime wages hinges on the extent of the employer's control of the on-call employee's activities during the time that he or she is waiting to be called. The more control an employer exerts, the more likely that the employee's on-call hours will be converted to regular hours which, in turn, are subject to overtime rules and restrictions.

The concept of overtime in general is derived from the federal Fair Standards Labor Act of 1937¹ ("FLSA"), which mandated the base 40-hour week and created two broad categories of employees: exempt (typically executive and professional workers) and non-exempt (everyone else - with some narrowly drawn exceptions involving live-in workers, agricultural employees, travelling sales staff and transportation workers). Non-exempt workers could not bargain away their

status or the right to receive overtime pay for working hours in excess of 40 per week. From this baseline, states and notably California refined these requirements, which became heavily dependent on the type of work being regulated. California enacted a series of 18 wage orders reflecting the reality imposed by different occupations. California also codified the hourly restrictions on the working week of non-exempt employees as Labor Code section 510, which adopted the federal limitation of 40 hours before overtime must be paid.

Several occupations necessarily have complicated work schedules and need to employ workers who are on call, that is, they may not be housed on the employer's premises but are required to make themselves available to be activated immediately in the face of an emergency. Typically the courts have computed their "hours worked" for overtime purposes based on whether they are "under the control" of the employer. The federal courts adopted what they termed the "Berry factors" (from the case of *Berry v. County of Sonoma*²), which explored the degree to which an employee that is restricted while on call has to be effectively engaged to wait. Specifically, the Berry Court looked at whether there was a fixed time to respond that effectively prevented personal pursuits, the frequency of calls, geographic restrictions, and activity restrictions. The more onerous and restrictive the requirements imposed on an on-call worker, the more likely a court will find that the on-call worker is simply an active worker waiting for an assignment and, therefore, entitled to an hourly wage for each hour "worked" and overtime for each hour in excess of the 40-hour standard.

Off Premises, On-Call Employees – An Extreme Factual Case

Of interest is a recent California decision, *Mendiola v. CPS Security Solutions, Inc.*,³ in which plaintiff security guards were required by their company to be on patrol and on call for equal shifts of 8 hours per day, leaving the remaining 8 hours for personal off-duty time. The on-call shift workers were required to

¹ 29 U.S.C. § 201 et seq.

² 30 F. 3d 1174 (9th Cir. 1994).

³ 60 Cal. 4th 833 (2015).

reside in an onsite trailer where they were barred from having visitors, including their children and pets, nor could they consume alcoholic beverages. If they wished to engage in a personal errand, such as a medical appointment, they had to receive permission from their employer and could be away from the premises for a maximum of 30 minutes. If they could not find another employer to relieve them, they were barred from leaving the premises even if there was a personal family emergency. Under this system, the employees were effectively prevented from leaving their place of work for 16 hours a day, but the shift labeled “on call” was uncompensated.

The *Mendiola* Court found that this arrangement violated various California wage orders and concluded that under these circumstances, the on-call hours were compensable as hours worked and subject to overtime. The court noted that the on-call guards were required to respond immediately and in uniform to their dispatcher in order to investigate suspicious activity; could not be more than 30 minutes from the worksite, and could not have visitors. The fact that they could engage in limited personal pursuits while on call (reading, eating, and listening to music) was irrelevant as the restrictions otherwise were so onerous that the guards were deemed under the control of their employer. It was also important to the court that the 24-hour presence of the employees was to the employer’s benefit as it fulfilled a contractual provision between the company and its clients.

Conclusion

The *Mendiola* case illustrated a somewhat extreme factual case. How does an employer with off-premises, on-call staff determine when the hours are being applied toward potential overtime? Generally, the question revolves around whether the employer’s requirements are such that they would necessarily interfere with the activities of ordinary daily living while the employee is on call. Is there a very short reporting time (30 minutes or less) that would prevent an employee from running an errand? Is the employee significantly restricted geographically while on call, and is he or she required to report in uniform? Can the employee use technology to shift or trade hours with other workers? How many calls can reasonably be expected during a shift, and does the employee have to respond to all calls? What is the percentage of on call to active work? Courts will probably look askance at an arrangement that calls for the employee to spend less time as an active employee than as an on-call employee when the duties between the two shifts are fundamentally the same.

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