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Labor & Employment ADVISORY ■

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California Supreme Court Expands "Suitable Seating" Requirements

In an opinion with far-reaching implications for California employers and one that will change the posture of California's "suitable seating" law, the California Supreme Court recently provided further guidance on how one of California's previously obscure Wage Order provisions, which requires that "all working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats," should be applied. *See Kilby v. CVS Pharmacy*, California Supreme Court (S215614) (April 4, 2016).

In its opinion, the court addressed questions certified by the Ninth Circuit, which is hearing appeals in two federal district court cases involving application of the Wage Order requirements. The court specifically addressed three issues:

- Does the phrase "nature of the work" refer to individual tasks or the entire range of an employee's duties?
- What factors should the court consider when determining whether the nature of the work "reasonably permits" use of a seat?
- If an employer has not provided any seat, must a plaintiff prove that a suitable seat is available in order to show that the employer has violated the seating provision?

First, the court concluded that the phrase "nature of the work" refers to employee tasks performed at a given location, such as a cash register, for which a right to a suitable seat is claimed, rather than a consideration of the entire range of an employee's duties. Second, the court also concluded that whether the nature of the work reasonably permits seating is a question to be determined objectively based on the "totality of the circumstances." Finally, the nature of the work aside, if an employer argues that there is no suitable seat available, the burden is on the employer to prove unavailability.

The Underlying Federal District Court Cases

The underlying circumstances giving rise to this opinion involve two federal district court cases: *Kilby v. CVS Pharmacy*, (S.D. Cal. 2012) 2012 U.S. Dist. Lexis 76507, and *Henderson v. JPMorgan Chase* (C.D. Cal. 2013) 2013 U.S. Dist. LEXIS 185099. In *Kilby*, a customer service representative filed a class action suit alleging that CVS violated California Wage Order No. 7-2001 (applicable to the mercantile industry). Section 14(A) provides that "all working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats." The district court concluded that in evaluating the nature of the work, the employee's entire range of assigned duties needed to be considered in determining whether the work "permits the use of a seat or requires standing." Finding there was no

dispute that many of the duties performed by clerk cashiers at CVS require the employees to stand while performing them, the court granted summary judgment to CVS, and Kilby appealed.

In *Henderson v. JPMorgan*, Henderson, along with three other bank tellers, filed a class action suit for violation of California Wage Order No. 4-2001, § 14(A), which has the same language as Wage Order No. 7-2001 but applies to professional, technical, clerical, mechanical and similar work occupations. The court in that case noted that bank tellers had duties associated with their teller stations, including accepting deposits, cashing checks and handling withdrawals, but that they also had "standing" duties away from their stations, such as escorting customers to safe deposit boxes, working at the drive-up teller window and making sure that automatic teller machines are working properly. The district court concluded that these duties varied depending upon the shift or branch location and whether the employee was a lead or regular teller. Based on these differences, the court denied class certification, and Henderson appealed.

The California Supreme Court Analysis

Because of the uncertainty regarding how California courts would interpret these Wage Order provisions, the Ninth Circuit requested the California Supreme Court to issue an opinion on the three questions. Beginning with the proposition that wage and hour claims are governed by two overlapping sources of authority, the California Labor Code and a series of 18 Wage Orders adopted by the California Industrial Welfare Commission (IWC), the court provided a historical summary of the seating provision, noting that the original provision enacted in 1911 was designed to "provide suitable seats for all female employees." The court pointed out that in 1972 and 1973, the Labor Code was amended to allow the IWC to make its wage orders applicable to all employees regardless of age or gender. More importantly, the court noted that the IWC modified the Wage Orders in 1976 to incorporate a "reasonableness standard."

In its opinion, the court gave deference to the position of the California Labor Commission and California's Division of Labor Standards Enforcement (DLSE), which is authorized to enforce California's labor laws and has issued opinion letters interpreting various Wage Orders. The court noted the DLSE has taken the position that the reasonableness standard in the subject provisions requires it to consider *all* existing conditions regarding the nature of work performed by employees. The DLSE would, upon an examination of the nature of the work, "determine whether the work reasonably permits the use of seats for working employees under subsection (A) of Section 14, and whether proximate seating has been provided for employees not engaged in active duties when such employees are otherwise required to stand under subsection (B)."

In interpreting the term "nature of the work" within the phrase "when the nature of the work reasonably permits the use of seats," the court rejected the defendant employers' view that the language requires the trier of fact to weigh all of an employee's "standing" tasks against all of the "sitting" tasks. The court concluded that "there is no principled reason for denying an employee a seat when he spends a substantial part of his workday at a single location performing tasks that could reasonably be done while seated, merely because his job duties include other tasks that must be done standing." The court further concluded that lower courts must examine subsets of an employee's total tasks and duties by location and consider whether it is feasible for an employee to perform each set of location-specific tasks while seated.

The Employer's Use of Business Judgment

While the court noted that it was applying a reasonableness standard, which is intended to balance an employee's need for a seat with an employer's considerations of practicality and feasibility, the court nonetheless tethered its analysis to the proposition that an employer's business judgment "cannot control or otherwise provide a basis for defeating the remedial purpose of the regulation."

The court concluded that business judgment – which defendant employers argue should be paramount, especially when consistent with the custom, usage and practice in the industries – does not encompass an employer's *mere preference* that a particular task be performed while standing.

In considering the physical layout of California workspaces, the court concluded that the physical layout of a workspace may be relevant in the "totality of the circumstances" inquiry, but it explained that an employer's mere preference for standing cannot constitute a relevant business judgment requiring deference: "An employer may not unreasonably design a workspace to further a preference for standing or to deny a seat that might otherwise be reasonably suited for the contemplated tasks."

Finally, the court also noted that it did not agree with the employers' position that physical differences among employees must be taken into consideration to determine whether employees could uniformly perform their duties with a standardized type and size of seat. The court held that the seating provision never suggested that physical differences among employees were relevant when considering whether any employee may work while seated. The court concluded that an employer seeking to be excused from the requirement bears the burden of showing that compliance is infeasible because no suitable seating exists.

Implications and Employer Takeaways

The implications for California employers, especially retail businesses and banking institutions, are significant. The court's new interpretations of existing regulations change the landscape of existing custom and practice for many California operations and create potential exposure to class action litigation and Private Attorney General Act (PAGA) claims, which were first raised in California about five years ago in the *Bright v. 99 Cents Only Stores* case. That case allowed plaintiff's attorneys to bring PAGA claims for violations of the suitable seat regulations and seek PAGA penalties. Employers are cautioned to review their existing practices and take the following proactive measures:

- Review and analyze your employees' duties to determine if particular tasks can be accomplished while seated.
- Review the physical layout of your existing work spaces in the context of the duties of your workforce and determine if seats can be installed, if necessary.
- Determine what tasks truly require standing and evaluate tasks to determine if they can be done sitting down.
- Determine the feasibility of seating by analyzing whether any transitions from sitting to standing unreasonably interfere with work tasks and are justified.
- Review all job descriptions to determine if they are consistent with a review of the physical requirements of the job.

Finally, because the standards articulated by the California Supreme Court turn on questions of reasonableness and the totality of the circumstances, the *Kilby* decision opens the door to additional litigation against employers regarding suitable seating requirements, and thus any decision by an employer to require standing for a particular employment classification should be amply detailed, justified and documented.

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