S259172

IN THE SUPREME COURT OF CALIFORNIA

JESSICA FERRA,

Plaintiff and Appellant,

v.

LOEWS HOLLYWOOD HOTEL, LLC,

Defendant and Respondent.

SECOND APPELLATE DISTRICT, DIVISION THREE, NO. B283218
LOS ANGELES COUNTY SUPERIOR COURT NO. BC586176

ANSWER BRIEF ON THE MERITS

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and Los Angeles County District Attorney
Required by Bus. & Prof. Code, § 17209

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INTRODUCTION

The sole issue on which this Court granted review is whether the Legislature intended the term "regular rate of compensation" in Labor Code section 226.7,[1] which requires employers to pay a wage premium if they fail to provide a legally-compliant meal period or rest break, to have the same meaning and require the same calculations as the term "regular rate of pay" in section 510(a), which requires employers to pay a wage premium for each overtime hour. The trial court and Court of Appeal both correctly answered this question in the negative, as have most federal district courts to address the issue.

Defendant and Respondent Loews Hollywood Hotel, LLC (Loews) follows the settled, standard practice of tens of thousands of California employers—upheld by the trial court and Court of Appeal—by paying required meal and rest period premiums (i.e., break premiums) at hourly employees' base hourly wage rate. Plaintiff and Appellant Jessica Ferra argues that California employers instead must pay these premiums at employees' "regular rate of pay," a California overtime pay law term of art that incorporates multiple forms of pay beyond the base hourly rate (e.g., commissions, non-discretionary bonuses).

This Court should reject Ferra's theory. As the Court of Appeal correctly concluded, the plain statutory language differentiates "regular rate of compensation" from "regular rate of pay." This result is consistent with the differences in policy

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[1] All undesignated statutory references are to the Labor Code.

objectives between the meal and rest period premium requirements and the overtime pay laws, as well as precedents of this Court and the Courts of Appeal which have addressed related issues. The rationale for defining "regular rate of pay" to include forms of pay other than the base hourly rate—to ensure employers do not circumvent overtime laws by paying a low hourly rate—is logically inapplicable to break premiums, which unlike overtime premiums are not proportional to time worked and may be owed to employees who perform no overtime work.

Legislative and administrative history do not compel the conclusion that the two phrases have the same meaning—nor does the language of other Labor Code provisions. Although the Division of Labor Standards Enforcement (DLSE) filed a brief supporting Ferra's petition for review with this Court, it had said nothing consistent with Ferra's position for nearly two decades—and it has no record of directing employers to pay meal or rest premiums at the overtime premium rate, rather than the base hourly rate.

All of Ferra's arguments to this Court rest, explicitly or implicitly, on the notion that "regular rate" is a term of art by itself. But this is true only under federal law, which requires wage premiums for weekly overtime *but does not regulate meal periods or rest breaks*. As Ferra concedes, the wage orders issued by the Industrial Welfare Commission (IWC) dating back to at least 1968 universally have required overtime premiums to be calculated at the "regular rate of pay," which is the applicable term of art under California overtime law. Although overtime

premiums are calculated the same way under both California and federal law, no published authority has suggested the unmodified phrase "regular rate" has a specialized meaning under California law—let alone outside the overtime pay context.

If either the IWC or the Legislature had intended break premiums to be calculated at the overtime premium rate, presumably they would have used the long-established term of art "regular rate of pay" in 2000 when they adopted the applicable wage orders and section 226.7, respectively. Instead, *both* the IWC and the Legislature chose the phrase "regular rate of compensation" for break premiums—while *contemporaneously* adopting the phrase "regular rate of pay" for overtime premiums. The IWC's and Legislature's consistent use of this different terminology is presumed to be meaningful, and there is no reason to conclude otherwise.

Although the Legislature frequently uses both "pay" and "compensation" as synonyms for "wages," the dictionary definitions quoted by Ferra show that "pay" invariably is given for goods or services rendered, while "compensation" additionally may pertain to *remuneration for a loss*—such as deprivation of a legally-required meal break or rest period. This distinction aptly reflects this Court's recognition that break premiums are designed to preserve employees' health and welfare, as opposed to overtime premiums which are calculated to provide full wages for work performed.

Contrary to Ferra's assertions, California employees who lack a base hourly rate are not left without a remedy under the

Court of Appeal's holding—just as they were not even allegedly without a remedy under the practices of California employers and the DLSE for the preceding two decades. In any event, this case *only* involves hourly paid employees with a base hourly rate. The Court of Appeal did not opine on inapposite scenarios where a base hourly rate does not determine employees' compensation.

Loews respectfully submits the Court of Appeal's judgment should be affirmed. Alternatively, Loews respectfully asks that this Court deny retroactive effect to any holding that adopts Ferra's interpretation of the "regular rate of compensation" for break premiums. Most California employers—including Loews—have reasonably paid break premiums at employees' base hourly rates. The statute, wage orders, prior court decisions, and agency guidance do not provide reasonable notice that "regular rate of compensation" means the same as the overtime "regular rate of pay." The consequences of retroactive application would be fundamentally unfair and financially enormous.

STATEMENT OF FACTS

Loews operates a 628-room luxury hotel located in the heart of Hollywood. (C.T. 4:871, 960, 5:1135 [i.e., C.T., vol. 4, pp. 871, 960, vol. 5, p. 1135].) Loews employed Ferra as an hourly-paid Cocktail Server and Bartender from June 16, 2012 to May 12, 2014. (Opn., p. 2; C.T. 1:8, 4:871, 960, 5:980-984, 1031, 1135.) After an investigation, Loews terminated Ferra for gross misconduct based on its finding that she failed to adhere to Loews's cash handling procedures. (C.T. 4:871, 960, 5:1135.)

At all relevant times, Loews has paid meal and rest period premiums to its hourly-paid employees at their base hourly rate of compensation earned at the time the break was allegedly not provided. (C.T. 1:8.) Thus, for example, if Ferra earned a base hourly rate of $15.69 at the time she missed a meal break, she would have been paid a $15.69 meal premium. (*Ibid.*) When Loews pays these premiums, it does not include an additional amount based on incentive compensation (such as non-discretionary quarterly bonuses). (*Ibid.*; opn., pp. 2-3; see, e.g., C.T. 6:1237.)

PROCEDURAL HISTORY

Ferra filed her operative First Amended Complaint on October 7, 2015. (Opn., p. 2; C.T. 1:4-5.) Ferra asserted causes of action for failure to pay minimum wages (Lab. Code, § 1197), failure to pay all wages due during each pay period (*id.*, §§ 204, 226.7), failure to pay overtime wages (*id.*, §§ 510, 1194), violation of the Unfair Competition Law (Bus. & Prof. Code, § 17200, et seq.), failure to pay all wages owed upon termination (Lab. Code, §§ 201-203, 510, 1194), and failure to furnish accurate wage statements (*id.*, § 226). (C.T. 5:1014-1028.) Each cause of action was asserted on behalf of one of three alleged classes, the broadest of which was defined to include all Loews employees in California dating back to June 26, 2011. (Opn., p. 2; C.T. 5:1018, 1021-1027.) Ferra alleged that Loews improperly calculated premium pay for missed meal and rest periods based on class members' hourly rate, thus resulting in nonpayment of "wages and penalties." (C.T. 5:1016, 1022.) Ferra also claimed Loews

failed to pay wages, and underpaid wages, by subjecting class members "to a rounding policy." (C.T. 5:1017-1018, 1021.)

On August 19, 2016, pursuant to the parties' stipulation and Code of Civil Procedure section 437c, subdivision (t), the trial court ordered that it would summarily adjudicate the following legal issues based on stipulated undisputed facts: (1) "Whether meal and rest period premium payments paid to employees pursuant to Labor Code § 226.7 must be paid at employees' 'regular rate of compensation,' i.e. their regular hourly wage, or at their 'regular rate of pay'"; and (2) if the trial court rejected Loews's interpretation of "regular rate of compensation," whether section 226.7 "is void for uncertainty under the 'due process' clause of the United States Constitution because [Loews] and other employers have not been on notice of what is required by [section] 226.7." (C.T. 1:16; opn., p. 3.)

Loews filed its motion for summary adjudication of the above-referenced issues, and supporting papers, on October 5, 2016. (C.T. 1:29-137.) Ferra filed her opposition papers on November 23, 2016 (C.T. 2:246-488, 3:489-598), and Loews filed reply papers on December 9, 2016 (C.T. 3:601-638).

After taking the motion under submission on January 24, 2017 (C.T. 5:1091), the trial court issued an order on February 6, 2017, in which it granted the motion as to the first issue and deemed the second issue to be moot (C.T. 5:1092-1107; opn., p. 3). The trial court agreed with Loews that break premiums "must be paid at employees' 'regular rate of compensation,' i.e., their regular hourly wage, and not at their 'regular rate of pay.'" (C.T.

5:1104; opn., p. 3.) Subsequently, on March 24, 2017, the trial court issued an order granting summary judgment for Loews and specifically finding its rounding policy is neutral both on its face and as applied. (C.T. 6:1425-1446; opn., pp. 3-4.)

Ferra appealed the judgment. (Opn., p. 4.) In a published decision, the Second District Court of Appeal, Division Three, affirmed the judgment in full. (Opn., p. 22; *Ferra v. Loews Hollywood Hotel, LLC* (2019) 40 Cal.App.5th 1239.)

LEGAL DISCUSSION

I. SUMMARY JUDGMENT IS APPROPRIATE WHERE, AS HERE, THERE ARE NO TRIABLE ISSUES OF MATERIAL FACT.

Summary judgment or adjudication "shall be granted if all the papers submitted show that there is no triable issue as to any material fact …." (Code Civ. Proc., § 437c, subds. (c), (f)(2).) A moving defendant meets its "burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action … cannot be established, or that there is a complete defense to that cause of action." (*Id*., subd. (p)(2).) Once the defendant meets its burden, "the burden shifts to the plaintiff ... to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto." (*Ibid*.) The trial court's order granting summary adjudication is reviewed independently. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 870.)

II. THE TRIAL COURT AND COURT OF APPEAL CORRECTLY RULED THAT BREAK PREMIUMS MUST BE PAID AT EMPLOYEES' REGULAR HOURLY RATE, RATHER THAN AT THE OVERTIME "REGULAR RATE OF PAY."

In 1999, the Legislature passed Assembly Bill No. 60 (1999-2000 Reg. Sess.) (AB 60), titled the "Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999." This law required the IWC to "review its wage orders and readopt orders conforming to the Legislature's expressed intentions," and also added Labor Code section 512, "which for the first time set out statutory meal period requirements." (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1045 (*Brinker*).)

In compliance with AB 60, the IWC conducted a "plenary review," held public hearings, "and adopted revised wage orders for each industry, including the current version of Wage Order No. 5, wage order No. 5-2001" (*Brinker*, at pp. 1045-1046)—which the parties agree governs this case (see OBM 4-5 [i.e., Appellant's Opening Brief on the Merits, pp. 4-5]). For the first time, the wage orders provided for meal and rest period premiums. The relevant subdivisions of Wage Order No. 5-2001 state as follows:

> "If an employer fails to provide an employee a meal period in accordance with the applicable provisions of this Order, the employer shall pay the employee one (1) hour of pay at the employee's *regular rate of compensation* for each work day that the meal period is not provided." (IWC Wage Order No. 5-2001 (Cal. Code Regs., tit. 8, § 11050) (Wage Order No. 5-2001), subd. 11(B), italics added.)

> "If an employer fails to provide an employee a rest period in accordance with the applicable provisions of this Order, the employer shall pay the employee one

> (1) hour of pay at the employee's *regular rate of compensation* for each work day that the rest period is not provided." (*Id.*, subd. 12(B), italics added.)[2]

Later in the same session in which it adopted AB 60, the Legislature passed Assembly Bill No. 2509 (1999-2000 Reg. Sess.) (AB 2509), which codified the meal and rest premium requirements newly added to the wage orders. Section 226.7 precludes an employer from requiring an employee "to work during a meal or rest or recovery period mandated pursuant to an applicable statute, or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health." (Lab. Code, § 226.7, subd. (b).) If an employer fails to provide an employee a meal, rest, or recovery period as required by state law, it "shall pay the employee one additional

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[2] IWC Wage Order Nos. 1-2001 through 4-2001, 6-2001 through 12-2001, 15-2001, and 16-2001 likewise provide for one hour's pay at the "regular rate of compensation" for failure to provide meal and rest periods. (See Cal. Code Regs., tit. 8, § 11010, subds. 11(D), 12(B); *id.*, § 11020, subds. 11(D), 12(B); *id.*, § 11030, subds. 11(D), 12(B); *id.*, § 11040, subds. 11(B), 12(B); *id.*, § 11060, subds. 11(D), 12(B); *id.*, § 11070, subds. 11(D), 12(B); *id.*, § 11080, subds. 11(D), 12(B); *id.*, § 11090, subds. 11(D), 12(B); *id.*, § 11100, subds. 11(D), 12(B); *id.*, § 11110, subds. 11(D), 12(B); *id.*, § 11120, subds. 11(C), 12(B); *id.*, § 11150, subds. 11(D), 12(B); *id.*, § 11160, subds. 10(F), 11(D); see *id.*, § 11170, subd. 9(C) [Wage Order No. 17-2001 ("miscellaneous employees") requires meal premiums but not rest periods].) Wage Order Nos. 13-2001 and 14-2001 (various agriculture employees) both require meal and rest periods, but do not separately prescribe premium pay for failure to provide such periods. (See Cal. Code Regs., tit. 8, § 11130, subds. 11, 12, § 11140, subds. 11, 12.)

hour of pay at the employee's *regular rate of compensation* for each workday that the meal or rest or recovery period is not provided." (*Id*., subd. (c), italics added.)

Ferra contends the phrase "regular rate of compensation" in section 226.7(c) and the wage order has the same meaning as "regular rate of pay," which was an established term of art in the context of overtime premium pay under California law long before 2000. (See Lab. Code, § 510, subd. (a); Wage Order No. 5-2001, subd. 3(A)(1); pp. 22-27, *post*.) The trial court and Court of Appeal disagreed with Ferra, and followed the weight of authority which holds that, for hourly-paid employees such as Ferra, the "regular rate of compensation" is their regular hourly wage. These lower court decisions were correct.

A. Multiple Canons of Statutory Construction Support Construing "Regular Rate of Compensation" to Mean an Employee's Base Hourly Rate.

In ascertaining a statute's meaning, courts "examine the language first, as it is the language of the statute itself that has 'successfully braved the legislative gauntlet.' [Citation.]" (*Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1117 (*Wasatch*).) "[T]he words of the statute … '… generally provide the most reliable indicator of legislative intent.' [Citation.]" (*Murphy v. Kenneth Cole Productions, Inc*. (2007) 40 Cal.4th 1094, 1103 (*Murphy*).)

The statute's plain language controls if it is "without ambiguity, doubt, or uncertainty." (*Halbert's Lumber, Inc. v. Lucky Stores, Inc*. (1992) 6 Cal.App.4th 1233, 1239; see *People v.*

Snook (1997) 16 Cal.4th 1210, 1215 ["If there is no ambiguity in the language, we presume the Legislature meant what it said and the plain meaning of the statute governs."].) "[S]tatutes governing conditions of employment are to be construed broadly in favor of protecting employees. [Citations.] Only when the statute's language is ambiguous or susceptible of more than one reasonable interpretation, may the court turn to extrinsic aids to assist in interpretation. [Citation.]" (*Murphy*, *supra*, 40 Cal.4th at p. 1103.) Courts "will apply common sense to the language at hand and interpret the statute to make it workable and reasonable. [Citation.] Accordingly, the statute should be interpreted to avoid an absurd result. [Citations.]" (*Wasatch*, *supra*, 35 Cal.4th at p. 1122; *People v. Clark* (1990) 50 Cal.3d 583, 605 [courts construe statute so as to avoid "arbitrary, unjust, and absurd results whenever the language of the statute is susceptible of a more reasonable meaning"].)

Courts must give significance to every word and phrase in the statute. (*Flowmaster, Inc. v. Superior Court* (1993) 16 Cal.App.4th 1019, 1028 (*Flowmaster*).) Courts do "not presume that the Legislature performs idle acts," or "construe statutory provisions so as to render them superfluous." (*Shoemaker v. Myers* (1990) 52 Cal.3d 1, 22 (*Shoemaker*).)

"An intention to legislate by implication is not to be presumed." (*In re Christian S.* (1994) 7 Cal.4th 768, 775 ["we are aware of no authority that supports the notion of legislation by accident"].) This is particularly so where such an implication is contrary to a "long-standing" practice. (See *Steinhebel v. Los*

Angeles Times Communications, LLC (2006) 126 Cal.App.4th 696, 709 (*Steinhebel*) [upholding legality of compensating employees with advances on commissions; "In view of its widespread nature, we are loath to hold the Labor Code bars such a practice by implication."].)

"Where different words or phrases are used in the same connection in different parts of a statute, it is presumed the Legislature intended a different meaning." (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1117 (*Briggs*).) In addition, "if the Legislature carefully employs a term in one statute and deletes it from another, it must be presumed to have acted deliberately." (*Ferguson v. Workers' Comp. Appeals Bd.* (1995) 33 Cal.App.4th 1613, 1621 (*Ferguson*); see *Murphy*, *supra*, 40 Cal.4th at p. 1108 ["That the Legislature chose to eliminate penalty language in section 226.7 while retaining the use of the word in other provisions of [AB] 2509 is further evidence that the Legislature did not intend section 226.7 to constitute a penalty."].)

"The IWC's wage orders are to be accorded the same dignity as statutes." (*Brinker*, *supra*, 53 Cal.4th at p. 1027.) Because wage orders "are quasi-legislative regulations," they "are construed in accordance with the ordinary principles of statutory interpretation." (*Gonzalez v. Downtown LA Motors, LP* (2013) 215 Cal.App.4th 36, 43, quoted in *Vaquero v. Stoneledge Furniture, LLC* (2017) 9 Cal.App.5th 98, 107.)

The Court of Appeal majority invoked many of these canons (opn., pp. 7-10), as opposed to relying "entirely" or "almost

entirely" on *Briggs*, as Ferra and the dissenting opinion erroneously assert (OBM 12, 23; dis. opn., pp. 21-23).[3] These familiar principles confirm Loews's interpretation of section 226.7(c) and Wage Order No. 5-2001, subdivisions 11(B) and 12(B), and do not support Ferra's position.

1. Section 226.7 and the Corresponding Wage Order Subdivisions on Break Premiums Do Not Include the Overtime Term of Art "Regular Rate of Pay."

The statutory and wage order provisions on overtime premiums exclusively use the phrase "regular rate of pay." Section 510 states in pertinent part:

> "… Any work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek and the first eight hours worked on the seventh day of work 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. Any work in excess of 12 hours in one day shall be compensated at the rate of no less than twice the *regular rate of pay* for an employee. In addition, any work in excess of eight hours on any seventh day of a workweek shall be compensated at the rate of no less than twice the *regular rate of pay* of an employee…." Lab. Code, § 510, subd. (a), italics added.)

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[3] Justice Edmon concurred with the majority that "Loews's policy of rounding time entries up or down to the nearest quarter hour is lawful." (Dis. opn., p. 1.) Since this Court denied review on the "rounding" issue, Justice Edmon's opinion will be referenced herein as the "dissent."

Wage Order No. 5-2001 contains the following overtime pay provisions:

> "(1) [Covered] employees shall not be employed more than eight (8) hours in any workday or more than 40 hours in any workweek unless the employee receives one and one-half (1½) times such employee's *regular rate of pay* for all hours worked over 40 hours in the workweek…. Employment beyond eight (8) hours in any workday or more than six (6) days in any workweek is permissible provided the employee is compensated for such overtime at not less than:
>
> "(a) One and one-half (1½) times the employee's *regular rate of pay* for all hours worked in excess of eight (8) hours up to and including twelve (12) hours in any workday, and for the first eight (8) hours worked on the seventh (7th) consecutive day of work in a workweek; and
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> "(b) Double the employee's *regular rate of pay* for all hours worked in excess of 12 hours in any workday and for all hours worked in excess of eight (8) hours on the seventh (7th) consecutive day of work in a workweek." (Wage Order No. 5-2001, subd. 3(A), italics added.)

In all, Wage Order No. 5-2001 uses the phrase "regular rate of pay" a total of 18 times—including in the context of alternative workweek schedules (Wage Order No. 5-2001, subd. 3(B)(1), (2), (8)), other specific overtime pay provisions (*id.*, subds. 3(E)(1), (2), (F)), and reporting time pay (*id.*, subd. 5(A), (B)).[4]

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[4] Wage Order Nos. 1-2001 through 4-2001 and 6-2001 through 17-2001 use the phrase "regular rate of pay" in similar contexts. (See Cal. Code Regs., tit. 8, § 11010, subds. 3(A), (B), (D), 5(A), (B); *id.*, § 11020, subds. 3(A), (B), (D), 5(A), (B); *id.*, § 11030, subds. 3(A), (B), (D), 5(A), (B); *id.*, § 11040, subds. 3(A), (B), (E), 5(A), (B); *id.*, § 11060, subds. 3(A), (B), (D), 5(A), (B); *id.*,

By comparison, Wage Order No. 5-2001 uses the phrase "regular rate of compensation" *only twice*—both in the context of meal and rest break premiums. (*Id.*, subds. 11(B), 12(B).) All other wage orders likewise use the phrase "regular rate of compensation" (if at all) exclusively in the context of meal and rest break premiums. (See p. 18 & fn. 2, *ante*.)

One wage order subdivision includes both "regular rate of pay" and "regular rate of compensation," but in distinct contexts. Wage Order No. 16-2001 (for on-site employees in construction, drilling, logging, and mining) excuses the rest period requirement "in limited circumstances when the disruption of continuous operations would jeopardize the product or process of the work," but requires the employer to either "make up the missed rest period within the same workday or compensate the employee for the missed ten (10) minutes of rest time at his/her *regular rate of pay* within the same pay period." (IWC Wage Order No. 16-2001 (Cal. Code Regs., tit. 8, § 11160), subd. 11(B), italics added.) However, this same wage order—like all others that prescribe premiums for failure to provide meal and rest periods—sets both premiums at the "*regular rate of compensation*." (*Id.*, subds. 10(F), 11(D), italics added.)

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§ 11070, subds. 3(A), (B), (E), 5(A), (B); *id.*, § 11080, subds. 3(A), (B), (D), 5(A), (B); *id.*, § 11090, subds. 3(A), (B), (D), 5(A), (B); *id.*, § 11100, subds. 3(A), (B), (D), (K), 5(A), (B); *id.*, § 11110, subds. 3(A), (B), (D), 5(A), (B); *id.*, § 11120, subds. 3(A), (B), (E), 5(A), (B); *id.*, § 11130, subds. 3(A), (B), (C), 5(A), (B); *id.*, § 11140, subds. 3(A), 5(A), (B); *id.*, § 11150, subds. 3(A), (B), (C), (D), 5(A), (B); *id.*, § 11160, subds. 3(A), (B), 5(A), (B); *id.*, § 11170, subd. 4(A), (B), 5(A), (B).)

Because the IWC uses different phrases in different parts of the same wage orders, it should be presumed that it intended different meanings for these phrases. (*Briggs*, *supra*, 19 Cal.4th at p. 1117.) Likewise, the Legislature's choice to use the wage orders' phrase "regular rate of compensation" in section 226.7 raises an inference that the Legislature intended that phrase to have a different meaning than the phrase "regular rate of pay" used in the overtime premium context (*ibid.*)—especially since the Legislature made these distinct choices in the same legislative session (*Murphy*, *supra*, 40 Cal.4th at p. 1108; *Ferguson*, *supra*, 33 Cal.App.4th at p. 1621).

This inference is further compelled because "regular rate of pay" is a term of art with a well-established meaning under California overtime law. As Ferra acknowledges, the wage orders have consistently used the phrase "regular rate of pay" to denote overtime premiums from "at least 1968" to the present. (OBM 49, citing *Rivera v. Division of Industrial Welfare* (1968) 265 Cal.App.2d 576, 598, fn. 35 [quoting Wage Order Nos. 8-68 and 13-68]; see *Lujan v. Southern Cal. Gas Co.* (2002) 96 Cal.App.4th 1200, 1204 [quoting Wage Order No. 4-89]; *Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 726 [quoting Wage Order No. 7-80]; *Skyline Homes, Inc. v. Department of Industrial Relations* (1985) 165 Cal.App.3d 239, 244-248 (*Skyline*) [lengthy analysis of term "regular rate of pay" in Wage Order No. 1-76], disapproved on another ground in *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 573.)

Had the IWC and Legislature intended to require break premiums to be calculated the same way as overtime premiums, they could—and presumably would—have used the term of art "regular rate of pay" in section 226.7 and the relevant wage order subdivisions, as the Legislature did in section 510 and as the IWC had done for several decades. For example, the Legislature could have simply switched the words "pay" and "compensation" in section 226.7, to state an employer "shall pay the employee one additional hour of *compensation* at the employee's *regular rate of pay* for each workday that the meal or rest or recovery period is not provided." Or it could have provided an employer "shall *compensate* the employee one additional hour of pay at the employee's *regular rate of pay* …."

Instead, the IWC and Legislature pointedly used the phrase "regular rate of compensation," which is not a term of art and has no specialized legal meaning. These choices presumably were intentional and meaningful. (See *Murphy*, *supra*, 40 Cal.4th at p. 1108; *Briggs*, *supra*, 19 Cal.4th at p. 1117; *Ferguson*, *supra*, 33 Cal.App.4th at p. 1621.)

Moreover, the Legislature amended section 226.7 in 2013 to define the term "recovery period," but has not defined the term "regular rate of compensation."[5] (Stats. 2013, ch. 719, § 1.) Where, as here, a statute defines one term but not another, it further "supports a conclusion that no specialized legal meaning

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[5] The only other amendment to section 226.7, in 2014, confirmed existing law that rest and recovery periods "shall be counted as hours worked, for which there shall be no deduction from wages." (§ 226.7, subd. (d) added by Stats. 2014, ch. 72.)

was ever intended for that [undefined] term. [Citation.]" (*People v. Griffin* (2004) 33 Cal.4th 1015, 1023.) "The Legislature knows how to be specific" (*City of Oakland v. Oakland Raiders* (1982) 32 Cal.3d 60, 73), and has decided *not* to explicitly require break premiums to be calculated at the overtime premium rate. This Court should not infer such a requirement.

2. Construing "Regular Rate of Compensation" to Mean an Employee's Base Hourly Rate Best Serves the Purpose of Break Premiums, and Is the Most Workable and Reasonable Interpretation.

The dissent argues that the majority's analysis "might suggest that 'regular rate of compensation' does not mean the same thing as 'regular rate of pay'—but it does not lead logically to the conclusion that 'regular rate of compensation' means straight hourly rate." (Dis. opn., pp. 22-23.) As the dissent acknowledges, however, the phrase "regular rate of compensation" suggests only two possible meanings—"*either* an hourly rate plus incentive/bonus pay *or* an hourly rate alone." (Dis. opn., p. 2, original italics [concluding on this basis that section 226.7 is facially ambiguous]; see pp. 62-63 & fn. 9, *post*.)

Based on the dissent's own reasoning, if "regular rate of compensation" is not merely synonymous with "regular rate of pay," *it can only mean* "an hourly rate alone" (dis. opn., p. 2), as the majority correctly held. This is the most "workable and reasonable" interpretation (*Wasatch*, *supra*, 35 Cal.4th at p. 1122), has been widely followed by employers and the DLSE for the past two decades (cf. *Steinhebel*, *supra*, 126 Cal.App.4th at p.

709), and is most consistent with the relevant language and common sense. (See *Maldonado v. Epsilon Plastics, Inc.* (2018) 22 Cal.App.5th 1308, 1336 [endorsing employer's "commonsense position" that failure to pay overtime premiums does not, by itself, render paystub inaccurate under section 226].)

This interpretation also best serves the intent behind break premiums, which are not "aimed at protecting or providing employees' wages," but instead are "primarily concerned with ensuring the health and welfare of employees by requiring that employers provide meal and rest periods as mandated by the IWC." (*Kirby v. Immoos Fire Protection, Inc.* (2012) 53 Cal.4th 1244, 1255 (*Kirby*).) "In other words, a section 226.7 action is brought for the *nonprovision of meal and rest periods*, not for the 'nonpayment of wages.'" (*Ibid.*, original italics; *Murphy*, *supra*, 40 Cal.4th at p. 1104 ["An employee forced to forgo his or her meal period similarly loses a benefit to which the law entitles him or her. While the employee is paid for the 30 minutes of work, the employee has been deprived of the right to be free of the employer's control during the meal period."]; *Naranjo v. Spectrum Security Services, Inc.* (2019) 40 Cal.App.5th 444, 474 (*Naranjo*) [premium wage for failure to provide a meal or rest period is "not an amount 'earned' for 'labor, work, or service ... performed personally by the employee[]'"], review granted & depublication den., Jan. 2, 2020, No. S258966.)

By comparison, the concept of "regular rate of pay" serves the "central purpose" behind *overtime pay law*, which "is to compensate employees for their time." (*Murphy*, *supra*, 40

Cal.4th at p. 1109; see *Parth v. Pomona Valley Hospital Medical Center* (9th Cir. 2010) 630 F.3d 794, 801 [overtime premiums are designed to ensure that employees are paid fairly for their work time, and are neither overworked nor underpaid].) By defining "regular rate of pay" this way, the law precludes employers from circumventing *overtime laws* by paying low hourly rates in conjunction with non-hourly remuneration such as large nondiscretionary bonuses. (See, e.g., *Huntington Memorial Hospital v. Superior Court* (2005) 131 Cal.App.4th 893, 905.)

This overtime pay rationale does not logically apply to break premiums. *Overtime premiums are directly proportional to the amount of overtime work*. For example, an employee who works 11 hours on the first day of a workweek earns overtime premiums for three hours, while an employee who works 10 hours that same day earns overtime premiums for only two hours. (See Lab. Code, § 510, subd. (a); Wage Order No. 5-2001, subd. 3(A)(1)(a).)

Unlike overtime premiums, *break premiums do not vary according to the specific nature of the violation, and are unconnected to time worked* beyond the minimum threshold for entitlement to breaks. "[E]mployees are entitled to 10 minutes' rest for shifts of three and one-half hours or more" and at least one additional rest break for shifts exceeding six hours (*Brinker*, *supra*, 53 Cal.4th at p. 1029), and also are entitled to at least one 30-minute meal period for shifts exceeding five hours (*id.* at p. 1041). These thresholds are considerably lower than those for overtime premiums (eight hours per day, 40 hours per week).

An employee who works an eight-hour day, but is denied both of her required rest breaks during this eight-hour day, would be entitled to *the same daily premium* as if she were provided one rest break of 10 minutes and one of only five minutes. (See *Brinker*, *supra*, 53 Cal.4th at p. 1029.) If this same employee were provided no meal period at all, she additionally would be entitled to *the same daily premium* as if she were provided a 25-minute meal period but not the required 30 minutes, or if she were provided a full 30-minute meal period later than required. (See *id.* at p. 1041.)

These distinctions in premium calculations and entitlement are consistent with the premiums' disparate purposes. Including items such as a nondiscretionary bonus in the overtime "regular rate of pay" is appropriate, because the amount of time the employee works is related directly to earning the bonus. (*Murphy*, *supra*, 40 Cal.4th at p. 1109.) But no such direct relationship exists to entitlement to break premiums, which are designed to compensate employees for deprivation of *non-working* time. (*Id.* at p. 1104.) Indeed, an employee is separately entitled to pay for any time worked in lieu of all or part of a meal period (*ibid.*)—including overtime premiums if required.

Ferra insists reversal is necessary to prevent employers from "depress[ing] base hourly wages," even "far below the minimum wage (e.g., $7.00 per hour)," while increasing other wage elements. (OBM 77-78 & fn. 11.) But this goal is already served by the definition of the overtime "regular rate of pay." And Ferra's theory would require employers to calculate and pay the

"regular rate of pay" *even for employees who perform no overtime work at all*. Ferra offers no basis to infer that the IWC or Legislature intended to impose such burdens, or designed break premiums to further disincentivize lower hourly wages, rather than to compensate for deprivation of required breaks. (See *Kirby*, *supra*, 53 Cal.4th at p. 1255.)

B. No Published California Authority Supports Ferra's Interpretation of "Regular Rate of Compensation."

Contrary to Ferra's contention, *Murphy* does not bolster her assertion that "regular rate of compensation" is synonymous and interchangeable with "regular rate of pay." (OBM 28-33.) This Court held the payment provided by section 226.7 "constitutes a wage or premium pay," rather than a penalty, *for purposes of the statute of limitations*. (*Murphy*, *supra*, 40 Cal.4th at p. 1099.) The law requires an employer to pay a worker "'... *one hour of wages* for each workday when [meal and] rest periods were not offered' [citation] ...." (*Id.* at p. 1108, original italics.) This Court repeatedly referred to these premiums as merely "an additional hour of pay." (See *id*. at pp. 1099, 1102, 1104, 1107-1108, 1111-1114; accord, *Kirby*, *supra*, 53 Cal.4th at pp. 1256-1257.) Nowhere in *Murphy* (or *Kirby*) did this Court indicate that payment of anything other than one hour at the base hourly rate was required.

The Court of Appeal likewise has observed "that the remedy for a section 226.7 violation is an extra hour of pay, but the fact that *the remedy is measured by an employee's hourly*

wage does not transmute the remedy into a wage as that term is used in section 203, which authorizes penalties to an employee who has separated from employment without being paid." (*Ling v. P.F. Chang's China Bistro, Inc.*, (2016) 245 Cal.App.4th 1242, 1261, italics added, quoted in *Betancourt v. OS Restaurant Services, LLC* (2020) 49 Cal.App.5th 240, 248.) No Court of Appeal decision indicates that payment at any increased rate is required. (See *Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal.App.4th 1112, 1134 [referring to "additional hour of pay for missed meal and rest periods provided by section 226.7"]; *United Parcel Services v. Superior Court* (2011) 196 Cal.App.4th 57, 66 [employees "may recover up to two additional hours of pay on a single work day for meal period and rest period violations"].)

Ferra misconstrues *Murphy* by arguing that this Court "equat[ed] … overtime and break premium pay" (OBM 31)—an assertion Ferra did not make in her Court of Appeal briefs. This Court did note that "an employee is entitled to [an] additional hour of pay immediately upon being forced to miss a rest or meal period," and "*[i]n that way*, a payment owed pursuant to section 226.7 is akin to an employee's immediate entitlement to payment of wages or for overtime. [Citation.]" (*Murphy*, *supra*, 40 Cal.4th at p. 1108, italics added.) The Court further explained that the IWC adopted "the 'hour of pay' remedy for meal and rest period violations … as a 'penalty' in the same way that overtime pay is a 'penalty,' although it is clear that overtime pay is considered a wage and governed by a three-year statute of limitations"—and

this Court reached the same conclusion on the section 226.7 remedy. (*Murphy*, at p. 1109.) The Court also observed that section 226.7—like overtime pay, reporting-time pay, and split-shift pay—"uses the employee's rate of compensation as the measure of pay and compensates the employee for events other than time spent working." (*Murphy*, at pp. 1112-1113.) But the Court did not state or suggest that this "rate of compensation" was the "regular rate of pay" used for overtime premiums. (See *Frausto v. Bank of America, N.A.* (N.D.Cal., Aug. 2, 2018, No. 18-cv-01983-MEJ) 2018 U.S. Dist. Lexis 130220, *14 (*Frausto*) [citing *Murphy* as recognizing "that 'the section 226.7 payment[] uses the employee's rate of compensation'" rather than the overtime "regular rate"].)

Critically, *Murphy* recognized that while the "central purpose" of overtime pay is "to compensate employees for their time" (*Murphy*, at p. 1109), the central purpose of break premiums is "first and foremost to compensate employees for their injuries" (*id*. at p. 1111) resulting from deprivation "of the right to be free of the employer's control" (*id*. at p. 1104; pp. 27-31, *ante*). This latter distinction was not dispositive in *Murphy*, but it was in *Kirby*. This Court held neither section 1194 nor section 218.5 authorizes attorneys' fees in a section 226.7 action, which "is brought for the *nonprovision of meal and rest periods*, not for the 'nonpayment of wages.'" (*Kirby*, *supra*, 53 Cal.4th at p. 1255, original italics.) Conspicuously, neither Ferra nor the dissent discuss *Kirby*, which fatally undercuts the notion that

this Court has not "'differentiate[d] between overtime and break premiums." (OBM 29.)

C. Administrative and Legislative History Further Support Loews's Interpretation of "Regular Rate of Compensation."

Ferra contends that "[r]egulatory and legislative history" support her contention that the Legislature intended the phrase "regular rate of compensation" to mean the same as the overtime term of art "regular rate of pay." (OBM 69.) The opposite is true.

As noted above, the IWC first added break premiums to the wage orders in 2000 pursuant to AB 60. (See *Brinker*, *supra*, 53 Cal.4th at pp. 1045-1046; pp. 17-18, *ante*.) During a November 8, 1999 public hearing addressing implementation of AB 60 and the eight-hour workday, the DLSE's then-Chief Counsel specifically noted that premium pay for overtime work "does not necessarily mean time and a half. It could be ten cents an hour more than the regular rate of pay." (C.T. 1:94, 97, 99-100.) As the agency empowered to enforce IWC Wage Orders and other California labor laws (see *Brinker*, at p. 1029, fn. 11), the DLSE was acutely aware of the specific legal meaning of the term of art "regular rate of pay." (See C.T. 1:101-102 [Mar. 6, 1991 DLSE opn. letter discussing "Calculation of Regular Rate of Pay"].) However, at a June 30, 2000 public hearing related to break premiums, the IWC Commissioner discussed the newly-contemplated imposition of a premium wage for failure to provide meal or rest periods:

> "And what I wanted to do, and I'd ... sort of amend the language that's in there to make it clearer, that what it would require is that on any day that an

> employer does not provide a meal period or rest period in accordance with our regulations, that it shall pay the employee one hour—one additional hour of pay at the employee's *regular rate of compensation* for each workday that the meal or rest period is not provided." (C.T. 1:106-107, italics added.)

The IWC proceeded to use "regular rate of compensation," rather than "regular rate of pay," in every single wage order subdivision regarding calculation of break premiums. (See pp. 17-18, 23-24 & fn. 2, 4, *ante*.)

Meanwhile, the original version of AB 2509 provided for a premium of *twice* the employee's "average hourly rate of compensation for the full length" of the missed meal or rest periods. (AB 2509, § 12, as introduced Feb. 24, 2000, quoted in *Murphy*, *supra*, 40 Cal.4th at p. 1106.) Under this language, an hourly-paid employee who was required to perform work during two half-hour meal periods would have received premium pay for two hours at her base hourly rate. This was changed in the final version of AB 2509 to "one additional hour of pay at the employee's regular rate of compensation" in order to track the existing wage order language. (*Murphy*, at pp. 1107-1108.)

Significantly, the Legislature's stated intent in making this change was to "*codify the lower penalty amounts* adopted by the Industrial Welfare Commission." (AB 2509, concurrence in sen. amends. (Aug. 25, 2000), p. 3, ¶ 4, italics added; C.T. 1:89.) In some cases, one hour at the "regular rate of pay" could be *greater* than twice the "average hourly rate of compensation"—for example, if an employee receives substantial bonus or

commission payments. The Legislature's reference to the wage orders' "lower penalty amounts" further refutes the notion that it silently intended break premiums to be paid at the *higher* "regular rate of pay" used for overtime premiums.

The Legislative Counsel's Digest for the chaptered version of AB 2509 also supports Loews's position, stating as follows: "This bill would require any employer that requires any employee to work during a meal or rest period mandated by an order of the commission to pay the employee *one hour's pay* for each workday that the meal or rest period is not provided." (C.T. 1:112; Stats. 2000, ch. 876, p. 2, italics added.)

Although the dissent suggests its interpretation is bolstered by legislative committee report descriptions of meal and rest break premiums "in terms of rates of *pay* or *wages*," the quoted reports only include the phrases "*hourly rate of pay*," "*average hourly pay*," and "hour *of wages*" (dis. opn., pp. 13-14, original italics, citations and quotation marks omitted)—*not* the overtime term of art "regular rate of pay," which is entirely absent from the legislative history and from AB 2509 itself. By comparison, AB 60 includes the phrase "regular rate of pay" 10 times—including in its amendment to section 510, regarding calculation of overtime premiums—but never mentions the phrase "regular rate of compensation." (Stats. 1999, ch. 134.)

Given that the same Legislature passed both AB 60 and AB 2509 and—like the IWC—selected distinct terms for different premiums, this Court should not presume that the terms are interchangeable in this context. (See, e.g., *In re Christian S.*,

supra, 7 Cal.4th at p. 775; *Steinhebel*, *supra*, 126 Cal.App.4th at p. 709.) To the contrary, the Legislature's and IWC's choices to exclusively use the alternative term "regular rate of compensation" in the context of break premiums, while contemporaneously reaffirming the long-standing phrase "regular rate of pay" to establish an employer's overtime obligations, is compelling evidence that calculation of the two obligations was *not* intended to be identical. (See *Murphy*, *supra*, 40 Cal.4th at p. 1108; *Briggs*, *supra*, 19 Cal.4th at p. 1117; *Ferguson*, *supra*, 33 Cal.App.4th at p. 1621.) Nothing in the administrative or legislative history supports Ferra's attempt to equate the phrases "regular rate of pay" and "regular rate of compensation."

D. The DLSE Has No Policy or Practice of Directing Employers to Pay Meal or Rest Premiums at the Overtime Premium Rate.

"[W]hen the Legislature entered the field of meal break regulation in 1999, it entered an area where the IWC and DLSE had, over more than half a century, developed a settled sense of employers' meal break obligations." (*Brinker*, *supra*, 53 Cal.4th at p. 1038.) But in the 20 years since break premiums were established, the DLSE has no record of directing employers to pay meal or rest period premiums at the overtime premium rate rather than the base hourly rate.

In a letter dated May 29, 2014, the DLSE responded to a Public Records Act request for:

> "All records, including but not limited to reports, research, briefs, analyses, assessments made against employers, and correspondence, pertaining to the

> correct methodology to calculate the 'regular rate of compensation' owed to employees as payments for missed meal and/or rest periods under California Labor Code section 226.7. This request shall include any documents showing changes, if any, to the DLSE's enforcement policy since 2000." (C.T. 1:113-115, italics added.)

The DLSE reported that "after a statewide search" of its "databases and files," the "subject matter" of "the methodology to calculate the 'regular rate of compensation' owed to employees under Labor Code [section] 226.7" was "not found" and "no documents" could be disclosed. (C.T. 1:115.)

The DLSE's response confirmed it had no record of supporting Ferra's view that break premiums must be calculated in the same manner of overtime premiums. This is particularly noteworthy given the DLSE's detailed guidance on calculation of overtime premiums. (See, e.g., 2002 Update of DLSE Enforcement Policies and Interpretations Manual (rev. 2019) (DLSE Manual) §§ 49.1-49.2.6.2, pp. 49 - 1-8.) Presumably, if the DLSE's position had been the same as Ferra's, it could and would have responded to the 2014 public records request regarding "regular rate of compensation" *simply by referring to its ample materials addressing "regular rate of pay" in the context of overtime premiums*. It did not, thus reflecting that the DLSE recognized a material distinction between the two phrases.

Ferra focuses on a single reference in the DLSE Manual which states that "if an employer employed an employee for twelve hours in one day without any meal period, the penalty would be only one hour at the employee's regular rate of pay."

(DLSE Manual, *supra*, § 45.2.8, p. 45 - 10; OBM 62-63. But see *Murphy*, *supra*, 40 Cal.4th at p. 1105, fn. 7 [section 226.7 premium is a "wage"; DLSE was "not consistent" on this issue].) However, Ferra acknowledges only one of four uses in the Manual of the phrase "regular rate of compensation" in the context of break premiums. (DLSE Manual, *supra*, §§ 45.2, 45.2.7, 45.2.9, 45.3, pp. 45 - 5-11.)

The DLSE Manual also states that "employees must be paid for all time they are restricted to the employer's premises, or worksite, ... if they are not free to leave .... Under such circumstances, the employees must be paid *their regular rate of compensation* (which cannot be less than the minimum wage) *or any overtime rate, if applicable*." (DLSE Manual, *supra*, § 45.1.5.1, p. 45 – 3-4, italics added.) The DLSE's unmistakable distinction between "regular rate of compensation" and "overtime rate" further contradicts the notion that the "regular rate of compensation" is to be calculated in the same manner as overtime premiums—and shows the DLSE took no such position before its amicus brief supporting Ferra's petition for review.

Ferra also quotes the "Meal Periods" page of the DLSE's website, which states in part that "the employer must pay one additional hour of pay at the employee's regular rate of pay for each workday that the meal period is not provided. IWC Orders and Labor Code Section 226.7. This additional hour is not counted as hours worked for purposes of overtime calculations." (Labor Commissioner's Office, Meal Periods (rev. July 11, 2012), <https://www.dir.ca.gov/dlse/FAQ_MealPeriods.htm> [as of July

6, 2020]; C.T. 3:594; OBM 63.) But this webpage inaccurately paraphrases section 226.7 and the wage orders, and does not purport to explain how to calculate the "regular rate of compensation"—let alone articulate or suggest that the term means the same as "regular rate of pay" in the overtime premium context. There also is no indication the webpage "evidences considerable deliberation at the highest policymaking level of the agency. [Citation.]" (*Alvarado v. Dart Container Corp. of Cal.* (2018) 4 Cal.5th 542, 561 (*Alvarado*) [discussing portion of DLSE Manual which demonstrated such deliberation].) Thus, this webpage does not support Ferra's position. (See *Taylor v. Department of Industrial Relations* (2016) 4 Cal.App.5th 801, 806, fn. 3 [denying request for judicial notice of printout from DLSE website where appellant did not demonstrate "its relevance to the issues on appeal"]; *Soto v. Motel 6 Operating, L.P.* (2016) 4 Cal.App.5th 385, 393-394 (*Soto*) [not relying on sample wage statement on DLSE website, which did not "address the issue of vacation pay" and therefore was "not helpful on the issue" before the court].)

The first time the DLSE asserted that "regular rate of compensation" should be interpreted the same as the overtime "regular rate of pay" was in an amicus curiae letter to this Court in support of Ferra's petition for review. When, as here, "an agency's construction '"flatly contradicts"' its original interpretation, it is not entitled to 'significant deference.' [Citation.]" (*Murphy*, *supra*, 40 Cal.4th at p. 1105, fn. 7.)

E. Ferra's Statutory Analysis Is Unpersuasive.

1. "Regular Rate," By Itself, Is Not a Term of Art Under California Law.

The centerpiece of Ferra's position is the notion that the phrase "regular rate" is a term of art in and of itself, with a "legal meaning" that "must be honored in every wage and hour context where it is utilized." (OBM 34.) California law does not support Ferra's argument.

The term "regular rate" does have a specialized meaning—*under federal overtime law*, as Ferra discusses at considerable length. (OBM 36-49.) The Fair Labor Standards Act (FLSA) defines "regular rate" only for purposes of the section which requires overtime premium pay and sets maximum weekly hours of work. (29 U.S.C. § 207, subds. (a), (e).) The definition states in pertinent part: "*As used in this section* the 'regular rate' at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include [specified items]." (*Ibid.*, subd. (e), italics added.) The FLSA does not include the terms "regular rate of pay" or "regular rate of compensation"—and contains *no provisions at all regarding meal and rest periods*.

Conversely, California's statutory and wage order provisions regarding overtime premiums use the term "regular rate of pay," *not* "regular rate" by itself. (Lab. Code, § 510, subd. (a); Wage Order No. 5-2001, subd. 3(A).) Loews is unaware of any authority which suggests that "regular rate" has any specialized

meaning under California law—much less such a meaning *outside the overtime pay context* to which the FLSA pertains.

As this Court has recognized, "where the language or intent of state and federal labor laws substantially differ, reliance on federal regulations or interpretations to construe state regulations is misplaced. [Citations.]" (*Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 798.) The language *and* intent of California's meal and rest period premium provisions differ substantially from that of federal (and state) overtime law (see pp. 27-31, *ante*), so it is misguided for Ferra to rely on FLSA regulations and interpretations.

Ferra claims this Court "confirmed and enhanced the 'term of art' status of 'regular rate' in California" in *Alvarado*, *supra*, 4 Cal.4th 542. (OBM 35.) But the *Alvarado* majority and concurring opinions used the phrase "regular rate[s] of pay" a combined 73 times when discussing California overtime pay law (*Alvarado*, at pp. 549-554, 559-567, 569-573 & fn. 1, 2, 4)—compared to only one use of the unmodified phrase "regular rate" *when quoting a federal overtime regulation* (*id.* at p. 551, fn. 3) and one shorthand use of "*that regular rate*" when referring to an employer's calculation of "a regular rate of pay" (*id.* at p. 563, italics added, discussing *Skyline*, *supra*, 165 Cal.App.3d at pp. 245-246). *Alvarado* confirmed "regular rate of pay" as a term of art under California law, but not "regular rate" by itself.

The same is true of the Court of Appeal decisions cited by Ferra. In *Advanced-Tech Security Services, Inc. v. Superior Court* (2008) 163 Cal.App.4th 700, the court used "regular rate" once in

its factual discussion (*id*. at p. 703) and otherwise only when quoting the FLSA or case law thereunder (*id*. at pp. 707-708). In *Alcala v. Western Ag Enterprises* (1986) 182 Cal.App.3d 546, the court used "*[t]his regular rate*" once in its factual discussion (*id*. at p. 549, italics added), and used "regular rate" once when discussing a prior Court of Appeal decision (*id*. at p. 551, discussing *Skyline*, *supra*, 165 Cal.App.3d at pp. 245, 248-249) and two other times when discussing federal law (*id*. at p. 550 & fn. 2). In *Skyline*, the court used "regular rate" three times (twice in one paragraph) when discussing California law (*id.* at pp. 245, 248) and several other times when discussing federal law (*id*. at pp. 246-247, 251, fn. 3).

The only case cited by Ferra which frequently uses the unmodified phrase "regular rate" when referring to California overtime law was decided *five years after* the IWC and Legislature adopted premiums for meal and rest violations (*Huntington Memorial Hospital v. Superior Court*, *supr*a, 131 Cal.App.4th at pp. 902-907), and is not arguably probative of what the IWC or Legislature intended in 2000. The mere fact that California courts have construed "regular rate of pay" under state overtime pay law to mean the same as "regular rate" under federal overtime pay law (OBM 52-53) likewise does not establish that "regular rate" is itself a term of art under California law—particularly outside the overtime context, in which the term was coined and exclusively applies under federal law.

2. The Definition of "Compensation"—Unlike That of "Pay"—Includes Reparation for a Loss, Consistent with the Distinct Policy Underlying Break Premiums.

Building on her unfounded contention that "regular rate" is a term of art under California law, Ferra argues that the words "compensation" and "pay" are interchangeable and that "regular rate of compensation" should be defined the same as "regular rate of pay." (OBM 53-69.) But as discussed above, this would violate settled canons of statutory interpretation by rendering meaningless the choices by the IWC and Legislature to use "compensation" in the context of break premiums, rather than "pay" as for overtime premiums. (See pp. 19-27, *ante*.)

Moreover, Ferra's reliance on dictionary definitions exposes a subtle but significant difference in the terms "compensation" and "pay." As this Court has observed, "'[p]ay is defined as 'money [given] in return for goods or services rendered.' (American Heritage Dict. (4th ed. 2000) p. 1291.)" (*Murphy*, *supra*, 40 Cal.4th at p. 1104; accord, American Heritage Dict. (2016) p. 1295 [defining the noun "pay" as "money given in exchange for work done"].) "Compensation" has a similar meaning, and "the Legislature has frequently used the words 'pay' or 'compensation' in the Labor Code as synonyms for 'wages.' [Citations.]" (*Murphy*, at p. 1104, fn. 6; see Lab. Code, § 200 [defining "wages" to include "all amounts for labor performed by employees …" and "labor" to include "labor, work, or service … performed personally by the person demanding payment"].) But unlike "pay," "compensation" also means "something, such as

money, given or received as payment *or reparation*, as for a service *or loss*." (American Heritage Dict. (2016) p. 376, quoted in OBM 68, italics added.)

These distinct definitions are consistent with the different purposes behind premiums for overtime work and for missed meal and rest periods. The definition of "compensation" as a "reparation" for a "loss" is consistent with the purpose underlying break premiums, while the definition that "compensation" shares with "pay"—money in return for work rendered—is not. (See pp. 27-31, *ante*.) Construing meal and rest premium "compensation" as having a different meaning than overtime premium "pay" thus fulfills the different purposes behind the two sets of provisions, and comports with the canon requiring courts to give significance to every word and phrase in a statute (*Flowmaster*, *supra*, 16 Cal.App.4th at p. 1028) rather than presuming the different word choices to be "idle acts" (*Shoemaker*, *supra*, 52 Cal.3d at p. 22).

Ferra also unavailingly relies on the use of the phrase "regular rate of pay" in a statute adopted in *2018*, which changed the law on rest periods for "nonexempt employees holding safety-sensitive positions at a petroleum facility." (OBM 58-59, citing Lab. Code, § 226.75, subd. (b) [effective Sept. 20, 2018, to be repealed by its own terms Jan. 1, 2021].) While the 2018 Legislature provided that rest period premiums for employees covered by section 226.75 are to be calculated at the "regular rate of pay," *it did not amend section 226.7* to use that phrase instead of "regular rate of compensation," or otherwise provide that break premiums under section 226.7 are to be calculated the same way

as overtime pay, or declare that the terms "regular rate of pay" and "regular rate of compensation" are synonymous.[6] In any event, the language the 2018 Legislature used in one statute has no impact on the meaning of the language the 2000 Legislature used in a different statute. (See *McClung v. Employment Development Dept*. (2004) 34 Cal.4th 467, 473 (*McClung*) [Legislature has no authority to declare "what it *did* mean" in a past statute] [original italics, citations and quotation marks omitted]; cf. *Pension Benefit Guaranty Corp. v. LTV Corp.* (1990) 496 U.S. 633, 650 ["[S]ubsequent legislative history is a 'hazardous basis for inferring the intent of an earlier' Congress. [Citation.]"].)

Apart from her misguided assertion that "regular rate" is a "term of art" under California law, the statutory construction canon Ferra emphasizes is that labor statutes and regulations are liberally construed to promote the protection of employees. (OBM 17, citing *Ramirez v. Yosemite Water Co*., *supra*, 20 Cal.4th at p. 794 [overtime exemptions "are narrowly construed"]; dis. opn., pp. 3-4.) But this Court has rejected the notion that the Labor Code's "general employee-protective thrust" inexorably compels courts to adopt statutory interpretations favored by

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[6] The Legislature also did not amend section 226.7 in 2015 when it added section 226.2, which specifies requirements for compensating piece-rate employees for rest and recovery periods, *but is silent on premium wages*. (See § 226.2, subd. (a)(3)(i), added by Stats. 2015, ch. 754, § 4; Frequently Asked Questions, Piece-Rate Compensation—Labor Code §226.2 (AB 1513), <https://www.dir.ca.gov/pieceratebackpayelection/AB_1513_FAQs.htm> [as of July 6, 2020].)

employee-plaintiffs—particularly when the interpretations do not comport with legislative intent. (*Mendoza v. Nordstrom, Inc.* (2017) 2 Cal.5th 1074, 1087 ["the Legislature intended to ensure employees, as conducive to their health and well-being, a day of rest each week, not to prevent them from ever working more than six consecutive days at any one time"]; see *Kirby*, *supra*, 53 Cal.4th at p. 1250 [notwithstanding the principle favoring employee protection, a plaintiff who prevails on a section 226.7 claim is not entitled to attorney fees under section 1194]; *Soto*, *supra*, 4 Cal.App.5th at p. 393 [principle favoring pro-employee construction of wage statutes does not authorize courts to rewrite the law to add what has been omitted, omit what has been added, or give the statute an effect beyond its plain language].)

Ferra ignores the majority's conclusion that its interpretation of "regular rate of compensation," which requires "employers to compensate employees with a full extra hour at their base hourly rate for working through a 30-minute meal period, or for working through a 10-minute rest break, provides a premium that favors the protection of employees." (Opn., p. 17.) The dissent contends that Ferra's interpretation "unquestionably encourages compliance with meal and rest break requirements because it raises the cost to employers of noncompliance." (Dis. opn., p. 3.) But as discussed herein, that interpretation does not correctly reflect the Legislature's intent in establishing break premiums. (See pp. 27-31, *ante*.)

3. Ferra's Position Is Not Supported by Use of the Term "Regular Rate of Compensation" in Other Labor Code Sections.

Ferra also relies on the Legislature's use of the term "regular rate of compensation" in two Labor Code sections which were enacted before section 226.7. (See OBM 60-61, citing Lab. Code, §§ 204.3, 751.8.) But neither statute uses the phrase "regular rate of pay," and neither supports Ferra's attempt to apply that term of art to section 226.7.

Section 204.3 allows an employee to receive compensating time off (CTO) "in lieu of overtime compensation," under specified terms and conditions, 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." (§ 204.3, subd. (a), added by Stats. 1993, ch. 544, § 1.) Under section 204.3, an employee entitled to overtime compensation for 10 hours of employment would be entitled to at least 15 hours of CTO, and an employee entitled to "double time" compensation for 10 hours (see Lab. Code, § 510, subd. (a), third and fourth sentences) may receive 20 hours of CTO.

The phrase on which Ferra relies states: "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." (§ 204.3, subd. (a), italics added.) As used in section 204.3, the phrase "regular rate of compensation" *only explains how to calculate CTO*, and has

nothing to do with calculation of overtime pay, much less meal or rest period premiums. The statute therefore does not support Ferra's suggestion that the Legislature has used "regular rate of compensation" and "regular rate of pay" interchangeably "with regard to overtime." (OBM 59-61.)

The legislative history of section 204.3 supports Loews's interpretation. A Senate committee analysis noted: "No worker could accrue more than 240 hours of CTO. Overtime compensation would be required for all overtime worked beyond 240 hours at the worker's *regular rate of pay* at the time of payment." (Sen. Com. on Industrial Relations, Analysis of Assem. Bill No. 2092 (1993-1994 Reg. Sess.) as amended June 2, 1993, p. 3, italics added; CT 3:606.) The Legislature's use of the term of art "regular rate of pay" regarding overtime premiums, while analyzing a bill that used the phrase "regular rate of compensation" in the context of determining CTO, further indicates that the Legislature never intended the two phrases to have the same meaning. (See *Briggs*, *supra*, 19 Cal.4th at p. 1117.)

Section 751.8 is obviously inapposite, since it is part of a chapter that pertains only to employment of underground miners, and those who work in smelters and plants for the reduction or refining of ores or metals. (See Lab. Code, § 750, subd. (a).) The legislative history further shows that the "regular rate of compensation" for underground miners is *not the same* as the "regular rate of pay" in other overtime contexts. The initial version of the legislation provided for underground miners to be

paid "at the overtime rate of pay, as prescribed by the wage orders of the Industrial Welfare Commission." (Assem. Bill No. 739 (1995-1996 Reg. Sess.), § 6, as introduced Feb. 22, 1995.) But a subsequent amendment specifically struck the reference to IWC Wage Orders, while adding the phrase "regular rate of compensation." (*Id.*, § 6, as amended, Apr. 26, 1995; see CT 3:612, 618.) The Legislature thereby signified its intent to establish a special set of overtime pay rules for underground miners, without reference to the "regular rate of pay" used for calculating overtime premiums for other employees.

Loews is unaware of any authority which has construed sections 204.3 or 751.8, and Ferra has cited to none. Neither statute supports Ferra's contention that the term "regular rate of compensation" in section 226.7 and the wage orders is synonymous with "regular rate of pay" in the context of overtime premiums.

In a footnote, the dissent erroneously asserts the majority's construction of "regular rate of compensation" is inconsistent with references in three other Labor Code sections to "straight time" or "base hourly rate." (Dis. opn., p. 23, fn. 9, citing Lab. Code, §§ 204.11, 1773.1, 1773.8.) *None of these statutes concerns calculation of premium wages*, such as those for break violations and overtime work. The only one that even existed in 2000—when section 226.7 and the relevant wage order provisions were promulgated—concerns wages for public works projects (§ 1773.1), and is not part of the same "statutory scheme" as section 226.7, so it not the type of "extrinsic source[]" this Court has

deemed relevant for purposes of statutory construction.[7] (*Murphy*, *supra*, 40 Cal.4th at p. 1105.)

4. Ferra's Reliance on the IWC's Statement as to the Basis is Unavailing.

Ferra seizes on the dissent's reliance on the IWC's Statement as to the Basis for all wage order amendments made pursuant to AB 60, which described the meal and rest premium as "one additional hour of pay at the employee's regular rate of pay for each work day that a meal [or rest] period is not provided." (IWC, Statement as to the Basis (Jan. 1, 2001) pp. 20-21; OBM 71-72; dis. opn., p. 12.) In the dissent's view, "the IWC itself appears not to have distinguished between the phrases 'regular rate of pay' and 'regular rate of compensation'—a telling

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[7] Section 1773.8 was added by a *2012* bill that amended section 1773.1, and provided "that an increased employer payment contribution that results in a lower hourly straight time or overtime wage is not considered to be a violation of the applicable prevailing wage determination so long as specified conditions are met." (Assem. Bill No. 2677 (2011-2012 Reg. Sess.), Legis. Counsel's Dig.) Section 204.11, added in *2017*, regulates commissions for employees "licensed pursuant to the Barbering and Cosmetology Act," and provides that they be paid "a regular base hourly rate of at least two times the state minimum wage rate" and "may be compensated for rest and recovery periods at a rate of pay not less than the employee's regular base hourly rate." (§ 204.11, added by Sen. Bill No. 490 (2017-2018 Reg. Sess.).) Statutes added in 2012 and 2017 are patently irrelevant to construction of statutory and wage order provisions promulgated in 2000. (See *McClung*, *supra*, 34 Cal.4th at p. 473.)

indicator that it intended these phrases to be applied interchangeably." (Dis. opn., p. 12.)

But the IWC plainly *did distinguish* between these two phrases in no fewer than 15 wage orders. (See pp. 17-18, 23-24 & fn. 2, 4, *ante*.) This is a far more telling indicator that the IWC *did not intend* the phrases to be applied interchangeably (see *Briggs*, *supra*, 19 Cal.4th at p. 1117)—particularly since only the wage orders "are to be accorded the same dignity as statutes" (*Brinker*, *supra*, 53 Cal.4th at p. 1027).

By comparison, a Statement of Basis "need only provide" a non-exhaustive explanation of "how and why the [IWC] did what it did." (*Small v. Superior Court* (2007) 148 Cal.App.4th 222, 232, citations and quotation marks omitted.) In this context, the IWC explained *why it added premium wages for failure to provide meal and rest periods*—it "heard testimony and received correspondence regarding the lack of employer compliance with the meal and rest period requirements of its wage orders." (IWC, Statement as to the Basis (Jan. 1, 2001) pp. 20-21.) It also explained that "[a]n employer shall not count the additional hour of pay as 'hours worked' for purposes of calculating overtime pay." (*Ibid*.) But nowhere did the IWC assert that break premiums are to be calculated in the same manner as overtime premiums.

Ferra—who never mentioned the Statement of Basis in her Court of Appeal briefs—now baselessly contends that if the IWC had "intended the words 'of compensation' to transform the meaning of 'regular rate[,]'" the Statement of Basis would have

explained this. (OBM 73.) But "regular rate" is not a term of art under California law (pp. 41-43, *ante*), so the premise of Ferra's argument fails. And the Statement's use of the phrase "regular rate of pay" where the wage orders had used "regular rate of compensation" hardly constitutes an explanation that the IWC intended the latter to have the same specialized meaning as the former. The IWC, like the Legislature, presumably does not "hide elephants in mouseholes." (*Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1171, citations and quotation marks omitted.)

F. Ferra Ignores Federal Court Decisions Which Have Predominantly Rejected Her Interpretation of "Regular Rate of Compensation."

The majority opinion is consistent with most federal court decisions to address the meaning of "regular rate of compensation." (See opn., pp. 12-17.) Ferra's opening brief ignores all of these decisions.

In one case, a district court granted partial summary judgment to the employer, concluding it was not required to provide meal period premiums under section 226.7 at the "regular rate of pay" used in section 510 for overtime purposes. (*Bradescu v. Hillstone Restaurant Group, Inc.* (C.D.Cal. Sept. 18, 2014, SACV No. 13-1289-GW) 2014 U.S. Dist. Lexis 150978, *21-*22 (*Bradescu*).) The *Bradescu* court found "there is no authority supporting the view that 'regular rate of compensation,' for purposes of meal period compensation, is to be interpreted in the same way as 'regular rate of pay' is for purposes of overtime

compensation." (*Id.* at *22.) The court reasoned that the "legislature's choice of different language is meaningful," and concluded it was lawful to pay break premiums at the employee's regular hourly rate, rather than the overtime "regular rate of pay." (*Ibid.*)

Similarly, another district court denied the plaintiff's motion to amend her complaint based on her contention that section 226.7's "'regular rate' language requires meal-period pay at the same regular rate upon which overtime is compensated." (*Wert v. United States Bancorp* (S.D.Cal., Dec. 18, 2014, No. 13-cv-3130-BAS) 2014 U.S. Dist. Lexis 175735, *7 (*Wert*).) The *Wert* court concluded that the "plain language of §§ 226.7 and 510 does not suggest that the phrase 'regular rate of compensation' is synonymous to and may be used interchangeably with 'regular rate of pay.'" (*Wert*, at *10.) The court found *Bradescu*'s reasoning "persuasive," and noted that the Legislature could have defined awards under sections 226.7 and 510 "in the same manner, but it chose not to." (*Wert*, at *10-11.) The court agreed with the employer that compensation for missed meal and rest periods is limited to the "employee's 'normal hourly rate,'" and that the plaintiff's newly-proposed claim had no legal basis. (*Id.* at *6-*7.)

Another district court granted a motion to strike allegations of miscalculation of break premiums. (*Brum v. MarketSource, Inc.* (E.D.Cal., June 19, 2017, No. 2:17-cv-241-JAM-EFB) 2017 2017 U.S. Dist. Lexis 94079, *14 (*Brum*).) The *Brum* plaintiffs alleged that the employer's premiums for missed meal and rest periods were not "at the correct rate of pay because

[they] did not include 'commissions, incentive pay, and/or nondiscretionary bonuses in the regular [rate] of pay.'" (*Id*. at *9.) But the court concluded it could not "ignore the distinction" between the phrases "regular rate of compensation" and "regular rate of pay," and invoked the principle that "'[i]f the legislature carefully employs a term in one statute and deletes it from another, it must be presumed to have acted deliberately.'" (*Id*. at *14, quoting *Ferguson*, *supra*, 33 Cal.App.4th at p. 1621, and citing *Keene Corp. v. United States* (1993) 508 U.S. 200, 208 [different terms in same statute presumed "intentional[]" and "purposeful"].)

In *Frausto*, *supra*, 2018 U.S. Dist. Lexis 130220, the plaintiff alleged that any premiums for missed meal periods "were inadequate because they were only based on her straight time rate, not her regular rate of pay that includes all bonuses earned." (*Id*. at *12.) After discussing *Bradescu*, *Brum*, and *Wert*, the district court concluded "there is no legally tenable argument that section 226.7 payments should be paid at the 'regular rate' used for overtime purposes," and granted the employer's motion to dismiss on this issue. (*Frausto*, at *14.)

Another district court granted a motion to remand a putative class action to state court, where it was the *defendant* (in the context of seeking to establish the requisite $5,000,000 amount in controversy for subject-matter jurisdiction) who sought to equate "regular rate of compensation" with "regular rate of pay" and the *plaintiffs* who insisted otherwise. (*Valdez v. Fairway Independent Mortgage Corp*. (S.D.Cal., July 26, 2019, No. 18-cv-

2748-CAB-KSC) 2019 U.S. Dist. Lexis 126013, *15-*16 (*Valdez*).) More recently, another district court "side[d] with the substantial weight of California federal district courts that have determined that 'regular rate of compensation' in § 226.7(c) differs from the meaning of 'regular rate of pay' in § 510(a)." (*Chavez v. Smurfit Kappa North America LLC* (C.D.Cal., Oct. 3, 2019, No. 2:18-cv-05106-SVW-SK) 2019 U.S. Dist. Lexis 208570, at *19-*20 (*Chavez*).) Both *Valdez* and *Chavez* declined to follow other district court decisions "that find the two terms interchangeable, as those cases either narrowly construed such a finding to the specific circumstances of that case or rejected the difference in language without explanation." (*Valdez*, at *14, citing *Ibarra v. Wells Fargo Bank, N.A.* (C.D.Cal., May 8, 2018, No. CV 17-4344 PA (ASx)) 2018 U.S. Dist. Lexis 78513, at *3 ["The Court disagrees with *Brum*, *Bradescu*, and *Wert* to the extent they are inconsistent with this conclusion, *although none of those cases addressed a compensation system comparable to Defendant's*."] [italics added], affd. in part and remanded in part (9th Cir., Apr. 15, 2020, No. 18-55626) 2020 U.S. App. Lexis 11891 (*Ibarra*),[8]

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[8] The Ninth Circuit affirmed the employer's liability for rest break violations, and directed it to pay $24,472,114, ostensibly the minimum amount of damages in the event of liability. (*Ibarra*, *supra*, 2020 U.S. App. Lexis 11891, at *7-*8.) The court also stated that the parties had stipulated class-wide damages would total $97,284,817 under plaintiffs' interpretation of "regular rate of compensation," but that it could not determine plaintiffs' entitlement to the remaining $72,812,703 without deciding the issue on which this Court granted review, and therefore instructed the district court to stay the remaining amount pending a decision in this case. (*Id.* at *8-*9.)

and *Magadia v. Wal-Mart Associates* (N.D.Cal. 2019) 384 F.Supp.3d 1058, 1077-1078 [citing earlier order agreeing with *Ibarra*'s conclusion; appeal pending, 9th Cir. No. 19-16184].)

The compensation system in *Ibarra* bears no resemblance to the one used by Loews. The *Ibarra* plaintiff was a Home Mortgage Consultant, whose compensation consisted of hourly pay, commissions and other incentive pay, and overtime premiums. (*Ibarra*, *supra*, 2018 U.S. Dist. Lexis 78513, at *3.) The employer's compensation plan expressly defined consultants' hourly pay and other paid time as advances on commissions, and provided that employees would be credited commissions and other incentive pay only to the extent they exceeded hourly pay. (*Ibid*.) Thus, consultants' "*normal compensation*" included not only hourly pay, but also incentive pay and overtime premiums; fewer than 25% of putative class members received only hourly pay. (*Id*. at *7, italics added.) Under these facts, the district court was "not persuaded that the 'regular rate of compensation' ... should be an hourly rate that *did not actually determine the compensation received* by most of the class members. [Citations.]" (*Id*. at *8, italics added.) Because Loews's compensation system is not similar to the one in *Ibarra*, that case is inapposite. Instead, Loews's compensation system is comparable to the ones at issue in *Bradescu*, *Wert*, *Brum*, *Frausto*, *Valdez*, and *Chavez*—all of which were correctly decided.

The only other district court decision to agree with Ferra's interpretation of "regular rate of compensation" focused on two similarities between premiums under sections 226.7 and

overtime premiums—neither are considered "penalties," and both use the words "regular rate." (*Studley v. Alliance Healthcare Services* (C.D.Cal., July 26, 2012, SACV No. 10-000067-CJC) 2012 U.S. Dist. Lexis 190964, *13-*14.) However, "[j]ust because all relief resulting from §§ 226.7 and 510 are wages" for statute of limitations purposes "does not necessarily or logically lead to the conclusion that the relief prescribed by §§ 226.7 and 510 are the same." (*Wert*, *supra*, 2014 U.S. Dist. Lexis 175735, at *6.) As the *Brum* court noted, *Studley* "failed to address the difference in language between 'regular rate of compensation' and 'regular rate of pay,'" and cases which used the terms "compensation" and "pay" interchangeably neglected to "analyze the distinction between the two terms." (*Brum*, *supra*, 2017 U.S. Dist. Lexis 94079, at *14; accord, *Chavez*, *supra*, 2019 U.S. Dist. Lexis 208570, at *20-*21.) The Court of Appeal majority in this case correctly followed the clear majority of federal district courts in rejecting Ferra's construction of "regular rate of compensation."

G. The Holdings of the Court of Appeal and the Majority of Federal Courts Will Not Produce "Absurd" Consequences.

Ferra insists the majority's construction of "regular rate of compensation" will "have absurd consequences" by denying "any statutory remedy" to "millions of California employees who are not paid a 'base hourly rate.'" (OBM 74.) These assertions—which the dissent did not echo—are incorrect and beside the point.

Under the stipulated facts, Loews paid break premiums to Ferra and other hourly employees at their base hourly rate of

compensation. (CT 1:8.) The only issue the trial court decided on summary adjudication was that such premiums must be paid at these employees' regular hourly wage, not their "regular rate of pay." (CT 1:16, 5:1104.) Neither the trial court nor the Court of Appeal decided—or opined on—issues pertaining to employees with no base hourly rate. Accordingly, this Court need not decide what the regular, normal, standard, or fixed rate of compensation would be for such non-hourly employees. (Cf. § 226.2, subd. (a)(3)(i); p. 46, fn. 6, *ante*.)

At any rate, Ferra has not alleged or demonstrated that non-hourly employees have somehow lacked a remedy for missed meal or rest periods in the two decades since section 226.7 and the corresponding wage order subdivisions were promulgated. This silence is conspicuous, since during the past 20 years, California employers generally have *not* paid break premiums at the "regular rate of pay," and the DLSE has *not* had a practice of awarding break premiums at the overtime rate.

Ferra also cites the dissent's discussion of the United States Supreme Court precedent which defined the federal *overtime* "regular rate" to include nondiscretionary bonuses, thus preventing "employers from evading *the intent of overtime provisions*." (AOB 76, italics added.) But the dissent *did not* suggest that this same definition was necessary to effectuate the intent behind break premiums under California law, and Ferra offers no factual or logical basis for such a conclusion.

As noted above, neither California employers nor the DLSE have had a practice of calculating break premiums at the

overtime "regular rate of pay" for the past 20 years. Despite this, Ferra has neither alleged nor demonstrated that employers have been depressing hourly wages during those two decades, and she acknowledges that overtime pay law already is designed to prevent such tactics. (OBM 76-77; see pp. 27-31 & 44-47, *ante*.)

III. ANY DECISION TO REQUIRE CALCULATION OF BREAK PREMIUMS AT THE "REGULAR RATE OF PAY" SHOULD ONLY BE PROSPECTIVE.

Although appellate decisions in civil litigation ordinarily are given retroactive effect, fairness and public policy have compelled exceptions for decisions that articulate a new standard or rule of law. (See, e.g., *Claxton v. Waters* (2004) 34 Cal.4th 367, 378-379 (*Claxton*) [giving only prospective effect to decision barring extrinsic evidence to prove parties to preprinted workers' compensation settlement form intended to release claims outside that system]; *Smith v. Rae-Venter Law Group* (2002) 29 Cal.4th 345, 372-373 [giving only prospective effect to decision changing the formula for determining whether an appeal from a Labor Commissioner award was successful], superseded by statute, see Lab. Code, § 98.2, subd. (c)]; *Woods v. Young* (1991) 53 Cal.3d 315, 331 [giving only prospective effect to holding that limitations period is tolled only by service of notice of intent to sue within last 90 days of that period]; *Hoschler v. Sacramento City Unified School Dist*. (2007) 149 Cal.App.4th 258, 270-271 [limiting retroactive effect of decision to require personal service rather than certified mail service of probationary release notices].)

Denying retroactive effect is warranted if parties may have reasonably relied on the previous rule, if the new rule "has a substantive effect," and if "denying retroactive effect will not unduly impact the administration of justice" or frustrate the purpose of the new rule. (*Claxton*, at pp. 378-379.)

Loews respectfully submits that if this Court agrees with Ferra that "regular rate of compensation" means the same as the overtime "regular rate of pay," such a decision should apply only prospectively. For two decades, California employers and the DLSE have construed hourly employees' "regular rate of compensation" to mean their base hourly rate, in reasonable reliance on the principle that the IWC and Legislature meant that term to have a different meaning than "regular rate of pay" based on the different phraseology. (See, e.g., *Murphy*, *supra*, 40 Cal.4th at p. 1108; *Briggs*, *supra*, 19 Cal.4th at p. 1117.)

Changing this rule would have an undeniably immense substantive effect. For example, in *Ibarra*, *supra*, 2018 U.S. Dist. Lexis 78513, the difference between these two calculations is $72,812,703. (*Id*. at *5 & fn. 3; p. 56, fn. 8, *ante*.) Although "Ferra does not argue that Loews's compensation system would result in similarly disparate damages" (opn., p. 15, fn. 7), it is reasonable to assume that adopting the rule Ferra advocates would add millions of dollars to employers' exposure in class actions under section 226.7 and corresponding wage order subdivisions. The impact would be greater still if this Court were to reverse the Court of Appeal's holding that "section 226.7 actions do not entitle employees to pursue the derivative penalties in sections

203 and 226," or attorney fees (§ 226, subd. (e)). (*Naranjo*, *supra*, 40 Cal.App.5th at pp. 474-475 [noting that break period lawsuits "can be expensive and time consuming for workers and businesses"].)

Denying retroactive effect would not negatively impact the administration of justice, or frustrate the purpose of the rule Ferra advocates. To the contrary, the impact of such a rule on employers going forward would be the same if the rule is applied only prospectively.

Considerations of due process and fairness further preclude retroactive application. The dissent adopted Ferra's interpretation of "regular rate of compensation" only after concluding this phrase is ambiguous. (Dis. opn., p. 2; see pp. 27-28, *ante*.)[9] Loews submits that Ferra's interpretation renders section 226.7 and the corresponding wage order subdivisions unconstitutionally vague and uncertain. Employers did not have fair notice that break premiums should be calculated at the overtime "regular rate of pay," and a person "of common intelligence" would have had to "guess" that the IWC's and

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[9] By comparison, the majority did "not believe the statutes' use of different definitions for the different premiums is ambiguous," based on its statutory construction, but it analyzed the legislative history anyway and found it did not support Ferra's contrary position. (Opn., p. 10.) Ferra's opening brief to this Court takes no position on the ambiguity question, although she previously contended "the words 'compensation' and 'pay' are unambiguous." (Appellant's Opening Brief to Ct.App., p. 35.) Loews's position on the ambiguity issue has been consistent: Ferra's interpretation of "regular rate of compensation" renders the phrase unconstitutionally vague and uncertain.

Legislature's choices of the phrase "regular rate of compensation" was meaningless. (*Britt v. City of Pomona* (1990) 223 Cal.App.3d 265, 278 [transient occupancy tax violated due process].) The DLSE itself never endorsed Ferra's interpretation until its letter supporting her petition for review. (Cf. *Alvarado*, *supra*, 4 Cal.5th at p. 573 [giving retroactive application to holding that was *consistent* with DLSE Manual].)

Loews respectfully submits this Court should hold "regular rate of compensation" means the base hourly rate of hourly-paid employees such as Ferra. If this Court holds otherwise, it should deny retroactive effect to such a decision.

CONCLUSION

The Court of Appeal's judgment should be affirmed.

DATED: July 6, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Counsel of record hereby certifies, pursuant to rule 8.520(c)(1) of the California Rules of Court, that this Answer Brief on the Merits is produced using 13-point Century Schoolbook type, including footnotes, and contains 13,958 words, which is fewer than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

DATED: July 6, 2020

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 6, 2020, at Encino, California.

Jeanette Tucci Kerr

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **FERRA v. LOEWS HOLLYWOOD HOTEL**
Case Number: **S259172**
Lower Court Case Number: **B283218**

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

7/6/2020

Date

/s/Jeanett Kerr

Signature

Manier, John (145701)

Last Name, First Name (PNum)

Ballard Rosenberg Golper & Savitt

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