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Julie T. Bittner, Esq.

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## Working Through Lunch

By Julie T. Bittner

Imagine this situation: your company was just awarded a huge contract, and the CEO has announced that for the company to successfully complete the work needed to fulfill this contract, it will require "all hands on deck."

Your company has multiple locations, and in your location, a majority of the employees are classified as exempt. Only a couple of employees are non-exempt, meaning that under the Fair Labor Standards Act they are entitled to minimum wage, as well as overtime compensation (time and a half) for all hours worked over 40 in a work week. Human Resources is not physically present at your location.

For the past six weeks, your entire office has been consumed by work for this new contract. Everyone is working long hours. Tempers are short. Expectations are high. Everyone is working through lunches just to keep up with the work. But in the chaos of it all, no one stops to tell the non-exempt workers that they should be clocking out for their lunches. Senior staff turns a blind eye to whether non-exempt workers are working through their lunches. While many people can empathize with this situation, it is one that may well subject the employer to liability.

While the Fair Labor Standards Act does not require breaks or meal periods be given to workers, some [states](#) have specific requirements requiring employers to provide their employees breaks or meal periods. If you work in a state that does not require breaks or meal periods, these benefits are generally a matter of

agreement between the employer and the employee (or the employee's representative). However, even in those states without required meal or break periods, employers must still pay attention to meal- and break-period policies, as the potential for legal exposure still exists.

The Department of Labor makes a distinction between rest times and meal times. "Rest times" are rest periods of short duration, usually 20 minutes or less. These short periods must be counted as hours worked, and the employee must be compensated for the time. On the other hand, bona fide meal periods (typically 30 minutes or more) generally need *not* be compensated as work time. The Department of Labor makes clear that for a meal period to be "bona fide," the employee must be completely relieved from duty for the purpose of eating regular meals. The employee is not considered relieved if he/she is required to perform *any* duties, whether active or inactive, while eating.

Problems arise, however, when employers fail to recognize and count certain hours worked as compensable hours. For example, an employee who remains at his or her desk while eating lunch and regularly answers the telephone and refers callers during that time is working. This time must be counted and paid as compensable hours worked because the employee has not been completely relieved from duty.

Many employers choose to include a meal and rest time policy in the employee handbook. These policies typically state when employees may take a rest period break, state the expected duration of the rest period break (such as 10-15 minutes), and indicate that the rest period break is compensated. These policies also typically specify if and when meal periods are to be taken. Many employers choose to have their employees clock out for a meal period anywhere between 30 minutes and one hour in duration when the employee works between five and eight continuous hours.

But what happens when an employee chooses not to clock out for his or her lunch break despite being told by Human Resources and management of the requirement to do so? Can the employer still be held liable?

If the employee works in a state where meal periods are statutorily required, then the employer should take steps to ensure that the employee is taking the lunch break. Employers in these states face exposure not only based on failure to pay an individual employee, but employees in these states can also seek to have their case certified as a collective action. In these situations, employers will face a long battle of either trying to get the class de-certified or prolonged litigation where the company's policies and procedures

are scrutinized. Employers in California are undoubtedly well aware of the risks associated with meal and break periods and could speak at length to the difficulty with such litigation, as California's laws on meal and break times have spawned numerous litigation in recent years, including the landmark [Brinker](#) decision in 2012.

However, even if an employer operates in a state that does not statutorily require meal periods, prudence still demands caution. Depending on how employers run their payroll in these states, allowing employees to work through designated meal and break periods could still create exposure under the Fair Labor Standards Act. Employers should always make sure that their policies regarding meal and break are being applied and adhered to consistently.

Some employers take the discretion completely away from the employee and implement a policy where the time clock automatically deducts a certain amount of time each day from the non-exempt employee's work hours for an unpaid meal break. This approach has its own set of problems, however. These employers face liability if they do not provide a process to their employees to report situations when their meal breaks were cut short or the employee skipped the meal break completely due to a work-related reason. Some employers have chosen to implement this policy by having their employees sign an acknowledgement in which they attest that they understand that the employer will deduct 30 minutes each shift over a certain number of hours for a meal break and that it is their responsibility to notify the employer and complete the proper paperwork each time the employee is not able to take an uninterrupted 30 minute break. Employers may also choose to have their employees review their time records on a daily or weekly basis to verify that the work hours are accurate. Although by no means a "silver bullet" that relieves the employer of any potential exposure, this two-step process may help reduce future liability.

When it comes to employee meal breaks, the important overall take away is to know and understand your own state's wage and hour laws, along with the laws of each state in which your company has employees. As always, it is important that you enforce your written policies and procedures consistently and provide adequate training to your managers and staff. Finally, promoting an open-door environment so that your employees can bring concerns regarding any wage and hour issues to your attention can possibly save you costly litigation down the road.

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