

The California Supreme Court Cooks up More Problems for Employers

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In yet another blow to employers, the California Supreme Court decided, in *Ferra v. Loews Hollywood Hotel, LLC*,¹ that the one hour of premium pay owed to employees who do not receive legally compliant meal or rest breaks must be paid at the employee's "regular rate" (as used in the calculation of overtime), not simply the employee's hourly rate. This decision impacts employers who pay nonexempt employees additional compensation, such as non-discretionary bonuses, shift premiums or commissions.

Ferra was a nonexempt employee who was paid a base hourly wage plus a quarterly incentive bonus. On occasion, Ferra was paid one hour of premium pay for a missed meal period, but the premium pay was calculated at her straight hourly wage rate without including amounts earned for the quarterly bonus. Loews successfully argued at summary judgment and on appeal that the one additional hour of pay at the employee's "regular rate of compensation" required by Labor Code section 226.7 meant something different than the "regular rate of pay," which would have required consideration of the incentive bonus as required for overtime purposes under Labor Code section 510(a).

Reviewing the legislative history, the Court found the phrase "regular rate of compensation" was intended to mimic the Fair Labor Standards Act's term of art, "regular rate." The Court rejected Loews's argument that the legislature meant only to require the payment of an hourly rate of pay because the legislature had used "regular rate of compensation" in section 226.7 and "regular rate of pay" in section 510(a). The Court found that "regular rate" was a well-known term of art when it was used in the statute, but the words "pay" and "compensation" were interchangeable.

The requirement to pay one hour of an employee's "regular rate of compensation" added teeth to the statutory meal and rest break requirements and the Court surmised that the additional one hour of pay meant to include all compensation paid to the employee. As Ferra argued, and the Court agreed, failing to include all compensation in a meal or rest break premium could penalize employees paid by piece rate and might incentivize employers to pay lower hourly rates with higher nondiscretionary components.

Following the pattern in recent decisions, the Court specifically ruled that its decision is retroactive. Rejecting Loews's argument that, given the uncertainty in the law prior to the ruling, employers could face millions of dollars in liability if applied retroactively, the Court stated that "it is not clear why we should favor the interest of employers in avoiding 'millions' in liability over the interest of employees in obtaining the 'millions' owed to them under the law."

Accordingly, employers with California employees must now ensure that all nondiscretionary payments for work performed by an employee are calculated into the payment of a meal or rest break premium.

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¹ Cal. Sup. Ct. Docket No. S259172, (July 15, 2021) (per curiam).