

July 2021

Follow @Paul_Hastings



California Employers Must Pay One-Hour Premiums For Meal, Rest, And Recovery Period Violations At The "Regular Rate of Pay" Used To Calculate Overtime Compensation

By [Zach Hutton](#), [Chris Jalian](#) & [Jennifer Milazzo](#)

In *Ferra v. Loews Hollywood Hotel, LLC*, No. S259172, 2021 Cal. LEXIS 4877 (July 15, 2021), the California Supreme Court ruled that employers must pay meal, rest, and recovery period premiums under California Labor Code section 226.7(c) at the "regular rate of pay" used to calculate overtime compensation, rather than employees' base hourly rates of pay. As a result, California employers whose non-exempt employees receive other pay that factors into overtime calculations—for example, shift differentials, piece rates, commissions, or non-discretionary bonuses—must include that pay in the calculation of premiums for meal, rest, and recovery period violations. Moreover, the Court's decision is not limited to payments made in the same week or pay period as the non-compliant meal, rest, or recovery period. The payments at issue in *Ferra* were quarterly bonuses, not pay that employees received in their regular pay checks. Therefore, if California employers make payments that factor into the regular rate at longer intervals (*e.g.*, monthly, quarterly, or annual payments), they now may need to calculate a "true-up" for meal, rest, and recovery period premiums paid during the period, just as they do for overtime. Finally, the Court also held that its decision applies retroactively.

All California employers who pay meal, rest, and recovery period premiums at employees' base hourly rates would be well advised to review this decision.

I. Underlying Action: Trial Court And Court Of Appeal Held That "Regular Rate Of Compensation" Means The Employee's Base Hourly Wage.

Labor Code section 226.7(c) states that if "an employer fails to provide an employee a meal or rest or recovery period in accordance with a state law, . . . the employer shall pay the employee one additional hour of pay at the employee's *regular rate of compensation* for each workday that the meal or rest or recovery period is not provided." (Emphasis supplied).

In *Loews*, the plaintiff Jessica Ferra, a bartender, asserted a class action against her employer for omitting "quarterly nondiscretionary incentive payments" from its calculation of premium pay for meal and rest period violations. The plaintiff contended that the phrase "regular rate of compensation" in section 226.7 means the same thing as the "regular rate of pay" used to calculate overtime pay—meaning it must include not only base hourly pay, but also non-discretionary bonuses.

The trial court granted summary adjudication for Loews, finding that “calculating premium pay according to an employee’s base hourly rate is proper under section 226.7” and that “‘regular rate of compensation’ in section 226.7(c) is ‘not interchangeable’ with the term ‘regular rate of pay’ under section 510(a), which governs overtime pay.”¹

The court of appeal affirmed, holding that the “regular rate of compensation” in section 226.7(c) and “regular rate of pay” in section 510(a) are “not synonymous”; “the premium for missed meal and rest periods is the employee’s base hourly wage.”² In so holding, the court relied on the principle of construction that “where 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.”³

II. The California Supreme Court Held That “Regular Rate of Compensation” Means The “Regular Rate Of Pay” Used To Calculate Overtime.

The California Supreme Court granted review to answer: Did the Legislature intend “regular rate of compensation” in California Labor Code section 226.7(c) (governing meal and rest premiums) to be synonymous with “regular rate of pay” in California Labor Code section 510(a) (governing overtime pay), which has been understood to include base hourly wages and nondiscretionary payments? The Court held it did.

The Court acknowledged that the California Labor Code and Wage Order 5-2001 do not define the “regular rate of pay” or “regular rate of compensation” and the phrases could be construed to mean either hourly wages, or hourly wages and nondiscretionary payments.⁴ Thus, the Court relied on the principle of construction that “where statutes use synonymous words or phrases interchangeably, those words or phrases should be understood to have the same meaning.”⁵ Additionally, the Court made the following observations:

- California Labor Code sections 226.7(c) and 510(a) both use the term “regular rate,” and courts and the Division of Labor Standards Enforcement (“DLSE”) traditionally have understood “regular rate” to have the same meaning as the “regular rate of pay.”⁶
- Courts and the legislature have, in various contexts, used the words “compensation” and “pay” interchangeably.⁷
- To adopt an interpretation that “regular rate of compensation” includes only base hourly wages would “incentivize employers to minimize employees’ base hourly rates and shift pay elsewhere, thereby harming employees who were paid in some form other than a base hourly rate.” The Court said that would contradict one of section 226.7’s functions – “‘shaping employer conduct’ to comply with labor standards.”⁸

Although most courts to consider the issue (including the court of appeal in this case) had reached the opposite conclusion, the Court expressly held that its decision applies retroactively.⁹

III. Practical Considerations

California employers owe meal, rest and recovery premiums only to non-exempt employees who were not provided compliant meal, rest, and/or recovery periods on a particular day. In light of *Ferra*, California employers should consult with counsel to review their policies and practices regarding the calculation of premium payments in the event there may be noncompliant rest, meal, and recovery periods.



If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

Los Angeles

Leslie Abbott
1.213.683.6310
leslieabbott@paulhastings.com

George Abele
1.213.683.6131
georgeabele@paulhastings.com

Orange County

Stephen L. Berry
1.714.668.6246
stephenberry@paulhastings.com

San Diego

Raymond W. Bertrand
1.858.458.3013
raymondbertrand@paulhastings.com

San Francisco

Zachary Hutton
1.415.856.7036
zachhutton@paulhastings.com

¹ 2021 Cal. LEXIS 4877 at *4.

² Id. at *5.

³ Id. at *7-8.

⁴ Id. at *7.

⁵ Id. at *8.

⁶ Id. at *9-10.

⁷ Id. at *20.

⁸ Id. at *31.

⁹ Id. at *25-29.

Paul Hastings LLP

Stay Current is published solely for the interests of friends and clients of Paul Hastings LLP and should in no way be relied upon or construed as legal advice. The views expressed in this publication reflect those of the authors and not necessarily the views of Paul Hastings. For specific information on recent developments or particular factual situations, the opinion of legal counsel should be sought. These materials may be considered ATTORNEY ADVERTISING in some jurisdictions. Paul Hastings is a limited liability partnership. Copyright © 2021 Paul Hastings LLP.