



# THE ADVOCATE

CAYUGA-ONONDAGA BOCES  
OFFICE OF PERSONNEL RELATIONS  
1879 WEST GENESEE STREET ROAD  
AUBURN, NEW YORK 13021-9430

VOLUME XXXIII  
MARCH/APRIL  
2014

## Office of Personnel Relations

**Randy J. Ray**  
Director of Personnel Relations

**Brent D. Cooley**  
Senior Labor Relations Specialist

**Emily Brown**  
Labor Relations Specialist

**Mark W. Snyder**  
Safety Coordinator

**Linda M. Brown**  
**Kelly M. Walsh**  
Administrative Support

Telephone: (315) 255-7683 or (315) 253-0361

FAX (315) 255-7625

Email: [lbrown@cayboces.org](mailto:lbrown@cayboces.org)

---

*Providing comprehensive  
employment and personnel  
relations services to local  
school districts for over  
40 years.*

## IN THIS ISSUE ....

- **EATING WHILE YOU  
WORK: HOW TO  
ENSURE MEAL  
BREAKS COMPLY  
WITH THE FLSA**
- **ABCs ARE NOT  
ARBITRARY**
- **AREA  
UNEMPLOYMENT  
RATES FOR  
MARCH 2014**
- **CPI FOR MARCH 2014**



# Eating While You Work: How to Ensure Meal Breaks Comply with the FLSA

By: Brian Walter, Esq. and Alison Kosinski, Esq.

Common misperceptions about meal periods under the Fair Labor Standards Act abound. For example, while most employers provide meal breaks, the FLSA does not require employers to do so. If an employer provides a lunch break, and the employee eats during the break, the employer still may have to pay for the entire lunch period, depending on what else the employee does during that time.

Understanding what makes a meal period compensable under the FLSA ensures that employers create and implement lawful meal break policies. This article discusses common issues regarding meal breaks across various types of public employment.

## The Law: Predominantly for the Employee's Benefit

Two tests determine whether a meal period counts as hours worked and therefore is compensable under the FLSA. A U.S. Department of Labor interpretive bulletin provides that for the meal period to be unpaid, a nonexempt employee "must be completely relieved from duty for the purposes of eat-

ing regular meals." (29 C.F.R. §785.19.)

Interpretive bulletins, as opposed to DOL regulations, however, are not binding law. Therefore, most courts have not applied the DOL standard for meal breaks; rather, they have applied the more lenient predominant benefit standard. (See *Southern New England Telecommunications Corp.*, 121 F.3d 58, 64 (2nd Cir. 1997); *Bernard v. IBP, Inc. of Nebraska*, 154 F.3d 259, 264 (5th Cir. 1998); *McKnight v. Kimberly Clark Corp.*, 149 F.3d 1125, 1130 (10th Cir. 1998); and *Hill v. U.S.*, 751 F.2d 810, 812-13 (6th Cir. 1984).) Under this standard, a meal period that predominantly benefits the employee is not compensable under the FLSA.

The 6th Circuit summarized the test for when a meal period is unpaid as follows:

"As long as the employee can pursue his or her mealtime adequately and comfortably, is not engaged in the performance of any substantial duties, and does not spend time predominantly for the employer's benefit" the time is not compensable. (See *White v. Baptist Memorial Health Care Corp.*, 699 F.3d 869, 873 (6th Cir. 2012).)

What can an employer do while still ensuring that a meal break is predominantly for the employee's benefit? As discussed below, an employer may place certain restrictions on a meal break and some interruptions may arise without converting the meal period into compensable time.

## Working through Lunch: When Is Employer Liability Triggered?

Under the FLSA, if an employer allows an employee to work, such time will be considered "hours worked," even if the employer is not specifically aware of the work being performed and even if the work is carried out while the employee is eating during a meal break. An employer's liability for work during an unpaid meal break depends on the circumstances.

When an employer knows or has reason to know that an employee is performing work during an unpaid meal break — for example by receiving emails from the employee or seeing him or her answer the phone during that time — the employer will be liable for compensating the entire meal break. On the other hand, if an employee skips lunch without telling the employer and the employer has no reasonable way of knowing that the employee worked through lunch, then the employer may not be liable.

An employer should not ignore signs that an employee worked through a meal break. Creating a policy that prohibits unauthorized work during meal breaks is also not enough to avoid liability. The employer must enforce its policy by disciplining employees when it discovers they have worked through lunch in violation of the policy.

### **Automatic Meal Break Deductions Are Lawful**

The FLSA does not prohibit automatic meal period deductions and, in fact, such practices are quite common. Rather than requiring employees to clock in and out for their meal breaks, employers may have a policy of automatically deducting 30 minutes (or a greater amount) from each employee's daily time records, or two hours and 30 minutes from their weekly records. This practice assumes that employees take a bona fide unpaid meal break each day. The challenge employers face is to identify time actually worked during the break and adjust the automatic deduction accordingly.

### ***White v. Baptist Memorial Health Care Corp.***

In *White v. Baptist Memorial Health Care Corp.*, the employer automatically deducted meal periods, but also had a practice of requiring employees to record time spent working during a meal break in an "exception log" regardless of whether the meal break was partially or entirely interrupted. The 6th Circuit held that the automatic

deductions were lawful and that the employer's policy of requiring employees to report time worked during a meal period on an exception log insulated the employer from liability for uncompensated time that an employee failed to report.

*White* teaches an important lesson: Create and consistently apply reasonable policies and practices for employees to report all time worked during a meal period. Automatic deduction practices commonly place the burden on the employee to report exceptions to an otherwise uninterrupted meal period. Therefore, procedures to report these exceptions should be easy to follow and as least burdensome as possible on the employee.

### **School Employees: Eating Lunch on the Playground or Away on a Field Trip**

A common scenario at schools is that a non-exempt employee, such as a teacher's aide, is directed to watch children on the playground during lunch. Under both the DOL interpretive bulletin and the predominant benefittest, this meal period likely would be compensable because the employee is not completely relieved from work responsibilities, nor is the time predominantly for the employee's benefit.

The issue of monitoring students during a meal break also arises on school field trips. Time spent by a nonexempt employee supervising students during a field trip is likely hours worked even at meal times. A challenge is ensuring that employees take bona fide meal periods — if they cannot be relieved from duty, the entire time is compensable. If an employee is required to be "on duty" for more than 24 consecutive hours on an overnight field trip, the school and employee may enter into an agreement regarding which hours will count as hours worked and thus be compensable. (29 C.F.R. §§785.23, 785.22.) This agreement may exclude meal breaks during which the employee is relieved from duties. (29 C.F.R. §785.22.)

## **Field Employees: Reasonable Restrictions Are Allowed**

Field workers, such as public works employees or inspectors who work away from the work premises pose a particular risk for public employers, as they are often solely responsible for deciding when and where to take their meal break. Those employees may work in remote areas from which it would be impractical to go out to lunch or run personal errands during a meal break. As a result, employees may want to skip the break, preferring to eat a brown bag lunch while working and leave work 30 minutes early. The FLSA permits an employee to work through lunch and leave early, but if that employee ends up working until the end of the regular shift, the entire time at work is compensable.

Employers may require employees to remain on site during a meal period. (29 C.F.R. §785.19(b)) Restrictions on smoking, changing clothes or making personal phone calls likely will not convert the meal break into compensable time. (See DOL Opinion Letter, 2004-7NA (2004 WL 5303035).) However, if an employee is required to remain at a post while on site, as opposed to more generally on the premises, then the meal period is likely compensable.

### **Transit Workers: Meal Breaks Combined with Travel Time**

Public-sector transit employees present a challenge in determining if and when an employee's meal break is compensable. Transit workers are typically on the road during the workday and unable to clock in and out for lunch. Given this, it may make sense for an employer to automatically deduct a meal period each shift. However, as discussed above, there must be a reasonable procedure for employees at the end of the shift to mark that they worked through lunch. If an employer knew or reasonably should have known that an employee worked through lunch, perhaps by eating en route, then the employer will be liable for compensating

the employee for the otherwise unpaid meal period.

When a transit employee is driving along an assigned route, it may be unclear when the employee stops work to begin the meal break and then starts work again. A transit worker's meal break begins upon leaving the assigned transit route and ends when the employee returns to the assigned route. (See DOL Opinion Letter 2006-1NA (2006 WL 4512943).) If an employee ends one route, takes a meal break, and then begins the next route at a new starting point, the time in which the employee travels from the end of the first route to the start of the second route is compensable time worked. (See *Chavez v. City of Albuquerque*, 630 F.3d 1300 (10th Cir. 2011).)

Sometimes transit workers receive compensation for washing up at the end of their route or before starting a meal break. Compensated washing up time does not convert the meal period into time worked. Similarly, time spent traveling to a lunch destination, so long as it is not part of the transit route, does not count as time worked.

### **Office Employees: Lunches Around the Office or at the Desk**

Employees who work in an office present common, yet challenging, meal period issues. Employees may decide to eat lunch at their desk during their lunch period, perhaps check their personal email, use the computer to surf the Internet, read a book, or play solitaire. FLSA concerns arise if the phone rings or an urgent email arrives requesting the employee's assistance. If the employee engages in work, the entire meal period could be converted to time worked if the employer knows the employee is taking lunch at his or her work location. Employers should have strict meal break policies that either prohibit employees from eating at their desk or require them to notify supervisors if they are working through their meal breaks.

Brown bag lunches and other lunch-time



meetings arranged by supervisors should not be counted as unpaid meal breaks for nonexempt employees. Such meetings, which commonly have an expectation of attendance and are related to work, are likely considered time worked, even if the employer provides lunch for the employees. A nonexempt employee who attends these meetings should be compensated for the entire time.

### **Police Officers: Implementing Some Restrictions Does Not Make Meal Periods Compensable**

If an agency has adopted a Section 7(k) public safety work period, rules governing meal periods for public safety employees at that agency are slightly different than for civilian employees. According to the DOL, a police officer's uninterrupted meal period is not compensable, so long as the officer is "completely relieved of duty." (29 C.F.R. §553.223(b).)

According to these regulations, meal breaks while an officer is conducting extended surveillance, for example, would be compensable. In practice, however, courts have applied a more lenient standard.

Simply being on call or having some police responsibilities during lunch does not make the officer's meal period compensable. For example, if an officer is responsible for responding to emergency calls, citizen requests and crimes committed in the officer's presence, the meal period is likely not compensable.

Even prohibiting an officer from running personal errands during lunch likely does not convert the time into hours worked. In contrast, if the officer's time or attention is taken up principally by work, such that the officer cannot comfortably spend the mealtime, then the meal period is compensable. (See *Lamon v. City of Shawnee, Kan.*, 972 F.2d 1145, 1157-58 (10th Cir. 1992).)

### **Firefighters: Special Rules Based on Length of Shift**

Compensability of firefighter meal periods depends on the length of the shift. If an agency has adopted a Section 7(k) work period, it must compensate firefighters for any meal period during a shift that is less than or exactly equal to 24 hours in duration — even if the officer is completely relieved of duty for the meal break. (29 C.F.R. §553.223(c).) If the shift is greater than 24 hours, the meal period is not compensable so long as it is a bona fide meal break.

Where a firefighter is responsible for answering phones, responding to emergencies and remaining at the station during meal breaks, the time is likely compensable. One court reasoned that because the firefighter's job description requires serving in a standby capacity, and the meal period is nothing different than a continuation of that standby status, the meal period is time worked. (See *Rotondo v. City of Georgetown, S.C.*, 869 F. Supp. 369, 375 (D.S.C. 1994).)

### **Employer Take-away**

Meal periods create the risk that employees will perform off-the-clock work without compensation, something the FLSA prohibits and which may result in significant liability for the employer. Consider reviewing current meal break policies and practices to ensure compliance with the FLSA. As with most FLSA issues, strong policies, training for employees on those policies and diligent enforcement are critical. Employers must ensure that supervisors and employees realize they cannot turn a blind eye to employees who are working through unpaid meal periods.

\* Used with permission

*Fair Labor Standards Handbook for States, Local Governments and Schools.* Copyright (c) 2014 by Thompson Information Services. All rights reserved. [www.thompson.com](http://www.thompson.com)



## ***ABCs Are Not Arbitrary***

Recently the New York State Education Commissioner was asked to consider whether use of an alphabetical tiebreaker was arbitrary and capricious when determining which teacher to terminate in a specific tenure area.

In this case, a school district sought to terminate a Spanish teacher after eliminating a teaching position. The question of which teacher to terminate was complicated because the school district employed two Spanish teachers with the same level of actual full-time service. In addition, both Spanish teachers were appointed at the same board meeting via the same resolution. In order to “break the tie” in determining seniority in their specific tenure area, the school district used the alphabetical order of the teachers’ last names and retained the teacher whose name came first alphabetically. The terminated teacher challenged this decision.

In analyzing the teacher’s appeal, the Commissioner of Education reviewed previous court cases that addressed the abolishment of a position in a specific tenure area and how to determine seniority. The Commissioner noted that a school district must first look at actual full-time service. If the level of actual service is equal, the school district must then consider the appointment date of the teachers. The teacher whose appointment occurred first is

deemed to have greater seniority.

The Commissioner then discussed how courts have indicated that a school district may use an objective standard to “break the tie” where actual service and date of appointment are the same for two teachers. The Commissioner also noted that the Appellate Division has cautioned that a school district must not act in an arbitrary or unreasonable fashion.

After reviewing how school districts evaluate seniority when determining which teacher to terminate, the Commissioner held that a school district’s decision to use of an alphabetical tiebreaker where actual service and date of appointment are the same was not arbitrary and capricious.

In her appeal, the terminated teacher also argued the retained teacher’s appointment was invalid because the retained teacher did not submit the requisite 30-day notice of resignation to her previous school district and her appointment contained an anticipated start date, not an actual start date.

The Commissioner rejected both of these arguments. The Commissioner found that the 30-day notice requirement in Education Law Section 3019-a did not support the position of the terminated teacher. He also held that any technical defect in appointment was cured when the school board ratified the appointment.

As illustrated in this case and many others like it, there are many potential pitfalls in determining which teacher has greater seniority in a specific tenure area. If your school district is facing budgetary constraints and decides to eliminate a teaching position in a specific tenure area and you are not familiar with the statutes and decisions governing seniority, please contact our office with any questions.

# AREA UNEMPLOYMENT RATES

## New York State Rate

Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Ann. Avg.
2014	7.3%	7.7%	7.3%										
2013	9.1%	8.6%	8.0%	7.4%	7.5%	7.8%	7.8%	7.5%	7.4%	7.3%	6.8%	6.6%	7.7%

## Syracuse, NY Metropolitan Statistical Area

Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Ann. Avg.
2014	7.4%	7.6%	7.1%										
2013	9.3%	8.9%	8.2%	7.5%	7.4%	7.7%	7.5%	7.1%	7.1%	6.8%	6.6%	6.5%	7.6%

## Auburn, NY Micropolitan Statistical Area

Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Ann. Avg.
2014	7.5%	7.8%	7.2%										
2013	9.2%	9.0%	8.2%	7.3%	6.7%	6.9%	6.9%	6.6%	6.4%	6.3%	6.2%	6.2%	7.2%

## Cayuga County Statistical Area

Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Ann. Avg.
2014	7.5%	7.8%	7.2%										
2013	9.2%	9.0%	8.2%	7.3%	6.7%	6.9%	6.9%	6.6%	6.4%	6.3%	6.2%	6.2%	7.2%

## Broome County Statistical Area

Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Ann. Avg.
2014	8.0%	8.2%	7.6%										
2013	9.7%	9.2%	8.4%	7.6%	7.5%	8.0%	7.8%	7.4%	7.4%	7.1%	7.0%	7.0%	7.8%

## Ithaca, NY Metropolitan Statistical Area

Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Ann. Avg.
2014	4.9%	4.9%	4.4%										
2013	6.3%	5.5%	5.0%	4.6%	4.9%	5.6%	5.6%	5.4%	4.7%	4.6%	4.2%	4.0%	5.0%

## Ontario/Seneca/Wayne/Yates Statistical Area

Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Ann. Avg.
2014	7.3%	7.7%	7.0%										
2013	9.2%	9.0%	8.3%	7.3%	6.7%	6.7%	6.3%	5.8%	5.9%	5.7%	5.8%	6.0%	6.9%

## Rochester, NY Metropolitan Statistical Area

Year	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Ann. Avg.
2014	7.0%	7.2%	6.7%										
2013	8.7%	8.3%	7.7%	7.1%	7.0%	7.1%	7.2%	6.8%	6.8%	6.5%	6.2%	6.1%	7.1%

*Source: New York State Department of Labor  
Labor Statistics  
[www.labor.state.ny.us](http://www.labor.state.ny.us)*

# CONSUMER PRICE INDICES

INDEX 1982-84 BASE YEAR=100	% INCREASE FROM PRIOR YEAR	% INCREASE FROM PRIOR MONTH
-----------------------------------	----------------------------------	-----------------------------------

## February 2014

### NY-Northeastern New Jersey Area

1. All Urban Consumers	259.019	-0.2	1.1
2. Urban Wage Earners & Clerical Workers	254.782	-0.3	1.0

### U.S. City Average

1. All Urban Consumers	234.781	0.4	1.1
2. Urban Wage Earners & Clerical Workers	230.871	0.4	1.0

## March 2014

### NY-Northeastern New Jersey Area

1. All Urban Consumers	259.971	0.4	1.3
2. Urban Wage Earners & Clerical Workers	255.933	0.5	1.3

### U.S. City Average

1. All Urban Consumers	236.293	0.6	1.5
2. Urban Wage Earners & Clerical Workers	232.560	0.7	1.4



# COST OF LIVING UPDATE

## ALL CITIES

## NY - NORTHEASTERN NEW JERSEY

Month	Revised Wage Earner Index	%	All Urban Consumers Index	%	Revised Wage Earner Index	%	All Urban Consumers Index	%
Jan-12	223.2	3.1	226.7	2.9	245.5	3.0	249.3	2.8
Feb-12	224.3	3.1	227.7	2.9	246.5	2.8	250.3	2.6
Mar-12	226.3	2.9	229.4	2.7	248.2	2.7	245.1	2.5
Apr-12	227.0	2.4	230.1	2.3	248.7	2.5	245.9	2.3
May-12	226.6	1.6	229.8	1.7	249.0	1.9	252.7	1.8
Jun-12	226.0	1.6	229.5	1.7	248.5	1.6	252.4	1.6
Jul-12	225.6	1.3	229.1	1.4	248.2	1.2	252.0	1.1
Aug-12	227.1	1.7	230.4	1.7	249.7	1.5	253.5	1.4
Sep-12	228.2	2.0	231.4	2.0	251.0	1.7	254.6	1.6
Oct-12	228.0	2.2	231.3	2.2	250.5	1.7	254.3	1.7
Nov-12	226.6	1.7	230.2	1.8	250.6	2.1	254.3	2.0
Dec-12	225.9	1.7	229.6	1.7	249.5	2.0	253.6	2.1
Jan-13	226.5	1.5	230.3	1.6	250.8	2.2	254.8	2.2
Feb-13	228.7	1.9	232.2	2.0	252.3	2.3	256.2	2.4
Mar-13	229.3	1.3	232.8	1.5	252.7	1.8	256.6	1.9
Apr-13	228.9	0.9	232.5	1.1	252.0	1.3	256.0	1.4
May-13	229.4	1.2	232.9	1.4	252.3	1.3	256.3	1.4
Jun-13	230.0	1.8	233.5	1.8	252.9	1.8	256.9	1.8
Jul-13	230.1	2.0	233.6	2.0	253.3	2.1	257.3	2.1
Aug-13	230.4	1.5	233.9	1.5	253.6	1.6	257.7	1.7
Sep-13	230.5	1.0	234.1	1.2	254.4	1.4	258.5	1.6
Oct-13	229.7	0.8	233.5	1.0	252.9	0.9	257.1	1.1
Nov-13	229.1	1.1	233.1	1.2	253.0	1.0	257.4	1.2
Dec-13	229.2	0.0	233.0	0.0	253.1	0.0	257.3	0.0
Jan-14	230.0	0.4	233.9	0.4	255.5	0.9	259.6	0.9
Feb-14	230.9	0.4	234.8	0.4	254.8	-0.3	259.0	-0.2
Mar-14	232.6	0.7	236.3	0.6	255.9	0.5	260.0	0.4
Apr-14								
May-14								
Jun-14								
Jul-14								
Aug-14								
Sep-14								
Oct-14								
Nov-14								
Dec-14								

# THE ADVOCATE STAFF

## Editorial Assistant & Desktop Publisher:

Linda M. Brown

## Contributors:

Randy J. Ray

Brent D. Cooley

Emily Brown

Mark W. Snyder

Linda M. Brown

## Published by:

Cayuga-Onondaga BOCES  
Office of Personnel Relations  
1879 West Genesee Street Road  
Auburn, NY 13021-9430  
Telephone: (315) 255-7683  
Fax: (315) 255-7625

\* All Rights Reserved

## PAST ISSUES OF “THE ADVOCATE”

Past issues of “The Advocate” can be read and/or downloaded for your reference at your convenience.

Simply go to our website at [www.cayboces.org](http://www.cayboces.org), navigate through Management Services, then Labor Relations Service, then click the link to “The Advocate” newsletter.