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Just A Minute, Isn't That De Minimis: California Should Not Burden or Require National Employers to Compensate Employees for De Minimis Off-the-Clock Work Activities

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**JUST A MINUTE, ISN'T THAT *DE MINIMIS*: CALIFORNIA
SHOULD NOT BURDEN OR REQUIRE NATIONAL
EMPLOYERS TO COMPENSATE EMPLOYEES FOR *DE
MINIMIS* OFF-THE-CLOCK WORK ACTIVITIES**

Alan Persaud*

ABSTRACT

The Fair Labor Standards Act (“FLSA”) requires employers to adhere to the federal minimum wage and overtime requirements when compensating employees for all “hours worked.” Federal courts recognize and apply an exception known as the *de minimis* doctrine to disregard insubstantial amounts of time. The *de minimis* doctrine excuses employers from compensating employees for trivial amounts of time spent on off-the-clock work activities, such as waiting to log onto a computer, passing through a security check, and activating an alarm. Under the *de minimis* doctrine, employees cannot receive compensation for a few seconds or minutes that occurred outside scheduled working hours. States, however, have their own wage orders and labor codes that provide greater protections to employees that go beyond the FLSA requirements. Thus, the application of the *de minimis* doctrine to off-the-clock claims brought under the FLSA is different than the doctrine’s application to claims brought under state wage and hour laws. No state has explicitly refused to apply the *de minimis* doctrine in state wage and hour claims, other than California. Regardless of whether California explicitly adopted the *de minimis* doctrine in its respective wage orders and labor codes, California should have applied the *de minimis* doctrine to off-the-clock state wage and hour claims. The doctrine’s policy interests warrant its adoption and use in state wage and hour law and rejecting the *de minimis* doctrine only burdens employers to record insignificant amounts of time that are administratively difficult to capture.

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I. INTRODUCTION

Though employers are required to compensate employees for hours worked, smaller or trivial increments that are administratively difficult to record are often in dispute, and either highly advanced technologies are needed to capture those small amounts of time, or a doctrine is needed to disregard them, such as the *de minimis* doctrine.¹ The *de minimis* doctrine excuses employers from paying wages for trivial amounts of otherwise compensable time.² The doctrine derives from the Latin legal maxim *de minimis non curat lex*, which translates as “the law does not concern itself

¹ See *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946). See generally *Troester v. Starbucks Corp.*, 421 P.3d 1114 (2018).

² *Troester*, 421 P.3d at 1116.

with trifles.”³ *De minimis*, or “trifles,” are something of small value or little importance.⁴ The rule applies when the harm is trivial, but calculating it for purposes of a remedy would be burdensome, time-consuming, and not worthwhile given its trivial nature.⁵ The *de minimis* doctrine is applicable to a variety of factual contexts,⁶ and its application conserves judicial resources and prevents the court system from getting hung up with trivial matters.⁷ In the context of wage and hour law, the *de minimis* doctrine’s applicability is based on three factors: “(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.”⁸ In wage and hour cases, employers bear the burden of proving that the *de minimis* doctrine applies.⁹ Hence, employers use the doctrine as a defense to wage and hour violations concerning off-the-clock work activities.¹⁰

Consider the following off-the-clock scenarios: A coffee shop manager spends about fifteen to twenty seconds unlocking the front door; about thirty seconds walking to the clock-in station; and one or two minutes to turn on the timekeeping system and finally clock-in. After completing his shift and clocking out, the manager spends about one minute activating the store’s alarm; fifty seconds exiting the store; fifteen seconds locking the main door; and forty seconds walking coworkers to their vehicles, if coworkers need to be walked to their vehicles. Assume the manager is only compensated for the time recorded via the clock-in system.

Another employee works at a plant that requires certain security measures. When the employee enters, she has to wait in a security line every day before clocking in and wait in the line after clocking out. The time spent waiting in the security line varies. On some days, the time spent passing through the security line is approximately less than three minutes. On other days, waiting time could be three or even five minutes. After passing through the security line, the employee takes twenty to thirty seconds to don (put on)

³ Jeff Nemerofsky, *What Is a “Trifle” Anyway?*, 37 GONZ. L. REV. 315, 316 (2001/2002) (citing *Ringgold v. Black Entm’t Television, Inc.*, 126 F.3d 70, 74 (2d Cir. 1997)).

⁴ *Trifle*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/trifle> (last visited Sept. 2, 2019).

⁵ *Mitchell v. JCG Indus., Inc.*, 745 F.3d 837, 841 (7th Cir. 2014).

⁶ See *Lueras v. BAC Home Loans Servicing, LP*, 221 Cal. App. 4th 49, 79, 82 (2013) (applying the *de minimis* doctrine to nominal damages); *Harris v. Time, Inc.*, 191 Cal. App. 3d 449, 458–60 (1987) (affirming that a few seconds to open envelopes and examine their contents is *de minimis* and a waste of judicial resources); *Overholser v. Glynn*, 267 Cal. App. 2d 800, 810 (1968) (applying the *de minimis* doctrine to prejudgment interest); *Pfaff v. Fair-Hipsley, Inc.*, 232 Cal. App. 2d 274, 278 (1965) (applying the *de minimis* doctrine to contract performance claims).

⁷ Nemerofsky, *supra* note 3, at 324.

⁸ *Lindow v. United States*, 738 F.2d 1057, 1063 (9th Cir. 1984).

⁹ *Kellar v. Summit Seating Inc.*, 664 F.3d 169, 176 (7th Cir. 2011).

¹⁰ *Id.*

a hardhat, safety glasses, and gloves. Then, she clocks-in and finally starts working. After completing her shift and clocking out, the employee spends fifteen to twenty seconds to doff (take off) her safety gear and about one to five minutes passing through a security line. Only then, is the employee's work-day complete. Assume that the plant worker is only compensated for the time recorded on the clock-in system, and no other advanced timekeeping systems were used.

Under the Fair Labor Standards Act ("FLSA" or the "Act"), employers risk federal wage and hour violations if they do not adhere to minimum wage and overtime requirements.¹¹ Based on the aforementioned plant worker's and coffee shop manager's off-the-clock work activities, assume that they allege violations of wage and hour laws against their respective employers and seek remedy in court. If the coffee shop manager brings his off-the-clock claims under the FLSA, the manager will not prevail since the time spent on the off-the-clock work activities "concern[] only a few seconds or minutes of work beyond the scheduled working hours" and will be disregarded as *de minimis*.¹² Specifically, the trivial amounts of time that the manager takes to walk to the clock-in station, turn on the timekeeping system, lock the door, activate the alarm, and walk coworkers to their cars are administratively difficult to record, insubstantial when aggregated, and vary in duration.¹³ Similarly, if the plant worker brings her off-the-clock claims under the FLSA, the plant worker will not prevail since the miniscule amounts of time that the worker takes to don generic safety gear and pass through a security line are *de minimis*.¹⁴

Employers have to comply not only with the FLSA, but also with state wage and hour laws that provide higher standards than the FLSA because states may offer greater protections to employees.¹⁵ The coffee shop manager and plant worker will most likely prevail if they bring their off-the-clock claims under state wage and hour laws, specifically under California wage and hour law.¹⁶ States, like California, have not explicitly adopted the *de*

¹¹ 29 U.S.C. §§ 206–07 (2019).

¹² *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946).

¹³ See *Hubbs v. Big Lots Stores, Inc.*, No. LA CV15-01601 JAK (ASx), 2017 U.S. Dist. LEXIS 85227, at *24–26 (C.D. Cal. May 12, 2017) (finding that time spent setting a store alarm and exiting the store after clocking out is *de minimis*); *Corbin v. Time Warner Entm't-Advance/Newhouse P'ship*, 821 F.3d 1069, 1081–82 (9th Cir. 2016) (holding one minute spent waiting to log into the timekeeping system is *de minimis*); *Fast v. Applebee's Int'l, Inc.*, 502 F. Supp. 2d 996, 1006 (W.D. Mo. 2007) (finding that time spent between the time walking in the door and the time clocking-in is *de minimis*).

¹⁴ See *Busk v. Integrity Staffing Sols., Inc.* 713 F.3d 525, 532 (9th Cir. 2013) (acknowledging that time spent during a security check can be classified as *de minimis*); *Von Friewalde v. Boeing Aero. Ops., Inc.*, 339 F. App'x 448, 454 (5th Cir. 2009) (finding that the time it takes to don and doff hearing and eye safety gear is *de minimis*).

¹⁵ See 29 U.S.C. § 218 (2019); *IBP, Inc. v. Alvarez*, 546 U.S. 21, 32 (2005) (holding that time spent waiting to don nonunique protective gear is *de minimis*).

¹⁶ See generally *Troester v. Starbucks Corp.*, 421 P.3d 1114, 1125 (Cal. 2018).

minimis doctrine into their respective state labor codes and wage orders.¹⁷ No evidence exists concerning the intent of the California Labor Code and Industrial Wage Commission's wage orders to adopt the *de minimis* doctrine.¹⁸ The California Supreme Court recently examined its own labor laws and determined that the doctrine does not apply to state wage and hour claims.¹⁹ Thus, employers must compensate employees for off-the-clock activities, such as activating an alarm, exiting a store, and locking a door, which last a few seconds or minutes.²⁰ California noted that it is free to provide greater protection to employees and that reliance on federal regulations or interpretations is misplaced when determining state law.²¹

First, this Comment gives an overview of federal and state wage and hour regulations and a history of the *de minimis* doctrine.²² Then, this Comment discusses the California Supreme Court's refusal to apply the *de minimis* doctrine to its state wage and hour claims.²³ This Comment argues that forcing employers to reevaluate their policies based on minuscule amounts of time, requiring them to measure every second of off-the-clock work activities, and leaving employers exposed to liabilities should be avoided at all costs.²⁴

Regardless of whether California explicitly adopted the *de minimis* doctrine in its respective wage orders and labor codes, California should have used federal precedent and applied the *de minimis* doctrine to off-the-clock state wage and hour claims.²⁵ Rejecting the *de minimis* doctrine only restricts employees and burdens employers to record insignificant amounts of time that are administratively difficult to capture.²⁶ Finally, this Comment recommends that states, like California, recognize the policy interests associated with the *de minimis* doctrine, apply the doctrine to state wage and hour claims, and not require employers to compensate employees for *de minimis* off-the-clock work activities.²⁷

¹⁷ *See id.*

¹⁸ *Id.* at 1119.

¹⁹ *Id.* at 1125.

²⁰ *Id.* at 1117.

²¹ *Id.* at 1119.

²² *See infra* Section II and III.

²³ *See Troester*, 421 P.3d at 1125.

²⁴ *See Mitchell v. JCG Indus., Inc.*, 745 F.3d 837, 843 (7th Cir. 2014).

²⁵ *See generally Troester*, 421 P.3d at 1121.

²⁶ *See Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946).

²⁷ *See infra* Sections VI–VIII.

II. OVERVIEW OF WAGE AND HOUR LAW

Before the FLSA, the United States government attempted to regulate public and private workers.²⁸ In 1936, Congress enacted the Walsh-Healy Public Contracts Act to improve labor conditions, but amendments and different court interpretations reduced the act's impact.²⁹ In support of better working conditions, President Franklin D. Roosevelt famously stated that employees should receive "a fair day's pay for a fair day's work" and that there is "no justification for the existence of child labor, no economic reason for chiseling workers' wages or stretching workers' hours."³⁰ President Roosevelt's speech echoed throughout the nation, and his words were the basis for the creation of federal and state wage and hour laws.³¹

A. Federal Wage and Hour Regulations

The principal federal law regulating the work environment, compensation, and hours worked is the FLSA.³² The administration and enforcement of the Act are the functions and responsibilities of the Department of Labor's ("DOL") Wage and Hour Division.³³ Congress passed the Act to rectify working "conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers."³⁴ Thus, the 1938 FLSA provides employees with minimum wage standards, overtime compensation protections, and child labor prohibitions.³⁵ The FLSA balances employer and employee interests by ensuring that employees receive compensation for the work that they completed.³⁶ The Act sets a national floor of a minimum hourly wage that all

²⁸ Ashley Singrossi, Comment, *The Final Rule: A Call for Congressional Action to Return the FLSA and the Middle Class to Its Former Glory*, 26 U. MIAMI BUS. L. REV. 117, 122 (2018).

²⁹ See Walsh-Healy Public Contracts Act, 41 U.S.C. § 6502 (2019) (originally enacted in 1936).

³⁰ H.R. REP. NO. 101-260, at 8–9 (1989), as reprinted in 1989 U.S.C.C.A.N. 696, 696–97 (quoting Message from President Franklin D. Roosevelt to Congress (May 24, 1937)).

³¹ Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, U.S. DEP'T LABOR, <https://www.dol.gov/general/aboutdol/history/flsa1938> (last visited Sept. 18, 2019).

³² 29 U.S.C. §§ 201, *et seq.* (2019).

³³ See 29 U.S.C. § 204 (2019).

³⁴ 29 U.S.C. § 202(a) (2019).

³⁵ 29 U.S.C. §§ 206, 207, 212 (2019); see GERALD MAYER ET AL., CONG. RES. SERV., R42713, THE FAIR LABOR STANDARDS ACT (FLSA): AN OVERVIEW 1 (2013), <https://www.fas.org/sgp/crs/misc/R42713.pdf>.

³⁶ *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981) (quoting *Overnight Motor Trans. Co. v. Missel*, 316 U.S. 572, 578 (1942)).

employers must adhere to.³⁷ The FLSA also requires employers to pay employees overtime compensation, in the amount of at least one-and-a-half times regular pay, for employees who worked over forty hours in a week.³⁸ Whether they sue individually and/or on behalf of “similarly situated” employees, employees can sue employers for violating the FLSA.³⁹ If found liable for FLSA violations, employers risk paying for liquidated damages in the amount equal to unpaid wages and overtime, in addition to reasonable attorney’s fees and court costs.⁴⁰

For payroll purposes and the accurate calculation of wages, employers need to determine what exactly qualifies as working time.⁴¹ The FLSA does not define “work,” but the Act does define “employ” as “to suffer or permit to work.”⁴² When determining what constitutes “work,” courts have interpreted the term broadly as to mean the exertion that employers benefit from or, more specifically, as the time that employers require employees to be on the workplace premises, even if those work activities do not require exertion.⁴³ In response to the different interpretations of what constituted “work,” Congress passed the Portal-to-Portal Act, which excluded preliminary and postliminary activities and the time traveling to the workplace from being calculated as compensable work.⁴⁴ Preliminary and postliminary activities include walking and traveling to and from the workplace, changing clothes before and after shifts, and other activities that precede and succeed principal work activities.⁴⁵ Preliminary and postliminary activities, however, that are integral and indispensable to the job are not excluded by the Portal-to-Portal Act.⁴⁶ Activities are integral and indispensable if they have intrinsic elements of principal activities that employees cannot forgo if they are to perform their respective work activities.⁴⁷

³⁷ See *Pac. Merch. Shipping Ass’n v. Aubry*, 918 F.2d 1409, 1425 (9th Cir. 1990), *cert. denied*, 504 U.S. 979 (1992).

³⁸ 29 U.S.C. § 207(a) (2019).

³⁹ 29 U.S.C. § 216(b) (2019).

⁴⁰ See *id.*

⁴¹ See 29 U.S.C. § 203 (2019).

⁴² 29 U.S.C. § 203(g) (2019); *IBP, Inc. v. Alvarez*, 546 U.S. 21, 26 (2005); see 29 C.F.R. § 785.6 (2019); see also *Reich v. N.Y. City Transit Auth.*, 45 F.3d 646, 649 (2d Cir. 1995) (“While . . . employers are required to compensate employees for ‘work’ . . . [Congress] did not define the contours of . . . ‘work.’”).

⁴³ See *Integrity Staffing Sols., Inc. v. Busk*, 574 U.S. 27, 31 (2014); see also *De Asencio v. Tyson Foods, Inc.*, 500 F.3d 361, 367 (3d Cir. 2007); *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692–94 (1946); *Armour & Co. v. Wantock*, 323 U.S. 126, 132–33 (1944); *Tenn. Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598–99 (1944).

⁴⁴ See 29 U.S.C. § 254 (2019).

⁴⁵ 29 U.S.C. §§ 203(o), 254 (2019).

⁴⁶ 29 U.S.C. § 254(a) (2019).

⁴⁷ *Busk*, 574 U.S. at 30.

The DOL adopted regulations that make work activities compensable, especially since the activities are for the benefit of the employer.⁴⁸ Accordingly, employers must compensate employees for off-the-clock work if employers knew or should have known that their employees completed work activities.⁴⁹ The DOL also adopted the continuous workday rule.⁵⁰ The rule defines a “workday” as the time period between commencing and completing principal work activities on the same workday.⁵¹ Preliminary and postliminary activities, however, to walk from a time clock to the work area or waiting to clock-in or receive safety gear occur outside of the continuous workday and are not compensable.⁵²

The DOL also codified the *de minimis* doctrine.⁵³ The DOL recognized that the amount of time spent on pre-shift and post-shift activities varies widely and that employers face difficulty when burdened with the task to monitor such off-the-clock work.⁵⁴ Thus, those circumstances warranted a doctrine to disregard activities so minimal that they are not compensable.⁵⁵

The FLSA also contains recordkeeping standards and requirements for recording hours worked by employees.⁵⁶ The DOL and FLSA require employers to ensure the maintenance of detailed and accurate records, such as information on each employee’s workweek, hours worked each day, applicable pay period, date of payment, and overtime compensation.⁵⁷ The DOL also adopted regulations allowing time rounding practices, which round starting and stopping work time to the nearest five minutes.⁵⁸ Time rounding practices are acceptable as long as the rounding does not fail to fully account for the time employees actually worked.⁵⁹

⁴⁸ See 29 C.F.R. § 785.11 (2019).

⁴⁹ See *id.*

⁵⁰ *IBP, Inc. v. Alvarez*, 546 U.S. 21, 29 (2005).

⁵¹ 29 C.F.R. § 790.6(b) (2019).

⁵² *Alvarez*, 546 U.S. at 37.

⁵³ 29 C.F.R. § 785.47 (2019) (“[I]nsubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded.... [S]uch trifles are *de minimis*.”); U.S. Dep’t of Labor, Wage & Hour Div., Opinion Letter FLSA2004-8NA at 1 (Aug. 1, 2004).

⁵⁴ See 29 C.F.R. § 785.47 (2019).

⁵⁵ See *id.*

⁵⁶ See 29 C.F.R. § 516 (2019).

⁵⁷ See *id.*; 29 C.F.R. § 785.13 (2019).

⁵⁸ 29 C.F.R. § 785.48(b) (2019).

⁵⁹ See *id.*

B. State Wage and Hour Law

Although the FLSA offers minimum standards for minimum wage and overtime compensation, the Act contains a savings clause that authorizes states to enact stricter regulations than those found in the FLSA.⁶⁰ States enact laws to require regular payment of wages and to prohibit employers from making unauthorized deductions from an employee's pay.⁶¹ The savings clause allows states to regulate minimum wages and overtime weeks, as long as the federal minimums are satisfied.⁶² Thus, employers could violate state wage and hour laws without violating the FLSA.⁶³

States have overtime wage laws covering a certain number of hours worked in a day, rather than in a week.⁶⁴ For instance, New York requires employers to compensate an additional hour of pay when employees work over ten hours within a work-day, which includes time from the beginning to the end of the workday and time off for meal breaks.⁶⁵ Whereas, Colorado requires employers to pay one-and-a-half times regular earnings for employees who worked over forty hours in a week, over twelve hours in one work-day, or over twelve consecutive hours.⁶⁶

Similarly, California employers are obligated to pay one-and-a-half times regular earnings for employees who worked over eight hours in a day and over forty hours "in any one workweek and the first eight hours worked on the seventh day of work in any one workweek."⁶⁷ California employers are also obligated to pay twice times regular pay for employees who worked over twelve hours in a day and over eight hours on the seventh day in a workweek.⁶⁸ California defines "hours worked" either as the amount of time employers permit employees to work or the amount of time employees are subject to the employer's control.⁶⁹ Like the FLSA, California wage and hour law requires employers to compensate employees for off-the-clock work if the employers knew or should have known that their employees completed

⁶⁰ 29 U.S.C. § 218(a) (2019).

⁶¹ *Id.*

⁶² *Id.*

⁶³ See Daniel V. Dorris, Comment, *Fair Labor Standards Act Preemption of State Wage-and-Hour Law Claims*, 76 U. CHI. L. REV. 1251, 1262 (2009).

⁶⁴ See COLO. CONST. art. XVIII, § 15; CAL. LAB. CODE § 510 (Deering 2019).

⁶⁵ See 12 N.Y. COMP. CODES R. & REGS. §§ 142-2.4(a), 142-2.18 (2019).

⁶⁶ COLO. CONST. art. XVIII, § 15; 7 COLO. CODE REGS. § 1103-1(4) (2019).

⁶⁷ CAL. LAB. CODE § 510(a) (Deering 2019).

⁶⁸ *Id.*

⁶⁹ *Morillion v. Royal Packing Co.*, 22 Cal. 4th 575, 582 (2000) (defining "hours worked" with two independent tests).

such work.⁷⁰ Employers must pay such compensation at the overtime rate, if applicable.⁷¹

In California, the provisions of the California Labor Code and the wage orders of California's Industrial Welfare Commission govern wage and hour claims.⁷² Courts characterize the purpose of California's Labor Code and wage orders as to protect employees.⁷³ Accordingly, the labor code and wage orders are liberally construed in favor of employees.⁷⁴ Since state wage orders and labor codes are more favorable than FLSA regulations, it incentivizes plaintiffs to bring wage and hour claims solely under state wage and hour laws.⁷⁵ Therefore, California and states with similar wage and hour laws would be hesitant to adopt a doctrine or defense that favors employers over employees.⁷⁶

III. HISTORY OF THE *DE MINIMIS* DOCTRINE

The *de minimis* doctrine has a long yet undeveloped history,⁷⁷ and it consistently promotes reasonableness on a case-by-case basis.⁷⁸ The main concept behind the doctrine is that violations may be so small that they would not be of the concern of the law.⁷⁹ The United States Supreme Court stated that “it is most unlikely Congress meant [the definition of “hours worked” in the FLSA] to convert federal judges into time-study professionals.”⁸⁰ The Court stated that the possible meaning of the FLSA's definition of “hours worked” could avoid “inconsequential judicial involvement in ‘a morass of difficult, fact-specific determinations.’”⁸¹ Due to the trivial nature of *de*

⁷⁰ See *id.* at 585.

⁷¹ See *id.*

⁷² *Brinker Rest. Corp. v. Superior Court*, 53 Cal. 4th 1004, 1026 (2012).

⁷³ *Mendiola v. CPS Sec. Sols., Inc.*, 60 Cal. 4th 833, 840 (2015); *Martinez v. Combs*, 49 Cal. 4th 35, 53–54 (2010).

⁷⁴ *Augustus v. ABM Sec. Servs., Inc.*, 2 Cal. 5th 257, 262 (2016).

⁷⁵ See *Dorris*, *supra* note 63, at 1252.

⁷⁶ See *generally* *Troester v. Starbucks Corp.*, 421 P.3d 1114 (Cal. 2018).

⁷⁷ *McAndrews v. Thatcher*, 70 U.S. 347, 359 (1865) (using *de minimis* as a term “nothing to speak of”); *Ware v. Hylton*, 3 U.S. 199, 268 (1796) (first mentioning “[d]e minimis non curat lex”).

⁷⁸ See Jeffrey Brown, *How Much Is Too Much? The Application of the De Minimis Doctrine to the Fourth Amendment*, 82 *Miss. L.J.* 1097, 1123–24 (2013).

⁷⁹ *Id.* at 1097–98.

⁸⁰ *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 234 (2014).

⁸¹ *Id.* at 235 (quoting *Sepulveda v. Allen Family Foods, Inc.*, 591 F.3d 209, 218 (4th Cir. 2009) (“[C]ourts and agencies would find themselves in a morass of difficult, fact-specific determinations if they were ultimately charged with deciding whether and how much of [small increments of] time was compensable.”)).

minimis claims, courts employ the doctrine and need not decide the substantive merits of such claims.⁸²

A. Origin of the De Minimis Doctrine in Wage and Hour Law

The origin of the *de minimis* doctrine and its use in wage and hour law was first mentioned in the seminal case, *Anderson v. Mount Clemens Pottery Co.*⁸³ Even though the United States Supreme Court ruled that the employee activities of walking to and from clock-in stations to actual work stations were considered “work” under the FLSA, the Court noted that some, if not all, of the walking time may be non-compensable with a *de minimis* rule.⁸⁴ When recording working time, employers may disregard insignificant amounts of overtime, which are administratively difficult to record for payroll purposes.⁸⁵ Compensable work needs to be recorded in light of industrial realities, but neither the realities of working conditions nor the FLSA’s policy interests support recording split-second absurdities.⁸⁶ Since the Court’s ruling in *Anderson*, courts have held that such trifles or insubstantial periods of time are “*de minimis*.”⁸⁷ Therefore, the *de minimis* doctrine is a common defense to unpaid claims regarding small amounts of time.⁸⁸

B. Courts Use the Lindow Factors to Determine Whether Off-the-Clock Activities Are De Minimis

How much is *de minimis*, and when is the doctrine applied? Most circuits use the *Lindow* factors when determining the applicability of the *de*

⁸² Anita Bernstein, *Civil Rights Violations = Broken Windows: De Minimis Curet Lex*, 62 FLA. L. REV. 895, 897–98 (2010) (“Litigants lose when their stance is cast as trivial or when they fail to persuade the judge that their adversary has made a trivial claim.”).

⁸³ *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692–94 (1946).

⁸⁴ *Id.* at 692.

⁸⁵ *Id.*

⁸⁶ *Rodriguez v. Nike Retail Servs.*, No. 14-cv-01508-BLF, 2017 U.S. Dist. LEXIS 147762, at *17 (N.D. Cal. Sept. 12, 2017); *see Anderson*, 328 U.S. at 692.

⁸⁷ *Von Friewalde v. Boeing Aero. Operations, Inc.*, 339 F. App’x 448, 458 (5th Cir. 2009); *Mitchell v. Williams*, 420 F.2d 67, 70 (8th Cir. 1969); *Frank v. Wilson & Co.*, 172 F.2d 712, 716 (7th Cir. 1949); *see Anderson*, 328 U.S. at 692.

⁸⁸ *Kellar v. Summit Seating Inc.*, 664 F.3d 169, 176 (7th Cir. 2011).

minimis doctrine.⁸⁹ In a landmark case, *Lindow v. United States*,⁹⁰ the Ninth Circuit laid out three guiding factors when analyzing the *de minimis* doctrine: “(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.”⁹¹ No one factor is dispositive of a *de minimis* finding, but the showing of more than one factor makes it more likely for a court to invoke the doctrine.⁹² When analyzing the *Lindow* factors, circuits engage in a factual inquiry that changes depending on the amount of *Lindow* factors present and the circumstances surrounding the off-the-clock work.⁹³

No exact “amount of time . . . is considered *de minimis per se*.”⁹⁴ Though some courts vary regarding what exactly constitutes *de minimis* time, most courts recognize that daily periods of ten minutes are *de minimis*.⁹⁵ When determining whether the *de minimis* doctrine is applicable, courts look to fairness, protection of individual rights, and enforcement of the law.⁹⁶

C. Federal Courts Apply the De Minimis Doctrine to Off-the-Clock Claims

The *de minimis* doctrine is commonly invoked in off-the-clock claims, including preliminary activities, such as putting on protective gear;⁹⁷ post-shift work, such as waiting and going through security checks;⁹⁸ work

⁸⁹ *Id.*; *Perez v. Mountaire Farms*, 650 F.3d 350, 373–74 (4th Cir. 2011); *De Asencio v. Tyson Foods, Inc.*, 500 F.3d 361, 374 (3d Cir. 2007); *Brock v. Cincinnati*, 236 F.3d 793, 804–05 (6th Cir. 2001); *Kosakow v. New Rochelle Radiology Assocs., P.C.*, 274 F.3d 706, 719 (2d Cir. 2001); *Reich v. Monfort, Inc.*, 144 F.3d 1329, 1333–34 (10th Cir. 1998); *Lindow v. United States*, 738 F.2d 1057, 1063 (9th Cir. 1984).

⁹⁰ *Lindow*, 738 F.2d at 1057.

⁹¹ *Id.* at 1063.

⁹² See Jim Nicholas, *Employers Must See Big Picture Around 'De Minimis' Time*, WORKFORCE: HR ADMIN. (Dec. 19, 2012), <https://www.workforce.com/2012/12/19/employers-must-see-big-picture-around-de-minimis-time/>.

⁹³ *Perez*, 650 F.3d at 373–74; *Lindow*, 738 F.2d at 1063; see *Castaneda v. JBS USA, LLC*, 819 F.3d 1237, 1243 (10th Cir. 2016); *Corbin v. Time Warner Entm't-Advance/Newhouse P'ship*, 821 F.3d 1069, 1081 (9th Cir. 2016); *Kellar v. Summit Seating, Inc.*, 664 F.3d 169, 176 (7th Cir. 2011); *Singh v. New York*, 524 F.3d 361, 371–72 (2d Cir. 2008); *De Asencio*, 500 F.3d at 374; *Kosakow*, 274 F.3d at 719; *Brock*, 236 F.3d at 804–05; *Reich*, 144 F.3d at 1333–34.

⁹⁴ *Rodriguez v. Nike Retail Servs.*, No. 14-cv-01508-BLF, 2017 U.S. Dist. LEXIS 147762, at *46 (N.D. Cal. Sept. 12, 2017) (quoting *Lindow*, 738 F.2d at 1062) (internal quotations omitted).

⁹⁵ *Lindow*, 738 F.2d at 1062; see, e.g., *Carter v. Pan. Canal Co.*, 314 F. Supp. 386, 392 (D.C. 1970) (2 to 15 minutes); *E.I. du Pont de Nemours & Co. v. Harrup*, 227 F.2d 133, 135–36 (4th Cir. 1955) (10 minutes); *Green v. Planters Nut & Chocolate Co.*, 177 F.2d 187, 188 (4th Cir. 1949) (“obvious” that 10 minutes is *de minimis*).

⁹⁶ Nemerofsky, *supra* note 3, at 330.

⁹⁷ *IBP, Inc. v. Alvarez*, 546 U.S. 21, 32 (2005).

⁹⁸ *Alvarado v. Costco Wholesale Corp.*, No. C 06-04015, 2008 WL 2477393, at *7–8 (N.D. Cal. June 18, 2008).

activities necessary to complete other activities, such as spending time loading a computer before logging into a timekeeping system;⁹⁹ and other factually similar unrecorded activities. If work activities are regularly occurring or substantial when aggregated, they are compensable and not *de minimis*.¹⁰⁰ For example, the *de minimis* doctrine does not apply if employees send work e-mails after work hours, spend a few seconds or minutes to respond, and employers knew that employees completed such activities.¹⁰¹

Waiting for a computer to boot up or waiting to log onto a computer network are examples of *de minimis* off-the-clock activities.¹⁰² For instance, the time technicians take to log into their system or look up assignments are *de minimis*, because those processes only take a minute or so.¹⁰³ Since those processes are of fleeting and varied duration, it is administratively difficult to record the time each of them took.¹⁰⁴ Even the one minute that call center employees spend to log onto or off a computer before clocking in or out is *de minimis*.¹⁰⁵ Thus, the *de minimis* doctrine is appropriate when cross-referencing every employee's logging patterns is administratively burdensome for employers and when monitoring each minute spent waiting to log in or out is practically difficult for an employer to record.¹⁰⁶

Spending time passing through a security line or bag check are also off-the-clock work activities that are *de minimis*.¹⁰⁷ Specifically, the couple of minutes that bag-carrying employees spend waiting in a bag check line when exiting the workplace have been found *de minimis*.¹⁰⁸ Although going through a bag check is a regular activity and the aggregated time is substantial, isolating the time spent in a bag check line from the time spent on non-compensable activities, such as shopping, socializing, and other personal activities, is administratively difficult to ascertain, even if a time

⁹⁹ Corbin v. Time Warner Entm't-Advance/Newhouse P'ship, 821 F.3d 1069, 1082 (9th Cir. 2016).

¹⁰⁰ Jeffrey Brecher & Eric Magnus, *A Matter of Time: Managing Wage and Hour Risks in a Digitally Connected World*, 20 No. 12 J. INTERNET L. 3, 6–7 (June 2017).

¹⁰¹ See Gomley v. Crossmark, Inc., No. 1:13-cv-00420-BLW, 2015 U.S. Dist. LEXIS 54037, at *6 (D. Idaho Apr. 22, 2015) (finding that employees who were required to look at e-mails, sync devices, organize folders, and complete other activities were engaged in non-*de minimis* work activity); Mahshie v. Infinity Ins. Co., No. 12-20148-CIV-OTAZO-REYES, 2012 U.S. Dist. LEXIS 163569, at *17–18 (S.D. Fla. Nov. 15, 2012) (denying summary judgment where an employee checked e-mails at home, because fact issue existed as to whether the time was *de minimis*).

¹⁰² See Chambers v. Sears, 428 F. App'x 400, 418 (5th Cir. 2011).

¹⁰³ *Id.* at 404, 418.

¹⁰⁴ *Id.* at 418.

¹⁰⁵ Corbin v. Time Warner Entm't-Advance/Newhouse P'ship, 821 F.3d 1069, 1073, 1079–80 (9th Cir. 2016).

¹⁰⁶ *Id.* at 1080–81.

¹⁰⁷ See, e.g., Busk v. Integrity Staffing Sols., Inc., 713 F.3d 525, 532 (9th Cir. 2013).

¹⁰⁸ Alvarado v. Costco Wholesale Corp., No. C 06-04015 JSW, 2008 WL 2477393, at *3 (N.D. Cal. June 18, 2008).

clock is repositioned after the bag check station.¹⁰⁹ Similarly, the *de minimis* doctrine applies to time spent in a security line.¹¹⁰ The administrative difficulty factor not only includes the burdens employers face, such as the costs and difficulties associated with capturing such time, but also the burdens that employees face.¹¹¹ For example, if each second spent in a security line or clock out station is tracked, then employers will impose significant restrictions on how long an employee spends when arriving, leaving, or staying on the premises.¹¹²

Other off-the-clock activities, such as time spent straightening up chairs and cleaning up trash between walking in and clocking in, have been found *de minimis*.¹¹³ Also, seconds spent on donning and doffing hardhats, safety glasses, and ear plugs have been held to be *de minimis*.¹¹⁴

D. Other States Use Federal Precedent and Apply the De Minimis Doctrine to State Wage and Hour Claims

Courts in other states followed federal precedent and found the *de minimis* doctrine to be generally and equally applicable to state wage and hour claims.¹¹⁵ For example, in Illinois, a state court found that federal case law is instructive when applying the doctrine to a state law claim.¹¹⁶ While analyzing the *de minimis* doctrine, the court rationalized that it would be an “administrative nightmare” to even attempt to capture the seconds and few minutes of hundreds of employees.¹¹⁷ Even though the claim was brought under Illinois wage and hour law, the court still indicated that federal precedent is persuasive and that the *de minimis* doctrine applies to split-second absurdities.¹¹⁸

In Kentucky, a court found that the *de minimis* defense was not a “creature of the FLSA,” but rather a highly recognized principle of Kentucky common law.¹¹⁹ Since Kentucky case law recognized the doctrine in multiple

¹⁰⁹ *Id.* at *4.

¹¹⁰ *Cervantez v. Celestica Corp.*, 618 F. Supp. 2d 1208, 1219 (C.D. Cal. 2009).

¹¹¹ *Id.* at 1217–19.

¹¹² *Id.* at 1219.

¹¹³ *Fast v. Applebee’s Int’l, Inc.*, 502 F. Supp. 2d 996, 1006 (W.D. Mo. 2007).

¹¹⁴ *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 235–36 (2014).

¹¹⁵ *England v. Advance Stores Co.*, 263 F.R.D. 423, 444 (W.D. Ky. 2009); *Bartoszewski v. Vill. of Fox Lake*, 269 Ill. App. 3d 978, 982–85 (1995).

¹¹⁶ *Bartoszewski*, 269 Ill. App. 3d at 982–83.

¹¹⁷ *Porter v. Kraft Foods Glob., Inc.*, No. 4-12-0258, 2012 WL 7051311, at *3, *9 (Ill. Ct. App. Dec. 10, 2012) (applying the *de minimis* doctrine to time spent donning gear, swiping identification cards, and walking from the facility’s entrance to a clock-in terminal).

¹¹⁸ *Id.* at *9 (quoting *Sandifer v. U.S. Steel Corp.*, 678 F.3d 590, 593 (7th Cir. 2012)).

¹¹⁹ *England*, 263 F.R.D. at 444.

respects, the doctrine was not exclusive to federal law.¹²⁰ When deciding a Kentucky wage and hour claim, the court noted that referring to federal law to determine the applicability of the *de minimis* defense was not contrary to the history or purpose of Kentucky wage and hour law.¹²¹ Thus, the court's reliance on FLSA case law and absent any conflicting authority kept the intent of the Kentucky Wages and Hours Act intact.¹²²

In Wisconsin, the state supreme court assumed, without deciding, that the *de minimis* doctrine applied to Wisconsin wage and hour claims.¹²³ The court explained that no explicit basis exists for the court to apply the *de minimis* doctrine.¹²⁴ Nevertheless, the court recognized that Wisconsin courts applied the doctrine in other contexts.¹²⁵ After viewing the *de minimis* doctrine with skepticism, Wisconsin courts may apply it narrowly to state wage and hour claims in the future.¹²⁶

IV. CALIFORNIA FOUND THE *DE MINIMIS* DOCTRINE NOT APPLICABLE TO CALIFORNIA WAGE AND HOUR CLAIMS

California is the first and only state to explicitly refuse and practically reject the application of the *de minimis* doctrine to state wage and hour claims.¹²⁷ The California Supreme Court found that California's labor code and wage orders did not adopt or incorporate the *de minimis* doctrine.¹²⁸ Thus, the court held that employers must compensate employees for off-the-clock activities, such as activating an alarm, exiting a store, and locking a door, which last a few seconds or minutes.¹²⁹

In *Troester*, a previous shift supervisor brought a putative class action under California wage and hour law, against Starbucks, on behalf of all nonmanagerial California employees who performed a store closing

¹²⁰ See *id.*; see also *Munson v. White*, 217 S.W.2d 641, 642 (Ky. 1949); *J.N. Youngblood Truck Lines v. Hatfield*, 201 S.W.2d 567, 571–72 (Ky. 1947); *Clark v. Mason*, 95 S.W.2d 292, 296 (Ky. 1934).

¹²¹ *England*, 263 F.R.D. at 445.

¹²² *Id.*

¹²³ *United Food & Commercial Workers Union, Local 1473 v. Hormel Foods Corp.*, 367 Wis. 2d 131, 162–63 (2016).

¹²⁴ *United Food*, 367 Wis. 2d at 165.

¹²⁵ See, e.g., *Waupaca Cty. v. Bax*, 323 Wis. 2d 824, 824 (Wis. Ct. App. Jan. 28, 2010) (zoning); *Town of Delavan v. City of Delavan*, 176 Wis. 2d 516, 532 (1993) (annexation).

¹²⁶ Jennifer Ciralsky & Daniel Mcalvanah, *Wisconsin Supreme Court Weighs in on the Compensability of Pre- and Post-Shift Work*, LITTLER MENDELSON (Mar. 14, 2016), <https://www.littler.com/publication-press/publication/wisconsin-supreme-court-weighs-compensability-pre-and-post-shift-work>.

¹²⁷ See *Troester v. Starbucks Corp.*, 421 P.3d 1114, 1125 (2018).

¹²⁸ *Id.*

¹²⁹ *Id.* at 1117.

procedure.¹³⁰ The closing tasks involved logging out of a computer and clocking out before initiating the close store procedure.¹³¹ After the close store procedure, the shift supervisor would: (1) activate the alarm, which took approximately one minute; (2) exit the store, which took less than one minute; (3) lock the front door, which took fifteen seconds to a few minutes; and (4) walk coworkers to their cars, which took thirty-five to forty-five seconds.¹³² Occasionally, the plaintiff would have to spend a few minutes to wait with employees for their transportation to arrive, reopen the store to allow employees to retrieve left-behind items, or bring in store patio furniture left outside mistakenly.¹³³ The unpaid time spent on these activities amounted to twelve hours and fifty minutes over a seventeen-month period, which added up to \$102.67.¹³⁴

The court stated that the practical administrative difficulty of recording the trivial amounts of time may be circumvented by using new technological advances to track small amounts of time, restructuring work to not have employees work off-the-clock, or initiating a rounding policy to reasonably estimate the compensable worktime.¹³⁵ The court noted that the need for a *de minimis* doctrine is limited, due to new legal advances, such as the modern availability of class actions.¹³⁶ The California Supreme Court decided that California's wage and hour laws did not adopt the *de minimis* doctrine and that the *de minimis* doctrine is not applicable to the specific facts of *Troester*.¹³⁷ The court left open the question of "whether there are circumstances where compensable time is so minute or irregular that it is unreasonable to expect the time to be recorded."¹³⁸

V. THE *DE MINIMIS* DOCTRINE APPLIES TO CALIFORNIA WAGE AND HOUR CLAIMS SINCE IT IS A GENERAL PRINCIPLE NOT RESTRICTED TO FEDERAL CASES

The *de minimis* doctrine is a generally adopted principle rather than just a federal doctrine.¹³⁹ Even though the United States Supreme Court first recognized the *de minimis* doctrine in a FLSA suit, the Court did so based not on any aspect of federal law but rather on the concept that a few seconds or

¹³⁰ *Id.* at 1116.

¹³¹ *Id.*

¹³² *Id.* at 1117.

¹³³ *Id.*

¹³⁴ This was totaled according to the then-applicable minimum wage of \$8 per hour. *Id.* at 1117.

¹³⁵ *Id.* at 1124.

¹³⁶ *Id.*

¹³⁷ *Id.* at 1125.

¹³⁸ *Id.* at 1116.

¹³⁹ *See generally id.* at 1114.

minutes of overtime should be disregarded as trifles.¹⁴⁰ *Lindow* even explained that the *de minimis* doctrine is not limited to federal cases, but rather it is a general rule that employees may not recover otherwise compensable time if the insignificant amounts of time are administratively difficult to track.¹⁴¹ Moreover, the *de minimis* doctrine is an integral component of the established background of legal principles that govern all enactments, including state wage and hour laws.¹⁴² Hence, the doctrine is not restricted to federal law and should be applied to California wage and hour claims.¹⁴³

Even if courts construe the *de minimis* doctrine as a federal law, the court should have found that California wage and hour laws are modeled on and derived from federal laws.¹⁴⁴ Given the significant similarities between the requirements in the FLSA and the California Labor Code, California should have permitted a *de minimis* analysis to *Troester*, in accordance with previous decisions.¹⁴⁵ Before the California Supreme Court decided *Troester*, courts in California found that the *de minimis* doctrine applied to state wage and hour claims.¹⁴⁶ When courts held that the *de minimis* doctrine applied to state wage and hour claims, they did not expect the California Supreme Court to find the contrary, indicating the state's departure from federal precedent.¹⁴⁷

When establishing that there are no controlling California labor laws mentioning the *de minimis* doctrine, the California Supreme Court should have turned to federal regulations, such as the FLSA, for guidance.¹⁴⁸ The court mistakenly reasons that since California labor codes and wage orders are silent on whether the *de minimis* doctrine applies to California wage and hour claims, the California Legislature did not intend to adopt the doctrine.¹⁴⁹ Complete silence of a doctrine, however, only indicates that the Legislature

¹⁴⁰ See *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946).

¹⁴¹ *Lindow v. United States*, 738 F.2d 1057, 1062 (9th Cir. 1984).

¹⁴² See *Troester*, 421 P.3d at 1121 (citing *Wisc. Dep't. of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 231 (1992)).

¹⁴³ See generally *id.* at 1114.

¹⁴⁴ *Alcala v. W. Ag Enters.*, 182 Cal. App. 3d 546, 550 (1986) ("California's wage orders are closely modeled after the federal wage and hour statutes.").

¹⁴⁵ *Hubbs v. Big Lots Stores, Inc.*, No. LA CV15-01601, 2017 U.S. Dist. LEXIS 85227, at *8 (C.D. Cal. May 12, 2017).

¹⁴⁶ *Rodriguez v. Nike Retail Servs.*, No. 14-cv-01508-BLF, 2017 U.S. Dist. LEXIS 147762, at *16 (N.D. Cal. Sept. 12, 2017); see, e.g., *Corbin v. Time Warner Entm't-Advance/Newhouse P'ship*, 821 F.3d 1069, 1081 n.11 (9th Cir. 2016); *Chavez v. Angelica Corp.*, No. D063199, 2014 Cal. App. WL 6973497, at *1 (Cal. Ct. App. Dec. 10, 2014); *Mosley v. St. Supéry Vineyards & Winery*, No. A137373, 2014 Cal. App. Unpub. LEXIS 1467, at *28 n.5 (Feb. 27, 2014); *LoJack Corp. v. Superior Court*, No. B219647, 2010 Cal. App. Unpub. LEXIS 2188, at *8 (Mar. 26, 2010); *Gillings v. Time Warner Cable LLC*, 583 F. App'x 712, 714 (9th Cir. 2014); *Gomez v. Lincare, Inc.*, 173 Cal. App. 4th 508, 527 (2009).

¹⁴⁷ See *Rodriguez*, 2017 U.S. Dist. LEXIS 147762, at *22.

¹⁴⁸ See *Candy Shops, Inc. v. Superior Court*, 210 Cal. App. 4th 889, 903 (2012).

¹⁴⁹ See *Troester v. Starbucks Corp.*, 421 P.3d 1114, 1119–21 (Cal. 2018).

never meant to explicitly depart from the well-established doctrine, not the contrary.¹⁵⁰

California's Division of Labor Standards Enforcement's ("DLSE") opinion letters also prove that the *de minimis* doctrine applies to California wage and hour claims.¹⁵¹ The DLSE administers and enforces California's wage and hour laws.¹⁵² Though the DLSE's opinion letters are not binding, courts may use the letters for guidance.¹⁵³ The California Supreme Court even stated that the court takes into account the DLSE's interpretations because the agency has the relevant knowledge and experience to properly inform the court's judgment.¹⁵⁴ Therefore, the California Supreme Court should have respected and considered the DLSE opinion letters, as they contain helpful analysis that should not be dismissed.¹⁵⁵ The California Legislature could have amended the labor codes and wage orders if it believed that the DLSE's adoption of the *de minimis* doctrine did not correctly reflect the Legislature's intent.¹⁵⁶ Since the California Legislature did not amend California's wage and hour laws, it indicated that it did not disagree with the DLSE's application of the *de minimis* doctrine to state wage and hour claims.¹⁵⁷ By the California Supreme Court dismissing the DLSE opinion letters that adopted the *de minimis* doctrine, the court disincentivized courts in California from using DLSE opinion letters for guidance in the future.¹⁵⁸

¹⁵⁰ See *United States v. Stafford*, 831 F.2d 1479, 1485 (9th Cir. 1987) ("[I]f anything is to be assumed from the congressional silence on this point, it is that Congress was aware of the Blockburger rule and legislated with it in mind.").

¹⁵¹ See Cal. Dep't. of Indus. Relations, DLSE Opinion Letter on Compensable Time at No. 1995.06.02, 2–3 (June 2, 1995); Cal. Dep't. of Indus. Relations, DLSE Opinion Letter on Rest Periods at No. 1994.02.03-3, 4 (Feb. 3, 1994) ("[T]he Division has adopted the *de minimis* rule relied upon by the federal courts[.]"); Cal. Dep't. of Indus. Relations, DLSE Opinion Letter on Compensable Time at No. 1988.05.16, 1–2 (May 16, 1988).

¹⁵² *Morillion v. Royal Packing Co.*, 22 Cal. 4th 575, 582 (2000) ("The DLSE 'is the state agency empowered to enforce California's labor laws, including IWC wage orders.'").

¹⁵³ *Brinker Rest. Corp. v. Superior Court*, 53 Cal. 4th 1004, 1029 n.11 (2012).

¹⁵⁴ *Augustus v. ABM Sec. Servs., Inc.*, 2 Cal. 5th 257, 267 (2016).

¹⁵⁵ See *Harris v. Superior Court*, 53 Cal. 4th 170, 190 (2011).

¹⁵⁶ See *Yamaha Corp. of Am. v. State Bd. of Equalization*, 19 Cal. 4th 1, 22 (Mosk, J., concurring) (1998) ("Lawmakers are presumed to be aware of long-standing administrative practice and, thus, the . . . failure to substantially modify a provision, is a strong indication [that] the administrative practice was consistent with underlying legislative intent.") (internal quotations omitted).

¹⁵⁷ See *id.*

¹⁵⁸ See *Troester v. Starbucks Corp.*, 421 P.3d 1114, 1120–21 (Cal. 2018).

VI. THE *DE MINIMIS* DOCTRINE'S POLICY INTERESTS WARRANT ITS ADOPTION AND USE IN CALIFORNIA WAGE AND HOUR LAW

Rejecting to adopt or apply the *de minimis* doctrine to off-the-clock work activities would conflict with the doctrine's supporting policy interests, restrict employee behavior, reduce employee safety and security, and subject employers to administrative burdens.

A. *Not Applying the De Minimis Doctrine Is Against Public Policy*

California employers rely on the *de minimis* doctrine as a general industry practice and custom, and by not applying the *de minimis* doctrine to state wage and hour claims, employers will face new lawsuits and penalties for mere seconds or minutes of work.¹⁵⁹ The *de minimis* doctrine serves the public by preventing costly litigation and deterring delays that injure other plaintiffs.¹⁶⁰ Moreover, protecting and fairly compensating employees are the purposes of the California Labor Code.¹⁶¹ The *de minimis* doctrine furthers those purposes by not allowing employers to disregard even small amounts of time if it is practical to record the time.¹⁶² Founded on reason and policy, the doctrine does not allow employers to avoid compensating employees, but rather the doctrine strikes a balance between compensating for on-the-clock work activities and disregarding trivial amounts of time that are not practical to record.¹⁶³ The application of the *de minimis* doctrine is generally appropriate when the negligible time is small and measuring it would be time-consuming, difficult, and not worthwhile.¹⁶⁴

B. *Rejecting the Doctrine Imposes Unfair Administrative Burdens on Employers*

California believes that employers are in a better position than employees to develop other alternatives to capture trivial amounts of time, but refusing to adopt the *de minimis* doctrine for off-the-clock activities, such as locking and exiting a door, would invalidate a majority of timekeeping

¹⁵⁹ See Derek Jones, *California Supreme Court Adjusts 'De Minimis Rule' for 'Off the Clock' Employees*, DEPUTY (Aug. 29, 2018), <https://www.deputy.com/us/blog/what-the-recent-california-supreme-court-off-the-clock-ruling-means-for-employers>.

¹⁶⁰ Nemerofsky, *supra* note 3, at 323–24.

¹⁶¹ CAL. LAB. CODE § 90.5 (2019).

¹⁶² See 29 C.F.R. § 785.47 (2019).

¹⁶³ *Rutti v. Lojack Corp.*, 596 F.3d 1046, 1057 (9th Cir. 2010).

¹⁶⁴ *Mitchell v. JCG Indus., Inc.*, 745 F.3d 837, 841 (7th Cir. 2014).

systems based on a few seconds or minutes.¹⁶⁵ Employers have to either acquire uniform, creative, or highly advanced timekeeping systems or risk not compensating employees for such trifles.¹⁶⁶ Since every minute, second, or even millisecond is difficult for timekeeping systems to capture, the *de minimis* doctrine is needed for employers to forgo such an arduous task.¹⁶⁷

California's reluctance to apply the *de minimis* doctrine imposes tremendous burdens on all employers, including small businesses and national employers that employ California employees.¹⁶⁸ National employers will have to start paying millions of dollars for penalties, back pay, and other expenses just for a few minutes or seconds that used to be *de minimis*.¹⁶⁹ Employers, including small businesses, will have to pay a front-end expense for a program to track each second employees work and will have to pay penalties and legal expenses if there are potential labor code violations.¹⁷⁰ Although legitimate injuries and claims for reasonable compensation exist, "a great deal of waste and excess" continues to permeate the judicial system.¹⁷¹ This is because of the trivial claims plaintiffs bring, the extreme costs associated with defending lawsuits, and the "drag" of waste and excess that most small businesses have to bear.¹⁷² In light of industrial realities, the *de minimis* doctrine is needed because requiring employers and small businesses to track every minute or second that each employee works is impractical.¹⁷³

¹⁶⁵ See *Troester v. Starbucks Corp.*, 421 P.3d 1114, 1125 (Cal. 2018).

¹⁶⁶ See *id.*

¹⁶⁷ See 29 C.F.R. § 785.47 (2019); *Corbin v. Time Warner Entm't-Advance/Newhouse P'ship*, 821 F.3d 1069, 1082 (9th Cir. 2016).

¹⁶⁸ See LLOYD DIXON ET AL., *IN THE NAME OF ENTREPRENEURSHIP?* 51 (Susan M. Gates & Kristin J. Leuschner eds., 2007), <https://www.jstor.org/stable/pdf/10.7249/mg663emkf.9.pdf>.

¹⁶⁹ See Michelle Lodge, *Starbucks Could Pay Some 'Seven Figures' if Wage Dispute Becomes Class Action*, THE STREET, INC. (2018), <https://www.thestreet.com/investing/california-high-court-case-against-starbucks-could-alter-retail-wage-practices-14564530>.

¹⁷⁰ Lisa Nagele-Piazza, *Must California Employers Pay for Every Second Worked?*, SHRM (May 8, 2018), <https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/california-starbucks-de-minimis-rule.aspx>.

¹⁷¹ Judyth W. Pendell & Paul J. Hinton, *Tort Liability Costs for Small Businesses*, U.S. CHAMBER INST. FOR LEGAL REFORM (May 2007), https://www.instituteforlegalreform.com/hooks/1/get_ilr_doc.php?fn=NERA%20Cost%20Study.pdf.

¹⁷² *Id.*

¹⁷³ See *Troester v. Starbucks Corp.*, 421 P.3d 1114, 1130 (Cal. 2018) (Cuellar, J., concurring).

C. *The Doctrine's Inapplicability Will Result in Restrictions on Employee Behavior*

California refuses to apply a doctrine that is less protective of employees,¹⁷⁴ but employees will face greater restrictions and repercussions without the adoption of the *de minimis* doctrine.¹⁷⁵ For instance, if employers prohibit off-the-clock work and create restrictive policies governing employee behavior, then employees will be subject to penalties if they accidentally complete *de minimis* work activities.¹⁷⁶ Repercussions will consist of prohibiting employees from spending any time around the working facility when not clocked-in or notifying employees about schedule changes only when they arrive rather than informing them through prior email correspondence.¹⁷⁷ Employers would not have to implement such restrictive policies or closely monitor each employee's movements if California adopted the *de minimis* doctrine.¹⁷⁸

Other restrictions would involve reducing or eliminating off-the-clock activities, such as going through a security check or bag check, which would expose the workplace to dangerous working conditions.¹⁷⁹ Security screenings serve the essential purposes of safety, but they do not constitute integral principal work activities and are not compensable.¹⁸⁰ Though security and bag checks have obvious benefits to employers, such as safekeeping of company products, security screenings and bag checks also keep employees safe and protected from others trying to bring weapons into the workplace.¹⁸¹ If an employer has to reclassify security checks as on-the-clock activities, then employers risk compensating employees for personal and non-compensable activities that precede the security check.¹⁸² To minimize that time, employers will have to regulate how long employees are allowed to stay on the premises after their respective shifts are complete.¹⁸³ For example, employers could resort to instructing employees to not bring bags or other personal items, which would eliminate the need for bag checks

¹⁷⁴ See *id.* at 1120 (majority opinion).

¹⁷⁵ See *Cervantez v. Celestica Corp.*, 618 F. Supp. 2d 1208, 1219 (C.D. Cal. 2009).

¹⁷⁶ See *Brecher & Magnus*, *supra* note 100, at 7.

¹⁷⁷ See *id.*

¹⁷⁸ See *id.*

¹⁷⁹ See *Gorman v. Consol. Edison Corp.*, 488 F.3d 586, 593 (2d Cir. 2007).

¹⁸⁰ See *id.* at 593–94.

¹⁸¹ See KISI, *Comprehensive Overview of Workplace Security*, WORKPLACE SECURITY, <https://www.getkisi.com/resources/workplace-security-guide> (last visited Sept. 2, 2019).

¹⁸² See *Gorman*, 488 F.3d at 593–94.

¹⁸³ See *id.*

and security screenings.¹⁸⁴ However, abolishing minimal security measures, such as bag checks and security screenings, will expose employers to product theft and expose employees to an unsafe work environment.¹⁸⁵

**VII. TROESTER'S OFF-THE-CLOCK CLAIMS FAIL SINCE THE
LINDOW FACTORS ARE PRESENT AND THE *DE MINIMIS*
DOCTRINE APPLIES**

Lindow explained that though an aggregate claim calculated over a long period of time may be significant, the administrative difficulty of tracking the disputed time and the irregularity of the off-the-clock work will still weigh in the favor of a *de minimis* finding.¹⁸⁶ In its reasoning, the California Supreme Court misinterpreted the *Lindow* factor of the practical administrative difficulty of recording the additional time for a factor of impossibility.¹⁸⁷ Employers, like Starbucks, do not dispute that it is indeed possible to track and record the small amounts of time.¹⁸⁸ What is at dispute is the burden and cost that employers will face when required to track and record such miniscule amounts of time.¹⁸⁹ That is the practical administrative difficulty explained in *Lindow*.¹⁹⁰

With that noted, some off-the-clock work activities are just not quantifiable. For example, the activities mentioned in *Troester* varied in their duration and it is unclear as to exactly how long each activity took.¹⁹¹ Without the exact time for each off-the-clock activity, payment for such work is administratively difficult to ascertain. Even if the court found that the time spent on the *Troester* activities amounted to a few minutes, the court should have found that ten minutes per day are *de minimis*.¹⁹² The court stated that the compensable work over the seventeen month period that amounted to \$102.67 “is enough to pay a utility bill, buy a week of groceries, or cover a month of bus fares.”¹⁹³ However, the court misinterpreted the aggregate

¹⁸⁴ See *Alvarado v. Costco Wholesale Corp.*, No. C 06-04015, 2008 WL 2477393, at *9 (N.D. Cal. June 18, 2008) (“People who do not carry bags or who have not purchased merchandise do not have to subject themselves to a security inspection and have no wait at all.”).

¹⁸⁵ See *KISI*, *supra* note 181.

¹⁸⁶ *Lindow v. United States*, 738 F.2d 1057, 1063–64 (9th Cir. 1984); *Rodriguez v. Nike Retail Serv.*, No. 14-cv-01508-BLF, 2017 U.S. Dist. LEXIS 147762, at *50 (N.D. Cal. Sept. 12, 2017).

¹⁸⁷ See *Troester v. Starbucks Corp.*, 421 P.3d 1124, 1124 (Cal. 2018); *Lindow*, 738 F.2d at 1063.

¹⁸⁸ *Troester v. Starbucks Corp.*, No. CV 12-7677 GAF (PJWx), 2014 WL 1004098, at *5 (C.D. Cal. Mar. 7, 2014) (“[N]ot every second can be or need be recorded and compensated.”).

¹⁸⁹ Oral Argument at 23:39, *Troester v. Starbucks*, 2016 WL 2902812 (9th Cir. Apr. 6, 2016), <https://www.courtlistener.com/audio/15728/douglas-troester-v-starbucks-corp/>.

¹⁹⁰ *Lindow*, 738 F.2d at 1063.

¹⁹¹ *Troester*, 421 P.3d at 1116–17.

¹⁹² *Farris v. Riverside*, 667 F. Supp. 2d 1151, 1165 (C.D. Cal. 2009).

¹⁹³ *Troester*, 421 P.3d at 1125.

amount of compensable time factor.¹⁹⁴ The aggregate amount of compensable time is supposed to consider daily amounts of compensable time, not the total amount of time over the disputed time period.¹⁹⁵ *Troester's* total amount of off-the-clock time per day was around four minutes to ten minutes, which is even less than what most courts hold as *de minimis*.¹⁹⁶

VIII. GUIDANCE FOR EMPLOYERS AND THE FUTURE OF STATE WAGE AND HOUR CLAIMS

No state has explicitly refused to apply the *de minimis* doctrine in state wage and hour claims, other than California.¹⁹⁷ States with similar wage and hour laws, like Colorado or Washington, will be prompted to evaluate the application of the *de minimis* doctrine in their respective wage and hour laws and use California's holding in *Troester* as persuasive precedent.¹⁹⁸ Like courts in California, courts in Washington have construed state wage and hour laws liberally in favor of employees.¹⁹⁹ Given the similarities between California's and Washington's wage and hour laws, it is more likely that a Washington court would arrive at the same conclusion as the California Supreme Court.²⁰⁰ This would widen the differences of the doctrine's application in federal and state wage and hour claims.²⁰¹

Even if states find the *de minimis* doctrine inapplicable and require compensation for trivial off-the-clock work activities, the time spent on such work needs to be capped or "cabined" at a specified number, otherwise the

¹⁹⁴ See *Lindow*, 738 F.2d at 1063.

¹⁹⁵ See *id.*

¹⁹⁶ *Farris*, 667 F. Supp. 2d at 1165; see *Hodgson v. Katz & Besthoff, #38, Inc.*, 365 F. Supp. 1193, 1197 n.3 (W.D. La. 1973) (acknowledging 1 to 10 minutes spent by employees before shift to count their cash bank and ensure everything is in order was *de minimis*); *Carter v. Pan. Canal Co.*, 314 F. Supp. 386, 392 (D.D.C. 1970) (holding preliminary activities of 2 to 15 minutes per day fall under the *de minimis* rule as not compensable); *E.I. du Pont de Nemours & Co. v. Harrup*, 227 F.2d 133, 135–36 (4th Cir. 1955) (finding preliminary activities of 10 minutes in length are so insignificant and of so short a duration that they are *de minimis* and not worthy of compensation).

¹⁹⁷ See *Troester*, 421 P.3d at 1125.

¹⁹⁸ See COLO. CONST. art. XVIII, § 15; 7 COLO. CODE REGS. § 1103–1(4) (2019); see also Gil Sparks, *Employer Alert: Is California Supreme Court Wage Decision a Harbinger for Washington Employers?*, WENATCHE VALLEY: BUS. WORLD (Sept. 8, 2018, 4:07 PM), <https://www.wvbusinessworld.com/news/2018/sep/08/employer-alert-is-california-supreme-court-wage-decision-a-harbinger-for-washington-employers/>.

¹⁹⁹ Sparks, *supra* note 198; see *Bostain v. Food Express, Inc.*, 153 P.3d 846, 852 (2007) (“[The] coverage provisions of the MWA must be liberally construed in favor of the employee.”) (citing *Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett*, 42 P.3d 1265, 1267 (Wash. 2002)).

²⁰⁰ Sparks, *supra* note 198.

²⁰¹ *Id.*; *California Supreme Court Departs from Federal Law in Overtime Calculations*, MCGUIREWOODS (Mar. 8, 2018), <https://www.mcguirewoods.com/client-resources/Alerts/2018/3/California-Supreme-Court-Departs-Federal-Law-Overtime-Calculations>.

time would be vulnerable to adjustment for other work days.²⁰² If there were no cap on the total amount of time spent on off-the-clock work per day, then the time would be irregular and non-compensable, as per the *de minimis* doctrine.²⁰³ Without an appropriate cap on the compensable amount of time spent on off-the-clock work, it would be nearly impossible for employers to accurately record the varying amounts of time for each employee's payroll.²⁰⁴ Also, since the California Supreme Court left open the question of whether sporadic and unanticipated off-the-clock work activities are compensable, the Court will have to decide whether a defense similar to the *de minimis* doctrine would apply.²⁰⁵ However, by finding that its wage and hour regulations did not adopt the doctrine, California will most likely adopt a limited rule similar to the *de minimis* doctrine only in rare cases and will apply it narrowly to unforeseeable, irregular, and brief off-the-clock work activities.²⁰⁶

Due to California's favorable state wage and hour laws and its rejection of the *de minimis* doctrine, plaintiffs have the incentive to bring their unpaid wage claims solely under state wage and hour law rather than under the FLSA.²⁰⁷ By refusing to adopt the *de minimis* doctrine, the California Supreme Court practically removed one of the very few defenses employers had left to defend against off-the-clock claims.²⁰⁸ That removal opened up the floodgates to unwarranted off-the-clock claims, lawsuits, and class actions.²⁰⁹ Specifically, plaintiffs will bring claims to receive remedies for off-the-clock work activities similar to those in *Troester* or bring claims concerning other previously determined *de minimis* activities.²¹⁰ If California employers do not use and implement new, highly advanced technologies to track every second and minute each employee works, then employers risk being exposed to class action lawsuits and seven-figure verdicts.²¹¹

Employers should consider amending employee handbooks to implement policies that would prohibit off-the-clock work activities and instruct employees to report unauthorized off-the-clock work, even if

²⁰² *United Food & Commercial Workers Union, Local 1473 v. Hormel Foods Corp.*, 367 Wis. 2d 131, 179 (2016) (Roggensack, C.J., dissenting).

²⁰³ *Id.* at 178.

²⁰⁴ *Id.* at 180.

²⁰⁵ *See Troester v. Starbucks Corp.*, 421 P.3d 1114, 1125 (Cal. 2018).

²⁰⁶ *See id.*

²⁰⁷ Darcey M. Groden, *Workplace Law Predictions for 2019*, FISHER PHILLIPS (Dec. 31, 2018), <https://www.fisherphillips.com/resources-newsletters-article-workplace-law-predictions-for-2019>.

²⁰⁸ Grant Alexander, *California Rules Hourly Employees Who Perform Tasks 'Off the Clock' Must Be Compensated*, ENTREPRENEUR (Aug. 23, 2018), <https://www.entrepreneur.com/article/318863>.

²⁰⁹ *Id.*

²¹⁰ *See Troester*, 421 P.3d at 1125.

²¹¹ *See Nagele-Piazza, supra* note 170.

incidental.²¹² If there is no business necessity for off-the-clock work activities, then employers should counsel managers and supervisors on how to stop employees from completing off-the-clock work activities.²¹³ Whether employers have to hire additional personnel or install surveillance cameras, ongoing monitoring is important to make sure that employees are complying with the policies and that all hours worked are being recorded.²¹⁴ Employers need to make clear that off-the-clock work is prohibited and that employees will be disciplined if they violate the policies.²¹⁵ Employers should also make their employees verify, in writing, their time worked each week.²¹⁶

Modern-day technologies, smartphones, and mobile apps could be used to track off-the-clock work activities.²¹⁷ Before purchasing and implementing such technologies into the workplace, employers need to consider exactly how much time the technologies will actually capture and what degree of employee training and involvement is needed in order for the time to be recorded properly and efficiently.²¹⁸ Also, employers need to be aware of new technologies and consistently make updates to confirm that the chosen technology accurately records every second worked.²¹⁹ Otherwise, plaintiffs may bring in experts to testify that the employer could have used and implemented alternative technologies that were available at the time of the purported wage and hour violations.²²⁰ Advanced timekeeping systems or apps that can track locations upon clock-in and that allow employers to choose when and where employees have access to clock-in are examples of how employers can capture each second and minute worked by employees.²²¹ Though these timekeeping methods may be expensive, intrusive, and restrictive, they are necessary if employers want to accurately record each employee's hours worked.²²² With restrictive policies and costly technologies

²¹² Courtney Bru, *What Exactly Is "De Minimis"? How to Address Off-the-Clock Work in Light of Modern Technologies*, JD SUPRA (Oct. 24, 2018), <https://www.jdsupra.com/legalnews/what-exactly-is-de-minimis-how-to-73992/>.

²¹³ *See id.*

²¹⁴ *See* Steve Holden, *Biz Smarts: Nothing Is Small in California Wage/Hour Law*, SACRAMENTO BUS. J. (Feb. 21, 2019, 4:37 PM), <https://www.bizjournals.com/sacramento/news/2019/02/21/biz-smartsnothing-is-small-in-california-wage-hour.html>.

²¹⁵ Brecher & Magnus, *supra* note 100, at 22.

²¹⁶ *See id.* at 21.

²¹⁷ *See* Troester v. Starbucks Corp., 421 P.3d 1114, 1124 (Cal. 2018).

²¹⁸ *See id.*

²¹⁹ *Labor & Employment Advisory: California Tosses De Minimis Doctrine for Off-the-Clock Work*, ALSTON & BIRD: NEWS & INSIGHTS (Aug. 1, 2018), <https://www.alston.com/en/insights/publications/2018/08/california-tosses-de-minimis>.

²²⁰ *See id.*

²²¹ *Accurate Timekeeping More Important than Ever in California and Beyond*, CEDR HR SOLUTIONS (Nov. 29, 2018), <https://www.cedrsolutions.com/accurate-timekeeping-more-important-than-ever-in-california-and-beyond/>.

²²² *See id.*

in place, employers will be able to eliminate off-the-clock work or at least be able to record and compensate for it.²²³ Employers in states that have similar wage and hour laws as California should implement similar policy changes and acquire new timekeeping methods to avoid potential state wage and hour claims, given the *Troester*²²⁴ decision.²²⁵

IX. CONCLUSION

The California Supreme Court should take into account all of the policy interests associated with the *de minimis* doctrine and find that the doctrine applies to state wage and hour claims.²²⁶ Though the doctrine is a defense that employers use against wage and hour violations, the *de minimis* doctrine balances employer and employee interests.²²⁷ If the doctrine is not applied, then “a fair day’s pay for a fair day’s work” would not truly be achieved.²²⁸ Even if California’s Labor Code and Industrial Welfare Commission’s wage orders did not explicitly adopt the doctrine, the doctrine should nonetheless apply to state wage and hour claims.²²⁹ Given that the court decided *Troester* according to the specific facts of the case, and that the court left open the possibility of applying a limited and narrower rule similar to the *de minimis* doctrine, it is unclear as to what California would hold as non-compensable, off-the-clock work activities in the future.²³⁰ The adoption of the *de minimis* doctrine to applicable off-the-clock claims would alleviate such uncertainties and burdens on California employers.

States, like California, should apply the *de minimis* doctrine in off-the-clock claims, especially in cases where the *Lindow* factors are present.²³¹ Given that federal and state courts routinely apply the doctrine to wage and hour claims and that the doctrine stands for a general principle, not just a federal rule, the California Supreme Court should have found the *de minimis* doctrine applicable to its state wage and hour claims.²³² The court should have deferred to California’s Department of Industrial Relations DLSE because the DLSE’s opinion letters explicitly adopted the *de minimis* doctrine and provided guidance that the doctrine should be used in appropriate

²²³ See Holden, *supra* note 214.

²²⁴ See *Troester v. Starbucks Corp.*, 421 P.3d 1114 (Cal. 2018).

²²⁵ See Sparks, *supra* note 198.

²²⁶ See 29 C.F.R. § 785.47 (2019).

²²⁷ See *Rutti v. Lojack Corp.*, 596 F.3d 1046, 1057 (9th Cir. 2010).

²²⁸ *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981) (quoting *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 578 (1942)).

²²⁹ See *Troester*, 421 P.3d at 1125.

²³⁰ See *id.*

²³¹ See *Lindow v. United States*, 738 F.2d 1057, 1063 (9th Cir. 1984).

²³² See, e.g., *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946).

cases.²³³ The doctrine's application would prevent unreasonable expenses and deter delays associated with litigation over a few seconds or minutes.²³⁴ The *de minimis* doctrine's application would also relieve employers from unfair administrative burdens of recording such miniscule amounts of time.²³⁵

Employers would not have to purchase expensive technologies or implement restrictive policies if the *de minimis* doctrine applied to state off-the-clock claims.²³⁶ Employers should compensate employees for meaningful amounts of time, not for a few seconds spent on trivial off-the-clock work activities.²³⁷ Due to the rejection of the *de minimis* doctrine, California employers will have to carefully monitor and surveil the workplace, impose disciplinary actions, and make sure that they are only paying for their employees' actual work time.²³⁸ High litigation expenses, unsafe working conditions, and compensation for non-compensable social activities are the inevitable outcomes associated with the abolition of the *de minimis* doctrine.²³⁹

Other states with similar wage and hour laws may arrive at the same holding as California.²⁴⁰ Nevertheless, states that refuse to apply the *de minimis* doctrine will have to cap or cabin the amount of time spent on off-the-clock work activities to ensure employers accurately record their employees' payrolls.²⁴¹ Since California has favorable state wage and hour regulations that do not adopt the *de minimis* doctrine, plaintiffs will most

²³³ See Letter from H. Thomas Cadell, Jr., Chief Counsel, Cal. Dep't of Indus. Rel., Div. of Labor Standards Enf't, to Barbara L. Nielson, Law Clerk, Kauf, McClain & McGuire (June 2, 1995) (on file with the FIU Law Review); Letter from H. Thomas Cadell, Jr., Cal. Dep't of Indus. Rel., Div. of Labor Standards Enf't, to Bruce P. Crary, Ballard, Rosenberg & Golper (Feb. 3, 1994) (on file with the FIU Law Review) ("[T]he Division has adopted the *de minimis* rule relied upon by the federal courts."); Letter from H. Thomas Cadell, Jr., Chief Counsel, Cal. Dep't of Indus. Rel., Div. of Labor Standards Enf't, to Cynthia M. Walker, Jackson, Lewis, Schnitzler & Krupman (May 16, 1988) (on file with the FIU Law Review).

²³⁴ Nemerofsky, *supra* note 3, at 323–24.

²³⁵ See 29 C.F.R. § 785.47 (2019); Corbin v. Time Warner Entm't-Advance/Newhouse P'ship, 821 F.3d 1069, 1082 (9th Cir. 2016).

²³⁶ See *Accurate Timekeeping More Important than Ever in California and Beyond*, *supra* note 221.

²³⁷ See *Anderson*, 328 U.S. at 692.

²³⁸ See Kirstin E. Muller & Felicia R. Reid, *CA Supreme Court Rejects FLSA De Minimis Rule, Opening the Floodgates for Off-the-Clock Claims*, HIRSCHFELD KRAEMER: BLOG: THE CAL. WORKPLACE ADVISOR (July 31, 2018), <https://www.hkemploymentlaw.com/blog/ca-supreme-court-rejects-flsa-de-minimis-rule-opening-the-floodgates-for-off-the-clock-claims/>.

²³⁹ See Daniel Fears, Laura Fleming & Tyler Runge, *9 FAQs About De Minimis Doctrine After Troester v. Starbucks*, LAW360 (Oct. 17, 2018), <https://www.law360.com/employment/articles/1090689/9-faqs-about-de-minimis-doctrine-after-troester-v-starbucks>.

²⁴⁰ See Sparks, *supra* note 198.

²⁴¹ See *United Food & Commercial Workers Union, Local 1473 v. Hormel Foods Corp.*, 367 Wis. 2d 131, 179 (2016).

likely bring off-the-clock claims solely under state wage and hour law, rather than under the FLSA.²⁴² Therefore, California courts should be prepared to see a flood of off-the-clock claims that concern small amounts of previously considered *de minimis* time.²⁴³ For instance, if the coffee shop manager and plant worker²⁴⁴ each bring their off-the-clock claims under California wage and hour law, they will most likely prevail since the *de minimis* doctrine would not likely be applied to their respective state wage and hour claims.²⁴⁵ However, states should adopt the *de minimis* doctrine and find that the doctrine applies to such claims. States, including California, should not require employers to compensate employees for off-the-clock work activities that last a few seconds or minutes because such time is administratively difficult to capture—*de minimis*—and thus not compensable.²⁴⁶

²⁴² See Groden, *supra* note 207.

²⁴³ Alexander, *supra* note 208.

²⁴⁴ See *supra* Part I.

²⁴⁵ See *Troester v. Starbucks Corp.*, 421 P.3d 1114, 1125 (Cal. 2018).

²⁴⁶ See 29 C.F.R. § 785.47 (2019).