Today's
GENERAL COUNSEL

Sit or Stand Is the Question for California Employers

By Tim M. Freudenberger and Amy S. Williams

California's regulations require employers to provide "suitable seats" for employees to use at any workstation where the "nature of the work" performed there "reasonably permits the use of a seat." In the last decade, workers in jobs that have traditionally required standing such as retail and grocery store cashiers, greeters, bank tellers and even security guards have filed lawsuits claiming that their employer failed to provide them with suitable seats.

Customer service, however, is a crucial aspect of operating any successful business and requires meeting customer expectations of fast, efficient service. Can an employer meet those expectations if its employees are seated? California employers are faced with a difficult decision: to provide seats or not to provide seats. The decision is not simple.

More than a century ago, the California Legislature enacted the first suitable seating law, requiring suitable seats for all female employees in the mercantile industry to use when not engaged in the active duties of their employment. Over the next 60 years, the requirement expanded to include suitable seating at any workstation when the nature of the work permits, and was extended to all employees regardless of age and gender — the rationale being the protection of workers and consideration for the welfare of employees. Since 1976, California employers have been saddled with the suitable seating law that requires seats when the nature of the work reasonably permits, and seats reasonably close to the work area that employees can use when their work requires them to stand.

Suitable seating maintained a low profile for decades until the enactment of California's Private Attorneys General Act (PAGA) in 2004. Before PAGA, only injunctive relief was available to redress a suitable seating violation and such injunctive relief could only be imposed by the California Labor Commissioner. PAGA opened the door for an employee, acting as a private attorney general, to bring an action for civil penalties on behalf of him/herself and other allegedly aggrieved employees as a representative of the state. Accordingly, PAGA triggered a cascade of litigation and employer panic. With violations of suitable seating resulting in possible civil penalties accruing at a rate of $100 per employee per pay period, along with attorneys' fees and costs, the use of PAGA as a vehicle for bringing representative actions for suitable seating violations is now rampant.

Providing seats for every worker in every area for every task sounds like a simple response but it could open the door to more issues. Providing seats could impact ADA access issues, impose hazards

for customers and employees, and increase awkward employee postures and movements that cause injury instead of providing relief from fatigue. It could impact productivity, customer service and sales by taking up precious floor space.

Until 2016, neither the California Department of Labor Standards Enforcement nor any California Court had interpreted the suitable seating provisions, and so employers had no guidance in evaluating compliance. In 2016, the California Supreme Court in *Kilby v. CVS Pharmacy* answered some, but not all, questions.

According to the ruling, the nature of the work refers to the "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 duties performed anywhere on the job site. If the tasks performed at a specific location reasonably permit sitting, and provision of a seat would not interfere with performance of tasks that may require standing, a seat is required. For example, an employee at a retail store may perform both sales and cashier duties, and have the right to sit while cashiering but not while selling.

Whether the nature of the work reasonably permits the use of seats at a specific workstation requires examination of the following:

- The tasks assigned to employees and whether it is feasible to complete the work while seated.
- The relationship between standing and sitting tasks, the frequency and duration of those tasks with respect to each other, and whether sitting, or the frequency of transition between sitting and standing would interfere with other tasks or the quality and effectiveness of overall job performance.
- An employer's business judgment concerning the expected levels of customer service and other standards, and physical layout of a workspace.

There are several ways to evaluate these factors. Employers may or may not engage an ergonomist, but it is important to evaluate whether a seat can be used safely and effectively within the work environment.

The physical layout of a workspace is important, including how it informs expectations of employer and employee with respect to job duties. Notwithstanding, reasonableness remains the touchstone and employers may not unreasonably design a workspace to further a preference for standing.

> Employers may not unreasonably design a workspace to further a preference for standing.

The seating analysis must also take into account an employer's business judgment as to whether the nature of the work requires standing. It is objectively reasonable for an employer to require a certain level of customer service that should be assessed, along with other relevant tasks and obligations, in determining whether the nature of the work reasonably permits use of a seat at a particular location.

The California Supreme Court rejected the notion that an employee's entitlement to a seat be based on the employee's physical characteristics. Rather, a seat is required when the nature of the work reasonably permits it, and when a suitable one is available. Ultimately, the employer bears the burden of showing compliance is infeasible because no suitable seating exists.

The good news is that before an employee can commence a suitable seating PAGA action, they must send written notice to the employer and the Labor and Workforce Development Agency (LWDA) supporting their allegation. The employee must then wait 65 days for the LWDA to respond. Only after expiration of the 65-day period can the employee commence a civil lawsuit. Thus, the employer has 65 days within which to investigate and, if appropriate, implement seating, thereby significantly limiting potential liability.

The suitable seating law also requires that an adequate number of seats be placed in reasonable proximity to the work area, and that employees are permitted to use them when they are not engaged in their active duties.

While California may be the most visible in its pursuit of employers regarding suitable seating, Florida, Massachusetts and New Jersey all provide for some version of a suitable seating law. With settlements providing windfalls to plaintiffs' attorneys and state funds alike, we can expect more states to follow suit. ■

Tim M. Freudenberger is Founding Partner and Chair of the Class Action Defense Litigation Practice Group at Carothers DiSante & Freudenberger LLP. He defends California and national employers in all aspects of labor and employment law and related litigation, with a special emphasis on defending class action wage and hour lawsuits, class action employment discrimination lawsuits, PAGA actions and other complex litigation matters.
tfreud@cdflaborlaw.com

Amy S. Williams is a Partner at Carothers DiSante & Freudenberger LLP. She has extensive experience representing employers in single plaintiff actions, with a special emphasis on the defense of wage and hour class and collective actions and PAGA claims.
awilliams@cdflaborlaw.com