California Supreme Court Expands "Regular Rate of Compensation" for Missed Breaks

Alert
07.21.2021

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If you have employees in California, it is time to review how you pay them for missed meal and rest breaks. The California Supreme Court's decision in *Ferra v. Loews Hollywood Hotel, LLC*, will change the way many companies pay employees for missed breaks.

Under California and federal law, calculating a non-exempt employee's overtime rate, known as the "regular rate of pay," must include non-discretionary payments, such as bonuses or shift differential pay. For missed breaks, California requires employers to pay penalties to employees of "one additional hour of pay at the employee's regular rate of compensation" for each workday in which a full and timely break was not provided. Because the term regular rate of compensation was different from the regular rate of pay, many companies have been paying one hour of base pay without considering other non-discretionary payments.

In *Ferra*, the parties disagreed over whether the "regular rate of compensation" for missed breaks, like the "regular rate of pay" for overtime, should include non-discretionary payments. The defendant in *Ferra* argued that because the California legislature chose to use two different terms—"regular rate of pay" and "regular rate of compensation"—the two terms should be presumed to have different meanings. Thus, the "regular rate of compensation" for missed breaks should not include non-discretionary payments. The Supreme Court disagreed, pointing to multiple instances where the California legislature used the terms "pay" and "compensation" interchangeably and noting that "where statutes use synonymous words or phrases interchangeably, those words or phrases should be understood to have the same meaning."

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The Supreme Court's decision will have immediate and sizable impacts on employers doing business in California, who now must ensure that their missed break pay calculations comply with the *Ferra* decision. Additionally, because the *Ferra* decision is retroactive, the decision creates new litigation exposure for California employers who, before *Ferra*, calculated missed break pay using only the base hourly rate. Some employers may think that this cannot involve much exposure or money. However, there are two reasons you should act to rectify any improper calculations and past payments now. First, this decision likely will result in Private Attorney General Act representative claims, which carry heavy penalties and the payment of attorneys' fees. Second, if you do not have an arbitration agreement that bars class actions, this is the type of issue that can leave your company exposed to class action lawsuits.

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