

## **EMPLOYEES ON-CALL: ENGAGED TO WAIT OR WAITING TO BE ENGAGED?**

**QUESTION:** I am a commercial real estate broker, and I employ four full-time assistants. Since I sometimes must meet with clients or show property on evenings and weekends, I require the assistants to rotate carrying a pager in case I need assistance after regular business hours. Lately business has been booming, so I've had to page the on-call assistant to come in to help out during almost every on-call shift. I overheard the assistants grumbling about having their social lives interrupted by my paging them, and complaining about how the pay isn't high enough to justify being at my beck and call.

The timing is funny because it just so happens that -- given our increased sales volume -- I have been thinking of paying each assistant a bonus for any sale which results from a situation that necessitated them to work after hours in response to the pager. I am considering such a bonus to keep the assistants motivated, not because I thought I was legally obligated. But overhearing their complaints makes me wonder whether I am required to pay them a premium rate (or some other bonus) when they are on pager duty. What are the rules here?

**ANSWER:** Whether an employer must pay for an employee's on-call time basically depends on whether or not the employee can use the time effectively for his or her own purposes. If the employee may effectively use the time for personal purposes, they are said to be "waiting to be engaged." However, if the employee's on-call demands are so restrictive that he or she may not utilize the stand by time for personal purposes, the employee is "engaged to wait" and the employer must compensate the employee for that waiting time.

Under Oregon and federal wage laws, employees required to remain on-call on the employer's premises -- or so close to the premises that they can't use the time effectively for their own purposes -- are working while on-call and must be compensated for the time. The law characterizes such time as "hours worked" because the employee is "engaged to wait" for the employer's benefit. In these situations, the employer must also count on-call hours when calculating any overtime due for the workweek.

On the other hand, if employees are merely required to carry a cell phone, pager or beeper, or to leave word with the employer about where they may be reached, the on-call time generally will not count as compensable “hours worked” under wage and hour laws. If the employee is not unduly restricted and is able to use the time for personal pursuits, the law considers this “waiting to be engaged.”

Courts will consider a number of factors in determining whether or not an employee can effectively use time spent on call for personal purposes. These factors include:

Whether an employee is required to remain on the employer’s premises;

Whether an employee is subject to excessive geographical restriction;

Whether the employer imposes an unduly restrictive time limit to respond to a call;

Whether the use of a pager can ease restrictions on the employee;  
Whether the frequency of calls is unduly restrictive;

Whether an employee can easily trade on-call shifts; and  
Whether the employee actually engages in personal activities during the on-call time.

No single factor is determinative; courts examine all of the facts and circumstances in determining whether an employee is unduly restricted and therefore the time counts as hours worked.

It is important to keep in mind that being able to use the time for one’s own purposes doesn’t necessarily mean the employee has to have the same level of freedom normally enjoyed during non-working hours. For example, courts have held that requiring an employee to refrain from drinking alcoholic beverages during on-call periods does not, by itself, make the time compensable.

Of course, even when the time spent on-call does not count as work hours, the employer must pay for work performed when the employee is actually called to duty. And if these calls are too frequent – say five calls during an eight-hour on-call period – the employee probably can't effectively use the time between calls for personal activities, and the employer should pay for the entire period.

For more information on this and other important issues affecting Oregon employers, including seminars conducted by BOLI's Technical Assistance Unit, visit our website at [www.oregon.gov/boli/ta](http://www.oregon.gov/boli/ta). You may also call us at 971-673-0824.