

CLIENT ALERT

Think That California Lawsuits Over Seating Concern Only Retail Cashiers? Think Again

May 26, 2011

Recent months have shown a dramatic increase in suits against retailers by cashiers seeking seats at work. The influx results from two California Court of Appeal decisions in late 2010 that permitted the plaintiff cashiers to pursue suits against their employers for not providing seating. Several suits filed since then come from cashiers seeking to require employers to provide them with seats at work. But a lawsuit filed in Los Angeles last Thursday shows that the issue does not just concern cashiers.

That suit, filed against Banana Republic and Gap, alleges that the clothing manufacturers failed to provide employees in their retail stores with adequate seating accommodations. Like the cashier lawsuits, the complaint is based on California Labor Code section 1198 and Industrial Wage Commission ("IWC") Wage Order 7-2001. Labor Code section 1198 prohibits employers from violating IWC wage orders. Wage Order 7-2001 requires employers within the "mercantile" industry to provide employees with suitable seats if the nature of their work allows. Specifically, Section 14 of the Wage Order requires employers to provide suitable seats to all employees "when the nature of the work reasonably permits the use of seats" and, when the nature of the work requires standing, provide seats close to the work area for employees to use "when it does not interfere with the performance of their duties."

Wage Order 7-2001 broadly defines the mercantile industry to include "any industry, business, or establishment operated for the purpose of purchasing, selling, or distributing goods or commodities at wholesale or retail; or for the purpose of renting goods or commodities."

The cashier cases all contend that cashier work reasonably permits the use of seats. The Banana Republic and Gap case does the same, but also expands beyond cashiers to include other employees who may wish to sit down when not engaged in active duties. So the net effect is that plaintiffs are now pursuing seating violations as they apply to every employee, not just those at the cash register. And they are seeking civil penalties under the Private Attorney General Act of 2004 that potentially number in the millions.

All employers operating in California should take note. The threat of litigation over seats is not limited to retailers and other employers operating under Wage Order 7-2001. Rather, it applies to every employer operating in California. Wage Order 7-2001's language regarding seats is either similar or identical to language in every wage order applied by the Division of Labor Standards Enforcement. Thus, all employers are likely covered under one of the wage orders that is at least similar to 7-2001.

So what should employers do? First, assess the nature of the work duties and make 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. Where employers deem standing to be essential for a job, they should make sure that the job description accurately reflects that determination. These decisions and the basis for them should be documented. Second, consider making seats available upon request, on a case-by-case basis; this could bolster the argument that should litigation later arise, the case should not proceed as a class action. Third, make seats available near the employee

work area, such as in a break room, and allow employees to use these seats when doing so does not interfere with the performance of their duties.

To assess your risk on this issue, or to discuss additional steps that you can take to avoid litigation, please contact a member of Crowell & Moring's labor and 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