

## Resources

### California Law Alert: Employee Seating Requirements in California

January 10, 2012

#### Background

While there is no statute in California specifically requiring employers to provide seating for employees whose jobs cause them to stand for long periods of time, California employers may still be liable for providing "suitable seating" under certain circumstances. Employers must comply with Wage Orders promulgated by the California Industrial Welfare Commission. Wage Order 7 governs employment in the mercantile (retail) industry and with respect to employee seating provides:

##### 14. SEATS

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

*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*

Although Wage Order 7 applies only to mercantile (retail) employees, identical language appears in the wage orders that apply to different industries, including manufacturing, personal services, and professional and technical services.

#### The Home Depot and 99¢ Only Stores Rulings

When Home Depot and 99¢ Only Stores were sued, two California appellate courts ruled that failing to provide suitable seating for employees may violate the requirements of the Wage Order and Labor Code § 1198, which provides in relevant part that, "The employment of any employee...under conditions of labor prohibited by the [Wage] order is unlawful." And most important, failure to provide suitable seating may also give rise to civil penalties under California's Private Attorney General Act (PAGA) (California Labor Code §§ 2698 et seq.), that provides a separate penalty for each aggrieved employee, for each pay period in which the violation took place. A first violation calls for as much as \$100 per employee per pay period and double that for subsequent violations.

Armed with these decisions that allow workers and their lawyers to use California's novel "private attorney general" provision, retailers are facing millions of dollars in damages. Although a winning plaintiff has to share these penalties with the state's labor department, penalties could still add up significantly when an entire class of employees is involved and when the provision in PAGA for attorney fees and costs is factored in.

Since the rulings nearly every national retail chain is under legal attack in California for failing to provide "suitable seating" for cashiers and other employees who are expected to spend the majority of their workday on their feet. Similar claims against smaller retailers, manufacturers and service providers are certain to follow.

#### Recent Developments

After the appellate court remanded the Bright v. 99¢ Only Stores case back to the trial court, on December 13, 2011, the court ruled that the plaintiff was not an adequate and competent representative and that allowing her to prosecute the action in a representative capacity pursuant to PAGA would be unmanageable. The plaintiff has been left to pursue only her individual PAGA damage claim--of course a far lower amount than she initially sought to recover.

## Going Forward

The Home Depot and 99¢ Only Stores rulings serve as reminders to employers that they are under close scrutiny if they do not provide adequate seating for employees. And while the plaintiff in the 99¢ Only Stores case was not successful in establishing herself as a class representative a new plaintiff might well succeed in obtaining class certification.

Another problem is that while the California courts have ruled that plaintiffs may legally continue to pursue their claims for PAGA penalties, the courts offered no opinion as to what it means to provide employees with suitable seats and the circumstances under which such seats are required. Defining "suitable seats" and determining appropriate damages when stores fail to meet the standard is certain to be the next battle.

## What Should Employers Do Now?

Employers should immediately:

1. Undertake comprehensive reviews of work positions that require employees to stand for extensive periods;
2. Determine whether an adequate number of suitable seats can be placed in reasonable proximity to the work area; and
3. Implement procedures that allow employees to use such seats while not interfering with the performance of their duties.

In circumstances in which suitable seats cannot be provided in or near the work area or use of seats will interfere with the performance of duties, employers should explore alternatives. Staggering assignments or relieving employees by rotating them during each shift might prove feasible and far less time consuming and expensive than defending a class action.

This alert was authored by **Laura P. Worsinger**, senior counsel at Dykema Gossett LLP in Los Angeles. Her practice focuses on all aspects of regulatory and employment law, counseling, and litigation. Please contact Laura at 213-457-1744 or your Dykema relationship attorney if you have questions or require assistance in implementing these new California employment laws.

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## Attorneys

Laura P. Worsinger

## Practice Areas

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