U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

FLSA2008-14NA

December 18, 2008

Dear **Name***:

This is in response to your request for an opinion regarding whether the on-call period you describe constitutes hours worked under the Fair Labor Standards Act (FLSA).* It is our opinion that the on-call period is not compensable under the FLSA.

You state that the on-call employee must be reachable at all times, abstain from alcohol or other substances, and report to work within one hour of notification. Call-backs are rare. You ask the following:

1) What restrictions can an employer impose during on-call periods?

2) Is the employer responsible for compensation when restrictions are imposed during on-call periods?

3) Is the number of call-backs a factor in determining whether the on-call period is compensable?

Whether time spent on call is compensable is a question of fact decided in the context of each case. Under 29 C.F.R. § 785.17, an on-call employee who is not required to remain on the employer's premises, but is only required to notify the employer where he or she may be reached is not working while on call. This is true so long as the employee is free to engage in personal activities when he or she is on call. *See* Wage and Hour Opinion Letter September 3, 1999 (copy enclosed). These principles also apply when an employee must carry a pager and report to work within a specific, reasonable time period. *Id.* The on-call time is compensable, however, when the on-call conditions are so restrictive or the calls so frequent that the employee cannot effectively use that time for personal purposes. *See* 29 C.F.R. § 553.221(d).

The federal courts examine 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 limitations on an employee's movements, whether the frequency of calls received or 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 is based on an agreement between the parties. *See Reimer v. Champion Healthcare Corp.*, 258 F.3d 720 (8th Cir. 2001); *Pabst v. Okla.*

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

Gas & Elec. Co., 228 F.3d 1128 (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 (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 (5th Cir. 1991). This list is illustrative, not exhaustive, and no one factor is dispositive.

As noted above, the number of calls received while on call is a relevant factor in determining whether the on-call period is compensable under the FLSA. In *Bright*, for example, a hospital required its on-call biomedical equipment repair technician to be reachable by beeper, remain sober, and arrive at the hospital within approximately 20 minutes after being called. The technician received calls while on call an average of 4-5 times per week. The Fifth Circuit concluded that the employee was able to use the on-call time "effectively for his own personal purposes" and, as such, the time spent on call was not compensable. *Id.* at 677-78. On the other hand, in *Renfro* the Eleventh Circuit concluded that on-call time was compensable for firefighters who were required to wear pagers and respond to callbacks within 20 minutes, and received an average of three to five calls, and as many as 13 calls, in a 24-hour on-call period.

Based on the information you have given us, it is our opinion that the requirements imposed by the employer in your case are not so restrictive to convert on-call periods into hours worked under the FLSA. Moreover, the call-backs are rare. Accordingly, we conclude that the on-call periods are not compensable under the FLSA. *See* Wage and Hour Opinion Letter May 28, 1998; Wage and Hour Opinion Letter June 30, 1994; Wage and Hour Opinion Letter July 20, 1993 (copies enclosed).

Your letter also states that the employer restricts on-call employees from working overtime and disciplines employees who refuse to follow its on-call restrictions. While the FLSA provides many labor standards, it does not generally regulate work schedules and work assignments. It does not require employers to pay for the inconvenience of being on call if such periods are not otherwise compensable. Also, disciplinary actions resulting from an employee's refusal to be on call is not within the FLSA's purview. Such matters are usually resolved privately between employers and employees or their authorized representatives.

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 issues 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).**