



# NEW SPATE OF CLASS ACTIONS SEEKS TO PENALIZE CALIFORNIA EMPLOYERS WHO DO NOT PROVIDE ADEQUATE SEATING FOR EMPLOYEES

A wave of class action suits has recently been filed against several large employers for alleged “seating” violations under the California Labor Code (“Labor Code”). In these cases, the plaintiffs seek to enforce Section 14 of Industrial Welfare Commission (“IWC”) Wage Order 7-2001, a seldom used and relatively untested provision of the Labor Code that requires employers to provide seating for their employees under certain circumstances. While historical precedent gave employers some comfort, a recent decision in the Northern District of California has expanded the damages available to plaintiffs and likely will fuel additional claims.

## IWC WAGE ORDER 7-2001

Wage Order 7-2001 (“Wage Order”) applies broadly to all industries, businesses, or establishments 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.”

Section 14 of the Wage Order (entitled “Seats”) requires that:

- A. All working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats.
- B. When employees are not engaged in the active duties of their employment and the nature of the work requires standing, an adequate number of suitable seats shall be placed in reasonable proximity to the work area and employees shall be permitted to use such seats when it does not interfere with the performance of their duties.

Section 14 does not contain its own penalty provision, and Section 20, the Wage Order's only penalty provision, does not address seating claims but rather penalizes employers who underpay employees.

## TYPICAL CLASS CLAIMS

These new class claims generally assert that employers who do not comply with Section 14 violate Labor Code § 1198, a provision that makes it illegal to employ an employee under conditions of labor that are prohibited by an IWC Wage Order. Plaintiffs have brought these seating claims under the Private Attorneys General Act of 2004 ("PAGA," Cal. Lab. Code § 2698 et seq.), which allows recovery for violations of "all provisions of [the Labor Code] *except those for which a civil penalty is specifically provided.*" PAGA § 2699(f) (emphasis added). PAGA penalties consist of \$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. Cal. Lab. Code § 2699(f)(2).

## PAST PRECEDENT: *HAMILTON V. SAN FRANCISCO HILTON*

For years, the only court opinion to specifically address a seating claim was *Hamilton v. San Francisco Hilton*, Case No. 04-431310 (S.F. Sup. Ct., 2005). In *Hamilton*, a guest service agent ("GSA") at the San Francisco Hilton filed a class action lawsuit on behalf of GSAs alleging that the hotel violated Wage Order 5-2001, Section 14 (containing a seating provision identical to Wage Order 7-2001) by failing to provide GSAs with seats at the front desk. The complaint sought PAGA penalties among other damages. Hamilton presented an ergonomic expert who confirmed that GSA work required standing and stated that reconfiguration of the workspace would be necessary if stools were provided. The expert proposed the use of a "sit-stand saddle" as an alternative to reconfiguring the workspace.

The court granted Hilton's motion for summary judgment because it found that PAGA penalties did not apply and that Hilton was lawfully permitted to make a rational business decision to require GSAs to stand while at the front desk.

**PAGA Claim.** As an initial matter, the court found that Hamilton could not recover PAGA penalties because the Wage Order contained its own civil penalties provision. The court noted that the Wage Order was the only place where seats were mentioned, and therefore the only way Hamilton could bring her seating claim was to incorporate the entire Wage Order. Because Hamilton did not make a claim for underpayment, the penalty provisions of Section 20 were unavailable.

**Employer's Business Judgment.** The court also held that Hilton did not violate Section 14 because its requirement that employees stand behind the counter was a rational business decision that the hotel was entitled to make and because Hilton had otherwise complied with Section 14. The court read Sections (A) and (B) of Section 14 collectively rather than separately and found that if the "nature of the work" requires standing (Section B), then the "nature of the work" cannot reasonably permit the use of seats (Section A). Using that interpretation, the court concluded that "if standing is required for part or all of a job, Section A does not apply and the employer must comply with Section B." The court held that Hilton had complied with Section B by permitting GSAs to go into a back room to sit when it did not interfere with their work duties.

The court additionally noted its obligation to defer to Hilton's establishment of reasonable job requirements. The court found no requirement for reconfiguration in the Wage Order and refused to require Hilton to adopt the ergonomic expert's proposed "sit-stand saddle." Instead, the court found Hilton's standing requirement reasonable because: (1) Hilton considered standing and continual mobility throughout the front office area to be an essential function of the job; (2) the GSA's job description listed "standing and continual mobility" as essential functions; (3) many GSA duties

required standing or walking; and (4) when seated, GSAs could not safely use a computer, fit their knees and legs in the workspace, or open a cash drawer without moving the seat. The court also held that SF Hilton was permitted to make a reasonable business judgment concerning its image and brand and that it should not “second guess” Hilton’s business judgment.

## ***HAMILTON* REJECTED—IN PART**

Much of the comfort that *Hamilton* had provided to employers for the past four years was recently eliminated when Judge Maxine Chesney issued her decision in *Currie-White v. Blockbuster Inc.*, Case No. 3:09-cv-2593 BZ (N.D. Cal. 2009). In the *Blockbuster* case, the plaintiffs brought claims similar to those in *Hamilton* on behalf of cashiers working at Blockbuster video rental stores. While granting Blockbuster’s motion to dismiss, Judge Chesney significantly undermined several of the key defenses that succeeded in *Hamilton*. First and most significantly, she ruled that plaintiffs *may* seek civil penalties under PAGA because the penalty provision of the Wage Order “does not provide a penalty for the violation alleged by plaintiff, specifically, a failure to provide seats for employees.” She also concluded that section 14 was properly promulgated by the IWC and that PAGA does not violate the state or federal Constitutions. Judge Chesney dismissed the complaint on the basis that the plaintiff had failed to plead sufficient facts but granted leave to file an amended complaint. The plaintiff filed an amended complaint on August 14, 2009, and further proceedings are pending.

One can expect that the conflict between *Hamilton* and *Blockbuster* will continue to be litigated in the several seating claim cases that have recently been filed. Their respective resolutions will likely determine whether seating claims fuel the next wave of class action litigation by the plaintiffs’ bar.

## **WHAT SHOULD AN EMPLOYER DO?**

- Evaluate employee tasks to determine whether the nature of the work reasonably permits the use of seats.
- Consider conducting an ergonomic study to determine the feasibility of adding seats.
- Document any efforts that have been made (such as task forces, joint study teams, focus groups) to determine whether seats are necessary.
- Evaluate job descriptions and customer service standards to determine whether they clearly identify jobs where continual mobility is an essential function of the job, and revise such descriptions appropriately to reflect the necessity of standing.
- Provide an adequate number of suitable seats in a nearby break room and allow employees to use such seats when it does not interfere with the performance of their duties.

## **LAWYER CONTACTS**

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our “Contact Us” form, which can be found at [www.jonesday.com](http://www.jonesday.com).

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