

(Nearly) Every Minute Counts for Non-Exempt Employees in California Following the State Supreme Court's Ruling in Troester v. Starbucks

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On June 2016, using a procedure permitting a federal court to request a ruling from the California Supreme Court regarding the meaning of California law,[1] the Ninth Circuit Court of Appeals requested certification for the following question in the case of *Troester v. Starbucks Corporation*:

Does the federal Fair Labor Standards Act's de minimis doctrine, as stated in *Anderson v. Mt. Clemens Pottery Co.* (1946) 328 U.S. 680, 692, and *Lindow v. United States* (9th Cir. 1984) 723 F.2d 1057, 1063, apply to claims for unpaid wages under California Labor Code sections 510, 1194, and 1197?[2]

The California Supreme Court granted the certification and issued its ruling in July 2018.[3] As we explain further, the Court ruled that the identified sections of California's overtime and minimum wage laws do not contain or incorporate the *de minimis* doctrine in a form that excused Starbucks from paying for the time challenged by the plaintiff. Yet, the Court did not rule out the possibility that some type of *de minimis* principle could apply under different facts in another case under California wage and hour laws.

As a result, although employers may act lawfully under the federal Fair Labor Standards Act ("FLSA") when excluding certain *de minimis* time from a non-exempt employee's compensable hours worked, California employers, including public agency employers, should proceed with extreme caution before doing so. In closing this article, we identify a number of recommended steps for employers to evaluate and potentially modify practices in light of the Court's ruling in *Troester*.

I. Overview

In August 2012, Douglas Troester brought suit on behalf of himself and a claimed class of all non-managerial California employees of Starbucks who performed store closing tasks from mid-2009 through October 2010. As a shift supervisor, Troester was responsible for

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activating the alarm at his assigned store, locking the door, and walking coworkers to their cars. Troester also occasionally reopened the store if an employee left an item behind, or to bring in store patio furniture that had been left outside mistakenly. Troester argued that he and the other employees should have been paid for these store closing tasks, which they completed regularly but not until they had already clocked out using software located inside the store.

It was undisputed that over the course of a 17-month period, Troester had spent a combined total of approximately 12 hours and 50 minutes performing these tasks and that the tasks involved would ordinarily be compensable. However, Starbucks defended its actions on the grounds that the individual increments of time were *de minimis* and so were appropriately excluded in determining the compensable hours worked by Troester and the other class members. In support of its argument, Starbucks relied upon the existing *de minimis* test in the Ninth Circuit under the FLSA, which requires consideration of (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." Based on this test, Starbucks argued that although the time was worked regularly, it was not compensable due to the other two factors.[4]

The district court agreed and granted Starbucks' motion for summary judgment based on its determination that the *de minimis* doctrine under the FLSA also applied to the claims under California law. On appeal, after determining that the California Supreme Court had never addressed this question of California state law, the Ninth Circuit certified that question to the Court. The Court responded with the following multi-part ruling:

- A *de minimis* doctrine has been recognized under some aspects of California law, such as under the free speech clause of the California Constitution, and also as one of the "maxims of jurisprudence" in the California Civil Code. A decision from the California Court of Appeal had used the FLSA standard in a wage and hour decision, without considering whether it applies to claims under California law.[5] Also, the doctrine had been included in the Policies and Interpretations Manual published by the Division of Labor Standards Enforcement ("DLSE") and in various opinion letters by the DLSE, but they were "advisory opinions" and not binding on the Court.[6]
- None of the Labor Code Sections at issue, nor the Wage Orders, have incorporated the *de minimis* doctrine as it has been defined and applied under the FLSA.
- As a result, Starbucks violated these provisions of California law when it permitted or required employees to "routinely work for minutes off the clock without compensation."

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Notably, the Court expressly left 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." Despite doing so, the Court observed that there had been significant technological developments in timekeeping in the decades since the seminal decisions were issued regarding *de minimis* time under the FLSA.

II. Significance of *Troester* for Public Agency Employers

It is important to keep in mind that Troester's claims were based on violations of Section 510 [overtime] and also Sections 1194 and 1197 [minimum wage] of the California Labor Code. Although the California Court of Appeal has ruled expressly that Section 510 of the Labor Code does not apply to a public agency,[7] the minimum wage requirements under the Labor Code do apply expressly to "the state, political subdivisions of the state, and municipalities."[8]

Similarly, while the overtime provisions of the wage orders generally do not apply to any "employees directly employed by the State or any political subdivision thereof, including any city, county, or special district," the Wage Orders do not completely exclude these types of public employees. For example, the Wage Order that covers the positions held by many public sector employees is Wage Order 4, which addresses wages, hours and working conditions in "Professional Technical, Clerical, Mechanical and Similar Occupations."[9] Wage Order 4 specifies that provisions such as daily overtime and double pay; meal and rest periods; reporting time pay; and uniforms and equipment, among others do not apply to those public employees: However, Wage Order 4 specifies that provisions related to determining entitlement to minimum wage and various definitions that affect compensability of time worked do apply to those employees. Notably, those provisions include the test for exempt/non-exempt status and definitions for key terms such as "hours worked" and "primarily."

The "hours worked" principle is particularly significant, because it not only influences time for which employees are entitled to compensation but may affect other time-based rights for employees under California law, such as accrual of sick leave under the Healthy Workplaces, Healthy Families Act or accumulation of the minimum 1250 hours for eligibility under the California Family Rights Act and New Parent Leave Act.

III. Recommended Next Steps

The key takeaway from the Court's *Troester* ruling is that employers need to be aware of all of the time that employees are working, keeping in mind that this includes any time that employees are "suffered or permitted" to work, including time "off the clock." The

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Court emphasized that employers are in the best position to develop methods that would allow them to capture all time worked by employees, especially work that is regularly occurring. Managers and supervisors will play a particularly critical role in helping Human Resources/Personnel and Finance/Payroll to identify the types of tasks that employees may be performing "off the clock" without compensation.

Based on that review, an employer may determine that there are, in the words of the Court, periods of time worked "off the clock" that are "so irregular or brief in duration that employers may not be reasonably required to compensate employees for the time spent on them." However, in light of the Court's recognition of modern advances in tracking employee time, employers would benefit from an extremely careful evaluation of their existing timekeeping methods and consideration of potential alternatives before making such a determination.

In particular, employers should carefully consider the wide range of potential resources that may affect the likelihood of establishing the "administrative difficulty" in tracking and compensating employees for all time worked. For example, in *Troester,* the Court suggested that employers could restructure duties to ensure that employees do not work before or after clocking out, use technology to help accurately record all time worked, and identify methods to reasonably estimate work time that can't be tracked readily. Again, managers and supervisors will play a critical role in helping to ensure that employees either stop performing reoccurring "off the clock" tasks or else are compensated appropriately for them.

As a further consideration, it will be important to determine whether new or updated policies are needed to document new or changed practices and expectations. Employers may also wish to consider providing training for employees in HR/Personnel, Finance/Payroll, as well as educating supervisors and managers regarding their expected roles.

Finally, we note that employers should also evaluate any potentially applicable obligations under labor relations laws regarding any decisions made related to represented employees' wages, hours, and working conditions or the effects of those decisions.

Overall, given the nuanced and fact-specific nature of the legal issues involved, employers are reminded to raise concerns regarding specific state or federal wage and hour issues with legal counsel or the agency's Regional Risk Manager.

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[1] On occasion, federal courts are required to decide cases that require an interpretation of state law related to an issue that has not yet been decided by the highest court in the state in which the case is filed. The federal court may then certify specific questions to that highest state court to assist in the federal court's analysis. For example, when this situation arises in California, Rule 8.548 of the California Rules of Court permits the federal court to request that the California Supreme Court answer specific questions regarding the meaning of California law.
[2] *Troester v. Starbucks Corp.* (9th Cir. 2016) 680 Fed.Appx. 511.
[3] *Troester v. Starbucks Corp.* (2018) 5 Cal.5th 829 (modified on denial of rehearing August 2018).
[4] Lindow v. United States, (9th Cir. 1984) 738 F.2d 1057, 1063.
[5] *Gomez v. Lincare* (2009) 173 Cal.App.4th 508.
[6] *See* Sections 47.2.1. and 47.2.1.1.
[7] *See e.g. Johnson v. Arvin-Edison Water Storage District* (2009) 174 Cal.App.4th 729.
[8] *See Cal. Labor Code* § 1182.12(b)(3).
[9] *See generally* 8 Cal. Code Regs. § 11040.

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