

A sunset scene over a city skyline with palm trees in the foreground. The sun is low on the horizon, creating a warm orange and yellow glow. The city buildings are silhouetted against the bright sky. Several palm trees are visible in the foreground, their fronds silhouetted against the sunset.

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CALIFORNIA MEAL AND REST PERIODS: RECENT RULINGS AND BEST PRACTICES

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California Meal Period Requirements

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California Meal Periods – Employer Obligations

- Meal Periods: Cal. Lab. Code § 512(a); IWC Wage Orders
 - If employee works **more than 5 hours** → employer must provide employee with the opportunity to take a meal period lasting at least 30 minutes where employee is relieved of their job duties and free to leave employer’s premises.
 - Meal period must be provided to begin no later than after 5 hours of work, *i.e.*, start meal by 5-hour mark.
 - Meal periods for shifts that are more than 5 hours long and less than or equal to 6 hours long can be waived by mutual consent between employer and employee.
 - If employee works **more than 10 hours** → employer must provide employee with the opportunity to take a second meal period lasting at least 30 minutes where employee is relieved of their job duties and free to leave employer’s premises.
 - Second meal period must be provided to begin no later than after 10 hours of work; *i.e.*, start 2nd meal by 10-hour mark.
 - Second meal periods for shifts that are more than 10 hours long and less than or equal to 12 hours long can be waived by mutual consent between employer and employee, as long as first meal period was not waived.

Shift Start	1 st Meal Start	1 st Meal End	2 nd Meal Start	2 nd Meal End	Shift End	Total Hrs Work ed	Notes
8:00 a.m.					2:00 p.m.	6.0	1 st meal can be waived
8:00 a.m.	12:00 p.m.	1:00 p.m.			5:00 p.m.	8.0	No meal waiver
8:00 a.m.	1:00 p.m.	2:00 p.m.			8:00 p.m.	11.0	2 nd meal can be waived
8:00 a.m.	1:00 p.m.	2:00 p.m.	7:00 p.m.	8:00 p.m.	10:30 p.m.	12.5	No meal waiver

Federal law does not currently mandate meal periods for employees.

***Brinker v. Superior Court (2012)* – Timing Requirements**

- The Court rejected plaintiffs' "rolling five" argument that employees are entitled to a meal period for every five *consecutive* hours worked. The law simply requires a meal period by the 5th hour of work and another by the 10th hour of work, and "does not impose additional timing requirements."

***Brinker v. Superior Court (2012)* – Duty to Provide**

- Employers are not required to “police” meal periods to ensure they are taken by employees. Employers must simply make those meal periods available to employees. Employer must not impede or discourage employees from taking meal periods.
- Employer satisfies its meal period obligation if it relieves its employees of all duty, relinquishes control over their activities, and permits them a reasonable opportunity to take an uninterrupted, duty-free, 30-minute meal period.

Donohue v. AMN Services, LLC

February 25, 2021 California Supreme Court Decision

Donohue v. AMN Services, LLC

- **First Key Holding: No Time-Rounding for Meal Breaks**

- Here, the employer rounded time punches to the nearest 10-minute increment, which meant that meal breaks could have been recorded as 30 minutes long or starting within the first five hours, but in reality could have been shorter or “late.”
- For example:
 - If an employee clocked out for lunch at 11:02 a.m. and clocked in after lunch at 11:26 a.m., the employer would have recorded the time punches as 11:00 a.m. and 11:30 a.m.
 - If an employee clocked in for work at 6:59 a.m. and clocked out for lunch at 12:04 p.m., the employer would have rounded the time punches to 7:00 a.m. and 12:00 p.m.
 - **In both cases, rounded time would suggest a compliant meal break, but unrounded time could suggest a break that was not correctly provided.**

Donohue v. AMN Services, LLC

- **First Key Holding: No Time-Rounding for Meal Breaks (cont.)**

- Rounding “did not properly account for meal periods that were short or delayed based on actual time punches but did not appear as short or delayed under the rounding policy.”
- Employer was already using dropdown prompts to explain late, short, or unrecorded meal periods—the court noted that the system “would have ensured accurate tracking of meal period violations if it had simply omitted rounding.”
- Employer also used biweekly employee certifications that the employer had provided the opportunity to take all breaks other than those reported on employee time sheets. The court explained that such certifications **did not** cure potential meal period violations where “employees would not have known about potentially noncompliant meal periods that [the timekeeping system] did not flag” due to the use of rounded time punches.

Donohue v. AMN Services, LLC

- **Second Key Holding: Employer's Burden to Prove Compliant Meal Breaks**
 - A time record showing a late, short, or unrecorded meal break creates a **rebuttable presumption that a meal-break violation occurred** and that a meal premium is owed.
 - The presumption places the **burden on the employer** “to plead and prove, as an affirmative defense, that it genuinely relieved employees from duty during meal periods.”
 - An employer can rebut the presumption “by presenting evidence that employees were compensated for noncompliant meal periods or that they had in fact been provided compliant meal periods during which they chose to work.” The latter evidence would need to show that employees voluntarily chose to work during meal periods recorded as short or delayed.
 - The court specifically noted that employers can use a timekeeping system that tracks potential meal-period violations with a drop-down menu for employees to indicate whether they were provided a compliant meal period but chose to work, and triggers premium pay for missed, short or delayed meal periods “due to the employer’s noncompliance.”

Donohue v. AMN Services, LLC

- **Implications**

- **The use of time punches to determine whether an employee took a late or short meal period must rely on actual, not rounded, time punches.**
- **Have a system in place for determining whether to pay a meal premium based on unrounded time entries. Examples:**
 - Automatically pay premiums at the regular rate based on noncompliant time entries alone
 - Automatic “drop-down” menu in timekeeping system
 - Written daily or weekly certifications that include descriptions of the flagged noncompliant time entries at issue (cannot be made a condition of receiving pay)
 - Documented discussions that include descriptions of the time entries at issue

Donohue v. AMN Services, LLC

- **Implications (cont.)**

- Consider impact of walking time between time clocks and break areas.
- Consider providing breaks longer than 30 minutes to avoid breaks slightly shorter than 30 minutes.
- Think about potential time spent waiting to clock in at the end of a meal break, including any security screening.
- Think about how to round seconds
 - Consider rounding forward for clock-outs (e.g., 1:00:10 p.m. rounds to 1:01 p.m.)
 - Consider rounding back for clock-ins (e.g., 1:30:51 p.m. rounds to 1:30 p.m.)
 - Avoids 29-minute meals that can occur when rounding seconds to the nearest minute
 - Employee clocks out at 1:00:29 (rounding to 1:00 p.m.) and clocks back at 1:29:31 (rounding to 1:30 p.m.) = employee received a meal break of 29 minutes and 2 seconds which rounds to 29 minutes, but time records show 30 minutes.
 - Pros and cons of preventing clocking in until after 30 minutes from clock-out
 - Risks of having employees clock rest-break time.

Ferra v. Loews Hollywood Hotel, LLC

July 15, 2021 California Supreme Court Decision

Ferra v. Loews Hollywood Hotel, LLC

- California Labor Code Section 226.7(c) requires employers to pay employees one hour of pay “at the employee’s **regular rate of compensation**” for each workday that a meal, rest, or recovery period is not provided.
- Here, the plaintiff was paid an hourly wage and received quarterly nondiscretionary incentive payments (bonuses). However, the employer paid the plaintiff meal and rest period premiums at her **hourly rate**.

Ferra v. Loews Hollywood Hotel, LLC

- **Issue:** Does “**regular rate of compensation**” in Section 226.7(c) have the same meaning as “**regular rate of pay**” in the context of overtime premium pay? California Supreme Court held: **Yes.**
 - Under California law and the Fair Labor Standards Act (FLSA), an employee’s “regular rate” for overtime purposes must be calculated using both hourly wages and other nondiscretionary wage payments, such as nondiscretionary bonuses, commissions, and shift differentials.

Ferra v. Loews Hollywood Hotel, LLC

- **Regular Rate Basics:**

- Determined by dividing the **total pay for employment** (except for the statutory exclusions) in any workweek by **the total number of hours actually worked** to determine the regular rate.
- Based on **all remuneration** for employment, except for statutory exclusions (*see* 29 C.F.R. 778.200):
 - gifts
 - vacation/holiday/PTO
 - expense reimbursements
 - purely discretionary bonuses/payments
 - certain health/insurance benefit payments made to third-party plans
 - overtime payments
 - certain restricted stock and stock options

Ferra v. Loews Hollywood Hotel, LLC

- **Regular Rate Basics (cont.):**

- Beware nondiscretionary “**flat sum bonuses**” (e.g., \$100 to all eligible employees); these must be included in the regular rate.
- *Dart v. Alvarado* decision from California Supreme Court: flat sum bonuses must be “factored into an employee’s regular rate of pay by dividing the amount of the bonus by the total number of nonovertime hours actually worked during the relevant pay period and using 1.5, not 0.5, as the multiplier for determining the employee’s overtime pay rate.”
- I.e., “a flat sum bonus must be expressed as a per-hour value,” and “for the limited purpose of calculating the overtime pay rate, a flat sum bonus must be treated as if it were earned on a per-hour basis throughout the relevant pay period.”

Ferra v. Loews Hollywood Hotel, LLC

- **Implications**

- First, for a pay period that includes the week the premium is earned:
 - Use the rate used to calculate overtime for the week (assuming the calculation is correct)
 - Example: Employee works 30 hours at \$15 per hour and 12 hours at \$20 per hour
 - Regular rate = $[(30 \text{ hours} \times \$15) + (12 \text{ hours} \times \$20)] / 42 \text{ hours} = \underline{\$16.43}$ per hour
 - Meal/rest/recovery premium, reporting pay, and sick pay should be paid at \$16.43 an hour
 - Example: Employee works 42 hours at \$15 per hour and earns \$420 in commissions
 - Regular rate = $\$15 + (\$420 \text{ commission} / 42 \text{ hours}) = \underline{\$25}$ per hour or $[(\$15 \times 42) + \$420] / 42 = \$25$ per hour
 - Meal/rest/recovery premium, reporting pay, and sick pay should be paid at \$25 per hour

Ferra v. Loews Hollywood Hotel, LLC

- **Implications:**

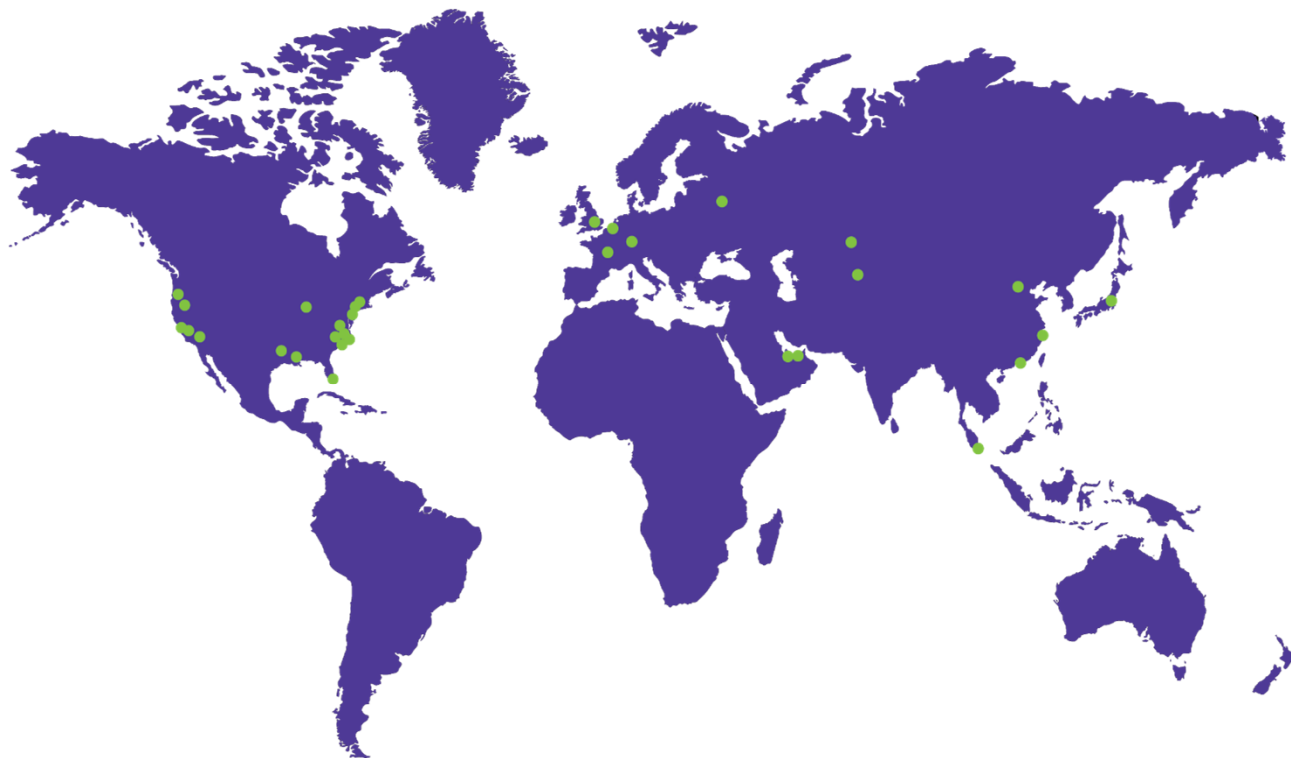
- Second, when an incentive (or other compensation) is paid after the pay period for the week when the break is missed:
 - When paying the amount for the week when the break was missed, true-up
 - Overtime
 - Break premiums
 - Reporting pay
 - Sick pay
- Consider paying any incentive compensation as a **percentage** of total compensation.
- **Note:** *Ferra* applies **retroactively**.
- Options for addressing retroactive implications.

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