

08/12/02 - Minimum Wage Opinion Letter - On-Call With a Pager

August 12, 2002

I am writing in response to your request for this Office's written opinion regarding the application of 455 C.M.R. 2.03(1)(b) to the *** on-call maintenance workers. [\[1\]](#)

As I understand it, *** employs maintenance workers who work a daily shift of 7:00 a.m. to 3:30 p.m. During all other hours, one of the maintenance workers carries a pager for emergencies. The on-call worker leaves the hotel premises after the daily shift ends, but may be called back to perform a repair if the night manager is unable to resolve a problem. You have asked if 455 C.M.R. 2.03(1)(b) requires the hotel to pay these on-call workers minimum wage for at least four hours per night.

Section 2.03(1)(b) provides that:

[e]mployees working in funeral homes, doctors' offices and other places of business, whether for profit or non-profit, which in the normal course of operations require the employee to be on duty or on call *at the work site* to attend to emergencies must be paid the basic minimum wage rate for every hour for which they are on duty or on call, except that employees who are on duty or on call *at the work site* at night and are provided sleeping quarters shall be paid the basic minimum wage for not less than four hours per night. The employer shall make no deductions for sleeping quarters provided. For purposes of this provision, "night" shall mean 10:00 P.M. to 6:00 A.M.

(emphasis added). On its face, this regulation only applies to employees who are on call at the worksite; therefore, it is inapplicable to the situation you have described. [\[2\]](#)

To determine the compensability of on-call time away from the worksite, the relevant regulation is 455 C.M.R. s. 2.01 which includes a definition of "working time." Section 2.01 defines "working time," in pertinent part, to include "all time" during which an employee is required to be on the employer's premises *or to be on duty*, or to be at the prescribed workplace, and any time worked before or beyond the end of the normal shift to complete the work." 455 C.M.R. s. 2.01 (emphasis added). As the employees in your scenario are permitted to leave the worksite, the question is whether these employees are considered still "on duty" during their on-call hours.

The term "on duty" is undefined under state regulations, but the terms "on duty" and "off duty" have been defined under analogous federal law [\[3\]](#) which we may look to for guidance. See Goodrow v. Lane Bryant, Inc., 432 Mass. 165, 170 (2000). Furthermore, federal regulations have specifically addressed the compensability of on-call time. See 29 C.F.R. s. 785.17. While Section 785.17 is rather brief, numerous court decisions and opinion letters issued by the U.S. Department of Labor Wage and Hour Division have developed factors relevant to a determination of the compensability of on-call time in a given factual situation. See e.g. Pabst v. Oklahoma Gas & Electric Co., 228 F.3d 1128 (2000); U.S. Department of Labor, Wage & Hour Division Opinion Letter, May 28, 1998. This Office would employ a similar analysis to determine whether an employee is "on duty," and, therefore, due compensation under state law.

As a general rule, when an on-call employee is free to leave the worksite and is effectively free to use his or her time for his or her own purposes, such on-call time is not compensable time. However, each situation must be evaluated on a case-by-case basis. Factors such as particularly onerous restrictions on movement, frequency of calls, required response time of very short duration, actual use of on-call time for personal pursuits, and whether calls can be refused or if disciplinary action is taken for lack of response may affect a determination of whether an employee is free to use the on-call time for his or her own purposes in any given

situation. Of course, if an employee actually responds to a call and works, that employee must be compensated.

I hope this information has been helpful. If you have any further questions, please feel free to contact me.

Sincerely,
Lisa C. Price
Legal Counsel

^[1] Please note that employers are also subject to the federal minimum wage and hour law, found in the Fair Labor Standards Act (FLSA) and regulations promulgated thereunder. For information about applicable federal wage and hour laws, you should contact the U.S. Department of Labor. The telephone number for the Boston Office is (617) 624-6700.

^[2] This Office is mindful of Dagan v. Jewish Community Housing for the Elderly, 445 Mass. App. Ct. 511 (1998), a Massachusetts Appeal Court case involving the compensability of on-call time to a live-in situation. The Commonwealth was not a party to that case, and neither the court nor the litigants considered pertinent Massachusetts regulations concerning on-call hours and working time. This opinion letter analyzes the question presented in light of these regulations.

^[3] See 29 C.F.R. ss. 785.16, 785.17.

= Names have been Omitted