crowell moring

CLIENT ALERT

California Seating Lawsuits Meeting Resistance, But Employers Shouldn't Sit Idly By

Oct.21.2011

California lawsuits by employees seeking damages and injunctive relief for the alleged failure to provide suitable seating at work, on the rise since early this year, are meeting increased resistance from the courts. Such cases have been brought against retail grocers, pharmacies, wholesale chains, and clothing stores, among others. In July, a federal court dismissed a lawsuit against Bank of America concluding that the Bank was only required to provide seats to employees if they requested them, and that the plaintiffs provided no evidence that they requested such seats. On Monday of this week, a California state court went even further, declaring, in a case against Whole Foods Market, that the statute on which these suits were being pursued in the first place is unconstitutional.

That act, the California Private Attorney General's Act, or "PAGA," permits private counsel to prosecute Labor Code violations on the public's behalf. And, California Labor Code section 1198 prohibits employers from violating Industrial Wage Commission ("IWC") Wage Orders, which in turn with limited exception require employers to provide employees with suitable seats if the nature of their work allows. Using PAGA, Plaintiffs have alleged they should be entitled to damages and penalties for the alleged Labor Code violation and to obtain seats at work.

So, now with PAGA's validity being questioned, what does that mean for employers?

In the short term, the *Whole Foods* ruling could mean fewer seating lawsuits as employees and their counsel evaluate the implications of that decision. But typically, plaintiffs' class action lawyers are not so easily deterred. Indeed, on the very same day the *Whole Foods* ruling was issued, a PAGA-based seating case was filed against Abercrombie & Fitch. In the long term, the court's ruling, if upheld on appeal, may eliminate seating lawsuits; or it may have the effect of endorsing these suits if the Court of Appeal overturns the decision. In the meantime, employers should not sit idly by waiting to find out. Taking active steps now reduces the chance of facing a seating lawsuit while the PAGA issue is on appeal, or after the appeal is over, assuming that the Court of Appeal gives its blessing for PAGA-based seating lawsuits to continue.

A good first step for employers is to find out about California's laws regarding seating for employees. A past Crowell & Moring client alert published in May 2011 on this subject provides concise guidance. This includes, but is not limited to, assessing the nature of the work duties and making determinations about whether the nature of the respective jobs reasonably permits the use of seats, and whether there is some reason that seating cannot reasonably be provided to employees awaiting active engagement. If further information is desired, or if an employer wishes to assess its risk on the issue, or discuss additional steps that it can take to avoid litigation, employers should contact a member of Crowell & Moring's Labor & Employment employment group. Crowell & Moring's Labor & Employment attorneys work closely with Crowell & Moring's retail industry practice group, established to counsel and represent a broad spectrum of clients in the retail industry, including wholesale and specialty retailers, department stores, and "big-box" retailers across the United States and internationally.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Kris D. Meade
Partner – Washington, D.C.
Phone: +1 202.624.2854
Email: kmeade@crowell.com

Thomas P. Gies
Partner – Washington, D.C.
Phone: +1 202.624.2690
Email: tgies@crowell.com