Quick Quiz Answer: "On Call" Time Under The FLSA

January 26, 2012 by John E. Thompson

The best answer to last week's Quick Quiz is, "No", it is not likely that Alan's time between calls would be found to be worktime under the federal Fair Labor Standards Act.

The idle time during which an otherwise off-duty employee is available to be called upon to do something might or might not be compensable FLSA "hours worked", depending upon the situation. Generally, the question is whether this idle time while "on call" is spent predominantly for the employer's benefit as opposed to the employee's. The answer usually turns upon the extent to which the employee is able to use the time effectively for personal purposes.

What Are The Important Factors?

The U.S. Labor Department and the courts say that this determination requires an evaluation of all the relevant facts. Among the things often considered are whether:

♦ The employer requires the employee to remain on the employer's premises;

♦ The employer requires the employee to wait at home for calls or messages or confines the employee to an excessively-restricted geographical area;

♦ The employee receives numerous, frequent, and/or lengthy work assignments during the on-call period;

♦ The employee must respond within a short timeframe under the circumstances (especially if the employee must travel somewhere to do the work);

♦ The employer requires the employee to be on-call frequently, never relieves the employee from on-call status, does not permit the employee to exchange calls or call periods with another worker, or does not allow the employee to turn down at least some calls;

♦ There is an agreement or understanding covering the arrangement (although an employee may not agree to anything that violates the FLSA).

Ordinarily, some combination of restrictive factors is present when idle on-call time is found to be compensable work.

But the time need not be free from any restrictions whatsoever. For example, courts have found these periods not to be worktime even though the employer required the employee to remain sober and not to take any mind-altering drugs, or to stay well-groomed and appropriately dressed. Neither is it necessary for the employee to be able to engage in literally any personal activity he or she might wish.

So What About Alan's Situation?

Alan is on-call only for seven days a month, and only for six hours on each on-call day. He need only phone within 30 minutes after receiving a message, rather than physically report somewhere within that time. He averages far less than one duty-message per on-call day and spends roughly 5% to 7% of his on-call period performing work. Although he cannot drink alcohol and must stay in the area, these restrictions standing alone do not mean that he is unable to use the on-call time for a wide variety of personal purposes. It is probable that a decisionmaker would not see these particular circumstances as causing Alan's idle on-call time to be FLSA "hours worked".

Of course, the predominant-benefit question is necessarily fact-specific. Therefore, each situation should be separately evaluated.

And Don't Forget . . .

States and other jurisdictions might have "on call" rules that are tougher on employers than the FLSA is. Employers should look at every applicable wage-hour law to find out whether this is the case.