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TROESTER V. STARBUCKS CORP. – WHAT *IS* A TRIFLE, ANYWAY?

By Rachel J. Moroski

On July 26, 2018, the California Supreme Court issued another highly anticipated opinion in *Troester v. Starbucks Corp.*, clarifying application of the federal *de minimis* doctrine to claims for unpaid wages under California law. Federal courts have long applied the *de minimis* doctrine to excuse the payment of wages for small amounts of otherwise compensable time upon a showing that the bits of time are administratively difficult to record.[1]

The California Supreme Court held that California's wage and hour statutes and regulations do not adopt the federal *de minimis* doctrine, and that California's *de minimis* rule was not applicable in the context of an alleged policy requiring employees to work minutes off the clock routinely.[2] The court left open the question of whether there might be wage claims involving employee activities that were so irregular or brief in duration that it would not be reasonable to require employers to compensate employees for the time spent on such activities.[3]

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THE FEDERAL *DE MINIMIS* DOCTRINE

The *de minimis* doctrine is an application of the maxim *de minimis non curat lex*, which means, "[t]he law does not concern itself with trifles."[4] Federal courts have applied the doctrine in some circumstances to excuse the payment of wages for small amounts of otherwise compensable time upon a showing that the bits of time are administratively difficult to record.[5] "When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded."[6] Rather, "[i]t is only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved."[7] The Ninth Circuit has explained that, in determining whether otherwise compensable time is *de minimis* under the Fair Labor Standards Act (FLSA), courts should consider: (1) the practical administrative difficulty of recording the additional time; (2) the aggregate amount of compensable time; and (3) the regularity of the additional work.[8] The Ninth Circuit has noted that "[m]ost courts have found daily periods of approximately 10 minutes *de minimis* even though otherwise compensable."[9]

California's Division of Labor Standards Enforcement (DLSE), the entity charged with the administration and enforcement of the state's wage and hour laws, has applied the *de minimis* doctrine for decades. Specifically, the DLSE has issued opinion letters explicitly adopting the *de minimis* rule, and concluding that employers are not obligated to pay employees for work time if "it is *de minimis*."[10] The "DLSE's opinion letters, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."[11] The *de minimis* doctrine also appears in the Enforcement Policies and Interpretations Manual published by the DSLE.[12]

BACKGROUND

The plaintiffs in *Troester* were nonmanagerial California Starbucks employees who performed store closing tasks.[13] In their putative wage and hour class action lawsuit, the plaintiffs alleged that Starbucks failed to compensate them for hours worked and, as a result, violated various provisions of the Labor Code and wage orders.

The named plaintiff, Douglas Troester, worked for Starbucks as a shift supervisor.[14] He submitted evidence that, during the alleged class period, Starbucks' computer software required him to clock out on every closing shift before initiating the software's "close store procedure," which transmitted daily sales, profit and loss, and store inventory data to corporate headquarters, on a separate computer terminal in the back office.[15] After completing this task, he activated the alarm, exited the store, and locked the front door.[16] In compliance with Starbucks policy, he then walked his coworkers to their cars.[17] He also occasionally reopened the store to allow employees to retrieve items they left behind, waited with employees for their rides to arrive, or brought in store patio furniture mistakenly left outside.[18] Troester estimated that, on a daily basis, he spent 4-10 minutes performing these closing tasks.[19] He sought payment for 12 hours and 50 minutes of compensable work over a 17-month period, amounting to $102.67 at a wage of $8 per hour.[20]

Starbucks moved for summary judgment on the ground that Troester's uncompensated time was so minimal that Starbucks was not required to compensate him.[21] The district court concluded that the *de minimis* doctrine applied and granted summary judgment against Troester.[22] Troester appealed, arguing that the district court erroneously applied the standard generally reserved for federal FLSA claims to his state law wage and hour claims. Recognizing that the California Supreme Court had never addressed whether the federal *de minimis* doctrine applied to wage claims brought under California law, the Ninth Circuit certified this question to the California Supreme Court.[23]

CALIFORNIA SUPREME COURT DECISION

The California Supreme Court considered two questions. First, it considered whether California's wage and hour statutes or regulations adopt the *de minimis* doctrine found in the FLSA.[24] Second, the Supreme Court considered whether the *de minimis* principle, which has operated in California in various contexts, applies to wage and hour claims, and to the specific facts of the case.[25]

The Supreme Court first concluded that California has not adopted the *de minimis* doctrine, as there is no indication in the text or history of the relevant California Labor Code statutes[26] or the governing Industrial Welfare Commission (IWC) wage order[27] of such adoption. The applicable wage order defines hours worked as "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so[.]"[28] California case law has clarified that the time during which the employee is "suffered or permitted to work" encompasses the time during which the employer knew or should have known that the employee was working on its behalf.[29] The wage order further provides that wages must at least be paid to an employee "for all hours worked."[30] Similarly, the California Labor Code obligates an employer to pay an employee additional compensation for "[a]ny work" beyond eight hours in any workday or 40 hours in any workweek.[31] Against this backdrop, the Supreme Court concluded that the federal *de minimis* rule was less protective than the California rule establishing that employees must be

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compensated for "all hours worked" or "[a]ny work" beyond eight hours a day.[32] Further, the Supreme Court determined that nothing in the language of the wage orders or the Labor Code demonstrated any intent to incorporate the *de minimis* rule.[33]

The Supreme Court then concluded that, although California has a *de minimis* rule that is a background principle of state law, the rule was not applicable to the specific facts of the case, where Starbucks required Troester to work "off the clock" several minutes per shift. The Supreme Court determined that applying the *de minimis* rule would fly in the face of the statutory purpose of the governing wage order and Labor Code statutes, which require liberal construction and demand that employers compensate employees for all hours worked.[34] For example, the Supreme Court observed that the wage orders expressly concern themselves with small amounts of time, as demonstrated by the fact that they demand strict adherence to the requirement to provide most nonexempt employees two daily 10-minute rest breaks.[35] "[T]he strict construction of a law prohibiting any interference with or reduction of a 10-minute rest break is difficult to reconcile with a rule that would regard a few minutes of compensable time per day as a trifle not requiring compensation if too inconvenient to record."[36] The Court also noted that the IWC regulations have been more expansive than the FLSA in defining the time for which an employee must be compensated, therefore militating against application of the federal *de minimis* doctrine.[37] The Supreme Court discounted the fact that the DLSE has applied the *de minimis* rule for decades on the ground that neither the manual nor the opinion letters are binding.[38]

Notably, the decision left open the question of whether there might be 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. Briefs on behalf of Starbucks invoked various hypothetical scenarios of potential *de minimis* activity in an attempt to illustrate that abolishing the *de minimis* rule would lead to undue burdens and absurd results for both employers and employees. For example, if, after an employee clocks out, a customer approaches the employee and asks for the location of a product and the employee spends five seconds pointing the customer in the right direction, should the employer be held liable for not capturing or paying the employee for that time?[39] If, before clocking in to the employer's computerized timekeeping system, the employee pushes the wrong button and accidentally turns off his or her computer, should the employer be held liable for not paying the employee the two minutes it took to reboot the computer?[40] If an employee reaches to "punch in" or "punch out" with a time card, sneezes, drops the time card, and must first pick it up, must the employer pay the employee for the extra seconds "worked"?[41] The Supreme Court recognized that there are
a "wide range of scenarios"[42] in which the *de minimis* principle may arise, thereby impliedly acknowledging that there may be limited circumstances in which application of the *de minimis* doctrine is appropriate. However, the Court expressly declined to "prejudge[] these factual permutations," and "decide[d] only whether the *de minimis* rule is applicable to the facts of this case as described by the Ninth Circuit."[43]

In sum, in light of "the wage order's remedial purpose requiring liberal construction, its directive to compensate employees for all time worked, the evident priority it accorded that mandate notwithstanding customary employment arrangements, and its concern with small amounts of time," the Supreme Court concluded that the *de minimis* doctrine had no application under the circumstances of this case.[44]

IMPLICATIONS FOR CALIFORNIA EMPLOYERS

The *Troester* ruling reaffirms that employers should diligently track all time spent by nonexempt employees and should ensure that all working time is compensated. The Court noted that "employers are in a better position than employees to devise alternatives that would permit the tracking of small amounts of regularly occurring worktime,"[45] and proposed several alternative ways to track such time. Whether any of these alternatives will be suitable for a particular workplace will depend on the circumstances of the workplace.

While the *Troester* opinion may trigger a rise in lawsuits seeking to recover for uncompensated time spent by employees before clocking in or after clocking out, it is important to note that the decision is limited in its application. Specifically, the Supreme Court did not decide "whether there are circumstances where compensable time is so minute or irregular that it is unreasonable to expect the time to be recorded."[46]

Entities that engage nonexempt employees should consult with legal counsel to determine how the *Troester* opinion will impact their businesses, and how best to implement any steps they may take in response. In particular, employers should consult legal counsel before implementing any of the time-tracking alternatives proposed by the Court.

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1 *Troester v. Starbucks Corp.*, 5 Cal.5th 829, 835 (2018).

2 *Id.*

3 *Id.*

4 BLACK'S LAW DICTIONARY (10th ed. 2014), p. 524.

5 *See Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692-93 (1946).

6 *Id.* at 692.

7 *Id.*

8 *Lindow v. U.S.*, 738 F.2d 1057, 1063 (9th Cir. 1984).

9 *Id.* at 1062.

10 DLSE Op. Letter 2010.04.07 (Apr. 7, 2010) p. 3; DLSE Op. Letter 1995.06.02 (June 2, 1995) pp. 2-3 ("[T]he Labor Commissioner has an established policy which holds that time which is *de minimis* need not be counted toward the employer's obligation to pay and, likewise, *de minimis* time may not be considered for purposes of deduction from an employee's pay."); DLSE Op. Letter 1994.02.03-3 (Feb. 3, 1994) p. 4; DLSE Op. Letter 1988.05.16 (May 16, 1988) pp. 1-2 (adopting *Lindow* test and recognizing that *de minimis* "determinations will have to be made on a case-by-case basis").

11 *Brinker Restaurants Corp. v. Superior Court*, 53 Cal.4th 1004, 1029, fn. 11 (2012) (internal quotation marks omitted).

12 DLSE Manual (2002) §§ 46.6.4, 47.2.1-47.2.1.1, 48.1.9-48.1.9.1.

13 *Troester*, 5 Cal.5th at 835.

14 *Id.*

15 *Id.* at 835-36.

16 *Id.* at 836.

17 *Id.*

18 *Id.*

19 *Id.* at 843.

20 *Id.* at 847.

21 *Id.* at 835.

22 *Id.* at 836.

23 *Id.*

24 *Id.* at 835.

25 *Id.*

26 CAL. LAB. CODE § 510, subd. (a).

27 IWC Wage Order No. 5-2001, concerning the "public housekeeping industry," includes establishments such as Starbucks that provide food and beverages. *See* Wage Order No. 5-2001, subd. 2(P).

28 Wage Order No. 5-2001, subd. 2(K).

29 *Morillion v. Royal Packing Co.*, 22 Cal.4th 575, 584-85 (2000).

30 IWC WAGE ORDER NO. 5-2001, subd. 4(A).

31 CAL. LAB. CODE § 510, subd. (a).

32 *Troester*, 5 Cal.5th at 840.

33 *Id.* at 841.

34 *Id.* at 844.

35 *Id.*

36 *Id.* at 844-45.

37 *Id.* at 845.

38 *Id.* at 842.

39 Brief of Amici Curiae Employers Group and California Employment Law Council in Support of Position of Respondent, p. 6 (Apr. 17, 2017).

40 Id.

41 Brief of *Amici Curiae* Association of Southern California Defense Counsel in Support of Defendant and Respondent Starbucks Corporation, p. 40 (April 13, 2017).

42 *Troester,* 5 Cal.5th at 843.

43 *Id.*

44 *Id.* at 847.

45 *Id.* at 848.

46 *Id.* at 835.

