



JAMES D. "BUDDY" CALDWELL  
ATTORNEY GENERAL

**State of Louisiana**  
DEPARTMENT OF JUSTICE  
P.O. BOX 94005  
BATON ROUGE  
70804-9005

**JUN 16 2015**  
**OPINION 15-0048**

92-A POLITICAL SUBDIVISIONS- Officers, Agents &  
Employees

29 C.F.R. §785.17

Mayor Gerard Landry  
City of Denham Springs  
P.O. Box 1629  
Denham Springs, LA 70727

Dear Mayor Landry:

The City of Denham Springs is permitted to pay its on-call employees for their on-call time, regardless of whether they are actually called out for work, provided that the conditions are sufficiently restrictive such that the employees cannot effectively use the time for personal purposes. On the contrary, if the on-call time is not compensable because the employees are able to use the on-call time for personal purposes, such payments will be unlawful as they constitute a prohibited donation of public funds. Further, once the City's employees have exceeded 40 hours per week, both on-call and call in work should be paid at an overtime rate.

You have requested an Attorney General's opinion concerning employment issues in the City of Denham Springs. Specifically, you state that, in addition to their regular salary, the City pays its on-call employees time and one half, after 40 hours worked, just for being on-call, as follows: Monday 1 hr.; Tuesday 1 hr.; Wednesday 1 hr.; Thursday 1 hr.; Friday 2 hrs.; Saturday 2 hrs.; Sunday 2 hrs.; and Holidays 2 hrs. On-call employees are paid regardless of whether they are actually called in to perform any work for the City. In addition, when these employees are called in for work, and after they have exceeded 40 hours per week, the City pays them overtime for every extra hour worked.

You pose a number of questions which will be answered in the order they were presented:

**1. Is it legal for the City to pay on-call employees when they are not called out for work?**

As an initial matter, we note that this type of work arrangement of paying on-call employees a base salary, on-call time and actual call in work is not uncommon.

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<sup>1</sup> See *Seal v. Bogalusa Cmty. Med. Ctr.*, 1999-0146 (La. App. 1 Cir. 2/18/00), 764 So. 2d 968, 969 (La. Ct. App.) writ denied, 2000-0818 (La. 5/12/00), 762 So. 2d 15 (noting that an on-call employee, an x-ray technician, received \$1.25 per hour while on-call, received one hour's straight pay once called back to work, and, upon arrival at the hospital, went on the clock at one and one half times his hourly rate of pay.)

Whether time spent on-call is compensable is a question of fact decided in the context of each case.<sup>2</sup> Because this office does not serve as a fact finder we address your inquiry by describing the law applicable to on-call employees in general:

The United States Department of Labor (DOL) has opined that whether on-call time constitutes hours worked depends upon the employee's ability to use the on-call time for his or her own purposes.<sup>3</sup> 29 C.F.R. §785.17 reads:

An employee who is required to remain on-call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes is working while "on-call". An employee who is not required to remain on the employer's premises but is merely required to leave word at his home or with company officials where he may be reached is not working while on-call. (*Armour & Co. v. Wantock*, 323 U.S. 126 (1944); *Handler v. Thrasher*, 191 F. 2d 120 (C.A. 10, 1951); *Walling v. Bank of Waynesboro, Georgia*, 61 F. Supp. 384 (S.D. Ga. 1945))

Among the factors to determine whether on-call time is compensable are: the 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 [or cell phone] could ease restrictions, and whether the on-call policy is based on an agreement between the parties.<sup>4</sup> This list is illustrative, not exhaustive, and no one factor is dispositive.<sup>5</sup>

For example, in Opinion FLSA2008-8NA, the DOL stated that on-call time of ambulance service employees' was compensable during the winter season; however, for non-winter seasons, the on-call time was not compensable. The DOL based its conclusion on the following combination of factors applicable to the winter season:

the extremely short in-person response time, which precludes the effective use of the on-call time for all but the narrowest range of personal purposes, all of which must take place within a restricted geographic area to allow for such a rapid response; the high number of call-ins (requiring one response every four hours); the apparent impossibility of trading on-call responsibilities because both employees are on-call five days per week; and the inability to turn down any of the call-ins. Given the very short in-person response time, the employees' use of a pager provides only limited relief.<sup>6</sup>

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<sup>2</sup> USDOL, Wage & Hour Division, Opinion FLSA2008-14NA.

<sup>3</sup> USDOL, Wage & Hour Division, Opinion FLSA2009-17, *supra*.

<sup>4</sup> USDOL, Wage & Hour Division, Opinion FLSA2008-14NA (citations omitted).

<sup>5</sup> *Id.*

<sup>6</sup> USDOL, Wage & Hour Division, Opinion FLSA2008-8NA.

The DOL, observed that if the frequency of calls in the non-winter months were to increase or if the frequency of calls in winter months were to decrease, the conclusion that the employees are able or unable to use the on-call time for their own purposes would need to be reevaluated.<sup>7</sup> The DOL explained that while the Fair Labor Standards Act (FLSA) provides for many labor standards, it does not require employers to pay for the inconvenience of being on-call if such periods are not otherwise compensable.<sup>8</sup>

According to your request, the City has the practice of paying its employees for on-call time at the one and one half rate, after 40 hours of actual hours worked. This on-call time is paid regardless of whether the employees are actually called in to work. Further, you provided our office with the City's Memorandum dated January 28, 2004 showing that this work arrangement applies across the board to several departments within the City.

Whether on-call time constitutes compensable time depends upon whether the conditions are so restrictive or the calls are so frequent that the City's employees cannot effectively use the time for personal purposes.<sup>9</sup>

Therefore, it is the opinion of this office that the City is permitted to pay its on-call employees on-call time, regardless of whether the employees are actually called out for work, provided that such on-call time is compensable because the employees are so restricted that they cannot effectively use the time for personal purposes. On the contrary, if the on-call time is not compensable because the employees are able to use the on-call time for personal purposes, such payments will be unlawful as they constitute a prohibited donation of public funds.<sup>10</sup>

**2. If the payment is lawful, are there any requirements as to the amount that hours be paid and how they should be paid?**

In La. Atty. Gen. Op. No. 87-307, this office opined that a municipality such as the City is not exempt from the minimum wage and overtime requirements of the FLSA. Further, "the compensation may cover both waiting and task, or only performance of the task itself.... The law does not impose an arrangement upon the parties."<sup>11</sup> Thus, the City is free to establish the number of hours that it will pay for on-call time, provided that such hours constitute actual on-call work. The payment amount should be in agreement with the FLSA's requirements<sup>12</sup> and any change to the City's policies will affect its employees only prospectively.<sup>13</sup>

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<sup>7</sup> *Id.*

<sup>8</sup> USDOL, Wage & Hour Division, Opinion FLSA2008-14NA, *supra*.

<sup>9</sup> USDOL, Wage & Hour Division, Opinion FLSA2009-17, *supra*.

<sup>10</sup> See, e.g., La. Atty. Gen. Op. Nos. 14-0199, 14-0197 and 10-0163 for a discussion of the prohibited donation of public funds described by La. Const. art. VII, § 14.

<sup>11</sup> *Skidmore v. Swift & Co.*, 323 U.S. 134, 137, 65 S.Ct. 161, 163 (1944).

<sup>12</sup> See *infra*.

<sup>13</sup> La. Const. art. I, § 23

**3. Does the on-call pay have to be overtime rate?**

In general terms, the FLSA requires that employers pay their employees overtime at the rate of time and one half after 40 hours on a work week.<sup>14</sup> Similarly, Section 74-32 of the City's Code of Ordinances states that "[o]vertime... shall be earned only when the actual hours worked exceed 40 hours per week.... calculated at one and one-half times the hourly rate...." As such, once the City's employees have exceeded 40 hours per week, the City should pay an overtime rate for both on-call time and actual time worked, and any additional time the City determines is required to be paid under the FLSA, as discussed in response to question number 1.

**4. If employees are called out to work, can they be paid for the hours actually worked in addition to on-call pay?**

The time spent on the actual job assignment after responding to a call must be counted as compensable hours worked.<sup>15</sup> As noted, overtime is earned upon performing actual work after reaching 40 hours per week. Thus, it is the opinion of this office that after exceeding 40 hours per week of work, on-call employees who are called in to perform work for the City should be paid for the hours actually worked at an overtime rate.

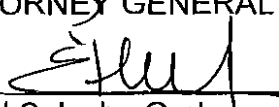
As previously noted, this opinion provides a general discussion of the applicable law. In the event that the DOL, Wage and Hour Division, reaches a different conclusion taking into consideration the specific circumstances of the City's employees, the federal agency's opinion prevails.

We trust this adequately responds to your request. However, if our office can be of further assistance, please do not hesitate to contact us.

Yours very truly,

JAMES D. "BUDDY" CALDWELL  
ATTORNEY GENERAL

By:

  
Ethel Solache Graham  
Assistant Attorney General

JDC: ESG

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<sup>14</sup> 29 U.S.C. § 207(a)(1).

<sup>15</sup> USDOL, Wage & Hour Division, Opinion FLSA2009-17, *supra*.