

## Publications

### California Supreme Court Rules That Meal and Break Premiums Are Paid At Higher Rates

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“When I use a word, Humpty Dumpty said in rather a scornful tone, it means just what I choose it to mean — neither more nor less. The question is, said Alice, whether you can make words mean so many different things.” Lewis Carroll, *Through the Looking Glass*

On July 15, 2021, the California Supreme Court answered Alice’s question with respect to paying employees for missed meals and rest breaks – employers must pay meal and break premiums at the employee’s higher “regular rate” rather than the employee’s base hourly rate.

Under California law, employers must provide employees with overtime pay when employees work more than a certain amount of time. To calculate overtime pay, an employer compensates an employee by a multiple of the employee’s “regular rate of pay.” The employee’s regular rate includes all non-discretionary compensation such as bonuses, incentive pay, commissions, shift differentials, meals, and lodging. California law also provides for meal and rest breaks. If an employer does not provide an employee with a compliant meal or rest break (i.e., the break was too short, untimely, interrupted, or not taken at all), the employer must “pay the employee one additional hour of pay at the employee’s regular rate of compensation.”

In *Ferra v. Loews Hollywood Hotel LLC*, the question was whether regular rate “of pay” was synonymous with regular rate “of compensation.” The plaintiff alleged that Loews – while it paid meal and break premiums – did not include her non-discretionary quarterly bonuses in calculating the meal and rest break premiums that it paid to her. In the lower courts, Loews successfully argued that the phrases “of pay” and “of compensation” mean different things, so it properly paid her meal and rest break premiums using her base hourly rate (not her “regular rate”). The plaintiff appealed to the California Supreme Court.

After canvassing legislative history, and invoking the mantra that “the state’s labor laws are to be liberally construed in favor of worker protection,” the Supreme Court unanimously reversed. In rejecting Loews’ arguments, the Court held the phrases “of pay” and “of

compensation” are interchangeable. Therefore, “premium pay for a noncompliant meal, rest, or recovery period, like the calculation of overtime pay, must account for not only hourly wages but also other non-discretionary payments for work performed by the employee.”

Loews argued that “regular rate of compensation” and “regular rate of pay” mean different things because the legislature is presumed to intend a different meaning when it uses different words in a statutory scheme. The Court rejected this position because its own interpretation was “very reasonable.” Thus, Loews “is simply wrong when it argues that ordinary people could not have predicted plaintiff’s interpretation, and that it would violate defendant’s due process rights to adopt that interpretation.”

As has been the trend with the Court’s recent pro-employee rulings, the holding is retroactive. The *Ferra* decision therefore exposes employers to up to four years of liability for improperly paid meal and break premiums – along with claims for incorrect wage statements and PAGA penalties. We expect this ruling to spark a new wave of litigation. Employers should immediately audit their current pay practices to ensure correct premium payments and then consider auditing the past four years to determine potential exposure. Employers also may want to rethink the impact of providing non-discretionary compensation like bonuses to non-exempt employees. Contact your Vorys lawyer if you have questions about these and other wage-hour compliance issues in California.