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FLSA2008-8NA

May 23, 2008

Dear **Name*:**

This is in response to your request for an opinion regarding the application of the Fair Labor Standards Act (FLSA) to employees of an ambulance rescue service. You ask whether the on-call time spent by rescue employees is considered hours worked under sections 6 and 7 of the FLSA.* We conclude, based on the facts presented, that with respect to the winter season on-call time is compensable under the FLSA. For non-winter seasons, however, the on-call time is not compensable.

You state that your non-profit ambulance rescue service responds to emergency calls in two small communities. The service employs two paid employees and has 23 volunteers who work without compensation.

According to your letter, the ambulance service operates as follows: The employee reports to the squad house from 8:00 a.m. to 4:00 p.m. and is paid an hourly wage for this time. In addition, the employee is on call from 6:00 a.m. to 8:00 a.m. and from 4:00 p.m. to 6:00 p.m. five days a week without compensation. If an emergency call occurs during the on-call period, the employee drives his or her vehicle to the squad house, picks up the ambulance, and responds to the call. The on-call employee must stay within a specific area and must respond--with the ambulance--to the call within eight minutes. The employee is paid one and one half times his or her hourly rate for the time spent on the emergency call. The number of calls to which the employee must respond varies. In the winter, the calls may occur every day. During the rest of the year, the employee may be called once or twice a week or, in some weeks, not at all.

In a follow-up telephone conversation, you stated that the on-call employees use pagers while on call. You also stated that it takes more than eight minutes to drive to the squad house from some towns within the coverage area; the on-call employee must wear identifying attire, such as a jacket, when reporting; and that it is unlikely that the two paid employees could exchange their on-call duties with any of the volunteers. You further stated that although there are disciplinary penalties for failing to meet the response time, there is no history of discipline taken against employees who fail to respond within eight minutes. You inquire whether the on-call time is hours worked when there is no call, and the employee must stay in the coverage area and respond within eight minutes.

Whether hours spent on call are compensable hours of work is a question of fact to be decided in the context of a given case, based upon a variety of criteria. As explained in 29 C.F.R. § 785.17, "[a]n employee who is required to remain 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.'" Furthermore, "[a]n 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." Id. Where an employee who is on call is free to come and go as he or she pleases and is also able to engage in personal activities during periods of idleness while subject to call, such time need not be compensated. See 29 C.F.R. § 553.221(d). These principles also apply where an employee is required to carry a paging device and to report to work or otherwise to respond (e.g., telephone in) within a specified period of time. If the calls are so frequent or the on-call time conditions so restrictive that the employee cannot effectively use the on-call time for his or her own purposes, the on-call waiting time would constitute hours worked. See Wage and Hour Opinion Letters May 28, 1998, August 12, 1997, and April 20, 1994 (copies enclosed).

As the Supreme Court has explained, where the facts demonstrate that an employee has been hired to spend time waiting to respond to the employer's needs, the employee is traditionally described as having been "engaged to wait," and such time constitutes compensable hours of work. Armour & Co. v. Wantock, 323 U.S. 126, 133 (1944). On the other hand, where the restrictions on the employees' activities do not prevent them from pursuing their normal pursuits, such employees are described as "waiting to be engaged," and such time is not compensable. Skidmore v. Swift & Co., 323 U.S. 134, 139 (1944). The federal courts evaluate a variety of factors when determining whether an employee can use on-call time effectively for personal purposes, such as whether there are excessive geographical restrictions on an employee's movements, whether the frequency of calls is unduly restrictive, whether a fixed time limit for response is unduly restrictive, whether the employee could easily trade on-call responsibilities, whether use of a pager could ease restrictions, and whether the on-call policy was based on an agreement between the parties. *See Reimer v. Champion Healthcare Corp., 258 F.3d 720, 724-25 (8th Cir. 2001); Pabst v. Okla. Gas & Elec. Co., 228 F.3d 1128, 1132 (10th Cir. 2000); Ingram v. County of Bucks, 144 F.3d 265, 268 (3d Cir. 1998); Owens v. Local No. 169, Ass'n of W. Pulp & Paper Workers, 971 F.2d 347, 351 (9th Cir. 1992); Renfro v. City of Emporia, 948 F.2d 1529, 1537 (10th Cir. 1991); Cross v. Ark. Forestry Comm'n, 938 F.2d 912, 916 (8th Cir. 1991); Bright v. Houston Nw. Med. Ctr. Survivor, Inc., 934 F.2d 671, 678 (5th Cir. 1991).* This list is illustrative, not exhaustive, and no one factor is dispositive.

In applying these factors, the court in Pabst held that the on-call time was compensable where technicians were required to respond within 10 or 15 minutes to alarms sent to their pagers or home computers. They often could respond by computer, but other times had to appear in person. They received three to five alarms per 15-hour shift and could not easily rotate or trade shifts. 228 F.3d at 1131. In *Reimer*, the court held that the on-call time was not compensable where nurses had to be reachable by telephone or beeper, had 20 minutes to report to the hospital if called in, and typically received not more than one call per shift. The court found that they could "pursue a virtually unlimited range of activities in town or at home," such as playing sports, going shopping, and visiting friends and neighbors. 258 F.3d at 725.

Based on the situation you describe, it is our opinion that the time spent waiting on call during the winter season is sufficiently restrictive to make it compensable under the FLSA. We base this conclusion on the following combination of factors: the extremely short in-person response time, which precludes the effective use of the on-call time for all but the narrowest range of personal purposes, all of which must take place within a restricted geographic area to allow for such a rapid response; the high number of call-ins (requiring one response every four hours); the apparent impossibility of trading on-call responsibilities because both employees are on call five days per week; and the inability to turn down any of the call-ins. Given the very short in-person response time, the employees' use of a pager provides only limited relief. It is also our opinion that during the non-winter seasons, if the frequency of calls is as described in your letter (once or twice per week, and in some weeks none), the time spent waiting on call would not be compensable. *See Dinges v. Sacred Heart St. Mary's Hospitals*, 164 F.3d 1056, 1058 (7th Cir. 1999) (finding that emergency medical technician were able to use on-call time effectively for their own purposes where they were subject to a seven minute response time but received calls on less than 50% of their on-call shifts); *Andrews v. Town of Skiatook*, 123 F.3d 1327, 1330-32 (10th Cir. 1997) (finding that emergency medical technicians were able to use on-call time effectively for their own purposes where established practice required them to respond and be rolling on a call within 5-10 minutes but they were only called back on 16-23% of on-call shifts). If, however, the frequency of calls in the non-winter months were to increase (as you indicated in the follow-up conversation may have occurred), the employees' ability to use the on-call time effectively for their own purposes would need to be reevaluated. Similarly if the frequency of calls in winter months were to decrease to fewer than, on average, one call per four-hour shift, the conclusion that the employees are unable to use the on-call time for their own

purposes would need to be reevaluated.

This opinion is based exclusively on the facts and circumstances described in your request and is given based on your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your letter might require a conclusion different from the one expressed herein. You have represented that this opinion is not sought by a party to pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor.

We trust that this letter is responsive to your inquiry.

Sincerely,

Monty Navarro
Fair Labor Standards Team
Office of Enforcement Policy

*** Note: The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. § 552(b)(7).**

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* Unless otherwise noted, any statutes, regulations, opinion letters, or other interpretive material cited in this letter can be found at www.wagehour.dol.gov.