DELMORE • GREENE

JULY 2021 **Employment Law Flash Update**

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MEAL AND REST PERIOD PREMIUMS MUST BE PAID AT THE REGULAR RATE OF PAY BOTH PROSEPCTIVELY AND RETROACTIVELY

On July 15, 2021, the California Supreme Court dealt another blow to California employers in *Ferra v. Loews Hollywood Hotel, LLC*. The Court held that when employers pay one-hour meal and rest period premiums to employees for non-compliant meal or rest periods, the pay is not at the employee's normal "base" hourly rate but must be at the same "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.

Employers must now account for not only base hourly wages, but also other non-discretionary payments for work performed by employees, including shift premiums, commissions, incentive 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 possible.

What is a Meal/Rest Period Premium?

California law requires employers to provide employees with legally required meal breaks. Subject to few exceptions, employers must provide employees who work over five hours in a day with a minimum thirty-minute uninterrupted meal period within the first five hours of their shift.

California law also requires employers to provide employees with legally required rest breaks. Subject to few exceptions, employers are required to provide employees with a minimum ten-minute uninterrupted rest break for each four hours worked, or major fraction thereof.

When an employee does not receive a compliant meal or rest break (i.e., the required break is untimely, interrupted, too short, or does not occur at all), employers are required to pay a meal period premium payment equal to one hour's pay. Prior to *Ferra*, it was common practice that the premium payment issued for meal and rest period violations be paid at the employee's base hourly rate. *Ferra* unequivocally held that practice was unlawful; instead, meal and rest period payments must be paid at an employee's regular rate of pay.

What is the Regular Rate of Pay and how is it Different from the Base Hourly Rate of Pay?

The Base Hourly Rate of Pay is the hourly amount paid to an employee; it does not include premium, bonus, incentive, or commission pay.

The Regular Rate of Pay is calculated using not only the employee's Base Hourly Rate of Pay, but also other non-discretionary payments for work performed by employees, including shift premiums, commissions, incentive payments, piecework earnings, and non-discretionary bonuses. The Regular Rate of Pay does not include discretionary bonuses, vacation, paid sick leave, reimbursement for business expenses, premiums, or penalties.

What does *Ferra* mean for Employers?

Since the California Supreme Court ruled that meal and rest break premium payments must be paid at the regular rate, non-discretionary compensation must be considered. This means that employers must take action prospectively to ensure compliance.

In addition, since the decision is retroactive, employers must review all meal and rest premiums paid in the past four years to determine if supplemental payments are required.

Finally, to the extent employers have not yet instituted arbitration as a means to protect against class actions, we encourage you to do so at your first opportunity. The *Ferra* decision will almost certainly trigger a torrent of class action litigation claiming meal and rest period premiums were being paid at the wrong rate.

Please contact us to discuss; this could develop into something very troublesome.

Please know that effective June 9, 2021, our firm name has changed to Delmore Greene LLP. Our services have not changed, however, and our commitment to our clients and strategic partners remains our highest priority. We look forward to continuing our relationship with you under the firm's new name. Thank you.

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