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California Supreme Court Changes the Rules for Calculating Missed Meal Period Premiums and Retroactively Penalizes Employers

At a glance:

- **California Supreme Court rules that meal and rest period premiums must be based on “regular rate of pay,” which includes non-discretionary payments as well as the hourly rate.**
- **The Court’s decision is retroactive, making employers who paid meal or rest period premiums based on employees’ hourly rate liable for past violations.**
- **Employers need to review how they calculate premium pay for missed meals and rest breaks to ensure compliance.**

As most employers know, employees that miss or are not afforded a full meal and rest breaks must pay workers a premium equal to an hour of pay. Most employers have historically used the non-exempt worker’s normal hourly rate as the basis for the payment.

However, the California Supreme Court recently ruled that the extra pay must be calculated at the employee’s “regular rate of pay,” which is required to calculate overtime premiums under the state labor code. The difference is that an employee who works 40 hours and makes \$15 an hour and has no other compensation has a regular rate of \$15. But if the employee also gets a free lunch worth \$8 or gets an automatic \$20 bonus, they would have a regular rate of \$15.70 an hour because the regular rate is the total compensation in a workweek and includes nondiscretionary compensation.

In *Ferra v. Loews Hollywood Hotel, LLC*, a bartender filed a class-action complaint alleging that her employer failed to properly pay premiums for the non-compliant meal and rest breaks because it omitted nondiscretionary incentive payments—such as

bonuses—from the calculation.

The lower courts found that the employee's normal hourly rate was the proper calculation, but the California Supreme Court reversed and held that the "regular rate of compensation" under meal and rest break rules "encompasses not only hourly wages but all non-discretionary payments for work performed by the employee." Worst of all, the Court held the law was retroactive.

What does the ruling mean for employers? If you have paid meal or rest period premiums in the past and used the employees' hourly rate as the basis, a review should be undertaken to determine whether there was additional nondiscretionary income paid during any of the times those premiums were paid. If so, the meal and rest period premium should be recalculated and immediately paid to the employee.

Going forward, employers must calculate premium pay for missed meal and rest breaks in the same way that they calculate overtime pay or simply eliminate any nondiscretionary compensation.

Please contact Theodore E. Bacon, Jonathan M. Werner, or any of AlvaradoSmith's Employment Practice attorneys if you have any questions about assessing the impact of this Supreme Court decision on past and current meal and rest break premiums.

Theodore E. Bacon is a seasoned trial lawyer who advises clients on what they need to know and do to minimize the chances of claims and to maximize the chances for positive results if suits are filed. He has successfully helped clients resolve various disputes, including all types of employment and business-related matters, such as wrongful termination claims, discrimination and harassment claims, wage and hour class actions, and PAGA claims.

Jonathan M. Werner focuses on the full range of HR issues all employers face: resolving problems, like lawsuits and other employment claims; hiring and separating employees, including creating the contracts and agreements that accompany such events; and creating safe workplace environments that comply with all federal and state laws and regulations.

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