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"On-Call" Time in Healthcare Settings: What Is It? When Do You Have To Pay for It? What if You Get It Wrong?

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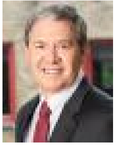

You may understandably think that everything about this subject has been resolved long ago. But you would be wrong if you do.

The federal law that undergirds most of what you think you know about how employers have to pay employees, known as the "Fair Labor Standards Act" ("**FLSA**"), was enacted more than 80 years ago – in 1938. There were laws before the FLSA that addressed employees' wages and hours worked (such as the federal Eight Hour Law of 1892, which prescribed maximum hours worked by various employees in "public works" projects to eight per day), but the FLSA was the United States government's first attempt to regulate the wages paid by virtually all private employers. The "constitutionality" of the FLSA was soon challenged in court, but that issue has been settled (in favor of the legality of the FLSA) for decades.

Let's start with the basics: If you're in the healthcare business, then you may safely assume that the FLSA applies to you. Meaning what? Meaning that you must pay all "non-exempt" employees (such as employees who are NOT physicians or "executive," "professional," or "administrative" employees as those terms are defined by the U.S. Department of Labor (**"DOL"**)) in a certain way to avoid legal hot water. (Which employees are and are not "exempt," however, is a critical subject unto itself.)

What is that way? Well, two ways, really. First, such "non-exempt" employees must be paid in a way that results in a minimum hourly wage of at least $7.25 (according to the FLSA anyway; some states require a higher minimum wage for some employees). But that rate (which for a full-time employee amounts to annual compensation of about $15,000) was put into effect in 2009 and has become something of an anachronism: Few employers can attract and retain a good and reliable workforce for that.

Second – *and this way is still relevant* – almost all such "non-exempt" employees must be paid at a premium "overtime" rate for all hours worked in excess of forty (40) *during each* seven-day workweek. That means that an employer had better know (i) when its seven-day workweek begins and ends and (ii) when each "non-exempt" employee, *in each such workweek*, has crossed that 40-hour threshold. You might think that the latter of those two requirements is a no-brainer as long as the employees in question are "punching a clock" or otherwise keeping track of and reporting to their employer all hours worked.

But – in a healthcare setting – not so fast. The delivery of healthcare can be a 24/7 business. Patients' needs

and demands are not limited to typical business- hours. Many healthcare providers, therefore, regularly require employees who are not "exempt" from the "overtime" pay requirements of the FLSA to be "on call," *i.e.*, to be available on short-notice outside of scheduled working hours to meet the needs of their employer and its patients. Is that unlawful? Of course not. But might such a requirement come with a cost – and possible significant liabilities – of which such employers may be unaware? Absolutely.

Why? Because the time during which a "non-exempt" employee is required to be "on-call" ("**On-Call Time**") may be "compensable" – meaning, in other words, that an employer *must include* all such On-Call Time in the hours worked during an employee's seven-day workweek for which the employer must pay. The On-Call Time may consist of so-called "straight time" – for example, four hours of On-Call Time in addition to 36 scheduled hours of work, for all of which the employer must pay the employee at his or her "regular" hourly rate. Or the On-Call Time may consist of "overtime" – for example, four hours of On-Call Time in addition to *40* scheduled hours of work, for which the employer must pay the employee at a premium rate, typically at 150% of the employee's "regular" hourly rate.

If only one full-time employee is putting in, say, four hours of On-Call Time during each of 50 weeks per year in addition to 40 scheduled hours of work, then he or she will have worked 200 hours of "overtime," for which he or she is entitled to be paid at a premium rate. That can add up. For example, if the healthcare provider has ten employees putting in such "compensable" time: That 200 hours of unpaid "overtime" due to one employee can easily become *2,000* hours of unpaid "overtime" for all ten employees – in a single year.

So when must healthcare providers *pay* employees for On-Call Time?

That, as you might guess, depends. The U.S. Supreme Court shared its thoughts on the subject as far back as 1945, when it said that "an employer … may hire [an employee] … to do nothing, or to do nothing but wait for something to happen. Refraining from other activity often is a factor of instant readiness to serve, and idleness plays a part in all employments in a stand-by capacity. **Readiness to serve may be hired, quite as much as service itself** … . Whether time is spent predominantly for the employer's benefit [*think "compensable"*] or for the employee's [think *not "compensable"*] is a question dependent upon all the circumstances of the case." And the DOL, in 2009, observed that:

> An employee who is required to remain on call on the employer's premises or so close to the premises that the employee cannot use the time effectively for his or her own purpose is considered working while on-call. An employee who is required to carry a cell phone, or a beeper, or who is allowed to leave a message where he or she can be reached is not working (in most cases) while on-call. Additional constraints on the employee's freedom could require this time to be compensated.

That, as with many categorical legal propositions, sums it up without being of much help. In what circumstances can "the employee … use … time effectively for his or her own purpose?" If an "employee who is required to carry a cell phone, or a beeper, or who is allowed to leave a message where he or she can be reached is not working" (and thus need not be *paid* for working) "in most cases," then what are the *other* cases? And what are the "[a]dditional constraints on the employee's freedom" that "could require" On-Call Time "to be compensated?"

The law provides answers, but they can be highly subjective and hinge on the particular factual circumstances in which the On-Call Time is being worked. *Wise employers in healthcare who require On-Call Time of employees will adopt clear personnel policies and enforce sensible practices designed to avoid disputes about whether On-Call Time is compensable or not.* They will do so to ensure that employees know when they are, and are not, "on the clock," and to avoid the significant problems that can result from getting the answer

wrong. Fights about whether On-Call Time is compensable are litigated with surprising frequency and can result in alarming liabilities – which can take the form of unpaid wages due to all employees who worked unpaid On-Call Time during as many as three (3) years, *plus* an equal amount of money in the form of "liquidated damages," *plus* the attorneys' fees of the employees' attorney, *plus* attorneys' fees incurred by the employer itself in the course of dealing with the problem. As if that weren't enough, such liabilities can be imposed on those who own and control the employer *personally*, not on the employing entity alone.

Failing to include On-Call Time in compensable hours of work can result in failure to pay "overtime" wages due. The DOL takes a dim view of that kind of thing, regardless of how it occurred. Just ask "From the Heart Companion Service LLC," a "homecare service provider" in Pennsylvania that "provides homecare for elderly and physically challenged individuals." The DOL, on April 14, 2022, published a news release in which it announced that the company "paid $191,591.71 in back wages and an *equal amount* in liquidated damages" – for a total tab of about $383,000 – to 46 "affected employees at four Pittsburgh-area locations for hours worked over 40 hours in a workweek". That's obviously costly and must be embarrassing for "company President and Owner Janis Mandich Durick," whom the DOL called out by name, no doubt to send a message to executives of other employers who might engage in similar behavior. Her company, according to the DOL, got things wrong in a costly and very public way.

Getting the answers right can more than pay for itself. An experienced employment lawyer can help you do that.

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