IV. Determining "Hours Worked"

- **Generally**
  - It is critical to understand what constitutes "hours worked" under California law in order to properly pay minimum wage and overtime, and otherwise comply with wage and hour laws. If an employee's time counts as "hours worked" that time must be paid in accordance with California law.

  - All Wage Orders have a general definition of "hours worked" as time during which an employee is suffered or permitted to work for the employer, whether or not required to do so. Hours worked includes the time that the employer knew or should have known the employee was working, whether such time was authorized or not. For example, if an employer has a policy that overtime is not allowed unless it is authorized in advance and the employee, nevertheless, works overtime and the employer knows about it, the employer may discipline an employee for not complying with the employer's rule, but must pay the employee for that overtime in accordance with California law.

  - Wage orders 4 and 5:
    - In Wage Orders 4 (the more general wage order) and 5 (facilities) the applicable standard to determine "hours worked" is based on whether the employee works in the "health care industry."

    - "Health care industry" in Wage Order 4 includes anyone providing patient care or regularly working as a member of a patient care team. Wage Order 5 defines "health care industry" as including hospitals, residential care facilities, convalescent institutions and "home health agencies." Wage Order 4 and 5 define "health care industry" a little differently, but both definitions should include employees working for Home Care Aide Organizations, Home Health Agencies and Hospice.

    - For employees working in the "health care industry" under Wage Orders 4 or 5, "hours worked" is interpreted in accordance with the provisions of federal law. Federal law differs from California law in how it defines hours worked, especially in the context of sleep time and meal periods. For example, federal law does not include some sleep time as "hours worked" unlike California law. (See discussion below regarding sleep and other nonproductive time; See also "Table 1: Hours Worked," at the end of these materials.)

    - For employees NOT working in the "health care industry" under Wage Orders 4 or 5, "hours worked" is defined by California law. As a general rule, under California law, all time an employee is required to be at the worksite (premises or facility) is "hours worked" even if the employee is free to engage in personal pursuits, such as watching television or sleeping. Except that under Wage Order 5 (facilities), for all employees who are required to reside on the premises, only the time spent carrying out assigned duties counts as "hours worked." Therefore, the

time an employee who is required to reside on the premises and is covered by Wage Order 5 spends engaging in purely personal pursuits such as entertaining, watching television, etc. does not count as hours worked unless the person is simultaneously carrying out assigned duties. (Wage Order 5, §2K) Reside on the premises, in this context, means that the employee actually lives on the premises permanently or for an extended period of time, not just that the employee is provided a bed.

- Wage Order 15 (occupations in a private households): "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 or not required to do so." Therefore, the time an employee is required to be at the worksite (private household) is "hours worked," even if the employee is free to engage in personal pursuits.

Sleep time as ''hours worked"

- Wage Orders 4 and 5, for employees working in the "health care industry" "hours worked" is interpreted according to federal law, therefore:

  – Employees residing on the employer's premises on a permanent basis or for extended periods of time are not considered working all the time they are on the premises. (Code of Federal Regulations 785.23) For example, an employee is not considered working while he pursues normal private pursuits such as eating, sleeping, entertaining or otherwise being completely relieved of all duty, including the duty to provide general supervision.
  It is an open question whether residing on the premises of the employer's client qualifies as residing on the "employer's premises" for purposes of this regulation.

  – Employees required to be on duty for 24 hours or more (Code of Federal Regulations (CFR) 785.22)

  -- Federal law allows for up to 8 hours of sleep time to be deducted from "hours worked," provided: the employer and employee agree to exclude a bona fide regularly-scheduled sleeping period of not more than 8 hours; adequate sleeping facilities are furnished by the employer; and, the employee can usually enjoy an uninterrupted night's sleep.
  --If the sleep period is more than 8 hours, only 8 hours will be credited.
  --Where no expressed or implied agreement to the contrary is present, the 8 hours of sleep time constitute hours worked. As such, it is important to have written agreements with employees regarding working hours and sleeping hours.

-- If the sleeping period is interrupted by a call to duty, the interruption must be counted as hours worked and compensated.
-- If the period is interrupted to such an extent that the employee cannot get a reasonable night's sleep, the entire period must be counted as hours worked. For enforcement purposes, federal law considers that if the employee cannot get at least 5 hours uninterrupted sleep during the scheduled work period the entire work period is hours worked.

– Employees working less than 24 hour shifts: All sleep time counts as hours worked (Code of Federal Regulations (CFR) 785.21)

- Wage Orders 4 and 5, for employees NOT in the "health care industry" If the employee is required to remain on the premises, the time counts as hours worked. This includes time the employee spends sleeping, UNLESS the employee is required to reside on the premises and is covered by Wage Order 5.
- Wage Order 5 (applicable to facilities), all employees: If an employee is required to reside on the premises, only the time spent carrying out assigned duties counts as "hours worked," therefore, sleeping is not counted as hours worked. (Wage Order 5, §2K). But employees should sign a written agreement detailing their assigned duties, work hours, and other terms of employment.
- Wage Order 15 (occupations in a private household): If the employee is required to remain on the premises, the time counts as hours worked because Wage Order 15's definition of "hours worked" is based upon California law. This includes time the employee spends sleeping. Under the *Mendiola* decision, it is advisable to pay for sleeping time. (*See* discussion in Frequently Asked Questions section, above.)

On-call time: When time spent on-call counts as "hours worked".

- If an employee is on call and is not completely relieved of all duties or cannot effectively use the on-call time for his or her own purposes, that time may be "hours worked" and thus subject to all of the wage requirements of California law.

- There is no bright-line test for whether on-call time is compensable. The analysis is very specific to the factual situation presented, but looks at the overarching concept of whether the time spent on-call is predominantly for the employer's benefit or primarily for the benefit of the employee. The following factors are looked at:

  – The geographical restrictions on the employee's movements;
  – The frequency of the calls to work;
  – Whether there is a fixed time limit for response and if so, how restrictive it is;