Are You Sitting Down for This? The California Supreme Court Offers Guidance to Employers For Meeting Their Seating Obligations

MSK Alert by Suzanne Steinke and Melvin Felton, II

Most employers rarely think about their obligation to provide seats for their employees. The California Supreme Court's recent decision in Kilby v. CVS Pharmacy should have employers standing up and taking notice.

Addressing how to evaluate whether "the nature of the work reasonably permits the use of seats," the Kirby Court clarified that this is an "objective" standard based on the "totality of the circumstances" and the employee's actual tasks performed at a given location in the workplace. While this opinion is likely to raise more questions than it answers, the Court offered some factors to be considered in the analysis, discussed in greater detail below. Likely most informative to employers, however, is the Court's warning that "[t]here 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."

California's Seating Requirements

California has Wage Orders covering specific industries and occupations, including a "catch-all" covering all employees not covered by the others. Nearly all of these Wage Orders currently include, in Section 14, the following two seating requirements:

> (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.

While the Kirby decision focuses on Section 14(A), the Court highlighted that both provisions may apply to a single employee at various times during the workday, though not at the same time. If an employee's actual tasks at a particular location make "suitable seating" feasible, he or she is entitled to a seat under section 14(A) while working at that location. If that same employee's work takes him or her to another location where the tasks must be performed standing, the employee would be entitled to a seat under section 14(B) during lulls in operation.

The Seating Analysis

Rejecting analytical approaches that would mandate seating either task by task or, on the other extreme, only if an employee's duties as a whole reasonably permitted the use of a seat, the California Supreme Court explained that the seating standard requires evaluation of the subsets of an employee's total tasks and duties by location, for example, at a cash register, in the stockroom or at a teller window. As described, this analysis is not dependent on job titles or descriptions, but rather, must be based on the actual tasks performed, or reasonably expected to be performed. According to the Court, this approach should include an evaluation of (i) the relationship between the standing and sitting tasks performed, (ii) the frequency and duration of each such task with respect to the others, with more weight being given to tasks performed more frequently or for a longer duration, and (iii) 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." The assessment is qualitative in nature, considering

the "totality of circumstances," and not a rigid quantitative analysis. For example, an employee may be entitled to a seat for tasks performed at one discrete location, like at the cash register, even if he or she spends more time on standing tasks.

Ask MSK

The Current Wage Order Seating Provisions Have Been Around for Decades. Why Do They Matter Now?

While seating requirements have been in California's Wage Orders for decades, the passage of California's Private Attorneys General Act of 2004 ("PAGA") and the explosion of class action employment litigation have brought the Wage Orders, and the seating provisions in particular, to greater prominence. PAGA allows employees to sue their employers for violations of the Labor Code, which can include violations of Wage Orders, and to seek recovery of penalties previously only collectable by the state. The default penalty is $100 for the initial violation and $200 for each subsequent violation per aggrieved employee per pay period, with 75 percent of the penalty going to the state and 25 percent to the aggrieved employees. Attorneys' fees are also awarded with a successful PAGA claim, significantly increasing the potential cost of such claims. Employers are well advised to review all standing duties of their employees and evaluate whether they are in compliance with both section 14(A) and section 14(B) of the Wage Order seating requirements.

Are There Other Lesser-Enforced Wage Order Sections Employers Should Evaluate?

Among the lesser-enforced Wage Order provisions employers may want to review are those governing workplace temperature and elevators. Section 15 requires nearly all employers to "take all feasible means to reduce … excessive heat or humidity to a degree providing reasonable comfort." Where the nature of the employment requires a temperature below 60 degrees Fahrenheit, "a heated room [of at least 68 degrees] shall be provided to which employee may retire for warmth." During hours of use of bathrooms, resting rooms and changing rooms, a temperature of not less than 68 degrees is required. Where applicable, federal and state energy guidelines prevail over these Wage Order provisions. In Section 16 of the Wage Orders, employers must provide adequate elevator, escalator or similar service, consistent with industry-wide standards for the nature of the process and work performed, when employees are employed four or more floors above or below ground level.