CARLTON FIELDS

California Supreme Court Rules Employers Must Provide Suitable Seats to Workers When Reasonably Permitted by the Job and Circumstances

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Twelve years ago, the California Legislature defunded its 100-year-old Industrial Welfare Commission (IWC). However, the IWC's prior wage orders remain in effect. One of those orders states "[a]ll working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats." Late yesterday (on April 4), in response to a Ninth Circuit request to interpret California law, the California Supreme Court construed that order in a way that will impact retailers, restaurants, and numerous other industries. *Kilby v. CVS Pharmacy, Inc.*, case no. S215614 (Calif. Sup. Ct. 4/1/16). The *Kilby* case involved a customer service representative at a CVS store. A consolidated case involved a JPMorgan Chase Bank teller. While the CVS employee's primary duty was as a cashier at a cash register and the JPMorgan Chase Bank employee's was a teller at a teller station, each had other duties. The cashier's other duties included straightening and stocking shelves, organizing products in the sales counter area, cleaning the register, vacuuming, gathering shopping baskets, and removing

trash. The bank teller's other duties included escorting customers to safe deposit boxes, working the drive-up window, and ensuring ATMs worked properly. Neither employee was provided a seat to perform any of their duties. In *Kilby*, the California Supreme Court looked at the history of California's law in this area and analyzed the issues as follows:

- The court rejected the employers' argument that, because the workers had some duties that obviously required standing, they were not entitled to a seat at all. Instead, the analysis looked separately at each task and asked whether that task reasonably permitted sitting. Determining whether sitting would be "reasonable" in performing a task requires balancing "an employee's need for a seat with an employer's considerations of practicability and feasibility," based on the totality of the circumstances. This balancing looks at the actual tasks performed, and not at job titles or job descriptions. It looks, for example, at the duration and frequency of the actual tasks, grouped by location, and whether they can be performed sitting; whether provision of a seat would unreasonably interfere with the standing tasks; whether the transition from sitting to standing would interfere with the work; and whether performing a task sitting would diminish the quality and performance of the job.

- Even if a task does not reasonably permit sitting, during a "lull in operation"—i.e., when the employee is still on the job but not actively engaged in any duties—a seat must be provided within "reasonable proximity to the work area."

- Because the test is an objective, "reasonable" one, the analysis defers to the employer's "business judgment" only in a limited way. Employers, of course, can define a job's tasks, and an employer's evaluation of how sitting/standing impacts the quality and effectiveness of the performance of the tasks is a factor—but only one of many. An employer's "preference" that a job be performed standing does not control.

- Of course, the physical configuration of a work area is a factor in determining whether providing a seat is feasible—but only to a limited degree. "[A]n employer may not unreasonably design a workspace to further a preference for standing." "Reasonableness remains the ultimate touchstone."

- Physical differences between employees is not a factor. Although the court recognized that a seating accommodation may be required under other laws (for example, the disability discrimination laws), a seat is only required by the IWA order "when the nature of the *work* reasonably permits it, not when the nature of the *worker* does."

- Finally, if providing a seat would be "reasonable," the court held that "[a]n employer seeking to be excused from the [seating] requirement bears the burden of showing compliance is infeasible because no suitable seating exists."

Today's decision could have far-ranging impact on numerous business types. At a minimum, it will affect pharmacies and banks, as well as any other industry that employs cashiers or customer

service representatives. Moreover, although this decision construes California law and so is limited to employment in California, it may foreshadow a trend toward more general government intrusion into how work must be performed. To discuss how this decision may impact your business, please contact a member of Carlton Fields Labor and Employment team.

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