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Employment Newsletter
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Bruno W. Katz is a Partner in Wilson Elser's San Diego office. Bruno has developed a diverse business litigation practice with an emphasis in labor and employment.

In his defense of clients, Bruno has tried or arbitrated cases involving violations of Title VII; race, age, sexual and gender discrimination; retaliation; breach of contract; nonsolicitation enforcement; negligence; federal preemption; and wage and hour class actions. Bruno also represents clients in administrative matters before the California Department of Fair Employment and Housing, the California Labor Commissioner, the EEOC and the National Labor Relations Board. Bruno provides training to both his clients and industry groups on employment practices, liability issues and other risk management matters.

Bruno is a Captain in the United States Navy Reserve, currently serving as the Commanding Officer of NR Legal Service Office Northwest, located in Bremerton, Washington. Under his leadership, NR Legal Service Office Northwest was awarded the Rear Admiral Gilbert Cup as the best reserve law unit in the country. Bruno is a 2010 recipient of the Outstanding Career Armed Services Attorney designation from the Judge Advocates Association.

Shirley Shu is an Associate in Wilson Elser's San Diego office. She practices in the areas of employment and general business litigation. Shirley has defended a number of businesses in suits involving claims of discrimination, harassment, retaliation, on-call and waiting time, wage and hour claims, and contractual disputes.

Payment Obligations under FLSA for "Waiting Time" and "On-Call Time"

By Bruno W. Katz and Shirley Shu

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 eployee 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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