

TIME IS MONEY: PAYING EMPLOYEES TO WAIT OR BE ON CALL

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Calculating the hours worked by non-exempt employees is generally a straightforward task, but complications may arise when employees spend time waiting for work or in “on call” status. Time devoted to these activities can constitute work time in some circumstances and the manner in which employers treat waiting time and “on call” time is receiving increasing scrutiny, so employers should be sure that they understand when these activities should be counted as hours worked.

Waiting time

In some industries, such as restaurants and car washes, for example, workflow may fluctuate substantially throughout the day, leaving employees with little or nothing to do at certain times and overwhelmed with work at others. During the slow periods of the day, employees may be idle while they wait for work flow to increase again. Although such waiting time may not constitute hours worked in some situations, it should be counted a compensable time in many circumstances.

In general, employers are required to pay non-exempt employees for all time during which the employee is on duty. If the employee is off duty, periods during which he is completely relieved of any obligation to the employer do not constitute hours worked if (a) they are long enough to enable the employee to use the time effectively for personal purposes, and (b) the employee is told in advance that he can leave the work site and will not have to return until a specified time.

Waiting time is likely to be considered hours worked when it is unpredictable and of short duration, such that the employee cannot effectively use the time for his or her own purposes. Examples of waiting time that would constitute hours worked include time spent by a courier waiting for an assignment, time spent by a fireman waiting for a call or an alarm, or time spent by an office worker waiting to resume work after an IT technician fixes his or her computer. In these situations, waiting is treated as an integral part of the employee’s job and therefore constitutes time worked.

“On call” time

Closely related to waiting time is the concept of “on call” status. The nature of some jobs requires employees to be “on call,” ready to respond to business or customer needs whenever they may arise. Some employees carry pagers or cellular telephones, for example, so that their supervisors can contact them and direct them to respond quickly to emergencies. This common scenario creates issues similar to those that arise with waiting time.

Time spent “on call” by non-exempt employees represents time worked, and is compensable, if the employee is (a) required to remain on the employer’s premises, or (b) required to remain so close to the workplace that the employee cannot effectively use the time for personal purposes. Courts and the Labor Commissioner determine on a case-by-case basis whether the restrictions imposed upon an employee “on call” are so strong that the employee cannot use the time in question for personal purposes.

Several courts have concluded that employees required to return to the workplace within 20 minutes of receiving a call were not controlled so tightly that they were entitled to compensation for the time they spent on call. If an employer's facilities were located far from residential areas, however, a policy requiring the employee to report to work within 20 minutes of a call could be viewed as quite restrictive, causing the time spent by the employee in "on call" status to be compensable. Time spent "on call" by employees who are required to be available to answer questions by phone, but are otherwise able to do as they please is unlikely to be regarded as time worked.

When a non-exempt employee is actually required to perform work while on call, special rules governing the calculation of hours worked may apply. If the employee was not otherwise regularly scheduled to work on the day in question, the employer's payment obligation varies depending on the number of hours worked:

- If the employee works more than half of his or her usually-scheduled day of work, the employer must pay the employee for all hours worked.
- If the employee works less than half of his or her usually-scheduled day of work, the employee is entitled to be paid half of the wages earned on a usual day, provided that the amount paid shall be equivalent to no less than two hours of pay and no more than four hours of pay. A full-time employee required to work for three hours while on call is thus entitled to payment for four hours.
- If an employee is required to report to work for the second time in a single day (regardless of whether the employee was regularly scheduled to work on that day or not) and works less than two hours after reporting for the second time in the day, the company must pay the employee for a minimum of two hours of work.

Proper calculation of hours worked by non-exempt employees is a basic but important task for employers, and mistakes regarding waiting time and on-call time are common. If you have any questions regarding the proper calculation of hours worked, or any other employment law issues, we invite you to contact one of our attorneys:

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