



NINTH CIRCUIT REVIVES OFF-THE-CLOCK CLAIM POST-TROESTER V. STARBUCKS CORP.

The *de minimis* doctrine is a defense theory applicable to actions in federal court. It precludes recovery for otherwise compensable amounts of “off-the-clock” work that are small, irregular or administratively difficult to record. The *de minimis* doctrine has been applied to periods lasting up to 10 minutes a day.

Last year in *Troester v. Starbucks Corp.*, the California Supreme Court held that the *de minimis* doctrine did not apply to claims brought under California law. In *Troester*, Starbucks employees were required to clock-out before conducting various closing activities. In reaching its decision, *Troester* rejected the 10-minute *de minimis* threshold as inconsistent with California law and its strong policies favoring paying employees for all hours worked. It further noted the regular nature of the off-the-clock time and the ability of employers to either restructure work to make it occur on the clock or to devise alternative methods to track the time.

Prior to the *Troester* decision, in *Rodriguez v. Nike Retail Services, Inc.* the Northern District of California dismissed an action brought by a group of Nike retail store employees who alleged that Nike violated California law by requiring them to submit to bag inspections after they clocked out for breaks or at the end of the day.

In reaching its decision, the District Court relied on evidence that the average security inspection lasted less than 20 seconds and that even the longest inspections never exceeded several minutes. Nike also presented evidence that it was administratively unfeasible to have the inspections occur on the clock, in part because inspections occurred at the front store exit where a time-clock could not be placed for business reasons. After the California Supreme Court issued its decision in *Troester*, the plaintiffs appealed and the Ninth Circuit issued its decision this summer.

On appeal, emphasizing the shortness of the inspections, Nike argued that the Northern District’s decision should be affirmed because of language in the *Troester* decision leaving open the possibility that the *de minimis* doctrine could survive “in circumstances where compensable time is so minute or irregular that it is unreasonable to expect the time to be recorded.” Nike also suggested based on a remark in *Troester*, that the Court of Appeal replace the previous 10-minute *de minimis* threshold with a 60-second threshold, a suggestion the Court declined. Further, although agreeing that even after *Troester* employers are not required to account for “split-second absurdities,” the Court of Appeal disagreed that inspections occurring on a daily basis and potentially lasting several

minutes could necessarily be categorized as so brief and irregular as to escape compensation. In reaching this decision the Court of Appeal noted that the inspections were a regular feature of the job and that there were alternatives to the current after clock-out inspections, including moving inspections to the rear of the store so they could occur before clock-out, or adding a fixed amount of compensable time for inspections after clock-out.

Although the *Troester* decision seemingly left open a small loophole for continued use of a *de minimis* defense in response to off-the-clock claims, the loop hole is extremely limited. Rodriguez makes clear that after *Troester*, the regularity and predictability of the off-the-clock time will be as, if not more important than the actual amount of time at issue. Further, to the extent the loop hole exists, administrative difficulty will likely be a non-consideration if there are alternative feasible methods of compensating for time such as adding on estimated amounts, or if off-the-clock time can be eliminated by restructuring duties.

Notes for Employers:

- Assume that any regular job feature is compensable, even if the amount of time involved lasts less than a minute.
- Opening and closing routines should be reviewed to eliminate off-the-clock work. Consider using checklists to ensure that employees are clocked-in while performing these routines.
- Employers that conduct employee bag checks should consider conducting them in the same area where time-clocks are located so that clock-out can occur immediately after the checks are complete.
- Regular employee duties that must occur off-the-clock, for example locking doors, setting alarms or closing gates are likely

compensable and employers should consider alternate methods of capturing time or a non-arbitrary method of estimating time.

Disclaimer: *This article is intended to provide Donahue Fitzgerald clients and contacts with general information. The content of this publication is for informational purposes only and is not legal advice. The law frequently changes and legal matters are fact specific. Readers should obtain legal counsel to provide advice on a particular matter and should not act upon the information contained in the publication without seeking professional counsel. Neither the presentation of the information in this publication nor the receipt of the information creates an attorney-client relationship. Donahue Fitzgerald assumes no liability for the use or interpretation of information contained herein.*

Copyright 2019 ©, Donahue Fitzgerald LLC. All rights reserved.

