

Client Alert

June 2010

Interested in solutions to new legal and regulatory challenges facing healthcare industry employers? Please join Baker & McKenzie's employment lawyers and Laurus Strategies for a one-day program on June 25 in Chicago. Click [here](#) for more information and to register.

In This Issue:

What Employers Can Do To Avoid Meal Break Class Action Lawsuits

Authors:

Douglas Darch

Tel: +1 312 861 8933

douglas.darch@bakermckenzie.com

John "Lou" Michels

Tel: +1 312 861 7975

John.Michels@bakermckenzie.com

Ryan Vann

Tel: +1 312 861 2588

Ryan.Vann@bakermckenzie.com

Hospitals and Health Care Systems in the Crosshairs for Meal Break Litigation

News articles in recent months have chronicled a number of lawsuits alleging or settling claimed wage-related meal break violations against hospitals and other healthcare providers. It is clear that plaintiffs' attorneys have identified the healthcare industry as an "area of opportunity" for meal break class action lawsuits – and the trend only seems to be escalating.

The Fair Labor Standards Act ("FLSA") permits employers to exclude meal periods from an employee's compensable time, but only if the employee is completely relieved of duty -- both "active" and "inactive" -- for a period of at least thirty minutes (although twenty minute meal breaks have withstood scrutiny on occasion). "Active duty" is time spent performing ordinary job functions. "Inactive duty" is a potentially troublesome issue for many healthcare providers. It can include time spent monitoring or responding to pages or calls, even if the employee is not performing ordinary job functions. Consequently, if an employee performs any duty during a meal period, the employee is not considered to be relieved of duty during that period. As a result, the employee is entitled to compensation, potentially for the entire meal period, not just the time period spent working.

The meal break issue in the healthcare industry is attributable to the fact that nurses and other employees often are required to carry pagers or telephones and respond to messages and calls on those devices as part of their normal duties. The FLSA compensable time problem occurs when the employee is required to monitor pages or calls during a meal break. As noted above, monitoring and responding to pages and calls can be treated as performing compensable work.

The cases filed to date typically involve employers who automatically deduct meal periods from working time. This timekeeping system may cause employers to be more vulnerable to claims because of two characteristics. First, employees whose time is tracked using this system do not clock in or out themselves for meal breaks. Rather, the timekeeping system automatically deducts the employee's meal break period from the employee's work day. Second, the employee is charged with the responsibility of manually overriding the automatic deduction when the deduction is not appropriate. Typically, this task is done at the end of the work day or work week, with the potential result that the manual override does not occur.

Even without an automatic meal break deduction, however, timekeeping violations can occur without the employer's knowledge -- or even in direct contravention of the employer's instructions. Where the employee is responsible for recording his or her time, an undocumented meal break interruption may arise because the employee fails to record the time as compensable. Employers who

have adopted policies which strictly prohibit nurses from performing duties during meal breaks are vulnerable if the policy is not feasible in practice or not enforced. Because of the nature of a nurse's duties -- or any other employee who remains "on-call" throughout their shift -- employers are at risk that those employees may be interrupted during meal breaks and fail to record the time as working time.

For example, in late 2009, the Department of Labor (DOL) determined that a Missouri-based health system owed nurses approximately \$1.7 million for deficiencies in paid meal breaks. The employer had been automatically deducting meal breaks from an employee's compensable time. However, the nurses allegedly performed some job duties during those breaks in violation of hospital policy. Because the nurses performed some duties, the meal period allegedly should have been treated as paid time, leading to the DOL award.

Similarly, three Pittsburgh-area health systems were sued in 2009 for FLSA violations relating to automatic meal break deductions. The Pittsburgh suits combine claims of potentially tens of thousands of health industry employees, resulting in contingent liability well into the millions of dollars.

Meal period litigation also hit Tennessee, Massachusetts and New York, with at least thirteen suits in those states against health systems in 2009. All of the suits related to so-called "automatic deduction" meal payment systems -- and each claims more than \$5 million in damages. Likewise, lawsuits based on similar automatic meal break deduction violations recently were filed against three Chicago-area hospitals. The trend likely will continue this year.

What Employers Can Do To Avoid Meal Break Class Action Lawsuits

Although failure to comply with meal and rest period requirements can be a costly mistake, it is one that can be avoided through proper policy review and management. Hospitals and other employers should take action now to ensure their policies and practices comply with the FLSA and state laws regulating meal breaks and rest periods.

- Employers using a timekeeping system that automatically deducts for meal breaks should consider using a different system. The FLSA requires employers to accurately track hours worked in a workday and total hours worked in a workweek. Automatically deducting a predetermined amount of time may raise questions about the accuracy of the time records and make it more difficult for the employer to prove that full breaks were taken if employees raise allegations of being shortchanged.
- Employers should review how their meal break policies are implemented and consider whether it is feasible to relieve employees of all duty during unpaid meal periods. If non-exempt employees are performing duties during their meal breaks, the time likely is compensable.
- Employers should be aware of applicable state laws. While the FLSA does not mandate the provision of meal breaks, many states require it. Thus, requiring employees to perform work during meal breaks may violate state law, even if employees are paid for this time. However, some states have exceptions that permit working meal breaks in limited circumstances.

www.bakermckenzie.com

For further information please contact

Chicago

Andrew Boling
+1 312 861 8076
andrew.boling@bakermckenzie.com

Douglas Darch
+1 312 861 8933
douglas.darch@bakermckenzie.com

John "Lou" Michels
+1 312 861 7975
john.michels@bakermckenzie.com

Bob Mignin
+1 312 861 2520
robert.mignin@bakermckenzie.com

Houston

Rick Hammett
+1 713 427 5016
jrichard.hammett@bakermckenzie.com

Scott Nelson
+1 713 427 5027
scott.nelson@bakermckenzie.com

Liquita L. Thompson
+1 713 427 5040
liquita.l.thompson@bakermckenzie.com

New York

Rob Lewis
+1 212 891 3532
robert.lewis@bakermckenzie.com

Palo Alto

Jenni Field
+1 650 856 5501
jenni.field@bakermckenzie.com

Cynthia Jackson
+1 650 856 5572
cynthia.jackson@bakermckenzie.com

Michael Westheimer
+1 650 856 5519
michael.westheimer@bakermckenzie.com

San Diego

Brian S. Arbetter
+ 858 523 6250
brian.s.arbetter@bakermckenzie.com

- When it is feasible to do so, employers should have clear policies that prohibit employees from performing work during meal breaks and take steps to ensure the policies are enforced. Supervisors need to be trained on implementing meal and rest break policies. The policy is only as effective as its level of enforcement.
- Employers periodically should review procedures for time recording and work-related equipment use during non-work time with employees to ensure that meal breaks are not interrupted by pages and telephone calls. Managers and payroll should have a system for monitoring any failure to follow proper timekeeping procedures.
- Any violation of the hospital's timekeeping policy should be documented by the employer; the employee should be appropriately compensated; the employer should determine the reason why the policy was not followed; and, if necessary, the obligation to follow proper timekeeping procedures should be reinforced with disciplinary action.
- Employers in a tech-laden environment may be able to automatically link pager use or telephone use during meal breaks to the timekeeping system, thereby removing the need for employees to manually override the automatic deduction for meal breaks. In any event, employers should preserve records for company-owned pagers, telephones and other work-related equipment that employees may be tempted to use during non-working hours, including unpaid meal breaks. Should an employer be charged with an FLSA violation, the employer with good policies and accurate time tracking information is in a much better position to minimize liability than it would if forced to respond to an employee's memory or personal notes.
- Employers should adopt and strictly enforce rules against performing work during off-duty periods, as any business use of a pager or telephone during a meal period may trigger FLSA liability.
- Finally, employers should keep in mind that many states have laws regulating meal and rest periods and some -- most notably California -- impose additional restrictions on meal and rest break requirements.