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California Supreme Court Holds That Meal And Rest Break Premiums Must Include All Forms Of Remuneration (Not Just Base Hourly Rate)

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On July 15, 2021, the California Supreme Court issued its decision in *Ferra v. Loews Hollywood Hotel, LLC*, in which it held that meal and rest break premiums required under California Labor Code section 226.7 ("Section 226.7") must be paid at non-exempt employees' ***regular rate of pay***—not merely their base hourly rate. The decision, ***which applies retroactively***, requires that employers promptly adjust their pay practices.

Background

Like the federal Fair Labor Standards Act ("FLSA"), Labor Code section 510 ("Section 510") requires that employers pay non-exempt employees overtime at their "regular rate[s] of pay." Under a different section of the Labor Code and the Industrial Welfare Commission's ("IWC") Wage Orders, employers also must provide non-exempt employees with unpaid meal and paid rest breaks at set intervals, depending on how many hours the employees work. Under Section 226.7, if an employer fails to provide an employee with a compliant meal or rest break, the employer must "pay the employee one additional hour of pay at the employee's ***regular rate of compensation***." Cal. Lab. Code § 226.7(c) (emphasis added).

Since the language in Section 226.7 is different from that in Section 510 ("regular rate of compensation" versus "regular rate of pay"), employers had long understood that the meal and rest break premiums were to be paid at non-exempt employees' base hourly rates (*i.e.*, the premiums did not have to include other forms of compensation above and beyond the base hourly rate). That is, until *Ferra*.

Ferra

Ferra was a wage and hour class action brought by a former hotel bartender, Jessica Ferra ("Ferra"), against Loews Hollywood Hotel, LLC ("Loews"). In addition to her hourly rate, Loews had paid Ferra certain nondiscretionary bonuses. In her lawsuit, Ferra claimed that Loews violated California law by failing to include nondiscretionary bonuses when calculating meal and rest break premiums.

Both the trial court and the Court of Appeal held in favor of Loews, deciding that the "regular rate of pay," as used in Section 510, was not synonymous with "regular rate of compensation," as used in Section 226.7. The California Supreme Court saw things differently, however.

In an opinion authored by Associate Justice Goodwin Liu, the Court held that "regular rate of compensation," as used in Section 226.7, means the same thing as an employee's "regular rate of pay" for purposes of overtime. Recognizing that the Labor Code provided no definition of "regular rate of compensation" under Section 226.7, the Court began by examining the legislative history of both Section 510 and Section 226.7. As to the former, the Court noted that both California's Division of Labor Standards Enforcement ("DLSE") and courts had long understood Section 510's definition of "regular rate" to have the same meaning as the phrase does under the FLSA, under which nondiscretionary amounts (and most other types of compensation) must be included in the overtime calculation.

As to Section 226.7's history, Loews had argued that because "regular rate of pay" was an "established term of art" by the time Section 226.7 was enacted, the fact that the Legislature used a different phrase in Section 226.7 meant that it did not intend "regular rate of pay" and "regular rate of compensation" to have the same meaning. However, the majority rejected that argument, deciding that the modifiers "of pay" and "of compensation" were irrelevant. In support of its interpretation, the Court noted that "the Legislature used the terms 'pay' and 'compensation' interchangeably in the very text of [S]ections 226.7(c) and 510(a)." The Court also pointed out that the terms had been used interchangeably by a number of federal appellate courts – including the U.S. Supreme Court – in interpreting the FLSA.

Finally, and most troublingly, the Court rejected Loews' argument that its opinion should apply only prospectively. Therefore, the *Ferra* decision applies retroactively.

Practical Implications

Ferra will have significant consequences for any employer with non-exempt employees in California. Although *Ferra* only concerned nondiscretionary bonuses, its holding almost certainly applies more broadly to other types of remuneration that must be included in an employee's regular rate for purposes of overtime (*e.g.*, commissions). Employers immediately must ensure that they pay meal and rest break premiums based on employees' regular rates of pay under Section 510—not merely their base hourly rates. Further, employers with questions about how to address *Ferra*'s retroactive application should consult legal counsel as soon as possible.

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