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Take a Seat! California Supreme Court Provides Clarity on California's Suitable Seating Laws

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For more information about Wilson Elser's Employment & Labor practice, visit our website.

Take A Seat! California Supreme Court Provides Clarity on California's Suitable Seating Laws

On April 5, 2016, the California Supreme Court issued its much-anticipated opinion addressing important issues surrounding California's suitable seating laws. As nearly every California Wage Order contains suitable seating provisions, the Court's ruling will have a significant and widespread impact on California employers.

A typical suitable seating provision of a California Wage Order provides the following:

> (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. IWC Wage Order 4-2001, Sec. 14.

THREE QUESTIONS BEFORE THE NINTH CIRCUIT

With that in mind, the Supreme Court decided three certified questions, which are currently before the Ninth Circuit in two separate class action lawsuits. The two appeals before the Ninth Circuit address these issues in the context of IWC Wage Order 4-2001 (Professional, Technical, Clerical, Mechanical and Similar Occupations) and IWC Wage Order 7-2001 (Mercantile Industry), respectively. The former involves CVS cashiers who, by the nature of their occupation, stand nearly 100 percent of the time; the latter involves bank tellers who are similarly situated and required to stand for the majority of their work day.

The certified questions and the Supreme Court's rulings are as follows:

> **Question 1:** Does the phrase "nature of the work" refer to an individual task or duty that an employee performs during the course of his or her workday, or should courts construe the "nature of the work" holistically and evaluate the entire range of an employee's duties?
>
> > (a) If the Courts should construe "nature of the work" holistically, should the Courts consider the entire range of an employee's duties if more than half of an employee's time is spent performing tasks that reasonably allow the use of a seat?
>
> **Court's Ruling:** "The 'nature of the work' refers to an employee's tasks performed at a given location for which a right to a suitable seat is claimed, rather than a 'holistic' consideration of the entire range of an employee's duties anywhere on the jobsite during a complete shift. If the tasks being performed at a given location reasonably permit sitting, and provision of a seat would not interfere with performance of any other tasks that may require standing, a seat is called for." See *Nykeya Kilby v. CVS Pharmacy, Inc,* 2016 Cal. LEXIS 1950 at 3-4, (Cal. Apr. 4, 2016).

Continued

The Court elaborated further by stating "Courts should look to the actual tasks performed, or reasonably expected to be performed, not to abstract characterizations, job titles, or descriptions that may or may not reflect the actual work performed." *Id.*

Question 2: When determining whether the nature of the work "reasonably permits" the use of a seat, should courts consider any or all of the following:

(a) the employer's business judgment as to whether the employee should stand;
(b) the physical layout of the workplace; or
(c) the physical characteristics of the employee?

Court's Ruling: "Whether the nature of the work reasonably permits sitting is a question to be determined objectively based on the ***totality of the circumstances***. An employer's business judgment and the physical layout of the workplace are relevant but not dispositive factors. The inquiry focuses on the nature of the work, not an individual employee's characteristics." *Id.* at 4 (emphasis added).

Question 3: If an employer has not provided any seat, does a plaintiff need to prove what would constitute "suitable seats" to show the employer has violated the applicable Wage Order?

Court's Ruling: "The nature of the work aside, if an employer argues there is no suitable seat available, the burden is on the employer to prove unavailability." *Id.*

The Court's ruling will affect a vast number of employers throughout California, and may likely influence other states' approach to their suitable seating requirements. Even more evident is the fact that avenues for litigation against California employers just widened significantly based on these newly clarified suitable seating requirements.

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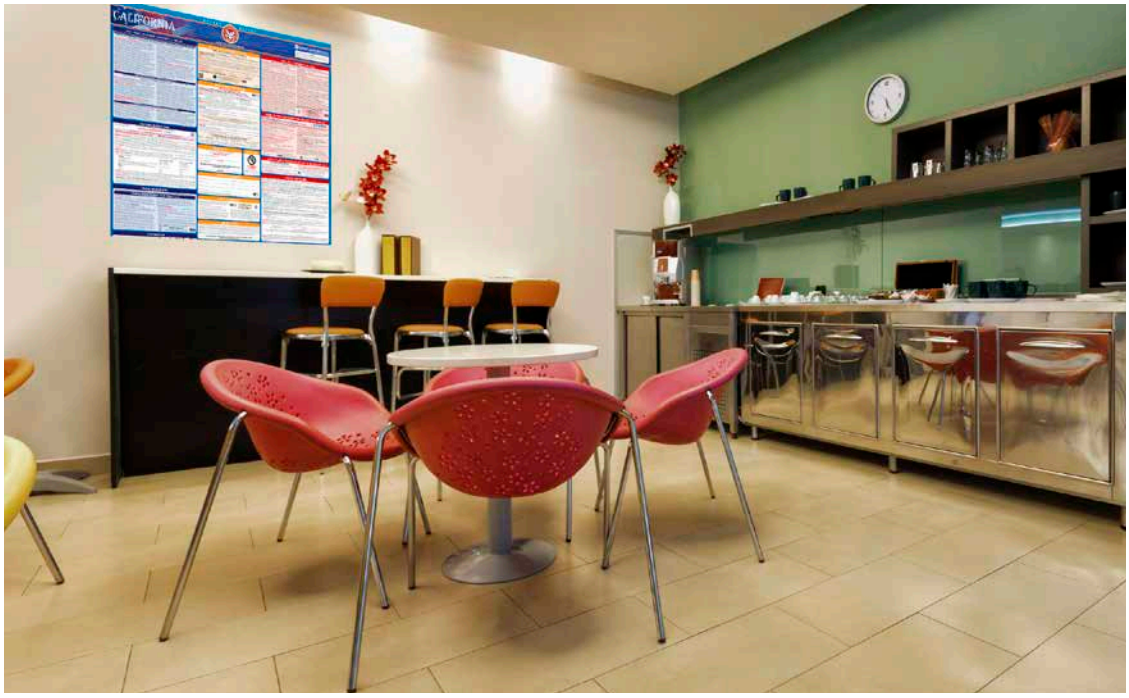


Employers Reminded to Post Annual Work Injury and Illness Summaries

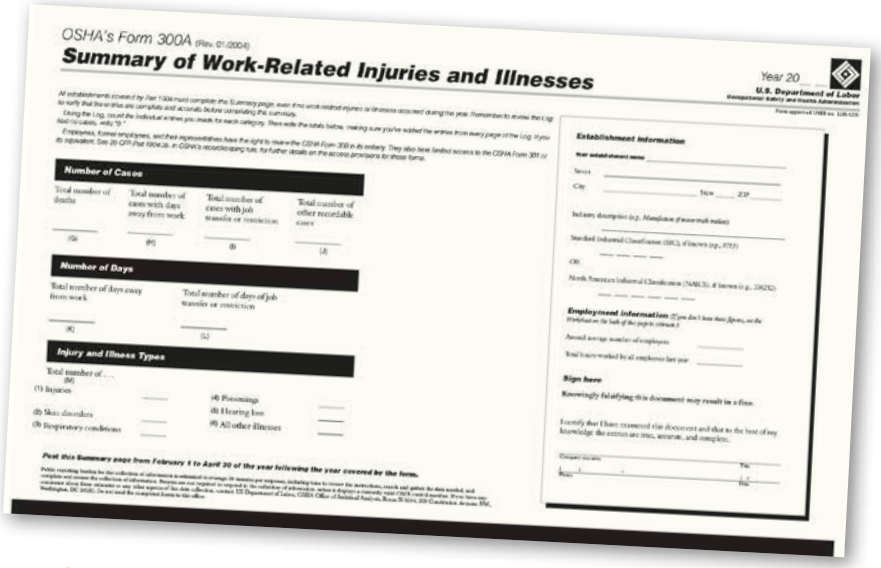
Cal-OSHA has published a reminder about the requirement to post the summary of all injuries and illnesses reported in the last year in a visible and easily accessible area at each worksite. The summary of annual injury and illness is compiled in Cal-OSHA Form 300A Appendix B and must be posted from February 1 through April 30. Employees have a right to review the list of injury and illness records. CCR Title 8 14300.35 (Employee's Involvement). Form 300A needs to be completed even if the employer had no reported workplace injuries in the last year. Incidents listed on the Form 300A Log are not necessarily eligible for workers' compensation or other insurance benefits. Listing a case on the Summary does not mean that the employer or worker was at fault or that a Cal/OSHA standard was violated.

Form 300A containing information relating to employee health must be used in a manner that protects the confidentiality to the extent possible while the information is being used for Occupational Health and Safety Purposes. CCR Title 8 14300.29(b)(6)-(10). For this reason, 300A Appendix A – the Log is not to be posted whereas 300A Appendix B – the Summary is the portion that needs to be posted.

WHICH WORK-RELATED INJURIES AND ILLNESSES SHOULD YOU RECORD?

An injury or illness is considered work-related if an event or exposure in the work environment caused or contributed to the condition or significantly aggravated a preexisting condition. Work-relatedness is presumed for injuries and illnesses resulting from events or exposures occurring in the workplace, unless an exception specifically applies. See CCR Title 8 14300.5(b)(2) for the exceptions. The work environment includes the establishment and other locations where one or more employees are working or are present as a condition of their employment. See CCR Title 8 14300.5(b)(1).

You must record any significant work-related injury or illness that is diagnosed by a physician or other licensed health care professional. You also must record any work-related case involving cancer, chronic irreversible disease, a fractured or cracked bone, or a punctured eardrum. See CCR Title 8 14300.7.


OSHA's Form 300A (Rev. 01/2004)

Summary of Work-Related Injuries and Illnesses

Year 20__

U.S. Department of Labor

Establishment information

Number of Cases

Number of Days

Injury and Illness Types

Post this Summary page from February 1 to April 30 of the year following the year covered by the form.

Additional criteria that require recording include the following work-related incidents:

- Any needlestick injury or cut from a sharp object that is contaminated with another person's blood or other potentially infectious material
- Any case requiring an employee to be medically removed under Cal/OSHA requirements
- Tuberculosis infection as evidenced by a positive skin test or diagnosis by a physician or health care professional
- An employee's adverse hearing test (audiogram) reveals diminished functionality following an industrial event.

Continued

WHAT ABOUT FIRST AID SITUATIONS?

Incidents requiring first aid as the form of treatment do not need to be listed. OSHA examples of nonreportable first aid include:

- Using nonprescription medications at nonprescription strength from first aid kit
- Cleaning, flushing or soaking wounds on the skin surface
- Using wound coverings, such as bandages
- BandAids™, gauze pads, etc., or using SteriStrips™ or butterfly bandages
- Using hot or cold therapy
- Using any totally non-rigid means of support, such as elastic bandages, wraps, non-rigid back belts, etc.
- Using temporary immobilization devices while transporting an accident victim (splints, slings, neck collars or back boards)
- Drilling a fingernail or toenail to relieve pressure, or draining fluids from blisters
- Using eye patches
- Using simple irrigation or a cotton swab to remove foreign bodies not embedded in or adhered to the eye
- Using irrigation, tweezers, cotton swab or other simple means to remove splinters or foreign material from areas other than the eye
- Drinking fluids to relieve heat stress

Visit to a doctor or health care professional solely for observation or counseling is not recordable.

PRIVACY CONCERNS: UNDER WHAT CIRCUMSTANCES SHOULD THE EMPLOYEE'S NAME NOT BE ENTERED ON THE FORM 300A LOG?

The following types of injuries or illnesses should be regarded as privacy concern cases and the employee's name should not be listed on the Form 300A Log:

- An injury or illness to an intimate body part or to the reproductive system
- An injury or illness resulting from a sexual assault
- A mental illness
- A case of HIV infection, hepatitis or tuberculosis
- A needlestick injury or cut from a sharp object that is contaminated with blood or other potentially infectious material (see CCR Title 8 14300.8 for definition)
- Other illnesses, if the employee independently and voluntarily requests that his or her name not be entered on the log.

For these cases, the words "privacy case" should be entered in the space normally used for the employee's name. You must keep a separate, confidential list of the case numbers and employee names for the establishment's privacy concern cases so that you can update the cases and provide information to the government if asked to do so. If you have a reasonable basis to believe that information describing the privacy concern case may be personally identifiable even though the employee's name has been omitted, you may use discretion in describing the injury or illness on both the 300A Appendix A Log and the 300A Appendix B Summary. You must enter enough information to identify the cause of the incident and the general severity of the injury or illness, but you do not need to include details of an intimate or private nature.

HOW LONG MUST THE EMPLOYER KEEP THE LOG AND SUMMARY ON FILE?

You must keep the Log and Summary for five years following the year to which they pertain.

Best practice dictates that for any listed incident on the Form 300A Log, there should be a corresponding document such as a Form 5020 (Employer's First Report of Occupational Injury) or a memo of incident/illness or medical condition reporting in the employee's file.

The Cal-OSHA Recordkeeping Website is at www.dir.ca.gov/dosh/etools/recordkeeping/index.html

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Lawfully Recovering Costs of Training Programs from Employees Is Tricky but Not Impossible

There are certain circumstances under which an employer may recoup costs of an employer-sponsored training program from an employee without violating the California Labor Code. Recently, the Court of Appeal in *USS POSCO Industries v. Floyd* Case (2016) 244 Cal.App.4th 197, held that an employee who voluntarily enrolled in a three-year, employer-sponsored educational program, was bound by the contract he entered into agreeing that if he quit his job within 30 months of completing the program, he would reimburse his employer a prorated portion of program costs. Floyd Case began his employment with USS POSCO Industries (UPI) as an entry-level laborer. He thereafter sought to become a maintenance technical electrical (MTE) worker. To qualify to do so, Mr. Case had to take and pass UPI's MTE exam. Before taking the exam he decided to go through UPI's MTE training program. When Mr. Case quit his job two months after completing the training course, the company sought to enforce its agreement with him and recover costs. The company sued him for breach of contract and he countersued claiming the contract violated various provisions of the California Labor Code.

Mr. Case was neither forced to take the training course to become a MTE nor was he required by UPI to take the training through UPI; he voluntarily elected to do so. Accordingly, the court found that (1) the voluntary optional nature of the program did not violate California Labor Code section 2802, which requires employers to pay for all necessary expenses in direct consequence of the employee's job duties, and (2) the agreement did not violate section 450 of the Labor Code, which prohibits employers from requiring employees to patronize the goods and services the employer offers.

The court distinguished this matter from *In Re Acknowledgment Cases* (2015) 239 Cal.App.4th 1498, stemming from the requirement by the City of Los Angeles that all newly hired police officers attend and graduate from the Los Angeles Police Academy. The city sought to find a way to curtail the attrition of newly hired officers. The city enacted Los Angeles Administrative Code section 4.1700 (LAAC § 4.1700), which provides, in part, that any police officer hired by the Los Angeles Police Department (LAPD) is required to reimburse the city a prorated portion of the cost of training at the academy if he or she voluntarily leaves the LAPD after serving less than 60 months following graduation and goes to work for another law enforcement agency within one year after terminating employment with the LAPD.

LAAC § 4.1700 further provides that upon application for a job as a police officer, the applicant shall sign an agreement stating that he or she intends to maintain employment with the LAPD for at least 60 continuous months and agreeing to reimburse the city for the direct and indirect costs of training if he or she leaves the LAPD within five years after graduation and becomes employed by another law enforcement agency within one year after leaving the LAPD. The agreement is called "the acknowledgment." In the *In Re Acknowledgment Cases*, the Court of Appeal ultimately determined that because the LAPD created its own training program and mandated its newly hired officers to attend, Labor Code section 2802, which requires that the employer bear the cost of training it requires to enable employees to discharge their duties, applies. Accordingly, the city could not seek reimbursement under such circumstances.

While the case law continues to develop in this area, employers should use caution and consult counsel when attempting to develop training or other programs where they seek to recover the costs of those programs from employees.

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The goal of the proposed amendments is to describe how consideration of criminal history in employment decisions may constitute a violation of the FEHA.

The Council proposes to clarify that business necessity, in addition to job-relatedness, is required if a policy or practice has an adverse impact on a protected class. Notably, the proposed amendments will articulate the following: (1) California employers are prohibited from using certain criminal background information in hiring, promotion, training, discipline and termination; (2) the concept of adverse impact; (3) how to prove adverse impact; (4) affirmative defenses of job relatedness and business necessity with respect to permitting or requiring consideration of criminal history; and (5) adverse impact's less discriminatory alternative doctrine.

The Council held a public hearing on April 7, 2016, in Berkeley, California. *Employers should expect final decisions from the Council shortly. For more details, go to www.dfeh.ca.gov.*

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