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

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*The field of behavioral ethics seeks to understand how people behave when confronted with ethical dilemmas. It has documented the mechanisms though which people may engage in unethical and illegal behavior without fully recognizing its meaning. In the field of employment law, which focuses on the interaction between employees and employers, the issue of the subtle mechanisms, which can account for people’s decisions to behave unethically is especially relevant, but has not been the subject of significant study. 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. The paper identifies three contexts in which the behavioral ethics perspective can change the current legal approaches:workplace bullying; workplace flexibility; and small, daily violations. 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. It identifies how employment law is struggling to address this problem and demonstrates how the paradigms of employment law can change and even benefit when taking behavioral ethics into account.*

1. Introduction

Behavioral ethics focuses on people’s inability to recognize the extent to which self-interest affects their own behavior.[[1]](#footnote-4) While legal but ethically inappropriate behavior has been the subject of critical work, particularly in the context of corporations,[[2]](#footnote-5) 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.[[3]](#footnote-6) A related theory, “ethical fading”,[[4]](#footnote-7) 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,[[5]](#footnote-8) reasoning[[6]](#footnote-9) and memory.[[7]](#footnote-10) Finally, behavioral ethics is more concerned with the implicit effects of self-interest than with its effects on explicit choices.[[8]](#footnote-11) The following will delve into some 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,[[9]](#footnote-13) and the fact that these biases operate without awareness makes it difficult for people to notice. 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 is automatic, viscerally compelling, and often unconscious.[[10]](#footnote-14) 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.[[11]](#footnote-15)

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,[[12]](#footnote-18) 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.[[13]](#footnote-19) 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.[[14]](#footnote-20) 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.

Behavioural ethics can be used to increase ethicality and compliance with positive social norms in the workplace. In the case of workplace environments, where the same people work closely together every day, the risk of such influence is inevitably exacerbated,[[15]](#footnote-21)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.[[16]](#footnote-23) The importance of understanding social norms within the workplace become clear given the daily interactions and dominance of employers regulation norms.[[17]](#footnote-24)

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.[[18]](#footnote-25) 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. it is preferable to shape and limit the ethical biases that determine how people approach dilemmas even before they consciously begin determining how to solve them. The recommended approach is to impel people, ex-ante to recognize when they are engaging in bad behavior rather than focus on assigning responsibility to them, ex-post.[[19]](#footnote-28) Making them recognize their unaware unethicality behavior, should help curtail such conduct.[[20]](#footnote-29) 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.[[21]](#footnote-30)

In light of this, alternative approaches to changing workplace ethics could be developed, especially for more subtle violations that go beyond traditional legal sanctions. For example, Bohnet, Bazerman, and Van Geen[[22]](#footnote-31) 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.

Given that people’s unethical behavior is frequently 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. 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.[[23]](#footnote-41) 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.[[24]](#footnote-42)

The field of behavioral ethics seeks to define patterns of behavior in managing these aspects of the relationship between an employee and an employer, providing new insights into the cognitive, situational, and social factors that influence the likelihood of violation by employees. the ethical contexts in which they operate. While organizational justice became one of the most studied organizational behavior topics in the 1990s,[[25]](#footnote-44) and significant advances have been made 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, the implication of this literatures to understanding the evasion of duties by employers rather than employees was not studied.[[26]](#footnote-45)

1. How behavioural approach contributes to employment law

Labour rights are entitlements that relate specifically to the role of being a worker, includes, among others, the right to fair working conditions, which may be based on a foundation of dignity. Those labour rights are, positively perspective, recognized as human rights,[[27]](#footnote-46) driven from the Marxist instrumental approach.[[28]](#footnote-47) Certain labour rights are compelling as claims that prohibit grave moral wrongs,[[29]](#footnote-48) and the right to be protected from can readily be recognized as an essential in a catalogue of labour rights.

One of the justifications is the conventional wisdom, whereby there are gaps between the power of the employee and the employer. For this reason, the starting point is that employees may be exploited by the employer and need the protection of the law.[[30]](#footnote-49) These gaps are also important in terms of compliance with the law. That is, even where the law does apply, employers operate in an environment with enforcement difficulties, and these conditions make disintegration worthwhile.[[31]](#footnote-50) This assumption is based on an unequal relationship between the employer and the employee that produces a work environment in which moral dilemmas may arise.[[32]](#footnote-51)

The idea of coming to the aid of employees is the moral foundation of the narrative of labour law,[[33]](#footnote-52) and the question of whether and in what way the addition of references to ‘human dignity’ aid in this elaboration is one which is of much interest. For that, we suggest a broader normative basis for labour law through behavioral perspective. Currently, labour law focused on the workplace set and two actors, workers and employers. This has simplified the explanatory power and moral force of labour law.[[34]](#footnote-53) As argued by Herzog, those moral rights are part of meta-ethical discussion.[[35]](#footnote-54) Herzog lays out her main argument, that organizations should respect basic moral norms because of the potential to amplify harm and the intensity of interactions with individuals, addressing the nature of working relationships as often having moral weight,[[36]](#footnote-55) which can lead to morally wrong decisions.[[37]](#footnote-56). Even when a behavior is not clearly covered by the law, or even in situations where the law provides protection, there are grounds for concern that the employee will underestimate the importance protecting their rights.

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, or agree to a particular behavior, the employee is usually expected to remain loyal to the organization.

There are numerous areas of organizational behavior in which ethical issues arise. To clarify, consider the following examples within hiring proceedings and third parties issue. Hiring by personnel departments, which engage in a number of diverse practices and a wide range of decision-making processes regarding applicants.[[38]](#footnote-58) This study will identify and analyze the impact of employer demands that can cause an employee to make unethical decisions, sometimes illegal or immoral (or against their conscious), some of which may even be prohibited under the law, but others of which are permissible by law but nonetheless considered immoral. These actions of abuse can be offensive or insulting. 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, during hiring, 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.[[39]](#footnote-59)
For example, in the case of sales people unethical conduct, as documented by Murphy and Laksenyak,[[40]](#footnote-61) The research suggests that sales practices can have a negative impact on their ethical behavior, must be clarified. In a study conducted by Ordonzo and others nearly every sales workplace sets daily goals, which often encourage ,if not pressure, employees to engage in questionable conduct just to meet their quotas, thus causing them both reputational and legal damage.[[41]](#footnote-62) Bazerman and Tenbrunsel have suggested a comprehensive set of solutions for policymakers based on insights derived from the behavioral ethics literature.[[42]](#footnote-63)

It is also possible to identify situations in which organizational requirements or culture will adversely affect employees’ behavioral ethics toward third parties. Studies of workplaces ethical culture have shown that when an employee is asked to engage in conduct the employee considers immoral or unethical, as a consequence of norms used to benefit the organization might cause the employee to sacrifice their ethical integrity[[43]](#footnote-66) Although this behavior is aimed at a third party and not between the employer and the employee, there is a concern this employees' behavior will lead to his dismissal on disciplinary grounds, even though the employer himself initiated that behavior, directly or indirectly. These can be assumed to be especially true when the third party chooses to sue the employer. 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.[[44]](#footnote-70) . 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.

These cases have significance both in terms of compliance with labor law and in terms of enforcement. The employee is in a dilemma, the managerial prerogative of the employer allows him to demand a certain behavior. The employee for his part, if he does not feel comfortable can terminate his employment, and will be considered to have resigned voluntarily. In another case, if he decides to oppose this course of conduct, the employer can dismiss him. Either way, the moral dilemma may arise for an employee in his or her workplace.

We do distinction between minimum standards that labour law wishes to apply on every employer, and additionalstandards that go beyond that minimum. By referring to behavioral ethics, we suggest to encourage higher standards of the mandatory minimum behavior within work relations. Davidov had well noted that a possible solution can be open-ended labour standards.[[45]](#footnote-71) He gives fairness and good faith as examples, we would like to offer ethics as another one.[[46]](#footnote-72) In contrast to ruls, Good ethics would than consider as a general idea and could assist us in a broad range of circumstances, as it can be included within the broad aspect of good faith at work. In some sense, the good faith duty can be seen through behavioral point of view. This mechanism can allow courts to add an important protection in the absence of reference in legislation. Raday also refer to the subject, she review a German case, which protects the right of the employee to act in accordance with the order of his ethical conscience.[[47]](#footnote-73) Weiss and Geck also refer to the German Law, where the constitutional guarantee of freedom of conscience has played an increasingly important role.[[48]](#footnote-74) Thus, unlike a conscientious objector in the context of religious belief, which is protected by, among others, Israeli[[49]](#footnote-75) and American law,[[50]](#footnote-76) an employee's conscientious order is less acceptable in terms of his ethics. Paz-Fuchs also referred to this in his article, according to which the courts tend to defend this right only when it is accompanied by a violation of protected constitutional rights.[[51]](#footnote-77)

Employers may act knowing that most employees will not sue, due to various barriers, cause them often to prevent of self-enforcement,[[52]](#footnote-78) and in cases where a claim is filed, they will be required to pay what they should have paid in the first place. Davidov elaborated on this, noted among other things, that employers' behavior, can aims to create labor relations that provide fewer rights for employees, as it violates specific legal requirements.[[53]](#footnote-79) And elsewhere, he noted, that as long as the power imbalance that characterizes the employment relationship exists, self-enforcement will remain unrealistic for many employees.[[54]](#footnote-80) That says, employers often have strong incentives for non- compliance; employ­ees usually face various barriers that prevent self- enforcement.

Understanding how to undermine negative effects of employees’ likelihood of behaving unethically could enhance the likelihood of employees fighting for their rights. Employees, who are pushed to break the law, might be less likely to come forward litigate in courts for exploitation of their own employment rights, fearing that going to court might jeopardize them. The discussion will focus on three issues: workplace bullying, workplace flexibility and small, daily violations. On this last issue, we will seek to examine the trial's reference to petty violations, using doctrineof the De minimis legal principle.

*3.1 Workplace Bullying*

The issue of workplace bullying, also known as “workplace maltreatment,” “workplace abuse”, or “workplace harassment,” creates a hostile workplace environment for the employee, often harming the mental or physical health of the worker.[[55]](#footnote-81)
Although the field of abuse at work by the employer is also not fully regulated, we would like to specifically point out workplace bullying within the context of aggressive clients or suppliers, who are, in essence, third parties to work relations. An increase in this problem of workplace bullying in the context of bullying 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 behaviours, some of which can be bad. Should an employer be held liable for customer harassment? In the absence of federal U.S.A legislation prohibiting generic workplace bullying, several states are considering legislation that would provide severely bullied employees with a claim for damages if they can prove that they suffered mental or physical harm as a result of the bullying. For example, a bill that was introduced in Massachusetts in 2017, would prohibit all "abusive conduct" against employees, even if it is not based on a protected characteristic.[[56]](#footnote-82) In Israel, there is no Law reference to workplace harassment, the issue is being addressed by labor courts.[[57]](#footnote-83) The legislature also found a special interest in this and promoted an Israeli bill for the Prevention of Abuse at Work passed a preliminary reading in the Knesset in July 2015.[[58]](#footnote-84) The managerial prerogative does not gives the employer unlimited powers, it must be exercised in good faith and while examining the employee's interest.[[59]](#footnote-85) The explanatory notes to the bill emphasize that workplace bullying is a widespread social phenomenon that harms many workers.[[60]](#footnote-86) Under this approach, discrimination or harassment at the workplace originating from third parties such as clients, is considered the responsibility of the employer. It is only a proposal, and while abusive behavior as sexual harassment is protected by law,[[61]](#footnote-87) also in the context of third parties, other abuse does not receive protection. This means, beyond the impact on work environment, that the employer is not obligated to enforce appropriate conduct towards the employee and is not obligated to compensate the employee for such conduct done towards him.

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 creating clear ex-ante definitions of what count as bullying and not rely on the ability of the employees to recognize when bullying happens and bring claims to court. As abusive behavior, while not always hard to define can have a negative impact on the employee’s work. 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.[[62]](#footnote-88)

The fact that there is not clear legal definition to what is considered to be bullying is clearly problematic, also by rational choice account, however from the behavioral ethics perspective, this might be even more problematic both from the perspective of the employer and that of the employee.

One of the classical mechanism in behavioral ethics suggest that under conditions of ambiguity, the moral wiggle room,[[63]](#footnote-89) create the room for people to self-justify the behavior which best serves their self-interest. Thus employer bullying could be done without a recognition that what they do counts as bullying. Under such circumstances when the employee himself is uncertain of what a line was crosses will hassitate to bring such claim to court. Thus again bullying which doesn’t involve especially gross acts of agreesion might be less likely to be challenged in court . employment law can protect the employee when such behavior occur, by clarifying and creating ex-ante certainty about which cases are considered bullying and which are not, and in general, the practice of the law on this issue may raise awareness and thus help minimize the phenomenon.

*3.2Workplace 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,[[64]](#footnote-90) 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, most of them have a reference point, such as the case of work hours that are well defined in the law and the problem is how it will be possible to ensure that the employee actually works according to these rules. This article will review one effect 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 a 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 work purposes.

Most countries have adopted a policy about working from home, without addressing the issue of reimbursement of expenses to employees,[[65]](#footnote-91) Most have regulated the issue with legislation or employment agreements, which allows employers the right to choose. As part of the various arrangements, there are references to the definition of work from home and the extend of it, the employees' availability and the supervision of working hours. 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. Addressing the Federal Fair Work Act, we notice that the employer cannot be compelled to bear those costs, unless it means that the employee is under wage paid.[[66]](#footnote-93) 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.[[67]](#footnote-94) 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.[[68]](#footnote-95) 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.[[69]](#footnote-96)

 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,[[70]](#footnote-98) with labor and employment laws notably not offering direction on this question.

Herea mandatory requirement for reimbursement might be needed as behavioral ethics might suggest that employees might not be good in negotiating their reimbursement for such costs. . This issue can be expected to preoccupy labor courts and judicial tribunals around the world in the future.Apparently, the additional cost of these expenses for working from home is relatively marginal albeit could accumulate to become substantial. With such uncertainty and inability to estimate in advance, the costs both the employers and employees might under estimate the importance of negotiating a fair reimbursement settlement between them.

 *3.3 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. Noted the difference between small contractual violations, where lack of action may be seen as acceptance, and small violations of employment laws, where acceptance is irrelevant. We seek to focus on violations that have meaning in terms of labor law. Allegedly, a violation of protective legislation in labor law, but there is also the possibility of addressing a contractual violation, between two parties. However, when the parties are an employee and an employer, the power attributed to the employer dictates a different approach to the agreements between them and therefore in the case of violations.

Behavioral theories help to understand why employees are willing to tolerate behavior against them that does not comply with labor laws, often by repeated minor violations,[[71]](#footnote-103) thereby undermining the ability to enforce labor laws and the law to evolve. In the employer-employee relationship, issues of smaller violations of employees’ rights are unlikely to be addressed. While some of them, are not reflected in the provisions of law they are still likely to have a significant impact on employees’ conduct. [[72]](#footnote-104) Thus, for example, there are references that are not considered abuse and those that the law of discrimination does not address. These references can relate to the employee's behavior, but be made in an abusive manner that relates to the employee's character. In addition, there can be an employer demands that can cause an employee to make unethical decisions, sometimes illegal or immoral. But most of all, it is possible to point out areas that labor law regulates, but actual enforcement is scarce. For example, the requirement for overtime work will rarely rich courts, when the sums are relatively small.

While there has been considerable research into the protection of employees’ rights in the context of employment law,[[73]](#footnote-105) the assumption is employees usually avoid litigation,[[74]](#footnote-106) especially for more benign type of legal violation of their rights. For example, employers who mistreat their employees might be penalized only if the violation is egregious enough, so the employee would file a claim against the employer. However, from a behavioral ethics perspective, it might be the case that such employers are actually more likely to harm more employees in the long run, especially because people might fail to recognize such smaller repeated violations of employees’ rights.[[75]](#footnote-107) In the long run such accumulation of violation of rights might emerge to a gross violation which traditional employment law approach might fail to notice, if the prolonged pattern is not discovered and treated accordingly.[[76]](#footnote-108)

Part of the ethical aspect of employers' behaviour assumes that some of the behaviour that creates harm to the employee, which does not necessarily amount to a violation of rights, at least not clearly, is done due to the assumption that protection against abusive behavior has a cost.[[77]](#footnote-109) It can be assumed that a behavioural approach to labor law can explain non-compliance with standards, which do not a violation of legislation.[[78]](#footnote-110) Moreover, as long as it is a minor violation, there is no incentive for the employee to file a lawsuit and the courts do not always mobilize for this, due to a perception of a waste of judicial resources. 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.

Although this study deals with violations towards the employee, it is important to note, especially in this issue of small violations, that it 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.[[79]](#footnote-111)

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 that 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. The employee's lack of response has behavioral significance, in the form of consent to the employer's behavior. In the legal aspect, although the employee cannot waive his rights and the consent aspect is meaningless. However, as the employee treats these violations as minor violations he may not stand up for his rights. This issue can arise by small contractual violations and small violations of employment laws. Although the laws are usually mandatory, there is an obligation, one arises from the provisions of the law and the other from the provisions of the contract. In both cases, the employment relationship between the two dictates the legal rule by which the case will be examined, as well as the legal jurisdiction of the Labor Court. Both violations are lack of action may be seen as acceptance (whether the violations are small or not); this is not the case for violations (however small) of the law, where acceptance is irrelevant. Regardless of the context of these small violations, not only does the law not consider them worthy of attention, as it tends to consider these violations as too minimal to warrant employment law protection,[[80]](#footnote-112) 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.

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,*[[81]](#footnote-113) 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.[[82]](#footnote-114) 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.[[83]](#footnote-115) 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.”[[84]](#footnote-116) 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.”[[85]](#footnote-117) 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*. [[86]](#footnote-118)

 The United States Department of Labor (DOL) has advised that the *de minimis* rule apply to the aggregate daily time for all activities for which an employee seeks compensation, and not to time spent separately on each discrete activity.[[87]](#footnote-121) 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.[[88]](#footnote-122) 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.[[89]](#footnote-123) 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).[[90]](#footnote-124) 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. 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.”[[91]](#footnote-125) 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.[[92]](#footnote-126)

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 has repercussions on 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.

Conclusion

This paper examined in what ways, good people behaving with limited awareness of the full legal and ethical meaning of their actions, are especially problematic in the context of employment law. We analyzed how the paradigms of labor law can change and even benefit when considering behavioral ethics, particularly with regard to understanding employment law compliance.[[93]](#footnote-131)

We have focused on three main issues to demonstrate our argument. We showed how behavioral theories are essential to understanding why employees are willing to tolerate behavior against them that does not comply with labor laws, often by repeated minor violations, The second issue was related to regulation of workplace bullying and help justify imposing a duty on the employer to exhaust all options to ensure a safe and protected work environment for employees. The third issue, we have discussed is related to workplace flexibility issue, offer a solution and place a duty on the employer to cover certain costs. Finally, we discuss the importance of recognizing repeated small legal violation in the context of employment relations, where there are imbalances of powers between the parties. Clearly, without enforcement, law will have very little effect on employees’ rights.

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83. 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); [↑](#footnote-ref-115)
84. 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-116)
85. 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-117)
86. *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-118)
87. 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-121)
88. 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-122)
89. *Troester v. Starbucks Corp.*, 5 Cal. 5th 829 (S.C. 2018). [↑](#footnote-ref-123)
90. Fair Labor Standards Act of 1938 (FLSA) (29 U.S.C § 213 (a)(1) (1938)). [↑](#footnote-ref-124)
91. *Rodriguez v. Nike Retail Serv*s., 928 F.3d 810, 818 (9th Cir. 2019). [↑](#footnote-ref-125)
92. Sean L. McLaughlin, *Controlling Smart-Phone Abuse: The Fair Labor Standards Act’s Definition of “Work” in Non-*Exempt Employee Claims for Overtime, 58 Kan. L. Rev. 737 (2010). [↑](#footnote-ref-126)
93. Chaim Gans "The Concept of the Duty to Obey the Law" **Mishpatim** 17 (1988) 507. [↑](#footnote-ref-131)