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Wage and Hour Update: Employee Break Time

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We've all seen groups of employees gathered around the entrances to buildings smoking cigarettes. And there's always the afternoon run to the local Starbucks. Is an employer required to count the time spent on these personal activities as time worked when calculating an employee's weekly hours of work? And how much break time is an employer required to give an employee each day?

Unless the break is a bona fide meal period it must be counted as working time. The question of what constitutes a bona fide meal break begins with 29 C.F.R. §785.11(a):

> Bona fide meal periods are not work-time. Bona fide meal periods do not include coffee breaks or time for snacks. These are rest periods. The 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.

How Is the Break Time Spent?

The "completely relieved from duty" requirement, however, has been rejected by most courts. Instead, the courts look at whether the time is spent "predominantly for the benefit of the employer." See *Reich v. Southern New England Telecommunication*, 121 F.3d 58, 64 (2d Cir. 1997) ("785.19 must be interpreted to require compensation for a meal break during which a worker performs activity predominantly for the benefit of the employer"); *Scott v. City of New York*, 592 F.Supp.2d 386, 400 (S.D.N.Y. 2008) (predominant benefit test "allows an employer to impose minimal restrictions on an employee's meal breaks without rendering breaks compensable work time"); *Mendez v. Radec Corp.*, 232 F.R.D. 78, 83 (W.D.N.Y. 2005) ("the question is not whether an employee did any work at all during his meal period, but whether that period itself is used primarily to perform activities for the employer's benefit"). Accord *Roy v. County of Lexington*, 141 F.3d 533 (4th Cir. 1998); *Bernard v. IBP of Neb.*, 154 F.3d 259, 264 (5th Cir. 1998); *Barefield v. Village of Winnetka*, 81 F.3d 704 (7th Cir. 1996); *Henson v. Pulaski County Sheriff Dept.*, 6 F.3d 531, 534 (8th Cir. 1993).

In *Southern New England Telecommunication*, employees were required to bring their lunch to work and to stay at the worksite during lunch in order to secure the employer's equipment and prevent harm to the public. The U.S. Court of Appeals for the Second Circuit found that such time constituted work.

> During their lunch break, the workers are restricted to the site for the purpose of performing valuable security service for the company. The importance, indeed indispensability, of these services is evidenced by the mandatory nature of the restrictions that surround the workers' lunch break. [T]he workers' on-site presence is solely for the benefit of the employer and, in their absence, the company would have to pay others to perform those same services. 121 F.3d at 65.

Factors that courts consider to determine if the time is spent predominantly for the benefit of the employer include the limitations and restrictions placed upon the employee, the extent to which those restrictions benefit the employer, the duties for which the employee is held responsible during the meal period, the frequency with which meal periods are interrupted, and whether the employee is allowed to resume an interrupted break. See *Haviland v. Catholic Health Initiatives-Iowa*, 729 F.Supp.2d 1038, 1061 (S.D. Ia. 2010); Wage and Hour Division's Field Operations Handbook §31623.

If under the particular circumstances the time spent during the break predominantly benefits the employer, the time will be considered work time regardless of the duration of the break.

Length of the Break

Once it is determined that the time was not spent predominantly for the employer's benefit, the next requirement is that the break be of sufficient duration. The regulations state that "ordinarily 30 minutes or more" is sufficient for it to count as non-working time. 29 CFR §785.19. They also state that breaks of five to "about 20" minutes are not long enough to constitute a bona fide break. 29 CFR §785.18. The open-question, therefore, comes from breaks between 20 and 29 minutes long. It has been the author's experience that the Department of Labor uses a 20-minute minimum. See also *Martin v. Waldbaums*, 1992 WL 314898, *2 (E.D.N.Y. 1992) (U.S. Labor

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Department agreed that breaks that exceed 20 minutes would be excluded); Opinion Letter FLSA 2007-INA (2007 WL 5130264) (May 14, 2007) ("periods of less than 20 minutes should be specially scrutinized by wage and hour investigation to ensure that the time is sufficient to eat a regular meal under the circumstances.")

There have even been a few cases where a break of less than 20 minutes was held lawful. In *Blain v. General Electric*, 371 F.Supp. 857 (W.D. Ky. 1971), the court found that an 18-minute meal break negotiated with a union was a bona fide break. Although the reasoning of *Blain* was adopted by the court in *Myracle v. General Elec.*, 1992 WL 699863 *8, (W.D. Tenn. Dec. 1, 1992), aff'd, 1994 WL 456769 (6th Cir. Aug. 23, 1994), these decisions are certainly in the minority.

Thus, breaks of 20 minutes or more during which the time is not spent predominantly for the benefit of the employer do not count as working time. Breaks of less than 20 minutes will be deemed working time.

Automatic Deductions

Courts have recognized that "automatic meal deduction polices are not per se illegal." Rather, it is the failure to compensate an employee who worked with the employer's knowledge through an unpaid meal break—whether the employee reported the additional time or not—that potentially violates the Fair Labor Standards Act. See *Ellis v. Commonwealth Worldwide Chauffeured Transportation of NY*, 2012 WL 1004848 (E.D.N.Y. March 23, 2012).

Many employers make an automatic deduction of a certain number of minutes to account for a lunch period without actually verifying that the employee is taking that number of minutes as a bona fide meal period and/or having a procedure in place for employees to report the lack of a break. That is a dangerous practice.

In *Ellis*, although plaintiff worked through at least some of his unpaid meal breaks, he failed to show that defendants were aware that he did not take a single meal break for which he was not paid. The court relied on the fact that plaintiff had reviewed, signed and returned Commonwealth's written policy which instructed him to "tell your supervisor if you do not believe you had the opportunity for a full meal break in any given day." Id. at *9 (citing and quoting *Wolman v. Catholic Health Sys. of Long Island*, 2012 WL 566255 (E.D.N.Y. Feb. 16, 2012)).

In *Haviland v. Catholic Health Initiatives-Iowa*, 729 F.Supp.2d 1038 (S.D. Ia. 2010), the court denied the claim for unpaid lunch breaks because the written policy provided:

> When an employee is unable to take a 30-minute meal break without disruptions caused by work, or if the meal break is disrupted by work responsibilities, the supervisor must be notified and notation of no meal will be made at the time clock at the end of shift. This time will count as worked hours. Id. at 1042-43.

Unless the break is a bona fide meal period it must be counted as working time.

It is also wise to have employees report the beginning and the end of their lunch breaks. In *Donovan v. White Beauty View*, 556 F.Supp. 414 (M.D. Pa 1982), the lack of accurate records of employee lunch breaks cost the employer dearly.

> While employees were entitled to receive meals during the workday, there was no record showing to what extent employees took advantage of this entitlement and how much time was expended while eating. There was testimony that some employees did not eat meals, especially during busy periods, and that others ate "on the run" while working. Because of the absence of records revealing the actual time spent by employees for meals, it would be pure speculation for me to attempt to reconstruct the appropriate amount of meal-time credit. When records are incomplete, the employer cannot complain of the adverse consequences visited upon him for the failure to maintain precise records as required under the Act. Id. at 418.

What Breaks Are Required?

Federal law does not require specific break time; that is the province of the New York Labor Law. Section 162 requires the following:

- Factory employees working at least six hours extending over the noonday meal period must get at least one-hour for the "noonday meal"; all other covered employees must get at least one-half hour. Lab. Law §162(2).[1]
- Employees who start work before 11 a.m. and work later than 7 p.m. must receive an additional meal period of at least 20 minutes between 5 p.m. and 7 p.m. Lab. Law 162(3).
- Employees working more than six hours between 1 p.m. and 6 a.m. must be given at least a 45-minute meal period (60 minutes for factory workers) midway between the beginning and end of their shift. Lab. Law §162(4).

Section 162 applies to all employees, including management. New York State Department of Labor Division of Labor Standards Guidelines for Meal Periods (LS 443—September 2007).

Under certain circumstances, an employee can waive the protections of Section 162. For example, in *American Broadcasting v. Roberts*, 61 N.Y. 2d 244 (1984), due to the nature of the work (a news program), the employees and union had agreed on alternative meal arrangements and compensation for employees who could not take a break. The court found a bona fide waiver of the protections of Section 162 through the collective bargaining agreement "by which the employee received a desired benefit in return." Id. at 250.

Matter of Cruz, 79 A.D.2d 1081 (3d Dept. 1981), held that a nursing home could require an assistant engineer to remain on his post where he could eat lunch and receive overtime for his 45-minute meal break. Even if the employer could not require it, the court found that the arrangement constituted a valid waiver. Id. at 1081.

In contrast, in *Consolidated Rail v. Hudacs*, 223 A.D. 2d 289 (3d Dept. 1996), train yardmasters who did not get a break were allowed to eat during their shifts. The court found this was not a valid waiver because the legislative purpose of Labor Law §162—ensuring that workers are given adequate opportunity to eat and rest for the protection of their own health and welfare as well as that of their coworkers and the public at large—was compromised because, unlike the agreement at issue in *Roberts*, it simply provides for no such periods at all. Moreover, even assuming that the purported waiver did not offend the legislative purpose of the statute, the yardmasters did not receive a desired benefit in return, which is an absolute prerequisite to the waiver doctrine. Id. at 293.

Employers, however, can take some comfort in the fact that there is no private right of action under Section 162. *Ellis*, 2012 WL 1004848 at * 10, *EEOC v. Walmart Stores*, 2001 WL 1725300, 8 *7 (W.D.N.Y. Sept. 28, 2001).

1. The noonday meal period runs from 11 a.m. until 2 p.m. Lab. Law. §162 (2).

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