Legal Update Article

What's Left of the *De Minimis* Doctrine in California? Ninth Circuit Court of Appeals May Soon Decide

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Last year, the California Supreme Court held the federal "de minimis" doctrine does not apply to California state law claims for unpaid wages for off-the-clock work allegedly performed on a regularly occurring basis in store closing and related activities. *Troester v. Starbucks Corp.,* 5 Cal. 5th 829. However, the California Supreme Court also noted that it was "leaving open whether there are wage claims involving employee activities that are so irregular or brief in duration that employers may not be reasonably required to compensate employees for the time spent on them." So, what circumstances may qualify for the exception left open in *Troester?* The U.S. Court of Appeals for the Ninth Circuit may soon answer the question left open by the California court.

On June 14, 2019, a panel of the Ninth Circuit heard oral argument in consolidated appeals involving the compensability of pre-exit inspections of employees' bags when they are leaving their shifts at two retail clothing store chains. In both cases, the district court granted summary judgment to the employer, holding the federal *de minimis* doctrine applied to the plaintiffs' claims under the California Labor Code and the time spent on the inspections was not significant enough to render the time compensable. *Rodriguez v. Nike Retail Services, Inc.,* 2017 U.S. Dist. LEXIS 147762 (N.D. Cal. Sept. 12, 2017); *Chavez v. Converse, Inc.,* 2017 U.S. Dist. LEXIS 169167 (N.D. Cal. Oct. 11, 2017). Both of these rulings, however, were based on the law at the time, under which courts (including the Ninth Circuit) still recognized the federal *de minimis* doctrine. Months later, the California Supreme Court in *Troester* rejected those holdings, concluding that, at most, a limited form of the *de minimis* doctrine might apply in some circumstances.

During the June 14 oral argument, the employers contended that the facts of *Troester* were distinguishable, in that the post-shift time at issue in *Troester* was between four and 10 minutes per shift. By contrast, in the cases before the Court, an expert time-and-motion study demonstrated the pre-exit inspections typically took *less than one minute.* In support of their argument that such small amounts of time fall within the exceptional circumstances alluded to by the California Supreme Court in *Troester,* the employers pointed to the high court's statement that the applicable California laws "do not allow employers to require employees to routinely work for *minutes* off the clock without compensation."

The plaintiffs, on the other hand, argued that the holding of *Troester* unequivocally required the Court of Appeals to overturn the grants of summary judgment to the employers. They added that on remand in *Troester,* the district court rejected the employer's *de minimis* argument regarding the 35–45 seconds typically spent by shift supervisor escorting coworkers to their vehicles following the closing of the store. In so doing, that district court noted this activity was clearly listed in the employer's policies as a routine supervisory duty and, therefore, was not the type of rare or irregular event contemplated by the California Supreme Court as still falling within the state's *de minimis* doctrine.

So, although it is unlikely to be a *de minimis* amount of time before the Court of Appeals rules, Jackson Lewis will continue to monitor this appeal for further developments. Meanwhile, please contact the Jackson Lewis attorney(s) with whom you work with questions about this or any other wage and hour issues.

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