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Engaged to Wait or Waiting to be Engaged?

by J. Craig Oliver

One of the most frequently litigated issues under the federal Fair Labor Standards Act ("FLSA") concerns the issue of when on-call time must be paid. A regulation promulgated by the federal Department of Labor provides that "an employee who 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 is working while on call." On the other hand, the regulation further states that "an employee who is not required to remain on the employer's premises but is merely required to leave word at his home or with company officials where he may be reached is not working while on call."

On April 3, 2008, the United States Court of Appeals for the Seventh Circuit examined this issue in a collective action involving more than 1,000 employees of Commonwealth Edison, an energy utility company. (See *Peter P. Jonites, et al. v. Exelon Corporation, et al*., Case No. 05 C 4234 (7th Cir. Apr. 3, 2008)). Commonwealth Edison ("Com Ed") handled emergency needs for manpower by utilizing an "automated roster call out system." This system notified off-duty employees, through telephone calls to numbers provided by the employees, when additional manpower was needed due to emergencies. Although employees were not required to respond to every call or report for work each time they were called, certain minimum standards were required. Specifically, an employee who answered less than 50 percent of the calls, or who reported for work less than 35 percent of the time he was called, was subject to discipline. Repeated failure to meet these minimum levels could result in termination of employment.

Com Ed required employees to respond to calls within 20 minutes to advise Com Ed if they were accepting or declining the request to work. Employees who accepted the request had two hours to report to their normal work stations, from which they would be dispatched to the emergency site(s). Employees were only paid if they reported to work. If they did so, they received pay from the time they left their work stations to travel to the emergency site until they returned from the emergency site back to their work stations.

In examining cases involving on-call time, many courts pose the issue as whether an employee is "engaged to wait," and therefore entitled to be paid for on-call time, or "waiting to be engaged," and therefore only entitled to be paid if the employee actually is called and reports to work. In this particular case, the Court of Appeals affirmed the district court's ruling that the employees were not entitled to pay unless they were actually called in and reported to their work station. In the words of the Court:

> Of course the requirement that one accept 35 percent of one's call outs curtails a worker's freedom of action somewhat even if they are infrequent, because if he is only slightly above the floor he will be jeopardizing his job if he leaves town for the weekend. But that does not mean that he must stay in the house all weekend. He just must stay within a two-hour radius of his normal duty station (for that is the time he is allowed for getting there if he accepts the call out). Is that such a hardship that it turns his waiting into working? We think not.

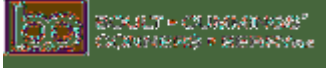
Two aspects of this care are particularly instructive. First, it is interesting to consider the specific factors the Court examined to support its decision. These include the time Com Ed allowed employees to respond to calls (20 minutes) and to report for work after accepting a call (two hours); the frequency with which

callbacks occurred (for a few employees, as often as once every five-and-half days; for others, no more than once a month); and the flexibility employees had to fail to respond to calls or to refuse to report for work if called. If any or all of these factors had been different, the result also may have been different. For example, if there were "zero tolerance" to refuse to accept requests for emergency assistance, and an employee had only 20 minutes to report for work after receiving a call, a better argument could have been made that the employees' freedom was so far curtailed that they could not use their time effectively for their own purposes.

Second, it is instructive to note the Court's stated assumption about how this litigation arose. According to the Court, what "bothered" the plaintiff-employees was that a reduction in force led Com Ed to insist on a higher response rate from on-call employees than it previously required. Specifically, for a time Com Ed did not discipline on-call employees regardless of their response rate, and the average response rate was below 20 percent (sometimes below 10 percent). The Court suggested that the more stringent policy applied by Com Ed following the reduction in force led employees to complain and, ultimately, pursue litigation.

The Seventh Circuit covers the states of Illinois, Indiana, and Wisconsin. However, in support of their opinion the Seventh Circuit Court of Appeals cited with approval a 2006 case from the United States Court of Appeals for the Sixth Circuit, which includes Tennessee. That case, *Adair v. Charter County of Wayne*, 452 F.3d 482 (6th Cir. 2006), involved a group of officers employed by a county airport authority who were assigned to special units and required to wear pagers while off duty. The officers, who regularly worked a 40-hour week, sought overtime compensation for all time spent carrying a pager. The Sixth Circuit Court of Appeals affirmed the district court's judgment dismissing the officers' claims, noting that, over the course of three years, the officers were paged between one and 20 times; the pagers operated throughout the state, meaning the employees had great freedom to travel while wearing the pagers; and there was no evidence the officers were ever subject to discipline for failing to respond to a page while off duty. The Court found that the pager requirement did not "impose burdens on the employee[s] so onerous that they prevent employees from effectively using their time for personal pursuits," and thus that the time spent carrying a pager did not constitute hours worked for purposes of the FLSA.

As illustrated by the above cases, the issue of whether employees must receive pay for time spent on call is highly fact-specific. It hinges on factors such as the amount of time an employee has to respond to a call; the frequency with which an employee is called to return to work; and the extent to which an employee may decline a particular request to return to work without facing adverse employment consequences. The ramifications of employer mistakes in this area are significant. Damages available under the FLSA include back pay for time that should have been considered hours worked (paid at an overtime rate if such hours would cause an employee's total number of hours worked that week to exceed 40); an additional equal amount as liquidated damages; and payment of the employee's attorneys' fees (in addition to the employer's own attorneys' fees, of course). Given the fact-specific nature of the inquiry and the potential ramifications of mistakes, employers should make sure their on-call policies are reviewed periodically for continued legal compliance.



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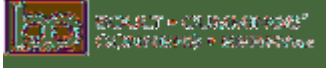

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