EMPLOYMENT, LABOR & WORKERS' COMPENSATION

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It Was a Hot Summer! The NLRB Attacks "At Will" and Strikes down Costco's Social Media Policy.

California Class Actions after Brinker Are Still as Hot as this Summer!

Employment Law Workshop

By

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Assembly Bill No. 1844

Passed the Assembly August 29, 2012

_____

Chief Clerk of the Assembly

Passed the Senate August 28, 2012

_____

Secretary of the Senate

This bill was received by the Governor this _____ day of _____, 2012, at _____ o'clock ____M.

_____

Private Secretary of the Governor

CHAPTER _____

An act to add Chapter 2.5 (commencing with Section 980) to Part 3 of Division 2 of the Labor Code, relating to employment.

LEGISLATIVE COUNSEL'S DIGEST

AB 1844, Campos. Employer use of social media.

Existing law generally regulates the conduct of employers in the state.

This bill would prohibit an employer from requiring or requesting an employee or applicant for employment to disclose a username or password for the purpose of accessing personal social media, to access personal social media in the presence of the employer, or to divulge any personal social media. This bill would also prohibit an employer from discharging, disciplining, threatening to discharge or discipline, or otherwise retaliating against an employee or applicant for not complying with a request or demand by the employer that violates these provisions.

Under existing law, the Labor Commissioner, who is the Chief of the Division of Labor Standards Enforcement in the Department of Industrial Relations, is required to establish and maintain a field enforcement unit to investigate specified violations of the Labor Code and other labor laws and to enforce minimum labor standards. Existing law authorizes, and under specified circumstances requires, the Labor Commissioner to investigate employee complaints of violations of the Labor Code, provide for a hearing, and determine all matters arising under his or her jurisdiction.

This bill would provide that the Labor Commissioner is not required to investigate or determine any violation of a provision of this bill.

The people of the State of California do enact as follows:

SECTION 1. Chapter 2.5 (commencing with Section 980) is added to Part 3 of Division 2 of the Labor Code, to read:

CHAPTER 2.5. EMPLOYER USE OF SOCIAL MEDIA

980. (a) As used in this chapter, "social media" means an electronic service or account, or electronic content, including, but not limited to, videos, still photographs, blogs, video blogs, podcasts, instant and text messages, email, online services or accounts, or Internet Web site profiles or locations.

(b) An employer shall not require or request an employee or applicant for employment to do any of the following:

(1) Disclose a username or password for the purpose of accessing personal social media.

(2) Access personal social media in the presence of the employer.

(3) Divulge any personal social media, except as provided in subdivision (c).

(c) Nothing in this section shall affect an employer's existing rights and obligations to request an employee to divulge personal social media reasonably believed to be relevant to an investigation of allegations of employee misconduct or employee violation of applicable laws and regulations, provided that the social media is used solely for purposes of that investigation or a related proceeding.

(d) Nothing in this section precludes an employer from requiring or requesting an employee to disclose a username, password, or other method for the purpose of accessing an employer-issued electronic device.

(e) An employer shall not discharge, discipline, threaten to discharge or discipline, or otherwise retaliate against an employee or applicant for not complying with a request or demand by the employer that violates this section. However, this section does not prohibit an employer from terminating or otherwise taking an adverse action against an employee or applicant if otherwise permitted by law.

SEC. 2. Notwithstanding any other provision of law, the Labor Commissioner, who is Chief of the Division of Labor Standards Enforcement, is not required to investigate or determine any violation of this act.

Approved _____, 2012

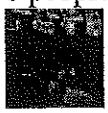
_____

Governor

Subject: FW: Social Media

Butler M Butler
....Looking for a part time female bartender, cute, sexy, tiny, doesn't smoke, doesn't have a cell phone, 21-31, with a great attitude and must live pretty close to my spot in the Valley.... The BrickYard Pub .... www.BrickYardNoHo.com . please email a pic and resume to BrickYardNoHo@yahoo.com asap. Thanks so much ! Butler
Like · [Comment] · 55 minutes ago ·

- 6 people like this.



Kellie Weston I have the great attitude part....but the rest...well, uhm...hmm.

48 minutes ago · Like · 1

Butler M Butler oh you wud rock it girl !

45 minutes ago · Like · 1

John Ruff I think Matt Destephano is looking for a gig.

45 minutes ago · Like

Ashley Rose That's nice 2share the info. I sent my pic/resume. I have a cell phone. Almost that broke 2not afford it. That's a weird request! How can they contact you then?

26 minutes ago via mobile · Like

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CLIENT BULLETIN

Client Bulletin #478

Car dealership must "cease and desist" from requiring courteous behavior, NLRB rules

By David Phippen
Fairfax, VA Office

We **reported previously** on a case in which a BMW salesman was terminated for postings on Facebook. (His dealership had served hot dogs and chips at a customer event, which the salesman thought was too low-brow for luxury car customers. An administrative law judge found that his posts about that were legally protected. But the salesman had also posted photographs, accompanied by snarky remarks, of a Land Rover that was accidentally driven into a pond on a test drive at a nearby dealership. The ALJ found that those postings were not protected, and warranted his discharge.)

Although the ALJ upheld the termination, he found that some provisions of the dealership's employee handbook violated Section 8(a)(1) of the National Labor Relations Act because it had a "chilling effect" on employees' Section 7 rights.

Both sides took the case to the National Labor Relations Board, and on Friday, the Board **issued its decision.**

First, the good news: The three-member panel of the Board agreed that the termination was lawful. Several other rulings of the ALJ were not challenged, and so the ALJ's decision stands.

Now, the bad news: Board Chair Mark Gaston Pearce and Member Sharon Block found that the employer's policy on "courtesy" (seriously!) violated Section 8(a)(1). Here's what the policy said:

> **Courtesy is the responsibility of every employee. Everyone is expected to be courteous, polite and friendly to our customers, vendors and suppliers, as well as to their fellow employees. No one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership.**

Pearce and Block found that the first part of this policy – the "aspirational" language – *might* have been lawful. (Significantly, they did not say *unequivocally* that it would have been.) However, in their view, the ban on disrespectful behavior or profane/injurious language violated Section 8(a)(1) of the Act because it would reasonably be construed by employees to encompass activity protected by Section 7 of the Act and

thus would reasonably tend to chill employees' exercise of their Section 7 rights. Pearce and Block emphasized that when language of a rule is ambiguous it will be construed against the employer.

Member Brian Hayes dissented from this part of the decision, saying that the majority read "words and phrases in isolation and [] effectively determin[ed] that the National Labor Relations Act invalidates any handbook policy that employees conceivably could construe to prohibit protected activity, regardless of whether they *reasonably* would do so." (Emphasis in original.) Hayes continued, "Reasonably construed and read as a whole, the rule is nothing more than a common-sense behavioral guideline for employees."

He concluded, "[T]he unassailable fact is that people use words that could be construed broadly all the time, yet manage to make themselves understood. That is because words do not exist in a vacuum; they are informed by context and experience."

Constangy is continuing to monitor closely the NLRB's decisions on social media and other employee communications. In the meantime, if you have questions, please contact any member of our **Labor Relations Practice Group**, or the Constangy attorney of your choice.

About Constangy, Brooks & Smith, LLP

Constangy, Brooks & Smith, LLP has counseled employers on labor and employment law matters, exclusively, since 1946. A "Go To" Law Firm in Corporate Counsel and Fortune Magazine, it represents Fortune 500 corporations and small companies across the country. Its attorneys are consistently rated as top lawyers in their practice areas by sources such as Chambers USA, Martindale-Hubbell, and Top One Hundred Labor Attorneys in the United States, and the firm is top-ranked by the U.S. News & World Report/Best Lawyers Best Law Firms survey. More than 140 lawyers partner with clients to provide cost-effective legal services and sound preventive advice to enhance the employer-employee relationship. Offices are located in Alabama, California, Florida, Georgia, Illinois, Massachusetts, Missouri, New Jersey, North Carolina, South Carolina, Tennessee, Texas, Virginia and Wisconsin. For more information, visit www.constangy.com.

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The Employers' Law Firm Since 1946

CLIENT BULLETIN

Client Bulletin #477

NLRB CLUBS COSTCO SOCIAL MEDIA POLICY

By David Phippen
Fairfax, VA Office

A panel of the National Labor Relations Board **has found that electronic posting rules issued by Costco Wholesale Corporation violated the National Labor Relations Act.** The Board panel largely followed guidance issued previously by Acting General Counsel Lafe Solomon (available **here**, **here**, and **here**) and found that generalized prohibitions on what employees could say online were overly broad and would unreasonably restrict employees in the exercise of their rights under the Act.

The Policy and Union Challenge

Costco's policy restricted employees from posting statements on electronic media such as online message boards and social media sites that could damage Costco or the reputation of others. The policy stated, in part, as follows:

> Any communication transmitted, stored or displayed electronically must comply with the policies outlined in the Costco Employee Agreement. Employees should be aware that statements posted electronically (such as [in] online message boards or discussion groups) that damage the Company, defame any individual or damage any person's reputation, or violate the policies outlined in the [agreement], may be subject to discipline, up to and including termination of employment.

The policy was challenged by a union seeking to organize Costco workers at a facility where the policy applied.

The NLRB Decision

In finding that the Costco policy violated the Act, the Board panel – consisting of Chair Mark Gaston Pearce, and Members Sharon Block and Richard F. Griffin, Jr. – laid out no special criteria for analyzing whether social media rules interfered with employee rights under the Act. Instead, the Board panel simply applied longstanding, traditional principles to determine whether the policy would reasonably tend to chill employee exercise of their rights under Section 7 of the Act. Such rights include the right to complain about an employer's wages, hours, working conditions and treatment of employees. In applying traditional principles, the Board panel assessed whether employees "would reasonably construe" the language of the policy rule to prohibit protected activity.

In making its assessment, the Board panel found that the prohibitions of the Costco policy "would reasonably" be interpreted by employees to include a prohibition on complaining about their working conditions. The Board panel found that, although the Costco policy did not explicitly restrict employees from protected activities, the ambiguity in the broad language of the policy, which "could" be read to include employee activity protected by the Act, needed to be construed against the drafter, Costco. In the final analysis, the Board panel found that the policy language was overly broad because employees "would reasonably" read it as a prohibition that included a restriction on complaining about Costco's treatment of workers. The Board panel thus found the rule "would reasonably" tend to chill employees' exercise of their rights under Section 7 of the Act and violated Section 8 (a) (1) of the Act.

The Board panel distinguished the Costco policy language from other employer policies that have survived Board review, contending that those other policies had survived because they had language restricting the policies' application. The Board panel indicated that, in past decisions, policy language limiting a restriction to egregious conduct, such as "malicious, abusive or unlawful" conduct, including "verbal abuse," "harassment," or "conduct which is injurious, offensive, threatening, intimidating, coercing, or interfering with" other employees, had survived Board scrutiny.

Finally, the Board panel suggested that inclusion of a "disclaimer provision" might protect a policy from an allegation of interference, emphasizing that the Costco policy had no language that "even arguably" suggested that protected communication activity was excluded from the "broad parameters" of the policy. Thus, this suggestion about "disclaimer" language may indicate that the Board, in a future case, would find a policy acceptable if it included language clearly and expressly excluding from its application employee activity protected by the Act. This is in contrast to the opinions of the Acting General Counsel, who has indicated that disclaimers will not rescue an otherwise unlawfully overbroad policy. What position a future panel of the Board will take on disclaimers remains to be seen.

The Take-Aways

The *Costco* decision highlights the problem with generalized policy language restricting employees from making critical remarks about their employers in any context, in the electronic and digital world of social media or otherwise, for example, plain old paper and pen. The Board panel's decision is a reminder that the Board is not hesitant to take on employers' restrictions on employees' right to express their "beefs." Given the Board's position and its aggressive approach into non-union workplaces, all employers in the private sector, union and non-union alike, should take the time now to review their employment policies with legal counsel experienced in matters under the Act, potentially to improve the policies' chances of withstanding Board scrutiny.

Leaving in place an invalid social media policy can have serious consequencs for employers. First, the employer faces the costs associated with a losing defense of the policy at the Board's region level or in litigation. Second, the employer faces the potential costs of a settlement or a litigation-produced remedy that might (and probably would) include back pay for an employee disciplined by the employer's application of the unlawful policy. Finally, an employer with an unlawful policy in place during a union organizing campaign could win the election only to have it set aside based on objections based on the unlawful policy. A losing union is nearly certain to look closely at filing objections and arguing that the unlawful policy thwarted the union. After a winning campaign effort, the "repeat election" club is probably not a club that employer wants to join.

September 24, 2012

About Constangy, Brooks & Smith, LLP

Constangy, Brooks & Smith, LLP has counseled employers on labor and employment law matters, exclusively, since 1946. A "Go To" Law Firm in Corporate Counsel and Fortune Magazine, it represents Fortune 500 corporations and small companies across the country. Its attorneys are consistently rated as top lawyers in their practice areas by sources such as Chambers USA, Martindale-Hubbell, and Top One Hundred Labor Attorneys in the United States, and the firm is top-ranked by the U.S. News & World Report/Best Lawyers Best Law Firms survey. More than 140 lawyers partner with clients to provide cost-effective legal services and sound preventive advice to enhance the employer-employee relationship. Offices are located in Alabama, California, Florida, Georgia, Illinois, Massachusetts, Missouri, New Jersey, North Carolina, South Carolina, Tennessee, Texas, Virginia and Wisconsin. For more information, visit www.constangy.com.

CLEARWATER PAPER

Clearwater Paper Corporation
Social Media Policy

Protection of Company Information

Employees are prohibited from posting information regarding Clearwater Paper Corporation (the "Company") on any social networking sites (including, but not limited to, Yahoo finance, Google finance, Facebook, Twitter, Linkedin, MySpace, LifeJournal and YouTube), in any personal or group blog, or in any online bulletin boards, chat rooms, forum, or blogs (collectively, "Personal Electronic Communications"), that under securities laws or financial disclosure laws should not be disclosed, such as dividend increases or decreases, earnings estimates, changes in previously released earnings estimates, significant new products or discoveries, liquidity or solvency problems, significant merger or acquisition proposals. It is illegal for an employee to communicate or give a "tip" on inside information to others so that they may buy or sell stocks or securities. Such online conduct may also violate the Company's Insider Trading Policy.

Post Only Appropriate and Respectful Content

- Employees should avoid making any maliciously false statements about the company and any harassment, bullying, discrimination, or retaliation that would not be permissible in the workplace is not permissible between co-workers online, even if it is done after hours, from home and on home computers or personal communication devices.
- Employees should maintain the confidentiality of the Company's trade secrets and private or confidential information, which may include information regarding the development of systems, processes, products, know-how and technology. Do not post internal reports, policies, procedures or other internal business-related confidential communications.
- Employees should not create a link from a blog, website or other social networking site to the Company website without identifying themselves as a Company employee.
- Employees should express only their personal opinions. Employees should not represent themselves as a spokesperson for the Company. If the Company is a subject of the content an employee is creating, the employee should be clear and open about the fact that he or she is an employee and make it clear that his or her views do not represent those of the Company, fellow employees, members, customers, suppliers or people working on behalf of the Company. If an employee does publish a blog or post online related to the work he or she does or subjects associated with the Company, it must be clear that the employee is not speaking on behalf of the Company. It is best to include a disclaimer such as "The postings on this site are my own and do not necessarily reflect the views of Clearwater Paper Corporation."

Employee Workplace Discussions through Electronic Communications

Employees are permitted to express personal opinions regarding the workplace, work satisfaction or dissatisfaction, wages hours or work conditions through personal electronic communications. If personal electronic communications used while at work interfere with an employee's job, job performance, or violate Clearwater Paper policies, we may request a cessation of such activity, and the employee may be subject to disciplinary action, including, in appropriate circumstances, termination.

This policy is for the mutual protection of the Company and our employees, and we respect an individual's rights to self-expression and concerted activity. This policy will not be interpreted or applied in a way that would interfere with the rights of employees to self organize, form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from engaging in such activities.

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Brinker Decision by California Supreme Court Clarifies Meal and Rest Period Obligations.

Dear Clients and Friends:

Yesterday morning, the California Supreme Court issued its long awaited decision in the case *Brinker v. Superior Court (Hohnbaum)*, S166350. The *Brinker* decision involved a class action against a number of restaurants operated by Brinker Restaurant Corporation, alleging that Brinker failed to provide meal and rest periods required by California law and required employees to work off the clock, and seeking to certify a class of approximately 60,000 restaurant employees.

The *Brinker* case centered on the proper interpretation of California's meal and rest period laws and regulations and how those interpretations inform and affect class certification. The central, and long anticipated, holding in this case is that employers need not ensure employees take 30 minute off the clock meal periods, but do need to provide meal periods, one for a shift longer than 5 hours, and a second for a shift over 10 hours. Also, employers need only "authorize and permit" 10 minute on the clock rest periods, for every 4 hour period of work or major fraction thereof. The *Brinker* decision outlined detailed requirements under the law, and the Court specifically ruled as follows:

As to 30 minute off the clock meal periods:

- A company's obligation is to provide (gave the opportunity for) employees to take meal periods, but not to "police" employees to ensure they took the meal period.
- The meal period must be at least 30 minutes, and the employee must be relieved of all duty and allowed to leave the work premises (except in limited circumstances.)
- Employees must be allowed to take one meal period if they work shifts over five hours, and that meal period must start no later than the end of the fifth hour of work.
- Employees must be allowed to take a second meal period if they work shifts over ten hours, and that meal period must start no later than the end of the tenth hour of work.
- The second meal period does not need to be provided within 5 hours of the first meal period.

It is important to note that even though an employer does not need to ensure employees take meal periods, if the employer actually knows that employees are not taking 30 minute meal periods in which employees are relieved of all duties and free to do what they want, it will be held liable. Also, if an employer has a policy that contradicts these regulations, it will be held liable, because the employee will not be given the opportunity to waive anything.

As to 10 minute rest periods:

- The employer must authorize and permit 10 minute on the clock rest periods for its employees. Again, the employer need not ensure they are taken by the employees.
- One 10 minute rest period must be provided for every four hours of work "or major fraction thereof." To calculate the number of rest periods required, an employer should divide the total number of hours of the shift by four, then round up if the fractional part is over 2 hours. For example, an employee who works 6 hours or more is entitled to two rest periods, not just one.
- The rest period must be provided in the middle of the four hour period "insofar as practicable."
- The first rest period need not necessarily be provided before the first meal period, if an employer's specific circumstances prevent it from doing so.
- However, an employee is entitled to no rest periods for shifts of 3 ½ hours or less.

The court in *Brinker* relied heavily on the existence of company-wide policies to decide whether the case should be certified as a class action. In fact, in *Brinker* the Court ruled that the portion of the case dealing with rest periods could proceed as a class action, because of Brinker's rest period policies. (The Court did not decide whether those policies violated the law.) Courts will first look to a company's meal and rest period policies (or lack of such policies) to help decide whether a lawsuit against the employer can be treated as a class action, because such policies show that the issue can be resolved for the entire class. This is just one factor, the company must also ensure that its practices do not impede employees from taking breaks. It will be the employer's burden to establish that the opportunity to take breaks was provided to employees.

Having specific policies that fully comply with the law, and these new Supreme Court rulings, is crucial for the defense of any class action that might be filed against your company. Companies who do not have such policies should work to implement policies as soon as possible and inform employees directly of these policies. Employers should also seek legal counsel to ensure their policies comply with these detailed requirements. The labor and employment attorneys of Landegger, Baron, Lavenant & Ingber are available to assist you.

By: Michael S. Lavenant, Esq.
Brian E. Ewing, Esq.
Oscar E. Rivas, Esq.
Released: 04-13-12

MEAL AND REST PERIOD POLICY

Employees that are scheduled to work more than five (5) hours must take a thirty (30) minute uninterrupted meal period, off the clock, no later than the end of the fifth hour of work. Employees are entitled to be relieved of all their duties and free to take care of personal matters during that time. Employees that have a six (6) hour shift may voluntarily waive the meal period if they execute a Six Hour Shift Waiver Form. Please see the Human Resource Department.

The Company provides a paid ten (10) minute rest period for every four (4) hours of work or major fraction thereof. An employee who works between three and a half (3 1/2) to six (6) hours is entitled to one (1) ten minute break, an employee who works over six (6) hours is entitled to a second ten minute break. An employee that works less than three and a half (3 ½) hours is not entitled to receive a paid ten (10) minute rest period. Please check with your supervisor for the appropriate time to take meal and rest breaks.

Meal periods and rest periods may not be waived to leave early nor may they be consolidated for a longer break or meal period.

It is against Company policy for any employee to perform work during meal or rest periods. It is against Company policy to return to work before the end of a 30 minute meal period or ten minute rest break. It is also against Company policy for employees to work "off the clock," that is, perform work without recording it as time worked on their timesheets.

Employees working more than ten (10) hours are entitled to a second meal period before end of the tenth hour of work, unless the employee voluntarily executes a Twelve Hour Shift Waiver Agreement and has taken the first meal period.

The undersigned acknowledges that he or she has read and understands the foregoing Meal and Rest Period Policy.

_____ _____

Employee Signature Date

SEMI-MONTHLY TIME SHEET FOR:

Full Name: _____
Address: _____
_____
Phone No.: _____

Pay Period _____, 20____ **through** _____, 20____
Soc. Sec. No.: _____

	REGULAR TIME (FILL IN TIME IN & OUT)				OVERTIME (FILL IN TIME IN & OUT)		TOTAL HOURS	
Date	In	Out	In	Out	In	Out	Regular	O.T.

OT Approval:

TOTALS		
I certify that I have provided complete and accurate information in completing this time sheet. I understand that it is against company policy to provide false or incomplete information on time sheets. I further certify that I have had the opportunity to take my required rest period(s) according to company policy and have taken the required meal period(s) according to company policy.	Regular/OT Hours	
	Vacation Hours	
	Holiday Hours	
	Sick Pay Hours	
	TOTAL	

_____ _____
Signature Date

47 CALCULATING HOURS WORKED.

47.1 **Rounding.** The Division utilizes the practice of the U.S. Department of Labor of "rounding" employee's hours to the nearest five minutes, one-tenth or quarter hour for purposes of calculating the number of hours worked pursuant to certain restrictions. (29 CF R § 78 5.48(b))

47.2 **"Rounding" Practices**. As mentioned above, the federal regulations allow rounding of hours to five minute segments. There has been practice in industry for many years to follow this practice, recording the employees' starting time and stopping time to the nearest 5 minute s, or to the nearest one-tenth or quarter of an hour. Presumably, this arrangement averages out so that the employees are fully compensated for all the time they actually work. For enforcement purposes this practice of computing working time will be accepted by DLSE, provided that it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked. (See also, 29 CFR § 785.4 8(b))

47.2.1 **Recording Insignificant Time Periods.** 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. The courts have held that such trifles are *de minimis*. (*Anderson v. Mt. Clemens Pottery Co*., 328 U.S . 680 (1946); *Lindow v. United States* 738 F .2d 1057 (9th C ir.1984)) 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 consideration s justified by industrial realities.

47.2.1.1 An employer may not rely on this policy to 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. See *Glenn L. Martin Nebraska C o. v. Culkin*, 197 F. 2d 981, 987 (C.A. 8, 19 52), *cert. denied*, 344 U.S. 866 (1952), rehearing denied, 344 U.S. 888 (1952), holding that working time amounting to $1 of additional compensation a week is "not a trivial matter to a workingman," and was not *de minimis*; see also *Addison v. Huron Stevedoring Corp.*, 204 F. 2d 88, 95 (C.A. 2, 1953), *cert. denied* 346 U.S. 877 , holding that "[T]o disregard workweeks for which less than a dollar is due will produce capricious an d unfair results;" and *Hawkins v. E. I. du Pont de Nemours & Co*., 12 W.H. Cases 448, 27 Labor Cases, para. 69,0 94 (E.D . Va., 19 55), holding that 10 minutes a day is not *de minimis*.

47.2.2 **Differences Between Clock Records And Actual Hours Worked**. Time clocks are not required but in those cases where time clocks are used, employees who voluntarily come in before their regular starting time or remain after their closing time, do not have to be paid for such periods provided, of course, that they do not engage in any work. 47.2.2.1 Actual facts must be investigated, of course, however, unless the employee is either

performing work during the period or has been directed by the employer to be on the premises, the early or late clock punching may be disregarded. Minor differences between the clock records and actual hours worked cannot ordinarily be avoided, but major discrepancies should be investigated since they raise a doubt as to the accuracy of the records of the hours actually worked .

47.2.2.2 **DLSE Enforcement Policy.** When auditing payroll records, Division personnel will ascertain the facts regarding the time keeping requirements (*i.e.,* the true work patterns of the workers and whether these patterns are accurately reflected by the time records). When, based on these facts, the above description results in an averaging out for both the employer and the employee, it is, in the long run, much more reasonable than an attempt at absolute accuracy by "counting minutes". This method also simplifies payroll computation and the average employer appreciates being permitted to use it.