

California Supreme Court Issues Significant Ruling Regarding the Calculation of Premium Pay for Meal, Rest, and Recovery Premiums



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In a decision that will impact the practices of employers throughout the state, the California Supreme Court issued a ruling on July 15, 2021 in *Ferra v. Loews Hollywood Hotel, LLC.*, S259172 (Cal. Sup. Ct., July 15, 2021), establishing the rate of pay employers must use to compensate nonexempt employees who are not provided statutory meal, rest, and recovery periods.

Pursuant to Labor Code Section 226.7, if an employer fails to provide nonexempt employees with duty-free meal, rest, or recovery periods in accordance with state law, the employer must pay the employee one additional hour of pay at the employee's "regular rate of compensation" for each workday that the statutory period is not provided. Until the Supreme Court's decision in *Ferra*, there was a dispute as to whether the "regular rate of compensation" set forth in Labor Code Section 226.7 should be calculated using the same methodology used to calculate the "regular rate of pay" for purposes of determining overtime compensation under Labor Code section 510 or whether the language meant something different.

The lower courts in *Ferra* concluded it meant something different. Those courts reasoned that the legislature's use of two different terms justified different interpretations, and further noted the distinct objectives underpinning the two statutes: overtime pay compensates employees for additional work *actually* performed while meal, rest, and recovery period premiums compensate employees for the loss of a benefit. Based on those reasonings, the lower courts

concluded employers were only required to compensate employees under Labor Code section 226.7 at an employee's base hourly rate of pay.

In its July 15 ruling, the Supreme Court disagreed and concluded the "regular rate of compensation" under Labor Code Section 226.7 has the *same meaning* as the "regular rate of pay" under Labor Code section 510. The Court justified its decision *in part* on policy considerations, concluding that allowing employers to compensate employees for meal, rest, and recovery period violations at an employee's base hourly rate of pay would incentivize employers "to minimize employee's base hourly rates and shift pay elsewhere, thereby harming employees who are paid in some form other than a base hourly rate."

Consequently, as a result of the Supreme Court's ruling in *Ferra*, when required to pay premiums under Labor Code section 226.7, employers must use an employee's overtime regular rate of pay, which includes all non-discretionary payments for work performed. Specifically, employers must factor in an employee's base rate of pay *as well as* all other nondiscretionary compensation, such as shift differentials, nondiscretionary bonuses, commissions, and other incentive pay.

Significantly, the Court also ruled that its decision will apply **retroactively**. Accordingly, employers who have reasonably relied on previous case law and paid meal, rest, and recovery period premiums equal to an employee's base hourly rate of pay may be subject to claims for prior meal, rest, and recovery period premium underpayments.

Employers should consult with their employment counsel and payroll administrators to immediately implement any adjustments necessary to accurately calculate premium payments for meal, rest, and recovery periods.

The Supreme Court's complete ruling in *Ferra* is located [here](#).

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