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NEW CALIFORNIA SUPREME COURT DECISION: FEDERAL DE MINIMIS PRINCIPLE DOES NOT APPLY TO STATE WAGE AND HOUR CLAIMS

On July 26, 2018, the California Supreme Court issued a unanimous opinion holding that the de minimis principle under the federal Fair Labor Standards Act does not apply to wage and hour claims brought under state law. In short, the holding means that, as a general rule, employees must be paid for all time worked even if the unpaid time is a small, de minimis amount. ("De minimis" is defined as "too trivial or minor to merit consideration.") This follows other recent decisions by the Court finding that California law provides employees greater protections than federal law (e.g., federal sleep time exception does not apply; definition of outside sales person; federal Portal-to-Portal Act does not apply to certain transportation time under employer's control).

The case is *Troester v. Starbucks Corporation.* Troester alleged that due to daily tasks related to store closing, such as transmitting daily sales and store data to Starbucks' corporate office, setting the alarm and locking the door, he was required to work between 4 and 10 minutes off-the-clock per shift. In his putative class action lawsuit, he sought individual compensation for approximately 12 hours and 50 minutes of unpaid time over a 17-month period which, at the then-applicable minimum wage of $8/hour, amounted to $102.67 total, exclusive of any penalties or other remedies (which comes to roughly $1.39/week). In reaching its holding, the Court explained that $102.67 "is enough to pay a utility bill, buy a week of groceries, or cover a month of bus fare. What Starbucks calls 'de minimis' is not de minimis at all to many ordinary people who work for hourly wages."

The Court emphasized that due to technological advancements employers are in a better position to come up with alternatives to track small amounts of regularly occurring work time. "One such alternative, which it appears Starbucks eventually resorted to here, was to restructure the work so that employees would not have to work before or after clocking out." The Court added that if existing technology does not provide a method, "an employer may be able to customize and adapt available time tracking tools or develop new ones when no off-the-shelf product meets its needs."

The Court went on to state that "even when neither a restructuring of work nor a technological fix is practical, it may be possible to reasonably estimate work time – for example, through surveys, time studies, or, … a fair rounding policy – and to compensate employees for that time. Under the circumstances of this case, we decline to adopt a rule that would require the employee to bear the entire burden of any difficulty in recording regularly occurring work time."

While the de minimis principle does not apply where employees are required "to work 'off the clock' several minutes per shift," the Court left the door open a small crack for future cases. "We leave open whether there are wage claims involving employee activities that are so irregular or brief in duration that it would not be reasonable to require employers to compensate employees for the time spent on them." The Court mentioned commute time that is brief and "incidental to noncompensable time," activities that are "irregular or rarely occurring," and "paperwork involving a minute

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or less of an employee's time." The Court was unwilling to prejudge these or other scenarios "such as an employee reading an email notification of a shift change during off-work hours." However, unless you are inclined toward possibly being the next test case regarding application of the de minimis principle, legal counsel should be consulted before allowing any work time to go unpaid.

It is important for employers to take notice of the Court's reference to rounding policies – where clock in and out times are rounded to the nearest 5, 10 or 15 minutes. While the Court did not expressly hold that rounding policies comply with state wage and hour laws, it did indicate that such policies may be valid if they do "not result over a period of time in the failure to compensate the employee for all the time they actually worked." In other words, the rounding policy must equally benefit the employer and employee such that over a representative period of time the amount of time rounded down is about the same as the amount of time rounded up. But such rounding policies have not yet been given the express seal of approval by the California Supreme Court, and conservative employers may want to consider paying employees to the minute rather than rounding time entries.

It is likely that this Supreme Court decision will result in an increase in wage and hour claims based on the failure to compensate employees for small periods of time. Employers should review their payroll policies and practices to ensure employees are not performing uncompensated off-the-clock work. Employers who currently do not compensate employees who spend small amounts of time performing discrete tasks, such as reviewing scheduling changes or responding to occasional calls or emails from home, run an increased risk of legal action in this area. Some additional action items include:

- Ensuring your timekeeping policy requires the accurate recording of when employees begin and end their workday, and the start and end of all meal periods
- Ensuring your timekeeping policy states that off-the-clock work is prohibited and may result in disciplinary action
- Considering timekeeping alternatives to ensure that all time worked is captured, including when limited off the clock time is spent checking emails or other tasks
- Considering compensation alternatives if there can be delays in the time it takes employees to record their time, such as the time it may take to log on if employees record time by logging into electronic timekeeping systems
- Considering whether to abandon rounding policies

Please contact Jeff Dinkin or John Wicker at Stradling if you would like our assistance.

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