Insights: Alerts

California Shapes Standards for Suitable Employee Seating Requirements

APRIL 7, 2016

Written by Susan W. Pangborn, James Smith, Craig A. McDougal and Christin J. Jones

California wage orders – state-issued employment standards having the force of law – require all working employees to be provided with "suitable seats when the nature of the work reasonably permits the use of seats." On April 4, 2016, the Supreme Court of California addressed this requirement in *Kilby v. CVS Pharmacy, Inc.*, clarifying what an employer must consider when determining the "nature" of an employee's work, as well as specifying the test for determining whether that work "reasonably permits" suitable seating.

The California Supreme Court's Opinion in *Kilby v. CVS Pharmacy, Inc.*

The Supreme Court of California issued its opinion in *Kilby* in response to a federal appeals court's request for guidance on three questions involving interpretation of the suitable seating requirement. Specifically, the federal court asked (1) whether the phrase "nature of work" refers to individual tasks performed throughout the workday or to the entire range of an employee's duties performed; (2) what factors should courts consider when determining whether the nature of the work "reasonably permits" use of a seat; and (3) whether there is a burden on an employee to establish that a suitable seat is available. These questions arose in connection with two pending cases brought by bank tellers and drug-store customer service employees who claimed that they were entitled to seats while working.

In analyzing the first question, the Supreme Court of California rejected the employers' argument that the "nature of the work" determination required consideration of an employee's job as a whole, instead finding that "[t]he '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."

In answering the second question regarding which factors should be considered in determining whether the nature of the work "reasonably permits" the use of a seat, the court explained that no one factor is dispositive and found that "[w]hether 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."

Finally, in considering the third question regarding burden of proof, the court stated that "[t]he nature of the work aside, if an employer argues there is no suitable seat available, the burden is on the employer to prove unavailability."

Practical Implications

While the *Kilby* ruling fails to provide bright-line rules regarding particular employee tasks that employers may use in

determining whether they must provide a seat for an employee, it does make clear that an employer must consider subsets of an employee's total tasks and duties by location – not the employee's responsibilities as a whole – and determine whether it is feasible for an employee to perform *each set* of location-specific tasks while seated. An employee's "sitting" tasks should not be weighed against all their "standing" tasks; rather, if an employee's actual or expected tasks are performed at a discrete location (such as a cash register or a teller window), those tasks should be considered together in evaluating whether the work there reasonably permits use of a seat. Further, tasks performed with more frequency or for a longer duration should be considered more germane to the seating inquiry than tasks performed briefly or infrequently.

Similarly, the *Kilby* ruling instructs that an employer should examine an employee's relevant tasks, grouped by location, and whether the tasks can be performed while seated or require standing to determine whether the totality of the circumstances entitles an employee to a seat. Importantly, the feasibility of a seat may be considered, which may include 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. Moreover, an employer's business judgment (including the definition of an employee's duties and customer service expectations) and the physical layout of a workspace may also be considered along with other relevant tasks and obligations. However, the standard is an objective one, so an employer's *mere preference* that a job be performed while standing does not allow employers to arbitrarily define certain tasks as "standing" ones. In addition, an employer may not unreasonably design a workspace to further a preference for standing or to deny a seat that might otherwise be reasonably suited for the contemplated task. The court emphasized that the duty to provide seating under the California wage orders arises from the nature of the work and not from the nature of the individual employees performing the work. Thus, an employer may not take into consideration the physical characteristics of a particular employee in determining whether the work reasonably permits a seat.

If the nature of the work reasonably permits the use of a seat, yet an employer wishes to be excused from the requirement of providing a seat, the employer must now be prepared to show that compliance is infeasible because no suitable seating exists. The burden is not on the employee to prove that a suitable seat for the work exists.

These new guidelines and requirements will likely result in an increase in the number of suitable seating wage order violation claims against employers that are filed in California. By requiring employers to review an employee's tasks grouped by location, instead of the job description as a whole, in determining whether a seat is required, the *Kilby* opinion substantially increases the likelihood of an employer failing to provide seating when required. Employers with employees in California should be cognizant of the considerations outlined above, consider whether existing policies and practices may expose them to claims of suitable seating wage order violations, and be sure to analyze employee positions that have historically not been provided seats to determine if any subset of the position's tasks may now require suitable seating.

Related People








Susan W. Pangborn
t 404.815.6305
spangborn@ktslaw.com



James Smith
t 415.273.4317
james.smith@ktslaw.com



Craig A. McDougal
t 214.922.7157
cmcdougal@ktslaw.com



Christin J. Jones
t 214.922.7148
cjones@ktslaw.com