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## NOTE

### On-Call Time Under the Fair Labor Standards Act

*Eric Phillips*

#### INTRODUCTION

Economic pressures, changing family structures, and technology have increasingly blurred the line between work time and personal time. The rise of independent contracting, the growing number of families in which both parents work, and the expanding reach of computer networks, fax machines, pagers, and mobile telephones, to provide a few examples, have blurred the once-familiar distinction between work time and leisure time.<sup>1</sup> This distinction is particularly unclear for on-call employees.

An on-call employee is one who may be physically away from the workplace but who remains connected to it by telephone, beeper, computer, or radio, and who must respond to the employer if called.<sup>2</sup> While on call, an employee generally does not face the constraints he may face while on a regular shift at his employer's premises. He may be able to go shopping or watch television during his on-call hours, for example. At the same time, even though he may have a greater measure of freedom than he does while working a normal shift, he is never truly free from work. The employer may interrupt the employee's personal activities without warning, and the threat of interruption may prevent him from engaging in certain activities altogether, either because he would not be able to return to work quickly enough, or because some activities — such as attending movies or sporting events — require a solid block of time and thus would be impractical. Moreover, non-payment for on-call time can be inequitable: employers obtain value from the on-call services, enabling them to reduce staff or

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1. See Clare Ansberry, *Workers Are Forced to Take More Jobs with Few Benefits: Firms Use Contract Labor and Temps to Cut Costs and Increase Flexibility*, WALL ST. J., Mar. 11, 1993, at A1; Sue Shellenbarger, *Firms Make the Most of Flexible Scheduling*, WALL ST. J., Apr. 12, 1993, at B1.

2. On-call service may require an employee to return to his employer's premises, *see, e.g.*, *Bright v. Houston Northwest Med. Ctr. Survivor, Inc.*, 934 F.2d 671 (5th Cir. 1991) (en banc), or simply respond by telephone, *see, e.g.*, *Berry v. County of Sonoma*, 30 F.3d 1174 (9th Cir. 1994).

limit compensable hours worked without compensating the employees who have forgone personal activities.<sup>3</sup>

The distinction between work and personal time is especially important for on-call employees covered by the Fair Labor Standards Act (FLSA or the Act).<sup>4</sup> The minimum wage and overtime requirements of the FLSA require proper categorization of an employee's service as either work or leisure time. Employers must pay any employee covered by the FLSA<sup>5</sup> at least the minimum wage for all hours they "work," and must pay an overtime premium for hours in excess of a forty-hour week.<sup>6</sup> The FLSA does not permit an employee to waive or contract around these minimum requirements.<sup>7</sup> Thus, the definition of work is important: if on-call duty is not "work," the employee need only receive compensation for time spent actively responding to his employer's call.<sup>8</sup> If on-call duty is "work," however, the employee must be paid at least the minimum wage for the time spent on call.

Although on-call arrangements are not new, until recently courts rarely dealt with the question of whether on-call arrangements constituted work for purposes of the FLSA. The FLSA offers little direct guidance on this matter,<sup>9</sup> and while the Supreme Court has ruled on cases involving "waiting time" — time spent on

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3. See Christopher S. Miller et al., *On-Call Policies Help Avoid Overtime Pay*, HRMAGAZINE, July 1996, at 57, 57 (noting that placing employees on call can keep them ready to respond to employer needs but simultaneously "off the clock").

4. 29 U.S.C. §§ 201-219 (1994).

5. The FLSA covers approximately 60% of the nation's workers, or about 80 million people. See Jon Tevlin, *Workplace Dilemma: Cash or Time Off?*, MINNEAPOLIS STAR-TRIBUNE, May 5, 1997, at D1. Among the largest groups of employees exempt from the FLSA's provisions are professional, administrative, and executive employees. See 29 U.S.C. § 213(a)(1) (1994); 51B C.J.S. *Labor Relations* §§ 1086-1138 (1968) (discussing the scope of the FLSA's coverage).

6. See 29 U.S.C. §§ 206, 207. As an illustration of how on-call duty does not fit into our traditional notion of work and is not adequately addressed by federal statutes, consider a hypothetical situation in which on-call duty prevents an employee from caring for a sick family member — because the employee might have to return to work for calls — but in which that duty is still not considered "work" under the FLSA. The on-call employee would have to take time off from work under the Family and Medical Leave Act, 29 U.S.C.A. §§ 2601-2654 (Supp. 1997), to ensure uninterrupted leisure time to care for the person, even though he is not "working" under the FLSA. Cf. *infra* note 61 (noting that work need not require exertion).

7. See *infra* section III.B.

8. There is no dispute that employees must be paid for the time spent actually responding to calls. The dispute relates to time spent waiting to be called by the employer.

9. Congress has been presented with the difficult questions raised by on-call work, but has not addressed these questions. See *Oversight of the Fair Labor Standards Act, 1996: Hearings on the Purpose, History, and Regulatory Requirements of the Fair Labor Standards Act as Applied in the Public and Private Sectors Before the Senate Comm. on Labor and Human Resources*, 104th Cong., 6-7 (1996) [hereinafter *Hearings*] (letter of Pete Wilson, Governor of California) (arguing for exclusion of public employees from FLSA coverage in part because states fear windfalls that could be given to firefighters and investigators for their on-call duty).

the employer's premises or within "hailing distance"<sup>10</sup> — it has never squarely addressed the issues raised by on-call time. Only in the past decade have federal appellate courts examined whether particular on-call arrangements require compensation under the FLSA.<sup>11</sup>

Because on-call arrangements do not fit neatly into traditional notions of "work," and because the FLSA does not adequately define the term, courts have struggled to create a rational approach for determining whether an on-call employee is working, and thus entitled to the statutory minimum wage and overtime guarantees for his time on call.<sup>12</sup> Courts have disagreed with each other,<sup>13</sup>

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10. See *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944); *Armour & Co. v. Wantock*, 323 U.S. 126 (1944). "Hailing distance" has been defined as "1: the limit to which a human voice is heard . . . 2: a close proximity: short reach . . ." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1020 (Philip Babcock Gove ed., 1986). At the time *Armour* and *Skidmore* were decided, it is probable that there were fewer workers on call than there are now. Technological innovations such as telephones and pagers were either not widely available or did not exist. Wealthier citizens who were more likely to own telephones were often not covered by the FLSA because they were professional, administrative, or executive employees. Compare BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES 783 (1975) (stating that in 1938 only 34.6% of U.S. households had telephones) with BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 561 (1996) (stating that in 1994 93.9% of U.S. households had telephones).

11. Compare *Berry v. County of Sonoma*, 30 F.3d 1174 (9th Cir. 1994) (holding that no compensation is required), *Birdwell v. City of Gadsden*, 970 F.2d 802 (11th Cir. 1992) (same), *Owens v. ITT Rayonier, Inc.*, 971 F.2d 347 (9th Cir. 1992) (same), *Martin v. Ohio Turnpike Commn.*, 968 F.2d 606 (6th Cir. 1992) (same), *Bright v. Houston Northwest Med. Ctr. Survivor, Inc.*, 934 F.2d 671 (5th Cir. 1991) (en banc) (same) and *Brock v. El Paso Natural Gas Co.*, 826 F.2d 369 (5th Cir. 1987) (same) with *Renfro v. City of Emporia*, 948 F.2d 1529 (10th Cir. 1991) (requiring compensation) and *Cross v. Arkansas Forestry Commn.*, 938 F.2d 912 (8th Cir. 1991) (same).

12. See *Halferty v. Pulse Drug Co.*, 864 F.2d 1185, 1189 (5th Cir. 1989) ("The FLSA's minimum wage and overtime requirements . . . are designed to apply readily and easily to workers whose jobs require them to show up at specific hours and to work more or less continuously while on their employers' premises.").

13. Compare *Renfro*, 948 F.2d 1529 (granting compensation when employees were interrupted three to five times per twenty-four hours of on-call duty) with *Berry*, 30 F.3d 1174 (refusing to grant compensation when employees were interrupted approximately four times per twenty-four hours of on-call duty). The court in *Berry* distinguished *Renfro* partly because the employees in *Berry* responded by telephone or radio within fifteen minutes, whereas the employees in *Renfro* had to return to their employer's premises. See *Berry*, 30 F.3d at 1184, 1186. According to the district court in *Berry*, however, even though there was no specific response time required for the return call, in practice the employees, who were coroners, responded to many calls "as soon as possible." *Berry v. Sonoma County*, 791 F. Supp. 1395, 1403 (N.D. Cal. 1992). Often this required the coroners to report to their offices or to the scene of a death. See 791 F. Supp. at 1405. Thus, the employees, in fact, were constrained in what they were able to do during the time on call. This suggests that the actual practice differed from the employer's stated rule. If in practice an employee must return to his employer's premises, the situation should be treated the same as if there were a rule explicitly requiring the return. Cf. *Skidmore*, 323 U.S. at 137 (holding that courts must examine the "practical construction of the working agreement by conduct").

There are differences among the circuits as to which general analysis and specific factors to apply in deciding whether a particular type of on-call duty is work. See *infra* section I.C.

often applying conclusory analysis<sup>14</sup> and have permitted extraneous issues to muddle their analyses.<sup>15</sup> In light of the predominantly factual basis of the question raised in on-call cases, a mechanical test likely cannot resolve the issue.<sup>16</sup> Courts therefore must examine all the circumstances involved in the on-call arrangement.<sup>17</sup>

This Note attempts to clarify the analysis for determining whether an employee is "working" while on call. Part I explains that neither the FLSA nor the Supreme Court provides clear guidance for defining "work" in on-call cases. Part II argues that when deciding on-call cases, courts should look to how the on-call arrangement both burdens the employee and benefits the employer. Part III contends that courts should eliminate two extraneous issues from their current analysis of on-call cases: whether an employee may trade an on-call shift, and whether employees and employers can decide for themselves through a contract whether on-call service is work.

## I. THE MUDDLED LEGAL HISTORY OF ON-CALL EMPLOYMENT

This Part sets out the basic guideposts courts have used to examine on-call time and explains why they lead to inconsistent results. Section I.A describes the statutory and regulatory schemes governing the definition of work and finds that they are either vague or incomplete. Section I.B reviews the relevant Supreme

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14. See *Sarmiento v. City of Denver*, No. 95-1225, 1996 WL 169806, at \*3 (10th Cir. Apr. 11, 1996) (containing a perfunctory discussion of the evidence); *Pfister v. City of New Orleans*, 1 Wage & Hour Cas. 2d (BNA) 559, 564 (E.D. La. 1993) (same); *Spires v. Ben Hill County*, 745 F. Supp. 690, 702 (M.D. Ga. 1990) (same).

15. See, e.g., *Service Employees Intl. Union Local 102 v. County of San Diego*, 60 F.3d 1346, 1354 (9th Cir. 1995) (considering the ability to trade on-call shifts to be relevant); *Berry*, 30 F.3d 1174 (same); *Owens*, 971 F.2d at 351 (same). Section III.A argues that the ability to trade on-call shifts is irrelevant to the determination of whether an employee is working while on call. Section III.B argues that employers and employees cannot contract around the requirements of the Act.

16. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 138 (1944).

17. As the Supreme Court noted fifty years ago, there can be no "legal formula" to resolve the question of whether or not an employee is working. See *Skidmore*, 323 U.S. at 136 (noting that factual situations differ). In addition to the difficulty of determining whether an on-call employee is working, practical considerations may affect the resolution of the issue. Payment for on-call service can impose large and often unexpected costs on employers that some find excessive for the service rendered. See *Hearings*, *supra* note 9, at 6-7 (letter of Pete Wilson) (claiming that state and local governments fear windfalls given to public employees for their on-call duty). Consequently, courts may be reluctant to find that on-call time is work, even though a balanced interpretation of the FLSA indicates that workers should receive payment for that time. A coherent framework of analysis would reduce employers' uncertainty and correspondingly reduce the likelihood of unexpected or unfair awards of wages to on-call employees, leading to a more equitable application of the law. See *infra* part II.

As with the resolution of any fact-intensive issue, the implementation of a legal framework will not eliminate difficult judgments. The analysis in this Note attempts to bring the inquiry into sharper focus by defining the important factors and eliminating irrelevant ones.

Court decisions on this issue and concludes that they similarly fail to provide concrete guidance. Section I.C contends that neither the statute nor Supreme Court decisions adequately facilitates consistent application by lower courts.

### A. *Statutory and Regulatory Guideposts*

The FLSA does not define work. It merely states that to “[e]mploy” includes to suffer or permit to work.”<sup>18</sup> The Department of Labor’s regulations under the FLSA also provide no clear guidance. Under the regulations,

[a]n 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.<sup>19</sup>

This definition properly indicates that the burden on the employee is the paramount consideration in resolving the question,<sup>20</sup> but ultimately is of little help to courts in determining whether an on-call employee must receive the minimum wage or overtime.<sup>21</sup>

The regulations are both too vague and too narrow. On one hand, they leave the courts with a great deal of discretion and lead to contradictory conclusions in similar situations.<sup>22</sup> Although the regulations focus on whether an employee can use his time “effec-

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18. 29 U.S.C. § 203(g) (1994).

19. 29 C.F.R. § 785.17 (1996) (emphasis added).

20. See *infra* section II.A. An exclusive focus on the burden on the employee does not resolve the issue, however, because it does not capture important equitable concerns that the FLSA advances. An employer gains from an on-call arrangement because it does not need to hire an additional worker to come in and wait for work, and the benefit to the employer can in some situations weigh in favor of requiring payment for on-call time. See *infra* section II.B.

21. The regulations are not controlling on the courts, but are entitled to weight only to the degree to which they are persuasive. See *Skidmore*, 323 U.S. at 140. Some courts, though, have given greater deference to the regulations than is appropriate. See *Renfro v. City of Emporia*, 948 F.2d 1529, 1537 (10th Cir. 1991) (noting that an agency’s construction of its own regulation is entitled to substantial deference). Congress did not provide the Secretary of Labor with authority to define work under the statute, and the regulations are therefore interpretative rules entitled to deference only to the extent to which they are persuasive. See KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 6.3 (3d ed. 1994) (discussing the difference between legislative and interpretative rules). In this case, the regulation is not persuasive because it would never require compensation for an employee who is on call away from his employer’s premises. See *infra* note 23 and accompanying text.

22. For example, the courts in both *Bright v. Houston Northwest Medical Center Survivor, Inc.*, 934 F.2d 671, 676 (5th Cir. 1991) (en banc) (refusing to grant compensation where employee was required to return to work within twenty minutes and was subject to three interruptions per on-call shift), and *Renfro*, 948 F.2d at 1535 (granting compensation where employees were required to return within twenty minutes and were interrupted an average of three to five times per on-call shift), relied in part on the regulations yet reached divergent conclusions on similar facts.

tively," that focus does not provide sufficient guidance. On the other hand, the regulations do not account adequately for the possibility that an employee may be entitled to compensation under the FLSA even when he is waiting on call more than a short distance from his employer's premises.<sup>23</sup>

### B. *Supreme Court Guideposts*

The Supreme Court, in two "waiting time" cases, *Armour & Co. v. Wantock*<sup>24</sup> and *Skidmore v. Swift & Co.*,<sup>25</sup> set out several helpful principles that lower courts have used in determining whether an on-call employee is working. These cases involved firefighters who waited on or near the employer's premises to be called to activity. In *Armour*, the Court determined that time spent waiting for work could be classified as work time under the FLSA.<sup>26</sup> In *Skidmore*, the Court indicated that the touchstone in such cases is whether the "time is spent predominantly for the employer's benefit or for the employee's."<sup>27</sup> Any such inquiry, the Court noted, is heavily fact-dependent<sup>28</sup> and "involves scrutiny and construction of the agreements between the particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time, and of all of the surrounding circumstances."<sup>29</sup>

Lower courts have relied on *Armour* and *Skidmore* when determining whether the FLSA requires compensation in on-call cases. But while the guideposts contained in those waiting-time cases are useful and provide the basis for the broad contours of this Note, they do not adequately tell courts how to reach consistent conclusions in cases involving on-call arrangements. Waiting-time cases present very broad principles applied to factual situations that differ from on-call cases. On-call cases are more difficult to resolve than waiting-time cases because, unlike the situations in *Armour* and *Skidmore*, in which the employees were required to remain on or close to the employer's premises,<sup>30</sup> most contemporary on-call ar-

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23. Every circuit that has examined on-call time has acknowledged that an employee may be entitled to compensation under the FLSA even if he does not remain on or very close to the employer's premises. The Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits have decided on-call cases. See, e.g., *Owens v. ITT Rayonier, Inc.*, 971 F.2d 347 (9th Cir. 1992); *Birdwell v. City of Gadsden*, 970 F.2d 802 (11th Cir. 1992); *Martin v. Ohio Turnpike Commn.*, 968 F.2d 606 (6th Cir. 1992); *Renfro*, 948 F.2d 1529; *Cross v. Arkansas Forestry Commn.*, 938 F.2d 912 (8th Cir. 1991); *Bright*, 934 F.2d 671.

24. 323 U.S. 126 (1944).

25. 323 U.S. 134 (1944).

26. See *Armour*, 323 U.S. at 132-34.

27. 323 *Skidmore*, U.S. at 133.

28. See *Armour*, 323 U.S. at 133; *Skidmore*, 323 U.S. at 137.

29. *Skidmore*, 323 U.S. at 137.

30. See *Armour*, 323 U.S. at 126; *Skidmore*, 323 U.S. at 134.

rangements provide for greater physical freedom, permitting employees to go home and perform certain tasks for the employer without having to return to the employer's premises.<sup>31</sup> At the same time, the burden on the on-call employee may be greater. On-call shifts sometimes may last longer than waiting shifts and, in extreme cases, on-call employees may be placed on call the entire time they are not performing their regular service.<sup>32</sup> The differences between on-call cases and waiting-time cases thus compel a different analysis.

### C. *Confusion in the Lower Courts*

Lower courts have not applied consistent analysis to on-call cases. The courts have disagreed over the broad outline of the test for determining what is work. The Sixth and Eleventh Circuits require compensation only when a severe burden has been placed on the employee,<sup>33</sup> whereas the Tenth Circuit merely asks whether the burden on the employee interferes with the employee's personal pursuits.<sup>34</sup> The elements of the test also vary among the circuits. For example, the Ninth Circuit looks at eight different factors,<sup>35</sup> while other courts apply fewer.<sup>36</sup> Some of these factors — for ex-

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31. See, e.g., *Berry v. County of Sonoma*, 30 F.3d 1174, 1178 (9th Cir. 1994) (finding that coroners who were on call could conduct some investigations from their homes).

32. See *Bright v. Houston Northwest Med. Ctr. Survivor, Inc.*, 934 F.2d 671, 680 (5th Cir. 1991) (en banc) (Williams, J., dissenting) (noting that continuous on-call service precludes a wide range of activities); *infra* note 78. But see *infra* notes 78-81 and accompanying text (arguing that the FLSA does not provide relief from continual on-call duty).

33. See *Birdwell v. City of Gadsden*, 970 F.2d 802, 810 (11th Cir. 1992) (requiring that a "severe" burden be compensated); *Martin v. Ohio Turnpike Commn.*, 968 F.2d 606, 611 (6th Cir. 1992) (holding that to prevail an employee must show that the on-call duty "seriously" interferes with personal activities); see also *Lurvey v. Metropolitan Dade County*, 870 F. Supp. 1570, 1579 (S.D. Fla. 1994) (citing *Birdwell*).

34. See *Armitage v. City of Emporia*, 982 F.2d 430, 432 (10th Cir. 1993).

35. In *Owens v. ITT Rayonier, Inc.*, 971 F.2d 347 (9th Cir. 1992), the court examined (1) whether there was an on-premises living requirement; (2) whether there were excessive geographical restrictions on employee's movements; (3) whether the frequency of calls was unduly restrictive; (4) whether a fixed time limit for response was unduly restrictive; (5) whether the on-call employee could easily trade on-call responsibilities[;] (6) whether use of a pager could ease restrictions; and (7) whether the employee had actually engaged in personal activities during call-in time. 971 F.2d at 351 (footnotes omitted). The *Owens* court also examined the employment agreement. See 971 F.2d at 354; see also *Berry*, 30 F.3d at 1183 (relying on the *Owens* factors). This Note argues that at least two of the *Owens* factors are not relevant to the question of whether on-call time is work. See *infra* Part III (arguing that courts should not consider whether employees can trade on-call duty, and that the existence of an agreement regarding the on-call time should not be given weight).

36. See *Armitage*, 982 F.2d at 432 (emphasizing the number of interruptions and the amount of time an employee has to return to a call); *Birdwell*, 970 F.2d at 808 (determining whether the on-call time was predominantly for the employer's benefit by examining whether employees could leave home while on call or work more than one job); *Martin*, 968 F.2d at 611-12 (examining whether the on-call employee could undertake personal pursuits by emphasizing the frequency of the calls and whether the call-in system was cumbersome); *Renfro v. City of Emporia*, 948 F.2d 1529, 1537-38 (10th Cir. 1991) (emphasizing the number of



ample, the ability to trade on-call shifts — have not been embraced uniformly,<sup>37</sup> and as discussed in Part III, do not further the analysis. In addition, nearly all circuits to consider on-call cases have failed to give adequate weight to the benefit an employer receives from the on-call arrangement.<sup>38</sup> Consequently, courts have reached different conclusions in cases with similar facts.<sup>39</sup>

## II. DEFINING WORK IN ON-CALL CASES

This Part seeks to bring greater coherence to the determination of whether an on-call employee is working within the meaning of the FLSA. Courts should consider both the burden the on-call time places on the employee and the benefit the on-call employee provides to the employer.<sup>40</sup> Section II.A proposes an analytic approach to measure the burden on the employee. The burden on the employee is generally the focus of the dispute; whether a court finds that an employee's obligations constitute work most often depends on what he actively does for the employer and the extent to which the on-call service constrains his personal activities.<sup>41</sup> Section II.B argues that courts should give greater weight to the benefit to the employer than they generally have. When the on-call activity — or inactivity — closely resembles regular duty, courts should presume the on-call time provides a valuable benefit to the employer. The greater the benefit to the employer, the more likely it is that the courts should require the employer to pay the minimum wage.

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callbacks, whether the employee could hold another job, whether the employee could trade shifts, and whether the time could be used for personal pursuits); *Cross v. Arkansas Forestry Commn.*, 938 F.2d 912, 916-17 (8th Cir. 1991) (noting that there could be no legal formula but emphasizing the ability to travel or to engage in personal activities, the required response time, the difficulty of monitoring calls, the possibility of the need to respond immediately, and whether the on-call employee was ever relieved from duty (citing *Skidmore v. Swift*, 323 U.S. 134, 136 (1944))).

37. See *infra* Part III.

38. Compare, e.g., *Owens*, 971 F.2d at 353-54 (examining seven factors and finding the benefit to the employer irrelevant) and *Allen v. Atlantic Richfield Co.*, 724 F.2d 1131, 1137 (5th Cir. 1984) (examining benefit to employer, but giving it little weight) with *Renfro*, 948 F.2d at 1538 (giving weight to the benefit to the employer). For a discussion of the significance of the benefit to the employer, see *infra* section II.B.

39. See *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944) (noting that courts limit the scope of their opinions to the specific facts of the case and thus “[g]eneral expressions transposed to other facts are often misleading”); see also *supra* notes 13, 22.

40. See *supra* note 27 and accompanying text.

41. See *Armour*, 323 U.S. at 133 (focusing on “[w]hether time is spent predominantly for the employer’s benefit or the employee’s”); cf. *Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944) (noting that work generally involves physical or mental exertion).

### A. *Burden on Employee*

This section argues that when courts consider the burden imposed on the on-call employee, they should examine (1) the number of times an employee is interrupted or called back to work; (2) the duration of the callbacks and interruptions; and (3) the amount of time an employee has before he must return to work. Courts should examine each of these factors in the context of the others; each of them alone might impose a minor burden, but several or all of them in combination could constitute a burden deserving compensation under the FLSA. When one element is especially burdensome, however, it may by itself compel compensation.

Courts should continue to give great weight to the first factor, the number of times the employer interrupts the employee or calls him back to the employer's premises. Frequent interruptions indicate that the on-call service both actively burdens the employee<sup>42</sup> and prevents him from engaging in personal activity, and may indicate that the on-call time closely resembles normal working hours, which, of course, would be compensable under the FLSA. In general, courts have found that where an employee is called back to work two or fewer times per twenty-four hours of on-call duty, the employee need not be compensated for the time he is inactive.<sup>43</sup> If, as anecdotal evidence suggests, the average call takes between one and three hours,<sup>44</sup> two callbacks per twenty-four hours of on-call time should leave the employee with sufficient time to pursue most

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42. *See, e.g., Birdwell v. City of Gadsden*, 970 F.2d 802, 807, 810 (11th Cir. 1992) (holding that an on-call employee, although required to report to his employer immediately and forbidden to leave town, was not sufficiently burdened to be entitled to compensation because he had never been called back); *Renfro*, 948 F.2d at 1537-38 (indicating that the frequency of callbacks — three to five per 24 hours — burdened the employee and was critical to the court's conclusion that employees must receive compensation for on-call duty).

43. Unless the court has found a significant constraint on an on-call employee beyond the number of interruptions, such as a quick response time, *see Oliver v. Mercy Med. Ctr., Inc.*, 695 F.2d 379 (9th Cir. 1982) (noting the district court's unappealed ruling that on-call employees who had three minutes to return to work must be compensated for their on-call time), or constant attention to a radio, *see Cross v. Arkansas Forestry Commn.*, 938 F.2d 912, 917 (8th Cir. 1991) (holding that employees could prevail where they were permitted to go 35-50 miles from home but were required to monitor radio calls continuously), employees have rarely prevailed when the number of interruptions or callbacks per day is two or fewer. *See, e.g., Armitage v. City of Emporia*, 982 F.2d 430 (10th Cir. 1992) (denying compensation when there were fewer than two callbacks per week); *St. Clair v. City of Iola*, No. 92-4024, 1994 U.S. Dist. LEXIS 14116, at \*10 (D. Kan. Aug. 26, 1994) (denying compensation for 1.15 interruptions per 24 hours); *Cleary v. ADM Milling Co.*, 827 F. Supp. 472, 476 (N.D. Ill. 1993) (denying compensation for 1.25 calls per week); *Burnison v. Memorial Hosp., Inc.*, 820 F. Supp. 549, 552 (D. Kan. 1993) (denying compensation when there were 1.1 to 1.4 calls per 24 hours).

44. *Cf. Renfro*, 948 F.2d at 1531 (average callback of one hour); *Bright v. Houston Northwest Med. Ctr. Survivor, Inc.*, 934 F.2d 671, 673 (5th Cir. 1991) (en banc) (involving callbacks that averaged less than two hours and forty minutes); *Cleary*, 827 F. Supp. at 473 (average call, excluding travel time, of one hour and ten minutes).

of the same activities in which he would be able to engage if not on call.<sup>45</sup>

Courts should also consider the length of the interruptions in determining the employee's burden. When a response to a call is lengthy, the employee faces a greater burden because he has less time in that on-call shift to conduct other activities. For example, an on-call employee who is interrupted simply to provide an answer to a question over the telephone bears much less of a burden than an employee who must return to his employer's premises.

The final factor, the amount of time within which an employee must return to the employer's premises, also determines much of the burden he faces while on call. A required response time of three minutes is far more burdensome than a response time of twenty minutes.<sup>46</sup> Like the requirement that an employee remain on the employer's premises while on call, a short response time can restrict the activities an employee may pursue while on call.

As a benchmark, courts should find that response times of twenty minutes or more do not, by themselves, burden the employee enough to require compensation under the FLSA. Requiring a response in less than twenty minutes dramatically narrows the range of the employee's activities: workers in the United States live, on average, approximately twenty minutes from work,<sup>47</sup> and thus could go no farther from work than their home — or outside a twenty minute radius from work if they carry a pager or mobile telephone — and would have to cease their activity immediately when called. Anecdotal evidence suggests that most people engage in nearly all of their leisure pursuits within a short distance of their homes,<sup>48</sup> and if employees live twenty minutes from their workplace and do not go far from home in their off time, a twenty-minute response time permits them to do nearly all of the things

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45. See, e.g., *Bright*, 934 F.2d at 674, 676 (involving employees who were called back an average of four to five times per week and who, while on call, could engage in normal personal activities at home, go shopping, and eat at restaurants); *Cleary*, 827 F. Supp. at 473-74 (involving employee who was called back, on average, 1.25 times per week and who could, while on call, go to the movies or the pool hall, watch television, entertain friends and family, and garden); *Burnison*, 820 F. Supp. at 552-53 (involving an employee called back 1.1 to 1.4 times per 24 hours who could, while on call, watch television, do housework, write letters, listen to music, read, and run errands).

46. Compare *Bright*, 934 F.2d at 677-78 (finding a twenty minute response time not burdensome), with *Oliver*, 695 F.2d at 380 (noting district court's unappealed ruling that on-call employees who had three minutes to return to work must be compensated for their on-call time).

47. In 1990, the average commuting time in the United States was 22.4 minutes. See BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 625 (1996).

48. According to the Fifth Circuit, "[m]illions of employees go for weeks at a time without traveling more than seventeen miles from their place of employment." *Bright*, 934 F.2d at 678.

they could do were they not on call.<sup>49</sup> Actual practice in the workplace appears to reflect this conclusion, as twenty-minute response requirements appear to be common.<sup>50</sup>

On the other hand, an extremely short response time — five minutes, for example — should compel compensation even when the employee bears no other burdens.<sup>51</sup> Although such an arrangement is not as burdensome as a requirement that an employee remain on his employer's premises — because he may be able to wait at home — an extremely short tether places severe limits on the on-call employee's activity. There are very few things an employee may do if he must return to work in five minutes. Furthermore, the rapid response time provides a significant benefit to the employer because the matters get addressed nearly as quickly as they do when on-site employees do the work.<sup>52</sup>

These three factors need only be applied if the employee is required to respond while on call. If an employee need not respond to an employer's call, then the time on call should not be compensable. Such an employee has, in a sense, an infinite amount of time to

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49. A twenty-minute tether would be a useful standard in most cases because it permits employees to pursue nearly all activities they would pursue if not on call. There may be some situations in which the size of the community would affect the activities the on-call employee would pursue if not on call, and that, therefore, should be taken into account. See *Burnison*, 820 F. Supp. at 554 (concluding that a five-minute response requirement was not burdensome because the employees lived in a small city). Alteration of the length of the tether should depend on what activities are available in the workplace's community, not on the distance each employee lives from work. Otherwise, employees who work for the same employer and provide the same service at the same location might be treated differently under the FLSA.

50. See, e.g., *Renfro v. City of Emporia*, 948 F.2d 1529, 1531 (10th Cir. 1991) (involving employees required to return to their employer's premises within 20 minutes); *Bright*, 934 F.2d at 673 (same).

51. See, e.g., *Oliver*, 695 F.2d 379 (noting the district court's unappealed ruling that on-call employees who had three minutes to return to work must be compensated for their on-call time), cf. *Brown v. United States*, 31 Fed. Cl. 585 (1994) (rejecting employer's motion for summary judgment when employees were required to respond in five minutes or less). Although *Brown* arose under the Federal Employees Pay Act (FEPA), 5 U.S.C. §§ 5541-5551 (1994), the court applied the same analysis as would apply under the FLSA.

Unless callbacks are so rare that an employee does not alter his personal activities, on-call duty requiring a response time of five minutes or less should be compensable, because in such cases the employee is essentially engaged to wait. See *Armour & Co. v. Wantock*, 323 U.S. 126, 133-34 (1944) (holding that an employee can be engaged to wait and that such an employee is entitled to payment of at least the minimum wage and an overtime premium); *Birdwell v. City of Gadsden*, 970 F.2d 802, 807, 810 (11th Cir. 1992) (holding, when employees had to report to their employer immediately and could not leave town, that employees were not entitled to compensation because they had never been called back); see also 29 C.F.R. § 785.17 ("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.'"); *Hours Worked/EMTs/On-Call Time*, 6A Lab. Rel. Rep. (BNA) (99 WAGE & HOUR MAN.) 5219 (Nov. 16, 1988) (Smith, Admr.) (Wage and Hour Division of the Department of Labor opinion indicating that a five-minute response time for EMTs makes the on-call time compensable). But see *Rousseau v. Teledyne Movable Offshore, Inc.*, 805 F.2d 1245 (5th Cir. 1986) (refusing to grant compensation when employees were required to remain on a barge for one week).

52. See *infra* section II.B (discussing the significance of the benefit to the employer).

respond and is not burdened by the duty. This situation arises when an employer has a list of employees he designates as "on call," but does not require any one of them to respond. Because no employee must return to work and give up his personal pursuits, no employee is tied to work. This is essentially no different from calling an off-duty employee to work;<sup>53</sup> the employee is "wait[ing] to be engaged"<sup>54</sup> and should receive no compensation.

Determining whether a response is mandatory should depend on practical, factual circumstances and not merely on the employer's policy. There may be instances in which a work rule states that responding to a call is voluntary, when in practice a response is mandatory. The touchstone for the courts should be whether or not an employee is treated adversely for refusing to respond to calls. Evidence of disciplinary action against employees who do not respond to calls should be enough to prove that the response is mandatory.<sup>55</sup> Courts should not conclude, however, that the arrangement is involuntary when those who do respond to the calls receive favorable treatment.<sup>56</sup> The FLSA seeks to constrain the employer's control over the workplace only in limited circumstances. Under the FLSA, so long as the employer pays the requisite minimum wage and overtime, he is free to promote employees and assign work as he wants.<sup>57</sup>

### B. *Benefit to Employer From On-Call Service*

The benefit to the employer is also relevant to the determination of whether an on-call employee is working under the FLSA. While nearly all lower courts that have examined on-call time have ignored this factor,<sup>58</sup> its use is consistent with Supreme Court precedent and with the equitable concerns that were central to the passage of the FLSA.

The Supreme Court has emphasized in its waiting-time cases that, in defining work, the benefit accruing to an employer is impor-

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53. Cf. *Caryk v. Coupe*, 663 F. Supp. 1243 (D.D.C. 1987) (holding that chauffeurs who did not have to wait on the employer's premises and had no responsibilities while waiting need not be compensated for waiting time).

54. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 137 (1944) ("Facts may show that the employee was engaged to wait, or they may show that he waited to be engaged."). An employee waiting to be engaged is not entitled to compensation under the FLSA. See *Skidmore*, 323 U.S. at 136.

55. See, e.g., *Renfro*, 948 F.2d at 1537 (noting that employees were subject to discipline if they were late for callback).

56. See *Norton v. Worthen Van Serv., Inc.*, 839 F.2d 653 (10th Cir. 1988) (holding that employers need to offer work to those who do not wait on the employer's premises).

57. The FLSA prohibits employers from discriminating against employees who assert their rights under the Act, see 29 U.S.C. § 215(3) (1994), but it does not prohibit employers from rewarding employees for doing more than is required under the Act.

58. See *supra* note 38.

tant.<sup>59</sup> This benefit, according to the Court, need not depend on actual physical exertion by the employee.<sup>60</sup> In *Armour*, the Court rejected an employer's argument that work required exertion and held that whether an employee was working under the Act did not turn solely on what the employee was doing.<sup>61</sup> An employee hired to do nothing but wait may be working and thus entitled to compensation by the FLSA.<sup>62</sup> The relevant question is "[w]hether time is spent predominantly for the employer's benefit or for the employee's."<sup>63</sup> Likewise, in deciding whether an on-call employee is working, consideration of the benefit to the employer is critical.

In fact, the value of the service to the employer was an important consideration in Congress's establishment of the minimum wage. Promoting fairness to employees was a central motivation behind passage of the FLSA; the minimum wage and overtime provisions were intended in part to ensure that workers received fair payment for the benefit they produced.<sup>64</sup> As introduced in the Senate, the bill that became the FLSA defined a "fair wage" as one "commensurate with the value of the service or class of service rendered."<sup>65</sup> Although the bill as enacted replaced this language with a specific minimum wage, Congress did not reject the principle.<sup>66</sup> There is also evidence that Congress embraced this principle be-

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59. See *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944).

60. See *Armour*, 323 U.S. at 133.

61. See *Armour*, 323 U.S. at 133; see also *Reich v. New York City Transit Auth.*, 45 F.3d 646, 651 (2d Cir. 1995) (noting that compensation for work may be required where the employee does not exert himself). But see *Phillips v. Lake County*, 721 P.2d 326, 334 (Mont. 1986) (applying the FLSA and holding that on-call employees were not entitled to compensation solely because they did not exert themselves); *Berry v. County of Sonoma*, 30 F.3d 1174 (9th Cir. 1994). *Berry* involved coroners who were placed on call after a normal daytime shift. Because people die at all times of the day, coroners were called upon to investigate deaths during their on-call shifts in much the same way as they would have if somebody had died during their regular shifts. Despite the fact that the coroners did the same kind of work during both normal and on-call shifts, the court held that they were "waiting to be engaged" and denied them compensation for their on-call time. *Berry's* holding is unsound, however, because the court did not adequately consider the similarity between the on-call service and the regular service. See *infra* notes 69-73 and accompanying text.

62. See *Armour*, 323 U.S. at 132-33.

63. *Armour*, 323 U.S. at 133.

64. The statute's chief advocate, President Franklin D. Roosevelt, wanted to ensure that a person would receive a "fair day's pay for a fair day's work." *Fair Labor Standards Act of 1937: Joint Hearings on S. 2475 & H.R. 7200 Before the Senate Comm. on Educ. and Labor and the House of Representatives Comm. on Labor*, 75th Cong. 739 (1937) 54-55 [hereinafter *Joint Hearings*] (quoting message of President Roosevelt, 81 CONG. REC. 4983 (1937)).

65. Fair Labor Standards Act, S. 2475, 75th Cong. § 2(a)(14) (1937) (bill as reported to the full Senate on May 24, 1937).

66. The rejection of the provision had nothing to do with the equitable concern about employers who gained unfairly from the work of an employee. Congress eliminated the provision that called for a board to set a minimum wage because of widespread concern that the board would set a lower minimum wage in parts of the South and West, thereby giving those regions a competitive advantage. See, e.g., 83 CONG. REC. 7275 (1938) (statement of Rep. Norton); 82 CONG. REC. 1396-97 (1937) (statement of Rep. Griswold).

cause many of the bill's proponents feared that the courts would strike down a wage not based on the value of the service to the employer.<sup>67</sup>

General policy concerns embedded in the FLSA also militate in favor of considering the benefits afforded employers from on-call service. The employer knows the employee will complete the task the employer needs done, even though the employee is not physically present. Having an employee who will respond to a call enables the employer to keep his workforce lean.<sup>68</sup> If the employee did not have to respond, then the employer either would have to go without the service or would have to pay somebody at least the minimum wage to be present at the place of employment.

Courts should calculate how much benefit accrues to an employer by comparing the on-call service to regular service. The employer's placement of a worker on a regular shift indicates that the employer values the worker's services at the minimum wage or higher. When the on-call duty resembles regular duty in terms of the service provided at the employer's workplace, it should be considered work and thus compensable under the FLSA.<sup>69</sup> Similarly, when an on-call employee does something akin to another employee's on-premises work, a significant benefit inures to the employer, weighing in favor of compensation.<sup>70</sup> The Supreme Court in *Skidmore* called on lower courts to examine the relation between waiting time and normal work time,<sup>71</sup> and the facts of *Armour*<sup>72</sup>

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67. The advocates of the FLSA believed that basing the minimum wage in part on the value of service was critical to its viability. The manager of the bill in the House of Representatives responded to the argument that a bill containing a uniform minimum wage would be unconstitutional by inserting into the *Congressional Record* this statement by a Roosevelt administration lawyer: "A minimum [wage] cannot be set without taking into consideration the value of services rendered." 83 CONG. REC. 7306 (1938) (statement of Ben Cohen, inserted by Rep. Norton). Cohen also stated that a low minimum wage would be easier to justify constitutionally because it would not be hard to show that the services were worth the amount set. See *id.* Furthermore, Attorney General Robert H. Jackson testified: "[A] minimum-wage law, Federal or State, which paid no regard to the fixing of the value of the services, would be on dangerous constitutional ground." *Joint Hearings, supra* note 64, at 88.

68. See Miller, *supra* note 3, at 57.

69. *Berry v. County of Sonoma*, 30 F.3d 1174 (9th Cir. 1994), illustrates that the benefit to the employer is high when on-call service resembles regular service. That case involved on-call coroners who performed many investigations while on call. In many instances, the coroners needed to respond quickly in order to investigate or to record the deaths. Because deaths occur at all times of the day and night, the coroners could not control the flow of their work; it is possible that as many investigations occur during on-call hours as during regular hours. In such a situation, the employer is getting as much benefit from the on-call service as from the regular service. The similarity between on-call duty and regular duty may also suggest that the burden on the employee is greater because an employee generally has less control over his time when at work than at home. See *Berry*, 30 F.3d at 1183-84.

70. Cf. *Brock v. El Paso Natural Gas Co.*, 826 F.2d 369 (5th Cir. 1987) (denying compensation to gas pipeline employees who served as security guards during on-call time).

71. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 137-38 (1944).

72. See *Armour & Co. v. Wantock*, 323 U.S. 126, 127-28 (1944).

suggest that on-call time that resembles other work time should be compensable. In *Armour*, firefighters were required to remain on the employer's premises while not on their regular shifts. The court held that the employer had to compensate them because as firefighters they were hired to wait.<sup>73</sup> Thus, when an employee's activity — or inactivity — while on call is similar to his normal on-premises duty, there is a strong implication that the value to the employer is higher, entitling the employee to compensation.

In sum, compensability for on-call service under the FLSA depends on what the employee does, what he is unable to do with his personal life because of the constraints placed on him, and how much the employer gains from his service. Focusing on the number and length of the calls and the speed with which an employee must respond captures both the employee's exertion and the constraints the service imposes. Considering the value of the on-call service is consistent with Supreme Court precedent and the Act's legislative history. Courts should therefore use this analysis to fill the gaps left by the statute.

### III. ELIMINATING EXTRANEOUS FACTORS

This Part argues that courts have frequently considered irrelevant factors when deciding whether an on-call employee must receive compensation, and offers two rules to prevent courts from getting side-tracked. In section III.A, this Part argues that it is irrelevant that an employee may trade an on-call shift; once an employee has taken a shift, it should not matter that he once had the option to trade it away. In section III.B, this Part contends that it is irrelevant whether or not particular on-call employees have agreed not to receive compensation, as the FLSA prohibits employers or employees from contracting around the requirements of the Act.

#### A. Trading Shifts

In a number of cases, courts have inquired whether employees may trade on-call shifts.<sup>74</sup> These courts reasoned that if an employee could trade on-call shifts, the employee would have more freedom from the demands of the employer, and his burden therefore would be lighter.<sup>75</sup> Correspondingly, in these courts' view, an

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73. See *Armour*, 323 U.S. at 133.

74. See, e.g., *Service Employees Intl. Union, Local 102 v. County of San Diego*, 60 F.3d 1346, 1354-55 (9th Cir. 1995), cert. denied, 116 S. Ct. 774 (1996); *Berry*, 30 F.3d at 1184-85; *O'Brien v. DeKalb-Clinton Counties Ambulance Dist.*, 3 Wage & Hour Cas. 2d (BNA) 37 (W.D. Mo. 1995); Matthew M. Smith & Steven H. Winterbauer, *Overtime Compensation Under the FLSA: Pay Them Now or Pay Them Later*, 19 EMPLOYEE REL. L.J. 23, 40, 44 (1993) (noting that courts consider an employee's freedom to trade on-call shifts).

75. See, e.g., *Owens v. IIT Rayonier, Inc.*, 971 F.2d 347, 351 (9th Cir. 1992) (finding the ability to trade on-call responsibility important in determining whether an employee could



employee who could not trade on-call time would face a greater burden.

Whether employers permit employees to trade on-call shifts should not enter into the determination of whether an employee is working while on call. The ability to trade shifts does not change the nature of the time spent while actually on call. How the employee came to perform the service should not matter: “[T]he crucial question [under the FLSA] is not whether the work was voluntary, but rather whether the [p]laintiff was in fact performing services for the benefit of the employer with the knowledge and approval of the employer.”<sup>76</sup> An employee who accepts a normal shift of work must be compensated, even though he voluntarily accepted it and possibly could have traded it. On-call time should be treated no differently.

The difference between trading on-call shifts and trading the duty to respond when actually on call is critical. The ability to trade an on-call shift allows the employee respite from work but does not alter the constraints on the employee or the benefit to the employer. By contrast, if an employee who is on call may get another employee to respond to a call, the burden on the first employee is much lower because he is not constrained — he need not return a call.<sup>77</sup>

One could argue that the ability to trade on-call duty ensures that an employee is completely free from work at some time during his employment, lightening that employee's burden. In some circumstances, an employee may be on call for the entire time he is not working on his normal shift, and some courts have considered such continual on-call duty an added burden weighing in favor of compensability.<sup>78</sup> An employee who is always on call may never be able to visit other parts of the country or take a second job, and may be affected psychologically by the inability ever to be completely free from work. Allowing an employee to trade an on-call

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engage in personal pursuits); *Brock*, 826 F.2d at 373 (finding that trading of waiting duty permits employees to leave their employer's premises).

76. *Truslow v. Spotsylvania County Sheriff*, 783 F. Supp. 274, 278 (E.D. Va. 1992) (quoting *Steiner v. Mitchell*, 350 U.S. 247, 251 (1956)).

77. Compare *Brock*, 826 F.2d at 373 (referring, apparently, to the ability to trade the duty to respond while on call) with *Berry*, 30 F.3d at 1184-85 (considering the relevance of the ability to trade on-call shifts).

78. See *Cross v. Arkansas Forestry Commn.*, 938 F.2d 912, 917 (8th Cir. 1991) (considering whether an employee has a respite from the on-call duty); *Darrah v. Missouri Highway & Transp. Commn.*, 885 F. Supp. 1307 (W.D. Mo. 1995) (considering the burden on an employee from continual on-call service). But see *Bright v. Houston Northwest Med. Ctr. Survivor, Inc.*, 934 F.2d 671, 679-80 (5th Cir. 1991) (en banc) (holding that the FLSA does not account for the burden of continual on-call duty); M.D. Rubenstein, Recent Development, 66 *TUL. L. REV.* 1517 (1992) (discussing *Bright's* analysis of continual on-call duty).

shift therefore might be justified as a way to reduce the burden caused by the accumulation of past on-call duty.

While continual on-call duty is harsh, the FLSA does not provide relief in this area, as the accumulation of past on-call duty cannot support compensation. The overtime premium compensates employees for working long hours. That premium does not increase once the forty-hour week threshold has passed, and it begins anew every week.<sup>79</sup> An employee who has worked one hundred hours in one week, for example, is not entitled to additional consideration the following week if a question of compensable time arises.<sup>80</sup> Thus, courts should not use the ability to trade an on-call shift as evidence that an employee is not burdened. Courts should look at the period of time in question and examine the benefit to the employer and the burden on the employee to determine whether an employee has worked.

### B. *Employment Agreements*

This Section argues that employers may not contract around the requirements of the FLSA to avoid compensating on-call employees. Some courts have relied on the existence of employment agreements in finding that on-call time is not compensable.<sup>81</sup> Implicit in this reasoning is a belief that employers and employees know more than courts about the nature of the on-call time and that they can therefore better determine whether such time is work or not.

This approach, however, contradicts the FLSA. It both conflicts with *Skidmore v. Swift & Co.*<sup>82</sup> and undermines the principles at the foundation of the FLSA. Agreements are relevant only insofar as they help to determine how an employee is constrained while on call.

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79. See 29 U.S.C. § 207(a)(1) (1994); see also *Bright*, 934 F.2d at 678 (noting that the FLSA is structured on the basis of a work week).

80. See *Bright*, 934 F.2d 671 (5th Cir. 1991) (rejecting the argument that an employee who was always on call when not at work faced a sufficient burden to require compensation).

81. A number of courts have given weight to the existence of the agreement, not just its substance. See *Brook*, 826 F.2d at 374 & n.8 (giving weight to the existence of an agreement, declining to examine the reasonableness of the agreement under the FLSA, and holding that an agreement is a "circumstance to consider" (quoting *Allen v. Atlantic Richfield Co.*, 724 F.2d 1131, 1136 (5th Cir. 1984))); *Rousseau v. Teledyne Mobile Offshore, Inc.*, 805 F.2d 1245, 1248 (5th Cir. 1986) (holding that the existence of an agreement is a fact to consider); *Allen*, 724 F.2d at 1135 (considering the mere existence of agreement); *Brown v. Luk, Inc.*, 3 Wage & Hour Cas. 2d (BNA) 560, 564 (N.D.N.Y. 1996) (indicating that the existence of an agreement was relevant independent of consideration of the burden on the employee); *Cleary v. ADM Milling Co.*, 827 F. Supp. 472, 476 (N.D. Ill. 1993) (finding the existence of an agreement regarding on-call time damaging to the employee's claim).

82. 323 U.S. 134 (1944).

Even when the facts of a case would otherwise lead a court to conclude that an employee is working while on call and is thus entitled to compensation under the FLSA, the reasoning of some courts would allow agreements between employers and employees to preclude payment for on-call time.<sup>83</sup> Those who believe agreements should receive weight argue that resolving the question of whether certain activity or inactivity constitutes work requires a more subtle inquiry than a court may be able to accomplish. According to this view, the parties know best whether employees are working while on call, and their own conclusion, as embodied in their agreement, is of value.<sup>84</sup> An employer and its employees certainly know more about the nature of the duties of on-call employees than would a court.<sup>85</sup> Presumably, an employee who is indeed working would not accept an agreement that denied him the minimum wage.

The notion that agreements can be weighed, or even be dispositive, stems from *Skidmore*.<sup>86</sup> In *Skidmore*, the Court stated that courts should examine agreements in determining whether an employee is working while on waiting time: "The law does not impose an arrangement upon the parties. It imposes upon the courts the task of finding what the arrangement was."<sup>87</sup> Some courts have interpreted "arrangement" to mean "agreement," and have con-

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83. See *Brock*, 826 F.2d at 374 (giving the existence of an agreement weight in concluding that on-call time was not compensable); see also *supra* note 81.

In 1985, the Department of Labor issued a bulletin indicating that agreements could resolve the issue in some circumstances. See Wage-Hour Division Publication 1459 (May 1985) (opining that when an on-call employee is "uninterrupted for long periods of time, any reasonable agreement of the parties for determining the number of hours worked will be accepted"). The Department's interpretation of this issue is only entitled to deference to the extent it is persuasive. See *supra* note 21. As this section argues, that interpretation is not persuasive to the extent other factors, see *supra* Part II and *supra* note 51 (involving very short response times), indicate compensation is required and the agreement does not reflect this. The test of reasonableness must be based on the requirements of the statute, not on the opinions of the parties.

84. See *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers*, 325 U.S. 161, 169-70 (1945) (declining to decide whether employees may resolve the question of what is working time); *Service Employees Intl. Union, Local 102 v. County of San Diego*, 60 F.3d 1346, 1355 (9th Cir. 1995) (noting that an "employment agreement between the parties suggests [the employer and employee] envisioned on-site night duty as work"); *Berry v. County of Sonoma*, 30 F.3d 1174, 1181 (9th Cir. 1994) (noting that "the existence of such [on-call] agreements assists the trier of fact in determining whether the parties characterized the time spent waiting on-call as actual work"); cf. 29 C.F.R. § 785.23 (1994) (allowing agreements to control when an employee remains on the employer's premises because it is "difficult to determine the exact hours worked under these circumstances"). In contrast, the regulations providing guidance for "waiting-time" situations do not state that agreements will be dispositive. See 29 C.F.R. §§ 785.14-.19.

85. See *Berry*, 30 F.3d 1174. The court in *Berry* explicitly stated that agreements cannot be dispositive of the issue. See 30 F.3d at 1180 n.5. Nonetheless, it went on to conclude, despite some evidence to the contrary, that the on-call time was not compensable, in large part because of the weight accorded to the existence of an agreement between the employers and employees regarding on-call time. See 30 F.3d at 1187.

86. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

87. *Skidmore*, 323 U.S. at 137.

cluded that the agreement that the parties have reached must be enforced.<sup>88</sup> This view maintains that because the court cannot meddle with an agreement, its inquiry ends with what the agreement says.

*Skidmore* cannot be used to support the argument that agreements are to be given weight in and of themselves. Had the agreement in *Skidmore* been dispositive, the Court would have remanded to the lower court only to examine the agreement. Moreover, less than a year after deciding *Skidmore*, the Supreme Court in *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers*<sup>89</sup> refused to embrace Justice Jackson's argument that *Skidmore* meant that employees and employers could decide for themselves whether on-call time was "work." Instead, the Court indicated that in that case it would not reach questions involving "the use of bona fide contracts or customs to settle difficult questions as to whether certain activity or nonactivity constitutes work."<sup>90</sup>

The FLSA does not suggest that employers and employees may decide that certain on-call time is not work. In fact, to do so would undermine the Act's central premise that employees do not have adequate bargaining power to ensure a fair minimum wage for their labor.<sup>91</sup> The statute does not mention on-call service, but nothing in the text suggests that an employer may contract around the requirement that all employees receive compensation for work.<sup>92</sup> The language of the FLSA shows that such compensation is mandatory: "Every employer *shall* pay to each of his employees" the required minimum wage.<sup>93</sup> The overtime provision is similarly emphatic: "Except as otherwise provided in this section, no employer *shall* employ any of his employees . . . for a workweek longer than forty hours unless such employee receives [an overtime premium]."<sup>94</sup>

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88. See *Brock*, 826 F.2d at 374 (indicating that the mere existence of an agreement can be relevant to determining whether an employee must be compensated under the FLSA); cf. *supra* note 82 (listing cases considering relevant the existence of an agreement).

89. 325 U.S. 161 (1945).

90. 325 U.S. at 169-70.

91. See *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 706-07 (1945) (noting that the FLSA is a response to unequal bargaining power between employers and employees); cf. *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981) (noting that the intention of the FLSA "was to protect all covered workers from substandard wages and oppressive working hours"); *Berry v. County of Sonoma*, 30 F.3d 1174, 1181-82 (9th Cir. 1994) (involving employees who claimed that the "agreement" was not the product of real negotiation and as such was not something to which they had agreed).

92. The FLSA specifically allows certain agreements to trump the minimum wage and overtime requirements. See 29 U.S.C. §§ 207(b)(1), (b)(2), (e)(7), (f) (1994). None of the exceptions, however, applies to on-call time.

93. 29 U.S.C. § 206(a) (1994) (emphasis added).

94. 29 U.S.C. § 207(a)(1) (1994).

The statutory requirement of minimum pay for all hours worked reveals an intent to protect workers from inequitable agreements regarding wages and hours. Given disparities in bargaining power, employers could reach agreements with employees to pay less than the minimum wage for on-call service, even when those employees would be working under the Act. If employees had sufficient power to protect themselves, there would be no reason to require payment of the minimum wage. Thus, certain considerations should not be left to free market forces because they inevitably will weigh in favor of the employer: an agreement may reflect relative bargaining power more than it reflects the realities of the work environment. The Supreme Court has plainly indicated that agreements cannot supersede the FLSA. In *Barrentine v. Arkansas-Best Freight System, Inc.*,<sup>95</sup> the Court held that “[a]ny custom or contract falling short of [the] basic policy [of the FLSA], like an agreement to pay less than the minimum wage requirements, cannot be utilized to deprive employees of their statutory rights.”<sup>96</sup>

The overtime provision also indicates that employers and employees may not contract around the requirements of the Act. The Congress that passed the FLSA clearly intended to protect against unfair and unreasonable agreements that did not meet the minimum requirements of the Act,<sup>97</sup> but it also attempted to create more jobs by spreading work.<sup>98</sup> The overtime premium was designed to create a disincentive to employers who want to keep their staffs small despite a large amount of work. In order to spread work, the FLSA does not apply only to the lowest-paid workers; the overtime provisions control even in higher-wage industries.<sup>99</sup> These issues were a matter of much debate. The bill as introduced in the

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95. 450 U.S. 728 (1981).

96. 450 U.S. at 741 (quoting *Tennessee Coal, Iron & R.R. v. Muscoda Local No. 123*, 321 U.S. 590, 602-03 (1944)). In *Barrentine*, the Court considered whether an employee could bring an FLSA claim in federal court despite a collective bargaining agreement stating that such claims were to be resolved only by joint grievance committees. The Court rejected the argument that an agreement could prevent employees from seeking the enforcement of their rights under the FLSA in federal court. See 450 U.S. at 740-41.

97. See, e.g., *Joint Hearings, supra* note 64, at 182 (statement of Francis Perkins, Secretary of Labor); *id.* at 209 (statement of Sen. Pepper); *id.* at 22 (statement of Robert H. Jackson, Attorney General).

98. See, e.g., 82 CONG. REC. 1391 (1937) (“This bill will eventually decrease unemployment if the employers of the country will face the issue in a practical manner and cooperate by spreading their work over a greater number.”) (statement of Rep. Norton); see also *Mumbower v. Callicott*, 526 F.2d 1183, 1188 (8th Cir. 1975) (noting that the intention of the FLSA is to spread work to more employees). In a colloquy with a Works Progress Administration economist, Senator Robert LaFollette asked what the effect of the 40-hour work week would be. The economist replied that one and one-half million unemployed people would go back to work. See *Joint Hearings, supra* note 65, at 95.

99. See *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers*, 325 U.S. 161, 167 (1945) (noting that “employees are not to be deprived of the benefits of the [Fair Labor Standards] Act simply because they are well paid”).

Senate and reported to the House of Representatives would have exempted from the FLSA employees bound by collective-bargaining agreements, but only if such agreements produced a wage above the minimum and a work week under the maximum. The exemption for collective bargaining agreements was eliminated in the House and was not part of the bill when signed into law.<sup>100</sup> The statute therefore rejects the notion that employees and employers have complete freedom to contract regarding their employment.<sup>101</sup> That approach had created the often oppressive conditions that the FLSA meant to remedy. To allow agreements to reduce in any way the protection offered by the Act would undermine its central goals.

The Court in *Skidmore* explained how courts should use agreements. *Skidmore* called for lower courts to consider other factors beyond an agreement in deciding whether the employees were working. Such an appraisal

involves scrutiny and construction of the agreements between the particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time, and all of the surrounding circumstances. Facts may show that the employee was engaged to wait, or they may show that he waited to be engaged. His compensation may cover both waiting and task, or only performance of the task itself. . . . The law does not impose an arrangement upon the parties. It imposes upon the courts the task of finding what the arrangement was.<sup>102</sup>

This statement calls for a broad examination and interpretation of the on-call arrangement. First, "appraisal of their practical construction of the working agreement by conduct" instructs courts to see how the agreement plays out in practice. This should include inquiries into things like the length of time an employee has before she must return to work and any restrictions on her activities while on call.<sup>103</sup> Second, "consideration of the nature of the service, and its relation to the waiting time" tells courts to examine what exactly the employee is doing while on call. Courts thus may examine how on-call time compares to the other time the employee spends work-

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100. See, e.g., H.R. CONF. REP. NO. 75-2738 (1938). There was some confusion about the meaning of the collective bargaining agreement provision, as some feared that it could be used to evade the requirements of the Act. See, e.g., *Joint Hearings*, *supra* note 64, at 21-22 (colloquy between Sen. Ellender and Robert H. Jackson, Attorney General).

101. See, e.g., *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 740 (1981) ("FLSA rights cannot be abridged by contract or otherwise waived because this would 'nullify the purposes' of the statute and thwart the legislative policies it was designed to effectuate." (quoting *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 (1945))); *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 513-14 (9th Cir. 1978).

102. *Skidmore v. Swift & Co.*, 323 U.S. 134, 137 (1944).

103. See *supra* section II.A.

ing.<sup>104</sup> Third, "all of the surrounding circumstances" allows courts to examine a range of factors that do not fit into the first two categories.<sup>105</sup>

In other words, an agreement should be used to help determine the extent of the restriction on the on-call employee and the benefit the employer receives from the service. If the agreement sets out restrictions so severe that an employee cannot use the on-call time for his own purposes, the employee must receive compensation, *whether or not he has been called upon by the employer*. An agreement may so constrain an on-call employee's freedom that he may not effectively use the time for his own purposes even if he returns only infrequently to the employer's premises.<sup>106</sup> Courts should therefore adopt the approach advocated in Part II, and examine the agreement in light of how it burdens the on-call employee and benefits the employer.<sup>107</sup> The objective character of the on-call duty, not the employee's or the employer's characterization of it, should be the central concern. Agreements that attempt to dispose of the issue without regard to the employment situation replace the FLSA and the proper analysis of what is work. An agreement that does not pay at least the minimum wage and overtime for on-call duty is relevant only to the extent it affects the actual burden on the employee and the benefit to the employer.

### CONCLUSION

The difficulty courts have had in creating a coherent analysis for determining whether on-call service is compensable stems from the FLSA's silence on this precise issue and the vagueness of fifty-year-old Supreme Court guidance on a similar issue. Because of this, courts have created an analysis that too often is based on their own conceptions of what service should be compensated and have strayed from the guidance the statute and the Supreme Court have provided. This Note has proposed an approach grounded in the

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104. See *supra* notes 70-74 and accompanying text.

105. One such circumstance may be what the employee can do within the area circumscribed by the response time. See discussion of commuting distances *supra* note 47 and accompanying text.

106. See, e.g., *Oliver v. Mercy Med. Ctr., Inc.*, 695 F.2d 379 (9th Cir. 1982) (indicating that an employee was working while on call where he was called only about two times per on-call shift but was required to return to work within three minutes of the call).

107. See *Martin v. Ohio Turnpike Commn.*, 968 F.2d 606, 611-12 (6th Cir. 1992) (examining an agreement to determine how onerous the on-call duty is); *Boehm v. Kansas City Power & Light Co.*, 868 F.2d 1182, 1185 (10th Cir. 1989) (same).

In addition, an agreement that provides employees with greater freedom cannot defeat compensation if the facts show that the time is spent primarily for the employer's benefit. In *Armour*, the employees had the freedom to engage in a variety of recreational activities while on call. That freedom was not dispositive, however, and the employees were awarded compensation. See *Armour & Co. v. Wantock*, 323 U.S. 126, 127 (1944).

FLSA's conception of work and has argued against analyses that are not consistent with the Act. Use of this analysis would ensure a more consistent determination of when on-call service is work.

This issue will continue to gain importance as on-call arrangements become more common. Indeed, Congress should act — it could, for example, separate on-call time from regular work time and set a different minimum wage for on-call time, or it could exempt on-call service from the overtime requirements. Any of these actions would assure some compensation to workers who have lost a measure of their freedom and would fairly reflect the extent to which employers benefit from their employees' service. At the same time, such action would reflect the fact that most on-call arrangements are neither as demanding for workers nor as valuable to employers as regular time, and may not merit payment at an employee's regular rate. In the absence of Congressional action, however, this Note provides analysis to make the resolution of this question more coherent and more consistent with the goals of the FLSA.