

Waiting for Pay

By Lois M. Kosch

Some workers are required to spend time "on-call" - that is, not actively working or on duty, but available. When called, problems may be resolved by logging onto a computer, making on-call duty less onerous than it was in the past. Technology has changed the nature of being on-call, but employers continue to question whether they must pay employees for on-call time.

There is little recent case law on the issue. The bulk of authority dates to the early 1990s when the Division of Labor Standards Enforcement issued a couple of opinion letters and federal courts issued a series of decisions. Appellate judges may once again be called upon to grapple with this issue as claims for on-call waiting time rise, particularly from employees who work in technology jobs. While employers pay their non-exempt employees for time spent responding to calls, most employers pay employees for time they are merely on-call, even though they may never have to respond to a single call or do any actual work?

Both California law and the Fair Labor Standards Act require that employees be paid for "hours worked." Section 2 of California's Wage Orders defines "hours worked" as the time during which an employee is subject to the control of an employer, and includes all time the employee is "suffered or permitted to work, whether or not required to do so." Federal regulations define the term to mean "(a) all time during which an employee is required to be on duty or to be on the employer's premises ... and

(b) all time during which an employee is suffered or permitted to work." (29 C.F.R. Section 778.223.)

There is very little published California case law on the issue of whether on-call time constitutes "hours worked." The Division of Labor Standards Enforcement focuses primarily on the extent to which the employee is subject to the control of the employer. If, while on-call, the employee is so restricted as to be unable to effectively engage in private pursuits, the time is subject to the control of the employer and constitutes hours worked. (DLSE Enforcement Policies and Interpretations Manual, Section 46.6.3.) However, the DLSE recognizes that merely requiring an employee to wear a pager and respond to calls is not so intrusive as to conclude the employee is subject to the employer's control. (See O.L. 1998.12.28 and 1993.3.31.)

Most plaintiffs seeking compensation for time they have spent on-call have had a tough row to hoe, with courts ruling against them in the vast majority of cases. Unless employees are so restricted by on-call duties that they are virtually incapable of engaging in any personal pursuits, on-call time will not be compensable.

The DLSE has favorably cited *Owens v. Local No. 169*, 971 F.2d 347 (9th Cir. 1992), and *Berry v. County of Sonoma*, 30 F.3d 1174 (9th Cir. 1994), which provide helpful frameworks for analysis. In *Owens*, mill mechanics sought compensation for on-call waiting time. The court held that the two predominant factors in determining whether on-



call time is compensable are "(1) the degree to which the employee is free to engage in personal activities; and (2) the agreements between the parties." Analyzing the mechanics' ability to engage in personal activities, the court provided an illustrative list of factors, including (1) whether there is an on-premises living requirement; (2) whether there are excessive geographical restrictions on the employee's movements; (3) whether the frequency of calls is unduly restrictive; (4) whether a fixed time limit for response is unduly restrictive; *continued*

(5) whether the on-call employee may easily trade on-call responsibilities; (6) whether use of a pager could ease restrictions (presumably use of cell phone and laptops would be considered as well); and (7) whether the employee actually engages in personal activities during on-call time.

The *Owens* mechanics were free to engage in their own personal activities while on-call, and while they may not have liked the company's on-call system, by continuing to work they constructively accepted its terms, including not being paid for merely being on-call. As such their waiting time was not compensable.

In *Berry*, deputy coroners sought overtime compensation for on-call time. The court looked to the parties' agreements to determine whether the parties characterized time spent waiting on-call as actual work. The court determined that the coroners had accepted that on-call time was without pay because they either accepted employment knowing the job requirements or continued to work after implementation of the on-call policy)

Next, the court analyzed the coroners' ability to engage in personal activities, applying the same seven-factor test utilized in *Owens*. The coroners were required to answer a call or page within 15 minutes. Since they were not required to report to the employer's premises or anywhere else, the 15-minute response time did not impose an excessive geographical restriction. Moreover, although the coroners were unable to engage in certain pursuits while on-call, their activities were not overly restricted. They admitted they were able to socialize with family and friends, dine out, shop, read, watch television and enjoy hobbies while on-call.

The coroners were called frequently. They typically received a report of a death about every six hours, 24 hours a day, and sometimes had to report to the scene. While the court acknowledged that this high level of calls was

somewhat restrictive, all the other factors, including the absence of an on-premises living requirement, geographical limitations, response time, an ability to easily trade shifts and to actually pursue personal activities, supported an overall conclusion that the coroners were free to pursue personal activities while on-call and thus did not need to be compensated.

The inquiry is not whether employees are prevented from participating in certain personal activities, but whether they actually are able to engage in personal activities during on-call shifts. To go uncompensated the employee must be free to engage in some personal activity, but the law does not require that he have "substantially the same flexibility or freedom as he would if not on-call, else all or almost all on-call time would be working time, a proposition that the settled case law and the administrative guidelines clearly reject." *Berry v. County of Sonoma*.

The fact that the on-call duties may make the position less than desirable does not factor into the analysis. In *Bright v. Houston Northwest Medical Center Survivor*, 934 F.2d 671 (5th Cir. 1991), the court acknowledged that the constant on-call status of the hospital's only biomedical equipment repair technician, who was required to be at the hospital within 20 minutes of receiving a call, made the job "highly undesirable and arguably somewhat oppressive," but nevertheless found "the [Fair Labor Standards Act's] overtime provisions are more narrowly focused than being simply directed at requiring extra compensation for oppressive or confining conditions of employment."

Cases finding on-call time compensable seem to require either extreme sacrifices on the part of the employee (usually because of excessive monitoring requirements) or that responses to calls be at a critical, life-or-death level. In *Renfro v. City of Emporia*, 729 F.Supp. 747 (D.Kan. 1990), the court found on-call waiting

time to be compensable where firefighters had to report to the station house within 20 minutes of being paged, received three to five calls per 24-hour on-call period, and had difficulty securing secondary employment and trading on-call shifts. The court also looked to the nature of the firefighters' work, which required them to "lie in wait for emergencies," thus limiting the extent to which they could use on-call time for their own pursuits.

Similarly, in *Cross v. Arkansas Forestry Comm'n*, 938 F.2d 912 (8th Cir. 1991), forestry service employees were not able to use the call-in time for their own purposes because they were confined to a 50-mile radio transmission radius and could not participate in activities that would prevent them from monitoring radio transmissions. Similarly, on-call time for employees at a hydroelectric power plant in remote Oregon was found compensable despite infrequent actual calls because of strict geographic constraints, the requirement to respond instantaneously and because of the grave risk posed by potential failure of the employer's dams. *Brigham v. Eugene Water & Electric Board*, 357 F.3d 931 (9th Cir. 2004).

Employers may wish to audit any positions they have requiring on-call duty to ensure proper pay practices. It would be helpful to interview employees about the extent to which on-call time restricts their activities and generally impacts the way they spend their on-call time. Take specific note of the activities the employees indicate they do participate in while on-call, keeping in mind that employees do not need to have the same level of flexibility or freedom as they do when not on-call.

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