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Court Redefines Standard For Employers To Designate A "Workweek" For Overtime Purposes And Broadly Interprets "Hours Worked" For On-Call Employees

In a recent decision having broad implications for employers, the First Appellate District of the California Court of Appeal in *Seymore v. Metson Marine, Inc.* (April 14, 2011, ___ Cal.App.4th ___, Case No. A 127489), reversed summary judgment for the employer after finding that the employer's designation of the workweek denied employees their right to overtime compensation under the Labor Code. The Court also found that the employees were due additional overtime pay for time spent "on call" because the employer exercised a sufficient level of control such that the time should qualify as "hours worked."

In this case, the employer provided crew members for offshore oil spill recovery vessels that were prepared to respond to emergency oil spills 24 hours a day. Crew members on the employer's ships worked on 2-week rotational hitches, i.e., 14-day hitches, alternating with 14-day rest periods. Each 2-week schedule started on a Tuesday at noon and ended at noon on the Tuesday 14 days later. The employees were paid to work a 12-hour daily shift during this 2-week period, except on crew change days, when they worked only 6 hours. They were paid their regular hourly rate for the first 8 hours and time and a half for the additional 4 hours of each 12-hour shift.

The remaining 12 hours in each 24-hour period were designated as "off-duty." The employer designated 8 hours of the "off-duty" time as sleep time, 3 hours as meal times and 1 hour as free time. During the "off-duty" time, the employer required employees to be on "standby." Crew members could leave the boat during their "off-duty" time, but were required to carry a cell phone or pager and be able to return to the ship within 30 to 45 minutes of an emergency call. The employer provided sleeping quarters for the crew who were required to sleep on board the vessels. Though it seldom occurred, if an emergency was reported while crew members were asleep, they were required to respond and return to work. They were also prohibited from consuming alcohol at any time during the 14-day hitch.

The employees filed a lawsuit seeking to recover unpaid overtime wages for both the time worked on the seventh consecutive workday and for the 12 hours that they were "on-call" each day.

On the first issue, the employees argued that the employer violated the Labor Code by

failing to pay them a seventh-day premium on both the 7th and 14th days of each hitch. Labor Code Section 510 requires overtime for "the seventh day of work in any one workweek." Section 500(b) defines a "workweek" as "any seven consecutive days, starting with the same calendar day each week. 'Workweek' is a fixed and regularly recurring period of 168 hours, seven consecutive 24-hour periods."

The Court found that it was undisputed that the employees worked a regular 14-day schedule beginning at noon on Tuesdays and ending at noon 2 Tuesdays later. Consistent with the workweek used by many employers, the employer calculated overtime pay on the premise that the workweek began at 12:00 a.m. on Monday and ended at 11:59 p.m. the following Sunday. Under the employer's calculations, the employees worked 6 days in the first workweek, 7 days in the second workweek, and 2 days in the third workweek. Based on the Monday-Sunday workweek, they were paid a single seventh day premium at the end of the second workweek.

The employees thought this was incorrect and argued that the premium pay must be calculated based on the "fixed and regular" schedule actually worked. They claimed that the employer should not be able to designate "an artificial workweek that does not correspond with the period actually worked." They thus asserted that the workweek actually began and ended on Tuesday and that they were entitled to overtime wages for work performed on the 7th and 14th days of each hitch.

The Court of Appeal agreed and declared that while an employer has some latitude in designating the "workweek," it may not do so in a manner designed to evade overtime requirements. In fact, the Court stated that "an employer may designate a workweek used to calculate compensation that differs from the work schedule of its employees only if there is a bona fide business reason for doing so, which does not include the primary objective of avoiding the obligation to pay overtime."

The implications of the Court's holding are significant because it calls into question the long-standing practice by employers of establishing a uniform "workday" and "workweek" for employees who work a variety of different schedules in order to efficiently administer payrolls and consistently compute overtime without the need to use different workdays and workweeks for different employees depending on their schedules. The Court's ruling suggests that an employer cannot have a single workweek or workday where employees work and "observe" varying schedules. While this ruling may not be the final word on this issue, employers should consult with experienced legal counsel to discuss the implications of this decision on their wage and hour and payroll practices.

On the second issue of "on call" time, the employees claimed that they were entitled to additional compensation for "on-call" hours worked in the course of their 14-day hitches. The employees argued that, in addition to pay for their 12-hour shifts, they were entitled to overtime for the 12 hours they were on standby each day because the restrictions imposed during that time period subjected them to continued control by the employer.

The Court explained that the term "hours worked" means 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. The Court examined the various factors that are considered in evaluating the level of control exerted by the employer, including (a) whether there was an on-premises living requirement; (b) whether there were excessive geographical restrictions on employees' movements; (c) whether the frequency of calls was unduly restrictive; (d) whether a fixed time limit for response was unduly restrictive; (e) whether the on-call employee could easily trade on call responsibility; (f) whether use of a pager could ease restriction; and (g) whether the employee had actually engaged in personal activities during call in time.

The employees were required to sleep at the employer's premises. In addition to their 12 hour shifts, 8 of the remaining 12 hours of off-duty standby time was allocated for sleeping aboard the ships. If employees left their ship during their standby time, they had to be able to return within at most 45 minutes. The employees also could not consume alcohol.

After evaluating the relevant factors cited above, the Court found that the employees were subject to the employer's control and should be compensated for the 4 hours of standby time that they were not sleeping. The Court's finding hinged on the fact that the employees were required to sleep on the ship.

Nonetheless, the Court determined that the employees were entitled to only 4 hours of pay for the "on call" time because the employer and employee had entered into an agreement to exclude the 8 hours of sleep time from hours worked. The Court noted that such an agreement to exclude up to 8 hours of sleep time from work for compensable time on 24-hour shifts, which need not be written, is permissible if adequate sleeping facilities are provided. Finding these requirements met here, the Court held that the employees were only entitled to overtime pay for the 4 hours of standby time when they were not sleeping.

This case provides further guidance for employers who have "on-call" employees, particularly those that require employees to sleep on the premises during extended shifts. Employers should consult with counsel to evaluate whether they are properly paying employees for "on call" time, and whether they can deduct the time employees spend sleeping from compensable time.

Authored by Sheppard Mullin's [Labor & Employment Practice Group](#).