Compensability of Meal Breaks in Patient Care Environments

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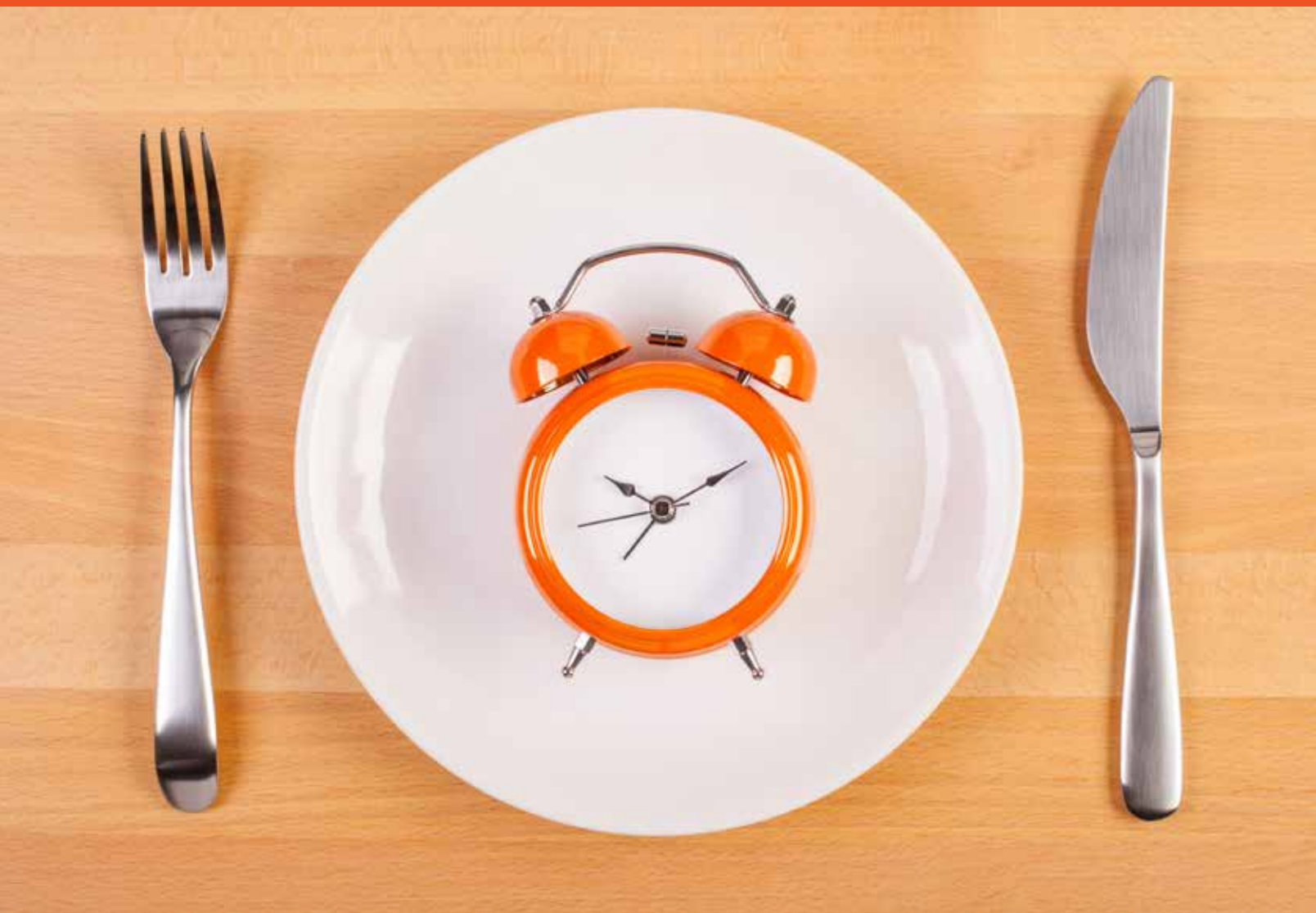

One of the most complicated aspects of employment-related compliance for health care organizations is providing and ensuring uninterrupted meal breaks for non-exempt, or hourly, employees. The federal Fair Labor Standards Act of 1938[1] (FLSA) provides some helpful guidance with case law interpreting its statutes and regulations, but state and local laws can muddy the water.

The nature of patient-care environments, particularly hospitals, makes administration of meal break policies uniquely complicated, especially for employers with operations in several states. Unlike many other industries, health care employers often have unanticipated patient needs arise that require staff to return from meal breaks early or be interrupted in some manner. In addition, during their meal breaks, nurses, techs, and other staff members may be asked questions, or be directed by physicians who are not employed by the hospital and who may not appreciate that the employee is on a break. Then, when an interruption is experienced, the employee may not know at the time whether it will be a "de minimis"[2] interruption or significant enough to justify clocking in. To further complicate the matter, health care employees may carry work phones or pagers or could have a geographic restriction that prevents them from leaving the premises during their meal break. In each of these situations, both the employee and the manager are required to make judgment calls about whether the meal break is compensable.

Additionally, there are few bright-line rules. The majority of federal guidance indicates that so long as the meal break "predominately benefits" the employee, the meal break is not compensable, but there is no specific definition of this term in the guidance. Aside from the fact that it is important for the well-being of health care employees to be able to take uninterrupted meal breaks, wage and hour lawsuits can drain resources better directed toward patient care, and generally are not covered by employment practices liability insurance (EPLI). Limited concerns raised by a single disgruntled employee can quickly blossom into a substantial issue in the hands of a plaintiff's attorney who may be looking to bring a lucrative class/collective action. Therefore, it is crucial to train supervisors and those with payroll responsibility to carefully review issues that are raised regarding pay, and that they recognize when to escalate concerns to senior management or counsel.

Preserving "Bona Fide" Meal Breaks

A common claim made by health care employees is that their meal breaks have been so interrupted that the meal periods are no longer "bona fide." The FLSA explains "bona fide"[3] meal breaks as follows:

> [t]he employee must be completely relieved from duty for the purposes of eating regular meals. Ordinarily 30 minutes or more is long enough for a bona fide meal period. A shorter period may be long enough under special conditions. The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating.[4]

The U.S. Department of Labor's (DOL's) *Field Operations Handbook* indicates that to determine whether an employee is completely relieved from duty, even if the meal period is less than 30 minutes, employers must conduct a case-by-case determination, evaluating factors including:

> (a) Work related-interruptions to the meal period are sporadic and minimal. (b) Employees have sufficient time to eat a regular meal. Periods less than 20 minutes should be given special scrutiny . . . (c) The period involved is not just a short break for snacks and/or coffee but rather is a break to eat a full meal, comes at a time of day or shift that meals are normally consumed, and occurs with no more frequency than is customary. (d) There is an agreement (e.g. CBA) between the employees and employer that the period of less than 30 minutes is sufficient to eat a regular meal. (e) Applicable State or local laws do not require lunch periods in excess of the period indicated.[5]

Being "on call" during a meal break does not necessarily render the meal break compensable.[6] However, interruptions during "on call" meal breaks necessitate compensation.[7] The mere fact that employees are required to wear radios or be available to be recalled to work does not prove that they are required to perform any duties, whether active or inactive, while eating.[8]

DOL Opinion Letters pertaining to bona fide meal breaks are somewhat instructive. For instance, in a 1992 Opinion Letter, the DOL established that a bona fide meal period would not be considered compensable under the FLSA in any of the following circumstances: (1) being required to leave a telephone number where employees are reachable during their meal break; (2) being required to leave radios on during a meal break; and (3) occasionally answering citizen questions during meal breaks (such as at a restaurant).[9] Other guidance from the DOL provides, however, that "[i]f the meal period is interrupted by a call to work, it then becomes hours worked"[10] and that missed meal breaks constitute hours worked and require compensation at the premium rate if the missed meal break pushes the employee into overtime.[11]

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Recent case law appears consistent with reasoning from these letters, generally holding that the occurrence of frequent interruptions during an "on call" meal break renders the time compensable. For example, a medical assistant who answered her phone remotely, called in prescriptions, and visited patients outside of work was entitled to compensation for such "on call" work.[12] However, cable line technicians who were only called once during 50% or fewer of "on call" meal break shifts were not entitled to compensation for the meal period. A Missouri court held that meal breaks were compensable for front desk clerks who lived onsite at a hotel and were required to supervise the front desk at all times, handling approximately five to seven calls per night from guests.[13] These employees were "working while 'on call'" because at least one front desk clerk had to remain on the premises and experienced frequent interruptions.[14] Similarly, a plaintiff who took his meal breaks in the same room as the front desk and was responsible for any job duties that arose while he was eating, was entitled to compensation for his meal break.[15]

Geographic restrictions alone, such as those restricting the employee to the medical campus during meal breaks, do not negate the bona fide meal period.[16] Under these circumstances, it is advisable that employees be required to take their meal breaks away from their work areas, not carry work-issued pagers or cell phones during their meal breaks (or turn them off), and have access to an exception procedure when their meal breaks are interrupted.

Off-the-Clock "Work"

Under the FLSA, "principal activities" are those that are integral and indispensable to the work the employee is employed to do and are considered "work."[17] Thus, the threshold issue is whether or not the activities that may occur during meal breaks, such as emailing and texting, are considered "work" under the FLSA, such that they are both integral and indispensable to the employee's principal activities.[18] The U.S. Supreme Court, in *Integrity Staffing Solutions, Inc. v. Busk*, determined that for a pre- or post-shift activity to be compensable under the FLSA, it must be an "intrinsic element" of the job, something that an "employee cannot dispense with if he is to perform his principal activities."[19] "Work" is not defined under the FLSA. Rather, courts consider whether the activity is "controlled or required by the employer and pursued for the benefit of the employer."[20] Courts also examine whether the employer knew or had reason to know the work was being performed, and how the employer managed the work.[21]

Regulations are vague and case law is constantly developing, making what constitutes "work" under the FLSA a moving target. For example, during meal breaks, many non-exempt employees now have the ability to check their work email on their phones and receive text or email messages from co-workers regarding work. It is critical for employers to evaluate which of these tasks their employees are able to do remotely and ensure that, to the extent employees perform such work during meal breaks, the employees know how to be compensated for such time and use exception procedures addressed below.

Timekeeping Systems and the Importance of Exception Procedures

Health care employers generally track non-exempt employees' meal break time either with an automatic deduction or a swiping timekeeping system. Both systems are compliant; however, the devil is in the details. Specifically, regardless of what timekeeping system is utilized, the employer must offer an exception procedure, such as a log book. This approach could include a form whereby the employee attests at the end of each pay period that the timekeeping records are accurate, and if they are not, an adjustment is requested. This form also may acknowledge that the employee knows how to use the exception procedure. Employers may want to reference the exception procedures in orientation materials and regularly follow up with employees who do not use them.[22]

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Federal Regulations and Administrative Interpretations

The U.S. DOL, under the previous administration, focused on several issues affecting health care workers, so it is worth noting two of the pertinent regulations issued:

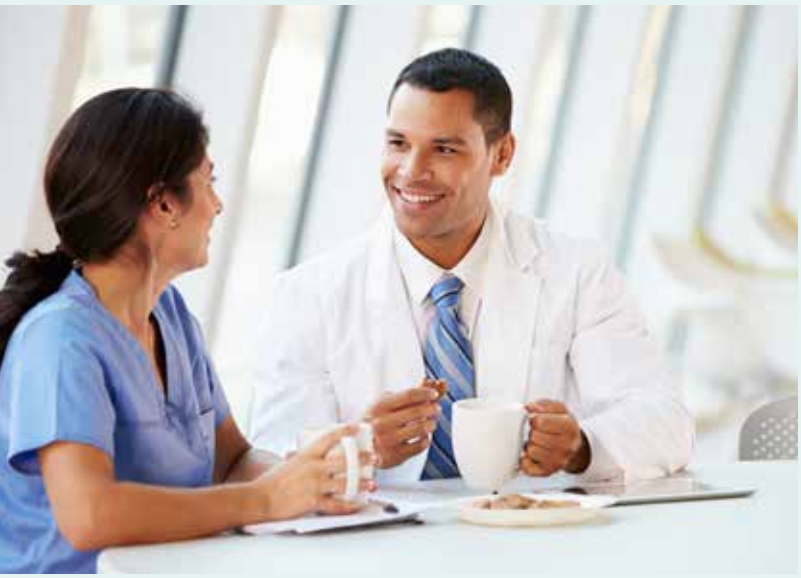
- *Home Care Regulations*:[23] Enforcement of the FLSA's companionship services exemption began January 1, 2016. The regulations generally apply to employees who provide care and protection to individuals who, due to age or infirmity, are unable to care for themselves. Although employers had long relied on this exemption to not pay overtime to many home care workers, such workers now must be paid overtime, including many "direct care workers such as certified nursing assistants, home health aides, personal care aides, and other caregivers," as well as live-in domestic service workers.[24] Additionally, the DOL's guidance states: "For a live-in domestic service employee, such as a live-in roommate, the employer and employee may agree to not pay for time spent during bona fide meal periods, sleep periods, and off-duty time. If the meal periods, sleep time, or other periods of free time are interrupted by a call to duty, the interruption must be counted as hours worked." Therefore, employers should carefully train employees and review agreements around meal time compensation.
- *Administrative Interpretations Regarding Independent Contractors and Joint Employment Status*:[25] The DOL issued two administrative interpretations that broadened low-wage worker protections in two regards. First, the DOL essentially indicated that the definition of "employ" is broad under the FLSA such that most workers will qualify as "employees," not independent contractors. Second, the DOL issued guidance regarding joint employment, following similar guidance issued by the National Labor Relations Board that joint employment is significantly broader than certain common law (right to control) determinations had been. Under these tests, it is likely that certain functions that health care employers may outsource or contract, such as janitorial, dietary/food and nutrition, security, certain administrative functions, sterile processing, and other areas, may support a joint employment finding. To this end, if the outsourcing or temporary staffing agency is not properly training around or paying for meal breaks, or taking improper deductions, the health care employer could face joint employment repercussions.[26]

State Law Nuances

Although most states generally follow the same principles in providing meal breaks, laws vary from state-to-state and often there is little on-point case law. For example, in Kentucky, the guarantee of a meal break can be negated if language to that effect is in the employee handbook.[27] Such a move would likely be considered a violation of law in California, where meal breaks are heavily regulated. Conversely, states such as Illinois provide exceptions to the state meal break law for employees "who monitor individuals with developmental disabilities or mental illness, or both, and who, in the course of those duties, are required to be on call during an entire 8 hour work period; however, those employees shall be allowed to eat a meal during the 8 hour work period while continuing to monitor those individuals."[28] Compare with Washington, where all employees must take a 30-minute completely duty-free meal break;[29] if the employee could be called back to duty on a "moment's notice," the employee is not completely relieved of all duties.[30]

Overtime Thresholds and the Meal Break Impact

In addition to the federal regulations governing overtime pay (e.g., 40 hours per week under the FLSA[31]), some states have passed stricter regulations on daily overtime thresholds. This is particularly relevant for hospital and patient-care employers who have non-exempt employees work 10- or 12-hour shifts. For instance, Colorado requires overtime to be paid after 12 hours per day.[32] California is even more restrictive, entitling employees to premium pay after an eight-hour shift, and *double pay* after working 12 hours in a day.[33] Like California, Nevada and Alaska each entitle employees to premium pay after reaching eight hours, with a unique caveat in Alaska exempting employees from overtime if they have a legally sufficient flexible work plan (i.e., employee consents in writing and the Alaska Department of Labor approves the plan).[34]



These overtime thresholds implicate meal breaks for several reasons. First, an unpaid meal break could push the workday into overtime, requiring pay at a premium rate. Next, some states require employers to provide a second "duty free" meal break if an employee reaches a certain number of hours in a day. This poses the same problems as a regular meal break, and could potentially subject an employer to greater overtime liability.

Conclusion

Staying compliant with wage laws can help health care employers avoid distracting and costly collective/class actions or administrative charges and also help to retain employees, so it is advisable for health care employers to regularly review their policies and ensure that their training is frequent and up-to-date. C

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Endnotes

1 29 U.S.C. §§ 201–219 (2012).
2 Though the definition of "de minimis" differs by circuit, de minimis interruptions during nonworking time are generally non-compensable. *See generally Perez v. Mountaire Farms, Inc.,* 650 F.3d 350 (4th Cir. 2011) (10.204 minutes of work time is de minimis); *Alvarez v. IBP,* 339 F.3d 894, 903-04 (9th Cir. 2003) (a few seconds or minutes is de minimis and not compensable under the FLSA); *Reich v. Monfort,* 144 F.3d 1329, 1333–34 (10th Cir. 1998) (8 to 11.5 minutes of work time is not "de minimis"); *Farris v. County of Riverside,* 667 F. Supp. 2d 1151, 1165 (C.D. Cal. 2009) ("Most courts have found daily periods of approximately 10 minutes de minimis even though otherwise compensable.") (internal citations omitted).
3 29 C.F.R. § 785.19(a) (2015).
4 *Id.*
5 U.S. DOL Field Operations Handbook Ch. 31 § b(23) (rev. Dec. 15, 2000).
6 *Burnison v. Mem. Hosp.,* No. 91–1072–B, 1992 WL 321608, at *6 (D. Kan. Oct. 7, 1992).
7 *Bernard v. IBP, Inc. of Neb.,* 154 F.3d 259, 265 (5th Cir. 1999).
8 *Ledbetter v. Mercedes Benz U.S. Intern'l, Inc.,* 2014 WL 1247988, at *3 (N.D. Ala. 2014).
9 DOL, Wage and Hour Division, Police/Hours Worked/Labor Contracts (Apr. 6, 1992).
10 DOL, Wage and Hour Division, Hours Worked/Sleep and Meal Times (Sept. 11, 1987).
11 DOL, Wage and Hour Division, Opinion Letter FLSA 2008-7NA, Missed Meal Breaks, Premium Pay Offset, Unrecorded Work and Rounding (May 15, 2008).
12 *Meesook v. Grey Canyon Family Med.,* 2014 WL 2208164, at *2 (W.D. Tex. May 28, 2014).
13 *Stockdall v. TG Invests., Inc.,* No. 4:14CV01557ERW, 2015 WL 9303105, at *7 (E.D. Mo. Dec. 22, 2015).
14 *Id.*
15 *Al-Quraan v. 4115 8th St. NW, LLC,* 123 F. Supp. 3d 1, 2 (D.D.C. 2015).
16 *See* 29 C.F.R. § 785.19(b) (2015) ("It is not necessary that an employee be permitted to leave the premises if he is otherwise completely freed from duties during the meal period.").
17 *See* 29 C.F.R. § 785.24 (2015).
18 *See, e.g., Alvarez v. IBP, Inc.,* 339 F.3d 894, 902-04 (9th Cir. 2003); *see also* 29 C.F.R. § 785.7 (2015) ("work" constitutes all hours the employee is required to give to his employer, except those that are preliminary or postliminary).
19 *Integrity Staffing Solutions, Inc. v. Busk,* 135 S.Ct. 513, 517 (2014).
20 *See, e.g., De Asencio v. Tyson Foods, Inc.,* 500 F.3d 361, 373 (3d Cir. 2007).
21 *See generally* 29 C.F.R. §§ 785.11-13 (2015).
22 *See, e.g., White v. Baptist Mem'l Health Care Corp.,* 699 F. 3d 869, 876 (6th Cir. 2012) (auto-deduct system is lawful under the FLSA because the employer had no knowledge of meal break work not noted in log books and the employer did not discourage use of the log book).
23 *See* 29 U.S.C. § 213(a)(15) (2012), 29 C.F.R. §§ 552.3, 552.6, 552.102, 552.109, 552.110 (2015).
24 U.S. DOL WHD, Home Care Domestic Service Final Rule Frequently Asked Questions, *available at* http://www.dol.gov/whd/homecare/faq.htm (last visited Feb. 23, 2017).
25 U.S. DOL WHD Administrator Interpretations Letters FLSA 2015-1 ("The Application of the Fair Labor Standards Act's 'Suffer or Permit' Standard in the Identification of Employees Who Are Misclassified as Independent Contractors"); FLSA 2016-1 ("Joint employment under the Fair Labor Standards Act and the Migrant and Seasonal Agricultural Worker Protection Act").
26 Joint Motion for Preliminary Approval of Proposed Class and Collective Action Settlement Agreement, Case No. 1:16-cv-00671-RM-MJW, Document 161 (D. Colo. Feb. 21, 2017).
27 *Jones-Turner v. Yellow Enter. Sys., LLC,* 2014 U.S. Dist. LEXIS 43942, at *6 (W.D. Ky. Mar. 31, 2014).
28 820 Ill. Comp. Stat. 140/3.
29 Wash. Admin. Code § 296-131-020(1).
30 *Weeks v. Chief of the Wash. State Patrol,* 639 P.2d 732, 734 (Wash. 1982).
31 29 U.S.C. § 207(a).
32 7 Colo. Code Regs. § 1103-1.
33 Cal. Lab. Code § 510.
34 Alaska Stat. Ann. § 23.10.060(b); Nev. Rev. Stat. § 608.018.