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CALIFORNIA SUPREME COURT SEVERELY RESTRICTS "DE MINIMIS" DEFENSE TO OFF-THE-CLOCK CLAIMS UNDER CALIFORNIA WAGE AND HOUR LAW

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By Tom Geidt

In a landmark decision interpreting California wage and hour law, the California Supreme Court unanimously held that employers in California cannot refrain from paying employees for all hours they work by relying on a "de minimis" defense like the one allowed under the Fair Labor Standards Act. *Douglas Troester v. Starbucks Corporation*, No. S234969 (July 26, 2018).

According to the Court, an employer that requires its employee 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." However, the Court left open the possibility that some work tasks could be "so irregular or brief in duration" that employers would not be required to pay for them.

Facts of the Case

A non-exempt shift manager at a Starbucks store, Douglas Troester, was required to perform certain store-closing duties at the end of each shift, after he had clocked out on Starbucks' timekeeping software. This included transmitting daily sales and inventory data to the corporate office, activating the store's alarm, exiting the store, locking the door, and walking his coworkers to their cars. It took him 4 to 10 minutes to complete these duties each day. Starbucks did not pay Troester for the time he spent on these tasks. Troester estimated that his unpaid time over a 17-month period totaled 12 hours and 50 minutes, which added up to $102.67 at his then-applicable minimum wage of $8 per hour.

Troester filed a class action lawsuit in a California state court alleging that Starbucks violated California labor law by failing to pay for this off-the-clock time. After removing the suit to federal court, Starbucks argued to a federal judge that the suit should be dismissed on summary judgment because Troester's store-closing activities were non-compensable "de minimis" time. The judge agreed with Starbucks and granted summary judgment in its favor, relying on de minimis principles that federal courts have applied in cases arising under the FLSA.

On appeal, the Ninth Circuit noted the absence of any authority under California law on the de minimis doctrine, and so it asked the California Supreme Court to decide whether the FLSA's de minimis doctrine applies to claims for unpaid wages under the California Labor Code.

De Minimis Doctrine Under the FLSA

For over 70 years, the federal courts have recognized the de minimis doctrine as a limited exception to the duty to pay for brief periods of off-the-clock work under the FLSA. The doctrine stems from the ancient legal principle that the law does not concern itself with trifles. In 1961, the doctrine was memorialized in a Department of Labor regulation, which states in part that "insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded," but only where they involve "uncertain and indefinite periods of time … of a few seconds or minutes duration, and where the failure to count such time is due to considerations justified by industrial realities." 29 C.F.R. § 785.47. An oft-cited Ninth Circuit case in 1984 observed that most federal courts have found daily periods of up to 10 minutes to be de minimis even though otherwise compensable, depending on the circumstances. *Lindow v. United States*, 738 F.2d 1057 (9th Cir. 1984). The *Lindow* court cited, as the three most important factors, (1) the practical administrative difficulty of recording the additional time; (2) the aggregate amount of compensable time involved; and (3) the regularity of the additional work.

Until now, no California appellate court had ever decided whether California wage and hour law recognizes the de minimis doctrine.

The Supreme Court's Holding

The Court's opinion, authored by Justice Goodwin Liu, answered "no" to the question certified to it by the Ninth Circuit: Does the federal FLSA's de minimis doctrine apply to claims for unpaid wages under the California Labor Code?

The Court first reviewed the language and legislative history of the Labor Code and wage orders. Nothing in the text or legislative history of these statutes or regulations, according to the Court, shows an intent to incorporate the federal de minimis rule. Rather, the Labor Code and wage orders expressly require that employees be paid for "all hours worked."

Although the California Division of Labor Standards Enforcement has endorsed the federal de minimis test in its Enforcement Manual and various opinion letters, the Court rejected the DLSE's enforcement position, noting that it is not binding on the courts and that the Court did not find it persuasive on this issue.

The Court cited California's strong public policy in favor of worker protections and found that the federal de minimis doctrine is less protective than the California requirement that employees must be paid for "all hours worked." Many past court decisions, the Court said, have held that California labor law is more protective than federal law on a variety of subjects.

Having held that the federal de minimis doctrine has no place under the California Labor Code or wage orders, the Court went on to decide whether, as Starbucks argued, the doctrine nonetheless can be applied under general common law principles of California law, given that the California courts have recognized the doctrine in some other non-employment contexts for many years. The Court ruled, however, that no de minimis defense can properly be applied to the facts of this case – that is, to the 4 to 10 minutes of daily store-closing time worked by Troester.

"What Starbucks calls 'de minimis' is not de minimis at all to many ordinary people who work for hourly wages," the Court said. A few extra minutes can add up, and the $102 claimed by Troester is "enough to pay a utility bill, buy a week of groceries, or cover a month of bus fares."

Ominously for employers, the Court also wrote that "the modern availability of class action lawsuits undermines to some extent the rationale behind a de minimis rule with respect to wage and hour actions," because "the very premise of such suits is that small individual recoveries worthy of neither the plaintiff's nor the court's time can be aggregated to vindicate an important public policy."

The Court also observed that advances in technology over the past 70 years have made it easier for employers to track small increments of work time than was true in the past, by using smartphones, tablets, or other devices. Another alternative for employers, the Court noted, is to restructure the work so that employees would not have to perform it before clocking in or after clocking out (for example, in the Starbucks situation, arrange for employees to clock out *after* they have performed all their other store-closing activities). In any event, according to the Court, to the extent it is difficult for employers to keep track of time worked, "the employee alone should not bear the burden of that difficulty."

However, the Court left open for future cases the possibility that in some other situations involving trivial or irregular off-the-clock activities, the time would not be compensable. "We decline to decide whether a de minimis principle may ever apply to wage and hour claims given the wide range of scenarios in which this issue arises."

In summary, the Court held that:

- The relevant California statutes and wage orders have not incorporated the de minimis doctrine found in the FLSA.
- Although California has a de minimis rule that is a background principle of state law, the rule is not applicable to the facts here.
- The Court is leaving open 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."

Concurring Opinions

Two of the Court's justices authored concurring opinions, agreeing with the holding but arguing that courts should employ a "rule of reason" in deciding future cases involving miniscule or irregular work activities. Justice Cuéllar wrote that the court's decision "does not consign employers or their workers to measure every last morsel of employees' time." Given modern technological changes, he warned of the potential privacy implications of a rule that would force employers to "monitor every fraction of every second of employee time." In colorful language, the Justice wrote that "our compensation rulings should not require subcutaneous microchips, pervasive digital surveillance of all employees' actions and communications, or other employment monitoring systems more at home in a cyberpunk novel than a modern place of employment."

Justice Kruger wrote separately to point out that the de minimis rule operates, in essence, as a rule of reason, and that a "properly limited rule of reason does have a place in California labor law." She noted that Troester's claims involved "nontrivial, regularly occurring periods of work," but there may be other

cases where the periods of time at issue are "so brief, irregular of occurrence, or difficult to accurately measure or estimate, that it would neither be reasonable to require the employer to account for them nor sensible to devote judicial resources to litigating over them."

Analysis and Recommendations

From the employer perspective, this case illustrates the legal principle that "bad facts make bad law." Because Troester was spending 4 to 10 minutes every shift performing work activities without pay at his employer's behest, it is not at all surprising that the Supreme Court would find his store-closing activities not to be de minimis. In many real-life situations, however, employees engage in far briefer and more irregular activities – including some that may last a minute or so, or even only a few seconds. An example would be reading a text message at home on an occasional basis.

Had this type of fact pattern been presented to the Supreme Court in the first instance, the Court might well have discussed the de minimis doctrine more receptively than it did in *Troester*. We can only hope that courts will adopt some commonsense guidelines in future cases when employees' pre-shift or post-shift activities are miniscule in nature and truly not capable of being tracked, thereby avoiding absurd results.

Troester is the latest in a string of California Supreme Court decisions over the past 18 months that have sided with employees on a variety of important issues. This includes the *Dynamex* case severely limiting an employer's use of independent contractors, the *Alvarado* case expanding employees' overtime rights when they receive certain bonuses, and the *Augustus* case prohibiting "on call" rest breaks, among others. In each of these cases, as in *Troester*, the Court emphasized the rule that California's wage and hour laws must be liberally construed in favor of employees to effectuate the State's public policy. Employers can expect to face this argument in every future case decided by the Court.

California employers already are being deluged with wage and hour class actions and PAGA lawsuits, each seeking the full plethora of statutory and civil penalties stacked on other penalties. *Troester* will surely spawn more lawsuits alleging off-the-clock violations in a wide variety of circumstances.

In light of *Troester*, all California employers should reevaluate their pay practices, ensuring as best they can that they are fully tracking and compensating employees for all compensable work activities under California's broad definition of "hours worked." All off-the-clock work should be strictly disallowed as a matter of written policy clearly communicated to all non-exempt employees. All "regularly occurring," non-trivial work activities must be paid, and employers should program their timekeeping systems accordingly.

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If you have any questions about this case or how it may affect your pay practices, please contact any GBG attorney.

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