California's '7th Workday' Rule Poses Unexpected Overtime Consequences

Under California law, all hours worked on the seventh consecutive day of a workweek must be paid a premium of one-half of the employee's regular rate for each hour worked.[1] In a California workplace where employees are scheduled to perform regular work activities on seven consecutive days (in the same workweek), the requirement of paying this "seventh day premium" is clear. Increasingly, however, California employers are encountering demands for seventh day overtime payments—often in conjunction with litigation alleging off-the-clock ("OTC") work time—that presents surprising, and potentially costly, unpaid overtime claims. This note demonstrates how seventh day overtime work claims may appear and suggests a practical solution that California employers can take to avoid them.

Consider an employee whose company workweek begins each Saturday at 12:01 a.m. and ends seven days later, at 12:00 a.m. the following Saturday. Assume this employee is scheduled to work five shifts within the workweek, beginning each workday at 4:00 p.m. and ending at 12:00 a.m. Further, assume the employee is to work Saturday, Monday-Tuesday and Thursday-Friday, with days off on Sunday and Wednesday. If the employee observes a 30-minute unpaid meal break each work day, under California law there is no daily overtime premium required (since no day involves more than 7.5 hours of work) and no weekly overtime applies to any workweek, since paid time for the workweek is 35.5 hours—well under the 40-hour mark where hourly overtime premium payments would commence.

This hypothetical employee's work week appears in Figure 1, below, where each shift is shown beginning and ending above a highlighting arrow:

Figure 1
Scheduled Hours, Saturday through Friday

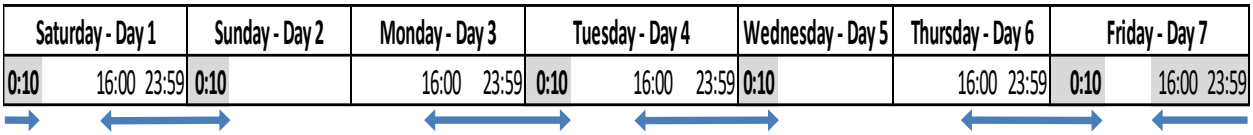
Saturday - Day 1	Sunday - Day Off	Monday - Day 2	Tuesday - Day 3	Wednesday - Day Off	Thursday - Day 4	Friday - Day 5
16:00 23:59		16:00 23:59	16:00 23:59		16:00 23:59	16:00 23:59

[1] See *California Labor Code*, Section 510, (a) "Eight hours of labor constitutes a day's work. Any work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek *and the first eight hours worked on the seventh day of work in any one workweek* shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee" (emphasis added).

Now suppose that an allegation is made by the employee that 10 minutes of off-the-clock time occurs at the end of his or her shift each workday—perhaps due to required "cleanup time," perhaps because the employee participates in a post-shift safety meeting or some other shift-related activity, such as waiting for a bag check to be performed.

At first glance, it might seem that such an off-the-clock claim gives rise to no overtime consequences, because 1) no workday yet involves more than eight hours of work (since even if proven, ten additional minutes of work per day does not lead to more than eight hours of compensable time) and 2) even including an extra 50 minutes of work per week would not lead to more than 40 hours of total compensable time requiring payment. But observe how the work week appears in the same diagram as above, with the modified work time that is alleged:

Figure 2
Alleged Work Hours, Including OTC Time (Bolded)



Based of the work activities shown in Figure 2, the employee can now be seen to work on a part of each of the first six consecutive work days of the workweek, followed by 7.5 hours of work on the seventh day. According to California law, all of these seventh-day hours must be paid at rate of 1.5 times the employee's hourly regular rate. This requirement of an overtime premium is not trivial in Figure 2, because it is not the claimed OTC minutes that require a premium payment, but *rather an entire, scheduled shift of 7.5 hours plus one 10-minute segment* worked on the seventh consecutive workday, as shown.

The assertion of overtime work on the workweek's seventh day rests entirely on the proposition that the ten minutes worked on Day 2 and another ten minutes worked on Day 5 actually constitutes two "days" of work, which will strike some as unreasonable.[2] Even if future legal authority determines what a minimum number of minutes constitutes a "day's work," any work shift that crosses the line separating two arbitrarily-defined work days (thereby distributing one shift's time over two workdays) must be accounted for when evaluating workweek overtime requirements in California.[3]

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[2] In spite of language in Section 510 describing a "day's work" as being eight hours, regularly scheduled shifts of less than eight hours (daily part-time work) can clearly constitute a day's work because it is the only shift worked that day. At this time, the minimum number of minutes that can constitute a day's work, or even a work shift, is undecided.

[3] Note that the prevalence of shifts crossing workday boundaries can have implications for daily—as well as weekly and seventh day overtime—when changes to an employer's defined workweek are being considered.

Can the potential appearance of seventh day overtime—at least as demonstrated above—be eliminated on a going-forward basis? The simple answer for employees working a five-day workweek is yes, because even firms operating on a 24-hour basis (when at least one employee must be present) can schedule work shifts such that every employee observes *two consecutive 24-hour days off per workweek.* Employers who regularly schedule work on six workdays per workweek would be advised to ensure that not only is one 24-hour workday to have no work scheduled in a workweek, but also that the ending time on a shift prior to the scheduled work day be far enough away from the beginning point of the off day that potential off-the-clock claimed activities will not lead to the appearance of unexpected seventh day work.

Additional consideration should also be given to any work activities that arguably occur outside of the workplace, such as checking work email or making work-related calls on an employee's day off. These activities are not uncommon and may be alleged to constitute (off-the-clock) work. Even if activities such as these might take as little as five or ten minutes per day of an employee's time, they could conceivably trigger unexpected seventh day overtime. Thus, employers, as a matter of policy, should ensure that employees understand that they are not to perform work activities on a scheduled day off if they are to avoid potential claims under California's "seventh day" law.

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