

Practice Update

The Cost of Meal and Rest Break Violations Just Went Up for California Employers

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California employers finally have clear guidance on the implications of failing to comply with California’s meal and rest break requirements under the Labor Code. Most businesses in California are familiar with meal and rest break requirements, and, equally so, with the penalty mandated by Section 226.7 of the Labor Code for violations—one hour of pay at the employee’s “regular rate of compensation” for each non-compliant break. What has been less clear, however, is how an employee’s “regular rate of compensation” should be calculated. This ambiguity has left employers struggling for years over best practices, often at the cost of expensive class action lawsuits. Finally, the California Supreme Court has resolved this issue: penalties for meal and rest break violations must be paid at the “regular rate of pay,” which includes an employee’s hourly wage rate *plus* any non-discretionary pay earned over the pay period.

In a decision issued July 15, 2021, a former bartender for a Los Angeles hotel filed a wage and hour class action for numerous Labor Code penalties stemming from the hotel’s meal and rest break practices. During her employment, the hotel paid the bartender hourly wages as well as quarterly nondiscretionary incentive payments. The hotel also provided non-exempt employees with one hour of pay for any non-

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compliant breaks according to the employee's hourly wage at the time the meal or rest period was not provided. If the employee earned any nondiscretionary payments in addition to an hourly wage (such as the bartender's quarterly incentive payments), the hotel did *not* factor those payments into the calculation of meal and rest break penalty pay. The key issue was whether the hotel's practice violated Section 226.7 of the Labor Code, which requires employers to pay one hour of pay at the employee's "regular rate of compensation" for each meal and rest break violation.

The former employee argued that "regular rate of compensation" has the same meaning as the term "regular rate of pay," a term of art under the Fair Labor Standards Act, and incorporated into California law, that requires the employer to calculate the overtime premium by incorporating all applicable rates of pay and non-discretionary incentives into the employee's hourly rate. In California, the "regular rate of pay" includes, in addition to the base hourly wage rate, shift differentials, commissions, and the per-hour value of any non-discretionary compensation that the employee earns on a given pay period (e.g., bonuses). The "regular rate of pay" is not the same as the employee's normal hourly wage because it is subject to change each pay period and can potentially increase beyond the hourly rate of pay. Thus, in effect, the employee was arguing that hotel underpaid its non-exempt employees for non-compliant meal and rest breaks by paying them at their base hourly rates rather than their hourly wages plus their non-discretionary compensation using the "regular rate of pay."

At the trial court level, the hotel moved to dismiss these claims on a motion for summary adjudication. The hotel argued that the two terms—"regular rate of compensation" and "regular rate of pay"—were distinct and that its practices complied with the letter and intent of the Labor Code provisions at issue. The trial court agreed. In affirming the lower

court's ruling, the Court of Appeal clarified the different policy goals of the statutes in which these two phrases appeared: the "regular rate of compensation," referred to in the context of meal and rest breaks was meant to compensate employees for their past injuries, and the term "regular rate of pay" was used in California's overtime law to pay employees premium wages for extra work. Accordingly, the two terms could not be equated in the manner proposed by the former employee.

The California Supreme Court reversed. Writing for the Court, Justice Liu examined the legislative history, state and federal case law, and opinion letters authored by the Division of Labor Standards Enforcement (DLSE). Based on legislative and judicial usage, Justice Liu found that the term "regular rate" was used by the Legislature as a term of art and encompassed hourly wages plus nondiscretionary payments. The Court was unable to find "any hint" in the adoption history of Section 226.7's phrase "regular rate of compensation" or any of the relevant statutory provisions that the term meant something other than "regular rate of pay" or specifically to mean an employee's hourly rate only. Thus, the Court held that the term "regular rate of compensation" in section 226.7(c) has the same meaning as "regular rate of pay" in California's overtime law and encompasses not only hourly wages but all nondiscretionary payments for work performed by the employee.

Of note, the Court denied the hotel's request to apply the decision only prospectively. The Court rejected the hotel's argument that a retroactive decision would expose employers to "millions" in liability, reasoning that, even if the hotel were correct, it was not clear "why [the Court] should favor the interest of employers in avoiding 'millions' in liability over the interest of employees in obtaining the 'millions' owed to them under the law."

Implications for Employers

In light of this ruling, California employers would be well advised to review their meal and rest break policies and procedures as soon as possible. Employers may need to update their payroll systems, or work with payroll providers, to ensure that the correct rate of pay is used to pay meal and rest break penalties.

In light of his decision, it is important that employers work aggressively to ensure that workers comply with California's meal and rest break requirements to avoid incurring meal and rest break penalties, particularly when those employees work on a piece-rate or commission basis, earn varying wage rates in a workweek, or are eligible for non-discretionary bonuses and incentives.

But perfect compliance is often unrealistic, so it is also critical that California employers ensure that they are correctly calculating meal and rest break penalties at the correct rate of pay, not just the standard straight time rate. Under the court's ruling, if an employee earns non-discretionary pay during the same pay period, that compensation will also need to be factored into the employee's "rate of pay" for purposes of determining the meal and rest break penalty. In many cases, employers may periodically need to revisit employees meal and rest break penalty pay and do a "true-up" after issuing any bonuses.

Because this decision is retroactive, past practices inconsistent with this decision may give rise to potential liability for unpaid penalties.

For questions regarding meal and rest break policies and practices, and all other wage and hour issues, contact your Akerman attorney.

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