

## Mathew Tully's Ask the Lawyer column

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By: Mathew B. Tully, Esq. 7/12/14  
Question: I'm so overwhelmed at work that I never get to take my half-hour, unpaid lunch break. Should I be compensated for the time I spend working through lunch even if I clocked out?  
Response: When employees work through their lunch breaks, they are not only missing an opportunity to rest and take in sustenance, they may also miss out on the opportunity to be fairly compensated for the work they perform. Federal regulation states that a "bona fide meal period" is "not worktime," and it should not be confused with coffee breaks or snack times. "These are rest periods. The employee must be completely relieved from duty for the purposes of eating regular meals," the regulation states. New York State Department of Labor guidelines state a minimum one-hour meal period should be afforded to factory workers and a minimum 30-minute meal period should be afforded to those "employed in or in connection with a mercantile or other establishment or occupation." Twenty-minute meal periods are allowed under special circumstances and with the permission of the Department of Labor. If the employee voluntarily, or under pressure, performs work while eating at his or her desk, he or she is not considered "completely relieved," according to federal regulation. And just because an employer requires an employee to clock out for lunch – or automatically does it for him or her – does not mean he or she waived any entitlement for compensation for work performed. "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 FLSA," the U.S. District Court for the Eastern District of New York said in *Perez v. G&P Auto Wash Inc.* (2013). Federal regulation requires the employee to be "otherwise completely freed from duties during the meal period," though not necessarily removed from the workplace. This "completely freed" requirement, however, does not mean the employer is automatically required to compensate an employee who performed a little work during his or her lunch break. Such "infrequent interruptions of short duration" are allowable, the U.S. District Court for the Western District of New York noted in *Mendez v. Radec Corp.* (2005). To determine whether the work performed by an employee during a lunch break is allowable, courts often rely on what is called a "predominate-standard test," which asks "whether the meal period is used predominantly or primarily for the benefit of the employer or for the benefit of the employee," the Court added. In cases where an employer turns a blind eye to the work performed by overwhelmed employees during lunch breaks, it could be argued the employer had constructive knowledge of such uncompensated "off-the-clock" work. The burden is on employers for ensuring employees are not working during lunch breaks. It is unrealistic to expect employers to ensure each employee is not working at his or her desk during a bona fide meal period. However, it is crucial for employers to repeatedly emphasize – and document – how employees should not work during lunch breaks. Such documentation can be used as a defense to FLSA lawsuits seeking back wages or unpaid overtime. Employees who believe they are not being properly compensated for work performed should immediately contact an employment law attorney, who can prepare for them an FLSA lawsuit and

represent them in federal court. Employers with concerns over their vulnerability to FLSA litigation should also consult with an employment law attorney, who can advise them on how to shield themselves against such claims. Mathew B. Tully is author of The Saratogian's "Ask the Lawyer" column and founding partner of the law firm Tully Rinckey PLLC in Colonie. Email business law-, employment law- or real estate law-related questions to [askthelawyer@1888law4life.com](mailto:askthelawyer@1888law4life.com). The information in this column is not intended as legal advice.