



Meal Time May Prove Stomach-Churning For Hospitals

By Karen Gieselman (Columbia) and A. Kevin Troutman (Houston)

For many of us, the perils of a lunch break include braving the weekend's leftovers, testing the over-used and under-cleaned breakroom microwave, or searching the community refrigerator for your poorly-labeled brown-bag lunch. But as recent lawsuits filed against several Pennsylvania hospitals demonstrate, meal breaks can prove far more stomach-churning than three-day-old leftovers.

These lawsuits included allegations that the hospitals violated federal wage-and-hour laws by failing to pay employees for all the time worked. One lawsuit included a potential plaintiff class of over 50,000 current and former employees.

Lunch-Time Litigation

Like many hospitals, the defendants' policies provided for meal periods when employees were to be completely relieved of duties. According to policy, if an employee did not receive at least twenty uninterrupted minutes of a meal period, the time would be paid.

The problem arose because the hospitals' computerized time-keeping systems *automatically* deducted thirty minutes of time from employees' time after five consecutive hours of work. Policies stated that the employees were responsible for seeking adjustment of the automatic deduction if and when they were unable to take a corresponding meal break.

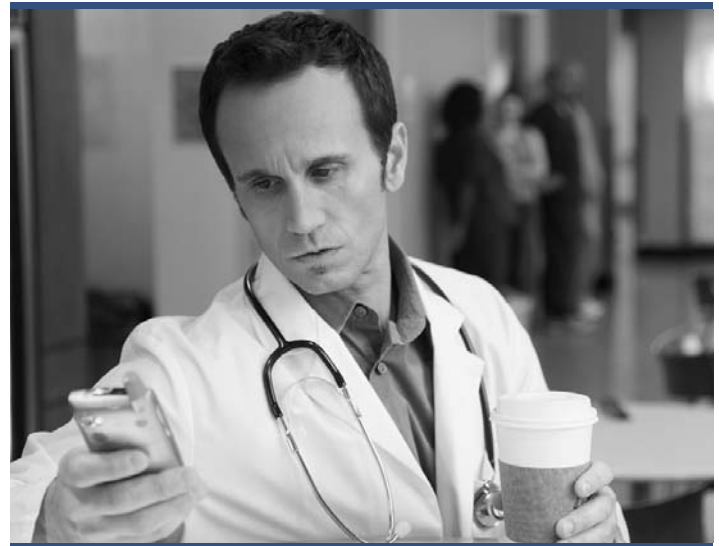
The plaintiffs alleged that employees routinely worked during meal periods, with their supervisors' knowledge, but were not paid. Employees asserted that they had to eat without relief and, therefore, frequently worked during their designated meal period. They also alleged that regardless of whether they were taking a meal break, they were expected to respond to pages, but were not paid for doing so.

In May, a federal judge found sufficient evidence of potential violations of wage-and-hour laws to allow the lawsuits to proceed as class actions. The court also found that the hospitals' written policies may have improperly shifted the burden to employees to ensure their pay was not improperly reduced.

Scrutinizing Snack Time

These lawsuits are not isolated. Employers across the nation are facing increased scrutiny of meal and break periods. Last year, clinic nurses in California filed a lawsuit alleging violations of meal and rest-period requirements. At the time, the employer had already reportedly paid \$3.8 million to employees for missed meal periods between 2005 and 2007.

While some states, such as California, impose requirements on employers to provide employees with breaks or meal periods, the FLSA *does not* mandate breaks of any kind. Rather, for most employees, these are benefits voluntarily provided by the employer to improve productivity and employee morale. But if not properly administered, such benefits can lead to costly, complicated litigation.



Break and Meal-Period Requirements

The rules concerning meal and break periods are deceptively simple. Generally, if an employer offers a short break (typically five to twenty minutes), the time is considered "hours worked" and must be paid.

By contrast, bona fide meal periods (typically thirty minutes or longer) are not considered work time and are not compensable. For a meal period to be "bona fide," employees must be completely relieved of their duties and free to leave the work area. If an employee is interrupted or required to perform any work during the period, the employee may be entitled to pay for the whole period. Accordingly, a unit secretary who stays at her work station and answers phones or a nurse who responds to pages during a meal period must be paid.

It's normally not enough just to tell employees not to work during meal periods, or that they must obtain approval to do work during their lunch break. You must pay employees for all hours worked – even for work done without advance permission. So systems that take automatic deductions are inherently risky.

Conclusion: Monitor Policies and Practices

These examples demonstrate why employers must accurately record all hours worked, regardless of scheduled breaks. You cannot simply shift this responsibility to employees. Noncompliance may result not only in costly litigation, but can hurt employee morale and even provide an issue for would-be union organizers. It's critical not only to implement compliant policies, but to regularly audit time recording *practices*.

For more information contact either author: kgieselman@laborlawyers.com or 803. 255.0000; or ktoutman@laborlawyers.com or 713. 292.0150.

Those “Bleeping” Beepers: On-Call Disputes Creating More Litigation Dangers

By Danielle Urban (Denver) and Kevin Troutman (Houston)

BlackBerry Smartphones, cell phones and pagers – are they a source of freedom and flexibility or are they just too darned restrictive? The question is not just a philosophical one. From a practical standpoint, many employers are learning that the wrong answer could be costly.

As the frequency of wage-and-hour lawsuits, especially collective actions, keeps growing, a new battleground seems to be growing. Although many employers provide some sort of compensation for time spent on call, the Fair Labor Standards Act does not require that non-exempt employees receive any such compensation, as long as they remain generally free to engage in personal endeavors.

But some employees are claiming that their on-call assignment is so restrictive that they should be considered “on duty” and therefore entitled to their hourly wage (including overtime pay). In the healthcare industry, where workers are regularly on-call, this can be an especially troublesome dilemma.

Familiar Scenarios – New Focus

On-call schedules and beepers are certainly nothing new in the world of healthcare. We have relied on these tools for many years. What is new, however, is the effort that plaintiffs’ lawyers are devoting to generating litigation in this area. Some are using slick websites to recruit would-be clients for free consultations. That’s why it is so important to monitor your facility’s policies and practices, to avoid problems before they mushroom.

The particular facts may vary, but the question comes down to whether non-exempt employees are so restricted by on-call duties that they are effectively working extra hours without pay. Examples of such disputes leading to lawsuits abound.

Recent Lawsuits

This year, a maintenance worker in Wisconsin claimed unpaid wages for time spent receiving and responding to messages while away from work. He received the messages on his employer-issued smartphone, pager, and cell phone. He was allegedly required to respond within 15 minutes.

In California, medical equipment service reps claimed they should be paid for on-call time because it interfered with their time off. Among other things, they had to respond to customer inquiries within 30 minutes, respond to service calls within two hours, and were not permitted to drink alcohol while on call. The employees were allegedly instructed not to record any time for patient calls that could be resolved by telephone.

In another lawsuit, plaintiffs alleged that their employer required them to be on call during meal breaks; stay on the premises, in uniform; and be immediately available for work. This scenario is all too familiar for hospitals and clinics. (See the accompanying article in this newsletter.)

Protecting Your Facility

In the face of this new scrutiny of on-call time, how do you safeguard your facility?

Start by reviewing your policies. If you do not have a policy regarding on-call work, consider developing one. An effective policy will not be so restrictive that employees have little freedom to use their time off for personal endeavors. How do you know if your on-call policy is too restrictive? Here are some factors to consider:

- Overly restrictive geographic limitations – requiring employees to be within a one-hour drive is probably not overly restrictive, while requiring employees to remain within a five-minute drive from the work site, or requiring them to remain on the work site, probably is. If so, the on-call time would be considered compensable time worked.
- Other restrictions on movement, such as requiring an employee to remain at home near a telephone are risky. Providing cell phones or pagers can obviously alleviate this concern.
- Do not require an employee to return telephone calls within too-short a period of time. Again, there is no bright line rule, but requiring telephone calls to be returned within 30 minutes has been found not to be overly restrictive. A 5-minute requirement probably would be.
- Is the employee required to wear a uniform? This is a strong indication that the employees’ off-work time is not their own.
- How many telephone calls or work-related interruptions does the employee experience while on-call? Frequent calls or requirements to perform work-related tasks mean the employee has little freedom to enjoy off-work time and probably should be compensated for the on-call time.
- May employees trade on-call shifts among themselves?

Although this list is by no means exhaustive, you should consider these factors, at a minimum, when evaluating or developing an on-call policy.

For more information contact either author: ktroutman@laborlawyers.com or 713.292.0150; or urban@laborlawyers.com or 303.218.3650

The *Healthcare Update* is a periodic publication of Fisher & Phillips LLP and should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult counsel concerning your own situation and any specific legal questions you may have. Fisher & Phillips LLP lawyers are available for presentations on a wide variety of labor and employment topics.

Office Locations

Atlanta phone (404) 231-1400	Houston phone (713) 292-0150	Orlando phone (407) 541-0888
Charlotte phone (704) 334-4565	Irvine phone (949) 851-2424	Philadelphia phone (610) 230-2150
Chicago phone (312) 346-8061	Kansas City phone (816) 842-8770	Portland ME phone (207) 774-6001
Columbia phone (803) 255-0000	Las Vegas phone (702) 252-3131	Portland OR phone (503) 242-4262
Dallas phone (214) 220-9100	Louisville phone (502) 561-3990	San Diego phone (858) 597-9600
Denver phone (303) 218-3650	New Jersey phone (908) 516-1050	San Francisco phone (415) 490-9000
Fort Lauderdale phone (954) 525-4800	New Orleans phone (504) 522-3303	Tampa phone (813) 769-7500

Fisher & Phillips LLP represents employers nationally in labor, employment, civil rights, employee benefits, and immigration matters