Got a minute? The de minimis standard in wage and hour law

By Scott Edward Cole and Hannah R. Salassi

Albert Einstein said that time is relative. For most of us, a minute or two floats by during a routine workday without conscious notice. For thousands of California workers each day, however, precious minutes are snatched from their day, without compensation, to further their employer's interests. This happens, for example, when employees have to wait in line for security bag checks after "clocking out," or don required uniforms prior to a shift. Courts sometimes allow employers to escape liability for small amounts of uncompensated time by applying a *"de minimis"* exemption, but the applicability of this exemption to meal and rest breaks remains unsettled.

Meal and rest breaks have long-since been recognized by the state of California as being necessary to the health and well-being of workers. In 1913, the Legislature established the Industrial Welfare Commission (IWC) to investigate and protect the health, safety and welfare of California workers. Although originally limited to women and children, the IWC's scope was gradually expanded to include all workers. As early as 1916, the IWC issued wage orders mandating meal and rest periods, with worker health and safety as paramount considerations.

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The Legislature took no further action to develop a body of law protecting meal and rest breaks until many decades later. Recognizing a lack of IWC authority to enact meal and rest break protections, the Legislature passed the Eight-Hour-Day Restoration and Workplace Flexibility Act in 1999. This Act codified various employer obligations, including the duty to provide hourly employees, in most circumstances, a 30-minute meal period (in any work period beyond five hours) and another meal period for work periods over 10 hours. In 2002, the Act was expanded to require that private employers authorize and permit net 10 minute rest breaks to their hourly workers in most situations.

Both before and since the enactment of these provisions, the IWC's initial fears over the health and safety implications of denying hourly workers meal and rest breaks have been well documented. Studies demonstrate that workers, particularly low-wage workers who perform significant manual labor, and do not receive regular meal and rest breaks, tend to be at greater risk of high stress and work-related accidents.

Despite widespread acknowledgment of the holistic importance of meal and rest breaks, many workplace policies and procedures continue to chip away at the duration of break periods otherwise due under the Labor Code. When challenging these policies, employee-side attorneys will argue that all of the time spent under the control of the employee is compensable time; management-side counsel will counter by asserting the "de minimis" exception.

The "de minimis" exception emerged as early as 1946 in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 684 (1946), which questioned an employer's practice of calculating employees' "working time" as the period between an even quarter hour after the employee punched in to the even quarter hour before the employee punched out, i.e., only compensating employees for the period during their "official" shift, even though the employees spent time before and after that period on job-related functions. Although the *Mt. Clemens* Court ultimately remanded the case for determination of the exact increments of time, it ruled that, when the matter at issue concerns only a few seconds or minutes of work beyond the scheduled working hours, that time could be disregarded as a "trifle." Referring to these small amounts of time as "split-second absurdities" and thus, not "compensable" time, *Mt. Clemens* has been said to stand for the proposition that compensable working time exists "only when an employee is required to give up a substantial measure of his time and effort."

In *Lindow v. United States*, 738 F.2d 1057 (1984) the court followed the rationale of *Mt. Clemens*, but cautioned that common sense had to be applied to the facts of each case, focusing on three factors: the administrative difficulty of recording small amounts of time for payroll purposes, the size of an aggregate claim of small periods of uncompensated time and the regularity with which employees incurred the uncompensated time. Under *Lindow*, employers would be required to compensate employees for even small amounts of daily time, unless that time was so miniscule that it could not, as an *administrative* matter, be easily recorded for payroll purposes. *Lindow* also explained that time which was de minimis when considered on a daily basis, could be aggregated, amount to a substantial claim, and support a viable unpaid wages claim. Finally, *Lindow* found that periods of de minimis time which were suffered on a fixed/regular basis should be compensable, even when quite small in isolation.

Presently, there is a dearth of state court authority applying the de minimis rule to regular or overtime pay cases and no published state appellate decisions to date that squarely co-examine the de minimis and meal and rest periods standards. Practitioners not surprised by this void generally cite the widely accepted rule requiring California employers to pay for all time hourly workers spend under their control. Yet the question persists whether this general principle is sufficient to prevent a court from sanding the sharp edges off the net 10 minute or 30 minute allowances for rest and meal breaks, respectively, and allowing employers some wiggle room in these respects.

In referring to meal and rest break requirements, courts have noted "[j]ust as the consumption process is essential to humankind, so is the elimination process, and these needs have not greatly changed in the last 40 years." *California Manufacturers Association v. Industrial Welfare Commission*, 109 Cal.App.3d 95 at 115 (1980). This commentary is illustrative of the fundamental justification for meal and rest break laws: basic human needs require them such that encroachments on that time, even if relatively small, usurp what has already been determined to be a fundamental necessity for employee health and welfare. Whether this position is trumped by practical workflow or timekeeping considerations presents an enormously important question for millions of California workers.

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