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It's About Time: Rejection of the De Minimis Doctrine in State Wage and Hour Laws

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Comments

It's About Time: Rejection of the *De Minimis* Doctrine in State Wage and Hour Laws

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ABSTRACT

Since the passage of the Fair Labor Standards Act ("FLSA") in 1938, courts have grappled with how to interpret which activities an employee performs for their employer should be considered "work." The FLSA requires employers pay a minimum wage, pay overtime, and keep records of their employees' time. However, to calculate these wages based on hours worked, the employer must know what constitutes "work." Over the 80 years since its enactment, federal courts have adopted rules to determine what counts as work. One doctrine courts apply is the *de minimis* doctrine.

Under the *de minimis* doctrine, employers do not need to compensate their employees for insignificant and insubstantial amounts of time. Federal courts have determined that some small amounts of work are too trivial for the employer to be required to track. Over time, the *de minimis* doctrine not only prevented

* J.D. Candidate, Penn State Dickinson Law, 2023. I would like to dedicate this Comment to my family. Without your love and support, I would not be where I am today. I would also like to thank the *Dickinson Law Review* members who helped edit and improve this Comment.

employee plaintiffs from prevailing in claims brought under the FLSA but also permeated state wage and hour laws. Individual states are allowed to establish and regulate their own wage and hour laws in addition to the FLSA. Some states have adopted the *de minimis* doctrine and applied it to their own labor code. Other states have explicitly rejected the *de minimis* doctrine as applied to their respective state wage and hour laws.

This Comment explores the reasoning behind these states' decisions and implores other states to consider following suit. The *de minimis* doctrine is inconsistent with the purpose of wage and hour laws and is no longer relevant due to current advances in technology. This Comment also explores the recent changes in the American workplace due to COVID-19 and how they demonstrate that the *de minimis* doctrine is no longer consistent with the current marketplace.

TABLE OF CONTENTS

INTRODUCTION

In 1938, the Fair Labor Standards Act ("FLSA" or "Act")[1] was enacted to create "minimum standard[s] of living necessary for health, efficiency, and general well-being of workers."[2] The Act requires employers to pay a minimum wage and an overtime rate of one and a half times the employee's regular rate.[3] Employers are required to pay employees for the time that they work.[4] However, over time, the *de minimis* doctrine developed to protect employers from having to keep track of small amounts of time. The *de minimis* doctrine states that "insubstantial or insignificant periods of time" that cannot be "precisely recorded" are not compensable.[5]

While the *de minimis* doctrine has been codified to apply to the FLSA, other states have adopted the doctrine by applying it to their state wage and hour laws.[6] Until 2021, California was one of the only states to affirmatively reject the *de minimis* doctrine as it applies to their labor code.[7] In June 2021, the Washington Court of Appeals refused to apply the *de minimis* doctrine to the Washington Minimum Wage Act ("MWA").[8] In July 2021, the Pennsylvania Supreme Court followed and answered a certified question of whether the Pennsylvania Minimum Wage Act ("PMWA") had a *de minimis* exception in the negative.[9] These three states found that the *de minimis* doctrine contradicted their wage and hour laws.[10] These states' rejection of the doctrine aligns with the purpose be-

1. 29 U.S.C. §§ 201–62 (1938).

2. 29 U.S.C. § 202 (1971) (stating that Congress found labor conditions at the time of enactment to be "detrimental" to employees).

3. 29 U.S.C. §§ 206–07 (1938).

4. *See generally* 29 U.S.C. §§ 201–62 (1938).

5. 29 C.F.R. § 785.47 (1961).

6. *See, e.g.*, Mitchell v. JCG Indus., Inc., 745 F.3d 837, 845 (7th Cir. 2014) ("[T]he de minimis rule is alive and well in Illinois's law of employee compensation."); Piper v. Jones Dairy Farm, 940 N.W.2d 701, 703 (Wis. 2020) ("We assume without deciding that the de minimis doctrine applies to claims arising under [the Wisconsin statute]."); Porter v. Kraft Foods Glob., Inc., No. 4-12-0258, 2012 WL 7051311, at *41–46. (Ill. App. Ct. Dec. 10, 2012) (stating that the time spent traveling to terminals or applying equipment requirements was *de minimis*, especially considering "that the time expended would amount to mere seconds or minutes"); England v. Advance Stores Co., 263 F.R.D. 423, 445 (W.D. Ky. 2009) (stating that reliance on the FLSA and the *de minimis* doctrine "does no violence to the intent of the Kentucky Wages and Hours Act").

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

8. *See generally* Robertson v. Valley Commc'ns Ctr., 490 P.3d 230 (Wash. Ct. App. 2021).

9. *See generally In re* Amazon.com, Inc., 255 A.3d 191 (Pa. 2021).

10. *See In re* Amazon.com, Inc., 255 A.3d 191 (Pa. 2021); Troester v. Starbucks Corp., 421 P.3d 1114 (Cal. 2018); Robertson v. Valley Commc'ns Ctr., 490 P.3d 230 (Wash. Ct. App. 2021).

hind most wage and hour laws, which is to ensure that employees are appropriately compensated for the work they provide.[11]

This Comment explores the background of the FLSA, the development of the *de minimis* doctrine, and the recent decisions in California, Pennsylvania, and Washington. It then explains why the reasoning behind the *de minimis* doctrine is inconsistent with the purpose of wage and hour laws and is no longer relevant due to current advances in technology. Moreover, with the recent changes in the workplace brought on by the COVID-19 Pandemic, states should consider rejecting the doctrine in their state wage and hour laws. Overall, state courts and legislators should consider these arguments when determining how to best protect employees during these times.

I. BACKGROUND

A. Fair Labor Standards Act

The FLSA and its implementing regulations establish a federal minimum wage,[12] the standard length of a work week,[13] and the requirement that employers pay overtime for any hours worked beyond the standard work week.[14] While Congress drafted the FLSA for several reasons, its main purpose was one of social and economic policy: to protect workers, often those most vulnerable, from employers who would require them to work for long hours with minimal pay.[15] Enacted during the Great Depression, the FLSA was one of the last major pieces of New Deal legislation passed under Franklin D. Roosevelt's presidency.[16] The day before he signed the bill, Roosevelt cautioned the American public to not let

11. *See, e.g.*, ALASKA STAT. § 23.10.050 (1959) (stating that public policy requires safeguarding minimum wage standards to ensure "the health, efficiency, and general well-being of workers against the unfair competition of wage and hour standards that do not provide adequate standards of living"); COLO. REV. STAT. § 8-6-101 (2020) ("The welfare of the state of Colorado demands that workers be protected from conditions of labor that have a pernicious effect on their health and morals . . . inadequate wages and unsanitary conditions of labor exert such pernicious effect.").

12. 29 U.S.C. § 206 (2016).

13. 29 C.F.R. § 778.105 (1968).

14. 29 U.S.C. § 207 (2010).

15. Foremost Dairies, Inc. v. Wirtz, 381 F.2d 653, 655 (5th Cir. 1967) ("The Fair Labor Standards Act is a major enactment by Congress of social and economic policy, intended to protect certain groups of the population from substandard wages and excessive hours which endanger the national health and well-being and free flow of goods in interstate commerce.").

16. Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, U.S. DEP'T LAB., https://bit.ly/3lRo5u9 [https://perma.cc/2XEF-6DW8] (last visited Mar. 3, 2022).

"calamity-howling executive[s] with an income of $1,000 a day . . . tell you . . . that a wage of $11 a week is going to have a disastrous effect on all American industry."[17]

Before Congress enacted the FLSA, concerns emerged in both the legislative and executive branches that legislation affecting private interests would not survive the U.S. Supreme Court's scrutiny.[18] Until 1937, the Court routinely rejected similar legislation, holding that the government should not interfere with private interests.[19] After the Court's sudden shift in 1937, often referred to as "The Switch in Time that Saved Nine,"[20] the Court adopted a new attitude towards labor legislation.[21] It began validating several types of social legislation, including state minimum wage laws.[22] Eventually, the validation of these social laws led to the FLSA's passage in 1938, which was designed to protect the "health, efficiency, and general well-being of workers" by prohibiting substandard wages and extreme hours.[23]

Because the FLSA did not define "work," courts had to determine what this term meant to properly calculate hours worked and overtime.[24] The Supreme Court first defined "work" in *Tenn. Coal, Iron, & R.R. Co. v. Muscoda Loc. No. 123*.[25] In *Tenn. Coal, Iron, & R.R. Co.*, the coal miner plaintiffs claimed that the time they spent traveling on the company's property to the mine entrance was compensable work time.[26] The total amount of time spent walking was

17. 1938 FRANKLIN ROOSEVELT, *Fireside Chat. June 24, 1938, in* THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 391, 392 (1938).

18. United Stated v. Lopez, 514 U.S. 549, 605 (1995) ("[T]he Court routinely invalidated state social and economic legislation under an expansive conception of Fourteenth Amendment substantive due process.").

19. *See* Lochner v. New York, 198 U.S. 45, 53 (1905) (holding that the government should not interfere with an individual's "right to make a contract . . . [and t]he right to purchase or to sell labor"); Grossman, *supra* note 16.

20. Webster v. Ryan, 729 N.Y.S.2d 315, 326 (N.Y. Fam. Ct. 2001) (referencing the terminology the "Switch in Time That Saved Nine").

21. Grossman, *supra* note 16.

22. *See, e.g.*, West Coast Hotel Co. v. Parrish, 300 U.S. 379, 400 (1937) (holding that state legislation establishing a minimum wage for women was constitutional).

23. 29 U.S.C. § 202 (1974).

24. *See, e.g.*, Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 692 (1946) (holding preliminary activities performed for the benefit of the employer constitute work but may not be compensable under the *de minimis* exception); Steiner v. Mitchell, 350 U.S. 247, 252 (1956) (holding that the changing of clothes was a "principal" activity and therefore should count as work time under the FLSA); Integrity Staffing Sols. v. Busk, 574 U.S. 27, 31 (2014) (interpreting the definition of "work" broadly).

25. Tenn. Coal, Iron, & R. Co. v. Muscoda Loc. No. 123, 321 U.S. 590 (1944).

26. *Id.* at 592.

just a few minutes.[27] In interpreting Congress's intent while drafting the FLSA, the Court defined work as: "physical or mental exertion" done for the primary benefit of the employer that is under the control of the employer.[28]

The FLSA definition of work has remained consistent over the past 70 years.[29] In *Integrity Staffing Solutions v. Busk*,[30] the Supreme Court stated the following regarding the definition: "[T]he FLSA did not define 'work' or 'workweek,' and this Court interpreted those terms broadly. It defined 'work' as 'physical or mental exertion, whether burdensome or not, controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.'" Over time, this broad definition increased employer liability and, in turn, increased litigation regarding what should be considered compensable time under the Act.[31]

To mitigate this influx of litigation, reduce employer liability, and offer clarity to what "work" means, Congress passed the Portal-to-Portal Act ("PTPA").[32] The PTPA sets out two categories of work that are not compensable under the FLSA: "(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and (2) activities which are preliminary to or postliminary to said principal activity or activities."[33] The Supreme Court has held that a "principal activity" is one that is "integral and indispensable."[34] For example, in *Busk*, the Court found that time spent completing security screenings to prevent theft was neither integral nor indispensable because the warehouse workers could perform their main task of retrieving and packaging items without complet-

27. *Id.* at 594–95.

28. *Id.* at 598.

29. *See, e.g.*, *Anderson*, 328 U.S. at 692 (holding preliminary activities performed for the benefit of the employer constitute work, but may not be compensable under the *de minimis* exception); *Steiner*, 350 U.S. at 252 (holding that the changing of clothes was a "principal" activity and therefore should count as work time under the FLSA); *Busk*, 574 U.S. at 31 (interpreting the definition of "work" broadly).

30. *Busk*, 574 U.S. at 31.

31. Jeffrey Brecher & Eric Magnus, *Managing Wage and Hour Risks in a Digitally Connected Workforce Addicted to Technology*, 20 J. INTERNET L. 3, 4 (2017) (stating that over 1,500 lawsuits were filed in the 6 months following the *Anderson* holding, which broadened the definition of work).

32. 29 U.S.C. §§ 251–262 (1974).

33. 29 U.S.C. § 254 (2019).

34. *Busk*, 574 U.S. at 33 (overruling a Ninth Circuit test stating principal activities were those that were primarily for the benefit of the employer).

ing the screenings.[35] Courts currently use the framework discussed in *Busk* to define what constitutes work under the FLSA.[36]

B. De Minimis Doctrine

Even if an employee activity falls under the Supreme Court's definition of work and is not excluded by the PTPA's exceptions, employers may avoid liability under the FLSA under yet another exception—the *de minimis* doctrine.[37] The *de minimis* doctrine is not found in the text of the FLSA but is a judicial doctrine that originated in *Anderson v. Mt. Clemens*.[38] In *Anderson*, the Court recognized that while some activities may be considered "work" under the FLSA, they may not be compensable because they are so small and insignificant as to be considered "trifles."[39] The Supreme Court's reasoning focused on the "realities of the industrial world" and the need to avoid holding employers responsible for "split-second absurdities."[40] If the activity performed is not substantial, the employees will likely not be able to recover.[41]

While the *de minimis* doctrine originated in case law, it has since been codified in regulations by the Department of Labor ("DOL"), the federal agency tasked with enforcing the FLSA.[42] Under 29 C.F.R. § 785.47,[43] "insubstantial or insignificant periods of time" that cannot be "precisely recorded" are not compensable. The regulation further explains that "[a]n 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."[44] In other words, employers cannot use the *de minimis* exception as a defense for not paying their employees for

35. *Id.* at 35.

36. *See, e.g.*, Bonds v. GMS Mine Repair & Maint., Inc., 2:13-CV-1217, 2015 U.S. Dist. LEXIS 127769, at *30–31 (W.D. Pa. Sept. 23, 2015) (citing to language in *Busk* defining what constitutes work); Jones v. Hoffberger Moving Servs. LLC, 92 F. Supp. 3d 405, 410–11 (D. Md. 2015) (discussing the standard of "work" established in *Busk*).

37. *See generally* Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946) (establishing the *de minimis* doctrine in the FLSA).

38. *Id. See* Brecher & Magnus, *supra* note 31, at 4.

39. *Anderson*, 328 U.S. at 692.

40. *Id.*

41. *Id.* (holding that the "precise scope" of the doctrine should be determined by a trier of fact because which activities are considered substantial may differ from case to case).

42. 29 U.S.C. § 204 (1995).

43. 29 C.F.R. § 785.47 (1961).

44. *Id.*

small amounts of time if the employees regularly perform these tasks.[45]

Courts have not determined a precise amount of time that would qualify as *de minimis*.[46] However, most courts have found that periods of ten minutes or less fall into this exception.[47] When determining whether the time spent performing the activity is *de minimis*, courts often look to factors first established in *Lindow v. United States*[48] (referred to as the *Lindow* factors). *Lindow* centered around employees seeking overtime compensation for time spent coming into work early to relieve the workers on the prior shift.[49] The court established three factors to determine whether the plaintiffs' time was *de minimis*: "(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."[50] The Ninth Circuit held that the plaintiffs' claims in *Lindow* were *de minimis* because it would have been difficult for the employer to record the overtime, the amount of time the employees spent doing the task varied, and the employees did not regularly engage in the activities.[51] While none of these factors were dispositive, subsequent court decisions focused on the amount of time spent doing the activity, recognizing that the *Lindow* court viewed it as an "important factor."[52]

C. California, Pennsylvania, and Washington State Wage and Hour Laws

At a minimum, states must follow FLSA standards, but they are not preempted from creating their own wage and hour laws that offer greater protection to workers.[53] Many states have chosen to implement their own wage and hour laws.[54] These laws tend to fall

45. *Id.*

46. Lindow v. United States, 738 F.2d 1057, 1062 (9th Cir. 1984) (describing how the Supreme Court established the *de minimis* doctrine but never established a standard time).

47. Alan Persaud, *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*, 14 FIU L. REV. 121, 132 (2020) (citing to cases in which different courts have considered a time of at least ten minutes *de minimis*).

48. *Lindow*, 738 F.2d at 1063.

49. *Id.* at 1059.

50. *Id.* at 1063.

51. *Id.* at 1064.

52. *See, e.g.*, Gonzalez v. Farmington Foods, Inc., 296 F. Supp. 2d 912, 928 (N.D. Ill. 2003) (quoting *Lindow*, 738 F.2d at 1062).

53. 29 U.S.C § 218 (1967).

54. Daniel V. Dorris, *Fair Labor Standards Act Preemption of State Wage-and-Hour Law Claims*, 76 U. CHI. L. REV. 1251, 1257 (2009).

into three distinct categories: (1) laws that offer more protections to workers, (2) laws that provide the "same substantive rights of the FLSA," and (3) remedial laws created to help enforce the substantive rights of other laws.[55] Currently, 30 states and Washington, D.C. have minimum wage laws that require a higher minimum wage than is required by the FLSA.[56]

Regarding the *de minimis* exception, several states have followed federal precedent and applied the exception to their own wage and hour laws.[57] Whether these states applied the *de minimis* doctrine based on the similarities between the FLSA and their own wage and hour laws or other common law principles, states use the doctrine to bar employee recovery of wages for "insignificant" amounts of time.[58] Prior to 2021, California was one of the only states to expressly reject the *de minimis* doctrine.[59] In 2021, Pennsylvania and Washington joined California in rejecting the *de minimis* doctrine as it applied to their state wage and hour laws.[60] The next two sections of this Comment will analyze the California, Pennsylvania, and Washington courts' reasons for rejecting the application of the *de minimis* doctrine. These states' rejection of the doctrine aligns with the purpose behind most wage and hour laws, which is to ensure that employees are appropriately compensated for the work they provide.

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55. *Id.*

56. *State Minimum Wages*, NAT'L CONF. OF STATE LEGISLATURES (Aug. 30, 2022), https://bit.ly/3nn8bXV [https://perma.cc/L4XH-FP54]; 29 U.S.C. § 206 (2016) (establishing the current minimum wage at $7.25).

57. *See, e.g.*, Mitchell v. JCG Indus., Inc., 745 F.3d 837, 845 (7th Cir. 2014) ("[T]he de minimis rule is alive and well in Illinois's law of employee compensation."); Piper v. Jones Dairy Farm, 940 N.W.2d 701, 703 (Wis. 2020) ("We assume without deciding that the de minimis doctrine applies to claims arising under [the Wisconsin statute]."); Porter v. Kraft Foods Glob., Inc., No. 4-12-0258, 2012 WL 7051311, at *41–46. (Ill. App. Ct. Dec. 10, 2012) (stating that the time spent traveling to terminals or applying equipment requirements was *de minimis*, especially considering "that the time expended would amount to mere seconds or minutes"); England v. Advance Stores Co., 263 F.R.D. 423, 445 (W.D. Ky. 2009) (stating that reliance on the FLSA and the *de minimis* doctrine "does no violence to the intent of the Kentucky Wages and Hours Act").

58. 29 C.F.R. § 785.47 (1961).

59. *In re* Amazon.com, Inc., 255 A.3d 191, 205 (Pa. 2021).

60. *In re Amazon.com, Inc.*, 255 A.3d at 193; Robertson v. Valley Commc'ns Ctr., 490 P.3d 230, 237 (Wash. Ct. App. 2021).

1. *California's Rejection of the De Minimis Doctrine: Troester v. Starbucks*

In *Troester v. Starbucks*,[61] the California Supreme Court held that California's wage and hour laws do not have a *de minimis* exception.[62] Douglas Troester worked for Starbucks from 2009 to 2010 as a shift supervisor.[63] After Troester officially clocked out of his shift each day, he was required to conduct several closing tasks, such as shutting down computer systems, activating alarms, locking doors, and escorting other coworkers to their cars.[64] Over the course of 17 months of working, the district court found that Troester worked for about 13 hours outside of his regular time, which would have totaled $102.67 in potential wages.[65] Troester brought claims against Starbucks under CAL. LAB. CODE §§ 510, 1194, and 1197[66] for unpaid wages.[67]

The California Supreme Court explained that the purpose of the California Labor Code was the "protection of employees."[68] Specifically, the Code requires that employees be paid for "all work performed" and the *de minimis* doctrine would defeat this requirement.[69] The Code is concerned with the "small things"; therefore, a doctrine that minimizes the importance of small things, or trifles, is inconsistent with its purpose.[70] Minutes worked beyond scheduled working time are more than "split-second absurdities."[71] The court found that advances in technology have ameliorated the difficulty of tracking time.[72] And even if tracking that time is difficult, the employee should not have to bear that burden.[73] The court concluded by emphasizing how significant this *de minimis* time can be:

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61. Troester v. Starbucks Corp., 421 P.3d 1114 (Cal. 2018).
62. *Id.* at 1116.
63. *Id.*
64. *Id.* at 1117.
65. *Id.*
66. CAL. LAB. CODE §§ 510, 1194, 1197 (Deering 1937).
67. Petitioner's Opening Brief on the Merits at 1, Troester v. Starbucks Corp., 421 P.3d 1114 (Cal. 2018) (No. S234969). In Troester's opening brief, one of the first sources he cites to explain the importance of paying employees for all hours worked is the Aramaic Bible, demonstrating that the importance of fair pay has historical roots. *Id.* at 2 ("'But the wages of one who labors are not accounted to him as a favor, but as that which is owed to him.' Romans 4:4.").
68. Troester v. Starbucks Corp., 421 P.3d 1114, 1119 (Cal. 2018) (refusing to adopt federal standards that would "expressly eliminate[ ] substantial protections to employees").
69. *Id.* at 1120.
70. *Id.* at 1122.
71. *Id.* at 1126.
72. *Id.*
73. *Id.* at 1123.

> Troester is seeking payment for 12 hours and 50 minutes of compensable work over a 17-month period, which amounts to $102.67 at a wage of $8 per hour. That is enough to pay a utility bill, buy a week of groceries, or cover a month of bus fares. What Starbucks calls "de minimis" is not de minimis at all to many ordinary people who work for hourly wages.[74]

This California Supreme Court decision placed an emphasis on protecting workers' rights and ensuring that employers are paid for every minute they work.[75] The court has since reiterated that the *de minimis* doctrine does not apply to California state wage and hour laws.[76]

2. *Pennsylvania's Rejection of the De Minimis Doctrine: In re Amazon.com, Inc.*

In *In re Amazon.com, Inc.*,[77] the Pennsylvania Supreme Court held that time spent waiting to participate in mandatory security screenings were compensable hours under the Pennsylvania Minimum Wage Act ("PMWA").[78] The Pennsylvania Supreme Court ruled that there is no *de minimis* exception to the PMWA.[79] The case involved employees who worked for an Amazon warehouse in Pennsylvania.[80] The employees clocked in and out at time clocks at the start and end of their shifts.[81] After their shifts ended, employees participated in "antitheft security screening[s]."[82] While the amount of time spent in these security lines was disputed, the employees claimed they took an average of four to eight minutes each day.[83]

The Pennsylvania Supreme Court held that the PMWA's purpose—to ensure each Pennsylvania worker is paid for the time they are required to work by their employer—conflicted with the *de minimis* doctrine.[84] The court recognized that while it has applied the common law doctrine of *de minimis non curat lex* when inter-

74. *Id.* at 1125.
75. *Id.*
76. *See, e.g.*, David v. Queen of Valley Med. Ctr., 264 Cal. Rptr. 3d 279, 288 (Cal. Ct. App. 2020) (holding that "the de minimis doctrine does not apply to wage and hour claims brought under California law").
77. *In re* Amazon.com, Inc., 255 A.3d 191 (Pa. 2021).
78. 43 PA. CONST. STAT. §§ 333.101–115 (1968).
79. *In re Amazon.com, Inc.*, 255 A.3d at 193.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.* at 209 n.19.
84. *Id.* at 208–09 ("[A]ny portion of the hours worked by an employee does not constitute a mere trifle.").

preting other statutes, it has never applied the *de minimis* doctrine established in *Anderson v. Mt. Clemens* to the PMWA.[85] Justice Debra McCloskey Todd, writing for the majority, stated:

> When the text of the PMWA is read consistent with its legislatively articulated purpose . . . —to maintain the economic well-being of our Commonwealth's workforce by ensuring that each and every Pennsylvania worker is paid for all time he or she is required to expend by an employer for its own purposes—we discern no intent on the part of the General Assembly to allow a *de minimis* exception to the PMWA's irreducible requirements. The PMWA plainly and unambiguously requires payment for "all hours worked," signifying the legislature's intent that any portion of the hours worked by an employee does not constitute a mere trifle.[86]

The court also discussed the limits of 29 C.F.R § 785.47 as it applies to the *de minimis* doctrine.[87] An employer may not refuse to pay an employee for "fixed or regular working time" merely because the amount is trivial.[88] The *de minimis* doctrine itself, when applied to the FLSA, is meant to protect only against "a triflingly small interval of an uncertain and indefinite duration."[89] Overall, the Pennsylvania Supreme Court's decision emphasized that employers must fairly compensate their employees for all the efforts they are required to expend.[90]

3. Washington's Rejection of the De Minimis Doctrine: Robertson v. Valley Communications Center

Washington also has explicitly rejected the *de minimis* doctrine as applied to the Washington Minimum Wage Act ("MWA").[91] In *Robertson v. Valley Communications Center*,[92] employees sued their employer under the MWA for unpaid wages.[93] The employees of the Valley Communication Center alleged that they were required to perform nine tasks before their shifts without compensa-

85. *Id.* The terminology *de minimis non curat lex*, meaning that the law is not concerned with small things, is a more generalized common law doctrine. *Id.* While Pennsylvania has recognized this doctrine at various times in its history, it has never been applied to the PMWA. *Id.*

86. *In re Amazon.com, Inc.*, 255 A.3d at 208–09.

87. *Id.* at 206.

88. *Id.*

89. *Id.* at 207.

90. *Id.* at 209.

91. *See generally* Robertson v. Valley Commc'ns Ctr., 490 P.3d 230 (Wash. Ct. App. 2021).

92. Robertson v. Valley Commc'ns Ctr., 490 P.3d 230 (Wash. Ct. App. 2021).

93. *Id.* at 232.

tion.[94] These tasks included gathering materials, punching into the attendance system, logging into the computer, and reviewing messages from the dispatch system.[95] The trial court found that six of the nine tasks performed by the employees were *de minimis*.[96]

The Washington Court of Appeals denied applying the *de minimis* doctrine to the tasks performed by the employees.[97] The court explained that there was no actual substantive authority in Washington law that explicitly adopted the doctrine to the state's wage and hour law.[98] It started by explaining that the FLSA and MWA are similar, and interpretation of the federal law can help aid its interpretation of the state law.[99] However, the court stated that there is no requirement to interpret the statutes the same way.[100] Similar to the Pennsylvania and California Supreme Courts, it held that "[a]doption of the de minimis doctrine, which allows otherwise compensable work to be uncompensated, would not advance the legislature's intent to protect employee wages and assure payment."[101] Because the MWA is to be "liberally construed," adopting the *de minimis* doctrine would run counter to the MWA's purpose.[102]

II. ANALYSIS

While only a few states have affirmatively rejected the *de minimis* doctrine, other states should follow their precedent. The reasoning behind the *de minimis* doctrine is inconsistent with the purpose of wage and hour laws and is no longer relevant due to current advances in technology. Additionally, the COVID-19 Pandemic has demonstrated how workplace expectations have changed; therefore, the interpretation of individual state wage and hour laws should adapt to these shifts.[103] While some employers may argue that the rejection of the *de minimis* doctrine will lead to unreasonable administrative burdens and increased litigation, these arguments no longer hold as much weight as they once did.[104] The

94. *Id.*
95. *Id.* at 233.
96. *Id.*
97. *Id.* at 237.
98. *Id.*
99. *Id.*
100. Robertson v. Valley Commc'ns Ctr., 490 P.3d 230, 237 (Wash. Ct. App. 2021).
101. *Id.*
102. *Id.*
103. *See infra* Part III.C.
104. *See infra* Part III.A.

positive effects of rejecting the doctrine far outweigh the potential negatives.

A. Supposed "Administrative Burdens" Are No Longer Significant

One of the most cited arguments employers use when advocating for the application of the *de minimis* doctrine is that requiring employers to keep track of small amounts of an employee's time will place significant administrative burdens on employers.[105] Some employers argue that it is impractical to keep track of each employee's time spent doing small tasks,[106] while others argue that they should not have to pay if an employee clocks in before their scheduled time because it is impossible to have multiple employees all clocking in at the same time.[107] Ultimately, employers claim that requiring them to keep track of all of their employees' time would be too burdensome.[108]

In *Troester*, California Supreme Court Justice Goodwin H. Liu explained why the administrative burden argument is losing strength as technologies advance.[109] Work no longer needs to be tracked by punching a time clock.[110] Employers can track time using "smartphones, tablets, or other devices."[111] Justice Liu pushed back on *Anderson*'s reasoning that courts should consider the "realities of the industrial world" because these realities have shifted with the advent of new timekeeping technologies and abilities.[112]

Justice Liu also argued that employers are in the best position to deal with these administrative difficulties.[113] He stated that it would be unfair to have the employees bear the burden of this diffi-

105. *See generally* Respondent's Brief at 33–34, Bustamante v. Teamone Emp. Specialists, LLC, 2011 Cal. App. LEXIS 3664 (Cal. App. May 17, 2011) (No. B222136); Brief of Amici Curiae Nat'l Retail Fed'n and Pa. Retailers Ass'n at 14–19, *In re* Amazon.com, Inc., 255 A.3d 191 (Pa. 2021) (No. 43 EAP 2019); Answering Brief of Defendant-Appellee at 73–75, Dager v. City of Phoenix, 380 Fed. Appx. 688 (9th Cir. 2010) (No. 09-15356).

106. Answering Brief of Defendant-Appellee at 73–75, Dager v. City of Phoenix, 380 Fed. Appx. 688 (9th Cir. 2010) (No. 09-15356).

107. Respondent's Brief at 33–34, Bustamante v. Teamone Emp. Specialists, LLC, No. 2011 Cal. App. LEXIS 3664 (Cal. App. May 17, 2011) (No. B222136).

108. Answering Brief of Defendant-Appellee at 73, Dager v. City of Phoenix, 380 Fed. Appx. 688 (9th Cir. 2010) (No. 09-15356) ("To the extent such time is compensable, tracking it is not just difficult; it is administratively impossible.").

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

110. *Id.*

111. *Id.*

112. *Id.* at 1124.

113. *Id.* at 1125.

culty.[114] However, employers may still disagree with this reasoning and argue that the expense of certain timekeeping systems is too high a burden when compared to the length of time in dispute.[115] There are several alternatives available to employers that may mitigate these perceived costs: adapting current tracking tools to account for the time, restructuring work, or estimating the time "through surveys, time studies, or . . . a fair rounding policy."[116] Overall, several low-cost options are available for employers to utilize that could help mitigate any potential administrative burdens.

B. Rejection of the De Minimis Doctrine Will Increase Productivity and Reduce Costs

With the advancement of technology and access to email and cell phones after work hours, it is no surprise that employees are reporting that they are working more hours during their workweek.[117] However, working more hours does not always correlate with increased productivity.[118] Once an employee reaches 56 hours of work a week, some studies have shown that productivity does not continue to increase at a notable rate.[119] When employees work over this amount in a given week, they essentially become less productive per hour paid.

The *de minimis* doctrine, which prevents employees from being paid for certain amounts of time in which they are working, contributes to this problem of lowered productivity. When employees are required to do work tasks in addition to their already scheduled hours, they are working more hours in a week. If this time compounds significantly, it can lead to decreased productivity over time.[120] Ensuring that employees are not required to work outside of their scheduled work hours will help reduce employee

114. *Id.*

115. *How Much Does Time Tracking Software Cost in 2022?*, PRICEITHERE.COM, https://bit.ly/3t8A7l5 [https://perma.cc/7EY4-5HHN] (last visited Mar. 3, 2022) ("Time and Attendance systems cost between $240 and $2,300 for a monthly subscription (per year). Pricing is determined by time tracking services, administrative controls, and equipment integration.").

116. *Troester*, 421 P.3d at 1125.

117. Kristen Purcell & Lee Rainie, *Email and the Internet Are the Dominant Technological Tools in American Workplaces*, PEW RSCH. CTR., https://pewrsr.ch/3tT2FB1 [https://perma.cc/6JX7-RVFK] (last visited Mar. 3, 2022) (reporting that 47 percent of office-based workers say that digital tools increase the amount of time they spend working).

118. JOHN PENCAVEL, THE PRODUCTIVITY OF WORKING HOURS 15 (2014), https://bit.ly/3Aq6YoG [https://perma.cc/YS77-NK5M] (detailing how output at 70 hours per week is essentially the same at 56 hours a week).

119. *Id.*

120. *Id.*

burnout.[121] Reducing burnout can lead to fewer health problems and reduced employer medical expenses.[122] While an employer may be quick to mention that paying employees for additional time will increase costs, the reduction in costs they will realize from increased productivity will likely outweigh these expenses.

Additionally, ensuring proper compensation for employees based on the entirety of the hours they work can also lead to increased productivity. Fredrick Herzberg, a leader in the area of motivation theory, argues that there are two dimensions to employee satisfaction: motivation and hygiene.[123] Motivators affect an individual's personal growth, such as "achievement, recognition, the work itself, responsibility and advancement."[124] Hygiene factors are related to the work environment, such as "company policies, supervision, salary, interpersonal relations and working conditions."[125] While motivation factors increase satisfaction, hygiene factors minimize dissatisfaction.[126] For example, salary is not necessarily a motivator, but increasing a salary can decrease dissatisfaction.[127] Ensuring that employees are paid for all of the work they provide can help decrease dissatisfaction in the workforce.[128]

When dissatisfaction is decreased, productivity increases.[129] Satisfied employees typically have better work attendance, greater retention rates, higher organizational commitment, and higher productivity levels.[130] By rejecting the *de minimis* doctrine and requiring employees to be compensated for all their efforts, one of two

121. Nien-Chih Hu et al., *The Associations Between Long Working Hours, Physical Inactivity, and Burnout*, 58 J. OF OCCUPATIONAL & ENV'T MED. 514, 514 ("Long working hours are correlated with burnout when working over 40 hours per week and is even stronger when working over 60 hours per week.").

122. *See generally Long Working Hours Increasing Deaths from Heart Disease and Stroke: WHO, ILO*, WHO (May 17, 2021), https://bit.ly/33I60Za [https://perma.cc/54V5-9SNZ] ("The study concludes that working 55 or more hours per week is associated with an estimated 35% higher risk of a stroke and a 17% higher risk of dying from ischemic heart disease, compared to working 35–40 hours a week.").

123. J. Michael Syptak et al., *Job Satisfaction: Putting Theory Into Practice*, AM. ACAD. OF FAM. PHYSICIANS, https://bit.ly/3GXJ4mX [https://perma.cc/9QW3-5ZC9] (last visited Mar. 3, 2022).

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* ("If individuals believe they are not compensated well, they will be unhappy working for you.").

128. *Id.*

129. *Id.* ("Satisfied employees tend to be more productive, creative and committed to their employers.").

130. Kanwal Rani, *A Study of Employees' Job Satisfaction and its Impact on Their Performance*, 1 J. OF INDIAN RSCH. 105, 105 (2013).

things is likely to happen. The first option is that employers will create procedures preventing employees from working outside of their scheduled hours to reduce this expense. This will ensure that employees are only working during their scheduled hours. Reducing the amount of extra work employees are required to do will likely increase productivity during their scheduled hours.[131] The other option for employers is to have employees continue to work these hours, but the employees will be fairly compensated for the hours worked. When employees believe they are being fairly compensated, dissatisfaction decreases, which can lead to increased productivity as well.[132] As a result, whichever path the employer pursues, both the employer and the employee win. The employer gets increased productivity, and the employee either gets increased compensation or increased work/life balance. Rejecting the *de minimis* doctrine will help employers realize increased productivity.

C. The COVID-19 Pandemic Calls for Other States to Reexamine Their Application of the De Minimis Doctrine

In early 2020, the United States experienced an unprecedented health crisis known as the COVID-19 Pandemic ("Pandemic"). The Pandemic has had devastating effects in numerous different areas of everyday life. The American workplace is one area that has experienced significant impacts. Mandatory health screenings have become commonplace,[133] many employers have shifted to remote work,[134] and employees have started reevaluating their work and personal goals.[135] The Pandemic has shifted employers' and employees' approaches to how, when, and where work gets done. With the lingering effects of the Pandemic still present in the workplace,

131. *See* JOHN PENCAVEL, THE PRODUCTIVITY OF WORKING HOURS 15 (2014), https://bit.ly/3Aq6YoG [https://perma.cc/K79T-YDFS].

132. J. Michael Syptak et al., *Job Satisfaction: Putting Theory Into Practice*, AM. ACAD. OF FAM. PHYSICIANS, https://bit.ly/3GXJ4mX [https://perma.cc/9G5T-4L3K] (last visited Mar. 3, 2022).

133. RACHEL LEVINE, ORDER OF THE SECRETARY OF THE PENNSYLVANIA DEPARTMENT OF HEALTH DIRECTING PUBLIC HEALTH SAFETY MEASURES FOR BUSINESSES PERMITTED TO MAINTAIN IN-PERSON OPERATIONS 2–3 (2020), https://bit.ly/3r3wfm4 [https://perma.cc/SM4P-SNKX] (describing requirements of health screenings for Pennsylvania businesses).

134. Gad Levanon, *Remote Work: The Biggest Legacy of COVID-19*, FORBES (Nov. 23, 2020, 5:04 PM), https://bit.ly/3oZ01G3 [https://perma.cc/M97Q-FDMV] (describing that remote work has increased four to six times since the start of the Pandemic).

135. Andrea Hsu, *As the Pandemic Recedes, Millions of Workers Are Saying 'I Quit'*, NPR (June 24, 2021, 6:01 AM), https://n.pr/3r2RQei [https://perma.cc/9JTR-PVMK].

states must confront the reality that the *de minimis* doctrine is no longer justifiable in a post-Pandemic world.

1. Mandatory Health Screenings

One effect that the Pandemic has had on the workplace is the implementation of health screenings prior to the start of an employee's shift.[136] The screenings are intended to mitigate the spread of COVID-19 by identifying potentially infected individuals.[137] Whether the screening was required by an executive agency,[138] required by state law,[139] or implemented as a best practice for businesses,[140] it became commonplace for employers to require employees to check their temperature and answer COVID-19-related questions before clocking in for work. Some employees claim that they spent up to 30 minutes completing these screenings, including waiting time and the actual length of the screening itself.[141] Mandatory health screenings should be considered a compensable activity under the FLSA and should not fall under the *de minimis* exception.

Requiring employees to wait in line before their shifts for health screenings is very similar to the mandatory antitheft screenings in *In re Amazon.com, Inc*.[142] Employees are required to spend time before their shift to complete a task required by their employer, just as the warehouse workers in *In re Amazon.com, Inc.* were required to stay after their shift to complete antitheft screen-

136. *See, e.g.*, *Sample Employee COVID-19 Health Screening Questions*, OSHA, https://bit.ly/3IuMJJl [https://perma.cc/D2RB-UB94] (last visited Mar. 3, 2022) ("Employers who fall under the scope of the Occupational Safety and Health Administration (OSHA) COVID-19 Emergency Temporary Standard (29 CFR 1910, subpart U) are required to screen employees before each work day and each shift for COVID-19 symptoms.").

137. *Guidance for Businesses and Employers Responding to Coronavirus Disease 2019 (COVID-19)*, CDC, https://bit.ly/3ApbkN5 [https://perma.cc/6JTX-G7UF] (last visited Mar. 3, 2022).

138. RACHEL LEVINE, INTERIM INFECTION PREVENTION AND CONTROL RECOMMENDATIONS FOR PATIENTS WITH KNOWN OR PATIENTS UNDER INVESTIGATION FOR 2019 NOVEL CORONAVIRUS (COVID-19) IN A HEALTHCARE SETTING 2–3 (2020), https://bit.ly/3nLZp75 [https://perma.cc/T4AZ-4J5J].

139. N.Y. LAB. LAW § 218-b(2) (Consol. 2021) (establishing a requirement that the commissioner creates infectious disease exposure prevention standards, including standards about employee health screenings).

140. *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, EEOC, https://bit.ly/3p0KHZx [https://perma.cc/D87Z-NAG7] (July 12, 2022).

141. Plaintiffs' Original Class and Collective Action Complaint and Jury Demand at 5–6, Haro v. Walmart Inc., No. 1:21-CV-00239 (E.D. Cal. filed Feb. 23, 2021).

142. *In re* Amazon.com, Inc., 255 A.3d 191, 193–94 (Pa. 1968).

ings.[143] While some may say that a health screening helps prevent the spread of disease, which benefits the employee, a health screening is primarily for the benefit of the employer, as it reduces their liability and prevents the spread of disease amongst their employees and clients.[144] Preventing employees from getting sick helps keep the employer's labor supply stable and reduces the risk of overworking healthy employees. The screenings can also be viewed as "integral and indispensable" to the employees' principal activities because employees are required to complete these screenings before they are able to start their work.[145] While the screenings can be integral to almost all employees' work, it is especially true for those employed in healthcare as their work focuses on the health of their patients.[146]

The health screenings should fall into the category of a compensable activity because they are integral to employees' principal work. Even if the time spent completing the screening would normally qualify as exempt under the *de minimis* exception, states should reconsider their application of the *de minimis* doctrine to their state wage and hour laws. Requiring health screenings has become so commonplace in our post-Pandemic world that it is expected of employees to complete this task before they can start working.[147] In light of this societal change, courts should consider how this time affects employees. Many employees are now required to make sure they are at their employer's business up to 30 minutes before their shift to ensure they make it through the health screening line to clock in on time.[148] Even 10 minutes each day spent in line for mandatory health screenings at the current minimum wage

143. *Id.*

144. KAHWATI VISWANATHAN ET AL., UNIVERSAL SCREENING FOR SARS-COV-2 INFECTION: A RAPID REVIEW 3 (Cochrane Libr. 2020), https://bit.ly/3G1Ljok [https://perma.cc/9FQ8-C38K] ("[W]eekly or biweekly screening of healthcare workers may reduce transmission to patients and other healthcare workers in emergency departments.").

145. Steiner v. Mitchell, 350 U.S. 247, 253 (1956).

146. *See* Robert Harrison, *COVID-19: Occupational Health Issues for Health Care Personnel*, UPTODATE, https://bit.ly/340Zhth [https://perma.cc/3RCP-9RDY] (last visited Mar. 3, 2022) (stating that infection rates are higher amongst healthcare workers because of their contact with patients).

147. LITTLER MENDELSON P.C., SPECIAL REPORT: LITTLER COVID-19 RETURN TO WORK SURVEY REPORT 5 (2020), https://bit.ly/3IdDdv7 [https://perma.cc/L6YJ-A3FJ].

148. *See* Plaintiffs' Original Class and Collective Action Complaint and Jury Demand at 5–6, Haro v. Walmart Inc., No. 1:21-CV-00239 (E.D. Cal. filed Feb. 23, 2021).

rate is about $315 a year, which can be significant for those currently earning minimum wage.[149]

Overall, the increased use of mandatory health screenings due to the COVID-19 Pandemic shows states that they should reconsider how they apply the *de minimis* doctrine to their respective state wage and hour laws.

2. *Increase in Working From Home*

Due to the COVID-19 Pandemic, remote working has increased drastically.[150] What started as an attempt to prevent the spread of the Pandemic has led to a revolution of how work is completed. Remote work allows for flexibility[151] and has even increased productivity.[152] Though not all aspects of the increase of working from home are positive,[153] remote work continues to be a present force in the American workplace. This increase has led to growing legal concerns over how to track employee time and how to ensure fair compensation of employees who are not physically present in the workplace.[154]

Guidance provided by the U.S. Department of Labor explains that even though work may not be performed at the physical location of the employer, employers are still required to pay their em-

149. The figure is calculated by multiplying 10 minutes by a 5-day work week by a 52-week year. This figure is a little over a week's worth of wages at minimum wage ($290).

150. *See The Rise of Working from Home*, ECONOMIST (Apr. 8, 2021), https://econ.st/3KmYuDo [https://perma.cc/XZ87-LTPH] (stating that remote work had increased from 5 percent to 60 percent by spring 2020); *see also* Rani Molla, *How Remote Work is Quietly Remaking Our Lives*, VOX (Oct. 9, 2019, 6:00 AM), https://bit.ly/3IkHonN [https://perma.cc/7EES-QDFJ] (predicting that by 2025, 70 percent of the workforce will be working remotely at least 5 days a month).

151. Andrea Alexander et al., *What Employees are Saying About the Future of Remote Work*, MCKINSEY & CO. (Apr. 1, 2021), https://mck.co/3413rkA [https://perma.cc/FB9Z-ZBUM] (stating that more than half of the employees polled stated that hybrid virtual-working models would help increase flexibility).

152. Kathy Gurchiek, *COVID-19 and Deciding Who Continues Working from Hom*e, SHRM (July 7, 2020), https://bit.ly/3AbGveq [https://perma.cc/UJ79-SHMQ] (describing how one company has seen an increase in productivity by 25 percent in 1 department since switching to remote work).

153. *See generally* Katja Kerman et al., *Work and Home Boundary Violations During the COVID-19 Pandemic: The Role of Segmentation Preferences and Unfinished Tasks*, 71 APPLIED PSYCH. 784 (2022) (describing how violations of work/life boundaries can lead to lower work- and home-related satisfaction).

154. CHERYL STANTON, UNITED STATES DEPARTMENT OF LABOR FIELD ASSISTANCE BULLETIN NO. 2020-5, at 1 (2020), https://bit.ly/3FNIerK [https://perma.cc/W7TM-SKYR] (providing guidance on the employer's obligation to track hours of their employees, particularly in light of the COVID-19 Pandemic) [hereinafter FIELD ASSISTANCE BULLETIN NO. 2020-5].

ployees for all hours worked.[155] An issue presented with remote work is whether or not the employer knew that the employee had worked beyond their scheduled hours.[156] To be compensated for the hours worked, an employer must have actual or constructive knowledge of the work performed by the employee.[157] The seminal case in this area, *Allen v. City of Chicago*,[158] places the burden on the employee to prove beyond a preponderance of evidence that they performed overtime work and were not fairly compensated for this work.

In *Allen*, the plaintiffs were current and former police officers of the Chicago Police Department.[159] One of the plaintiff's claims was for unpaid wages owed from when the police officers were required to check their phones and take calls after their scheduled work hours.[160] The Seventh Circuit held that for an employer to be liable, they must have actual knowledge or constructive knowledge of the work being performed.[161] One of the ways the employer could exercise due diligence in determining when employees were working is to establish a reporting system.[162] The police department had a process for reporting overtime hours on written slips, but the officers did not always comply with this process.[163] The court held that the employers could not be held responsible for the time worked because they essentially did not know it was being performed.[164] While the ruling ultimately went against the employees, it made clear that employers can be liable if they have constructive knowledge of the work being performed.[165]

With the increase of remote work performed, it is crucial for employers to have a process in place to track employees' time and to ensure compliance with the process. Doing so can help avoid liability for the employer for work that was performed that the employer had constructive knowledge of. With an increasing number of employees performing work off-location, there is a greater risk that employees will perform work outside of their scheduled work

155. *Id.*
156. *Id.*
157. Allen v. City of Chicago, 865 F.3d 936, 943 (7th Cir. 2017) (holding that an employer needed to have some knowledge that the plaintiffs worked overtime).
158. Allen v. City of Chicago, 865 F.3d 936 (7th Cir. 2017).
159. *Id.* at 938.
160. *Id.* at 939–40.
161. *Id.* at 938.
162. *Id.*
163. *Id.* at 940–41, 945.
164. *Id.* at 938.
165. *Id.*

hours.[166] Ultimately, the employer bears the burden of preventing work from being performed when it is not desired.[167] As stated in *Allen*, "[e]mployers must . . . pay for all work they know about, even if they did not ask for the work, even if they did not want the work done, and even if they had a rule against doing the work."[168] As work shifts from office settings to remote work, it is important that time spent working by employees is tracked meticulously to ensure compliance with the FLSA.

With the increase of remote work and the need to track employee time carefully, it is an opportune time for states to reject the *de minimis* doctrine as applied to their state wage and hour laws. Employers are already requiring remote workers to report all of their time to ensure the employers have actual or constructive knowledge of the employees' work while not at the office.[169] In reporting time under the FLSA, the employer can show due diligence by having a process in place to report time.[170] Because this process should already be put in place for remote workers, it makes sense that the technology can be utilized to track what would have previously been considered *de minimis* time.

3. "The Great Resignation"

The U.S. Bureau of Labor Statistics reported that about 4.2 million workers quit their jobs in August 2021.[171] Labor experts have named this mass exodus of workers "The Great Resignation."[172] Many workers, particularly those in Generation Z, are unsatisfied with their current job and the lack of work-life balance.[173] Fortune, a business media organization, claims that some of the reasons for dissatisfaction are because "they're spending more hours working on unimportant tasks, struggling with work/life balance,

166. FIELD ASSISTANCE BULLETIN NO. 2020-5, *supra* note 154, at 1.

167. *Id.* at 2.

168. *Allen*, 865 F.3d at 938.

169. *See generally* FIELD ASSISTANCE BULLETIN NO. 2020-5, *supra* note 154.

170. *Id.* at 3.

171. *See Table 4. Quits Levels and Rates by Industry and Region, Seasonally Adjusted*, U.S. BUREAU LAB. STAT., https://bit.ly/2ZqBe4l [https://perma.cc/98P2-EBNC] (last visited Oct. 26, 2021) (describing that the 4.2 million resignations demonstrate a 42-percent increase from August 2020 to August 2021).

172. Arianne Cohen, *How to Quit Your Job in the Great Post-Pandemic Resignation Boom*, BLOOMBERG BUSINESSWEEK (May 10, 2021, 6:00 AM), https://bloom.bg/2Zm3u8o [https://perma.cc/93YN-H9SB].

173. Rachel King, *What's Fueling "The Great Resignation" Among Younger Generations?*, FORTUNE (Aug. 26, 2021, 9:00 AM), https://bit.ly/3jEP1vL [https://perma.cc/5U8K-XQLA] (describing that only 56 percent of younger workers are satisfied with work/life balance and only 59 percent are content with their current job).

and feel that technology is the missing piece to achieving productivity."[174] The COVID-19 Pandemic has led to an increase in remote work opportunities, uncertainty amongst workers, and increased workloads, all of which have led workers to rethink their personal and work goals.[175]

As more individuals leave the workforce, remaining employees are forced to take on the additional work.[176] Increased workloads lead to burnout among current employees.[177] Given the current state of the labor market, employers are struggling to retain talent, and a significant number of employers consider the "labor/skills shortage" as their top external concern for this year.[178] Some employers have tried to attract and retain employees by "increas[ing] flexibility," placing "more emphasis on well-being and mental health," and giving "more time off."[179] Many of the strategies employers have implemented to increase employee retention focus on the respect and value of employee time.

The current workforce places a large emphasis on keeping their personal life and work life separate.[180] The *de minimis* doctrine runs counter to these values. It undervalues the importance of the employees' time because it treats certain activities as "insignificant."[181] Even though the doctrine typically applies only to activities that are less than ten minutes, that could be a significant part of an employee's time when compounded daily.[182] Employers are currently struggling to retain employees, and the current employee market places extreme value on their time. A rejection of the *de minimis* doctrine would help employers retain their workers and help employees gain back their time, whether through fewer tasks completed outside of the workday or increased compensation commensurate with the time spent working.

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174. *Id.*

175. *Id.*

176. Lance Lambert, *The Great Resignation Is No Joke*, FORTUNE (Oct. 21, 2021, 10:45 PM), https://bit.ly/3nviZ6f [https://perma.cc/4LYY-WCHP].

177. *Id.*

178. *Id.*

179. *Id.*

180. Morgan Smith, *Gen Z and Millennial Workers Are Leading the Latest Quitting Spree—Here's Why*, CNBC (Sept. 3, 2021, 11:44 AM), https://cnb.cx/3nzUmFy [https://perma.cc/F43C-8WRB].

181. Lindow v. United States, 738 F.2d 1057, 1064 (9th Cir. 1984) (applying the *de minimis* doctrine and finding that time ranging from 5 to 15 minutes was insignificant).

182. Troester v. Starbucks Corp., 421 P.3d 1114, 1124–25 (Cal. 2018).

CONCLUSION

This Comment illustrates how the evolution of the American workforce has demonstrated that the *de minimis* doctrine is outdated and has no place in state wage and hour laws. While the doctrine may have had some utility during the industrialization of the workplace, technological advances and changes in how work is performed show that it is no longer applicable.[183] When we examine the purpose behind most state wage and hour laws, which is to prevent employers from taking advantage of employees, the *de minimis* doctrine contradicts this purpose. Not only are there social policy reasons for rejecting the doctrine, like increased work-life balance and retention rates,[184] but there are also economic policy reasons for doing so, such as increased productivity and reduced costs in the long run.[185] In addition, the COVID-19 Pandemic has drastically changed how the workplace operates, facilitating the need to reevaluate how employers track time.[186] After examining the recent changes that California, Pennsylvania, and Washington have implemented in their respective wage and hour laws,[187] other states throughout the country should consider following their lead.

183. *See generally* Troester v. Starbucks Corp., 421 P.3d 1114 (Cal. 2018).
184. *See supra* Part III.C.3.
185. *See supra* Part III.B.
186. *See supra* Part III.C.
187. *See supra* Part II.C.