

To: Our Clients and Friends

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Civil Penalties Available for Suitable Seating Violations

Bright v. 99¢ Only Stores Confirms that PAGA Penalties Can Be Recovered

A number of big box retailers recently have been hit with lawsuits for failure to provide suitable seating to cashiers. The California wage order covering the retail industry requires employers to provide working employees with suitable seats when the nature of the work reasonably permits their use. When the nature of the work reasonably requires standing, employers must provide an adequate number of suitable seats placed in reasonable proximity to the work area for employees to use when they are not engaged in their active duties and use of the seats would not otherwise interfere with the performance of their duties.

The wage order does not provide for damages and it only provides for penalties if an employee is underpaid. Plaintiffs' class action counsel have argued that such a wage order violation should be subject to the default penalties under California's Labor Code Private Attorneys General Act of 2004 ("PAGA"). In a newly published decision involving 99¢ Only Stores, a California Court of Appeal determined PAGA penalties are available for suitable seat violations.

What Are PAGA Penalties?

The default PAGA penalties consist of \$100 for each aggrieved employee per pay period for initial violations, and \$200 for each aggrieved employee per pay period for each subsequent violation. Courts have discretion to reduce the amount of the penalty awarded when an award would otherwise be unjust, arbitrary and oppressive, or confiscatory. Seventy-five percent of the penalty awarded must be paid to the California Labor and Workforce Development Agency. The aggrieved employees can recover 25 percent of the penalty awarded. An employee can recover PAGA penalties on behalf of a group of affected employees without having to meet class action standards. Successful plaintiffs' counsel can recover attorneys' fees. Court approval is required for a settlement of PAGA penalty claims.

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What Can I Do to Reduce Exposure to Suitable Seat Claims?

California retailers should look at their job classifications to determine whether they consist of duties employees can perform while seated, or whether seating should be made available while an employee is waiting to be engaged. Cashiers are an obvious example. If cashier work stations are too small for a stool, or their work would be impeded by the presence of a seat, consider providing seats nearby for use while cashiers are waiting to be engaged. Look at certain specialty positions to determine whether seats should be provided, such as: customer service, returns and lay away. Also consider whether a seat should be provided to employees in certain specialty departments with mandatory staffing requirements, such as jewelry or electronics.

Who can I contact for more information?

If you have any questions or would like additional information on this topic, please do not hesitate to contact Julie Patterson (949-223-7144 or jepatterson@bryancave.com) or Pam Calvet (310-576-2390 or pcalvet@bryancave.com). You can also contact any member of our [Retail Group](#) to discuss further.

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