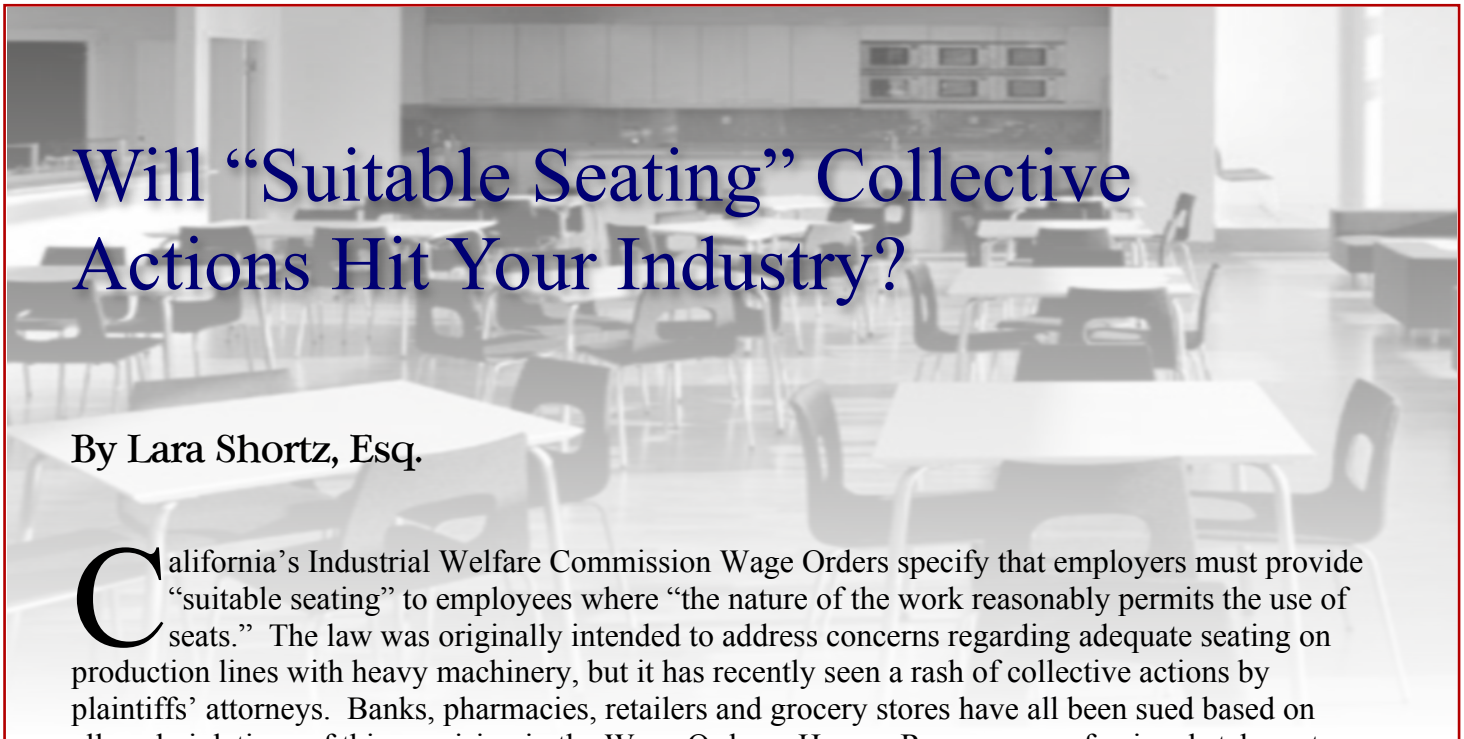


Will "Suitable Seating" Collective Actions Hit Your Industry?

By Lara Shortz, Esq.

California's Industrial Welfare Commission Wage Orders specify that employers must provide "suitable seating" to employees where "the nature of the work reasonably permits the use of seats." The law was originally intended to address concerns regarding adequate seating on production lines with heavy machinery, but it has recently seen a rash of collective actions by plaintiffs' attorneys. Banks, pharmacies, retailers and grocery stores have all been sued based on alleged violations of this provision in the Wage Orders. Human Resources professionals take note while many businesses haven't seen litigation in this area yet, this is an issue that is sure to impact industries that are ripe for these kinds of lawsuits, including restaurants, warehouses, airports and others where employers require standing and/or movement.

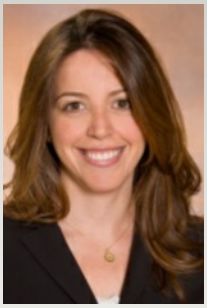
Plaintiffs in these cases often seek millions of dollars in connection with alleged violations of suitable seating requirements, even in instances where no one on the job ever requested a seat. In Green v. Bank of America No. 11-56365 (February 11, 2013), the Ninth Circuit held that "employees need not make a request for suitable seating before filing a lawsuit…" Additionally, many of these cases are filed by plaintiffs who hold jobs that are typically performed by individuals while standing.

In 2011, a plaintiff filed a class action lawsuit against Disneyland alleging that staff was not given access to suitable seating. Disneyland's attorneys responded that most Disneyland employees had jobs that did not necessitate providing seating. While the case was ultimately dismissed in March of 2013 due largely to Plaintiff's misconduct throughout the litigation, it begs the question regarding how courts will define some of the nebulous language, particularly the "nature of the work" and "suitable seating" aspects of the Wage Order. In two separate cases in December 2013, the Ninth Circuit asked the California Supreme Court to provide clarification regarding much of Section 14's terminology.

To the extent that employers do not provide seats to their employees, they should be sure that the employees' duties require standing and/or movement. Employers should also determine if there is an alternative arrangement that may be reasonable. For example, in Garvey v. Kmart Corporation (2012 WL 6599534), the court suggested that while a lean-stool may be a reasonable seating alternative to no stool at all, Kmart was found to have a genuine customer service rationale for requiring its cashiers to stand (i.e., to supply efficiency and appearance of efficiency). The court did suggest, however, that where a customer lane is empty (on a slow day, for example) the customer service rationale may not apply. The takeaway from this decision is that where there are long periods of the work day that do not require standing and/or movement, employers may be liable for failure to supply suitable seating.

Further, a best practice for employers is to communicate their seating policy to employees via their employee handbooks and encourage employees to address any concerns regarding suitable seating.

On December 31, 2013, the 9th Circuit Court of Appeal certified questions to the California Supreme Court arising out of two separate suitable seating cases before it, and requesting clarification with respect to how the courts should interpret the suitable seating requirements. These questions will be closely watched and may significantly impact how suitable seating requirements are followed. In the interim, Human Resources professionals should keep up to date with the requirements that could have a major impact on their industry. As the state of the law evolves, bearing in mind that employees need not request seats to avoid liability, you should be proactive in providing seating to employees whenever possible. Doing so could lessen the chances to fall prey to a costly lawsuit down the line.



Lara Shortz is an experienced litigation attorney at the law firm of Michelman & Robinson, LLP, who has represented clients in a wide range of practice areas and industries, including Advertising, Marketing & Media, Financial Services, Insurance, Manufacturing & Distribution, Professional Services, Health Care, and Underground Storage Tank Enforcement. Ms. Shortz advises management on state and federal employment acts (such as EEOC, FEHA, ADA, ADEA, WARN, etc.), hiring, firing and wage and hour compliance in the areas of employment law for management. She also handles executive employment contract disputes and conducts workplace training, investigations and compliance.