

# THE OKLAHOMAN

## Daily Q&A with Ellen Adams

March 30, 2017



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### Retail Industry Responds to “On-Call Scheduling” Complaints

Last year, a coalition of nine attorneys general issued a joint letter to several major retailers requesting documents and answers about employee scheduling, specifically “on-call scheduling.” The states joining in the effort included New York, Massachusetts, California, Connecticut, Illinois, Maryland, Minnesota, Rhode Island, and the District of Columbia. In response to the coalition’s effort, six major retailers, such as Disney and Aeropostale, announced that they would no longer utilize on-call scheduling. Given the attention the effort

received, it is anticipated that more retailers will modify how they schedule employees in the months to come.

#### What is “on-call scheduling?”

On-call scheduling typically requires employees to contact their employer within hours of a scheduled shift to learn whether they are still needed for work. If the employer determines the employee is not needed, then the employee is not paid. Conversely, if the employer determines the employee is needed, then the employee must show up for work.

#### Why would attorneys general be interested in this type of scheduling?

From employees’ perspective, this type of last-minute scheduling impacts their ability to have supplemental employment, pursue educational opportunities and effectively manage family obligations, such as finding reliable childcare and elder-care. From the employer’s perspective, this type of just-in-time scheduling reduces labor costs while ensuring that stores are staffed according to when customers are most likely to peak.

#### Is this type of scheduling reserved for the retail industry?

While it’s a feature of the retail and fast food industry, many other industries use similar methods categorized broadly as “just-in-time scheduling” to manage the demands of certain positions without substantially increasing wage costs. For instance, in safety sensitive industries, there is often a need for someone to be “on call” just in case there is an emergency. In these positions, the shifts are not designed around customer demand but based on what may be unforeseen events.

**What are the applicable laws for on-call scheduling?**

Under the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201, *et seq.*, (the “FLSA”) and various state’s laws and regulations, employers must be cautious about the use of on-call shifts. The FLSA requires employers to pay non-exempt employees for all hours actually worked but not for “waiting time.” The Code of Federal Regulations advises that whether waiting time is compensable under the FLSA depends upon particular circumstances involving “scrutiny and construction of the agreements between particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to waiting time, and all of the circumstances.” 29 C.F.R. § 785.14 (emphasis added). In other words, it is a very factually specific inquiry.

**Are there clear examples of what is and isn’t waiting time?**

An employee is categorized as either “engaged to wait” (actually working) or “waiting to be engaged” (not working) based on whether the employee has the ability to use the time effectively for his or her own purposes. The federal regulations indicate “a fireman who plays checkers while waiting for alarms” or “a messenger who works a crossword puzzle while awaiting assignments” would be regarded as engaged to wait. If an employee is not required to remain on the employer’s premises and is free to use his time as he wishes unless or until his employer calls him to come to work, the employee is on call and would be regarded as “waiting to be engaged.”

**What are the applicable laws in Oklahoma?**

Employers in Oklahoma are subject to the FLSA. Oklahoma employers should consider a variety of factors in determining whether their “on call” employees are “engaged to wait” or “waiting to be engaged” before deciding whether those employees should be paid for “on call” shifts. Additionally, employers should consult with an attorney to conduct a wage and benefits audit to ensure that there are not other laws that may impact the manner in which they schedule and pay employees.

<http://www.oklahoman.com/daily-qa-with-ellen-adams-retail-industry-responds-to-on-call-scheduling-complaints/article/5543523>