GIBSON DUNN

California Supreme Court Announces New Formula for Calculating Premium Payments for Failures to Provide Meal Periods or Rest Breaks

Client Alert | July 16, 2021

On July 15, 2021, the California Supreme Court in *Ferra v. Loews Hollywood Hotel, LLC* adopted a new formula for calculating the one extra hour of premium pay that employees are owed if an employer fails to provide a compliant meal period or rest break. Specifically, the Court held that those premium payments must include the hourly value of any nondiscretionary earnings (such as a nondiscretionary bonuses), and cannot simply be paid an employee's base hourly rate. This holding aligns the formula for calculating meal period and rest break premium payments with the formula for calculating overtime payments under California law.

The *Ferra* decision represents a change in the law, as the California Court of Appeal and several federal district courts had previously held that California Labor Code section 226.7's use of the term "regular rate of compensation" meant that premium payments for failures to provide meal periods or rest breaks should be calculated using an employee's base hourly rate. Despite this shift, however, the California Supreme Court held that its decision applies retroactively.

In light of *Ferra*, employers should take steps to evaluate whether their calculation of premium payments for the non-provision of meal periods and rest breaks includes nondiscretionary payments, as well as assess the impact of the decision on any pending meal period or rest break litigation.

***Ferra* Holds That Nondiscretionary Earnings Must Be Included in the Calculation of Meal Period and Rest Break Premiums**

California courts have long held that premium wages for calculating overtime pay must factor in the hourly value of nondiscretionary earnings. At issue in *Ferra* was whether that same formula applied to premium payments that are owed to employees when an employer fails to provide a meal period or rest break. Specifically, the California Supreme Court answered the following question: "Did the Legislature intend the term 'regular rate of *compensation*' in Labor Code section 226.7, which requires employers to pay a wage premium if they fail to provide a legally compliant meal period or rest break, to have the same meaning and require the same calculations as the term 'regular rate of *pay*' under Labor Code section 510(a), which requires employers to pay a wage premium for each overtime hour?"

The California Supreme Court held that "regular rate of compensation" and "regular rate of pay" are interchangeable terms, and 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."

Related People

Jason C. Schwartz

Michele L. Maryott

Katherine V.A. Smith

Bradley J. Hamburger

Lauren M. Blas

Megan Cooney

Katie M. Magallanes

Amber D. McKonly

Nick Barba

Rebecca Lamp

The Court explained that, in enacting Labor Code section 226.7, the California Legislature did so with an understanding that the federal Fair Labor Standards Act's use of the phrase "regular rate" has been "consistently understood . . . to encompass all nondiscretionary payments, not just base hourly rates." With this context, the Court concluded that "regular rate" was the "operative term" in the statute, and that the modifiers "of pay" and "of compensation" were intended to be used interchangeably.

The Court also held that its decision applies retroactively, emphasizing that it had not previously issued a definitive decision on the issue.

***Ferra*'s Impact on Employers**

Employers should review their how they are calculating any meal period or rest break premium payments to ensure that they include the value of any nondiscretionary earnings during the relevant pay period.

As for litigation regarding the improper calculation of meal period and rest break premiums, *Ferra* does not eliminate all defenses to such claims or ensure that class certification will be granted in such cases. While *Ferra* clarifies how meal period and rest break premiums must be calculated, it says nothing at all regarding whether or not such premiums are owed in the first place. This means, as *Ferra* itself recognized, that an "employer may defend against" a claim that it has failed to provide meal periods or rest breaks "as it has always done." In other words, plaintiffs pursuing *Ferra*-based claims will still need to establish an entitlement to a premium in the first place, and under *Brinker Restaurant Corp. v. Superior Court*, 53 Cal. 4th 1004 (2012), this means plaintiffs must establish that a compliant meal period or rest break was not provided. And in a putative class action, plaintiffs must show that this threshold question can be resolved on a classwide basis.

Some plaintiffs may attempt to skip over this important threshold requirement by pointing to the fact that an employer voluntarily made meal period or rest break premium payments, and argue that such payments are evidence that they were not provided with compliant breaks. But the fact that an employer may have made a meal period or rest break premium is not dispositive evidence that a compliant meal period or rest break was not provided. Employers often pay such premiums proactively and out of an abundance of caution, even where a premium was not in fact due. In other words, employers do not need to concede that the payment of a premium establishes that an employee was entitled to it. And this will mean that, in many cases, determining whether a compliant meal period or rest break was provided, and thus whether a premium was owed in the first, is a question that is not capable of classwide resolution.

Moreover, even if a plaintiff can show that they were entitled to a meal period or rest break premium, they must also prove that they earned a form of nondiscretionary pay during that same pay period that must be included in calculating the amount of the premium under *Ferra*. Whether a particular payment was discretionary or nondiscretionary is also often a highly fact-dependent inquiry, and thus may not be suitable for resolution on a classwide basis.

This alert was prepared by Jason Schwartz, Michele Maryott, Katherine Smith, Brad Hamburger, Lauren Blas, Megan Cooney, Katie Magallanes, Amber McKonly, Nick Thomas, Nick Barba, and Rebecca Lamp.

Gibson Dunn lawyers are available to assist in addressing any questions you may have about these matters. Please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's Labor and Employment practice group, or the following authors:

Jason C. Schwartz – Co-Chair, Washington, D.C. (+1 202-955-8242, jschwartz@gibsondunn.com)
Michele L. Maryott – Orange County (+1 949-451-3945, mmaryott@gibsondunn.com)

Katherine V.A. Smith – Co-Chair, Los Angeles (+1 213-229-7107, ksmith@gibsondunn.com)
Bradley J. Hamburger – Los Angeles (+1 213-229-7658, bhamburger@gibsondunn.com)
Lauren M. Blas – Los Angeles (+1 213-229-7503, lblas@gibsondunn.com)
Megan Cooney – Orange County (+1 949-451-4087, mcooney@gibsondunn.com)
Katie Magallanes – Orange County (+1 949-451-4045, kmagallanes@gibsondunn.com)

Related Capabilities

Labor and Employment