

PARK WATCH

LEGAL DEVELOPMENTS NEWSLETTER

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Workers Entitled to Compensated "On-call" Time, says Supreme Court

— Profound implications for many in the Workplace

By Terry R. Dowdall, Esq.

● UPSHOT

In a stunning reversal of accepted employment practices for employers such as mobilehome park owners with parks more than 50 spaces (requiring on site personnel), the California Supreme Court has held that "on-call" employees who are subject to employer restrictions (to the extent that their time is primarily for the benefit of the employer) must be paid for "on-call" hours. Moreover, in some situations employers may not exclude sleep hours from 24-hour shifts.

● THE MENDIOLA CASE

In *Mendiola v. CPS Security Solutions, Inc.* (Mendiola), California's highest court held that security guards who were obligated to stay in trailers on worksites were entitled to be paid for their time, even if they spent it watching TV, online or napping. This decision will have a far ranging effect, depending on the extent to which you rely on managers when they are off duty. The greater the control an employer exerts over on-call managers, the more likely that employer would be obligated to pay for all employees' hours, including on-call time.

● FACTS

The Mendiola case involved security guards who were posted at construction sites and who spent part of their time on active patrol, and part on-call. *During their on-call time, the*

guards had to remain immediately available to respond, in uniform, to disturbances. According to their written agreement, the guards had to reside in a furnished trailer provided by CPS on the site. They could use the time as they pleased in these trailers while on-call, but there were restrictions, including no children, pets or alcohol. Adult visitors had to be approved. If the guards wanted to leave the site, they had to notify a dispatcher, who would send

another employee to relieve them, if one was available. If relieved, the guards had to be reachable and stay within 30 minutes of the site. (If no one was available to relieve them, they could not leave.) The guards weren't paid for this on-call time, unless there was a disturbance, and then they were paid for the actual time they spent investigating the disturbance, or all eight hours if they spent more than three on a disturbance.

The Court held that the guards' on-call hours constituted compensable hours and that CPS could "not exclude sleep time

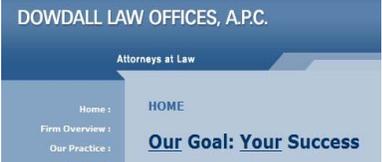
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from the guards' 24-hour shifts."¹

Wage claims such as this are governed by the Labor Code and by a series of wage orders adopted by the IWC -- a state agency that was defunded in 2004, although its orders remain in effect. *The ruling in this case turns on whether on-call hours constituted hours worked within the meaning of Wage Order 4, which defines hours worked 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 or not required to do so."*

● EMPLOYER CONTROL, WAITING TO BE "ENGAGED" AND SLEEP TIME

Since the 1940s, it's been well established that on-call hours are sometimes compensable. But whether that on-call time equals hours worked depends on the facts of each case, and in particular the *extent of the employer's control of the employee during those times*. For instance, "When an employer directs, commands or restrains an employee from leaving the work place. . .and thus prevents the employee from using the time effectively for his or her own purposes, that employee remains subject to the employer's control." *Ghazaryan v. Diva Limousine, Ltd.*, 2008, ("Ghazaryan"). (Id.).

In mobilehome parks, the employee while "on call" is typically allowed to leave the premises, eat, shop and recreate so long as the employee can return to the premises within a reasonable time, e.g., 30 minutes.

In one case², , the court held that "[o]n-call waiting time may be compensable if it is spent *primarily for the benefit of the employer and its business*."

One distinction that traces back to the '40s is still key:

"Whether an employee was 'engaged to wait,' which is compensable, or 'waiting to be engaged,' which is not compensable"³.

As cited in the *Mendiola* opinion, the court in *Armour & Co.*, 32 U.S., 1944 ("Armour") put it this way:

"Readiness to serve may be hired, quite as much as service itself, and time spent lying in wait for threats

to the safety of the employer's property may be treated by the parties as a benefit to the employer."

More recently, in *Madera Police Officers Assn. v. City of Madera*, the court held that officer having on-call meals were engaged to wait, and thus those hours were compensable.

The distinction between being on stand-by and standing by to be called, said the Carman court, "[M]ust be determined by the circumstances in a given case." Those circumstances should be analyzed in terms of the following factors and questions, as articulated in *Owens v. Local No. 169*, 9th Cir., 1992 ("Owens"), and *Gomez v. Lincare, Inc.*, 173 Cal.App.4th, 2009 ("Gomez").

For purposes of the manufactured housing industry, the "on call" time issue, when practiced in the custom and practice of the industry, should be deemed to be of the 'waiting to be engaged' variety. Park owners do not (and should not) so closely delimit permissible activities by employees that it could be deemed that on call time is predominantly devoted to awaiting an employer's call back into actual service.

Let's review the totality of the issues posed here.

1. *Is the employee required to live on the premises?*
2. *Are there "excessive" geographical restrictions on the employee's movements? If they can leave the park, how far away are they allowed to go while on-call?*
3. *Does the employee have to do anything more than leave contact information as to how to reach them with the employer?*
4. *How often is the employee actually called while on-call?*
5. *Is there a fixed time for an employee to respond to calls while on-call, and is the response time unduly restrictive?*
6. *Can the on-call employee easily trade his or her on-call responsibilities with another employee?*
7. *Has the employee actually engaged in personal activities during on-call time? To what extent?*

Note: "Such a list is illustrative, not exhaustive. No one factor is dispositive." (Owens).

A third aspect of the *Mendiola* decision concerns the exclusion of sleep time from wage calculations. In an earlier case,⁴ the court found it acceptable to have agreements that excluded sleep time from compensable time. However, the Court concluded that the Wage Order "does not permit the

¹ *Monzon v. Schaefer Ambulance Service, Inc.*, 224 Cal.App.3d 16 (1990) and *Seymore v. Metson Marine, Inc.* 194 Cal.App.4th 361 (2011).

² *Gomez v. Lincare*, 173 Cal. App. 4th 508, 523 (2009).

³ *Carman v. Yolo County Flood Control and Water Conservation Dist.*, 535 F. Supp. 2d., (2008)

⁴ *Monzon*, which however, only applied to ambulance drivers and attendants.

exclusion of sleep time from compensable hours worked in 24-hour shifts covered by Wage Order 4." However, some workers may be deemed on-call while asleep in some situations, but some may not.

The guards' situation is different from that of an on-site manager in at least one key respect: the former are not sleeping in their own home, but rather are suffered to stay in a temporary trailer accommodation on a construction site.

● ON-CALL TIME FOR MANAGERS

The determination of whether or not on-call time for park managers must be compensated begins with the questions discussed above. It comes down to how free the employee is to go about his or her business and do what they would otherwise be doing.

First, a strong employment agreement specifically detailing on call time terms and conditions is strong evidence. Even where the common problem of claimed misunderstandings which lean toward compensable "on call" time are advanced, a documented employment agreement is robust evidence to work with in defeating a false claim. Without documentation, the employee story is likely to be deemed more believable than the employer.

Second, actual practices should be adopted which provide clear and bright deviation from the "land mines" of the cases finding compensable "on call" time. Once we start to impose restrictions on employee time or how they may use it, we open the door to scrutiny. "

For example. The guards could not have kids, pets or alcohol in the trailers. They could not have adult visitors, unless they were pre-screened. And they couldn't leave the construction site unless a replacement could be brought in. All of these restrictions were intended to make them available on the spot, should the need arise, and to serve the deterrent function of a guard on site. So even if they were free to watch TV, they weren't really free to leave and their time was not at their disposal. Thus the court decided that time was more for the benefit of the employer, CPS. Employers will not be restricting their employees to the park during off hours.

Yet a worker who is waiting to be engaged, such as a waitress or cab driver who is on-call for a shift, is probably waiting to be engaged – assuming the only restriction on their time is that they have to have their phone with them. But the guard or emergency worker or phone operator who is told to sleep in a particular place and can't leave that place, even when they're not working? They have to be paid for that time, because they're not really free to do what they'd like with

their time.⁵

So it comes down to both the quantitative and qualitative extent of restrictions placed on managers during "on-call" time.

If the only requirement is that they must be reachable by phone, then it is not paid time.⁶ If you are required to carry a cell phone or you're allowed to leave a message where you can be reached, you may not have to be paid unless you are actually called. The Department of Labor gives this example:

An assisted living facility has four LPN wellness coordinators who are paid hourly. They rotate being on call each week. They are required to carry a cell phone and be within 45 minutes of the facility when they are on call. They are not paid for all time spent carrying the cell phone but are paid for time spent responding to calls and time when they have returned to work at the assisted living facility. However, remember that California law goes further than federal law in protecting employees and it's not certain that a California court would concur with this example.

● CONCLUSION

The new *Mendiola* case changes the rules for "on-call" time for park managers. "On-call" obligations that put restrictions on what managers may do when "on-call" may be a thing of the past. It is still permissible to require managers to be available by phone, but any greater tether requires close scrutiny.

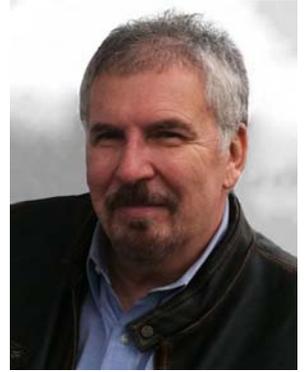
How do you decide? Start with the Court's own list of questions. Park owners will need to be able to demonstrate a good faith effort to comply with wage laws. One way to do that is to make sure your employment agreements are specific and detailed in terms of what is – and what is not – expected during "on-call" time which would keep your practices away from the holdings in our recent case.

⁵ *Armour v. Wantock*, 323 U.S. 126, 1944; *General Electric Co. v. Porter*, 208 F. 2d 805 (9th Cir.1953), cert. denied, 347 U.S. 951, 975 (1954); *Central Mo. Telephone Co. v. Conwell*, 170 F. 2d 641 (8th Cir 1948).

⁶ *Henry v. Med-Staff*, 2007 U.S. Dist. LEXIS 49853, 28 (2007), *Berry*, 30 F.3d (9th Cir. 1994).

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Please feel free to contact Terry R. Dowdall, Esq., for further information and questions.



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