The Death of "De Minimis" Is Greatly Exaggerated

Insights
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The "*de minimis*" worktime concept is a common-sense, court-recognized notion dating from the federal Fair Labor Standards Act's earliest days. It has been articulated by the U.S. Labor Department this way:

In recording working time...,insubstantial 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. * * * This rule applies only where there are uncertain and indefinite periods of time involved of a few seconds or minutes duration, and where the failure to count such time is due to considerations justified by industrial realities. An employer may not arbitrarily fail to count as hours worked any part, however small, of the employee's fixed or regular working time or practically ascertainable period of time he is regularly required to spend on duties assigned to him.

29 C.F.R. § 785.47.

De Minimis Called Into Question By _Sandifer_

Last January, we reported (here and here) on the U.S. Supreme Court's decision in *Sandifer v. U.S. Steel Corp.*, which clarified the meaning of the phrase "changing clothes" in the FLSA's Section 3(o). However, the opinion also contained *dictum* that seemed to undermine the *de minimis* doctrine.

Justice Scalia, author of the Court's unanimous opinion, stated that "[a] de minimis doctrine does not fit comfortably within the [FLSA], which, it can fairly be said, is all about trifles . . .." Furthermore, he continued, "there is no more reason to *disregard* the minute or so necessary to put on glasses, earplugs, and respirators, than there is to *regard* the minute or so necessary to put on a snood." [Emphasis in original].

As a result, some commentators have opined that *de minimis* might no longer be a viable defense even outside the context of FLSA Section 3(o). But a quick survey of recent court opinions demonstrates that the death of the principle has been greatly exaggerated.

Courts Remain Open To The Concept

In *Mitchell v. JCG Industries* (about which we wrote earlier this month), the majority took note of the Supreme Court's admonition that courts should avoid relatively inconsequential involvement in a morass of difficult, fact-specific determinations. Even the dissenting judge concluded that the *de*

minimis issue raised in the case involved "serious disputes of fact," thus stopping short of asserting that *Sandifer* precluded this defense.

Other courts have likewise seen a continuing role for the concept. In *Castaneda v. JBS USA, LLC*, 2014 U.S. Dist. Lexis 62390 (May 6, 2014), the court said that "[t]here are conflicting views in the courts concerning the application of the common law doctrine of de minim[i]s to these cases and Justice Scalia expressed doubt about its application in Sandifer. The [U.S. Labor Department] has, however, adopted it in 29 C.F.R. § 785.47 . . .. That fits this case."

And in *Jones v. C&B Technologies, Inc.*, 2014 U.S. Dist. Lexis 39009 (S.D. Ind. Mar. 25, 2014), the court noted that the activities at issue there counted as compensable time, *unless* the *de minimis* principle applied. Yet another ruling, in *Hernandez-Hernandez v. Hendrix Produce, Inc.*, 2014 U.S. Dist. Lexis 23662 (S.D. Ga. Feb. 13, 2014), cited *Sandifer* but observed that "the de minimis exception might apply to certain claims." Moreover, a California federal court recently applied the doctrine in *Troester v. Starbucks Corp.*, dismissing claims for allegedly unpaid minimum wages, overtime compensation, and related damages for time spent after the plaintiff clocked out for the day.

The Bottom Line

While *Sandifer* probably will continue to spur arguments that the *de minimis* concept is inapplicable in FLSA disputes, so far courts do not appear to be receptive to that view. This is unsurprising given the long history of the principle in FLSA caselaw, including in the Supreme Court. *See Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946)("Split-second absurdities are not justified by the actualities of working conditions, or by the policy of the [FLSA]."). If the Supreme Court truly believes that the principle has no standing under the FLSA, then it will likely have to say so in a much-clearer and more-unambiguous fashion, including by disavowing its own previously-expressed views.

But as we have said before, no particular timeframe is necessarily insignificant enough to be reliably considered *de minimis*, and the per-occurrence amount of time is not all that the courts take into account. Employers should proceed carefully in evaluating whether and under what circumstances to consider even small amounts of worktime to be *de minimis*.

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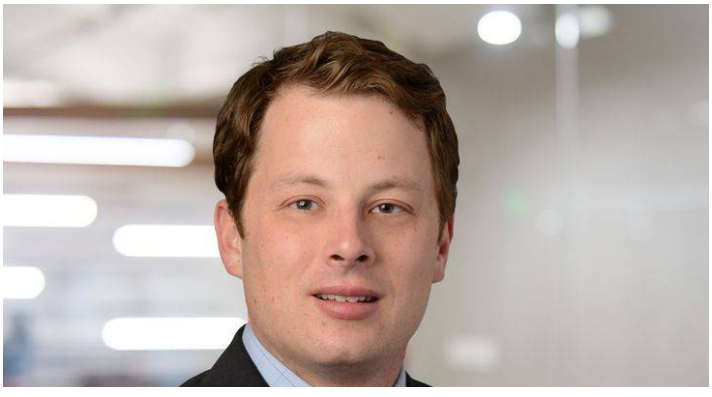

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