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California Supreme Court Clarifies Employers' Obligation to Provide "Suitable Seating" to Employees

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The California Supreme Court has issued a recent opinion (*Kilby v. CVS Pharmacy, Inc.*, No. S215614) interpreting, for the first time, California's Wage Order requirement that "all working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of a seat."

The Court held that employers should review employee tasks performed at *each specific work location*, rather than all of the tasks the employee performs throughout the day, and consider whether, based on the totality of the circumstances, it is *feasible* and *practicable* for employees to perform those location-specific tasks while seated. The Court unambiguously ruled that an employer's preference that employees stand is irrelevant and cannot be a part of this analysis. The employer's business judgment about the underlying nature of the work, however, is relevant.

Under this analysis, each time an employee changes location to perform tasks, employers must make a particularized assessment as to whether it would be feasible to provide a seat in that location. The physical characteristics and layout of a workspace "may be relevant" as a part of a "totality of the circumstances inquiry." However, "reasonableness remains the ultimate touchstone," and employers may not "unreasonably design a workspace to further a preference for standing." Employers may also take into consideration whether a seat would unduly interfere with other tasks that require standing in that location, whether frequently transitioning from sitting to standing interferes with the work, or whether seated work impacts the quality and effectiveness of overall job performance.

Under the California Private Attorneys General Act, a plaintiff may seek recovery of penalties for violations of the seating requirement on behalf of all aggrieved employees. Penalties are $100 for each aggrieved employee per pay period for the initial violation and $200 for each aggrieved employee per pay period for each subsequent violation. These penalties add up. The 9th Circuit, which certified questions regarding interpretation of the seating requirement to the California Supreme Court, conservatively estimated that the damages in the cases before it were "in the tens of millions of dollars."

In light of this decision, employers who do not currently provide seats at all times should examine the nature of their employees' tasks, duties, and work environments. Employers must determine whether the tasks performed at each specific work location (such as those performed at a cash register) may reasonably and feasibly be performed while seated, and ensure that employees have seats when they are not actively engaged in their duties. Employers in industries such as manufacturing, retail, and hospitality may be particularly affected.

Our attorneys have deep counseling and litigation experience on these issues. To discuss these issues further or pose questions about this alert, please contact one of the attorneys listed below.

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Key Contacts

Wendy Brenner **Palo Alto**	**brennerwj@cooley.com** **+1 650 843 5371**
Leslie Cancel San Francisco	lcancel@cooley.com +1 415 693 2175
Joshua Mates San Francisco	jmates@cooley.com +1 415 693 2084
Michael Sheetz Boston	msheetz@cooley.com +1 617 937 2330

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