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California Supreme Court Rejects FLSA's De Minimis Rule Saying Every Minute May Count

On July 26, the California Supreme Court decided that the Fair Labor Standards Act's *de minimis* rule does not apply to wage claims brought under California law. The court concluded that neither the California Labor Code nor any Industrial Welfare Commission Wage Order had adopted the federal rule that allows employers to disregard insubstantial periods of off-the-clock work for pay purposes. Employers with operations in California should review and update their timekeeping policies and pay practices in light of the ruling.

Background

The federal Fair Labor Standards Act (FLSA) generally requires employers to compensate employees for all hours worked, including all time an employee must be on the employer's premises, on duty, or at a prescribed work place. With two important exceptions, employees must be paid for all time they are allowed to work — even if not requested by their employer.

First, under the Portal-to-Portal Act, employers are not required to pay an employee for time spent on certain activities that occur before or after the employee's regular working hours ("preliminary" or "postliminary" activities) unless they are compensable according to contract, custom, or practice. However, the exception for preliminary activities does not extend to principal activities that are integral and indispensable to the employee's job duties.

Second, employers are generally not obligated to pay for *de minimis* or "insubstantial" periods of time worked outside scheduled work hours and may disregard such time if it is administratively impractical to capture for payroll purposes. Courts have found periods of up to 10 minutes *de minimis* even though otherwise compensable.

The Daily Grind

Douglas Troester, a non-exempt Starbucks shift supervisor in Burbank, covered the closing shift. After clocking out, he allegedly spent between four and 10 minutes after each shift activating the store's alarm, locking the front door, and walking co-workers to their cars in accordance with Starbucks policy. Troester also claimed that he occasionally spent time reopening the store to allow coworkers to retrieve items they forgot, waiting with them for

their rides home to arrive, or bringing in patio furniture that had been left outside. Starbucks did not compensate him for the off-the-clock time.

In 2012, he brought suit against Starbucks on behalf of himself and a putative class of Starbucks' non-managerial California employees for failing to compensate them for store closing activities in violation of California law. Troester claimed that Starbucks owed him for nearly 13 hours of unpaid time and roughly $100 for performing those off-the-clock activities over his 17 months of employment. Starbucks removed the suit to federal court and moved for summary judgment on the basis of the *de minimis* rule. The federal district court granted summary judgment, concluding that the *de minimis* rule applied and the work time — even though occurring regularly — was so small that it need not be compensated.

Troester appealed to the 9th Circuit Court of Appeals. The 9th Circuit recognized the *de minimis* defense under the FLSA but found no corresponding reference to it in the California Labor Code or Industrial Welfare Commission's Wage Orders. Accordingly, the court asked the California Supreme Court to decide whether the *de minimis* rule is available as a defense to wage claims brought under California law. Specifically, it certified the following question to the state's high court:

> Does the federal Fair Labor Standards Act's *de minimis* doctrine, as stated in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946) and *Lindow v. United States*, 738 F.2d 1057, 1063 (9th Cir.1984), apply to claims for unpaid wages under the California Labor Code sections 510, 1194, and 1197?

California Supreme Court's Opinion

In *Troester v. Starbucks Corp.*, the California Supreme Court concluded that no state court had incorporated into its wage and hour law precedents the *de minimis* rule, which had been on the books for over 50 years. While the *de minimis* principle has operated in California in various contexts, the court concluded that the state had not recognized a version of the rule that would apply in this case.

The court acknowledged that the California Division of Labor Standards Enforcement (DLSE) has recognized the FLSA's *de minimis* defense in its Enforcement Policies and Interpretations Manual and opinion letters but found that they were not binding authority. Rather, the court concluded that "[a]n employer that requires its employees to work minutes off the clock on a regular basis or as a regular feature of the job may not evade the obligation to compensate the employee for that time by invoking the *de minimis* doctrine."

California Law More Protective than FLSA

In reaching this conclusion, the court noted that California's definition of compensable time, which places importance on small amounts of time and requires employers to compensate employees for "all hours worked" notwithstanding customary employment arrangements, is more expansive than federal law. For example, the court found it "instructive" that California amended the definition of "hours worked" in its wage orders to include preliminary and postliminary activities that the FLSA excludes.

Noting that "application of a de minimis rule is inappropriate when 'the law under which this action is prosecuted does care for small things,'" the court observed "that the regulatory scheme of which the relevant statutes and wage order provisions are a part is indeed concerned with 'small things.'" It expressed difficulty in reconciling California's

strict adherence to the requirement to provide two 10-minute rest breaks per day to employees with permitting the application of the *de minimis* rule to excuse payment for up to 10 minutes of their work time.

While the court relied heavily on the differences between federal and California law in rejecting the application of the *de minimis* rule here, it also criticized the rule more generally for forgiving more than "split-second absurdities" and penalizing employees for their employers' administrative challenges to track actual time worked. Acknowledging that technology has eliminated many of the difficulties in tracking small time increments that helped justify the rule when employees punched a time clock, the court noted that employees can now track their work time using smartphones, tablets, and other devices.

Ruling Leaves Some Uncertainty

The court concluded that the relevant wage order and statutes have not incorporated the *de minimis* rule and do not permit its application on the facts given to it by the 9th Circuit — "where the employer required the employee to work 'off the clock' several minutes per shift." While the ruling requires employees to be paid for reasonably measurable hours worked, it left open the question of whether "there are wage claims involving employee activities that are so irregular or brief in duration that it would not be reasonable to require employers to compensate employees for the time spent on them."

While concurring opinions suggested that this ruling would not require employers to track short, inconsistent time increments that would be "impractical and unreasonable," they acknowledge that it remains unsettled whether California would recognize a *de minimis* exception for such increments.

What It Means for Employers

The 9th Circuit will take the California Supreme Court's ruling into account in deciding whether to revive Troester's lawsuit. Its outcome will have far-reaching implications for California employers and employees alike, particularly for retail, hospitality, and other employers with large numbers of hourly workers.

Based on federal law and the DLSE's position, California employers have relied on the *de minimis* rule as a defense against claims for unpaid wages under the California Labor Code and, more significantly, in class actions and Private Attorneys General Act lawsuits. Now, employers could face increased exposure to wage claims for small increments of time that previously were treated as noncompensable. To minimize potential risk, employers should consider alternatives such as restructuring job duties and/or shifts to preclude off-the-clock work, implementing new time-tracking tools, or adopting "a fair rounding policy" to capture and compensate employees for all the time they spend working.

Rounding Hours Worked

The FLSA allows employers to round work time to the nearest five minutes, or to the nearest one-tenth or quarter of an hour. However, employers may violate federal minimum wage and overtime pay requirements if they always round down.

A California appellate court recently upheld an employer's use of a payroll system that automatically rounds employee time up or down to the nearest quarter hour, rather than using exact check-in / check-out times to calculate wage payments. In ***AHMC Healthcare, Inc. v. Superior Court of Los Angeles County***, the court found the system was neutral both on its face and as applied and, thus, was in compliance with California law.

While the court rejected plaintiffs' argument that "a rounding policy that resulted in any loss to any employee, no matter how minimal, violates California employment law," the decision also highlighted potential risks in rounding. To minimize those risks, employers should consider periodic audits to ensure that their rounding practices are not systematically undercompensating employees.

In Closing

The California Supreme Court has adopted a different standard than federal law for determining whether small amounts of off-the-clock work must be paid. Employers with operations in California should review and update their timekeeping policies and pay practices in light of that ruling.

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