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CLIENT ALERT

Employers: Are You Sitting Down? New California Supreme Court Ruling Clarifies Seating Rules

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On April 4, 2016, the California Supreme Court, in *Kilby v. CVS*, addressed three questions regarding California's seating law for the U.S. Court of Appeals for the Ninth Circuit. California's seating requirement is found in wage orders published by the California Industrial Welfare Commission (IWC), which state that "[a]ll working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats." (Cal. Code Regs., tit. 8, §§ 11040, subd. 14(A) (Wage Order No. 4-2001), 11070, subd. 14(A) (Wage Order No. 7-2001).) These seating requirements apply broadly across many types of workers in California, and the impact of this decision will be widespread across the state.

The Ninth Circuit is currently considering two federal appeals involving the seating requirements in two different industries. The first suit, *Kilby v. CVS Pharmacy, Inc*., involves a customer service representative for CVS who filed a class action lawsuit alleging CVS violated Wage Order No. 7-2001, which applies to the mercantile industry, by not providing her a seat during certain tasks. The district court concluded that it must consider an employee's "entire range of assigned duties" when determining whether the work permits the use of a seat or requires standing, and granted summary judgment in favor of CVS. The employee appealed.

The second seating case, *Henderson v. JPMorgan Chase Bank NA*, involves a group of bank tellers at Chase Bank branches alleging violation of the seating portion of Wage Order No. 4-2001, applicable to "professional, technical, clerical, mechanical, and similar occupations." The bank tellers had duties that were associated with their teller stations, but also had various other duties that differed according to their individual branches, and whether they were a "regular" teller or a "lead" teller. Based on these differences, the district court denied class certification, and the tellers appealed.

The three questions certified by the Ninth Circuit for the California Supreme Court's review were:

1. Does the phrase "nature of the work" refer to individual tasks performed throughout the workday, or to the entire range of an employee's duties performed during a given day or shift?
2. When determining whether the nature of the work "reasonably permits" the use of a seat, what factors should courts consider? Specifically, are an employer's business judgment, the physical layout of the workplace, and the characteristics of a specific employee relevant factors?

3. If an employer has not provided any seat, must a plaintiff prove a suitable seat is available in order to show that the employer has violated the seating provision?

In brief summary, the California Supreme Court answered as follows:

1. The "nature of the work" refers to an employee's tasks performed at a given location, for which a right to a suitable seat is claimed, rather than a "holistic" consideration of the entire range of an employee's duties anywhere on the jobsite during a complete shift. If the tasks being performed at a given location reasonably permit sitting, and provision of a seat would not interfere with performance of any other tasks that may require standing, a seat is called for.
2. Whether the nature of the work reasonably permits sitting is a question to be determined objectively based on the totality of the circumstances. An employer's business judgment and the physical layout of the workplace are relevant, but not dispositive factors. The inquiry focuses on the nature of the work, not an individual employee's characteristics.
3. 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.

Analysis

Defendants in the two cases argued that examining the "nature of the work" required a "holistic" approach, with due consideration to *all* of an employee's tasks and duties throughout a shift. The California Supreme Court disagreed, however, stating this approach was too broad and ignored important factors such as the duration and frequency of each task.

Plaintiffs, on the other hand, defined the inquiry too narrowly, suggesting a "task-by-task evaluation of whether a single task may be feasibly performed seated" that conflict with the "reasonableness" aspect of the wage order seating provisions, according to the court. Instead, the court's holding requires an examination of the employee's tasks and duties by location, frequency, and duration, stating, "if an employee's actual tasks at a discrete location make seated work feasible, he is entitled to a seat under section 14(A) while working there. However, if other job duties take him to a different location where he must perform standing tasks, he would be entitled to a seat under 14(B) during 'lulls in operation.'"

As for the second question, the court noted that determining whether an employee's work "reasonably permits" use of a seat "begins with an examination of the relevant tasks, grouped by location, and whether the tasks can be performed while seated or require standing. This task-based assessment is also balanced against considerations of feasibility. Feasibility may include, for example, an assessment of whether providing a seat would unduly interfere with other standing tasks, whether the frequency of transition from sitting to standing may interfere with the work, or whether seated work would impact the quality and effectiveness of overall job performance." The court noted that "business judgment" of the employer could be one contributing factor, but that the employer's preference that a task be done standing is not in itself enough. The court acknowledged that the physical layout of a workspace would be relevant in an inquiry into the totality of the circumstances in assessing whether the use of seating is reasonable, but noted that an employer who designs a workspace to further a preference for standing or to deny an otherwise appropriate seat would receive no deference on this point. The court addressed the argument as to whether employers should consider the "physical differences among employees" to determine "whether employees could uniformly perform their duties with a standardized type and size of seat," as argued by CVS. The court determined that nothing in the language or history of the seating provisions indicated that the physical make-up of the worker bears on whether a seat is required.

Finally, the court considered which party – the employee or employer – bears the burden of proving that a particular seat is suitable under section 14(A) of the wage orders. The employers argued that even if an employee can show that the nature of their work permits the use of a seat, the employee must prove that a suitable seat exists but was not provided. The court disagreed, however, and noted that there "is no language suggesting that an employee must additionally show [that] a particular type of seat" would fulfill the wage order's requirement. Instead, the court

concluded that if the employer was seeking to be excused from the seating requirement, then it must show that complying with the requirement would be infeasible because no suitable seating exists.

Recommendation for Employers

Ultimately, the Court's answers to the three certified questions suggest that whether the "nature of the work reasonably permits the use of seats," is dependent on a panoply of considerations that are fact intensive by nature. These considerations are likely to yield varying results from one job title to the next, even for the same job title at different employers--or different employer *locations*.

California employers cannot rely on long standing assumptions that certain job positions can or cannot be done (in whole or in part) from a seated position. Employers should contact counsel for an audit of their operations to determine whether they are in compliance with the wage order seating requirements discussed in this briefing. Employers found not in compliance could be subject to class action lawsuits and penalties under the California Private Attorneys General Act.

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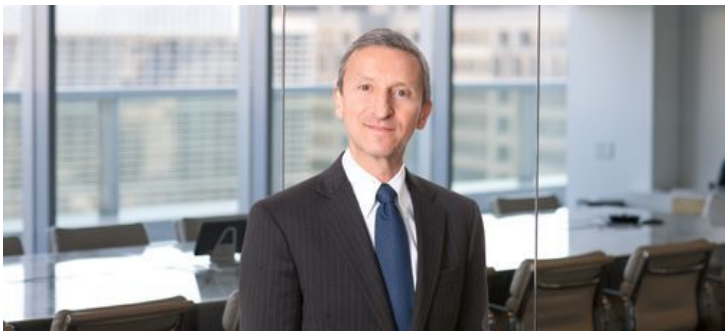

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