

## **When is an employee's on-call time compensable?**

A very simple principle underscores our free market economy: you work, you get paid.

This simple principle becomes a bit more complicated when employees are on call. Employees are on call when they provide services during their off-hours. For example, a police officer monitoring the radio at home for emergencies or a highway crewperson who plows during the winter are both on call.

The U.S. Department of Labor considers an employee on call when “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...” 29 C.F.R. § 785.17. Accordingly, the general rule of thumb is that an employee should be compensated when engaged to wait for work and not compensated when waiting to be engaged in work. The time for which an employee is “engaged to wait” is compensable, whereas the time for which an employee is “waiting to be engaged” is not.

Distinguishing between the two, and, consequently, when hours should be counted as hours worked, will be a very fact-driven analysis. The U.S. Court of Appeals for the Ninth Circuit considers (1) the degree to which an employee is free to engage in personal pursuits, and (2) any agreements that may exist between the employees and their employer, to determine whether an employee’s on-call waiting time is compensable. *Owens v. Local No. 169, Ass’n of W. Pulp & Paper Workers*, 971 F.2d 347 (9th Cir. 1992).

It is this formula that Vermont’s courts may look to for guidance. The first factor, “the degree to which an employee is free to engage in personal pursuits,” is measured by (1) whether employees are required to live on-premises; (2) restrictive travel; (3) excessive call-volume; (4) unduly strict response times; (5) the ability to trade on-call shifts; (6) whether using a pager eased restrictions; and (7) whether employees actually pursued personal pursuits during their on-call shifts. Basically, the factors that permit personal pursuits are balanced against those that restrict personal pursuits to figure out whether an employee is so restricted that he or she is engaged to wait.

The second factor, “whether any agreements exist between the employees and their employer,” helps courts determine whether they consider on-call time as actual work. Though neither factor will decide the matter on its own, together they can help courts determine whether an employee’s on-call time should be compensated.

We suggest municipalities keep the first factor in mind when characterizing employees’ on-call time, and to follow the example of the second by incorporating it into an on-call policy that informs the employer, employee, and courts exactly when employees work and when they get paid.

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