

CALIFORNIA SUPREME COURT ISSUES RETROACTIVE DECISION ON CALCULATING MEAL AND REST BREAK PREMIUM PAY

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Since 2019, California employers have relied on *Ferra v. Loews Hollywood Hotel, LLC*, 40 Cal.App.5th 1239, for the proposition that only hourly wages would be used to calculate “premium pay” for meal or rest breaks under Labor Code section 226.7. In a serious blow to California employers, the California Supreme Court has reversed this ruling and held that non-discretionary bonus payments and commissions must be included in calculating these premium payments in the same manner as calculating for overtime pay. Adding insult to injury, the Court has held that its ruling will apply retroactively.

In *Ferra*, the plaintiff was employed as a bartender at Loews Hollywood Hotel, where she was paid hourly wages as well as quarterly nondiscretionary incentive payments. These quarterly incentive payments were not factored into the calculation of meal and rest break premium pay owed under section 226.7(c). The plaintiff filed a class action suit against the hotel alleging, among other claims, that the omission of the nondiscretionary incentive payments from the premium pay calculations resulted in a failure to make proper premium payments for noncompliant meal or rest breaks. The trial court granted summary adjudication on the issue in favor of the employer and the Court of Appeals affirmed.

However, the California Supreme Court took a different approach when considering the question of “what the Legislature meant when it used the phrase ‘regular rate of compensation’ in section 226.7(c).” (*Ferra v. Loews Hollywood Hotel, LLC* (July 15, 2021) 2021 WL 2965438 at *3.) Elaborating on the history of Labor Code section 226.7, the Fair Labor Standards Act (“FLSA”), and Labor Code section 510, the high court ultimately concluded that “rate of compensation” (under section 226.7) and “rate of pay” (under section 510) were synonymous. With this fundamental question answered, calculating meal and rest break premiums must now be done in the same manner that overtime pay is calculated, as set forth in *Alvarado v. Dart Container Corp. of California*. (*Ferra, supra*, 2021 WL 2965438 at *11.) And because the Court’s

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holding only serves to clarify an existing statute, the ruling will apply retroactively. (*Id.* at *11-12.)

Conclusion

This decision by the California Supreme Court will have substantial ramifications throughout the business community and is sure to result in a landslide of new class action claims. Employers who provide non-discretionary payments to their hourly employees will need to audit their records for the last four years and, for each instance of a premium payment being issued, provide additional compensation to each qualifying employee based on this new calculation. Going forward, employers subject to this ruling will also need to revise employee handbooks, internal company policies and compensation practices to comply with this ruling. Employers who utilize third-party payroll providers will need to immediately make sure that the meal and rest break premiums are based on the *Alvarado* decision.

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