

Wisconsin Federal District Court Upholds Rural Hospital's EMT "On Call" Policy

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Two EMTs in a small rural Wisconsin city filed a Fair Labor Standards Act lawsuit challenging their Hospital employer's "on call" policy. This policy required EMTs "on call" to be able to respond by being at the Hospital within seven minutes of being paged. The EMTs felt the restrictions placed on them during their "on call" hours converted their time into hours worked, for which they should be paid their regular hourly wage rather than "on call" pay for all "on call" hours. They also sought overtime for all weeks in which they worked more than 40 hours per week – counting the "on call" hours as regular hours of work.

Judge Shabaz of the United States District Court for the Western District rejected the employees' claims and upheld the rural hospital's "on call" policy for EMTs requiring a seven minute response time. The Court found as a matter of law that the restrictions imposed on the EMTs while "on call" were not so onerous as to require compensation under the Fair Labor Standards Act. Compensability of "on call" time is dependent upon the employee's ability to use the "on call time for his or her own purposes rather than for the Hospital's purposes. In this case, the Court found that the EMTs could use their "on call" time for their own purposes even with the seven minute response time. This was because:

- The EMTs were not required to stay at the Hospital while "on call."
- The EMTs could and did regularly trade shifts.
- The EMTs did not have to monitor radio transmissions but were provided a pager while "on call."
- The number of calls the EMTs responded to did not preclude using the EMTs' "on call" time for their own personal use.
- While "on call," the EMTs had access to the entire rural city.
- The EMTs were not formally disciplined for exceeding the seven minute response time.
- The EMTs had several complete days off (with no call) during each two week cycle.
- On average, the EMTs responded to less than one call per "on call" shift.

The Court also found significant that both EMTs were aware of the working conditions and the compensation system when they took their jobs. The two EMTs in this case had originally been part-time employees who requested regular full-time work and with it more "on call" hours.

The only issue that the Court found to support the plaintiffs' position was that the EMTs, while not paid minimum wage, were paid \$1.75 to \$2.25 per hour for "on call" time. If the time was not work, it seemed inconsistent for any payment to be made. But the Court noted that if payment of less than the minimum wage would cause the "on call" time to be compensable, then employers would have a perverse incentive to pay nothing for the inconvenience of "on call" duty. This would not serve the employees' interests. Accordingly, because the restrictions imposed on the EMTs were not so onerous as to require compensation pursuant to the Fair Labor Standards Act, the Court granted the Hospital summary judgment and dismissed the claims.

In light of this decision, hospitals and medical centers having "on call" policies will want to review them to make sure that the restrictions placed on non-exempt employees are not so onerous that the "on call" time becomes compensable. FLSA regulations provide that where an "on call" employee is required to be on the employer's premises that time is compensable. However, where the employer allows the employee to remain on the premises for his or her own convenience, then the "on call" time is not compensable. In this case, the Hospital charged employees \$1.00 if they wanted to stay in a room at the Hospital while "on call." The \$1.00 charge was to demonstrate that it was the employee's choice to use the room and not the Hospital's requirement. While the charge is not necessary, it is helpful to show that staying on the premises is at the employee's option.

Provided there is no on-premises requirement, the "on call" hours remain non-compensable so long as the employee can use the "on call" time for his or her own purposes. This is determined by (1) the geographic restrictions, (2) the frequency of call-ins, (3) whether the fixed time limit for response is unduly restrictive, (4) the ease with which the "on call" time can be traded among employees, (5) whether the use of a pager eases the restrictions and (6) whether the employee can actually engage in personal activities while "on call."

In this case, the EMTs could travel anywhere in the city within seven minutes. This would not be true in a larger metropolitan area. The EMT schedule only had the EMTs work in the hospital a total of 70 hours every pay period (two weeks). These EMTs did not work or take call several days in each pay period. The EMTs on average were called in less than one time each 14 to 16 hours of call. When called in, the employees were compensated at a rate of time and one-half and paid for at least two hours.

In addition, trades were relatively easy to make even though there were few co-workers. Trades could generally be made without supervisory approval unless overtime was involved. Employees were given pagers and did not have to monitor radios. They could take the pager with them wherever they went. They did not use radios except to acknowledge the page. Being called in only three to four times each pay period, the EMTs were able, despite the seven minute response time, to use the "on call" time to eat, sleep, watch television, use a computer, entertain in their homes, attend church services and public gatherings and read without distraction.

"On call" policies not requiring employees to remain on the premises with response times of 15 minutes or more are regularly upheld as not creating compensable time under the Fair Labor Standards Act. In appropriate cases, response times of five minutes or more have also been upheld as not creating compensable time. Whatever the response time, the key is how often are the employees called in and how intrusive are the "on call" requirements. Employers who want certainty can pay for "on call" time. The "on call" time can be paid at minimum wage (presently \$5.15 per hour) with overtime also being paid, when required. However, a properly structured "on call" policy will allow employers to pay less than minimum wage for "on call" time.

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