**Behavioral Ethics Approach to Employment Law and Workplace's Norms**

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*This article addresses how applying behavioral ethics to employment law can expand the scope of employment law and change its outcomes. In addition, this paper will identify workplace attitudes or activities that can place employees in positions where they may feel pressured to act in a manner contrary to their personal ethical standards. Thus, this article examines not only what the law declares about a certain behavior, but whether that conduct is appropriate or acceptable beyond its legal ramifications. While legal but ethically inappropriate behavior has not been studied in the field of employment law, it has been the subject of critical work, particularly in the context of corporations.[[1]](#footnote-1) 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.[[2]](#footnote-2)* *To explore these issues, we will examine situations identified with small, everyday violations, which employment law is struggling to address, and show how the paradigms of employment law can change and even benefit when behavioral ethics are taken account.*

1. Introduction

Behavioral ethics focuses on people’s inability to recognize the extent to which self-interest in its broader sense affects their own behavior.[[3]](#footnote-3) While legal but ethically inappropriate behavior has been the subject of critical work, particularly in the context of corporations,[[4]](#footnote-4) It has not yet been studied in the context of employment law. Numerous scholars in the field of behavioral ethics claim that because people want to maintain a positive and coherent view of themselves, they fail to recognize that many of their actions are based on self-interest.[[5]](#footnote-5) A related theory, “ethical fading,”[[6]](#footnote-6) emphasizes how people adjust reality to suit their interests, positing that by deceiving themselves, people allow ethical concerns to fade into the background of the decision-making process, thus weakening the potential impact of ethical issues on the decision. In contrast to classical economics, which primarily examines how self-interest affects motivation, behavioral ethics also accounts for the impact that self-interest has on cognitive processes, such as visual perception,[[7]](#footnote-7) reasoning[[8]](#footnote-8) and memory.[[9]](#footnote-9) Finally, behavioral ethics is more concerned with the implicit effects of self-interest than with its effects on explicit choices.[[10]](#footnote-10) The following will delve into some of the most relevant findings of behavioral ethics and explain their relevance to workplace ethics and employment law.

1. Why employment law should focus more on the “good” people?

As already suggested, since people’s interest is to not view themselves in a negative light, they are likely to engage in various biased cognitive process related to reasoning, memory, and vision. Thompson and Loewenstein have shown that people were more likely to remember information that was related to their own position, with the result that their opinion of what was fair aligned with their interest in the outcome of a settlement.[[11]](#footnote-11) The fact that these biases operate without awareness makes it difficult for people to notice the process. Moore and Loewenstein were among the first to show that self-interest and concern for others affect behavior through different cognitive systems, and that self-interest, unlike concern for others, is automatic, viscerally compelling, and often unconscious.[[12]](#footnote-12) By comparing people’s private beliefs and public behavior, Moore demonstrated that people truly believed their own biased judgments, not recognizing any problems in their responses.[[13]](#footnote-13)

As the above review reveals, there is a growing recognition that many ethical decisions are the result of implicit, not explicit choices.[[14]](#footnote-14) Given that people’s unethical behavior is frequently accompanied by or the result of a limited and distorted view of their own conduct, it is particularly important to focus on legal violations by otherwise good employers in the context of employment law. Indeed, this study will show that many of those mechanisms that are particularly likely to increase the likelihood of good people behaving with limited awareness of the full legal and ethical meaning of their actions are especially problematic in the context of employment. In the employer-employee relationship, issues such as ambiguity, repeated smaller violations and the strong effect of workplace norms which do not necessarily conform to those of the employees [[15]](#footnote-15) are likely to have a significant impact on employees’ conduct.

Clearly, social norms can affect the likelihood that people will engage in unethical behavior. The field of law and economics has incorporated the effects of social norms based on rational choice approaches, taking into account such aspects as reputation, expressive effects, shaming, and social sanctioning. Cooter,[[16]](#footnote-16) for example, has developed an economic theory of how the expressive values of law can shape social norms and individual preferences. In addition, Gino, Ayal, and Ariely have shown that the effect of unethical group norms on people’s inclination to engage in dishonest behavior strongly depends on the salience of the group identity.[[17]](#footnote-17) In a more thorough examination of this psychological mechanism, Gino and Galinsky have studied the effect of psychological closeness on the likelihood that social norms cause people to engage in unethical behavior.[[18]](#footnote-18) For example, they have shown that the likelihood that an unethical norm will lead to a change in one’s ethical decision-making is highly dependent on the level of psychological closeness of the participant to the unethical individual. In the case of workplace environments, where the same people work closely together every day, the risk of such influence is inevitably exacerbated,[[19]](#footnote-19)especially when considered in the context of some research suggesting that people are more attentive to unethical behavior of others in order to justify their own ethical missteps, thus maintaining their self-images.[[20]](#footnote-20)

In light of individuals’ limited awareness of their unethical conduct, there is a strong argument to be made that the legal rules governing such behavior in the employment context need revision.[[21]](#footnote-21) In addition, the lessons of behavioral ethics highlight the need to make some change in the underlying situations individuals face in the workplace, which can shape both explicit and implicit choices. This approach differs from that of changing the pertinent incentives, which can only shape people’s conscious decisions.[[22]](#footnote-22) Rather than adopting these nudge-like approaches, which alter the social cues, it is preferable to shape and limit the biases that determine how people approach dilemmas even before they consciously begin determining how to solve them. The recommended or ideal approach is to impel people to recognize when they are engaging in bad behavior. If people often engage in unethical behavior because they are unaware of its nature, making them recognize their unethicality should help curtail such conduct.[[23]](#footnote-23) Approaches based on behavioral ethics can be used to increase ethicality and compliance with positive social norms in the workplace. Some of the leading scholars in behavioral ethics have observed that classical intervention techniques, such as penalties, are rendered ineffective if ethical decisions are produced without awareness.[[24]](#footnote-24) In light of this, alternative approaches to changing workplace ethics could be developed, especially for more subtle violations. For example, Bohnet, Bazerman, and Van Geen[[25]](#footnote-25) have shown that when people evaluate others in a between-subjects comparison rather than in a within-subject comparison, negative stereotypes regarding race became less relevant.[[26]](#footnote-26) Thus, alternative approaches to racial discrimination or stereotyping in the workplace that go beyond traditional legal sanctions may be called for.

1. Why the workplace is especially prone to violations by “good” people

Employee-employer relations have long been governed by legal norms and regulations. Transcending or extending beyond these legal requirements are issues regarding 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 these aspects of the relationship between an employee and an employer.

Ethical culture has been defined as a subsection of the field of organizational culture that influences employees.[[27]](#footnote-27) 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,[[28]](#footnote-28) and significant advances have been made in the field since then, more work remains to be done 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 in the context of corporate law and conduct, similar studies have not been conducted in the legal context of employment law and the relationship between employer and employee.[[29]](#footnote-29) As a result, little is known about employees’ reactions to perceived acts of unfairness which take the form of unethical behavior.

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 follow 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. While there has been considerable research into the protection of employees’ rights in the context of employment law,[[30]](#footnote-30) very little has been written about employees’ moral rights in the context of behavioral ethics in employment law. While unethical behavior is not specifically addressed in the laws governing employer-employee relationships, it is reasonable to argue that pressuring employees to engage in unethical behavior should be considered improper.

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.[[31]](#footnote-31) Studies of workplaces have shown that when an employee is asked to engage in conduct the employee considers immoral or unethical, the employee’s moral code is affected, particularly as it is expressed toward third or outside parties.[[32]](#footnote-32)

Similarly, in the realm of bounded ethicality, rather than assuming bad intentions where they cannot be proven, it may be possible to collect data on ethical decisions over time and create criteria to be applied if the aggregation of behaviors indicates that an individual should have been aware of the negative effect of his or her actions. For example, misuse of office supplies or the improper acceptance of gifts may be considered misbehavior even if any individual instance of such conduct is merely questionable. A sufficient number of repeated marginal occurences can warrant sanctions regardless of the actor’s intent. Important jurisprudential work remains to be carried out to justify imposing greater individual responsibility for one event based merely on the fact that it likely to be repeated, as employment law is a classical area where many of the isolations can be so categorized.[[33]](#footnote-33)

Given the difficulty of determining individuals’ awareness of the unethical nature of their decisions, behavioral ethics suggests considering the aggregate of people’s decisions as proof of wrongdoing. This approach is analogous to the one taken in the area of employment discrimination, where the inability to penetrate people’s minds has, in some cases, led to an aggregated approach to evaluating decision-making.[[34]](#footnote-34) Beginning with *Griggs v. Duke Power Co.*,(1971) the U.S. Supreme Court has recognized that although it is not mandatory for the composition of a company’s workforce to replicate that of the general population, statistical disparities between the two can be used as compelling evidence of employment discrimination under a disparate impact theory. According to this theory, even if it is impossible to prove that the employer intended to treat candidates differently, the fact that the employer used criteria that resulted in discrimination or an unequal outcome toward a class of individuals is sufficient to establish an illegitimate discrimination.[[35]](#footnote-35)

There are numerous areas of organizational behavior in which ethical issues, such as those of the ethics of workplace safety, ethics within hiring proceedings, and sales goals, arise. Workplace safety is particularly salient in this context. 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 come into contact with 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.[[36]](#footnote-36) 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 are 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.[[37]](#footnote-37)

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.[[38]](#footnote-38) To better understand 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 daily goals, which often encourage if not pressure employees to engage in questionable conduct, thus causing them damage.[[39]](#footnote-39) Bazerman and Tenbrunsel have suggested a comprehensive set of solutions for policymakers based on insights derived from the behavioral ethics literature.[[40]](#footnote-40) Focusing directly on those affected, the authors also offered various techniques to help people become aware of their limited ability to recognize their ethical failings and to find ways of remedying this situation. For example, focusing on the concepts of the “should” rather than the “want” self, Bazerman and Gino suggested that by becoming aware in advance of those “want” factors that can arise during moments of decision-making, individuals can become better prepared to resist such desires and, instead, make a decision based on their ethically sound “should” preferences.[[41]](#footnote-41) The authors use the example of a common interview question inquiring about the pay offered by a competing employer. The “want” self is likely to wish to inflate the number, thereby encouraging the applicant to lie to the potential employer. By anticipating this tendency, an individual can offer a more ethically acceptable answer, such as “I’m not comfortable sharing that information,” which serves their self-interest but also does not violate moral rules.

1. Behavioral Ethics in a Substantive Examination of Employment Law

Focusing on the contribution of behavioral ethics to employment law, this section analyzes how the paradigms of employment law can change and benefit when examined within the framework of behavioral ethics. The discussion will focus on four issues: employers’ responsibility for employees’ violations, workplace violence, workplace flexibility, and workplace organization.

* 1. *What is the employer's responsibility for violations of the employee?*

Employment law struggles to address this issue of an employer’s responsibility for employee violations in a number of situations: those where employers are unaware of employee violations; those where the employer is aware but does not address them; or those in which the employer has created an organizational environment that has led the employee to commit ethical violations. Essentially, current employment law almost always automatically places complete responsibility on the employer.[[42]](#footnote-42) Tort law, which continues to serve as the general framework governing employment law, calls for the application of vicarious liability under a working relationship, whereby the employer will compensate another person for damage caused by a third party, the employee.[[43]](#footnote-43)

In order to establish vicarious liability, three cumulative conditions must be met: the existence of employee and employer relationship; that the wrongful act was actually committed by the employee; and that the wrongful act occurred during the course of work for the employer. The responsibility model is so expansive that employers can be held responsible for acts that were not committed in response to a direct demand from the employer, as well as in cases in which the employee acted negligently and in actual contravention of the employer's instructions.[[44]](#footnote-44) Thus, even if the employer does not explicitly direct employees to perform certain acts, the employer will nevertheless be considered responsible for damages caused by these acts. This doctrine was first established by the British Judge William Blackstone in the late 17th century and was later consolidated in several 19th-century British judicial rulings.For example, in the Stibel case, the court imposed liability for employee misconduct on the employer, even though the damage caused by the employee was not the result of the employee’s employment conditions or employer’s policies.[[45]](#footnote-45) In that case, a bank branch manager worked on a private basis with financial investments of the bank's clients. After losing money, one of the investors tried to hold the bank accountable for the losses. The bank countered that not only had the employee not been working within the scope of his employment conditions, but that he had acted contrary to his authority and outside the scope of his employment with the bank, taking actions contrary to the interests of the bank and solely for his own benefit. Nonetheless, the court ruled that the fact that the employee's actions had taken place on the bank premises was sufficient to create an anticipation of authority, thus rendering the bank liable for the employee’s actions, and justifying the court’s decision to have the bank compensate the customer.

It should be noted that courts favor protecting the interest of an injured party who relied on the employer to ensure that employees’ actions were carried out properly during the course of their work and in such a way that would not cause harm. The justification for this result based on position that because the employer has the ability to direct and supervise the employee's actions, the employer should be liable for damages in cases in which the employee does not have the resources to pay them. In line with these judicial rulings, which consider the greater resources available to employers and the perception of the employer's control and supervision ability, employment law has developed a doctrine that reinforces the responsibility of the employer in place of that of the employee. It is our view that the level of responsibility of the employer must be judged not just according to rigidly imposed legal rules, but also on the basis of behavioral mechanisms in the workplace. The employer-employee relationship is distinguishable from other legal situations in which full responsibility is always placed on one party, such as that of a parent-child relationship. In light of the behavioral ethics approach, it is arguable that in situations where the employer has clearly developed an organizational culture that emphatically condemns certain conduct, placing the entire responsibility on the employer for employee misconduct amounts to legal overreach. Without giving consideration to behavioral ethics issues, the law will make decisions based solely on financial considerations rather than on those of genuine responsibility.

* 1. *Workplace Violence*

The issue of workplace violence, also known as “workplace maltreatment,” “workplace bullying,” or “workplace harassment,” creates a hostile workplace environment for the employee, often harming the mental or physical health of the worker. This study addresses workplace violence within the context of aggressive clients or suppliers, who are, in essence, third parties to work relations. An increase in this problem of workplace violence in the context of abuse by third parties can be seen in the field of education, with more and more teaching staff complaining about abusive or threatening behavior from children and their parents.

According to the well-known adage, the customer is always right. The trouble is, customers are people, too, and people come with a variety of biases and a range of behaviors, some of which can be bad. Should an employer be held liable for customer harassment? This issue has been addressed in Title VII of the Civil Rights Act of 1964 in the United States, as well as in other employment laws, according to which employers must create and maintain a harassment-free workplace, an obligation that extends to nonemployees and customers. As a result, if someone who is not an employee engages in behavior that violates the law, the employer is obligated to intervene and protect the employee. But in other countries, such as Israel, there is no reference at all to workplace harassment. An Israeli bill for the Prevention of Abuse at Work passed a preliminary reading in the Knesset in July 2015.[[46]](#footnote-46) The explanatory notes to the bill emphasize that workplace bullying is a widespread social phenomenon that harms many workers.[[47]](#footnote-47) Under this approach, discrimination or harassment at the workplace originating from third parties is not considered the responsibility of the employer.

Usually, however, the question of whether the employer has a personal responsibility for the work climate and the mental well-being of the employee with respect to creating a safe and protected work environment is either not addressed in employment law, or it is likely to lead to results holding that the employer is not responsible for nor need address such violations. By applying the lessons of behavioral ethics, the paradigms of employment law can be expanded to include imposing a duty on the employer to do everything possible to ensure a safe and protected work environment for employees with respect to threatening or abusive behavior, whether from within or outside the workplace.

A behavioral ethics approach can justify imposing such a duty, as abusive behavior can have a negative impact on the employee’s work, which would also affect an employer’s financial interest. An employee who feels comfortable and protected in the workplace and receives support from the employer in such situations of abusive behavior from third parties can be expected to become more motivated to work, thereby becoming a better employee.

* 1. *Workplace Flexibility*

The corona pandemic, which continues to have a dramatic impact on many millions, has forced businesses to find solutions enabling them to continue operating. Employers have had to move quickly to a model of remote communication and working from home, in full or in part. Solutions for achieving some degree of occupational flexibility have been the subject of discussion and experimentation throughout the world for about a decade,[[48]](#footnote-48) and some countries seem to have already responded to the employment challenges arising from a telecommuting model. The move to working from home has a broad spectrum of effects on employees, and this article will review one in particular: that of the new external expenses employees incur. Despite the recognized benefits of working from home, both to employers and employees, there remains a genuine concern about employees now having to bear some of the financial burden of the workplace. Employers choosing to move to a work from home model will certainly enjoy savings in real estate expenses and other ongoing overhead expenses involved in managing and maintaining physical offices. Along with this, employees then have to cover costs, such as one-time expenses for setting up an home office, and other periodic expenses for home office maintenance, together with an expectation from employers that employees will be using private assets, including the employee’s personal phone, for example, for work purposes.

In the absence of reference of any attention to these issues in labor law today, it is important to ask where to what extent responsibility can be placed on employers to participate, in full or in part, in expenses arising from employees working from home. Here, behavioral ethics may offer a solution and place a level of duty on the employer. Most countries have adopted a policy about working from home, without addressing the issue of reimbursement of expenses to employees,[[49]](#footnote-49) with labor and employment laws notably not offering direction on this question. The United States has been more forthcoming, with the Federal Fair Work Act referring to the issue and suggesting that employees not be required to bear the costs directly.[[50]](#footnote-50) However, imposing a duty to refund expenses to employees can be complicated, as can be seen in the state of California, which implements the federal law and requires employers to reimburse their employees for the reasonable and necessary expenses that arise directly from fulfilling their duties.[[51]](#footnote-51) Nonetheless, a California state court, examining the purpose of the law, which is to prevent costs from being pressed on the employee, ruled that that there was no entitlement to a refund in cases of combined employment from home and in the workplace.[[52]](#footnote-52) In that case, the court reasoned that there was no obligation on the employer to allow remote work and no obligation to bear costs for actions that could be carried out from the office.[[53]](#footnote-53)

Sometimes working from home is not a choice, but a necessity for health or other reasons. However, there is currently no legal approach for regulating which party covers the expenses of employees employed from home. A recent example can be found in the Federal Court in Switzerland, which ruled on a case in which an employer, in response to the corona pandemic, chose to continue having employees work from home, even after the closure there had been lifted, in order to save on rental payments. The employee claimed a refund for part of the rent for the apartment, which also served as a workspace. The court rejected the employer’s argument that there was no legal obligation to cover the employee’s rental costs, and recognized the employee's demand as legitimate, notwithstanding that such payment was not specified by law or employment agreement.[[54]](#footnote-54) This issue can be expected to preoccupy labor courts and judicial tribunals around the world in the future. It is important, then, to apply the intellectual framework of the behavioral ethics approach when examining this question of whether employers should be mandated to cover certain costs of working from home.

It can also be argued that the duty of employers in such situations is a function of the trust obligations of the parties and reflects the perception of their relationship as unequal. Given the unique situation created by the corona crisis, where so many people have been forced to work from home, Aristotle’s definition of integrity law should be born in mind, as it holds that if the law adheres too rigidly or harshly to existing rules and principles, injustice or bad law are likely to be created.[[55]](#footnote-55)

* 1. *Workplace Organization*

Generally, the organization of employees as a bargaining group has changed labor law and had led to a fundamental shift in the balance of power between employers and employees. Upon organizing, employees are no longer individuals within the relationship, but part of a larger labor organization wielding more power than an individual. Labor organizations are perceived as promoting employees’ rights and enabling discourse with the employer and are therefore regarded, as least theoretically, as altruistic organizations, as they are seen as taking actions on the behalf of others. Perhaps as a result of this perception, labor laws allow labor organizations to engage in protest and pressure measures against the employer, including strike measures. As a counterbalance, labor courts are empowered to restrict the right to strike or to determine that it is illegitimate, if, for example, it is done in bad faith, in a manner that is disproportionate to the goals the organization wishes to achieve, or has been taken before other solutions were tried.[[56]](#footnote-56)

The reality is that labor organizations are not always so altruistic. In light of this, attempts have been made to declare some of their interests as illegitimate. One example is that of an electricity company employees’ organization which was perceived as militant rather than altruistic, as it was seeking personal economic benefits for its employees, such as free electricity, which are not recognized as a right in labor law, over the public interest. Using a behavioral ethics approach can establish a layered, non-binary analysis of the subject of labor organizations, thus facilitating better perceptual flexibility regarding the legitimacy of employees organizing, and enhancing the trust between employers and labor organizations.

An interesting phenomenon among labor organizations in recent years is an increase in the creation of internal organizations rather than joining or assisting an external labor organization.[[57]](#footnote-57) The external labor organization often has financial interests that are not relevant for employees at a particular workplace, and their annual membership fees can be very high. While the law does not distinguish between different types of labor organizations, it is very likely that there are advantages to negotiating with an internal employees’ organization, and perhaps the law should come to reflect a preference for internal rather than external labor organizations. With each workplace having its own DNA and manner of discourse, exposing a company’s internal matters to an external labor organization, however professional it may be, could undermine the interests of both employers and employees. This analysis of organizations using a behavioral approach is consistent with the seminal work of Mary Follett Parker, who was the first to raise the importance of sharing management and organization decisions with employees, due to their familiarity with the organization and its goals and character.

1. Small, daily violations and the *De* *minimis* legal principle

This section examines those situations which employment law struggles to address involving small, everyday violations, as well as the mechanisms governing behavioral capacities which could serve as warning signs for the purpose of behavioral discussion in employment law.

The small, sometimes daily violations of employees’ rights gradually accumulate, and, with time, can profoundly erode the rights of employees. These occurrences raise two interesting legal issues regarding employers’ unethical behavior towards employees. First, the law tends to consider these violations as too minimal to warrant employment law protection.[[58]](#footnote-58) Second, employment 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 insist upon 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 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 employment law does not address, but which this article examines. The focus is 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 be available for calls 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 are usually 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 employment 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,*[[59]](#footnote-59) 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 aggregate of these minor infractions can render the employee morally vulnerable.[[60]](#footnote-60) 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 private law 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.”[[61]](#footnote-61) 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.”[[62]](#footnote-62) 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 (per day) of working time is considered *de minimis*. [[63]](#footnote-63)

The United States Department of Labor (DOL) has also recognized the *de minimis* principle.[[64]](#footnote-64) 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.”[[65]](#footnote-65) 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 spent 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.[[66]](#footnote-66) 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.[[67]](#footnote-67) 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).[[68]](#footnote-68) 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.”[[69]](#footnote-69)

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. [[70]](#footnote-70)

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 claimed 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.[[71]](#footnote-71)

1. Conclusion

Beyond the discourse of accepting certain behavior, this article addressed the issue of how the paradigms of labor law can change and even benefit when taking behavioral ethics into account. The question of what ethics are has engaged philosophers throughout the world since the time of Socrates and Aristotle and to this day.[[72]](#footnote-72) Indeed, this question arises frequently in the field of employment law and its concomitant obligations governing employee-employer relationships, particularly the issue of the obligation to comply with the law.[[73]](#footnote-73) An examination of how the concepts of behavioral ethics are perceived and applied in employment law should help determine what the appropriate behavior and regulatory responses are in that field.

We contend that in addition to workers’ legal rights under employment law, some of which are included in what are considered natural rights, workers also have the moral right to follow their own consciences within the framework of the employment relationship, even though this moral right is not otherwise protected by law.[[74]](#footnote-74) 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.

1. \*

   Virginia K. Bratton, *Affective Morality: The Role of Emotions in the Ethical Decision-Making Process* (2004). [↑](#footnote-ref-1)
2. In the matter of unethical behavior between employees see: Adam Barsky, *Investigating the Effects of Moral Disengagement and Participation on Unethical Work Behavior*, 104 J. Bus. Ethics 59 (2011); Raymond O. S. Zaal, Ronald J. M. Jeurissen & Edward A. G. Groenland, *Organizational Architecture, Ethical Culture, and Perceived Unethical Behavior Towards Customers: Evidence from Wholesale Banking*, 158 J. Bus. Ethics 825 (2019). For unethical behavior towards consumers see: Rhea Ingram, Steven J. Skinner & Valerie A. Taylor, *Consumers’ Evaluation of Unethical Marketing Behaviors: The Role of Customer Commitment*, 62 J. Bus. Ethics 237 (2005). [↑](#footnote-ref-2)
3. \*

   Linda K. Treviño, Gary R. Weaver & Scott J. Reynolds, *Behavioral Ethics in Organizations: A Review*, 32 J. Mgmt. 951 n. 6 (2006). [↑](#footnote-ref-3)
4. Virginia K. Bratton, *Affective Morality: The Role of Emotions in the Ethical Decision-Making Process* (2004). [↑](#footnote-ref-4)
5. Shaul Shalvi, Michel J. J. Handgraaf & Carsten K. W. De Dreu, *Ethical Manoeuvring: Why People Avoid Both Major and Minor Lies*, 22 Brit. J. Mgmt. S16 (2011). [↑](#footnote-ref-5)
6. Ann E. Tenbrunsel & David M. Messick, *Ethical Fading: The Role of Self-Deception in Unethical Behavior*, 17 Soc. Just. Res. 223 n. 2 (2004). [↑](#footnote-ref-6)
7. Emily Balcetis & David Dunning, *See What You Want to See: Motivational Influences on Visual Perception*, 91 J. Pers. & Soc. Psychol. 612 n. 4 (2006). [↑](#footnote-ref-7)
8. Ziva Kunda, *The Case for Motivated Reasoning*, 108 Psychol. Bull. 480 n. 3 (1990). [↑](#footnote-ref-8)
9. Lisa L. Shu, Francesca Gino & Max H. Bazerman, *Dishonest Deed, Clear Conscience: When Cheating Leads to Moral Disengagement and Motivated Forgetting*, 37 Pers. & Soc. Psychol. Bull. 330 n. 3 (2011). [↑](#footnote-ref-9)
10. For a review of the potential contribution of behavioural ethics to the law in general see, Yuval Feldman, *The Law of Good People: Challenging States’ Ability to Regulate Human Behavior* (2018) (here and after: The Law of Good People. [↑](#footnote-ref-10)
11. Leigh Thompson & George Loewenstein, *Egocentric Interpretations of Fairness and Interpersonal Conflict*, 51 Org. Behav. & Hum. Decision Processes 176 n. 2 (1992). [↑](#footnote-ref-11)
12. Dan A. Moore & George Loewenstein, *Self-Interest, Automaticity, and the Psychology of Conflict of Interest*, 17 Soc. Just. Res. 189 n. 2 (2004). [↑](#footnote-ref-12)
13. Don A. Moore, Lloyd Tanlu & Max H. Bazerman, *Conflict of Interest and the Intrusion of Bias*, 5 Judgment & Decision Making 37 n. 1 (2010). A similar view was advanced by Gino and co-authors, who demonstrated that the level of control needed to behave ethically is much higher than that following from the decision to be unethical, see Francesca Gino, Maurice E. Schweitzer, Nicole L. Mead & Dan Ariely, *Unable to Resist Temptation: How Self-Control Depletion Promotes Unethical Behavior*, 115 Org. Behav. & Hum. Decision Processes 191 n. 2 (2011). Epley and Caruso concluded that automatic processing leads to egocentric ethical interpretations, see Nicolas Epley & Eugene M. Caruso, *Egocentric Ethics*, 17 Soc. Just. Res. 171 n. 2 (2004). Similarly, Van den Bos and co-authors found support for the notion that when appraising a situation, we prefer outcomes that benefit ourselves, and only later correct to take into account fairness toward others, see Kees Van den Bos, Susanne L. Peters, D. Ramona Bobocel & Jan Fekke Ybema, *On Preferences and Doing the Right Thing: Satisfaction With Advantageous Inequity When Cognitive Processing is Limited*, 42 J. Experimental Soc. Psychol. 273 n. 3 (2006). [↑](#footnote-ref-13)
14. For example, Nina Mazar, On Amir & Dan Ariely, *The Dishonesty of Honest People: A Theory of Self-Concept Maintenance*, XLV J. Mar. Res. 633 (2008); David M. Bersoff, *Why Good People Sometimes Do Bad Things: Motivated Reasoning and Unethical Behavior*, 25 Pers. & Soc. Bull. 28 (1999); Rushworth M. Kidder, *How Good People Make Tough Choices: Resolving the Dilemmas of Ethical Living* (2009); Madan M. Pillutla, *When Good People Do Wrong: Morality, Social Identity, and Ethical Behavior*, *in* Social Psychology Organization 353 (David De Cremer, Rolf van Dick & J. Keith Murnighan eds., 2011); James Hollis, *Why Good People Do Bad Things: Understanding Our Darker Selves* (2008); Mahzarin R. Banaji & Anthony G. Greenwald, *Blindspot: Hidden Biases of Good People* (2013). Many others do not use the term 'good people' in their titles but make the same argument in the text (see, e.g., Pillutla 2011). This is also the view held by Max Bazerman, George Loewenstein & Don A. Moore, *Why Good Accountants Conduct Bad Audits*, 80 Harv. Bus. Rev. 1 (2002). Note that the “good people” scholarship is usually different from the type of research conducted by Zimbardo (2007) on the Lucifer effect, see Philip Zimbardo, *The Lucifer Effect: How Good People Turn Evil* (2007), Their work generally try to explain how ordinary people end up doing evil or at least engage in gross criminal behaviors. [↑](#footnote-ref-14)
15. For example: Dana, Weber, and Kuang have shown in a series of experiments one dominant strategy people use to maintain their self-concept while engaging in self-driven behavior – moral wiggle room. See, Jason Dana, Roberto A. Weber & Jason Xi Kuang, *Exploiting Moral Wiggle Room: Experiments Demonstrating an Illusory Preference for Fairness*, 33 Econ. Theory 67 n. 1 (2007). [↑](#footnote-ref-15)
16. Robert Cooter, Michal Feldman & Yuval Feldman, *The Misperception of Norms: The Psychology of Bias and the Economics of Equilibrium*, 4 Rev. of Law and Economics 889 n. 3 (2008). [↑](#footnote-ref-16)
17. Francesca Gino, Shahar Ayal & Dan Ariely, *Contagion and Differentiation in Unethical Behavior: The Effect of One Bad Apple on the Barrel*, 20 Psychol. Sci. 393 n. 3 (2009). [↑](#footnote-ref-17)
18. Francesca Gino & Adam D. Galinsky, *Vicarious Dishonesty: When Psychological Closeness Creates Distance from One’s Moral Compass*, 119 Org. Behav. & Hum. Decision Processes 15 (2012). [↑](#footnote-ref-18)
19. Benjamin van Rooij & Adam Fine, *Toxic Corporate Culture: Assessing Organizational Processes of Deviancy*, 8 Adm. Sci. 23 n. 3 (2018). [↑](#footnote-ref-19)
20. Rachel Barkan, Shahar Ayal, Francesca Gino & Dan Ariely, The Pot Calling the Kettle Black: Distancing Response to Ethical Dissonance, 141 J. Experimental Psychol. 757 n. 4 (2012); Nicholas Epley & David Dunning, *Feeling “Holier Than Thou”: Are Self-Serving Assessments Produced by Errors in Self- or Social Prediction?*, 79 J. Pers. & Soc. Psychol. 861 n. 6 (2000); Cooter, Feldman & Feldman, *supra* n. 15. [↑](#footnote-ref-20)
21. Feldman, Y., and H. Smith. Forthcoming. Law vs. equity: Lessons from behavioral ethics. in What Makes Intervention Legitimate? 31st Seminar on New Institutional Economics J. Economic Perspectives. Symposium volume (2014). [↑](#footnote-ref-21)
22. Karl Aquino, Dan Freeman, Americus Reed II, Vivien K. G. Lim & Will Felps, *Testing a Social-Cognitive Model of Moral Behavior: The Interactive Influence of Situations and Moral Identity Centrality*, 97 J. Pers. & Soc. Psychol. 123 n. 1 (2009). [↑](#footnote-ref-22)
23. Yuval Feldman & Yotam Kaplan, *Preferences Change & Behavioral Ethics: Can States Create Ethical People?*, forthcoming 22 Theoretical Inquiries L. n. 1 (Oct. 1, 2020), <http://ssrn.com/abstract=3675300>. [↑](#footnote-ref-23)
24. Mahzarin R. Banaji, Max H. Bazerman & Dolly Chugh, *How (Un)ethical Are You?*, 81 Harv. Bus. Rev. 56 n. 2 (2003). [↑](#footnote-ref-24)
25. Iris Bohnet, Alexandra van Geen & Max Bazerman, *When Performance Trumps Gender Bias: Joint Versus Separate Evaluation*, 62 Mgmt. Sci. 1225 n. 5 (2016). [↑](#footnote-ref-25)
26. The authors believe that comparing multiple candidates requires more deliberative, System 2 reasoning than making a simple yes-or-no evaluation of a single candidate, which is decided by System 1 and is therefore more prone to be biased. Thus, when people need to decide between two candidates at the same time, their System 2 is more likely to monitor and reduce the potential disruptive effect of stereotypes of their decision-making. [↑](#footnote-ref-26)
27. Treviño, Weaver & Reynolds, *supra* n. 3. [↑](#footnote-ref-27)
28. Jason A. Colquitt & Jerald Greenberg, *Organizational Justice: A fair Assessment of the State of the Literature, In* Organizational Behavior: The State of the Science 165 (Jerald Greenberg ed., 2nd ed. 2003). [↑](#footnote-ref-28)
29. Yochi Cohen-Charash & Paul E. Spector, *The Role of Justice in Organizations: A Meta-Analysis*, 86 Org. Behav. & Hum. Decision Processes 278 n. 2 (2001); Jerald Greenberg, *Who Stole the Money and When? Individual and Situational Determinants of Employee Theft*, 89 Org. Behav & Hum. Decision Processes 985 (2002); Gary R. Weaver, & Linda Klebe Treviño, *Compliance and Values Oriented Ethics Programs: Influences on Employees’ Attitudes and Behavior*, 9 Bus. Ethics Q. 315 n. 2 (1999); Suzanne S. Masterson, Kyle Lewis, Barry M. Goldman & M. Susan Taylor, *Integrating Justice and Social Exchange: The Differing Effects of Fair Procedures and Treatment on Work Relationships*, 67 Acad. Mgmt. J. 738 n. 4 (2000). [↑](#footnote-ref-29)
30. 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, c.71 (UK), and the U.S. Department of Labor enforces the Fair Labor Standards Act of 1938 (FLSA) (29 U.S.C § 206 (1938)) which sets basic minimum wage and overtime pay standards. [↑](#footnote-ref-30)
31. Yitzhak Zamir "Ethics and Law", *in* **Introduction to Ethics** 21, 24 (Asa Kasher ed., 1st ed. 2009). [↑](#footnote-ref-31)
32. Alan J. Dubinsky, Rajan Nataraajan & Wen-Yeh Huang, *The Influence of Moral Philosophy on Retail Salespeople's Ethical Perceptions*, 38 J. Consumer Aff. 297 n. 2 (2004). [↑](#footnote-ref-32)
33. Marina Motsenok, Talya Steiner, Liat Netzer, Yuval Feldman & Raanan Sulitzeanu-Kenan, *The Slippery Slope of Rights-Restricting Temporary Measures: An Experimental Analysis*, Behav. Pub. Pol'y 1 (2020). [↑](#footnote-ref-33)
34. Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 Stan. L. Rev. 1161 n. 6 (1995). [↑](#footnote-ref-34)
35. Elaine W. Shoben, *The Use of Statistics to Prove Intentional Employment Discrimination*, 46 L. & Contemp. Probs. 221 n. 4 (1983). [↑](#footnote-ref-35)
36. Ronald E. Riggio, *Introduction to Industrial/Organizational Psychology* 80 (5th ed. 2008). [↑](#footnote-ref-36)
37. Elaine W. Shoben, *Probing the Discriminatory Effects of Employee Selection Procedures with Disparate Impact Analysis Under Title VII*, 56 Tex. L. Rev. 1 n. 1 (1977); Celia Moore, James R. Detert, Linda Klebe Treviño, Vicki L. Baker & David M. Mayer, *Why Employees Do Bad Things: Moral Disengagement and Unethical Organizational Behavior*, 65 Pers. Psychol. 1 (2012). [↑](#footnote-ref-37)
38. Patrick E. Murphy & Gene R. Laczniak, *Marketing Ethics: A Review with Implications for Managers, Educators, and Researchers*, *in* Review of Marketing 1981 251 (Ben M. Enis & Kenneth J. Roering eds., 2011). [↑](#footnote-ref-38)
39. Among other side effects to setting these goals, the researchers pointed to an increase in unethical behavior of employees. The investigators used the example of the 'Ford Pinto' case, see Lisa D. Ordóñez. Maurice E. Schweitzer, Adam D. Galinsky & Max H. Bazerman, *Goals Gone Wild: The Systematic Side Effects of Overprescribing Goal Setting*, 23 Acad. Mgmt. Perspectives 6 n. 1 (2009).See also: Maurice E. Schweitzer, Lisa Ordóñez, & Bambi Douma, *Goal Setting as a Motivator of Unethical Behavior*, 47 Acad. Mgmt. J. 422 n. 3 (2004). Barsky argues that goal setting impedes ethical decision making by making it harder for employees to recognize ethical issues and easier for them to rationalize unethical behavior, see Adam Barsky, *Understanding the Ethical Cost of Organizational Goal-Setting: A Review and Theory Development*, 81 J. Bus. Ethics 63 n. 1 (2008). Regarding police officers' targets, see Gabriele Jacobs, Frank D. Belschak & Deanne N. Den Hartog, *(Un)Ethical Behavior and Performance Appraisal: The Role of Affect, Support, and Organizational Justice*, 121 J. Bus. Ethics 63 (2014). [↑](#footnote-ref-39)
40. Max H. Bazerman & Ann E. Tenbrunsel, Blind Spots: *Why We Fail to Do What’s Right and What to Do about It* (2011). [↑](#footnote-ref-40)
41. Max H. Bazerman & Francesca Gino, *Behavioral Ethics: Toward a Deeper Understanding of Moral Judgment and Dishonesty*, 8 Ann. Rev. L. & Soc. Sci. 85 (2012). [↑](#footnote-ref-41)
42. For example, clause 13 of the Torts Ordinance in Israel obliges the employer to be liable for damages caused by the employee. The clause is relatively broad in its applicability because it obligates the employer to be responsible for any action taken by the employee in the course of his work. Moreover, the clause states that 'an act is deemed to have been done in the course of an employee's work, if done as an employee and when he performs the normal functions of his work and what involves in it even though the employee's act was an improper performance of an act permitted by the employer.' See Civil Wrongs Ordinance (New Version), 1972 (L.S.I vol. 2). [↑](#footnote-ref-42)
43. Ibid, §13, §14; For ultra vires doctrine in British law, see Douglas M. Branson, *Countertrends in Corporation Law: Model Business Corporation Act Revision, British Company Law Reform, and Principles of Corporate Governance and Structure*, 68 Minn. L. Rev. 53, 73–74 (1983). [↑](#footnote-ref-43)
44. The House of lords in England stated that vicarious liability may be established even when an employee was 'acting contrary to express instructions, see Dubai Aluminium Company Limited v. Salaam [2002] W.L.R 48 (A.C). [↑](#footnote-ref-44)
45. C.A. 445/88, **The Official Receiver as the Liquidator of North-America Bank v. Shtibel**, P. D. 44 (3) 331. [↑](#footnote-ref-45)
46. Draft Bill for Prevention of Abuse at Work, 2015, H.H 971. [↑](#footnote-ref-46)
47. Ibid, The explanatory notes to the bill. [↑](#footnote-ref-47)
48. For Example, L.C. (T.A.) 1727-01-14, **Rahman v. Lichi Translation Ltd**, para. 10 (Published, 6.18.2016). The Israeli Civil Service also began a pilot of remote work, but without reference to the expense reimbursement component, see Civil Service Commissioner's Guidelines Regarding Remote Work – According to the Purple Label Standards, 2020, [www.gov.il/BlobFolder/policy/home\_work\_guidelines/he/home\_work\_guidelines.pdf](https://www.gov.il/BlobFolder/policy/home_work_guidelines/he/home_work_guidelines.pdf); Civil Service Commissioner's Directive – Pilot to Execute Extra Work Hours From Home – Update Eligibility Rules, 2019, [www.gov.il/BlobFolder/policy/directive-6-2020/he/directive-6-2020.pdf.](http://www.gov.il/BlobFolder/policy/directive-6-2020/he/directive-6-2020.pdf..In)  In the context of the principled willingness to recognize digital work hours as legitimate working time, see Hani Ofek-Ghendler "Weisure Time – Between Work and Leisure in the Digital Era" **Eyoni Mishpat** 40 (2017) 5, 41–43. [↑](#footnote-ref-48)
49. For example, in the U.S, according to the Telework Enhancement Act of 2010, all government's agencies are obligated to form a remote working plan and obey specific demands that are purposed to encourage the use of this plan. Recently, The Families First Coronavirus Response Act was added to the Labor regulation in U.S. This new act doesn't change the time frame or the right to overtime work remotely (due to causes related to Covid-19) as provided in the Labor Act from 1938, except for the flexibility of the hourly framework of the working day, so that the counted working hours will be calculated according to the actual working hours that the employee preformed work, and according to the agreement between the employee and the employer. See, Wage and Hour Division – Department of Labor, *Paid Leave Under the Families First Coronavirus Response Act*, 85 Fed. Reg 19326 n. 66 (2020). In the E.U there is a policy that encourages remote work for several decades. This policy was reflected in signing a Framework Agreement between the major organizations of employees in the E.U, see Summaries of EU Legislation, *Teleworking*, EUR-Lex, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Ac10131>; The most advanced country, regarding Teleworking, is Netherland. In Netherland the Framework Agreement was adopted as a voluntary collective agreement. The agreement is backed by the government, that added additional policy measures in order to fulfil the main ideas of Telework. Those measures include tax benefits for employers that are using the Telework method among their employees, and framework agreement for remoter work in the public sector. These measures have led to a doubling of the proportion of employed persons from home in years 2003–2007, see *Working Anytime, Anywhere: The Effects on the World of Work*, Eurofound, https://www.eurofound.europa.eu/sites/default/files/ef\_publication/field\_ef\_document/ef1658en.pdf. [https://fs.knesset.gov.il/globaldocs/MMM/0badb26d-329b-ea11-8105-00155d0aee38/2\_0badb26d-329b-ea11-8105-00155d0aee38\_11\_16205.pdf.](https://fs.knesset.gov.il/globaldocs/MMM/0badb26d-329b-ea11-8105-00155d0aee38/2_0badb26d-329b-ea11-8105-00155d0aee38_11_16205.pdf. )  [↑](#footnote-ref-49)
50. Fair Labor Standards Act of 1938 (FLSA) (29 U.S.C § 207(b)(3)(e) (1938)):'"Regular rate" defined as used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include…(2)… other expenses' [↑](#footnote-ref-50)
51. Cal. Lab. Code § 2802 (1937). [↑](#footnote-ref-51)
52. *Gattuso v. Harte-Shoppers, Inc*., 42 Cal. 4th 554, 562 (S.C. 2007). [↑](#footnote-ref-52)
53. *Novak v. Boeing Co.*, 2011 U.S Dist. WL 9160940 (C.D. Cal. July 20, 2011). [↑](#footnote-ref-53)
54. *Companies must pay share of rent for employees working from home*, Swissinfo (May 24, 2020), [www.swissinfo.ch/eng/business/court-decision\_companies-must-pay-share-of-rent-for-employees-working-from-home/45781126](http://www.swissinfo.ch/eng/business/court-decision_companies-must-pay-share-of-rent-for-employees-working-from-home/45781126). [↑](#footnote-ref-54)
55. Penguin, *Aristotle: Ethics* 198–200 (Jak Thomson trans., 1976). [↑](#footnote-ref-55)
56. Municipality of Metro. Seattle v. Public Employment Relations Com, 118 Wn.2d 621 (Wash. 1992); Martin H. Malin, *Public Employees' Right to Strike: Law and Experience,* 26 U. Mich. J. L. Reform 313, 329 (1993). [↑](#footnote-ref-56)
57. See the Jerusalem Labor Court's recognition of the workers' organization established by 'Pothim Atid', which is a subsidiary of the Jewish Agency, as a representative workers' organization of the company's employees. This is a precedent ruling, recognizing for the first time an internal workers' organization as a workers' organization without external mediators. See L.C. (Jm.) 38562-06-16, **Project 'Pothim Atid' in the Agency Workers' Organization v. The Maof Union – The New Workers Union** (Published, 6.19.2016). [↑](#footnote-ref-57)
58. On July 7, 2016, the New Brunswick Court of Appeal in *Attorney General of Canada v Mullin and Workplace Health, Safety and Compensation Commission*, 2016 NBCA 31, restored an original denial of compensation for a claim of gradual onset mental stress issued by WorkSafe NB.See Derek Sankey, *Workplace Stress on Rise*, Calgary Herald (29 Feb. 2012), [http://www.calgaryherald.com/business/workplace+stress+rise/5200301/story.html](http://www.calgaryherald.com/business/workplace+stress+rise/5200301/story.html" \t "_blank). [↑](#footnote-ref-58)
59. Max. L. Veech & Charles R. Moon, *De Mininis Non Curat Lex*, 45 Mich. L. Rev. 537 n. 5 (1947); Anna Funder, *De Minimis Non Curat Lex The Clitoris, Culture and the Law*, 3 Transnat'l. L. & Contemp. Probs. 417 (1993); Frederick G. McKean, Jr., *De Minimis Non Curat Lex*, 75 U. Pa. L. Rev. 429 (1926-1927). [↑](#footnote-ref-59)
60. Compare with the general principles in criminal and constitutional law, see Alon Harel & Ariel Porat, *Aggregating Probabilities Across Cases: Criminal Responsibility for Unspecified Offenses*, 94 Minn. L. Rev. 261 (2009);Brandon L. Garrett, *Aggregation and Constitutional Rights*, 88 Notre Dame L. Rev 593, 641–648 n. 2 (2012). [↑](#footnote-ref-60)
61. H.C. 3434/96, **Hofnong v. The Knesset's Chairman**, P. D. 50 (3) 57; C.A. 1333/02, **The Regional Committee for Planning and Building, Raanana v. Horwitz**, P. D. 58 (6) 289. [↑](#footnote-ref-61)
62. 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 Auth*., 45 F.3d 646, 652 (2d Cir. 1995)*; Lindow v. United States*, 738 F.2d 1057, 1062–63 (9th Cir. 1984). [↑](#footnote-ref-62)
63. *Lindow*, Ibid; Anderson *v. Mt. Clements Pottery Co.*, 328 U.S. 680, 692 (1946);*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-63)
64. Codifying at 29 C.F.R. § 785.47, See Wage and Hour Advisory Memorandum No. 2006-2 (May 31, 2006), <https://www.dol.gov/agencies/whd/field-assistance-bulletins/2006-2>. [↑](#footnote-ref-64)
65. Ibid. [↑](#footnote-ref-65)
66. Jens Meyer-Ladewig, *The Principle of "De Minimis Non Curat Praetor" in the Protection System of the European Convention on Human Rights*, 5 Const. L. Rev. 127 (2012); Harris, S.J. Harward, E.D. (Ed.). (1983). Need for a de minimis policy. United States: Atomic Industrial Forum, Inc.; Selin Özden Merhact & Vehbi Umut Erken, *From Anglo-American Law to Continental European Law – De Minimis Rule in Private Law*, 9 Inonu U. L. Rev. 49 N. 2 (2018). [↑](#footnote-ref-66)
67. *Troester v. Starbucks Corp.*, 5 Cal. 5th 829 (S.C. 2018). [↑](#footnote-ref-67)
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