

California High Court Rejects *De Minimis* Standard, Requiring Employers to Account for and Compensate Even Small Increments of Time After Clocking Out

by Gabrielle Wirth and Nisha Verma

In a long-awaited decision, the California Supreme Court rejected the federal *de minimis* doctrine, making clear that in any instance in which employees perform “minutes of work,” before or after their shifts, that time must be compensated. Under the *de minimis* doctrine, “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.” Federal courts “have found daily periods of approximately 10 minutes *de minimis*.”

The Court addressed a certified question from the Ninth Circuit, which was grappling with an appeal from a district court that granted summary judgment to Starbucks after applying the federal *de minimis* doctrine. The undisputed evidence was that, after he had clocked out, a shift supervisor at Starbucks performed certain closing tasks for between four and ten minutes per day, as follows:

Plaintiff activated the alarm approximately one minute after he clocked out. Moreover, he did so within two minutes on 90 percent of the shifts and within five minutes on every shift. Once he set the alarm, Plaintiff needed to exit the store within one minute to avoid triggering the alarm. And Plaintiff testified that it took 30 seconds to walk out of the store. He then locked the door, which took 15 seconds to ‘a couple minutes,’ and walked his coworkers to their cars, which took 35 to 45 seconds.

The Supreme Court held that under California law, the above-described activities were compensable and Starbucks could be liable for them. The Court found no room for the application of the federal *de minimis* doctrine in California law, where the Labor Code and Industrial Welfare Commission Wage Orders simply require payment for “all hours worked” or “all work performed.” Plainly, California law is more protective than a “federal rule permitting employers under some circumstances to require employees to work as much as 10 minutes a day without compensation.” Further, “[n]othing in the language of the wage orders or Labor Code shows an intent to incorporate the federal *de minimis*

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Notably, the Court was not swayed by arguments relating to the administrative difficulties of tracking small amounts of time worked before and after regularly scheduled hours, rejecting the notion that “when it is difficult to keep track of time worked, the employee alone should bear the burden of that difficulty.” The Court explained that:

[E]mployers are in a better position than employees to devise alternatives that would permit the tracking of small amounts of regularly occurring work time. One such alternative, which it appears Starbucks eventually resorted to here, was to restructure the work so that employees would not have to work before or after clocking out. Moreover, as noted, technological advances may help with tracking small amounts of time. An employer may be able to customize and adapt available time tracking tools or develop new ones when no off-the-shelf product meets its needs.

The Court pointed to smartphones, tablets, or other devices, which may be far superior in capturing time worked than a stationary “punch” clock – the standard timekeeping device when the *de minimis* rule was created. It also posited that the addition of a reasonable estimate of work time for before or end of shift activities “through surveys, time studies, or . . . a fair rounding policy” is a tenable solution. That is, the Court appeared to bless a system where one to two minutes of compensation would be added to the beginning or end of a shift, regardless of any confirmation that the time was actually worked.

The Court did, however, limit its ruling to the facts before it relating to *Troester*. The Court was faced with several examples of incredibly brief work-related activity, lasting seconds, rather than minutes, such as “an employee reading an e-mail notification of a shift change during off-work hours.” Instead of creating a rule which would address every second of work-related activity, the Court left “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.”

While the Court was purposefully not explicit regarding exactly when such time becomes compensable, the opinion is clear enough that time amounting to “minutes” of work must be compensated. Accordingly, the *Troester* decision sends a clear signal to employers to closely review their operations relating to employee activity before clocking in or after clocking out. Where there is opportunity to capture additional minutes of time spent working, employers are expected to do it. This may involve restructuring closing procedures to allow employees to clock out after final tasks, such as setting a security alarm, are completed, or even adding one minute automatically to the end of closing shifts.

Contact us if you are interested in a review of your timekeeping policies and procedures in light of the *Troester* ruling.