

# Missed Meal Period Penalty Must Include Adjustment for Nondiscretionary Payments

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In a unanimous opinion in *Ferra v. Loews Hollywood Hotel*, the California Supreme Court ruled on the important practical question of whether the “regular rate of compensation” for calculating meal or rest break premium payments means the same thing as the “regular rate of pay” used for calculating overtime premium payments.

The Supreme Court answered “Yes” and thus the premium pay for missed meal and rest breaks must include an adjustment to the regular rate to include nondiscretionary payments similar to the required calculation for overtime:

"We hold that the terms are synonymous: 'regular rate of compensation' under Section 226.7(c), like 'regular rate of pay' under Section 510(a), encompasses all nondiscretionary payments, not just hourly wages."

The Court reversed a 2019 California Court of Appeal decision by a split panel which held that "regular rate of compensation" and "regular rate of pay" phrases were different, and therefore the premium for missed breaks was based only on an employee's base hourly wage. The court of appeal relied on the canon that "where different words or phrases are used in the same connection in different parts of a statute, it is presumed the Legislature intended a different meaning."

In *Ferra*, the Supreme Court disagreed, holding "the words 'compensation' and 'pay' appear interchangeably in legislative and judicial usage, and we find no indication that the Legislature intended 'regular rate of pay' in Section 510(a) and 'regular rate of compensation' in Section 226.7(c) to have different meanings."

The Court analyzed California's requirement of premium pay for overtime based on an employee's regular rate of pay, which has been interpreted as requiring the rate to include nondiscretionary payments, in part because the phrasing has the same meaning as the regular rate in federal overtime requirements. The Court also relied on the legislative history of the Wage Orders citing a statement by California's Industrial Welfare Commission about creating a wage order including missed breaks. The Wage Order

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used the term "regular rate of compensation," but the statement used "regular rate of pay," indicating the terms were used interchangeably.

The *Ferra* ruling applies retroactively. Employers who pay nondiscretionary bonuses should consider making supplemental payment to adjust meal penalty payments to take this ruling into account. Employers should also use this decision as an opportunity to review their meal and rest period practices, to both ensure that they provide timely meal periods and make timely rest breaks available to employees, as well as to review their practices and policies for determining when an employee is owed meal or rest break premium payments.