
Coates' Canons Blog: Waiting to Be Engaged or Engaged to Wait? When is On-Call Time Compensable under the FLSA?

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Most local governments require at least some employees to be on-call to return to work in the event of an emergency. Departments with on-call requirements may include water, sewer and other utilities, public works, law enforcement, fire, EMS, emergency management, social services and information technology. Whether such employees must be paid for the time they are on-call time can be a vexing question. This blog post sets out the Fair Labor Standards Act rules governing compensation of on-call time.

Background

Both employees who are exempt from overtime and nonexempt employees may be scheduled for on-call duty. Employers never have to pay exempt employees for on-call hours, regardless of whether they perform any work during that time or not. Exempt employees are by definition paid on a salary basis and are never entitled to any additional compensation beyond their regular salary, no matter how many hours beyond their stated schedule they may work. (On exempt employees see [here](#), [here](#), [here](#), [here](#), and [here](#); on what it means to be salaried, see [here](#)).

Nonexempt employees are another matter. They must be paid for all of the hours they work and, when they work more than 40 hours in a single workweek, they are entitled to time-and-one-half overtime premium pay. But what about time spent on-call? Is it “work” that counts toward the 40 hours necessary for overtime? Is it time-and-one-half “work” after 40 hours? Here’s how to figure it out.

The DOL’s On-Call Regulation

The U.S. Department of Labor’s (DOL’s) FLSA regulations devote only one section to on-call time, 29 CFR § 785.17, which reads:

An employee who is required to remain on call on the employer’s premises or so close thereto that he cannot use the time effectively for his own purposes is working while “on call”. An employee who is not required to remain on the employer’s premises but is merely required to leave word at his home or with company officials where he may be reached is not working while on call.

In interpreting this section, DOL’s Wage and Hour Administrators and the federal courts have said that in determining whether a nonexempt employee must be paid for time spent on-call, the most important question is whether the time is being spent primarily for the benefit of the employer or the employee. In other words, as a practical matter, can the employee, while waiting for a call, use the time for his or her own benefit? Time can still be considered for the employee’s own benefit even where employers impose some restrictions on employees who are on-call – such as requiring them to abstain from alcohol consumption. Modest restrictions do not make on-call time compensable.

Factors in Determining the Compensability of On-Call Time

The fact that employees may not use on-call time precisely as they might wish or even that they may have to spend some time at home that they otherwise might spend elsewhere does not by itself turn on-call time into compensable time. Nor does the frequency of calls. Determination of whether on-call time must be paid is made by consideration of a number of factors in light of all of the circumstances. Factors include:

- any agreement between the employer and employee;
- whether the employee may carry a phone or beeper and leave home or whether the employee must remain in one place;
- how quickly an employee must take action in response to a call, whether that action involves driving back to the workplace or taking some action electronically – the shorter the response time, the more likely it is that the on-call time is compensable;
- whether employees can easily trade on-call shifts;
- how restricted the employee is geographically;
- the extent to which an employee is able to engage in personal activities; and
- the number and frequency of calls during an on-call period in relation to the time spent without having to respond to calls.

On the relevant factors, see, for example, [here](#) and [here](#). Reported cases provide a far greater number of examples in which on-call time has been found not to be compensable than they have examples of compensable time.

Some Examples of Compensable On-call Time: Engaged to Wait

In a 2000 case involving a utility company as employer, the U.S. Court of Appeals for the Tenth Circuit found that electronics technicians employed by a gas and electric company were entitled to compensation for on-call time. The technicians were on call to monitor building alarms weekdays from 4:30 p.m. to 7:30 a.m. and 24 hours a day on weekends – in other words, they were on-call whenever they were not on-duty. Each technician typically fielded three to five calls per on-call period. The technicians did not always have to return to the workplace, but when they did not have to do so, they had to take action by computer within 15 minutes.

In an earlier 10th Circuit case involving municipal firefighters, the court found on-call time compensable where the firefighters were called back into work an average of three to five times per 24-hour on-call period and were required to report to the station house within 20 minutes. The firefighters could trade on-call shifts only with great difficulty and were effectively precluded by their schedules from obtaining a second job. Indeed, the court found that they could not effectively use their on-call time for personal pursuits at all.

Finally, in a federal appeals court case from Arkansas, the court found on-call time compensable for state forestry service firefighters who were required to remain within 50 miles of their work site while on-call and had to respond to an emergency call within 30 minutes. The firefighters were on-call 24 hours per day and could not, therefore, trade shifts. In addition, they were unable to take part in social or other activities that did not allow them to simultaneously monitor radio transmissions.

In each of these three cases, the employer scheduled employees for long stretches of on-call with little opportunity for relief under circumstances in which the employees regularly received at least a handful of calls that required some action on their part during every on-call shift. Two of the three cases feature response times on the order of 15-20 minutes, and in two of the three cases the court expressly found that number of calls and relatively short response time rendered the employees effectively unable to use the on-call time for their own purposes.

Some Examples of On-call Time That Is Not Compensable: Waiting to Be Engaged

Law enforcement officers and firefighters figure predominantly in on-call cases. The practices of the jurisdictions represented in these cases vary substantially, which allows us to gain a better idea of why in most instances on-call time is not compensable. The most important factors in rendering on-call time noncompensable appear to be:

- the ability of employees to trade on-call shifts,
- the ability of employees freely to move about geographically when a cellphone or pager is used as the method of

contact,

- the relative frequency of calls that necessitate a response from the on-call employee, and
- whether or not the employee was, in fact, able to engage in personal activities.

In *Whitten v. City of Easley*, an unpublished 2003 case from the federal Fourth Circuit Court of Appeals (which covers North Carolina), the court found that municipal firefighters' spent their on-call time predominantly for their own benefit and were not entitled to compensation. The court reached this conclusion because 1) firefighters were on-call only to respond to relatively rare second-alarm calls, 2) firefighters were allowed to trade on-call shifts, 3) firefighters carried pagers 4) firefighters responded to an average of only 6 second-alarm calls per month, and 5) the fire department did not require firefighters to respond to a set percentage of second-alarm calls. See *Whitten v. City of Easley*, 62 Fed. Appx. 477 (4th Cir. 2003).

Similarly, in *Ingram v. Cty. of Bucks*, the Third Circuit held that where county sheriffs were not required to remain at the sheriff's office or wear their uniforms, carried beepers, could trade on-call shifts, and experience call frequency that was not so great as to keep deputies from engaging in personal activities, on-call time was not compensable.

Even a five-minute reporting time does not render on-call time compensable where the other factors give employees the freedom to pursue their own interests. In one small Iowa town, EMTs had the ability to choose which shifts to be on-call. In the majority of on-call shifts, two EMTs worked two or fewer hours of their twelve hour on-call shift and one EMT did not have to respond to single call during fifty-five percent of his shifts. The second EMT did not respond to a single call during thirty-nine-five percent of his shifts. Because this was a small town, the EMTs lived less than a five-minute drive from the EMS station where they worked and even when they were not at home while on call, the town's small size meant the EMTS could freely move around town and engage in number of personal activities quickly and efficiently.

Two other cases in which the court emphasized the infrequency with which employees were actually called back are *Reimer v. Champion Healthcare Corp.*, and *Dinges v. Sacred Heart St. Mary's Hosps., Inc.* The *Reimer* case involved on-call nurses, who were required to be reachable by telephone or beeper, and had to be able to report to hospital within 20 minutes. Other than a requirement that they abstain from alcohol or recreational drug use, the nurses could do what they pleased while on call. The court noted that over a three-year span, only about one-quarter of nurses were called in more than once during their scheduled on-call times. In the *Dinges* case, rural EMTs were required to report into the hospital within seven minutes of a page. The court nevertheless found the on-call time not to be compensable, primarily because EMTs had less than a 50% chance of being called in any 14- to 16-hour time period.

Conclusion

Evaluating whether on-call time is compensable should be an on-going project, not a once-and-done determination as the relevant circumstances may change over time. Employers should periodically investigate how frequently on-call employees are being called to take action or to return to work. Employers should also know whether employees do, in fact, engage in personal pursuits while on-call. Those in charge of determining compensable time should know not only whether there is a standard reporting time, but also whether the department penalizes employees who do not meet the reporting standard, as this may be a factor in making the time compensable. Even if supervisors prefer having regular, assigned on-call shifts, human resources should encourage all departments to allow employees to trade on-call shifts.

Links

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