

Shift plus on-call duty creates tired employees

Q Could you please comment on the legal issues surrounding employees working a regular eight-hour day followed by a rotating shift of mandatory evening telephone support (12 hours) followed by a regular eight-hour workday? What are the implications with respect to lack of alertness during the second day of regular shift or when commuting to and from work?

A Mandatory work outside generally accepted shift hours is a complicated issue, controlled by both federal and state laws, which, of course, vary. Federal law requires all non-exempt employees to be paid time-and-a-half for any time over 40 hours worked in a single workweek. The law does not impose any restrictions on the schedule that must be worked; in theory, an employee could work 40 consecutive hours and then no more the rest of the week and *not* be entitled to overtime. The sum-total of time worked and the non-exempt status of the individual working control the decision.

Before cell phones and pagers, an employee who was required to take calls from home was entitled to pay, because being on call generally meant being within arm's reach of a landline phone. The loss of personal freedom to the employer's requirements entitled the employee to be paid for that time. Today, with the availability of cell phones, on-call time may not be subject to pay, straight or overtime.

On-call payment becomes an issue only when the employee's freedom is significantly restricted. If being on call means that an employee may not sleep or travel about locally, must remain in the place of employment or within a particular geographic range, or may not drink a glass of wine with dinner, then the time may be subject to pay — including overtime. Each determination

is fact-specific, and the more tightly an employee's behavior is controlled while on call, the more likely the entire on-call period will be subject to pay.

The situation described raises the issue of whether an employee is permitted to sleep during a shift — not uncommon on long shifts — and certainly not an unreasonable prospect here. Sleep time during the shift is not exempt from pay, but this is generally subject to mutual agreement by employer and employee beforehand.

Once a shift reaches 24 hours, however, eight of those hours may be unpaid and provided for sleep. If work interrupts and the employee has fewer than eight uninterrupted hours for sleep, he is entitled to pay. An employee who has to travel back to work for on-call emergencies is entitled to travel time, even if the job does not ordinarily involve compensable travel.

If on-call duty means that an employee cannot get a sufficient amount of sleep because of the frequency of calls — and being on call is a condition of employment — the case could be made that he is on a continuous shift, and that the employer created an unsafe working environment. This situation would make the employee a foreseeable risk to others, for which the employer is responsible. Quantifying the degree of risk and the likelihood of liability depends on a number of factors: Was the employee, in fact, on company time? Was it foreseeable that the employee would be so impaired by lack of sleep that there was a risk? Are there other significant factors the employer had neither knowledge nor control of (such as alcohol use or personal issues that exacerbate lack of sleep)?

The employer *is* responsible for the work done by the employee, regardless of his condition, and *is* liable for mistakes, whether intentional or negligent. Further, if an employer is aware that an

employee is too tired, sick, or otherwise impaired to properly perform his job duties and permits him to work, the employer may be seen as disregarding known risks. If so, the employer may be considered reckless, opening the door to punitive damages in the event of a successful lawsuit. In extreme cases, when risks to others or to the employee himself are obvious, significant, and ignored, reckless disregard of risk to others may even raise a question of possible criminal neglect.

An employee with a medical condition that requires rest time may have to be accommodated, even if the overall policy is otherwise appropriate. An employee with underlying health issues may require an uninterrupted period of sleep for medical reasons. If so, the Americans with Disabilities Act may require accommodation and exempt the employee from mandatory 12-hour night call.

Interestingly, the American Committee on Graduate Medical Education calls for a limitation of resident work hours: not more than 80 hours per week, never more than 24 consecutive hours, and a mandatory 24 hours completely off work every week. Although this standard has no direct application to staffing hospital labs, it is indicative that the healthcare profession has become aware of the problems of overworked, tired staff.

It behooves laboratory managers to find solutions to understaffing that do not create additional legal or medical issues for the staff, the institution, or the patients. □



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