



## ***On-Call and Standby Pay***

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## On-Call and Standby Pay

If you require an employee to stay at home or at work on an on-call or standby status, that time may qualify as hours worked, depending on how much you restrict his/her ability to actually have free time. Hours worked is defined 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 required to do so or not."

Under California law, if the employee is under your control, it is likely that you will have to pay him/her even if the employee is just sitting around waiting for something to happen. On-call time is not compensable if the employee can use the time spent on-call primarily for his/her own benefit.

Courts typically consider the following in looking at whether on-call time should be paid:

- Are there excessive geographic restrictions on the employee's movements?
- Is the frequency of calls unduly restrictive?
- Is there a fixed time limit for the employee to respond to the call that is unduly restrictive?
- Can the on-call employee easily trade his/her on-call responsibilities with another employee?
- Can the employee engage in personal activities during on-call periods? If so, to what extent?
- What is the nature of the employment relationship and the industry practice?
- Are there any other limitations on the employee's ability to use the time for his/her own benefit?<sup>1</sup>

Agreements between you and your employee that the on-call time is noncompensable do not hold up against state requirements.

Carrying a cell phone or similar device does not usually constitute hours worked, if the employee is free to come and go as he/she pleases. You must give the employee sufficient time to report so that he/she can be free to use the off duty time to his/her own benefit. Sufficient time to report is generally at least 20 to 30 minutes, depending on geographic population density.

All time spent on call-backs during a standby period is counted as time worked. Time worked includes a reasonable time for travel both to and from the worksite from the point at which the employee is summoned to return to work. Use good judgment and be reasonable when you determine travel time. For example, consider an employee who lives three miles from the worksite. However, when you call him to return to work at 12:00 p.m., he is at the beach 20 miles away. The employee returns and works until 9:00 p.m. In this case, the travel time would be calculated from the beach to the worksite and back to the employee's home.

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<sup>1</sup> Berry v. County of Sonoma, 763 F. Supp 1055 (1990); Madera Police Officers Assoc. v. City of Madera, 36 Cal. 3d 403 (1984)

You must pay call-back or controlled standby time the same as regular hours worked. You must pay the regular or agreed wage for this period as well as applicable overtime.

### **On-Call Resident Employees**

Some businesses have employees who stay overnight on the premises, such as security guards or apartment managers.

Certain Wage Orders have specific rules, and you should always refer to the Wage Order that covers your particular business. For instance, on-call resident employees, such as resident managers, under Wage Order 5, Public Housekeeping Industry, need only be paid for time spent performing their assigned job duties. Under Wage Order 5, you are not required to pay on-call resident employees for the time they spend on-call if they can freely engage in personal activities, regardless of any geographic restrictions you impose on these activities.<sup>2</sup>

For most purposes, however, the rules regarding on-call pay for employees who stay overnight on the employer's premises are the same as for other on-call employees. Whether the employee should be paid depends on how much control you exert over the employee's activities. Employees should be paid for on-call time when they cannot leave the premises and are significantly restricted from engaging in non-work, personal activities.<sup>3</sup>

RV Parks & Campgrounds  
fall under Wage Order #5  
for Resident Employees,  
but not for Security Guards

A California Supreme Court case discussed how to handle on-call time when security guards were required to stay overnight on the employer's premises.<sup>4</sup> The case involved employees under Wage Order 4 and does not apply to other Wage Orders that are relative to resident employees.

CPS Security Solutions provided security guards for building construction sites. Part of the guards' day was spent on regular security patrols. Nights were spent at the guards' assigned job site in CPS residential trailers. Guards were required to be on-call, investigate alarms and suspicious activity, respond to disturbances and prevent vandalism and theft.

The guards signed on-call agreements with CPS. If the trailer guard wanted to leave the jobsite during on-call hours, the guard had to notify a dispatcher, provide information as to where the guard was going and for how long, and wait for a relief guard. The guard had to remain within a 30-minute radius, carry a pager and respond immediately if called. If no relief guard was available, CPS could order the guard to remain on the premises, even if the guard had an emergency.

The guards were allowed to keep personal items in the trailers. Adult visitors were permitted only with prior approval, and children, pets and alcohol were not permitted at any time on the premises.

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<sup>2</sup> Isner v. Falkenberg/Gilliam Associates, 160 Cal. App. 4th 1393 (2008)

<sup>3</sup> Mendiola v. CPS Security Solutions, Inc., 2015 WL 107082 (2015)

<sup>4</sup> Mendiola v. CPS Security Solutions, Inc., 2015 WL 107082 (2015)

On the weekdays, the guards were on patrol for eight hours and on-call for eight hours. During the nighttime shifts, CPS did not compensate the guards for the on-call time, except for time actually worked (responding to disturbances). If a guard spent three or more hours engaged in investigations during the on-call period, the guard would be paid for the entire eight hours.

On the weekends, the guards worked 24-hour shifts and were on patrol for 16 hours and on-call for eight hours.

One of the guards, Tim Mendiola, sued CPS on behalf of himself and other guards for unpaid wages and overtime. The lawsuit alleged that the on-call policy violated the Labor Code and the applicable Wage Order (Wage Order 4).

The main issues before the Court were whether the hours spent "on-call" and in the trailers should count as "hours worked" and be paid to the guards and whether CPS could exclude up to eight hours of sleep time from the guards' 24-hour weekend shifts.

As to the issue of on-call compensation, the California Supreme Court held that the guards were entitled to compensation for all on-call hours spent at their assigned worksites under their employer's control. The Supreme Court ruled that compensation was warranted because CPS exercised significant control over the guards' activities during the on-call time.

CPS exercised significant control over the guards' activities: the guards were required to live onsite, respond promptly, and were not free to leave at-will, but only when a reliever is available.

The guards also were "substantially restricted" in their ability to engage in private pursuits and could not enjoy the "normal freedoms of a typical off-duty worker" — no children, pets, or alcohol and no visits with adult friends or family without permission.

Additionally, the Supreme Court found that "the guards' on-call time was spent primarily for the benefit of CPS." The restrictions on the on-call time were primarily directed toward fulfilling an important function for the employer and its clients — deterring theft and vandalism. Thus, the guards were entitled to minimum wage and overtime for all such hours.

On the issue of excluding sleep time, the California Supreme Court held that CPS could not exclude eight hours of sleep time from the guard's 24-hour weekend shifts. Here, the Supreme Court reversed the court of appeal. The court of appeal, relying on other cases and federal regulations, ruled that CPS could exclude eight hours of sleep time from the guard's work time when working 24-hour shifts as long as the sleep time was uninterrupted; a comfortable place was provided; and the parties entered into an agreement specifically excluding the sleep period from compensation.

The Supreme Court rejected this analysis and the applicability of the federal regulations to California's specific Wage Orders (here, Wage Order 4). The Supreme Court held that Wage Order 4 does not permit the exclusion of sleep time from compensable hours worked in 24-hour shifts.

This case is limited to Wage Order 4; different Wage Orders, such as those applying to ambulance drivers, etc., contain different language allowing for the exclusion of sleep time. This case is also an example of a situation where the employer exhibited significant control over on-call time, with a requirement that employees stay on-premises.

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