



# Automatically Deducting For Meal Breaks Can Be Costly

Insights

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Automatic deductions, where the employer's timekeeping system assumes and deducts for a 30-minute meal break, have proved to be a fruitful target for plaintiffs. During the past 10 years, over 40,000 lawsuits have been filed under the federal Fair Labor Standards Act (FLSA), and the trend shows no signs of easing. Filings increased by 10% in 2010. There has been a similar flood of lawsuits under state and local laws.

This wage-and-hour litigation has become almost a "cottage industry" for plaintiffs' lawyers seeking high-dollar, high-profile cases. These cases are becoming increasingly common not only because they usually involve numerous employees, but because the law allows prevailing employees to recover liquidated (or double) damages, plus attorneys' fees.

These cases are also unique and troublesome because, unlike most employment litigation, the hospital's intentions are irrelevant. In other words, even a logical, well-intentioned policy does not prevent liability when a technical violation occurs.

Within the broad classification of so-called "off the clock" FLSA cases, missed meal-and-break periods allegations are increasingly common. These allegations can be even more costly because the allegedly unpaid work time often pushes the employee's compensable time to more than 40 hours in a week, thus into a higher overtime pay rate. Fortunately, it is also relatively easy to reduce or even eliminate exposure in these cases.

## The Legal "Lay of the Land"

Federal law (and many states' laws) do not even require employers to provide meal breaks for employees. But regardless of whether break or meal periods are involved, you *must* pay workers for all time worked. This includes not only time that was authorized, but *all* time worked, if you either knew or *should have known* about it.

The employer is responsible for creating and keeping accurate records of all such time. In fact, in the absence of solid evidence to contrary, courts and the U.S. Department of Labor (DOL) are likely to accept an employee's recollections, sometimes even when contradicted by a hospital's documented records. Thus, your records *and practices* must demonstrate compliance with the law.

Short 10- or 20-minute breaks are normally compensable and cannot be considered unpaid meal breaks. To be excluded from compensable work time, a meal break must normally last at least 30 minutes and be *uninterrupted*. If employees are unable to leave their workstations or are interrupted, the meal period will probably be considered compensable time.

In a patient-care setting, it can be difficult for an employee to take an uninterrupted, bona fide meal break. This is why the practice of automatically assuming (and deducting time for) 30-minute meal breaks can result in repeated and costly violations of the law. This practice apparently originated to streamline record-keeping where employees were normally able to take meal breaks. On occasions when employees couldn't take such breaks, they were responsible for reporting or documenting it in their time records.

While that approach may sound logical, a hospital cannot escape liability by simply instructing employees to record and report missed meal breaks, especially during today's lean economic times. Some employees inevitably forget or neglect to do this. Recognizing that this practice does not relieve employers of the responsibility to record and pay for all time that employees work, plaintiffs' lawyers and the DOL have made this practice a favorite target area in wage and hour investigations and litigation. Some plaintiffs' firms have aggressively marketed in this area, using billboards and websites. Some have even purchased lists of registered nurses and used direct mail solicitations addressing this very issue with hospital workers.

### **Our Advice**

To safeguard against this trend, many hospitals have returned to the nearly-abandoned practice of having workers literally clock out for meal periods and clock back in when they return to their workstations. By itself, this change considerably reduces the risk of lawsuits seeking unpaid wages for missed (but deducted) meal periods.

But hospitals can do more to avoid a wave of wage-and-hour litigation. First, ensure that your time-recording policies are current and accurately describe actual practices. Second, and even more important, policies *and practices* should emphasize that – although employees must check with a supervisor before working overtime or missing a meal break – the most important thing to do is to record all time accurately. The hospital's time records could be rendered nearly useless if a plaintiffs' lawyer shows there was an actual practice of working "off the clock."

Finally, when a question or problem arises, establish a pattern of addressing it promptly and fairly, without permitting any semblance of retaliation against the person who complained.

The rising tide of wage-and-hour litigation shows no signs of relenting, but with these few steps, hospitals can significantly reduce their risk of getting soaked.

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