Legal Update Article

Ninth Circuit Swiftly Rebuffs Attempted Expansion of California De Minimis Doctrine

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On June 14, 2019, a panel of the Ninth Circuit Court of Appeals heard oral argument in consolidated appeals involving the compensability of pre-exit inspections of employee bags at two retail clothing store chains. While the district courts had granted summary judgment to the employers in both cases, they did so by holding that the federal *de minimis* doctrine applied to the plaintiffs' claims under the California Labor Code. Not long thereafter, the California Supreme Court, in answering a certified question from the Ninth Circuit, rejected those holdings, concluding that the federal doctrine was inapplicable and that, at most, a limited form of the *de minimis* doctrine might apply in some circumstances. *Troester v. Starbucks Corp.*, 5 Cal. 5th 829 (2018). Thus, while the underlying district court holdings were certain to be overturned, the question remained: When do those limited circumstances exist?

Not very often, the Ninth Circuit has ruled. *Rodriguez v. Nike Retails Servs.*, 2019 U.S. App. LEXIS 19475 (9th Cir. June 28, 2019). Rejecting arguments by the defendant employers that a minute or less automatically constitutes a *de minimis* amount of time, and that an accumulation of such minutes still fails to constitute compensable time, the Court of Appeals concluded that such an interpretation of *Troester* not only would "read far too much into *Troester's* passing mention of 'minutes,' but it would also clash with *Troester's* reasoning, which emphasized the requirement under California labor laws that 'employee[s] must be paid for all hours worked or any work beyond eight hours a day.'" Added the Ninth Circuit, "We doubt that *Troester* would have been decided differently if the closing tasks at issue had taken only 59 seconds per day."

"Instead," held the Court of Appeals, "we understand the rule in *Troester* as mandating compensation where employees are regularly required to work off the clock for more than 'minute' or 'brief' periods of time." Thus, employers need not account for exceedingly brief periods of time (*i.e.,* "split-second absurdities") or short periods of time that are so "irregular that it is unreasonable to expect the time to be recorded." Otherwise, "[a]fter *Troester*, an employer that requires its employees to work minutes off the clock on a regular basis or as a regular feature of the job may not evade the obligation to compensate the employee for that time by invoking the *de minimis* doctrine."

The Takeaway

As *Troester* established, and the Ninth Circuit Court of Appeals has reaffirmed, in California the *de minimis* doctrine will rarely provide a defense to an employer's failure to compensate its employees for all time spent on work-related tasks, including pre- and post-shift inspections. Employers with operations in California must ensure that their employee inspection, timekeeping and other policies and procedures properly account for all such time.

If you have any questions about this or any other wage and hour issue, please contact the Jackson Lewis attorney(s) with whom you regularly work.