

Ninth Circuit Weighs in on California *De Minimis* Standard, Finding that *Troester* Requires Compensation for Even “Seconds” of Time Worked on a Regular Basis

by Gabrielle Wirth and Nisha Verma

In July of 2018, Dorsey updated you on the California Supreme Court’s ruling in *Troester v. Starbucks Corp.*, where the Court rejected the federal *de minimis* doctrine, which exempts employers from compensating employees for short periods worked before and after shifts (often described as ten minutes or less). In doing so, the Court made clear that any work performed for “**minutes** off the clock on a regular basis or as a regular feature of the job” must be compensated. One might interpret *Troester* to allow regular, unpaid periods of **less than a minute** to be nevertheless defensible. However, the Ninth Circuit rejected that rationale in a pair of wage and hour class actions brought against Nike and Converse, respectively.

In those cases, the employees claimed they were owed wages for time spent waiting for and undergoing brief inspections prior to leaving the retail stores. Before the *Troester* decision was issued, the district court in each case granted summary judgment to the retailers, based on the federal *de minimis* standard. On appeal, the retailers conceded that the federal *de minimis* standard did not apply, but asserted that even under *Troester*, the pre-exit inspections were not compensable because the inspections almost always took less than a minute (expert analysis reflected that 92.2% took less than a minute, and 97.5% took less than two minutes). The Ninth Circuit expressly disagreed with that logic, holding: “To the extent Nike urges us to interpret *Troester* as replacing the federal *de minimis* doctrine’s 10-minute daily threshold with a state-law 60-second analogue, we hereby decline to do so.” The Court doubted that “*Troester* would have been decided differently if the closing tasks at issue [there] had taken only 59 seconds per day,” and interpreted *Troester* as “mandating compensation where employees are regularly required to work off the clock for more than ‘**minute**’ or ‘**brief**’ periods of time.”

A critical fact in the Nike and Converse cases was that the employees performed these brief pre-exit inspections daily (or in some instances more than once a day). The Ninth Circuit acknowledged the language in *Troester* that suggests **irregular** – and very brief – periods may be uncompensated. *Troester* “does not require employers to account for split-second absurdities, and it might not apply in cases where work is so irregular that it

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is unreasonable to expect the time to be recorded.” However, according to the Ninth Circuit, *Troester* requires compensation “where employees are required to work for ***more than trifling amounts of time on a regular basis or as a regular feature of the job.***”

Given the Ninth Circuit ruling, employers should review any policies or procedures that would cause employees to perform work or otherwise spend time under employer control (i.e., simply waiting for a manager to unlock the doors so employees can exit), before or after clocking out. Such a practice requires careful consideration if it is a regular occurrence, such as a store closing routine.

We are available to review your policies and procedures and advise on potential restructuring of operations in light of this development.