Payment Obligations under FLSA for “Waiting Time” and “On-Call Time”

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The Fair Labor Standards Act (FLSA), the federal law that governs the payment of wages to employees, is enforced by the U.S. Department of Labor (DOL) Wage and Hour Division. In 2009, the federal government significantly increased the budget of the DOL Wage and Hour Division, resulting in an increase in wage and hour audits.

Employers who are found to have violated the FLSA may be liable for unpaid wages or unpaid overtime compensation, for up to three years. In addition, the employer may be required to pay a penalty equal to the amount it underpaid the employee, so that the employer is essentially liable for “double back pay.” However, this penalty may be waived if the employer can show it acted reasonably or in good faith. In addition to unpaid wages and penalties, employers in violation of the FLSA may be penalized by an injunction requiring them to change their conduct or employment policies.

Along with more frequent wage and hour audits by the DOL, there has been a steady increase in putative class actions for alleged violations of wage and hour laws. A poorly understood area of wage and hour law is the circumstances under which an employee is entitled to be paid for waiting time and/or on-call time. As with many wage and hour areas, the issue as to whether an employer is obligated to pay wages for waiting or on-call time is a fact-specific analysis.

The general rule for payment of wages is that employees are compensated for actual work performed for their employer, whether the work is located on the employer’s premises, or off-site. The key factor is whether the employee is actually engaging in work. Employees are paid for the amount of work they perform or the time they put in at work.

In addition, employees are eligible to be paid wages for certain time spent waiting to perform work as defined by the FLSA. For example, a firefighter playing cards at the firehouse while waiting for a fire alarm to sound, a factory worker who talks to other employees while a safety shutdown of equipment is being performed, and a messenger who reads a magazine while waiting for an assignment are all working during periods of inactivity and are entitled to be paid their hourly wages or overtime, if applicable, even though they are waiting. Whether waiting time is time worked under FLSA depends upon particular circumstances. The determination involves “scrutiny and construction of the agreements between particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time, and all of the circumstances. Facts may show that the employee was engaged to wait or they may show that he waited to be engaged.” Skidmore v. Swift, 323 U.S. 134 (1944). Such questions “must be determined in accordance with common sense and the general concept of work or employment.” Central Mo. Tel. Co. v. Conwell, 170 F.2d 641 (8th Cir., 1948).

The obligation to pay wages for waiting time may also apply to employees who work away from the work site. For example, a truck driver is working while he waits for his employer’s customer to get the delivery ready for pickup. Also, a repairman is working while he waits for his employer’s customer to get the premises in readiness. In either event, the employee is unable to use the time effectively for his own purposes. Therefore, his time is controlled by the employer, and the waiting is an essential part of the job. In a manner of speaking, the employee is engaged to wait and is entitled to be paid for his waiting time. Skidmore v. Swift, 323 U.S. 134, 137; Wright v. Carrigg, 275 F. 2d 448 (4th Cir. 1960). Waiting is an integral part of the job. However, if a truck driver is sent from Los Angeles to San Francisco, leaving at 6 a.m. and arriving at noon, and is completely and specifically relieved from all duty until 6 p.m., when he again goes on duty for the return trip, the idle time is not working time. He is waiting to be engaged. Skidmore v. Swift, 323 U.S. 134, 137 (1944).

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In addition, some employees are required to be “on call” for a certain amount of time in addition to their actual work day. Under certain circumstances, an employee may be eligible for pay during his on-call time. If the employee is on call during off hours, different rules apply to determine whether the employee is considered to be at work during that time. If the employee is required by the employer to expend significant physical or mental energy, that is work time and is compensable, even if the employee is waiting to start working.

Whether on-call time is considered work time is dependent on the facts involved. The DOL Wage and Hour Division has stated that if an employee “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,” the waiting time is considered hours worked under the FLSA and is compensable. On the other hand, an employee who is “merely required to leave word at his home or with company officials where he can be reached” after his regular working hours is not entitled to compensation for his on-call time. See Armour & Co. v. Wantock, 323 U.S. 126 (1944); Handler v. Thrasher, 191 F. 2d 120 (10th Cir. 1951).

While the DOL Wage and Hour Division has attempted to spell out when on-call time is compensated and not compensated, overall this language is merely a guide to employers. Each employer needs to look at each situation and examine it based on the facts to determine whether the employee is to be compensated while on call. Courts and labor commissioners have relied on multiple factors to make this determination. However, the primary issue as to whether such time is compensable is the degree of control over the employee’s time by an employer. “A determination of whether the on-call waiting time is spent predominantly for the employer’s benefit depends on two considerations: (1) the parties’ agreement, and (2) the degree to which the employee is free to engage in personal activities.” Owens v. Local No. 169, 971 F. 2d 347, 350 (9th Cir. 1992). “An agreement between the parties which provides at least some type of compensation for on-call waiting time may suggest the parties characterize waiting time as work. Conversely, an agreement pursuant to which the employees are to be paid only for time spent actually working, and not merely waiting to work, may suggest the parties do not characterize waiting time as work.” Berry v. County of Sonoma, 30 F.3d 1174, 1181 (9th Cir. 1994).

Factors to be considered in making a determination as to whether the employer is exercising control over the employee when the employee is on call include:

- Is the employee required to remain on premises?
- If allowed off premises, are there excessive geographic restrictions on the employee’s movements?
- Is more than merely leaving contact information with the employer required?
- How often is the employee actually contacted while on call?
- Is there a fixed time for an employee to respond while on call, and is the response time unduly restrictive?
- Can the on-call employee easily trade on-call responsibilities with another employee?
- To what extent is the employee allowed to freely use time while on call?

“Such a list is illustrative, not exhaustive. No one factor is dispositive.” Owens, supra, 971 F.2d 347, 351 (9th Cir. 1992). In most instances, the question comes down to the amount of “control” the employer may exercise. If such control is unreasonable, the on-call time is compensable. Berry, supra, 30 F.3d 1174, 1181, 1184-1185 (9th Cir. 1994).

Under the FLSA, periods during which an employee is completely relieved from duty – and that are long enough to enable him to use the time effectively for his own purposes – are not hours worked. For example, a telephone operator who is on duty during specified hours – but permitted to sleep and provided with sleeping facilities when not busy answering telephone calls – is still working and must be paid for that time. That employee is restricted by the employer and is unable to engage in personal activities. Armour v. Wantock, 323 U.S. 126 (1944); General Electric Co. v. Porter, 208 F. 2d 805 (9th Cir.1953), cert. denied, 347 U.S. 951, 975 (1954); Central Mo. Telephone Co. v. Conwell, 170 F. 2d 641 (8th Cir 1948).

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Conversely, when the employee is deemed free to pursue personal interests, the employee is “waiting to engage” and need not be compensated. Recently, this issue was addressed in analyzing the concept of lunch breaks in regard to security employees required to remain on premises and on call during their meal period in Aiken v. Catholic Health Initiatives, No. 4:07-cv-018, 2010 U.S. Dist. LEXIS 79782 (S.D. Iowa 2010). In Aiken, the security guards were allotted 30-minute unpaid meal breaks pursuant to the defendant’s written policy and practice. However, for the duration of this break, they were required to: (1) remain on premises; (2) carry their hospital radios; and (3) respond to any incidents or assignments in the hospital, should they arise. If a security guard was unable to take a full 30-minute meal break due to an incident, the employee was instructed to notify the supervisor in order to be paid for the entire 30-minute period – and the employer did, in fact, make these payments. The security guards sought compensation for these unpaid meal periods under the FLSA.

The court rejected the security guards’ claims to be paid during the meal periods when they were able to take the full, uninterrupted meal. The evidence from the guards themselves showed that during the meal breaks, they made personal calls, played cards and surfed the Internet. The Aiken court found that the “predominant benefit” of the meal break fell to the employees, and when there were interruptions, the employees were paid by the employer. Therefore, the employer had complied by paying the employees for all times when they were working.

To determine whether on-call time is working time, one must determine by the circumstances in a given case: “Whether an employee was ‘engaged to wait,’ which is compensable, or ‘waiting to be engaged,’ which is not compensable.” Carman v. Yolo County Flood Control and Water Conservation Dist., 535 F. Supp. 2d 1039, 1055 (E.D. Cal. 2008).

In summary, under federal law, whether payment is required to employees for waiting time or on-call time requires a fact-intensive analysis and must be determined on a case-by-case basis. An employer should keep an open dialogue with its employees, so that it is fully informed of the facts needed to make a well-reasoned evaluation as to when, or if, an employee is subject to being compensated. Employers who do this – and apply the guidelines above – will be well positioned to justify the determination and to defend themselves before the DOL Wage and Hour Division.