

## Do You Pay Overtime For On-Call Work? A Cautionary Tale

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Many employers are intimidated by the myriad rules, regulations and exemptions contained within the Fair Labor Standards Act (FLSA). History shows they have every reason to be: mistakes are super easy to make and can be very costly for a business – both in terms of the bottom line and bad publicity.

A new case out of Ohio this week regarding overtime for an on-call employee provides a timely reminder of how important it is for employers to make sure they fully understand the FLSA and pay their employees properly.

### Pop Quiz:

**(1) Are You Paying Overtime for Employees Who Are On-Call?**

**(2) Can You Explain Why You Shifted Employees From Exempt To Non-Exempt?**

If either of your answers are “no,” then listen up.

The case, *Hempfling v. Community Mercy Health Partners*, involved a nurse at a community health center who claimed unpaid overtime for working on-call over the weekends. The nurse was required to work 48 hours on-call every other weekend, clocking in at 8 a.m. on Saturday and clocking out at 8 a.m. on Monday. She was paid her normal wage rate – \$36 an hour – for all the time she spent on-call on the weekends. As a result, the issue was not payment for her straight time, but payment for what she claimed was unpaid overtime during her on-call weekend work.

Over the weekends, the nurse averaged about 25.4 hours of active work time (which was in addition to her work during the work-week). This included reviewing reports, listening to messages, handling calls from patients and visiting patients. During the remainder of the time she spent on-call (approximately 22.6 hours on average per week), she could engage in some personal activities.

Examining the hospital’s opposition to the nurse’s claim, the court first took issue with the hospital’s attempt to characterize her on-call time as non-compensable on the grounds that she was not actively engaged in labor the entire time she was on-call. The problem with this argument was that the hospital *paid* her hourly rate for the entire time that she was on-call. In other words, the hospital paid her as if she was actively engaged in working all 48

hours.

Nevertheless, even accepting the argument that the nurse was not actively working the entire on-call period, the court still concluded that it constituted compensable working time – and eligible for overtime. Looking over the regulations (including 29 C.F.R. §785.17), the court reasoned that an employee who is required to remain on-call at home, or who is allowed to leave a message or contact number where he or she can be reached, normally is not considered to be working while on-call. However, this applies only as long as the employee is free to engage in personal activities while on-call. If the on-call conditions are unduly restrictive or the work calls are so frequent that the employee cannot effectively use the on-call time for her own personal reasons, the on-call time would be considered compensable work time. In considering the ability to effectively use personal time, court looked at several factors, including whether there were excessive geographical limitations on the employee's movements and whether the number of calls or response time was unduly restrictive.

Turning back to the facts of the case, the court concluded that since the nurse worked 25.4 hours out of 48, she did not have sufficient time to effectively use for other pursuits. The court also noted that this was not a role, like say a firefighter, in which the nurse was waiting to be engaged or waiting to be called to work on an emergency basis. To the contrary, she was paid a flat rate for all of her time by her employer and performed tasks throughout that time period. Added to that, she had to be available at a moment's notice to take phone calls, give advice and contact or visit patients. Accordingly, the court found that the nurse should have been paid overtime for all hours worked over 40 in a single week.

In awarding damages to the nurse, the court found that the hospital's conduct was willful and as a result, the nurse was entitled to liquidated damages in addition to unpaid overtime compensation. Reviewing the employer's history, the court observed that the hospital had treated the nurse's position exempt until 2016, when it abruptly shifted the position to non-exempt (and eligible for overtime). However, the nurse's job duties did not change at that time, and the hospital offered no credible explanation for the prior determination of exempt status or the change – leading to the conclusion that the employer had willfully failed to compensate the nurse for overtime.

The case provides several important reminders and lessons for employers:

- On-call time should be carefully monitored to assess whether the time should be paid and if appropriate, whether overtime should be provided. In doing so, employers should examine whether the employees have sufficient time to engage in personal pursuits while they are on-call.
- Decisions to switch employees from exempt to non-exempt (or vice versa) should be thoroughly documented so that the reasons can be explained if later subject to challenge. Employers also should recognize that these decisions – even if made for entirely laudable purposes – can come back to haunt them. This is why it is critical for employers to get it right the first time.