

# Management Alert



## Considerations For The Call Of Duty

When an employer has an employee “on call” - ready to work if called or paged - an issue arises as to whether the employee must be paid for the on-call time. In *Mendiola v. CPS Security Solutions, Inc.*, the Court of Appeal held that if an employee is scheduled to work or be on call for less than 24 hours, the on-call time is compensable if the employer sufficiently restricts the employee’s ability to engage in non-work activities. However, if an employee is scheduled to work or be on call for 24 hours or more, then up to 8 hours of on-call time may be unpaid as uncompensable sleep time.

### The Facts

CPS Security Solutions (CPS) provided security guards to monitor construction sites throughout California for 16 hours per day Monday through Friday and then for 24 hours on Saturday and Sunday. The security guards were scheduled to patrol jobsites during the weekdays for 8 hours and be on call for 8 hours. On weekends, the security guards were scheduled to patrol jobsites for 16 hours and be on call for 8 hours.

The security guards signed on-call agreements providing that they would not be paid for the period between 9:00 p.m. and 5:00 a.m., but that they would be paid for any time spent conducting an investigation during those hours. Additionally, if the guards received fewer than five hours of uninterrupted free time, they would be paid for the entire 8 hours of on-call time.

Because the on-call hours were overnight, CPS provided the guards with trailer homes at the jobsites. Although the “on-call agreements” referred to the trailer homes as “residences,” the security guards were forbidden to have children, pets, or alcohol in the trailers, and could have adult visitors only with prior approval from CPS. A security guard who wished to leave the jobsite during on-call hours would have to wait for a reliever to arrive and then remain within a 30-minute radius of the jobsite.

Certain security guards filed a class action seeking unpaid overtime wages for the time that they were on call and at the job site. During on-call hours, the employer had paid only for the time spent actively investigating various conditions, or while the guards were waiting to be relieved.

After certifying the class, the trial court granted a preliminary injunction requiring the employer to pay the security guards for the time they spent in the trailers while on call during both the weekdays (when on patrol for 8 hours and on call for 8 hours) and weekends (when on patrol for 16 hours and on call for 8 hours).

### The Appellate Court Opinion

The Court of Appeal agreed with the trial court that during weekdays, when security guards were on patrol for 8 hours and were on call for 8 hours, the 8 hours spent on call was compensable time.

Determining whether on-call time constitutes hours worked depends on “[t]he level of the employer’s control over its employees” during that time -- *i.e.*, whether the on-call time “is so substantially restricted that [the employees] are unable

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to engage in private pursuits.” The Court of Appeal concluded that the on-call time was compensable because the security guards lived on the premises, were not free to leave at will, and were significantly limited in their ability to engage in personal activities compared to other typical off-duty workers (e.g., prohibiting children, pets, and alcohol in their trailers). The Court found that the restrictions were “primarily directed toward the fulfillment of the employer’s requirements” to its customers.

The Court of Appeal, however, reached a different conclusion regarding on-call time during the weekend. When security guards were on 24-hour shifts, CPS could properly exclude up to 8 hours as uncompensable sleep time, so long as that time was uninterrupted, the guards were provided “a comfortable place,” and the guards had signed the agreement stating that the 8 hours would not be compensated. The Court of Appeal reached its conclusion based on its observation that an employee on a 24-hour shift “may be presumed to be spending a significant portion of that time asleep or resting.”

Although the Court of Appeal generally sanctioned the on-call agreement in relation to 24-hour shifts, it ruled that any time the guards worked during the sleep time must be compensated. Further, if the guards received less than five hours of uninterrupted free time during a 24-hour shift, then CPS would be required to pay for the entire on-call period.

## What *Mendiola* Means for Employers

The *Mendiola* decision does not provide any bright-line rules to determine whether on-call time is compensable. Employers with non-exempt, on-call employees should be mindful of any restrictions that are placed on the employees during on-call periods. Even if the employees need not remain on the premises while on call, employers should be cautious about the restrictions they place on employees, including any unduly restrictive requirement to respond to pages or calls. And if there is a need to have non-exempt employees scheduled for 24-hour shifts, then employers should have their employees sign agreements clearly stating that 5 to 8 hours will be “sleep time” and not compensable, so long as that time is uninterrupted.

It should be noted that the rules articulated in *Mendiola* do not apply to all industries. For example, non-exempt employees in the housekeeping industry who are required to reside on the premises need be compensated only for the time spent carrying out assigned duties. Therefore, it is critical that an employer have a good understanding of the particular wage and hour laws applicable to its industry.

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