

JUST WHEN YOU THOUGHT YOU UNDERSTOOD CALIFORNIA'S MEAL AND REST BREAK PREMIUM LAWS...

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HIGHLIGHTS OF *FERRA V. LOEWS HOLLYWOOD HOTEL, LLC*

- Premiums for noncompliant meal, rest, and recovery periods must be paid at the “regular rate of pay” rather than the base hourly rate.
- The decision applies retroactively, and the statute of limitations for meal and rest break liability is up to four years.
- California employers whose workforce includes nonexempt employees who receive incentive pay, such as nondiscretionary bonuses, commissions, piece rate compensation, or shift differential pay should revisit the rate at which meal and rest period premiums are paid.

Is “regular rate of compensation” the same thing as “regular rate of pay” for purposes of calculating meal and rest break premiums? On 15 July 2021, in the landmark decision of *Ferra v. Loews Hollywood Hotel, LLC*, the California Supreme Court unanimously answered “Yes.”

BACKGROUND

Plaintiff Jessica Ferra was a bartender employed by Loews Hollywood Hotel, LLC (Loews). Her compensation included both hourly wages as well as quarterly nondiscretionary incentive payments, including incentive bonuses. Loews paid an hour of additional pay for noncompliant meal and rest periods, but did so at employees' base hourly rate. Ferra brought a class action on behalf of Loews' nonexempt employees, alleging that meal and rest break premiums should have been paid at employees' regular rates of pay.

Under both the federal Fair Labor Standards Act and California law, nondiscretionary incentive payments must be included in the “regular rate of pay” for purposes of calculating overtime. Regular rate of pay includes both an employee's base hourly rate and additional compensation such as shift differentials, piece rate pay, and other earned compensation. California employees are also entitled to one 30-minute meal period for every five hours worked, one 10-minute rest break for every four hours worked or major fraction thereof, and “recovery periods” where necessary to prevent heat illness. California Labor Code Section 226.7 and Industrial Welfare Commission (IWC) Wage Orders further provide that for each work day that a meal period, rest break, or recovery period is not provided, the employee is entitled to “one additional hour of pay at the employee's regular rate of *compensation*” (emphasis added).

Plaintiff Ferra argued that in enacting California Labor Code Section 226.7 and the Wage Orders, the legislature and the IWC intended “regular rate of compensation” to be synonymous with “regular rate of pay,” and the difference in word choice did not signify an intent to apply a different meaning. On the other hand, Defendant Loews asserted that the phrase “regular rate of pay” is a term of art. Therefore, in requiring break premiums to be paid at the “regular rate of compensation” in Labor Code Section 226.7(c) while requiring overtime rates to be paid at 1.5 or two times the “regular rate of pay” in Section 510(a), the Legislature intended for these terms to carry different meanings.

The Court of Appeal agreed with Loews, relying on the principle that “[w]here different words or phrases are used in the same connection in different parts of a statute, it is presumed the Legislature intended a different meaning.”¹ Ferra appealed the decision, and the California Supreme Court granted review.

THE COURT'S DECISION

The California Supreme Court first looked to the purpose behind the California Labor Code and IWC Wage Orders, which is to protect employees and to address legislative concerns about their “working conditions, wages, and hours.” Under this framework and mindset, the California Supreme Court then examined the intent behind “regular rate of compensation.”

The Court found that when the Legislature enacted Section 226.7 in 2000, it did so against the backdrop of long-standing federal law that defined overtime pay in terms of an employee's “regular rate.” The Court noted that subsequent jurisprudence also appeared to identify “regular rate” as the operative term in the phrase “regular rate of pay.” This position is further supported by the IWC's Statement as to the Basis and legislative history behind Labor Code Section 226.7,² which indicated that the IWC and Legislature may have used “regular rate of pay” and “regular rate of compensation” interchangeably. Thus, the Court reasoned, the term of art at issue was actually “regular rate,” not “regular rate of pay.”

In rejecting Loews' arguments differentiating break premiums and overtime premiums, the California Supreme Court went on to reiterate the principle that break premiums are intended to compensate employees for labor or scheduling that results in a detriment to employees. In doing so, the Court drew parallels between break premiums and overtime premiums, both of which were intended to compensate employees not for time spent working, but rather for noneconomic injuries like increased risk of accidents and stress due to long working hours.

FERRA APPLIES RETROACTIVELY

Generally, judicial decisions are applied retroactively, whereas laws passed by legislation apply prospectively.³ Narrow exceptions to retroactivity exist for judicial decisions that change a settled rule.

In commentary that may be unsurprising following the Court's decision earlier this year in *Vasquez v. Jan-Pro Franchising International Inc.*⁴—which examined the retroactivity of *Dynamex Operations West, Inc. v. Superior Court*⁵ (see our prior alert [here](#))—the Court declined to apply *Ferra* prospectively only. The Court found that because it was addressing an appeal from a divided Court of Appeal decision, and a conflict existed across various federal district courts, there was no “settled law” regarding the proper rate of break premium pay. Therefore, no exception to retroactivity applied.

WHAT DOES THIS MEAN FOR EMPLOYERS?

- **Update Premium Rates.** Employers whose workforce includes nonexempt employees who receive compensation beyond a base hourly wage should promptly work with their payroll departments and vendors to adjust premiums paid from the base hourly rate to the regular rate of pay.
- **Audit Policies and Practices.** It is more important than ever to maintain compliant and robust break policies and practices, as well as making sure that employees (including managers and Human Resources) are following proper procedures to ensure compliant breaks. Employees in supervisory, payroll, and Human Resources roles should be trained to ensure compliance with meal, rest, and recovery period policies and practices, as well as proper calculation of the regular rate.
- **Confirm Regular Rate Calculations.** Whereas before, regular rate calculations were at issue in weeks where employees work overtime, they are now critical in any workweek where an employee receiving extra-hourly compensation may be entitled to, but is not provided the opportunity to take, a requisite meal, rest, or recovery period. It is now more important than ever for employers to ensure that they are applying the correct calculation for regular rate.
- **Harbinger of Things to Come?** Extensive similarities drawn between break premiums and overtime premiums in *Ferra* may serve as a preview into upcoming California Supreme Court rulings. *Naranjo v. Spectrum Security Services, Inc.*, also pending before the California Supreme Court, asks whether meal and rest break premiums are “wages” such that failure to pay premiums can give rise to wage statement and waiting time penalties. The *Ferra* Court’s extensive analogizing of overtime premium pay and meal and rest break premiums may be a hint that it views the two in a similar light.

FOOTNOTES

¹ *Ferra v. Loews Hollywood Hotel, LLC*, 40 Cal. App. 5th 1239, 1247 (2019).

² The Statement as to Basis is a document that explains the “how and why” of the IWC.

³ *Vasquez v. Jan-Pro Franchising Int’l Inc.*, 10 Cal. 5th 944, 951 (2021).

⁴ 10 Cal. 5th 944, 951 (2021).

⁵ 4 Cal. 5th 903 (2018).

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