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On-Call Duty

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Many public safety agencies rely on overtime, volunteers and part-time workers to staff essential positions. In larger agencies, those paid for extra duty may be at the top of a seniority list. Smaller agencies, when faced with unexpected illnesses or injuries, often resort to call-ups or callbacks.

The advent of pagers and mobile phones has made life easier for everyone. Employers have a fast and efficient system of summoning replacement workers. Employees who are on an on-call status are free to travel within a designated area, usually defined by a maximum response time.

While some welcome the opportunity to earn premium pay, restrictions such as alcohol abstinence are not always appealing.

A. Difference between standby and on-call duty

Some employers use the words interchangeably, but the U.S. Office of Personnel Management (OPM) makes a distinction. Standby duty is time on-the-clock, and on-call duty is not.

5 C.F.R. §550.112(k) Standby duty.

(1) An employee is on duty, and time spent on standby duty is hours of work if, for work-related reasons, the employee is restricted by official order to a designated post of duty and is assigned to be in a state of readiness to perform work with limitations on the employee's activities so substantial that the employee cannot use the time effectively for his or her own purposes. A finding that an employee's activities are substantially limited may not be based on the fact that an employee is subject to restrictions necessary to ensure that the employee will be able to perform his or her duties and responsibilities, such as restrictions on alcohol consumption or use of certain medications.

5 C.F.R. §550.112(l) On-call status.

An employee is off duty, and time spent in an on-call status is not hours of work if--

(1) The employee is allowed to leave a telephone number or carry an electronic device for the purpose of being contacted, even though the employee is required to remain within a reasonable call-back radius; or

(2) The employee is allowed to make arrangements for another person to perform any work that may arise during the on-call period.

5 C.F.R. §551.431 also illuminates the distinction.

Time spent on standby duty or in an on-call status.

(a)(1) An employee is on duty, and time spent on standby duty is hours of work if, for work-related reasons, the employee is restricted by official order to a designated post of duty and is assigned to be in a state of readiness to perform work with limitations on the employee's activities so substantial that the employee cannot use the time effectively for his or her own purposes. A finding that an employee's activities are substantially limited may not be based on the fact that an employee is subject to restrictions necessary to ensure that the employee will be able to perform his or her duties and responsibilities, such as restrictions on alcohol consumption or use of certain medications.

(a)(2) An employee is not considered restricted for "work-related reason" if, for example, the employee remains at the post of duty voluntarily, or if the restriction is a natural result of geographic isolation or the fact that the employee resides on the agency's premises. For example, in the case of an employee assigned to work in a remote wildland area or on a ship, the fact that the employee has limited mobility when relieved from duty would not be a basis for finding that the employee is restricted for work-related reasons.

(b) An employee will be considered off duty and time spent in an on-call status shall not be considered hours of work if:

(1) The employee is allowed to leave a telephone number or to carry an electronic device for the purpose of being contacted, even though the employee is required to remain within a reasonable call-back radius; or

(2) The employee is allowed to make arrangements such that any work which may arise during the on-call period will be performed by another person.

Federal standby and on-call regulations are **not** binding on state and local agencies, but can serve as a guidepost.

B. Restrictions determine whether overtime applies

An analysis of the Fair Labor Standards Act is beyond the scope of this article. Suffice it to note that those officers and civilians who are not statutorily exempt will be entitled to 150% their hourly pay rate when overtime applies, usually after 40 hours in a 7 day period for civilians and 171 hours in a 28 day period for most law enforcement officers; special rules apply to firefighters and EMT personnel. See [29 C.F.R. §553.211\(f\)](#).

- Also see, The Fair Labor Standards Act and Police Compensation, by Michael E. Brooks, 73 (6) FBI Law Enf. Bull. 24-32 (Jun. 2004), IACP Net Doc. #573777, and viewable at <http://www.fbi.gov/publications/leb/2004/june04leb.pdf>

The Supreme Court has not addressed the issue of on-call compensation under the FLSA since 1944, when Skidmore v. Swift & Co., 323 U.S. 134 and Armour & Co. v. Wantock, 323 U.S. 126 were decided.

Unions love to cite the case of [Renfro v. City of Emporia](#), #90-3249, 948 F.2d 1529, 1991 U.S. App. Lexis 26636 (10th Cir.).

Kansas firefighters argued that the on-call policy greatly restricted their personal activities because of a twenty-minute response time requirement and the large number of callbacks. They could not go out of town, visit a movie theater or go out to dinner for fear of being called back; they could not be alone with their children unless they had a babysitter on-call, and could not drive anywhere with another person because they would need separate cars in case of a callback.

The district court determined that, *based on these conditions*, the firefighters were “engaged to wait,” and therefore entitled to compensation under FLSA. The frequency with which firefighters were subject to callbacks distinguished this case from other cases that have held that on-call time was not compensable. A three-judge panel affirmed, noting that “the on-call shifts were 24 hours in length and the average number of callbacks was 3-5 times per 24-hour period.”

In a 1992 case, the Ninth Circuit noted that other courts have considered a number of factors in determining whether an employee had effective use of on-call time for personal purposes:

- (1) Whether there was an on-premises living requirement;
- (2) Whether there were excessive geographical restrictions on employee's movements;
- (3) Whether the frequency of calls was unduly restrictive;
- (4) Whether a fixed time limit for response was unduly restrictive;
- (5) Whether the on-call employee could easily trade on-call responsibilities;
- (6) Whether use of a pager could ease restrictions; and
- (7) Whether the employee had actually engaged in personal activities during call-in time.

The panel added that such a list was only illustrative and not exhaustive. "No one factor is dispositive," it cautioned. Owens v. ITT, #91-35409, 971 F.2d 347 (at 351), 1992 U.S. App. Lexis 19044, 30 WH Cases (BNA) 1728.

In 1995, the (then) Chairman of the National FOP Labor Committee asked these questions:

- (1) While you are "on call," are you allowed to attend to personal business and interests?
- (2) Are you allowed to leave your home?
- (3) How long a period of time are you subjected to being "on call?"
- (4) How often are you actually subjected to being called out?
- (5) How quickly are you expected to respond when called out?
- (6) Are you free to wear casual clothing while "on call?"
- (7) How large an area are you free to travel in while on call?
- (8) How ready for duty must you be while on call? For instance, are you allowed to drink?

He noted that "among restrictions that have been ruled as not so disruptive to one's regular lifestyle as to warrant compensation under the FLSA are the following:

- a) Wearing a pager,
- b) Not being allowed to drink alcoholic beverages, and
- c) Having to stay within a particular jurisdiction or call area.

Nash, Fair Labor Standards Act On Call Issues (Nov. 1995).

A few additional cases:

1. South Carolina firefighters worked a 24-hour on-duty shift followed by a 48-hour on-call shift; while on-call they could work at part-time jobs, travel to other states, and pursue personal interests. The FLSA did not mandate overtime pay. [Whitten v. Town of Easley](#), # 02-1445, 62 Fed. Appx. 477, 2003 U.S. App. Lexis 6739 (Unpub. 4th Circuit).
 2. Arizona deputy sheriffs were able to engage in personal activities and were not entitled to compensation for on-call time. [Dean v. Co. of Yavapai](#), #93-15520, 1994 U.S. App. Lexis 25494 (Unpub. 9th Cir.).
 3. Alabama on-call firefighters were “waiting to be engaged” rather than “engaged to wait.” The time was spent predominantly for their own benefit, rather than for the employer’s benefit, because there were a many days when firefighters were not called to work and there was a relatively brief amount of time that they spent when called in to work. [Largent v. E. Ala. Fire Prot. Dist.](#), #3:03-cv-876, 330 F. Supp. 2d 1252, 2004 U.S. Dist. Lexis 15906 (M.D. Ala.).
 4. An Illinois police officer was not entitled to overtime pay because he was able to use his on-call time effectively for his own purposes. [Shamblin v. City of Colcester](#), #91-1078, 1993 U.S. Dist. Lexis 21446 (Unpub. C.D. Ill.).
- In summary, whether on-call time is compensable depends on how much control management has over an employee and whether an off-duty employee can reasonably use on-call time for personal activities.

C. Pagers and mobile phones

Technology has mostly eliminated the onerous task of notifying communications operators of an on-call employee’s contact number. Arbitrators and courts are likely to find, that unless there are frequent callbacks, the time is not compensable.



An Ohio police officer who was subpoenaed to testify in a criminal trial was denied

overtime for the waiting time while on-call with a pager. The union filed a grievance, which proceeded to arbitration.

The officer had been instructed by the chief to carry the pager, which somewhat limited his ability to travel and prevented him from consuming alcoholic beverages. The bargaining agreement required the employer to pay for *stand-by time*, which was not defined.

The Fair Labor Standards Act requires employers to pay for “standby time” distinguished from “on call” time. The latter depends on the restrictions on a worker’s personal time.

Management claimed the time was not compensable because the grievant was “waiting to be engaged.” The officer was free to go about his usual activities with a minimum of restriction on activities for his own benefit.

The arbitrator noted that the case law distinguishes “waiting to be engaged” from “engaged to be waiting.” Engaged to be waiting is a situation where the freedom of the employee is so restricted that the worker should be compensated. “Waiting to be engaged is where the idle time is primarily to the employee’s benefit and is not compensable.

He wrote that “Engaged to be waiting requires a finding of almost no freedom at all ... That is clearly not the case here.” As to the restrictions in this case, he asked:

1. Were the functions performed while waiting similar to work time activities? *They were not.*
2. Was the response time to go to court unduly restrictive? *It was not.*
3. Did the pager ease his restrictions? *It did.*
4. Could the officer refuse the court call? *He could not.*
5. Was the geographical restriction excessive? *It was not.*
6. Was the employee able to engage in personal activities during this time? *He was.*
7. Did the frequency of the calls restrict the employee? *It did not.*

The grievance was denied. City of Washington and FOP, FMCS #01/13235, 116 LA (BNA) 686 (Szuter, 2001), viewable at <http://www.aele.org/law/2002FPAPR/w-fop.html>

A few illustrative court decisions:

1. Off-duty Pennsylvania sheriff’s deputies who wore a pager every 10th week were not entitled to overtime compensation. Ingram v. Co. of Bucks, #96-2122, 1997 U.S. Dist. Lexis 5317, 3 WH Cases2d (BNA) 1611 (Unpub. E.D Pa.).

2. The Tenth Circuit struck down an overtime suit based on employee's claim he had to stay within the reception range of his pager. Sarmiento v. City of Denver, #95-1225, 82 F.3d 426 (*Table*), 1996 U.S. App. Lexis 7562 (Unpub. 10th. Cir.).
3. Whether standby periods are compensable depends on whether the employee can "effectively use the time" while under subpoena and waiting to see if and when he will be called to testify in court. If officers are "engaged to wait" the time is compensable; if they are "waiting to be engaged" it is not compensable. Thompson v. City of Canton, #5:90CV1558 (Unpub. N.D. Ohio 1992).
4. Georgia police officers were not entitled to compensation for on-call duty. Officers who were on on-call status had to carry a pager and to respond to a call within thirty minutes. Arrington v. City of Macon, #91-cv-182-1, 986 F. Supp. 1474, 1997 U.S. Dist. Lexis 17382, 4 WH Cases 2d (BNA) 348 (M.D. Ga.).
5. A federal court ruled that on-call time was not overtime, although firefighters were required to wear pagers, where callbacks averaged only three per month per firefighter. Clay v. City of Winona, #WC-89-114, 753 F Supp. 624 (N.D. Miss. 1990).

D. Bargaining agreements can authorize compensation for on-call periods.

In agencies with collective bargaining, the union and management can agree to compensate those individuals who are subject to call. A bargaining agreement can establish two or more pools, with different restrictions and compensation levels.

Some officers are assigned to elite units for which they receive premium pay; additional compensation for on-call status is not typical. Examples include SWAT team members, bomb & arson specialists, and crime scene investigators. These assignments are usually voluntary and highly prized.

Nevertheless, members of a Sheriff's Police bomb squad sued, and the court refused to dismiss their FLSA claims. Dornbos v. O'Grady, #88-C-4055, 1990 U.S. Dist. Lexis 15050, 1990 WL 179711 (N.D. Ill. 1990).

A jury was convened, and the officers were awarded 12 hours overtime pay for each 24-hour period of on-call status.

A distinctly different result involved bomb squad officers in the Miami-Dade County Police. The court noted that the officers "have some dislike of the present compensation arrangement. That dislike, however, does not negate the existence of an agreement. It is

clear that continuance of employment can be evidence of an implied agreement to the terms of that employment.”

The county was given a summary judgment. [Lurvey v. Metro. Dade Co.](#), #92-1501, 870 F. Supp. 1570, 1994 U.S. Dist. Lexis 18843 (S.D. Fla.).

E. References (*chronological*)

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On-Call Time Under the Fair Labor Standards Act, by Eric Phillips, 95 (8) Mich. L. Rev. 2633-2655 (Aug. 1997)

On-call Policies Help Avoid Overtime Pay, by Christopher Miller, et al., HR Magazine (July, 1996).

The Impact of Electronic Paging and On-Call Policies on Overtime Pay Under the FLSA, C. Miller, S. Whitehead and E. Clark-Morrison.11 (2) The Labor Lawyer (ABA) 231-246 (Summer, 1995).

Overtime Compensation Under the FLSA: Pay Them Now or Pay Them Later, by M. Smith & S. Winterbauer, 19 Employee Rel. L.J. 23 (1993).

The Fair Labor Standards Act: An Administrative Nightmare, by E. Randels, 59 (5) Police Chief (IACP) 28-32 (May 1992).

F. Specimen policies*

1. [Birmingham](#) (AL) Police Overtime Policy
 2. [Marietta](#) (GA) Police Salary Augmentation Procedure
 3. [Orlando](#) (FL) Police Call-Out Procedures
- Specimen policies are just that – they are not intended as models.

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