

## Employers Must See Big Picture Around 'De Minimis' Time

There are several traps an employer can fall into with regard to accurately recording the time that an employee actually works.

By **Jim Nicholas**

The Fair Labor Standards Act requires employers to accurately record the hours their employees work and to compensate them for each of those hours. While this mandate appears simple enough, there are several traps an employer can fall into with regard to accurately recording the time that an employee actually works.

### 'DE MINIMIS' TIME

Generally, every employer must record any part of the employee's regular, fixed working time, however small, as hours worked. The FLSA, however, provides that in recording working time, employers may disregard insignificant periods of time outside of scheduled working hours that cannot, as a practical matter, be precisely recorded. According to the U.S. Labor Department, this exception applies only where a few seconds or minutes of work are involved and where the failure to count such time is because of considerations justified by industrial realities. The courts have dubbed this rule the "de minimis doctrine."

Predictably, the question of what qualifies as de minimis time has been the subject of litigation. There is no general consensus among those courts that have been confronted with the issue. However, at least some courts have applied a multifactor analysis to determine whether an employee's work is de minimis:

- The amount of daily time spent on the additional work.
- The practical administrative difficulty of recording the additional time.
- The aggregate amount of compensable time.
- The regularity of the additional work.

No one factor resolves the issue, and the future applicability of these factors is not certain since very few appellate courts have ruled on the issue. For now, however, these factors provide the only real guidance in this area, and employers should carefully consider each of them in deciding whether employee work is de minimis.

To be sure, the periods of time that will likely be considered de minimis will generally be very short. But the amount of time an employee spends on arguably de minimis work is only part of the inquiry. For example, in a 2008 case, the 2nd Circuit held that New York City's practice of requiring its fire inspectors to safely transport certain documents during their commute to work fell under the de minimis doctrine.

The inspectors' commute was certainly more than just a few minutes. But the court in *Singh v. City of New York* found that New York's requirement did not affect the inspectors' commute on a regular basis such that the commuting time should be compensable. In reaching its conclusion, the court addressed three of the four factors listed above.

Apart from considering the irregularity of the work, the court noted that as a practical administrative matter, it would be difficult, if not impossible, to record and monitor the additional commuting time for each inspector. The court also

found that inspectors' aggregate claims were small, generally amounting to only a few minutes a day, which was in line with the policy rationale underlying the de minimis rule.

Based on those facts, the court concluded that the additional commuting time was de minimis as a matter of law. *Singh* and cases like it make clear that employers should consider the four factors as a whole, in the context of their business, to determine whether an employee's work, performed outside of the employee's fixed schedule, qualifies as de minimis.

### ROUNDING

A related issue with respect to recording working time involves the practice of "rounding." The Labor Department allows employers to compute the time an employee spends working by rounding to the nearest one-tenth or quarter of an hour. For example, where an employee clocks in at 8:55 a.m. for the start of a 9 a.m. shift, the employer may record that the employee clocked in at 9 a.m., without having to pay the employee for the additional five minutes of time. Similarly, if an employee clocks out at 5:05 p.m. for a shift ending at 5 p.m., the employer may record that the employee clocked out at 5 p.m., again, without having to compensate the employee for the additional working time.

However, 29 C.F.R. § 785.48(b) requires that if an employer incorporates a rounding protocol into its time-keeping systems, the system must ultimately result in compensating employees for all the time they have worked. Thus, employers must be careful to apply the rounding practice in an egalitarian manner. Over the long term, the result of the rounding practice must be that the time credited to both the employee and the employer average out.

Practically speaking, employers need to ensure that they not only round up when their employee clocks in at 8:55 a.m., but also round down when that employee clocks in at 9:05 a.m. Put another way, the employee should be credited with beginning his or her shift at 9 a.m. and paid for the five minute gap even though the employee actually clocks in a few minutes before or after the start of their shift. Under this model, which assumes that most employees occasionally clock in before or after the start of their scheduled shifts, the employee would, over time, ultimately, be compensated for all actual time worked.

Many employers will undoubtedly chafe at the idea of paying employees for a full shift when they arrive late to work. But if those employers benefit by not paying employees for time worked before their shifts then they need to extend the same benefit to their employees as well.

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