



Compensability Of On-Call Time

Insights

11.01.10

(Healthcare Update, No. 4, November 2010)

Work in the healthcare industry is unpredictable, and patient care is provided 24 hours a day, seven days a week. Ceiling leaks, staff illnesses, and patient emergencies can't be contained to the normal day-time work hours. As a result, many employers have on-call policies and procedures that allow them to effectively respond to off-hours demands.

Under such policies, on-call employees are expected to report in to work within a designated period of time ready to perform their job duties. As a result, on-call employees are often restricted in their ability to travel out-of-town, prevented from consuming alcohol, and must be reachable by phone or pager. Whether such restrictions make the time spent on call compensable under the federal Fair Labor Standards Act (FLSA) or state law is a fact-specific inquiry that must be evaluated carefully to avoid liability for unpaid wages.

Federal Court Finds Nurses' On-Call Time Not Compensable

This past spring, a federal court in Wisconsin considered whether a private, not-for-profit hospice violated the FLSA by not paying nurses minimum wage while they were on call. On-call nurses were expected to carry a cell phone and pager, remain in the service area (a radius of 30-35 miles), return a call from the triage nurse within 15 minutes, and refrain from drinking alcohol. The nurses were on call one to two shifts a week and averaged just under one call per shift. The nurses maintained that they were not able to effectively use their on-call time for personal purposes such as completing household chores or going to dinner with friends, and that the failure to pay them for on-call time was a violation of the FLSA.

While the court recognized that the on-call shifts posed some meaningful restrictions on the nurses' ability to engage in personal activities, such as traveling out of town, the restrictions were not so onerous as to convert the on-call time to compensable "working time." In particular, the court noted that "[n]o doubt they would not want to plan to attend an expensive non-refundable rock concert during a call shift, but [the nurses] [did] not explain how a local shopping trip or a typical casual dinner out would be so impractical If one has to cut short a trip to the store every once in awhile, that is hardly a reason to forgo even *trying* to go shopping."

The court noted that the nurses were not required to immediately drop everything and rush to work for an emergency, but rather were given a 15-minute window in which "to finish a chapter in a book,

change the laundry, finish a meal, click 'send' on their email, etc." before contacting the triage nurse for the call. The court's analysis emphasized the actual impact on nurses' schedules and discounted the nurses' "own subjective reactions to the on-call regime."

The judge issuing the decision wrote, "I conclude that [the nurses] complaints about [the employer's] call policy are based largely on their own, somewhat idiosyncratic reactions to the policy rather than any requirements that the policy would impose on a typical person." The court found the employer's policy did not unduly restrict an average person's use of the time, and dismissed the FLSA claim.

Standard For Determining Compensability

As demonstrated by the Wisconsin case, not all time spent on call by employees is compensable. Rather, employees must be compensated only when they are deemed to be "working" while on call. That, in turn, depends on how much control the employer exercises while the employee is on call and whether employees can effectively use the time for their own purposes.

If employees' activities are so restricted that they cannot use the time to run errands, make dinner, do chores, or attend a child's soccer game, they will be considered to be "working" or "engaged to wait" and must be paid. On the other hand, if employees are free to use their time to engage in their ordinary, daily activities, subject to reasonable restrictions, the law does not require that they be compensated.

Reasonable restrictions on the employee (for example, a no-drinking-alcohol rule) will not convert on-call time into compensable hours worked. But litigation arises over the question of when on-call requirements and restrictions become so onerous as to prevent employees from using their time effectively for personal purposes. The difference depends on the unique circumstances and restrictions of each on-call policy.

Factors To Consider

Some factors considered by the courts and DOL include the following:

- the frequency of calls during the on-call period;
- the time limit provided to respond;
- the geographic restrictions placed on the employee;
- the ability to trade or swap on-call responsibilities, and the amount of advance notice of assigned on-call time periods;
- the use of a pager or cell phone to contact on-call employee (e.g. whether an employee is expected to continuously monitor radio traffic for a call vs. employees being issued a pager that will notify them of calls); and
- the employees' ability to engage in personal activities during on-call time periods

No one factor is determinative and the list is not exhaustive.

Best Practices

To minimize the risk of liability, you should provide employees as much advance notice of on-call schedules as possible and, if possible, provide an opportunity for employees to trade or swap assignments so that on-call schedules impede on personal activities as little as possible. Additionally, on-call employees should be issued a pager, cell phone, or personal digital assistant (e.g. Blackberry) during on-call periods to allow them to travel freely in the local area to run errands, eat meals, and attend school events.

The response time should be reasonable and take into consideration the average commute time and other unique factors. While it is permissible to prohibit employees from drinking during on-call time, restrictions on other activities during on-call time should be minimal.