



Half an Hour for Health Care

Standby Employment Strategies to Keep Your Business Safe

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Seyfarth Shaw LLP

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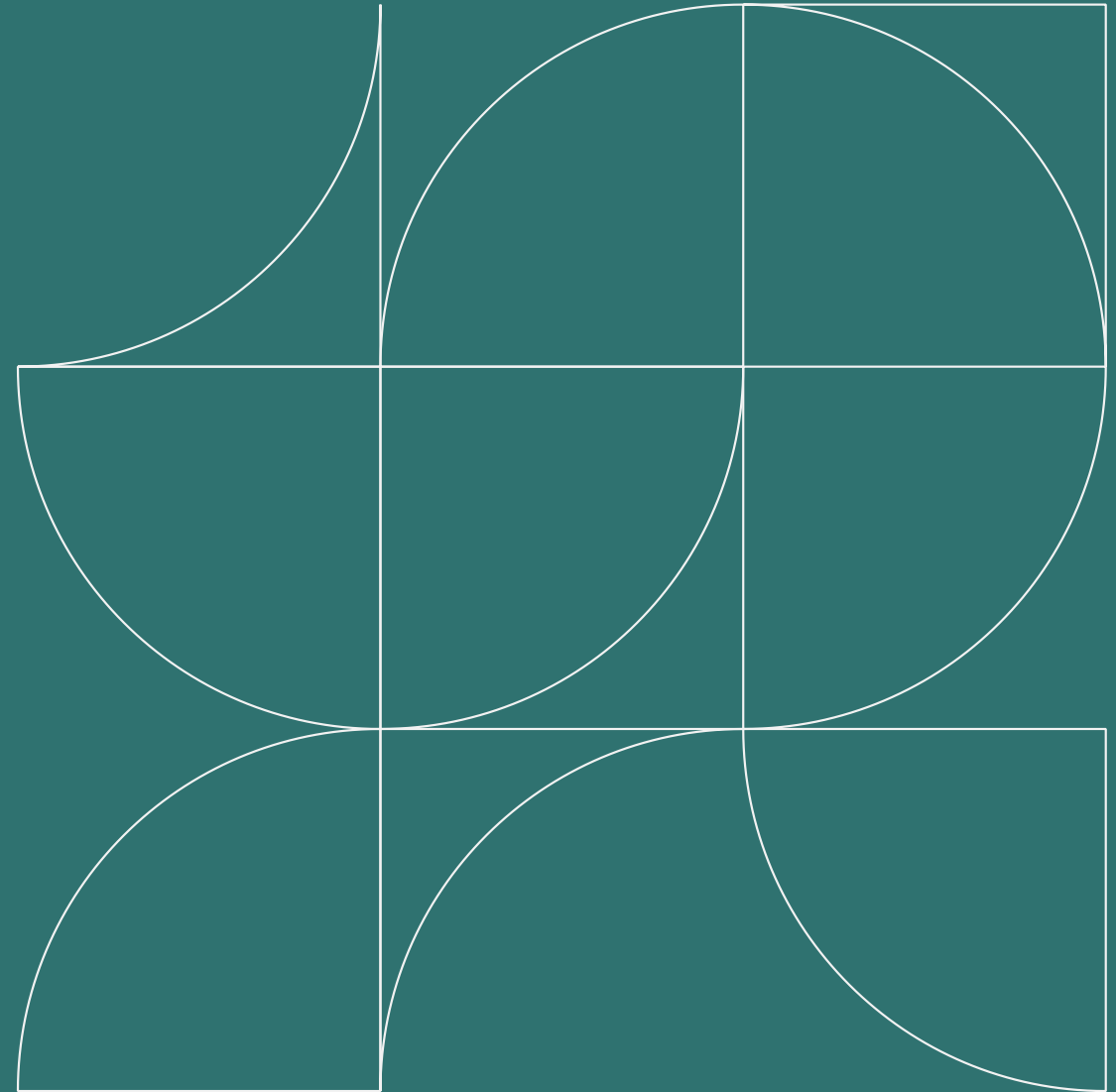
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Agenda

- 1 | When are employees on “standby” or “on-call”?
- 2 | What do employers need to pay these employees?
- 3 | Why does this matter?

Standby – A Brief Overview



Controlled vs. Uncontrolled Standby

- “The proper inquiry is ‘whether [an employee] is so restricted during on-call hours as to be effectively engaged to wait.’” *Berry v. County of Sonoma*, 30 F.3d 1174 (9th Cir. 1994)
- An employee is not required to have “substantially the same flexibility or freedom as he would if not on call, else all or almost all on-call time would be working time, a proposition that the settled case law and the administrative guidelines clearly reject.” *Id.*
- Courts consider a multi-factored balancing test
 - The factors are non-exhaustive

Berry Factors

Multi-Factored Test

- 1) Whether there was an on-premises living requirement;
- (2) Whether there were excessive geographical restrictions on employee's movements;
- (3) Whether the frequency of calls was unduly restrictive;
- (4) Whether a fixed time limit for response was unduly restrictive;
- (5) Whether the on-call employee could easily trade on-call responsibilities;
- (6) Whether use of a pager could ease restrictions; and
- (7) Whether the employee had actually engaged in personal activities during on-call time.

Considerations for standby time

Takeaway Points from *Berry*

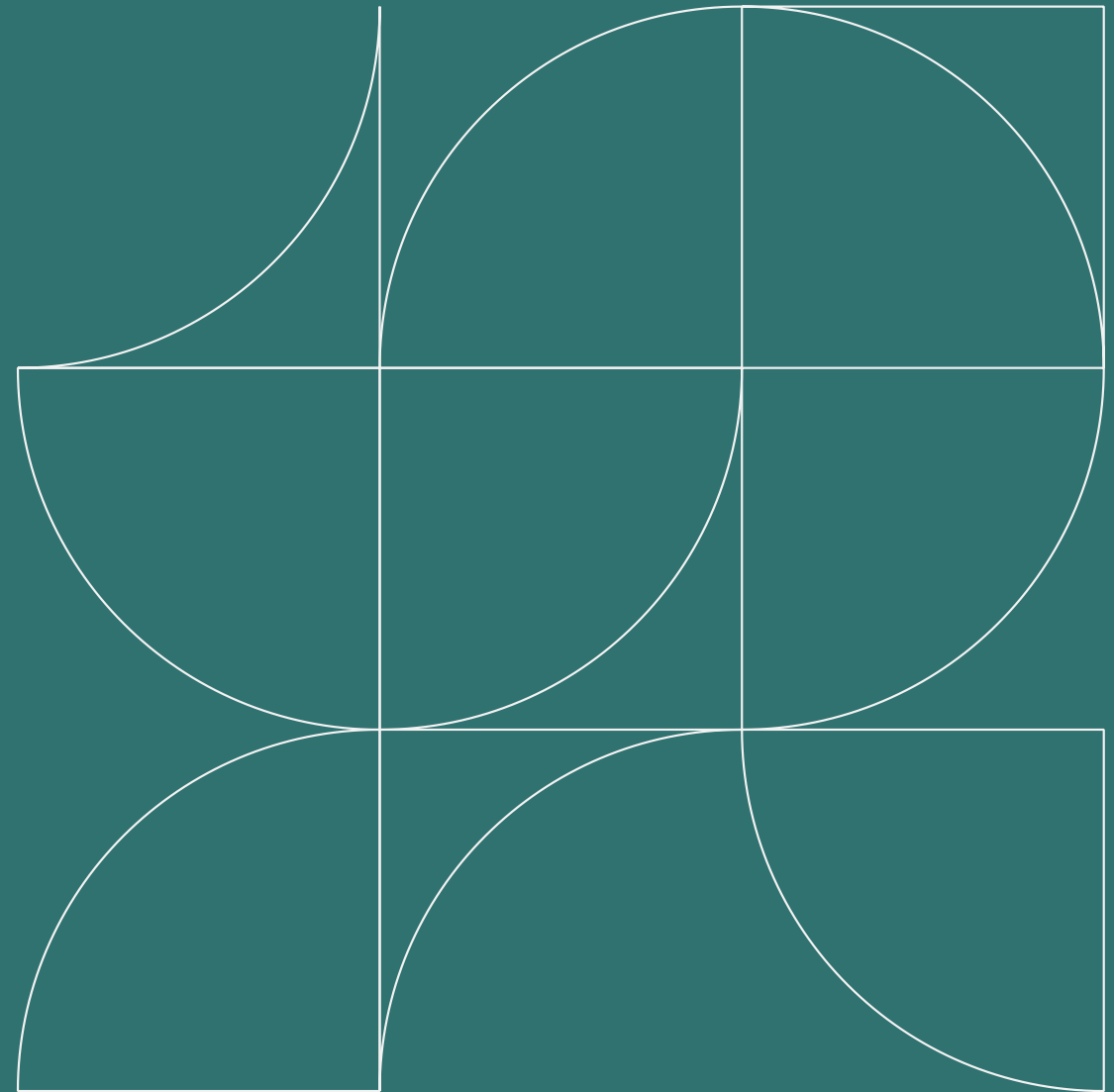
- Fact intensive inquiry
- Response time should not be overly restrictive
- Consider frequency of calls
- Potential expense reimbursement issues

Sleep Time During Controlled Standby

Definition of “Hours Worked”

- *Mendiola v. CPS Security Solutions, Inc.*, 60 Cal. 4th 833 (2015)
 - Finding sleep time compensable during on-premises overnight shifts
- Wage Order 5: “Within the health care industry, the term “hours worked” means the time during which an employee is suffered or permitted to work for the employer, whether or not required to do so, as interpreted in accordance with the provisions of the Fair Labor Standards Act.”

**How much do you
need to pay?**



Uncontrolled Standby

Generally, no requirement to pay employees unless they do work or are under employers' control

- BUT many employers pay for uncontrolled standby time
- Collective Bargaining Agreements

Controlled standby

Controlled standby must be paid at minimum wage or agreed-upon rate

- The “regular rate of pay” is the weighted average of the employee’s earnings for the workweek
 - All “remuneration” for employment (*i.e.*, all compensation for work performed), except some statutory exclusions, in the workweek divided by the total hours worked by that employee in the workweek.
 - Where an employee earns compensation in addition to the base rate, the regular rate of pay will be higher than the employee’s base hourly rate.
 - Healthcare employers are targets because healthcare employees are paid many different premiums, bonuses, differentials, on-call pay, etc.

Regular Rate Calculation



To calculate an employee's regular rate, you need to know three things:

1. What is their workweek? (i.e. what period of time are we looking at their compensation and hours worked.)
2. What compensation needs to be included in the numerator?
3. What hours need to be included in the denominator?

$$\frac{\text{Total Earnings (Wages + Bonuses)}}{\text{Total Hours Worked}} = \text{Regular Rate}$$

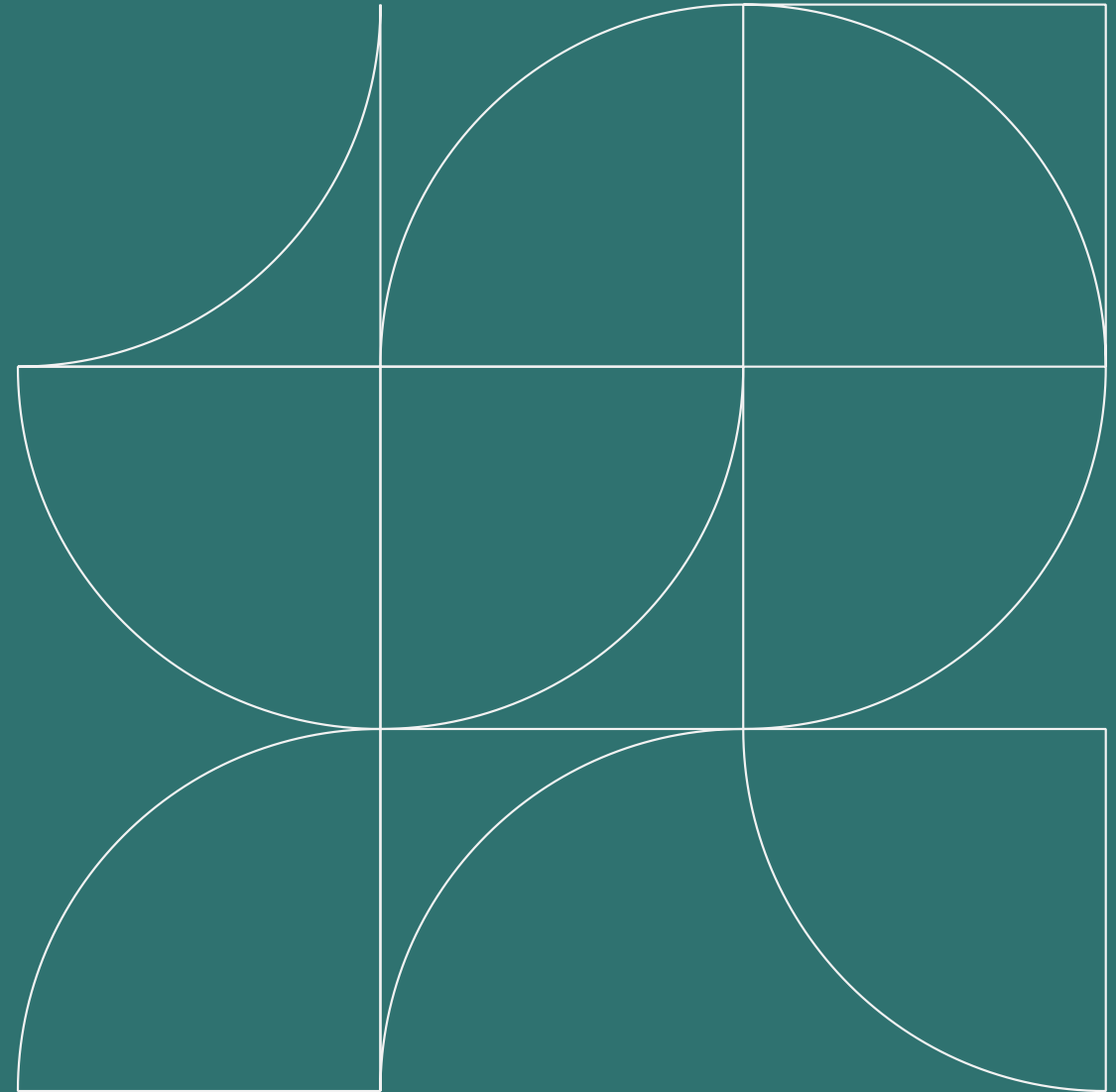
What's In? What's Out?



What counts as “hours worked” for the denominator?

- In: all worked hours, including
 - Regular hours
 - Education time
 - Controlled standby time
- Out:
 - Uncontrolled standby time
 - Meal and rest period premiums
 - Unworked reporting time pay hours
 - Vacation, Sick Pay, PTO etc.
 - Any “double-counting” of hours already included

**Why does this
matter?**



Reporting time



Controlled standby may trigger reporting time pay even if no work is performed.

- Wage Order number 4
 - Section 5 (A) Each workday an employee is required to report for work and does report, but is not put to work or is furnished less than half said employee's usual or scheduled day's work, the employee shall be paid for **half the usual or scheduled day's work**, but in no event for less than two (2) hours nor more than four (4) hours, **at the employee's regular rate of pay**, which shall not be less than the minimum wage.
 - For example, if an employee was scheduled to work six hours, the reporting-time pay would be three hours.

Why it Matters



- Errors in controlled v. uncontrolled standby time can result in huge exposure in derivative claims. Reporting time pay constitutes wages.
 - Labor Code 203 penalties
 - Labor Code 226 penalties
 - PAGA
- Increased focus of Plaintiffs' bar and DLSE
 - Standby practices can be required by local regulation
 - *E.g.*, Local Emergency Medical Services agencies can require hospitals to have on-call staff.
 - Trial courts can (wrongly) decide this regulation and associated polices are enough to certify a class.

Advice



- Be Proactive
 - Don't assume that your payroll provider is getting it right.
 - Not only the calculations but how its presented on the wage statements
- Identify any employees who are “on-call” and do regular audits to make sure that they are configured correctly.
- Ensure that the regular rate and overtime are being calculated correctly for employees who have “on-call” schedules.

Q & A



Some common questions....

- *Question:* The employees at my hospital are represented by unions. Do I need to worry about reporting time pay?
- *Answer:* Yes.
 - Wage Orders do not have an explicit waiver of reporting time pay requirement for employees covered by a CBA.

Q & A



Some common questions....

- *Question:* Do I need to worry about reporting time for employees who are on an alternative workweek schedule?
- *Answer:* Yes.
 - AWS affects overtime thresholds, not:
 - Definition of hours worked.
 - Reporting time pay obligations.

Q & A



Some common questions....

- *Question:* Should I pay employees minimum wage for uncontrolled standby time?
- *Answer:* Possibly.
 - Healthcare minimum wage laws increased attention on this issue:
 - No requirement to pay employees on uncontrolled standby
 - Very common and almost expected in the industry
 - Can trigger litigation risk from disgruntled employees



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