Employee-employer relations have long been governed by legal norms and regulations. Transcending or extending beyond these legal requirements are issues with respect to employees’ codes of daily ethical or moral conduct. These ethical issues involve values of human dignity, equality, trust and the balance of power between the parties within the working relationships. The field of behavioral ethics seeks to define normative patterns of behavior in managing this aspect of the relationship between an employee and an employer.

The question of what ethics are has engaged philosophers throughout the world since the time of Socrates and Aristotle and to this day.[[1]](#footnote-1) Indeed, this question arises frequently in the field of labor law and its concomitant obligations governing employee-employer relationships, particularly the issue of the obligation to comply with the law.[[2]](#footnote-2) An examination of how the concept of behavioral ethics is perceived and applied in labor law should help what the appropriate behavior is in that field.

On a routine level, employees tend to intuitively accept their organization’s behavioral norms. As a result, most people will usually carry out the instructions they are given, whether out of habit or due to the power of inertia. Often, employees carry out instructions because they simply fail to give much thought or attention to the deeper meaning of the daily actions they are asked to perform as part of their defined duties. Unquestionably, employees enjoy clearly defined legal rights. It can also be assumed that they also enjoy certain moral rights, among which is the employee’s right not to compromise his or her ethical standards. This article seeks to identify workplace attitudes or activities that place employees in positions where they may feel pressured to act in a manner contrary to their personal ethical standards. While there has been considerable research into the protection of employees’ rights in the context of labor law,[[3]](#footnote-3) very little has been written about employees’ moral rights in the context of behavioral ethics in labor law. While unethical behavior is not specifically addressed in the laws governing employer-employee relationships, it is arguable that pressuring employees to engage in unethical behavior should be considered improper.

Thus, this article examines not only what the law declares about a certain behavior, but whether that conduct is appropriate or seemly beyond its legal ramifications. While legal but ethically inappropriate behavior has not been studied in the field of labor law, it has been the subject of critical work, particularly in the context of corporations.[[4]](#footnote-4) This indicates that unethical behavior, even if unregulated by legal standards, can be discerned in the workplace. Such behavior can take many forms, ranging from unethical behavior by employers toward employees to organizational conduct that causes the employee to engage in unethical behavior towards other employees or customers in the workplace.[[5]](#footnote-5)

Ethical Culture has been defined as a subsection of the field of organizational culture that influences employees.[[6]](#footnote-6) Behavioral ethics researchers have found links between employees’ perceptions of justice and their ethical and unethical conduct. While organizational justice became one of the most studied organizational behavior topics in the 1990s,[[7]](#footnote-7) and significant advances have been made in the field since then, more work remains to be carried out in the behavioral ethics field to clarify what factors influence ethics within the workplace. For example, while employees’ perceptions about the fairness of the treatment they receive from their organizations have been extensively studied[[8]](#footnote-8) in a corporate context, similar studies have not been conducted in the legal context of labor law and the relationship between employer and employee. As a result, little is known about employees’ reactions to perceived acts of unfairness in the form of unethical behavior.

A set of behavioral rules of propriety exists separately from the rules of behavior required by law. Legal rules are determined by the official institutions of each state and articulated through legislation, provisions, regulations, and court judgments. In contrast, ethical rules usually evolve gradually in society, without being imposed by above, and develop through a myriad of quotidian situations that arise in the family, the public sphere, and at work. The law, as opposed to ethical rules, regulates only deviant or clearly unacceptable forms of behavior. In contrast, ethical rules can address conduct to which the law is either indifferent or which it defines as normative.[[9]](#footnote-9) We contend that in addition to workers’ legal rights under labor law, some of which are included in what are considered natural rights, workers also enjoy the moral right to follow their own consciences within the framework of the labor relationship, even though this moral right is not otherwise protected by law.[[10]](#footnote-10) This moral right is intuitively identified with a social code of conduct and not necessarily with a legal right. When an employee faces a moral dilemma in the workplace whereby the employee is expected to engage in conduct that does not conform with his or her moral code, the employee usually is expected to remain loyal to the organization. Studies of workplaces have shown that when an employee is asked to engage in conduct the employee considers immoral or unethical, the employee’s ideology is affected, particularly as it is expressed toward third or outside parties.[[11]](#footnote-11)

The issue of the ethics of workplace safety is particularly salient in this context.[[12]](#footnote-12) In addition to the obvious impact of work safety on employees, it is possible to identify situations in which organizational requirements or culture will adversely affect employees’ behavioral ethics toward third parties who must encounter workplace facilities. Another area of organizational behavior where ethical issues arise is that of hiring by personnel departments which engage in a number of diverse practices and a wide range of decision-making processes regarding applicants.[[13]](#footnote-13) This study will identify and analyze the impact of employer demands that can cause an employee to make unethical decisions, some of which may even be prohibited under the law, but others of which will be permissible by law but nonetheless considered immoral. Such cases can include those where an employer makes an internal request to consider only applicants under a certain age, despite the fact that such a request constitutes age discrimination. The employee must then make a decision as to whether to accede to the unethical requirements, or to act in accordance with the law and his or her conscience. Also in the hiring field, employers can make race and gender requirements in a covert or subliminal manner, thus making it difficult to prove allegations of illegal discrimination against the employer. Nonetheless, these demands place the employee in a position of feeling pressured to engage in a decision-making process which is not only morally questionable to the employees, but is also actually contrary to the provisions of law.[[14]](#footnote-14)

While these issues arise in the corporate environment, there are equally pressing ethical issues that arise in the area of sales, as documented. by Murphy and Laksenyak.[[15]](#footnote-15) To obtain a clearer picture of the ethical issues faced by sales employees, the ways in which the organizational or cultural philosophy of the sales field can have a negative impact on employees’ ethical behavior must be clarified. For example, according to a joint study conducted by Ordonzo, Schweitzer Galinsky, and Bizerman, nearly every sales workplace sets goals daily, which often urge if not pressure employees to engage in questionable conduct, and thus cause them damage.[[16]](#footnote-16)

This article will address cases in which there are small, sometimes daily violation of employees’ rights, the accumulation of which erodes their rights. Such instances raise two interesting legal issues regarding employers’ unethical behavior towards employees. First, the law tends to consider these violations as too minimal to warrant labor law protection.[[17]](#footnote-17) Second, labor law addresses the complex employer-employee relationship, usually characterized by power imbalances and long-term yet changing relationships between employees and employers. Consequently, if a minor legal infraction by the employer is acquiesced to or not objected to by the employee, the employer may enjoy legal protection by virtue of the employee’s acceptance of the questionable conduct. Regardless of the context of these small violations, not only does the law not consider them worthy of attention, but employees are usually likely to consider them too minor to call for a reaction, and therefore do not stand up for their rights. In either case, these small erosions of employees’ ethical norms can have the cumulative effect of undermining their basic moral rights.

Indeed, this issue of small violations applies not only to employees but also can also have an impact on employers. For example, there can be situations where an employee tends to be late to work a few minutes each day, or takes slightly longer breaks than allowed. The employer may determine that these violations are too minor to justify termination of the employee, particularly if the employer wants to keep that employee on the workforce. Thus, the employer will not comment on or object to these small infractions, and therefore can be considered as having accepted this otherwise unacceptable conduct by the employee,

Clearly, there are minor ethical violations that labor law does not address which this article will explore. The focus will be on violations against employees, based on the assumption that these are the most common violations. These minor but cumulative violations by employers include lack of payment for break time, requiring an employee to available beyond working hours, provocative or “harmless” statements which nonetheless do not cross the line of harassment, and an accumulation of mental stress at the workplace. Each of these examples involves minor but abusive conduct which can have the cumulative effect of infringing on employees’ rights in the workplace. We contend that even these seemingly negligible infractions, especially as they become increasingly common, constitute unethical acts that should invoke the protection of the law for employees within the field of labor law.

As discussed above, small infractions usually are met with no response, which can be interpreted as an acceptance of a certain course of conduct. Legally, this could be construed as a waiver of a contractual or legal right. This issue arises most commonly in the context of long-term contractual relationships in which trust relationships develop between the parties. Generally, when determining the nature of a course of conduct, it is not sufficient to rely on any one specific action. Rather, an ongoing pattern of behavior, as opposed to random behavior, must be examined. This kind of inquiry is required when examining any inter-party behavior, but increased attention to small, even random violations is especially important in the area of labor relations, where there are imbalances of powers between the parties.

Nonetheless, there are numerous situations, even in employer-employee relations, when the weight of each violation is so small that it does not meet the normative threshold of the serious harm needed to warrant law protection, a situation that the law treats as a *de minimis non-urate lex,*[[18]](#footnote-18) based on the Latin phrase meaning, “the law does not concern itself with trifles.”

In such situations, we argue that there is a need to determine how the aggregation of these minor infractions can render the employee morally vulnerable.[[19]](#footnote-19) Harel and Porat are of the opinion that it is ineffective for the law to develop rules to address these minor injuries, and that it may not be effective to conduct legal proceedings in response to them. However, we contend that while Harel and Porat’s argument may indeed be applicable to other fields, it should not be rigidly applied to the field of labor relations, where workers’ rights may be in need of greater protection due to the inequality in the balance of power between the parties.

Returning to the foundational *de minimis* legal principle, the law indeed has long chosen not to deal with minor matters, and “it does not tend to engage in minimal infringement of the right.”[[20]](#footnote-20) This principle originates in tort law, but also operates in contract law. The Supreme Court first described the *de minimis* doctrine as applying to “split-second absurdities” that “are not justified by the actualities of working conditions or by the policy of the Fair Labor Standards Act.”[[21]](#footnote-22) The *de minimis* principle has more recently been adopted by U.S. labor courts with respect to minor normative injuries. While there are no bright-line rule as to how much time amounts to *de minimis*, many courts have held that less than ten minutes of working time is considered *de minimis*. [[22]](#footnote-24)

The United States Department of Labor (DOL) has also recognized the *de minimis* principle. [[23]](#footnote-25) A DOL regulation provides 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 he is regularly required to spend on duties assigned to him.” The DOL has advised that the *de minimis* rule applies to the aggregate daily time for all activities for which an employee seeks compensation, and not to time spend separately on each discrete activity.

For the past 70 years, federal courts have applied the *de minimis* doctrine to excuse the payment of wages to non-exempt employees for small amounts of compensable time if the time was shown to be administratively difficult to record.[[24]](#footnote-26) In 2018, in Troester v. Starbucks Corporation, the California Supreme Court held that California’s wage and hour laws did not fully align with the federal *de minimis* doctrine.[[25]](#footnote-27) In this landmark decision, the California Supreme Court concluded that non-exempt employees must be compensated for off-the-clock work which included small increments of time, such as four to ten minutes per shift. In reaching its conclusion, the court reasoned that California’s wage and hour laws had not adopted the *de minimis* doctrine found in the federal Fair Labor Standards Act (FLSA).[[26]](#footnote-28) The court noted that California law was more protective of employee rights than federal law and required non-exempt employees to be paid for all time worked.

Specifically, in Troester, the court concluded that California law required employees to receive compensation for all hours worked or any work beyond eight hours a day. The court ultimately rejected the application of the *de minimis* rule to the plaintiff employee with respect to daily post-closing activities ranging from four to ten minutes each shift. In so holding, the court emphasized that such activities amounted to a number of minutes on each shift and occurred regularly, thus creating a compensable aggregate of time.

Following the Troester case, some observers suggested that the *de minimis* doctrine in California was dead, or that any time exceeding a minute was compensable in California. However, neither of these positions is correct. Notably, according to the Ninth Circuit, the rule in Troester “does not require employers to account for split-second absurdities and might not apply in cases where work is so irregular that it is unreasonable to expect the time to be recorded.”[[27]](#footnote-29)

Although the *de minimis* doctrine is not a dominant factor in the overall employer-employee relationship, and its application varies in different jurisdictions, it can nonetheless play a significant role in regulating the relationship between employee and employer. It is found within the framework of protective legislation protecting workers’ rights so that they cannot be conditioned, even voluntarily. Just as the employee may not be considered to have waived these rights, so the law cannot abdicate its protection of them. Furthermore, the rigidity of legislation with respect to *de minimis* elements provides an outstanding example of how conduct is regulated without regard to the parties’ will. Other similar examples can be found in state laws protecting workers' rights, even to the extent of legally requiring employees to denounce or report certain behaviors, even in situations where the employee has no incentive to conduct legal proceedings against the employer. [[28]](#footnote-30)

It is our contention that there is an incremental and harmful effect of these *de minimis* infractions. Indeed, this cumulative effect approach has been recognized in research on the subject that has contended that it was not necessary to recognize or apply the *de minimis* doctrine with regard to overtime pay, based on the argument that employees’ injuries should be measured cumulatively, leading to the conclusion that small divergences can add up to a significant extra hour.[[29]](#footnote-31)

1. *Aristotle's Nicomachean Ethics*, Robert C. Bartlett, and Susan D. Collins (eds/trans.), Chicago: The University of Chicago Press (2012). [↑](#footnote-ref-1)
2. <https://lawjournal.huji.ac.il/sites/default/files/2018-01/31.%20%D7%97%D7%99%D7%99%D7%9D%20%D7%92%D7%A0%D7%96%20-%20%27%D7%9E%D7%95%D7%A9%D7%92%20%D7%94%D7%97%D7%95%D7%91%D7%94%20%D7%9C%D7%A6%D7%99%D7%99%D7%AA%20%D7%9C%D7%97%D7%95%D7%A7%27.pdf>

   [↑](#footnote-ref-2)
3. Employment relations in Israel are regulated by a number of sources: constitutional rights, as determined by the Basic Laws mentioned above; Statutory rights, as set out in statutes and regulations; International standards, especially ILO conventions adopted by Israel, but also EU standards, are used by the government and courts as guidelines, even though they are not  binding. For a protective legal legislation, see: Employment Protection Act 1975 (UK), and the U.S. Department of Labor enforces the Fair Labor Standards Act (FLSA), which sets basic minimum wage and overtime pay standards. [↑](#footnote-ref-3)
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    Brandon Garrett, Aggregation and Constitutional Rights, 88 NOTRE DAME L. REV 593, 641–648 (2012) [↑](#footnote-ref-19)
20. (בג"ץ 3434/96 ולראות שם עוד אסמכתאות, וגם דנ"א 1333/02). [↑](#footnote-ref-20)
21. Since *Mt. Clemens*, federal courts have generally analysed three non-determinative factors to determine whether time is *de minimis*or compensable: (1) the practical difficulty the employer would face in recording the additional time; (2) the total amount of compensable time; and (3) the regularity of the additional work.  *See, e.g.*,*Reich v. New York City Transit Authority*, 45 F.3d 646, 652 (2d Cir. 1995)*; Lindow v. United States*, 738 F.2d 1057, 1062-63 (9th Cir. 1984). [↑](#footnote-ref-22)
22. Anderson v. Mt. Clements Pottery Co., 328 U.S. 680’692 (1946); Lindow v. United States, 738 F.2d 1057 (9th Cir. 1984). *See, e.g.*,*Aguilar v. Mgmt & Training Corp.*, 948 F.3d 1270, 1284 (10th Cir. 2020); *Lyons v. Conagra Foods Packaged Foods LLC*, 899 F.3d 567, 584 (8th Cir. 2018).    [↑](#footnote-ref-24)
23. codifying at 29 C.F.R. § 785.47, See DOL Wage and Hour Advisory Memorandum No. 2006-2 (May 31, 2006), available at <https://www.dol.gov/agencies/whd/field-assistance-bulletins/2006-2>. [↑](#footnote-ref-25)
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    <file:///C:/Users/netan/Dropbox/My%20PC%20(LAPTOP-KMCEF9V2)/Downloads/export_2020-09-29%2014_41_12.pdf>;

    <https://heinonline.org/HOL/Page?handle=hein.journals/inonu9&div=31&g_sent=1&casa_token=zZ8yUXJaWlEAAAAA:UUaTDY0Azp5p9O_LuV0NYbrxq5Vz6nRbRtp71TfOKEi9WPxor-traMJr8-pME7-W7ZXnuelQ&collection=journals> [↑](#footnote-ref-26)
25. Troester v. Starbucks Corp. [↑](#footnote-ref-27)
26. Fair Labor Standard Act, 29 U.S.C § 213 (a)(1) [↑](#footnote-ref-28)
27. *Rodriguez v. Nike Retail Services, Inc.*, 928 F.3d 810, 818 (9th Cir. 2019) [↑](#footnote-ref-29)
28. כמו במקרה של אפלייה כלפי נשים, להפנות לחוק עבודת נשים בישראל/

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    <https://heinonline.org/HOL/Page?handle=hein.journals/wmlr26&div=27&g_sent=1&casa_token=MrE61iQ5l-MAAAAA:S1wzpAi2jdA1xBf8bgozX5f-GmeRdnJ5_v2bRUQ5GvewYKoWa_yj4dLOyriRvJ6_0AeyZmHs&collection=journals> [↑](#footnote-ref-30)
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