

California Supreme Court Complicates Break Premium Calculations – Base Rate of Pay Not Enough

JULY 19, 2021

On July 15, 2021, the California Supreme Court issued its much-anticipated decision in *Ferra v. Loews Hollywood Hotel, LLC*, leaving California employers disappointed. The Court was faced with the following question: Must employers pay out premiums for non-compliant meal and rest breaks (required by Labor Code section 226.7) at employees' "regular rate of pay" or at their "base hourly rate"?

The Court concluded that meal and rest break premiums must be paid at the same Fair Labor Standards Act "regular rate" that is currently used to calculate overtime premiums, rather than the "base hourly rate." In other words, employers must pay California meal and rest break premium payments not at an employee's base hourly rate alone, but they must *also* factor in all non-discretionary payments (e.g., bonuses, shift premiums, incentive payments, and commissions) made to an employee in the pay periods in which the employee did not receive a compliant break.

Importantly, the Court's decision applies retroactively. This is problematic for the many California employers who have been paying meal and rest break premiums at an employee's base hourly rate.

In light of this decision, California employers are encouraged to contact legal counsel to take immediate measures to ensure compliance with this new interpretation and evaluate how to address its retroactive effects. A starting point is to ensure that going forward, payroll systems calculate and pay the meal and rest break premiums at the "regular rate."

Please contact [Monique Ngo-Bonnici](#), [Zar Papazyan](#), or your Winston relationship attorney for further information on the matters discussed herein.

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