

Legally (Relevant



by Gary Hanson, JD
Stumbo Hanson, LLP, Topeka, Kan.

ON-CALL TIME

Readers of this magazine understand that public water supply is a 24/7/365 business. Larger systems have employees on the job at all times, but for the vast majority of systems in Kansas, nights, weekends, and holidays are covered by employees on call.

Federal wage and hour laws regulate on call time for public employees. These rules can be complicated, and do not apply the same to everyone. For example, rules that apply to public safety employees like firefighters are different from rules that apply to water or wastewater system operators. Many public employers, including several in Kansas, have learned the hard way how

These rules can be complicated and do not apply the same to everyone.

failing to comply with wage and hour laws as they relate to on call time can get employers in trouble, as millions of dollars have been paid in cases brought by the U.S. Department of Labor or employees in the past several years.

Basis of compensation

Federal wage and hour laws are governed by the Federal Fair Labor Standards Act ("FLSA"). In short, unless an employee is exempt (for purposes of this discussion, generally an exempt employee will be one who regularly supervises two or more other full time employees and has other management responsibilities), each employee must be paid for hours worked, and time and a half for all hours worked in an excess of 40 hours in a work week. There is no question but what an employee who is called back to work must be paid for those call back hours worked, and if those hours together with the other hours the employee worked during the week exceed 40, that time must be paid at the rate of one and a half times the regular rate. The real question is, is the time spent "on-call" counted towards "hours worked"?

The answer to this question depends on whether the on-call time is used "predominantly for the employee's benefit". In answering this question, the FLSA looks at the following factors:

1. Restrictions on Mobility. An employee who is required to remain on the employer's premises or so close that he cannot use the time effectively for his own purposes is considered to be working while on-call. An employee who is merely required to leave word at his home or with company

officials where he may be reached, or to carry a cell phone to receive calls from work, is not working while on-call.

2. Time to Respond. The amount of time an employee is given to respond to a call is a factor that affects the ability of an employee to use on-call time for his personal benefit.

The Department of Labor Administrator stated that on-call time would be compensable where emergency medical technicians were required to report to work within five minutes of being called. However, a court ruled that water department employees who were given one hour to respond did not have to be compensated.

3. Number of Calls to be Answered. Generally, on-call employees who are allowed to ignore a certain percentage of calls are not required to be compensated. For example, a court held that employees who were required to respond to at least one-third of all calls were not restricted enough to warrant compensation.

4. Frequency of Calls Received. Employees who receive several calls per on-call period should be compensated; however, employees who rarely receive calls are not required to be compensated.

5. Employee's Use of On-Call Time. If employees are able to use the on-call time for substantial personal projects and affairs, their on-call time may be non-compensable. Reasonable restrictions, such as rules concerning alcohol use, may be imposed without substantially interfering with employees' use of their on-call time for their personal benefit. Significant interference with sleep, time spent with family and friends or other personal activities may cause the on-call time to be required to be paid.

6. Discipline for failure to Answer. If employees are not disciplined for failure to answer calls while on-call, the on-call time may not be compensable.



The real question is, is the time spent “on-call” counted towards “hours worked”?

It should be evident that the answer to the question above, is the on-call time spent predominantly for the employee's benefit, is going to depend on the totality of these factors, and they are going to

vary from one case to the next. There simply is no bright line answer, although a number of guides are available to help. The U.S. Department of Labor has some very user friendly materials available online, including a flowchart that is very helpful. See, <http://www.dol.gov/elaws/esa/flsa/hoursworked/screenER80.asp>, or simply do a Google search of “FLSA on call time”. With the help of these guides, and with counsel from the city or RWD's attorney, utility systems should be able to develop employee handbooks and on-call time policies and apply those handbook and policy provisions so as to avoid having the employees' on-call time be “hours worked”.

Getting these rules right is vital to water and wastewater systems. There are 168 hours in a 7-day week. Assuming 40 of the hours would be covered by the regular work shift, that leaves 128 during

which one or more employees may be on-call. For an employee making \$20 per hour, the cost of having an employee on-call under very restrictive policies, administered so as to cause those on-call hours to be classified as "hours worked" could cost the employer \$3,840 per week (time and one-half x 128) in addition to the regular pay of \$800. Obviously, few employers can afford that kind of expense.

Note that the discussion above concerns what the law requires. Many employers, including many water and wastewater systems, go beyond what is required by compensating their employees for their on-call time even though such on-call time would not count towards "hours worked" under the test mentioned.

Many employers, including many water and wastewater systems, go beyond what is required by compensating their employees for their on-call time even though such on-call time would not count towards "hours worked" under the test mentioned.

Such payments are often fairly nominal, maybe \$1 or \$2 per hour of on-call time, or perhaps some time off with pay to compensate for the on-call time. These are all examples of good accommodations made between employer and employee. But such nominal payment would never suffice as payment for that time if the employee has been called back to work or is actually performing "hours worked" while on-call using the test above – remember that "hours worked"

must be paid at the regular rate, and time and one-half if over 40.

Employers who have employees on-call need to be familiar with the rules that apply to this arrangement. Look at employee hand books and other policies to make sure that they are not overly restrictive, and consult with your counsel with questions.

From the Ground Up!

Building and maintaining great tanks, that's what Maguire Iron has been doing since 1915.
We are now in 30 states so let us do it for you too from the ground up!



We *designed* it. We *fabricated* it. We *erected* it. We *painted* it. We *maintain* it.



Maguire Iron, Inc.
Towering above the rest

P.O. Box 1446 Sioux Falls, SD 57101 605 334-9749
www.MaguireIron.com

Let's be perfectly CLEAR...

...There simply is no better tank coating than glass-fused-to-steel.

Glass-Fused-to-Steel (Porcelain Enamel) is:

- A single, strong, integrated porcelain enamel and steel material fused together at over 1500 degrees F
- An inert, inorganic coating that NEVER needs painting

Glass-Fused-to-Steel is not:

- Mechanically bonded coating that needs painting every 10-15 years
- An organic coating that begins to deteriorate starting day one after installation



PWSD No. 11
48' D x 38' H, on 36' D x 149' H column
500,000 gallons, near Cherokee, Kansas

Proven for over 60 years – the technology is so robust that a service expiration date is yet to be determined. Don't be fooled by claims that paint and other paint-like coatings are better than glass.



City of Parsons, Kansas

**If it's NOT fading,
If it's NOT chalking,
Then it's not paint.....it's Glass !!**

Specify quality, experience and low maintenance.
Specify Aquastore® glass-fused-to-steel tanks.

For more information, call Engineering America at **913-782-7774**
or visit www.engamerica.com.

In 1980 we made an innovative promise that our tanks would never need to be painted. No Aquastore® tank has been painted since – we are the authentic glass-fused-to-steel!

THINK TANK