

## **CALIFORNIA SUPREME COURT TAKES A STAND ON SEATING REQUIREMENTS IN EMPLOYMENT**

The California Supreme Court has issued guidance regarding a lesser known labor requirement that California employers provide employees with suitable seating under certain circumstances. Found in nearly all of California's Wage Orders, this requirement has been given new life by the court's recent analysis and now demands the attention of nearly all California employers. Arising from the case Kilby v. CVS, the California Supreme Court's guidance on seating is a crucial yet hazy road map for all employers seeking to comply with this sure-to-be hot-button issue in California employment.

The passage from the Wage Orders, in this particular case Wage Order Nos. 4 and No. 5, at issue is the requirement that "all working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats." This requirement has been so misunderstood that the United States Court of Appeals for the Ninth Circuit asked the California Supreme Court to answer three specific questions: 1) what "nature of the work" means, 2) what factors must be considered when determining whether the nature of the work "reasonably permits" the use of a seat? and 3) if an employer has not provided a seat, does an employee have to prove that a suitable seat was available and not provided?

First, the phrase "nature of the work" is important because it bears heavily on whether an employer has to provide seating for employees. In the Kilby case, the employee plaintiffs argued that the phrase means that employers must provide seating when any particular task being performed makes sitting feasible. The defendant retailer argued that the phrase means that an employer should weigh the overall tasks of an employee to determine whether the job as a whole is a standing job or sitting job. The court took a middle road and declared that the employee's duties must be examined in relation to the location where an individual task is completed in order to determine whether he or she must be provided a seat.

More simply, if an employee's tasks at a discrete location make seated work feasible, the employee is entitled to a seat while working at that discrete location. In making that evaluation, the court will consider the relationship between the standing and sitting tasks performed at that particular location within the workplace, the frequency and duration of those tasks with respect to each other, and whether sitting, or the frequency of transition between sitting and standing, would unreasonably interfere with other standing tasks or the quality and effectiveness of overall job performance. In short, an employee may be entitled to a seat to perform tasks at a particular location even if his or her job duties include other standing tasks so long as being seated would not interfere with the performance of standing tasks and overall job performance.

Second, the Ninth Circuit asked the California Supreme Court to lay out the factors to be considered when determining whether the nature of the work reasonably permits the use of a seat. The court stated whether an employee is entitled to a seat depends on the “totality of the circumstances.” This means that the court will consider the physical layout of the workplace, the task being performed, and the objectively reasonable expectations of both the employer and the employee. The physical layout of the work space is relevant because it not only informs employers and employees of the expectations they should have for how work can be performed at a particular location, but also allows an outside party (for example, the court) to use objective judgment in determining whether an employee should have a seat in any given instance. The court notes that the employer’s customer service objective (business judgment) is important, and the breadth of the totality of the circumstances test allows courts to weigh all relevant factors when making its evaluation.

Finally, the Ninth Circuit asked which party, the employee or the employer, bears the burden of demonstrating whether seating should be provided. The court pointed to the language of the Wage Order, which states that employees “*shall*” be provided with suitable seats when the nature of the work reasonably permits the use of seats.” For the court, the bottom line is that an employer seeking to be excused from the requirement bears the burden of showing that compliance is infeasible because no suitable seating exists.

These long-winded and malleable answers likely raise more questions than answers for employers seeking to comply with the seating requirements in California’s Wage Orders. There are few tasks involved with any given employment that are easily categorized as sitting or standing, especially when coupled with employers’ legitimate customer service and productivity expectations. Ferber Law encourages employers to analyze their operations to identify possible tasks and locations that could be performed with a seat without not unduly affecting efficiency and the quality of work.

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