No. B283218

In the Court of Appeals for the State of California

Second Appellate District, Division 3

JESSICA FERRA,
Plaintiff / Appellant,

v.

LOEWS HOLLYWOOD HOTEL, LLC,
Defendant / Respondent.

APPEAL FROM THE LOS ANGELES SUPERIOR COURT
THE HONORABLE KENNETH R. FREEMAN
Case No. BC 586176

APPLICATION OF CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION AND JACQUELINE F. IBARRA FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFF-APPELLANT JESSICA FERRA; PROPOSED BRIEF

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APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

The California Employment Lawyers Association ("CELA") and Jacqueline F. Ibarra, as *amici curiae*, request leave to file the attached *amicus curiae* brief in support of appellants Jessica Ferra et al.

Interest of the Amicus Curiae

CELA is an organization of California attorneys whose members primarily represent employees in a wide range of employment cases, including wage and hour class actions similar to *Ferra v. Loews Hollywood Hotel*. CELA and its members have a substantial interest in protecting the statutory and common law rights of California workers and ensuring the vindication of the public policies embedded in California labor laws. The organization has taken a leading role in advancing and protecting the rights of California workers, which has included submitting amicus briefs and letters and appearing before this Court in employment rights cases such as *Murphy v. Kenneth Cole Prods., Inc.*, 40 Cal.4th 1094 (2007), *Gentry v. Superior Court*, 42 Cal.4th 443 (2007), *Brinker Restaurant Corp. v. Superior Court*, 53 Cal.4th 1004 (2012), *Iskanian v. CLS Transp. Los Angeles, LLC,* 59 Cal.4th 348 (2014), and *Ayala v. Antelope Valley Newspapers, Inc.*, 59 Cal.4th 522 (2014).

Jacqueline Ibarra is the plaintiff-appellee in *Ibarra v. Wells Fargo Bank, N.A.*, Ninth Circuit Case No. 18-55626. The defendant-appellant in that pending appeal, Wells Fargo Bank, has made arguments similar to those presented in this case by

Loews Hollywood Hotel, regarding how to calculate meal and rest period premium pay under Labor Code §226.7 for employees whose compensation includes non-discretionary incentive pay such as commissions and bonuses.

How the Proposed Amicus Brief Will Assist the Court

In *Ferra*, this Court must decide whether, under Labor Code §226.7(c) and Industrial Welfare Commission ("IWC") Wage Order No. 5, §12, the "regular rate of compensation" for an employee who was not provided a legally-compliant meal or rest period (and is thus entitled to an hour of premium pay at his or her "regular rate of compensation") includes all types of compensation regularly received by that employee (the same way overtime premiums are calculated) or only the hourly pay component of that compensation. *Amici* agree with appellant that "regular rate" is a term of art in wage-and-hour law that refers to *all* components of an employee's compensation, including, for example, nondiscretionary bonuses and commissions.

We do not repeat appellant's arguments here. Rather, we submit this brief to provide the Court with further support for Ferra's construction of the term "regular rate of compensation" in Section 226.7 and the Wage Orders, drawn from the history of the statute and the amendment to the Wage Orders that adopted the premium-pay requirement in 2000; and the interchangeable use of the terms "compensation" and "pay," and "regular rate of compensation" and "regular rate of pay," by the Legislature and the IWC. Amici will also show that the Superior Court's incorrect

interpretation of Section 226.7 undermines the purpose of the premium pay remedy by allowing employers to artificially lower their exposure for failing to provide legally-compliant meal and rest periods.

California Rules of Court 8.200(c)(3) Disclosures

No party or counsel for a party to this appeal authored any part of this amicus brief. No person other than the amici, their counsel, and CELA's members made any monetary contribution to the preparation or submission of this brief.

Conclusion

For the foregoing reasons, the Court should grant *amici curiae* CELA's and Jacqueline F. Ibarra's application for leave to file the attached amicus brief.

Dated December 10, 2018

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AMICUS CURIAE BRIEF

INTRODUCTION

In 2000, the California Legislature enacted a new remedy for an employer's violation of its obligation to provide timely meal periods and rest breaks as required by the Labor Code and Industrial Welfare Commission ("IWC") Wage Orders. In Labor Code §226.7(c), the Legislature defined that remedy as one hour of premium pay, to be calculated at the employee's "regular rate of compensation." That is the identical language used by the IWC itself, in the amended Wage Orders it adopted in 2000 shortly before the enactment of Section 226.7(c).

Plaintiff Ferra has persuasively demonstrated that the phrase "regular rate" is a term of art in the wage-and-hour context, which is derived from federal and state overtime law and which refers to a rate of pay whose calculation is based on all remuneration paid to the employee, not just the hourly pay portion of the employee's compensation package or any other portion that the employer unilaterally characterizes as the "regular" rate.

As we demonstrate below, the intertwined history of Labor Code §226.7 and the IWC's Wage Orders, together with the Legislature's and the IWC's contemporaneous use of the terms "regular rate of compensation" and "regular rate of pay," establishes that those terms were used interchangeably, as synonyms. As such, the "regular rate of compensation" calculation for meal-and-rest-period premiums must follow the

familiar methodology that employers have used for decades to calculate overtime premiums – i.e., to include not only the base hourly wages earned by the employee (if any), but also all non-discretionary bonuses (for example, based on attendance, productivity, or the like); piece-rate pay; commissions earned under a commission pay plan; banquet service charges, etc.

The Superior Court erroneously granted summary adjudication to Loews on the Labor Code §226.7 issue in this case on the ground that Loews had properly *excluded* plaintiff hotel employees' non-discretionary quarterly bonuses in calculating their "regular rate of compensation" for meal-period-and-rest-break premium pay, even though Loews was legally required to include those amounts in calculating overtime premiums due to those same employees. The Superior Court's erroneous construction of Section 226.7 not only contradicts the statutory text, purposes, and history, but it effectively permits employers to determine for themselves, unilaterally, what portion of the employee's promised compensation to characterize as "regular" when a court has found them liable for failing to provide legally compliant breaks and thus responsible for paying premium pay at the affected employees' "regular rate of compensation."

The impact of allowing employers to decide for themselves what portion of their employees' compensation is "regular" would be particularly harsh on employees who work under incentive pay plans, which often include a nominal "base" hourly pay component coupled with substantial commissions and bonuses. Such an approach also completely undermines the purpose of

Section 226.7's premium pay remedy, which was intended to deter violations of meal-period-and-rest-break protections by imposing a significant financial disincentive on employers that fail to provide legally-compliant meal periods and rest breaks.

ARGUMENT

I. When the Legislature Uses Different Words Interchangeably, the Courts Must Construe Those Words as Synonyms.

The Court should find that the Legislature intended "regular rate of compensation" in Labor Code §226.7 to mean the same thing as "regular rate of pay" under Labor Code §510, which all parties agree requires the regular rate for overtime premiums to be calculated based on all forms of compensation paid to the employee (with limited exceptions such as purely discretionary bonuses).

Loew's contends that different words, when used in different statutes enacted in the same Legislature or included in the same Wage Order, must always be construed as having different meanings. Respondent's Br. at 33, 41, citing *Briggs v. Eden Council for Hope & Opportunity*, 19 Cal.4th 1106, 1117 (1999). But the overall goal of statutory interpretation is to determine legislative intent. The canons of statutory interpretation are "merely aids to ascertaining probable legislative intent." *Stone v. Superior Court*, 31 Cal.3d 503, 521 n.10 (1982); *see also Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001) (canons of statutory interpretation are "not mandatory rules"); *City of Palo Alto v. Public Employment Relations Bd.*, 5 Cal.App.5th 1271, 1294 (2016) ("[The canons] are

tools to assist in interpretation, not the formula that always determines it.") (brackets in original; citations omitted). Those canons may not be applied to "defeat the underlying legislative intent otherwise determined." *Dyna-Med, Inc. v. Fair Emp. & Housing Comm'n*, 43 Cal.3d 1379, 1391 (1987).

Where the Legislature (or an administrative agency like the IWC) uses synonymous language in two similar statutes without providing any clear indication that it intends that language to have different meanings, it becomes the courts' function to scrutinize the statutes' text, structure, history, and underlying purposes to construe that language. Thus, in *City of Palo Alto*, 5 Cal.App.5th at 1293-94, for example, the California Court of Appeal held that the duty of an employer under the Myers-Milias-Brown Act to "meet and confer in good faith" and to "consult[] … in good faith" were equivalent, rejecting the employer's argument that certain canons of statutory interpretation required the court to find that "different words … have different meanings."

Here, the IWC used the terms "regular rate of compensation" and "regular rate of pay" interchangeably when it adopted the "regular rate of compensation" language in 2000. The Legislature has also routinely used the terms "compensation" and "pay" interchangeably in the Labor Code, as the California Supreme Court noted in *Murphy v. Kenneth Cole Prods., Inc.*, 40 Cal.4th 1094, 1104 & n.6 (2007). The intertwined history of Section 226.7 and the Wage Order amendments reflects the Legislature's intent in Section 226.7 that an employee's "regular

rate of compensation" would include all forms of remuneration, not just an employee's "base" hourly rate.

II. In Adopting the Premium Pay Language in Labor Code §226.7 in August 2000, the Legislature Intended to Conform its Language to the Premium Pay Language that the IWC Had Just Adopted.

Because the language, purpose, and dates of enactment of Section 226.7 and the 2000 amendments to the IWC Wage Orders overlap, the Court must seek to harmonize them. *Brinker Restaurant Corp. v. Superior Court*, 53 Cal.4th 1004, 1027 (2012). Harmonization of the premium-pay remedy for meal-and-rest-period violations is particularly appropriate because the Legislature enacted Section 226.7 in 2000 to conform to, and supplement, the IWC's just-promulgated June 2000 revisions to the Wage Orders' meal-and-rest-period provisions, and the Legislature used the term "regular rate of compensation" in Section 226.7 because that was the term the IWC had just used in the same context. The history of those enactments further confirms that the IWC intended "regular rate of compensation" to mean the same thing as "regular rate of pay," and that the Legislature, by adopting the IWC's "regular rate of compensation" language in Section 226.7, intended to replicate the IWC's usage.

The Supreme Court described much of this history in *Murphy*. The original version of A.B. 2509, the bill that was eventually codified as Section 226.7, was introduced in the Legislature on February 24, 2000. That original bill included a remedy for missed meal and rest periods of an "amount equal to

twice [*the employee's*] *average hourly rate of compensation* for the full length of the meal or rest periods during which the employee was required to perform any work." *Murphy*, 40 Cal.4th at 1106 (emphasis added; brackets in original).

At the same time the Legislature was considering A.B. 2509, the IWC was considering amending its Wage Orders to create a remedy for employees whose employers failed to provide legally compliant meal and rest periods. On June 30, 2000, the IWC adopted the current Wage Order language, which states that the remedy for failure to provide a meal or rest period is "one (1) hour of pay at the employee's regular rate of compensation for each workday that the [meal or] rest period is not provided." *Murphy*, 40 Cal.4th at 1109-10.

In August 2000, shortly after the IWC added this remedy to the statewide Wage Orders that would go into effect on January 1, 2001, the California Senate amended A.B. 2509 to conform its premium pay language to the language the IWC had just adopted. *Murphy*, 40 Cal.4th at 1107. The Senate Rules Committee explained that the change was "intended to track the existing provisions of the IWC wage orders regarding meal and rest periods." *Id.* The Legislature ultimately adopted A.B. 2509 with the Senate's amendment. *Id.* at 1108.[1]

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[1] Loews suggests that by amending the bill to conform to the "lower penalty amounts" adopted by the IWC in the Wage Orders, the Legislature must have intended that "regular rate of compensation" would not include forms of employee compensation other than the employee's base hourly wage. Respondent's Br. at 40-41. Loews' logic completely misses the mark. The only way an hour of pay at the employee's "regular

III. In Amending the Wage Orders to Adopt the Premium Pay Remedy for Meal and Rest Periods, the IWC Used the Terms "Regular Rate of Compensation" and "Regular Rate of Pay" Interchangeably.

The IWC's contemporaneous use of the terms "regular rate of compensation" and "regular rate of pay" shows that the IWC meant no different meaning between those two phrases. The IWC used those phrases interchangeably throughout the entire time it was considering and adopting the meal-period-and-rest-break premium pay language. Although the IWC used the term "regular rate *of compensation*" in the amended Wage Orders themselves, its Statement as to the Basis described the remedy for an employer's failure to provide a timely, paid rest period as "one additional hour of pay at the employee's *regular rate of pay*." Statement as to the Basis at 19-21 (Jan. 1, 2001), available at https://www.dir.ca.gov/iwc/statementbasis.pdf.

The January 1, 2001 Statement as to the Basis is an important tool for judicial interpretation of the Wage Order language. A Statement as to the Basis of an IWC Wage Order, required by Labor Code §1177, sets forth the IWC's "explanation of how and why the [IWC] did what it did." *Small v. Superior Court*, 148 Cal.App.4th 222, 232 (2007) (brackets in original). As such, it is "a particularly useful 'contemporaneous administrative

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rate of compensation" could *always* be less than "twice [the employee's] average hourly rate of compensation" (the terminology used in the original version of A.B. 2509) would be if *both* calculations included *all* forms of compensation owed to the employee.

construction of an administrative regulation.'" *O'Connor v. Starbucks Corp.*, 2008 WL 2761586 at *5 (N.D. Cal. July 14, 2008) (quoting *Intoximeters, Inc. v. Younger*, 53 Cal.App.3d 262, 270-71 (1975)); *see also Cal. Hotel & Motel Ass'n v. IWC*, 25 Cal.3d 200, 214 (1979). Here, the January 1, 2001 Statement as to the Basis shows that the IWC intended no difference between the terms "regular rate of compensation" as used in the new meal-and-rest period premium language, and "regular rate of pay" as that term is used elsewhere in the Wage Orders and is commonly understood in wage-and-hour law.[2]

IV. The Legislature Uses the Terms "Pay" and "Compensation," and "Regular Rate of Pay" and "Regular Rate of Compensation," as Synonyms.

Not only did the IWC use the terms "regular rate of pay" and "regular rate of compensation" interchangeably in adopting the premium pay remedy language in 2000, but so has the Legislature, in both the rest period and the overtime context. Indeed, as the Supreme Court has already determined, "the

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[2] Moreover, when the IWC intended to refer to an employee's base hourly rate rather than the employee's "regular rate" (the legal term of art requiring all remuneration paid to the employee to be accounted for), it knew how to do so. For example, in Section 3(B)(3) of Wage Order 5, the IWC specified that the adoption, repeal, or nullification of an alternative workweek schedule shall not result in the reduction of an employee's "regular rate of *hourly* pay." (Emphasis added.) And when the IWC intended to allow collective bargaining parties to agree to certain different terms and conditions than those set forth in the Wage Orders, it gave those rights to parties to an agreement where employees receive a "regular *hourly* rate of pay" of not less than 30 percent more than the minimum wage. Wage Order 5, §3(L) (emphasis added).

Legislature has frequently used the words 'pay' and 'compensation' in the Labor Code as synonyms for 'wages.'" *Murphy*, 40 Cal.4th at 1104 n.6 (citing Labor Code §§96, 511, 1043).

Even in the specific context of premium pay for rest break violations, the Legislature has used the terms "regular rate of compensation" and "regular rate of pay" interchangeably. The recently enacted Labor Code §226.75, for example, provides that safety-sensitive petroleum industry employees may be required to take on-call (rather than off-duty) rest breaks under certain conditions, and that unless those conditions are met, those employees are entitled to of "one hour of [premium] pay at the employee's *regular rate of pay* for the rest period that was not provided." Labor Code §226.75(b) (emphasis added). The Legislature's bill analyses show that the Legislature was fully aware that meal-and-rest period premium pay under Labor Code §226.7 is defined as one hour at the employee's "regular rate of compensation."[3] Yet the Legislature did not define "regular rate of pay" in Section 226.75 or explain how that phrase differed from "regular rate of compensation" as used in Section 226.7 – thus indicating that the Legislature believed no further explanation was necessary.

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[3] See, e.g., Sen. Committee on Labor & Indus. Relations Bill Analysis, A.B. 2605 (Aug. 27, 2018); Sen. Rules Committee Bill Analysis, A.B. 2605 (Aug. 30, 2018); Concurrence in Sen. Amendments, A.B. 2605 (Aug. 31, 2018); Assem. Committee on Labor & Employment Bill Analysis, A.B. 2605 (Aug. 31, 2018).

Had the Legislature intended to create a new formula for calculating meal-and-rest period premiums for safety-sensitive petroleum workers that was different from the formula for calculating those premiums for all other California employees subject to Section 226.7, it would have said so. But it did not, and the Legislature is presumed not to "hide elephants in mouseholes." *Jones v. Lodge at Torrey Pines P'ship*, 42 Cal.4th 1158, 1171 (2008).

The Legislature also used "regular rate of pay" and "regular rate of compensation" interchangeably in the overtime-pay context to describe how to calculate employees' overtime premiums. *Compare* Labor Code §510 ("Any work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek … shall be compensated at the rate of no less than one and one-half times the *regular rate of pay* for an employee.") (emphasis added) *with* Labor Code §751.8 ("All work performed … in excess of 40 hours in a workweek, shall be compensated at one and one-half times the employee's *regular rate of compensation*.") (mine and smelter employees; emphasis added) *and* Labor Code §204.3 ("An employee may receive, in lieu of overtime compensation, compensating time off at a rate of not less than one and one-half hours for each hour of employment for which overtime compensation is required by law. If an hour of employment would otherwise be compensable at a rate of more than one and one-half times the employee's *regular rate of compensation*, then the employee may receive compensating time off commensurate with the higher rate.") (emphasis added). A

comparison of these parallel statutory provisions makes clear that the Legislature intended "regular rate of pay" and "regular rate of compensation" to mean the same thing and to be calculated in the same manner.

Loews is unable to distinguish Sections 204.3 and 751.8 or even to come close. *See* Respondent's Br. at 44-46. Loews argues that Section 204.3(a) concerns only the calculation of compensatory time off ("comp time") rather than the calculation of overtime premiums. This is true, but there can be no serious dispute that the purpose of Section 204.3 was to allow comp time as a substitute for overtime premium pay, not to adopt an entirely new method of calculating overtime premiums for employees whose employers choose to provide comp time. In referring to the calculation of comp time, the Legislature simply *described* the overtime premium to which an employee would otherwise be entitled (if comp time had not been provided) by reference to the employee's "regular rate of compensation," rather than by reference to the "regular rate of pay" formulation used in Labor Code §510.

Loews' argument that, in adopting Labor Code §751.8, the Legislature meant to create "a special set of … rules" for calculating overtime premiums in the mine and smelter industry fares no better. The legislative history of Section 751.8 makes plain that the Legislature's objective was not to adopt "special rules" for *calculating* overtime but was instead to *permit* mine and smelter employees not covered by collective bargaining

agreements to work overtime hours. *See* Legislative Counsel's Digest, Stats. 1995, ch. 903 (A.B. 739).

Indeed, the statutory language and legislative history suggests that the Legislature intended mine and smelter workers' overtime pay to be calculated no differently from the overtime pay of other California workers. The term "regular rate of compensation" is not defined in Section 751.8, as it would have been if the Legislature had intended to create a novel means of calculating overtime for mine and smelter workers. Likewise, the Legislative Counsel's Digest with the chaptered bill merely says that overtime premiums of "1½ times the employee's regular rate of compensation would apply to hours worked in a workday that exceed the scheduled hours established by an employee election under these provisions up to and including 12 hours, or in excess of 40 hours in a workweek, and that the overtime rate of double the employee's regular rate of compensation would apply to overtime hours that exceed 12 hours in a workday," without further explanation. *See* Legislative Counsel's Digest, Stats. 1995, ch. 903. Again, if the Legislature had intended to adopt a new method of overtime calculation by using the phrase "regular rate of compensation," it would have said so.

The change in language from the bill's original version to the April 26, 1995 version (which was not the final language ultimately adopted by the Legislature), on which Loews relies, does not demonstrate any intent to create a new method for calculating overtime premiums for mine and smelter workers. The original bill provided that employees must be paid "the

overtime rate of pay, as prescribed by the wage orders of the [IWC] for hours worked in excess of that employee's regularly scheduled shift." A.B. 739, as introduced Feb. 22, 1995, §6. On April 26, 1995, the California Assembly deleted the reference to the IWC Wage Orders, and substituted a clearer explanation of when overtime premiums were due at the time-and-a-half versus the double-time rate:

> The premium wage rate of one and one-half times the employee's regular rate of compensation shall apply to all hours worked in any workday in excess of the regularly scheduled hours established for that workday, up to and including 12 hours. The premium wage rate of double the employee's regular rate of compensation shall apply to all hours worked in excess of 12 hours in any workday.

A.B. 739, as amended Apr. 26, 1995, §6.

In adopting this amendment, the Legislature left "regular rate of compensation" undefined. Thus, by replacing the reference to the Wage Orders with language specifying the circumstances in which employees must receive time-and-a-half or double-time premiums, the Legislature simply eliminated any potential for confusion as between the Wage Orders and the Labor Code about when each level of premium pay was to be paid. Nothing in the text or history of that amendment even hints at a legislative intent to create a new, wholly undefined method of calculating overtime premiums for a limited subset of workers in a single industry. The Legislature is presumed *not* to have "silently, or at best obscurely … created a significant

departure from existing law." *In re Christian S.*, 7 Cal.4th 768, 782 (1994).

In sum, "regular rate of compensation" and "regular rate of pay" are used interchangeably throughout the Labor Code. Where the Legislature uses different words as synonyms, the Court should not strain to impose different meanings on these terms. *See City of Palo Alto*, 5 Cal.App.5th at 1293-94. The California Supreme Court already recognized in *Murphy* that "pay" and "compensation" mean the same thing, and that "regular rate" has a specific, fixed meaning in wage-and-hour law. Therefore, "regular rate of pay" and "regular rate of compensation" as used in the Labor Code must be construed as meaning the same thing, and the well-established formula for determining an employee's "regular rate" for overtime purposes must be held to apply to meal-period-and-rest-break premium calculations as well.

V. The DLSE Uses "Regular Rate of Compensation" and "Regular Rate of Pay" Interchangeably.

As plaintiff Ferra demonstrated in her Reply Brief at 23-25, the Division of Labor Standards Enforcement's ("DLSE") use of the phrases "regular rate of compensation" and "regular rate of pay" with respect to meal-and-rest period premiums in its Enforcement Manual and in Opinion Letter 2003.10.17 shows that the agency charged with enforcing the Labor Code and Wage Orders also uses those phrases interchangeably, indicating that both phrases are intended to have the same meaning. While the DLSE's guidance does not have the force of law, it is persuasive

authority for interpreting the Labor Code. *Brinker, Restaurant*, 53 Cal.4th at 1029 n.11.

Loews mischaracterizes the one Labor Commissioner decision that it cites in support of its assertion that the DLSE looks exclusively to the employees' base hourly wage in calculating meal-and-rest period premium pay. Respondent's Br. at 49, citing CT 1:121-122. The issue in that decision was whether the claimant was an independent contractor or an employee. The *only* compensation that claimant alleged was promised to him was $13 per hour. After finding that the claimant was an employee rather than an independent contractor, the Labor Commissioner awarded meal-period premiums at the applicable minimum wage rate because the claimant did not produce sufficient evidence to support his claim that he was promised $13 per hour. The decision did not consider whether forms of compensation such as non-discretionary bonuses, guaranteed service charges, or commissions must be included in the calculation of the "regular rate of compensation" for meal-period-and-rest-break premiums because those additional forms of compensation were not at issue or claimed in that case. Administrative decisions, like judicial opinions, cannot be considered authority for issues that were never presented or considered. *Cf. Santisas v. Goodin*, 17 Cal.4th 599, 620 (1998).

VI. To Effectuate the Purposes of Section 226.7, "Regular Rate of Compensation" Must Be Construed to Include All Forms of Compensation Provided to the Employee, Not Just the Portions of the Employee's Compensation Package That the Employer Deems "Regular."

Finally, the "regular rate" paid for any kind of premium pay cannot be an amount selected unilaterally by the employer for purposes of lowering the premiums owed.

It has long been recognized under the federal Fair Labor Standards Act and state law that the "regular rate" for purposes of overtime calculations "cannot be left to a declaration by the parties as to what is to be treated as the regular rate for an employee; it must be drawn from what happens under the employment contract." 29 C.F.R. §778.108. As the U.S. Supreme Court has explained, the "regular rate" "must reflect all payments which the parties have agreed shall be received regularly during the workweek, exclusive of overtime payments. It is not an arbitrary label chosen by the parties; it is an actual fact." *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 424 (1945). This is because the dual purposes of the "regular rate" requirement in overtime law are to deter employers from overworking their employees (by spreading work to additional employees) and to compensate employees who perform long hours of work. *Id.* at 423-24; *see also Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 577-78 (1942); *Murphy*, 40 Cal.4th at 1109 (overtime premiums have dual purpose of "compensat[ing] employees for their time [and] serv[ing] a secondary function of shaping employer conduct"). A so-called "regular rate" that is not what employees are actually paid -- because their *full* compensation package includes additional forms of non-discretionary pay -- "is not in fact the regular rate under any normal circumstances." *Youngerman-Reynolds*, 325 U.S. at 426.

Allowing an employer to exclude from the so-called "regular" rate whatever forms of compensation it chooses would undermine the deterrent purposes of the overtime premium requirement by lessening the impact on employers' pocketbooks of requiring employees to work long hours.

Similar considerations govern the interpretation of the term "regular rate of compensation" under Section 226.7. Rest breaks required by the Labor Code and Wage Orders are considered "so sacrosanct that [they are] unwaivable." *Vaquero v. Stoneledge Furniture, LLC*, 9 Cal.App.5th 98, 113 (2017), *review denied* (2017). As such, they are "'part of the remedial worker protection framework'" that calls for an interpretation of the Wage Orders to "'best effectuate that protective intent.'" *Id.*, quoting *Brinker*, 53 Cal.4th at 1027.

Like overtime premiums, the premium pay remedy for meal-period-and-rest-break violations was intended "as a premium wage to compensate employees, while also acting as an incentive for employers to comply with labor standards." *Murphy*, 40 Cal.4th at 1094. That incentive would be sorely undermined if employers were permitted to designate any portion of their employees' compensation package they choose as the "regular" portion for purposes of calculating meal-and-rest-period premium pay.

Consider, for example, sales employees who earn a base hourly rate plus commissions. Under the Superior Court's construction of "regular rate of compensation," the employer could designate only the hourly pay as the "regular" rate for meal

and rest period premiums, even if the overwhelming percentage of the employee's compensation consisted of commissions -- and even though that so-called "regular" rate was never the amount that any employee earned or was reasonably expected to earn (as even a moderately successful salesperson). *See Youngerman-Reynolds*, 325 U.S. at 426. That interpretation would deter commissioned employees from taking their rest periods (because they cannot earn sales-based commissions while resting, *see Vaquero*, 9 Cal.App.5th at 112) while gutting the incentive for employers to provide timely paid breaks, because the cost of not providing such breaks would be based on an artificially low rate of employee compensation. Including all compensation in the calculation of the "regular rate of compensation" for those premiums ensures that the premium pay remedy imposes the maximum deterrent effect on employers, thereby best effectuating that the remedial purposes of the Labor Code's and the Wage Orders' rest period requirements.

CONCLUSION

For the foregoing reasons, and those stated in plaintiff Ferra's briefs, this Court should reverse the Superior Court's grant of summary adjudication on the Labor Code §226.7 issue.

Dated December 10, 2018

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CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 5094 words, including footnotes, but excluding the Tables of Contents and Authorities. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

Dated December 10, 2018

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By: */s/ Eileen Goldsmith*
Eileen Goldsmith

Attorneys for Amici Curiae
California Employment
Lawyers Association and
Jacqueline F. Ibarra

PROOF OF SERVICE

I am employed in the State of California, County of San Francisco. I am over the age of 18 and not a party to the within suit; my business address is 177 Post Street, Suite 300, San Francisco, California 94108.

On December 10, 2018, I served the documents describes as: **APPLICATION OF CALIFORNIA LAWYERS ASSOCIATION AND JACQUELINE F. IBARRA FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFF-APPELLANT JESSICA FERRA; PROPOSED BRIEF** on the interested parties in this action as follows:

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DENNIS F. MOSS
MOSS BOLLINGER, LLP
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Sherman Oaks, California 91403

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VIA TRUEFILING ELECTRONIC SERVICE SYSTEM

I transmitted via the internet a true copy(s) of the above-entitled document(s) through the Court's Mandatory Electronic filing System via the TrueFiling Portal, and concurrently caused the above-entitiled Document(s) to be sent to the recipients listed above pursuant to the E-Service List maintained by and as it exists on that database. This will constitute service of the above-listed document(s).

Clerk's Office

Los Angeles Superior Court

Central Civil West

600 S. Commonwealth Ave.

Los Angeles, CA 90005

BY MAIL

I am "readily familiar with the firm's practice of processing correspondence for mailing. Under that practice it would be deposited with the US postal service on that same day with postage theron fully prepaid at San Francisco, California in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this December 10, 2018 at San Francisco, California.

Joaquin Banuelos	/s/ Joaquin Banuelos
Type or Print Name	Signature