



**New Standard for Paying Missed Meal and Rest Period Premiums  
August 2021**

Employers know that strict compliance with California’s wage and hour laws is absolutely necessary to avoid the potentially devastating consequences of being named as a defendant in a class action lawsuit or an action filed under the Private Attorneys General Act (“PAGA”). As difficult as it can be for busy employers to keep up with the very complex wage and hour requirements, employers should prioritize both understanding the law and documenting compliance.

As we often say, your documents, your timecards and wage statements in particular, can either make or break your case. California law requires employers to maintain complete and accurate records of all hours worked by non-exempt employees and, with limited exceptions, the start and stop times of each meal period. Although employers are not required to specifically document the time spent by employees on rest periods, it is a good practice to have employees document the fact that they took rest periods by at least checking a box or signing a timecard certification. There are countless timekeeping systems used by employers and you need to decide what will work best for your operation. The key is both understanding when employees are required to be paid for overtime and for missed meal and rest periods, and ensuring the employees are paid at the correct rate. The focus of this article is the **new standard** set by the California Supreme Court in July 2021 for the rate employees must be paid for missed meal and rest period premiums.

**REVIEW OF THE BASICS** - We’ll start with a very brief overview of the basic meal and rest period rules. As there are many detailed requirements for providing meal and rest periods, please consult with your employment law counsel to ensure your meal and rest period policy complies with the current state of California law.

1. **Meal Periods** - Employers must provide a 30-minute uninterrupted meal period for each employee who works more than 5 hours in a workday. Employees who work less than 6 hours in a workday may waive their meal 1<sup>st</sup> period. Employers who work more than 10 hours, but less than 12 hours in a workday may waive their 2<sup>nd</sup> meal period if they took a compliant 1<sup>st</sup> meal period. Under very limited circumstances, employees may be permitted to take an on-duty meal period. All waivers and on-duty meal period agreements should be documented in writing and, in the case of an on-duty meal period, must contain mandatory language. With some exceptions, meal periods are not counted as time worked and employees are not paid for the time spent on meal periods. It is imperative that employers ensure that all meal periods are uninterrupted, last a minimum of 30 uninterrupted minutes, and that each meal period is taken in a timely manner. The 1<sup>st</sup> meal period must begin before the end of the 5<sup>th</sup> hour worked (i.e. before the beginning of the 6<sup>th</sup> hour worked) and the 2<sup>nd</sup> meal period must begin before the end of the 10<sup>th</sup> hour worked (i.e. before the beginning of the 11<sup>th</sup> hour worked). The following chart illustrates how to count the number of hours worked by an employee:

8:00 a.m. – 9:00 a.m.	1 <sup>st</sup> hour worked
9:00 a.m. – 10:00 a.m.	2 <sup>nd</sup> hour worked
10:00 a.m. – 11:00 a.m.	3 <sup>rd</sup> hour worked
11:00 a.m. – 12:00 p.m.	4 <sup>th</sup> hour worked
12:00 p.m. – 1:00 p.m.	5 <sup>th</sup> hour worked - - - the 1 <sup>st</sup> meal period must begin no later than 12:59 p.m. To avoid a late meal period, consider requiring the meal period to start by 12:45 p.m. Employees can start their 1 <sup>st</sup> meal period any time before the end of the 5 <sup>th</sup> hour worked.
1:00 p.m. – 2:00 p.m.	6 <sup>th</sup> hour worked
2:00 p.m. – 3:00 p.m.	7 <sup>th</sup> hour worked

3:00 p.m. – 4:00 p.m.	8 <sup>th</sup> hour worked
4:00 p.m. – 5:00 p.m.	9 <sup>th</sup> hour worked
5:00 p.m. – 6:00 p.m.	10 <sup>th</sup> hour worked - - - the 2 <sup>nd</sup> meal period must begin no later than 5:59 p.m. To avoid a late meal period, consider requiring the meal period to start by 5:45 p.m. Employees can start their 2 <sup>nd</sup> meal period any time before the end of the 10 <sup>th</sup> hour worked.
6:00 p.m. – 7:00 p.m.	11 <sup>th</sup> hour worked
7:00 p.m. – 8:00 p.m.	12 <sup>th</sup> hour worked

2. **Rest Periods** - A net 10 minute rest period shall be taken for every 4 hours worked, or major fraction thereof (i.e., anything over 2 hours). Rest periods are required to be taken as close to the middle of the work period as practicable. Rest periods are counted as time worked and employees are paid for the time they spend on rest periods. Employees may not accumulate rest periods or use rest periods as a basis for starting work late, leaving work early, or extending a meal period. The following chart shows the number of rest periods employees are required to receive each day, based on the number of hours the employees work:

Work days of less than 3.5 hours	No rest period
Work days of 3.5 – 6 hours	1 rest period
Work days of 6 – 10 hours	2 rest periods
Work days of 10 – 14 hours	3 rest periods

**THE STRUGGLE IS REAL** - The constant struggle for employers is complying with the obligation to provide employees with compliant meal and rest periods when employees are adamant that they do not want to start their meal period before the end of the 5<sup>th</sup> hour worked, do not want to take a full 30 minutes for a meal period, or want to skip meal and rest periods so they can get done with their work sooner. While we’d love to trust that these purported “waivers” by employees will be sufficient, in most cases, they will be deemed ineffective if ever subject to a challenge by a current or former employee and, even if you prevail, it will take a significant amount of time and money to defeat the claims. If you utilize any meal or rest period waivers in your operation, you should have the waivers reviewed by your employment law counsel.

**MPP & RPP** - In most cases, if an employee does not take a compliant meal or rest period, the employer must pay the employee 1 extra hour of pay for each day in which the employee’s meal and/or rest period was missed, taken late or was short. If an employee takes more than 1 non-compliant meal period (or more than 1 rest period) in the same day, the employer is only required to pay the employee for 1 extra hour of pay for that day. However, if an employee has both a non-complaint rest period and meal period in the same day, the employer must pay the employee 2 extra hours of pay for that day. The extra hour of pay is called a Meal Period Premium (“MPP”) or Rest Period Premium (“RPP”).

**THE NEW PAYMENT STANDARD** – Until the new decision in *Ferra v. Loews Hollywood Hotel, LLC* (2021) 11 Cal.5<sup>th</sup> 858, employers generally paid MPP and RPP at the relevant employee’s base hourly rate. Not anymore! The California Supreme Court has now ruled that **MPP and RPP must be paid at the employee’s regular rate of pay** (“RRP”). Employers typically only think of the term RRP in the context of computing overtime. However, employers should know the RRP must be also used to pay employees for paid sick leave, and now, for MPP and RPP.

Computing the RRP can be simple or quite complex, depending on how you pay your employees. If a non-exempt employee receives compensation in addition to a base hourly rate during any workweek in which a MPP or RPP is paid, the employee’s regular rate of pay will be higher than the employee’s base hourly rate, unless the additional payment is excluded.

The following payments to employees are *included* in the RRP:

- All amounts paid for time worked, whether based on an hourly rate, salary, piece rate, commission, etc.
- All amounts paid for on-call / standby time
- Housing benefits and meals provided by the employer
- Payments given as a housing or rent allowance for employees who do not live in employer-provided housing
- Payments made to employees in lieu of participating in the employer’s health insurance plan

- Non-discretionary bonuses or other amounts paid, including bonuses or payments based upon hours worked, production or proficiency (e.g. on-call bonus or stipend, attendance bonus, quality bonus, etc.)

The following payments to employees are *excluded* from the RRP:

- Discretionary bonuses, including amounts paid as gifts at a holiday or other special occasions, rewards for good service, etc., which are not measured by or dependent upon hours worked, production or efficiency
- Payments made for time that is not actually worked, including vacations, holidays, sick leave, reporting time pay, split shift premium pay, MPP and RPP
- Additional compensation for working holidays, weekends or extra hours *if* the additional compensation is paid at a *premium rate of at least 1.5x the base rate* for similar work performed during non-overtime hours on other days
- Reimbursements for travel expenses and other expenses incurred by an employee on behalf of the employer
- Profit sharing contributions
- Retirement plan contributions
- Insurance plan contributions (e.g., health, life, accident, etc.)

Depending on the compensation structure, computing the RRP can be as simple as just adding the various categories of compensation together and dividing by the total number of hours worked. However, there are specific formulas that must be used if the employee earns a non-discretionary flat sum bonus or production based bonus, or if the employee is paid on a piece rate basis or is paid commissions. To ensure you are paying your employees the correct rate for MPP and RPP, consult with employment law counsel who is familiar with your compensation structure and your operation.

## WHAT NOW?

1. **Do you need to change your rate?** You should determine whether paying your employees MPP and RPP at the RRP actually requires you to make any adjustment in the amount you pay depending on your compensation structure.
2. **Do you actually need to pay MPP and RPP?** You should review your practices to ensure that you know when you actually need to pay MPP and RPP. To satisfy your obligation to provide compliant meal and rest periods, employers must actually relieve employees of all duty, relinquish control over their activities, permit them a reasonable opportunity to take timely, uninterrupted and complete meal and rest periods (during which they are free to come and go as they please), and must not impede or discourage employees from taking their meal and rest periods. Employers who automatically pay MPP or RPP without regard to the circumstances at issue are likely paying for MPP or RPP when they are not required to do so.
3. **Do you need to audit previous MPP and RPP?** Unfortunately, the *Ferra* decision is *retroactive*, which means that any MPP or RPP that were not paid at the correct rate for the last 3 to 4 years may give rise to a claim. You should consider conducting an audit and consulting with your employment law counsel to determine whether you should correct any underpayments now, rather than waiting to see if any of your current or former employees pursue a claim.

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