

THOSE “BLEEPING” BEEPERS: ON-CALL DISPUTES CREATING MORE LITIGATION DANGERS

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Blackberries, cell phones and pagers – are they a source of freedom and flexibility or are they just too darned restrictive? The question is not just a philosophical one. From a practical standpoint, many employers are learning that the wrong answer could be costly.

As the frequency of wage-and-hour lawsuits, especially collective actions, keeps growing, a new battleground seems to be growing. Although many employers provide some sort of compensation for time spent on call, the Fair Labor Standards Act does not require that non-exempt employees receive any such compensation, as long as they remain generally free to engage in personal endeavors.

But some employees are claiming that their on-call assignment is so restrictive that they should be considered “on duty” and therefore entitled to their hourly wage (including overtime pay). In the healthcare industry, where workers are regularly on-call, this can be an especially troublesome dilemma.

Familiar Scenarios – New Focus

On-call schedules and beepers are certainly nothing new in the world of healthcare. We have relied on these tools for many years. What is new, however, is the effort that plaintiff’s lawyers are devoting to generating litigation in this area. Some are using slick websites to recruit would-be clients for free consultations. That’s why it is so important to

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monitor your facility's policies and practices, to avoid problems before they mushroom.

The particular facts may vary, but the question comes down to whether non-exempt employees are so restricted by on-call duties that they are effectively working extra hours without pay. Examples of such disputes lawsuits abound.

Recent Lawsuits

This year, a maintenance worker in Wisconsin claimed unpaid wages for time spent receiving and responding to messages while away from work. He received the messages on his employer-issued blackberry, pager, and cell phone. He was allegedly required to respond within 15 minutes.

In California, medical equipment service reps claimed they should be paid for on-call time because it interfered with their time off. Among other things, they had to respond to customer inquiries within 30 minutes, respond to service calls within two hours, and were not permitted to drink alcohol while on call. The employees were allegedly instructed not to record any time for patient calls that could be resolved by telephone.

In another lawsuit, plaintiffs alleged that their employer required them to be on call during meal breaks; stay on the premises, in uniform; and be immediately available for work. This scenario is all too familiar for hospitals and clinics. (See the accompanying article in this newsletter.)

Protecting Your Facility

In the face of this new scrutiny of on-call time, how do you safeguard your facility?

Start by reviewing your policies. If you do not have a policy regarding on-call work, consider developing one. An effective policy will not be so restrictive that employees have little freedom to use their time off for personal endeavors. How do you know if your on-call policy is too restrictive? Here are some factors to consider:

- Overly restrictive geographic limitations – requiring employees to be within a one-hour drive is probably not overly restrictive, requiring employees to remain within a five-minute drive from the work site, or requiring them to remain on the work site, probably is. If so, the on-call time would be considered compensable time worked.

- Other restrictions on movement, such as requiring an employee to remain at home near a telephone are risky. Providing cell phones or pagers can obviously alleviate this concern.
- Do not require an employee to return telephone calls within too-short a period of time. Again, there is no bright line rule, but requiring telephone calls to be returned within 30 minutes has been found not to be overly restrictive. A 5-minute requirement probably would be.
- Is the employee required to wear a uniform? This is a strong indication that the employees' off-work time is not their own.
- How many telephone calls or work-related interruptions does the employee experience while on-call? Frequent calls or requirements to perform work-related tasks mean the employee has little freedom to enjoy off-work time and probably should be compensated for the on-call time.
- May employees trade on-call shifts among themselves?

Although this list is by no means exhaustive, you should consider these factors, at a minimum, when evaluating or developing an on-call policy.

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