What Are Acceptable Workplace Conditions?

By Eric Steinert

Retail employers should hold on to their seats after a recent California Court of Appeals decision created potential exposure for rather picayune requirements regarding working conditions.

The California wage orders are generally known for establishing minimum wage and overtime requirements in various industries, but more obscure sections discuss workplace minutiae ranging from bathroom temperature to location of clocks. For example, Wage Order 7, which applies to retail employers, requires "suitable seats" where "reasonably permit[ted]" by the work.

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Until recently, no appellate court had recognized a monetary remedy regarding these workplace strictures. Indeed, many employment law practitioners were likely unaware of their existence, let alone their potential for employer liability.

On Nov. 12, 2010, however, the California Court of Appeal held in *Bright v. 99 Cents Only Stores* that employees denied suitable seating can seek civil penalties under the Labor Code Private Attorneys General Act of 2004 (PAGA).

In *Bright*, the trial court sustained a demurrer as to a retail cashier's PAGA claim for allegedly being denied a chair while working, holding that such failure is not a condition "prohibited" by Wage Order 7. The Court of Appeal reversed and reinstated the claim.

PAGA provides civil penalties for Labor Code violations involving provisions for which a civil penalty does not already exist. For those violations, PAGA establishes penalties of $100 per employee, per pay period for the first violation, and $200 for each subsequent violation. PAGA also allows "representative actions" on behalf of similarly situated coworkers.

Labor Code Section 1198 prohibits employment "for hours longer than" or "under conditions prohibited by" the wage orders. Section 1198 does not itself provide for civil penalties, but Wage Order 7 does provide civil penalties for "underpaid" employees "in addition to any other civil penalties provided by law."

The *Bright* court determined, however, that suitable seating is a "standard condition of labor" established by Wage Order 7, and thus failure to provide suitable seating is in turn a violation of Section 1198. Moreover, the court determined that wage order penalties were not the exclusive remedy for every wage order violation because they are in addition to "other civil penalties provided by law." Thus, the *Bright* court concluded that PAGA penalties could extend to wage order working conditions.

The *Bright* court rejected the employer's arguments that Section 1198 only extends to prohibitory wage order provisions — as opposed to affirmative workplace requirements, and that the wage order's civil penalties for pay violations indicated an intent to forego monetary penalties regarding working conditions, such as suitable seating.

The *Bright* decision now permits litigation over some rather peculiar wage order provisions. For example, under Wage Order 7, every California retail employer must provide: suitable lockers, closets, "clean" changing rooms or resting facilities "separate from toilet rooms;" clocks in all major work areas; adequate elevator or escalator services for work performed above four floors or below ground level; and facilities for "securing hot food and drink" for night-shift meal periods.

The retail wage order is very sensitive about temperature, requiring a "comfortable" temperature using all "feasible means" to reduce "excessive heat or humidity," and more specifically: "Toilet rooms," resting rooms, and change rooms of at least 68 degrees, and a heated 68 degree room must be provided if work requires temperatures below 60 degrees.

Moreover, retail employers must accurately maintain the following records *for each employee, for three years*: Full name, home address, birth date; time records including meal periods; total wages including value of "board, lodging, or other furnished compensation;" incentive plans and production records; and itemized wage statements for each pay period showing all deductions.

Additionally, these requirements must be posted in an area "frequented by employees where it may be easily read during the workday, or if such posting is impractical, "available to every employee upon request."

Consider an otherwise compliant retail employer, who perhaps fails to provide closets or lockers for the "safekeeping" of employee "outer clothing," maintains bathrooms at a chilly 67 degrees, lacks a separate breakroom, fails to maintain written bonus plans for three years and fails to (gasp) install an escalator to the basement storage room.

Under PAGA, such a retail employer with 40 employees, biweekly pay periods, and five technical violations per pay period, would accrue $204,000 in penalty exposure per year, in addition to potential liability for attorney fees.

Whether this is good public policy in a major recession with double-digit unemployment is a question for another day. One thing, however, is clear: retail employers must now review their working conditions for compliance with very minor details of Wage Order 7 or face significant PAGA penalties and expensive litigation.