Portfolio Media. Inc. | 111 West 19th Street, 5th floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

An Unclear Path For Defending Calif. Wage-And-Hour Claims

By **Brandon Takahashi and Brian Noh** (August 28, 2018, 1:06 PM EDT)

Brandon Takahashi

Brian Noh

As wage-and-hour litigation continues to evolve in California, recent decisions from the California Supreme Court in Douglas Troester v. Starbucks Corporation and the U.S. Northern District Court of California in Ser Lao v. H&M Hennes & Mauritz LP have thrust, stage-front, the question of whether the de minimis doctrine, long-held as a defense against wage-and-hour claims brought under the Fair Labor Standards Act, will be applicable at all as a defense when applied to the California Labor Code.

The de minimis doctrine is an application of the age-old legal principle originating from the maxim de minimis non curat lex, which means "[t]he law does not concern itself with trifles."[1] Numerous courts have cited to, and relied upon, the doctrine in a wide variety of subject matters. In the employment context, federal courts have applied the doctrine to excuse employers from the payment of small amounts of otherwise compensable time upon a showing that the time is administratively difficult to record.[2]

California state courts have not been able to reach the same level of uniformity. This variation is highlighted by the different approaches that California courts and the Department of Labor Standards Enforcement, or DLSE, have taken in defining the de minimis doctrine. In 1988, long before Troester, the DLSE was asked to opine on an employment scenario wherein employees spent small amounts of time changing into and out of their work uniforms.[3] After reviewing the facts and available law, the DLSE suggested that the employer may, indeed, have to compensate the workers for this time. Significantly, the DLSE rested its decision on the Ninth Circuit case of Lindow v. United States, where the court held that an employer is not liable for failing to pay for de minimis time that is administratively difficult to record.[4] The DLSE later memorialized this view in its Enforcement Policies and Interpretations Manual.[5] Meanwhile, the California Supreme Court remained silent on this issue.

Douglas Troester v. Starbucks Corporation

In Troester, the California Supreme Court has finally attempted to address this apparent gap in authority. The case was initiated by a Starbucks shift supervisor who filed a complaint in Los Angeles Superior Court on behalf of himself and a putative class of all nonmanagerial Starbucks employees in California who performed store closing tasks from mid-2009 to October 2010.[6] The plaintiff, Douglas Troester, submitted evidence that during the alleged class period, he was required to clock out on every closing shift before initiating the company software's "close store procedure" on a separate computer terminal in the back office.[7] After completing this task, he would activate the alarm, exit the store and lock the front door.[8] On some occasions, he would reopen the store to allow employees to retrieve items they left behind, wait with employees for their rides, or bring in store patio furniture mistakenly left outside.[9] Generally, these closing tasks required Troester to work four to 10 additional minutes each day, and over the 17-month period of his employment, his unpaid time totaled approximately 12 hours and 50 minutes, adding up to $102.67, exclusive of any penalties or other remedies.[10]

From the foregoing, the central question reviewed by the California Supreme Court was whether the FLSA's de minimis doctrine, as stated in prior federal caselaw, applied to claims for unpaid wages under California Labor Code Sections 510, 1194 and 1197. The California Supreme Court structured its decision into two parts: (1) whether California's wage-and-hour statutes or regulations adopted the de minimis doctrine found in the FLSA; and (2) whether the de minimis doctrine applies, as a general matter, to wage-and-hour claims.

The first part of the California Supreme Court's analysis focused on the statutory language and legislative history of the Labor Code and Industrial Welfare Commission, or IWC, wage orders. The court found that the language of the Labor Code and IWC wage orders should be afforded liberal construction in favor of protecting employees. Barring evidence of the IWC's intent to adopt the different federal standard, the court concluded that California statutes and wage orders did not adopt the federal de minimis doctrine.[11]

This finding, however, did not completely resolve the question before the court. Turning its attention to the question of general applicability of the de minimis doctrine, the California Supreme Court noted the "ancient origin" of the doctrine and its "part [in] [] the established background of legal principles against which all enactments are adopted."[12] The history and longstanding view of the doctrine meant that, absent contrary indication, the doctrine was part of all enactments.[13] Despite such observation, however, the California Supreme Court declined to extend the principle to the set of facts presented before it, finding that the few extra minutes of work the plaintiff had engaged in each day added up to a nontrivial amount of time that the court did not view as "de minimis."[14] The court thus left open the question of whether there may ever be 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.[15] As notably pointed on in Justice Mariano-Florentino Cuéllar's concurring opinion, "[I]n reaching [its] conclusion, the majority opinion [] le[ft] unresolved whether an employee's work may ever be so fleeting or irregular that such time is no longer compensable."[16]

With the new Troester decision in hand, California courts appear to be left standing at a proverbial fork in the road. On the one hand, the California Supreme Court has unambiguously held that both the statutory text and legislative history of the Labor Code and IWC wage orders do not leave room for the de minimis doctrine. On the other hand, it has declined to judicially rule the de minimis doctrine out of existence, leaving it intact for those few and rare occasions when the time spent is "so irregular or brief in duration that it would not be reasonable to require employers to compensate employees for the time spent on them."

Ser Lao v. H&M Hennes & Mauritz LP

As would be expected, the Troester decision has already begun to have important effects on California wage-and-hour class action matters. In a pending class action case venued with the U.S. District Court of California, the Northern District has already applied the California Supreme Court's holding regarding the re-examined value of the de minimis doctrine from Troester, to partially grant a class certification motion filed by a former employee against the retail apparel company H&M Hennes & Mauritz LP

In the current case Ser Lao v. H&M Hennes & Mauritz LP,[17] the plaintiff, Ser Lao, worked approximately one-and-a-half years as an hourly, nonexempt employee, who had some managerial duties at one of H&M's stores in Fresno, California.

Lao claims: (1) that he and all other hourly, nonexempt employees for the company were required under company policy to undergo security checks before leaving the store for their rest breaks and at the end of their shifts, but were not compensated for this time; (2) that he and all other hourly, nonexempt employees for the company were issued "Money Network ATM cards" for their final payment of wages upon separation without their consents to this, and that as a result of using the "Money Network ATM cards," employees were sometimes charged a fee for accessing and/or using their final pay; and (3) that H&M failed to specify the applicable hourly rates and number of hours worked by hourly, nonexempt employees on wage statements for pay periods during which such an employee worked overtime and earned a bonus and/or nondiscretionary incentive pay.[18]

Based on these assertions, Lao moved to certify a class on each basis; the Northern District's application of the Troester decision, however, impacted only the first category presented by the plaintiff, regarding the allegation that employees were not compensated properly for time spent undergoing security checks while leaving the store.

According to evidence submitted in support of the plaintiff's motion, security inspections are to be performed of employees and their bags as a theft-deterrent. So long as an employee enters a store carrying a "bag, purse, briefcase, backpack, etc." and goes into an "employee only" area of the store, that employee must submit to a "visual search" of that bag by a member of management prior to exiting the store. If a manager or security officer is not at the door to the store, the employee is supposed to find a manager and have his/her bag inspected.[19]

According to Lao, security checks that took place at the end of an employee's shift were conducted "off-the-clock," and potentially took a "significant [amount of] time." The entire security check process included clocking out, waiting for a manager and undergoing a visual or bag inspection. And for those inspections that took place at the end of an employee's shift, "three to four minutes, or more" could be expended.[20]

In opposition, H&M argued that it should not be held liable for security checks that took only de minimis time, and that there is no feasible way to determine which putative class members would have undergone a security check that lasted more than de minimis time other than by conducting individualized inquiries of every employee.[21] H&M further added that its security checks are, at most, irregular and/or brief.[22]

Applying Troester to this scenario, the Northern District: (1) observed several other cases where a class was certified based on the common question as to whether employees should be compensated for off-the-clock time spent undergoing mandatory security checks;[23] (2) accepted the evidence that all H&M employees are subject to a common security check practice that includes a visual inspection of an employee and a bag check, if that employee is carrying a bag;[24] (3) accepted evidence that the wait time to undergo a security check could be as long as 30 minutes;[25] and (4) observed that under the principle set forth by Troester, California law "do[es] not allow employers to require employees to routinely work for minutes off-the-clock without compensation."[26] Therefore, given that "[a] few extra minutes of work each day c[ould] add up," the Northern District ruled that the de minimis doctrine could not be successfully relied upon by H&M[27] and granted class certification on this issue.

It should be noted that the Northern District also walked through an analysis of the other bases for certification, as well as an analysis of H&M's alleged practice of conducting security checks on the clock for employees leaving for their rest periods. However, for purposes of this article, as Troester did not impact those analyses, those issues have not been addressed.

Looking Forward

If anything is clear, it is that the state of the de minimis doctrine in California as applied to state wage-and-hour claims will be unclear until either the California Courts of Appeal or the California Supreme Court issue further rulings in other matters, clarifying the parameters of this doctrine. Until then, courts may very well continue to struggle to come up with a uniform standard. Meanwhile, in their efforts to articulate a standard, courts may be more likely to grant future motions for class certification due to the recent Troester decision, especially as the ability of employers to keep more exact time data for their employees progresses, and as the amounts of time arguably spent under an employer's control, but off-the-clock, are more closely scrutinized — no matter how seemingly minuscule.

Brandon A. Takahashi is a partner and Brian M. Noh is an associate at Hinshaw & Culbertson LLP.

Disclosure: Takahashi formerly served as external litigation counsel for H&M Hennes & Mauritz LP.

firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] Black's Law Dict. (10th ed. 2014), p. 524.

[2] See Troester v. Starbucks Corporation (2018) 5 Cal. 5th 829.

[3] See Dept. of Industrial Relations, DLSE Opn. Letter No. 1988.05.16 (May 16, 1988).

[4] Lindow v. United States (9th Cir.1984) 738 F.2d 1057, 1064 .

[5] See Troester, supra, (2018) 5 Cal. 5th at 841.

[6] See Troester, supra, (2018) 5 Cal. 5th at 835.

[7] See Troester, supra, (2018) 5 Cal. 5th at 835-36.

[8] Ibid.

[9] Id.

[10] Id.

[11] Id. at 840-42.

[12] Id. at 842.

[13] Id.

[14] Id. at 847.

[15] Id. at 848.

[16] Id. at 848-49.

[17] N.D. Cal. Case No. 5:16-cv-00333-EJD.

[18] Ser Lao v. H&M Hennes & Mauritz, L.P. , N.D. Cal. Case No. 5:16-cv-00333-EJD, Order Granting In Part and Denying In Part Plaintiff's Motion for Class Certification, 1:14-22.

[19] Ser Lao v. H&M Hennes & Mauritz, L.P., N.D. Cal. Case No. 5:16-cv-00333-EJD, Order Granting In Part and Denying In Part Plaintiff's Motion for Class Certification, 3:6-18.

[20] Id. at 4:10-17.

[21] Id. at 12:16-20.

[22] Id. at 13:10-11.

[23] Id. at 11:24-12:15.

[24] Id. at 14:17-19.

[25] Id. at 14:24-26.

[26] Id. at 13:3-6.

[27] Id. at 15:13-17.