

## **PAYING OFFICERS FOR “ON-CALL” TIME**

By

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As a general rule, a non-exempt employee must be paid for on-call time if such time is predominantly for the employer's benefit. The fact that an employee must remain available for recall, in and of itself, does not require that such off-duty, on-call time be compensated. It is the degree of restriction placed upon an employee's ability to engage in personal pursuits which will be determinative of whether an obligation to pay for such off duty time arises.

The Supreme Court first addressed the issue in 1944. The DOL regulations citing that case and other federal cases, state:

“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.”

### ***Restrictions on Movement***

Requiring an officer to remain at home and in uniform, ready to respond immediately would certainly require compensation.<sup>i</sup> However, employees who are free to pursue personal interests, be with their families or carry on another business are far less likely to be eligible for compensation. Requiring an off-duty employee to carry a beeper or leave a phone number where he or she can be reached at all times, by itself, is not enough to trigger a requirement for compensation.<sup>ii</sup> In fact, one court felt that wearing a beeper was something an employee could do to minimize the effect of the employer's restrictions.<sup>iii</sup>

### ***Response Time***

Where employers require a response within a very short period of time, there is a greater likelihood that on-call compensation will be required. However, the geography of the community should be taken into account. For example, in a rural area, where an employee could reasonably be expected to reach any location in town within 5-10 minutes, shorter response times might be allowed. However, in a larger city, even a 15-20 minute response time requirement might trigger on-call time pay.

By way of example, EMT's who were required to report to work in 5 minutes were entitled to on-call compensation.<sup>iv</sup> Conversely, in a very small rural community, a 7-minute response time was held not too restrictive.<sup>v</sup>

### ***Frequency of Calls***

The courts are inclined to consider evidence of the actual number of calls to which an off-duty employee responds over a given period of time. Firefighters were found entitled to on-call compensation where, on average, there were three to five calls of one (1) hour duration per 24 hour on-call period. In fact, there were as many as thirteen (13) calls on some 24 hour on-call shifts.<sup>vi</sup> In this case the 20 minute response rule meant that firefighters often had to plan their personal lives accordingly, taking 2 vehicles and hiring stand-by baby sitters.

An opposite result was reached in an opinion letter rendered concerning on-call firefighters who were governed by a 15-minute response requirement. The difference was that in the latter case, firefighters were rarely called.<sup>vii</sup> In the same vein, a regional (less authoritative) Wage and Hour opinion Letter indicated that no compensation was required where there was no more than one call per two-hour period of on-call time.<sup>viii</sup>

### ***Actual Use of On-Call Time***

Where courts learn that on-call employees are able to use their on-call time for substantial personal endeavors, they are less inclined to order compensation. EMT's who were able to run their own independent businesses while on-call or to pursue personal hobbies, were ruled not entitled to on-call compensation, even though there was a 10 minute response requirement.<sup>ix</sup>

## ***Public Safety Officials***

Police officers governed by section 207(k) are covered by rules in addition to those discussed above. For example, while sitting at home on-call until being summonsed to court to testify, in a constant state of readiness, officers must be compensated.<sup>x</sup> Conversely, academy attendees are not entitled to pay outside of class hours so long as they are free to use the time for their own pursuits, even if confined to a barracks. In addition, police officers do not become entitled to on-call compensation simply because they are given police cars to take home and use on private business, even where the department requires they keep the radio on and respond to emergency calls.

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<sup>i</sup> See D.O.L. Opinion Letter, September 4, 1987, regarding deputy sheriffs.

<sup>ii</sup> See Wage and Hour Opinion Letters of January 4, 1968, March 12, 1987, September 16, 1987, December 10, 1987, and November 3, 1988.

<sup>iii</sup> *Norton v. Worthen Van Service, Inc.*, 839 F.2d 653 (10th Cir. 1988).

<sup>iv</sup> Wage and Hour Administrator, Opinion Letter, November 16, 1988.

<sup>v</sup> Wage and Hour Administrator, Opinion Letter, September 8, 1988.

<sup>vi</sup> *Renfro v. City of Emporia*, 729 F.Supp. 747, 29 Wage & Hour Cas. (BNA) 1049 (D.Kan. 1990).

<sup>vii</sup> Wage and Hour Administration, Opinion Letter, March 12, 1987.

<sup>viii</sup> Kansas City Regional Wage and Hour Office, Opinion Letter, April 15, 1989.

<sup>ix</sup> *Spires v. Ben Hill County*, 745 F.Supp. 690, 29 Wage & Hour Cas. (BNA) 1545 (M.D. Ga. 1990).

<sup>x</sup> FLSA, 20 C.F.R., §553.14.