

LEGAL UPDATES

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# California: Nondiscretionary Wages Are Included in Premium Payment Calculation for Meal and Rest Periods

On July 15, 2021, the California Supreme Court (Court) unanimously held that employers must pay out meal and rest period premiums using the same “regular rate” that is used to calculate overtime compensation and not the employee’s base hourly rate, which had previously been approved by the Court of Appeals.

In *Jessica Ferra et al., v. Loews Hollywood Hotel, LLC*, the Court reversed the decisions of the Court of Appeals and trial court and held that the meaning of the phrase “regular rate of compensation” as used in section 226.7(c) of the California Labor Code regarding meal and rest periods is synonymous with the phrase “regular rate of pay” as used with respect to payment for overtime under section 510(a) of the Labor Code. Thus, the premium pay calculation for meal and rest period premiums must be based on the employee’s base hourly wage plus other nondiscretionary wages (*e.g.*, bonuses, commissions, etc.) paid to the employee. Despite the prior authority approving use of the base rate of pay, the Court stated that its decision applies retroactively, creating a conundrum for employers who believed they were in compliance with the law.

## Premium pay for noncompliant meal and rest periods

Under section 226.7(c) of the California Labor Code, employers who fail to provide employees with a meal or rest or recovery period mandated by an applicable order of the Industrial Welfare Commission are required to pay the employee one additional hour of pay at the employee’s “regular rate of compensation.” The Labor Code does not define the phrase “regular rate of compensation.” The Court examined relevant statutory code sections, underlying legislation, legislative regulations and relevant case law to determine that the phrases “regular rate of pay” and “regular rate of

compensation” as used in the California Labor Code are synonymous and refer to hourly base wages and other nondiscretionary wages paid to employees during the relevant pay period. The Court stated that its decision furthers the purpose of the Labor Code by protecting workers and avoids the possibility of inequitably penalizing workers whose income is comprised of base hourly wages and nondiscretionary bonuses or incentives. In particular, the Court cited concerns that employers could use an artificially depressed base rate of pay to compensate employees for meal and rest period penalties.

### **What this means to you**

Employers should review their timekeeping and payroll practices to ensure that all noncompliant meal and rest breaks are paid at the employee’s “regular rate” of pay used for overtime calculations, including nondiscretionary wages.

### **Contact us**

If you have questions about California’s laws regarding premium payments for noncompliant meal and rest periods or would like assistance with wage and hour audits or guidance on California wage and hour laws and regulations, contact Joe Glynias, A.J. Weissler, Amberly Morgan or your Husch Blackwell attorney.