***Troester v. Starbucks Corp.*, Supreme Court of California, July 26, 2018**

California's wage and hour statutes and regulations have not adopted the *de minimis* doctrine found in the FLSA. Where an employer requires an employee to work "off the clock" several minutes per shift, the *de minimis* principle does not apply.

FACTS/PROCEDURE

Douglas Troester worked for Starbucks from mid-2009 to October 2010. During this time his shift often included "closing up the store." This process would occur after he clocked out on the store's computer terminal, and included time spent: initiating the computer's "close store procedure," activating the store alarm, exiting the store, locking the front door, and walking his co-workers to their car (in compliance with Starbuck's safety policy). Troester also occasionally reopened the store to allow employees to retrieve items they had left behind, waited with employees for their rides to arrive, or brought in store patio furniture mistakenly left outside.

All together these extra tasks took Troester between four and ten minutes on average. The district court assumed that all of the above activities were compensable for the purpose of its analysis. Over Troester's seventeen-month employment, the unpaid time totaled approximately twelve hours and fifteen minutes. At eight dollars an hour, this added up to $102.67 in unpaid time. The district court found this uncompensated time to be *de minimis* and granted summary judgement in favor of Starbucks against Troester's claims for failure to provide accurate wage statements, failure to pay all final wages in a timely manner, and unfair competition.

On appeal, the ninth circuit recognized that, though the *de minimis* doctrine has long been a part of the FLSA, the California Supreme Court had never addressed whether it applies under California Law. As such, they certified the question to the Court.

HOLDING/DISCUSSION

Question Answered. The California Labor Code and the Industrial Welfare Commission's Wage Orders have not adopted the *de minimis* rule. Further, the Court determined that the *de minimis* principle does not apply to the relevant wage orders and statutes in this case, but declined to decide whether there are circumstances where "compensable time is so minute or irregular that it is unreasonable to expect the time to be recorded."

In *Anderson v. Mt. Clemens Pottery Co.* (1946) 328 U.S. 680 the U.S. Supreme Court considered whether time spent walking to and from workstations was compensable. The *Anderson* case involved a pottery plant covering eight acres. The high court determined that when the time at issue concerns "only a few seconds or minutes of work," they are trifles which may be disregarded. (*Id.* at 692.) However, "when an employee is required to give up a substantial measure of his time and effort," compensable working time is involved. In such cases, the scope of compensable time can be determined only by the trier of fact. (*Id.*)

In 1961, the *de minimis* doctrine was codified in federal regulation. It applies only where there are uncertain and indefinite periods of time involved, of a few seconds to a few minutes in

duration, and where failure to count such time is justified by industrial realities. Therefore, an employer cannot arbitrarily fail to count even small periods of time an employee is required to spend on duties assigned to them.

Subsequently, in *Lindow v. U.S.* (9th Cir. 1984) 738 F. 2d 1057, the ninth circuit explained that "in determining whether otherwise compensable time is *de minimis* [under the FLSA], we will 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." (*Id.* at 1063.)

In California, wage and hour claims are governed by the Labor Code and the IWC Wage Orders. The IWC's wage orders "are to be accorded the same dignity as statutes. They are 'presumptively valid' legislative regulations of the employment relationship [citation], regulations that must be given 'independent effect' separate and apart from any statutory enactments." (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal. 4th 1004, 1027.) Wage Orders take precedence over common law to the extend where they conflict.

When construing these governing statutes and regulations, the Court construed them in the way that best follows the purpose of the Legislature and the IWC. The Court determined that that purpose is the protection of employees, and therefore the Labor Code and Wage Orders should be construed in favor of the protection of employees.

Wage Order No. 5 sets the minimum wage and specifies that wages must be paid "for all hours worked." In comparison, the federal rule permitting employers to sometimes require employees to work as much as ten minutes per day without compensation is less protective than California's "for all hours worked." "Nothing in the language of the Wage Orders or Labor Code shows an intent to incorporate the federal *de minimis* rule articulated in *Anderson*, *Lindow*, or the federal regulation." (Opinion at 16.) The Court found no statutory or regulatory history to indicate that the Legislature or the IWC intended to adopt the federal *de minimis* rule.

The Court acknowledged that the *de minimis* doctrine appears in the Enforcement Policies and Interpretations Manual published by the Division of Labor Standards Enforcement (DLSE Manual) in Sections 47.2.1 and 47.2.1.1. However, unlike Wage Orders, the DLSE Manual is not binding on the court.

The Court declined to decide whether a *de minimis* principle might ever apply to wage and hour claims. They decided only that the *de minimis* rule was not applicable to the facts of the case as described by the Ninth Circuit. According to the Ninth Circuit, it was undisputable that, on a daily basis, closing tasks took between four and ten minutes. This does not include the time spent letting co-workers back into the store or bringing in patio furniture mistakenly left outside.

As the *de minimis* rule stands for the policy that "the law does not care for trifles," the rule would be inappropriate in contexts where "the law under which this action is prosecuted does care for small things." (*Francais v. Somps* (1891) 92 Cal. 503, 506.) The applicable Labor Code and Wage Orders clearly "care for small things." For example, California law ensures that most

employees receive two ten-minute breaks. As such, it cannot be said that four to ten minutes of off the clock work is a "trifle not requiring compensation."

The ready availability of class action lawsuits also "undermine to some extent the rationale behind" the *de minimis* rule. (Opinion at 27.) Class actions allow suits for even small amounts of individually owed damages to be brought without waste of either the plaintiff's or the court's time.

Finally, the court claimed reluctance to rely on a rule purportedly grounded in "the realities of the industrial world" (*Anderson*, 382 U.S. at 692) when technological advancements have materially altered those realities. "Many of the problems in recording employee work time discussed in *Anderson* 70 years ago, when time was often kept by punching a clock, may be cured or ameliorated by technological advances that enable employees to track and register their work time via smartphones, tablets, or other devices." (Opinion at 28.) Employers are currently in a better position than employees to devise ways to track small amounts of regularly occurring work time.