Labor and Employment Alert: California Supreme Court Holds That Sitting Down On the Job May Be Required

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Are you reading this sitting down? If so, you may have to give that seat to one of your employees. For more than a century, California's Industrial Welfare Commission's Wage Orders required that employees be provided with "suitable seats." Specifically, the Wage Orders state:

(A) All working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats.

(B) When employees are not engaged in the active duties of their employment and the nature of the work requires standing, an adequate number of suitable seats shall be placed in reasonable proximity to the work area and employees shall be permitted to use such seats when it does not interfere with the performance of their duties.

Those provisions were fairly obscure until California enacted the Private Attorneys General Act, which incentivized plaintiffs to scour the Labor Code for potential wage-hour issues (like "suitable seating") and then file class actions for alleged violations. Two of those suitable seating cases (*Kilby v. CVS Pharmacy* and *Henderson v. JP Morgan Chase*) are pending before the Ninth Circuit Court of Appeals. In April 2016, the California Supreme Court answered three questions the Ninth Circuit certified to it on the parameters of suitable seating, which are outlined below.

Question 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?*

Answer: Whether the nature of the work reasonably permits the use of seats requires examining **"**the actual tasks performed, or reasonably expected to be performed." Thus, subsets of an employee's total tasks and duties by location must be examined to determine whether it is feasible to perform each set of location-specific tasks while seated. The Court rejected reliance on abstract characterizations, job titles, and job descriptions, which may not reflect the actual work an employee

performs. Basically, an employer must now provide a seat if the tasks performed at a given location reasonably permit sitting and sitting would not interfere with other tasks that may require standing.

Question 2: *When determining whether the nature of the work "reasonably permits" 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?*

Answer: Whether an employee's work "reasonably permits" sitting is an objective question that looks to the "totality of the circumstances." In making this determination, "reasonableness remains the ultimate touchstone." Relevant, albeit non-dispositive, factors include the employer's reasonable expectations, the employer's business judgment, and the physical layout of the workplace. The Court specifically noted that an employer cannot engineer the workplace to prevent seating opportunities and "evidence that seats are used to perform similar tasks under other, similar workspace conditions" may also be relevant (foreshadowing an increase in expert witness testimony). An employer's preference that its employees stand is not relevant. According to the Court:

> *An objective inquiry properly takes into account an employer's reasonable expectations regarding customer service and acknowledges an employer's role in setting job duties. It also takes into account any evidence submitted by the parties bearing on an employer's view that an objective job duty is best accomplished standing. It protects employees because it does not allow employers unlimited ability to arbitrarily define certain tasks as 'standing' ones.*

Notably, the Court recognized that "providing a certain level of customer service *is* an objective job duty that an employer may reasonably expect." Of course, "customer service" is comprised of different tasks, some of which may permit seating, while others do not. And it's left to employers to sort this out.

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

Answer: The one bright-line rule emanating from the Court's opinion is that the burden of proof is on the employer to show that seating is unreasonable.

The Supreme Court placed great emphasis on the "reasonableness" of the seating determination, noting that "the seating requirement has never been understood as absolute or doctrinaire." At the same time, the new "totality of the circumstances" test for determining whether sitting is "reasonable" is open to judges' and juries' differing interpretations. What is absolute is that an employer's decision to not provide seats will be heavily scrutinized, and, given this, employers should review their operations and whether it is reasonable to provide employees with seats.

Contact your Vorys lawyer if you have questions about California's suitable seating requirements.