

BARSAMIAN & MOODY

A Professional Corporation

Attorneys at Law

1141 West Shaw Avenue, Suite 104

Fresno, California 93711-3704

Tel: (559) 248-2360

E-mail: laborlaw@theemployerslawfirm.com

Fax: (559) 248-2370

California Supreme Court Announces Meal and Rest Period Premium Pay

Since 2000, California has had a requirement that employers pay one-hour premiums for employees who are not provided compliant meal or rest periods. Labor Code § 226.7 states that this payment is measured as “one hour of pay at the employee’s “regular rate of compensation.” “Regular rate of compensation” is not defined by the Labor Code or the Industrial Welfare Commission Wage Orders. The prevailing practice by employers, which had been held to be proper by the majority of lower court cases to consider the issue, was that the employer made the payment at the employee’s usual or “base” rate of pay without taking into account other forms of wages.

By contrast, where the same statute that enacted the meal and rest period payments described overtime premiums, it stated they must be paid at 1.5 times the employee’s “regular rate of pay.” “Regular rate of pay” arises out of the federal Fair Labor Standards Act and requires an employer to add up most of the wages employees receive over a week or pay period and divide by the total hours worked in the pay period. So, for example, if an employee earned a base of \$15 per hour in a 40-hour week, but also earned a \$500 bonus in the same week, the base rate would be \$15 but the “regular rate of pay” would be \$27.50 (\$1,100 total wages divided by 40 hours). As this example shows, the difference between the two concepts can sometimes be substantial.

In the case of *Ferra v. Loews*, the Court held that when employers pay one-hour meal and rest period premiums to employees who report that they were not provided compliant meal or rest periods, the pay is not at the employee’s normal “base” hourly rate but must be at the same FLSA “regular rate” that is used to calculate overtime premiums. Thus, paying employees meal and rest period premiums at their base hourly wage is no longer acceptable.

Because this decision announces a rule that the vast majority of employers do not follow and have not followed for the past 20 years, the employer argued that the new standard should apply only prospectively. The court disagreed. The Supreme Court noted that decisions are presumed to apply retroactively unless they upset a settled legal standard. Here, although the majority of courts to address this issue had sided with the employers, there was enough uncertainty in the law that the normal rule of retroactivity will apply. Although Loews argued that retroactive application will expose employers to massive liability, the Court noted it cannot deny employees what they are owed under the law.

What This Means for Employers:

Employers must now account for not only base hourly wages, but also other non-discretionary payments for work performed by employees, when determining the rate of pay for meal and rest period premiums, including shift premiums, commissions, incentive

“The Employers’ Law Firm” SM

www.TheEmployersLawFirm.com

payments, and non-discretionary bonuses. This opinion announced a standard that very few employers have practiced, which likely means that many California employers will need to make significant payroll and policy changes as quickly as practicable. To the extent their payroll systems have built-in ability to make supplemental overtime payments to comply with the overtime regular rate rules, employers will want to set them up similarly to apply to meal and rest period premiums. This may include making “meal period adjustment” payments to accompany the issuance of monthly, quarterly or annual bonuses. Contact Barsamian & Moody for assistance with compliance sooner rather than later to discuss what options are appropriate.

The goal of this article is to provide employers with current labor and employment law information. The contents should neither be interpreted as, nor construed as legal advice or opinion. The reader should consult with Barsamian & Moody at (559) 248-2360 for individual responses to questions or concerns regarding any given situation.