NOW + NEXT

JULY 31, 2018

California Supreme Court rejects federal de minimis doctrine as defense to claims for unpaid wages under state law

By Seth L. Neulight and Hillary Baca

The de minimis doctrine has long been recognized as a defense by employers to claims for unpaid wages under the federal Fair Labor Standards Act (FLSA). This doctrine holds that insignificant amounts of time employees spend on job-related tasks beyond their scheduled work hours, which are not susceptible to accurate recording as a practical matter, may be disregarded for payroll purposes. In *Troester v. Starbucks Corporation*, the California Supreme Court held that this doctrine has *not* been incorporated under the California Labor Code and Industrial Welfare Commission (IWC) Wage Orders. While the Court left open whether the doctrine might apply in some circumstances, it held that California wage laws "do not allow employers to require employees to routinely work for minutes off-the-clock without compensation." The *Troester* decision is sure to become more grist for the mill of class actions in California, particularly in cases alleging claims of unpaid wages for off-the-clock work.

The facts in *Troester v. Starbucks*

Troester worked for Starbucks as a non-exempt shift supervisor. He submitted evidence that on every closing shift, Starbucks required him to clock out before completing certain store closing tasks. These tasks included: initiating a "close store" procedure on a computer, activating the store alarm and locking the front door. Troester further claimed that occasionally he: walked co-workers to their cars, as required by company policy; reopened the store to allow employees to retrieve belongings left behind; waited with employees for their rides to arrive; and/or brought in store furniture left outside. Troester claimed that he spent between four and ten minutes on these unrecorded closing tasks each day. Over the 17-month period of Troester's employment, the unpaid time alleged amounted to about 13 hours, which equated to about $102 of unpaid wages at his then applicable rate of pay.

Troester filed a putative class action against Starbucks in Los Angeles County Superior Court on behalf of all non-managerial employees in California who performed store closing tasks. He sought damages for unpaid wages and related penalties in violation of the California Labor Code and IWC Wage Orders. Starbucks removed the action to federal district court. The district court granted Starbucks' motion for summary judgment, finding that the uncompensated time alleged by

Troester was de minimis, and therefore, his wage claims were barred. Troester appealed the decision to the Ninth Circuit, which then certified the question for the California Supreme Court whether the de minimis doctrine applies under state law.

The *Troester* court decision

The *Troester* court approached its decision on this issue in two parts: (i) whether California's wage and hour statutes or regulations adopted the de minimis doctrine found in the FLSA, and (ii) whether the de minimis doctrine, which has operated in California in various contexts, applies to wage and hour claims.

Addressing the first question, the court emphasized that the purpose of the California Labor Code and Wage Orders is to protect employees, and the laws should be liberally construed toward that end. The court reasoned that these laws contemplate and require that employees be paid for all hours worked, and nothing in them shows an intent to incorporate the federal de minimis rule. Notably, the court acknowledged that the California Division of Labor Standards Enforcement (DLSE) adopted the federal de minimis rule in its Enforcement Policies and Interpretations Manual, and in several opinion letters. However, the court found that these advisory pronouncements were not binding. Ultimately, the court concluded that the Labor Code and Wage Orders did not adopt the federal rule.

The court then turned to the second question of whether some version of the de minimis doctrine nonetheless applies to wage and hour claims as a matter of California law. Limiting its analysis of this issue to the facts presented by the Ninth Circuit, the court concluded that an employer could not invoke the doctrine to evade paying wages when it required an employee to "work minutes off the clock on a regular basis or as a regular feature of the job." The court challenged, and ultimately declined to fully adopt for purposes of California law, the landmark decision of the U. S. Supreme Court in *Anderson v. Mt. Clemens Pottery Co.*, 328 U. S. 680 (1946), which established the de minimis doctrine. The court questioned why, to the extent it is difficult or administratively impractical to track small amounts of time worked, the employee alone should bear the burden of that challenge. The court also noted that the *Anderson* court's rationale for the doctrine is undermined by "the modern availability of class action lawsuits" where "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 opined that many of the time recording challenges at issue when *Anderson* was decided 70 years ago can be solved today by "technological advances that enable employees to track and register their work time via smartphones, tablets or other devices." Finally, the court observed that employers are in a better position than employees to develop ways to track and pay for small amounts of regularly occurring work time. Such solutions, the court suggested, could include restructuring the job so that off-the-clock tasks could be avoided, or reasonably estimating such time through work studies or surveys, and then proactively paying employees for that time.

The Supreme Court was careful to leave open the issue "whether there are circumstances where compensable time is so minute or irregular that it is unreasonable to expect the time to be recorded." A separate concurring opinion by Justice Kruger shed some light on what factual scenarios might be appropriate to apply the de minimis rule. Justice Kruger noted that "a properly limited rule of reason does have a place in California labor law." She suggested that a de minimis rule might apply in situations such as where: (i) a retail store employee waiting off duty after their shift ends spends a minute or two helping a customer; or (ii) an employee, during his/her off hours, must occasionally read and acknowledge e-mails or text messages from the employer notifying them of work schedule changes.

What employers should do now?

In light of *Troester*, California employers can no longer count on the de minimis doctrine as a defense against wage claims for unrecorded time employees spend on job-related tasks that is nontrivial and regularly occurring. Employers should review the job descriptions and actual duties of their non-exempt employees to determine: (a) whether and to what extent such off-the-clock work may be occurring; and (b) what options exist to reduce or eliminate such activity. Time recording policies, procedures and systems should be examined in light of these realities to determine if they are adequate to allow employees to capture all time worked. Employers may want to consider implementing alternative or supplemental time tracking procedures for use by employees who regularly perform pre- or post-shift tasks as part of their responsibilities.

For more information on the content of this alert, please contact your regular Nixon Peabody attorney or:

— Seth L. Neulight at **sneulight@nixonpeabody. com** or 415-984-8377

— Hillary Baca at **hbaca@nixonpeabody. com** or 415-984-8393