

July 21, 2021

The California Supreme Court has just decided that calculation of the required one hour premium payment for missed, late or short meal and rest breaks must take into account all nondiscretionary payments, such as certain types of bonuses and shift premiums. This requirement adds to the complexities imposed by California wage and hour laws for paying non-exempt employees, which include overtime for time worked over 8 hours in a day; the precise recording of all daily hours worked, including the beginning and ending of meal periods; and providing required meal and rest periods at specified times. Below we outline the ruling and offer five key takeaways.

Issue

In *Ferra v. Loews Hollywood Hotel, LLC*, the California Supreme Court addressed whether the legislature intended “regular rate of compensation” for meal and rest break premiums under Labor Code Section 226.7(c) to have the same meaning as “regular rate of pay” for overtime under section 510(a), such that the calculation of premium pay for a noncompliant meal, rest, or recovery period, like the calculation of overtime pay, must include not only wages but also other nondiscretionary payments for work performed by the employee.

Ferra’s Facts

Jessica Ferra was a non-exempt Loews employee, meaning that her job duties required that her hours worked be tracked and overtime paid. If Ferra, as a non-exempt employee, missed or had a noncompliant meal or rest break, Loews paid Ferra an additional hour of pay at her hourly rate and did not factor nondiscretionary payments, such as bonuses, into the premium pay calculation. Ferra alleged that Loews improperly omitted nondiscretionary incentive payments from the calculation of premium pay and therefore failed to pay Ferra her “regular rate of compensation” as required under section 226.7(c). The trial and appellate court ruled for Loews, holding premiums paid for breaks need not include nondiscretionary payments. The Supreme Court reversed this decision.

California Supreme Court’s decision

On July 15, 2021, the court held “regular rate of compensation” like “regular rate of pay” encompasses all nondiscretionary payments in addition to the hourly rate of pay. Employees who miss meal or rest breaks, or take late or short meal or rest breaks, must be paid for one additional hour as a premium (in other words, a penalty). The Loews decision means that the premium to be paid *includes* all nondiscretionary incentive payments, such as bonuses and commissions.

Key takeaways

- **Key takeaway #1:** The Loews case is one more striking example of the need for employers to fully understand and to comply with various aspects of the different laws of the US states in which they operate.
- **Key takeaway #2 - Ferrera applies retroactively** The court held that the decision applies retroactively, meaning employers will be held responsible if they calculated premiums incorrectly prior to this decision. This exposes employers to liability, and California employers can expect that new wage and hour class actions will seek civil penalties for failing to include nondiscretionary payments in their premium pay calculations. The statutes of limitations for California wage and hour claims can go back as far as three or four years, depending upon the specific claims. The penalties available for violations of California wage and hour law far exceed the underlying amounts owed.
- **Key takeaway #3 - Review of application of policies** The impact of treatment of premium penalties for meal and rest periods in the past should be assessed in the context of this new ruling, including a determination of whether to re-calculate past premium payments.
- **Key takeaway #4 - Updating payroll policies** Employers will need to update payroll policies to ensure compliance with the calculation of the meal and rest period premiums as now enunciated by the California Supreme Court.
- **Key takeaway #5 - Nondiscretionary incentives** Employers should be aware that nondiscretionary payments, such as nondiscretionary bonuses, are included in the calculation of the regular rate for both overtime and meal and rest premium pay purposes. For simplicity, employers may wish to avoid creating new incentive programs to avoid raising the regular rate of wage payments to non-exempt employees.

If you would like further information on California's wage and hour laws and how to comply with them, please contact one of the authors listed in this alert.

Your Key Contacts



Sandra R. McCandless

Partner,
San Francisco/Oakland
D +1 415 882 2412
M +1 415 999 1589
sandra.mccandless@dentons.com



Megan Giles

Associate, Atlanta
D +1 404 527 4916
megan.giles@dentons.com