THE GOLDSTEIN LAW FIRM, A.P.C.
Established 1977

ATTORNEYS AT LAW

LABOR & EMPLOYMENT LAW NEWSLETTER

8912 BURTON WAY • BEVERLY HILLS, CALIFORNIA 90211

(310) 553-4746 • cgoldsteinesq@gmail.com

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I. TAKE A SEAT – THE NEW BATTLE CRY IN THE WAGE AND HOUR LEGAL WARS AND ITS CONSEQUENCES FOR CALIFORNIA EMPLOYERS.

The California Wage Orders section 14 Seating states: (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 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."

While the seating requirement dates back to 1919 and there have been a number of revisions over the years, the Labor Commissioner did not actively enforce the seating requirements. Now in the age of mega wage and hour class action lawsuits and PAGA lawsuit, plaintiffs' attorneys filed class actions lawsuits a number of years ago against retailers and banks based on these employers' failure to comply with Section 14 and provide seating to employees.

The cases that were filed in federal court against CVS Pharmacy, Inc. and JP Morgan Chase were appealed to the U.S. Ninth Circuit Court of Appeals that certified questions regarding the California Wage Order Section 14-Seating to the California Supreme Court. The *Kilby* case involved the duties of customer sales representative, sale clerks/cashiers at CVS and the *Henderson* case involved bank tellers at JP Morgan Chase.

The California Supreme Court consolidated the *Kilby v. CVS Pharmacy, Inc.* with *Henderson v. JPMorgan Chase Bank* issued an opinion on April 4, 2016 regarding its interpretation of the requirement that employers provide seating for certain employees under Section 14 of the Wage Orders.

The Court stated: "The inquiry [whether an employee is to be provided with seating] does not turn on the individual assignments given to each employee, but on consideration of the overall job duties performed at the particular location by any employee while working there, and whether those tasks reasonably permit seated work." The Court rejected the plaintiff's argument that whether the "nature of the work reasonably permits the use of seats 'turns on a task by task evaluation of whether *a single task* may feasibly be performed seated.'" The Court stated: "This view is too narrow and likewise inconsistent with the language and history of Section 14(A)."

The Court recognized that Section 14 (A) had been modified in 1976 to include the word "reasonably" before the phrase "permits the use of seats." The Court concluded that the use of the word reasonably was to make the requirement to provide seating more flexible and more subject to administrative judgment as to what is reasonable. Finally, the court said that "The seating requirement has never been understood as absolute or doctrinaire. Plaintiffs' proposed examination of the individual task in isolation is inconsistent with the flexibility envisioned by the IWC's reasonableness standard. The reasonableness standard and its attendant flexibility were intended to balance an employee's need for a seat with considerations of practicability and feasibility."

The Court stated in an effort to provide guidance to lower courts and litigants in any future cases that "When evaluating whether the 'nature of the work reasonably permits the use of seats' courts must examine subsets of an employee's total tasks and duties by location, such as those performed at a cash register or a teller window, and consider whether it is feasible for an employee to perform each set of location specific tasks while seated. 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. Tasks performed with more frequency or for a longer duration would be more germane to the seating inquiry than tasks performed briefly or infrequently."

As an example of the application of the guidelines, the Court stated that "An employee may be entitled to a seat to perform tasks at a particular location even if his job duties include other standing tasks, so long as provision of a seat would not interfere with performance of standing tasks. At the same time consideration of all actual tasks performed at a particular location would allow the court to consider the relationship between the standing and sitting tasks done there, the frequency and duration of those tasks with respect to each other, and whether sitting, or the frequency of transition between sitting and standing, would unreasonably interfere with other standing tasks or the quality and effectiveness of overall performance." The Court stated that "This inquiry is not a rigid quantitative analysis based merely upon the counting of tasks or amount of time spent performing them. Instead, it involved a qualitative assessment of all relevant factors." Other factors that should be considered by the court, although not dispositive, are the business judgment of the employer regarding how it wants employees to provide better customer service, standing or seated; and the physical layout of the employer's place or places of business, but not physical differences between employees.

Finally, the Court concluded that employers, not employees, have the burden where seating is provided to prove that the seating is suitable.

<u>How Should California Employers React to the Supreme Court's Seating Decision to Avoid or Minimize Liability for Violating the Seating Requirements of Section 14?</u>

1. Investigate whether the nature of the work your employees perform reasonably permits the use of the seats?

2. Investigate whether when your employees are not engaged in active duties of their employment and the nature of the work requires standing, do you have to provide an adequate number of suitable seats in reasonable proximity to the work area?

3. If you find that the nature of the work your employees perform reasonably permits the use of the seats when performing their jobs and/or when employees are not engaged in

the active duties of their employment that there are insufficient seating for the employee in proximity to their work areas, take immediate corrective action.

4. To avoid costly class action lawsuits and PAGA lawsuits for violating Section 14 – by failing to provide suitable seating for employees, especially employers in retail industries, you should have **THE GOLDSTEIN LAW FIRM** conduct an internal audit that is protected by the attorney – client and attorney work product privilege to determine whether your organization is in full compliance with the seating requirements of Section 14 (A) and (B) of the Wage Orders.

II. GOVERNOR BROWN SIGNS THE LAW INCREASING THE CALIFORNIA MINIMUM WAGE INCREASES

Governor Jerry Brown signed a new law on April 4th, 2016 increasing the California minimum wage to $15.00 per hour by 2022. The new law increases the state minimum wage to $10.50 per hour in 2017; to $11.00 per hour in 2018; followed by a $1.00 per year increase through 2022. After 2022, the minimum wage will increase annually based on the cost of living.

Employers in the City of Los Angeles and County of Los Angeles will have to pay employees a minimum wage of $10.50 effective July 1, 2016.

III. IF YOU HAVE 50 OR MORE EMPLOYEES, HAVE YOU MET THE CALIFORNIA LEGAL REQUIREMENT THAT EVERY 2 YEARS YOU ARE REQUIRED TO TRAIN YOUR MANAGERS AND SUPERVISORS IN SEXUAL HARASSMENT PREVENTION AND NOW ANTI- BULLYING?

The California Government Code Section 12950.1 requires every California employer with 50 or more employees to provide at least 2 hours of classroom or other effective interactive training and education regarding sexual harassment every two years. The training must also include training regarding preventing bullying in the workplace.

Employers who fail to provide their managers and supervisors with sexual harassment training and training on what constitutes bullying, risk this fact being used against the employer in costly contentious employee lawsuits for sexual harassment and other claims.

Since 2006 when Government Code Section 12950.1 was originally enacted **THE GOLDSTEIN LAW FIRM** has trained thousands of managers and supervisors in its **SEXUAL HARASSMENT PROGRAM** that is based on the combined 80 years of experience representing employers in sexual harassment, discrimination and wrongful termination cases.

Contact THE GOLDSTEIN LAW to have a Sexual Harassment Seminar Conducted for your managers and supervisors that meets the legal requirements of Government Code Section 12950

IV. EXPLODING THE "FALSE MYTHS" OF EMPLOYMENT AND THE WAGE AND HOUR LAWS

Each of the statements listed below are ***false*** and should never be used as the basis for management's decision in employment law and wage and hour law matters.

Get sound, timely legal advice and counsel from **THE GOLDSTEIN LAW FIRM** in order to avoid making your employment and wage decisions based on these false myths.

A. TEN (10) *FALSE* MYTHS OF EMPLOYMENT LAW:

1. You can't fire a person in a protected class at anytime unless they do something horrific at work;
2. If a person has a disability or is perceived as disabled you have to accommodate the disability or perceived disability under all circumstances, regardless of the effect on your business;
3. If an employee is injured on the job, regardless of how long they are on leave or whether you have replaced them, you must hold open their position and take them back to work;
4. You have the right to fire employees for any reason, at any time, because they are at-will employees;
5. Juries will always side with employees and give them large damage awards so employers should settle all cases;
6. An employee's right of privacy about the reason he or she was fired preempts an employer's right to tell persons who have a need to know about the true reason why the employee was fired;
7. Employees who use marijuana cannot be fired because they have a medical marijuana card that entitles them to use marijuana for medicinal reasons;
8. If you have a troublesome employee, lay-off the employee, instead of firing them, and you won't be subject to a potential wrongful termination and/or discrimination lawsuit;
9. If you find a better employee to replace another employee who is out on pregnancy leave you can do so without any legal consequences;
10. You cannot fire anyone who has been with you a long time.

B. NINE (9) *FALSE* MYTHS OF WAGE AND HOUR LAW

1. If you receive a salary, regardless of your job duties, you are not required to be paid overtime;
2. A national company does not have to comply with specific California Wage and Hour Laws because the Federal Fair Labor Standards Act preempts state law;
3. Time cards filled out by an employee and signed by a supervisor will completely protect a Company against wage and hour claims for unpaid wages and overtime;
4. Employees who perform work in violation of a rule that employees must secure the permission of their supervisor to work overtime should not be paid for the overtime, even though the employer knew or should have known, that the employee was performing work;
5. Employers who do not pre-approve employees working from home do not have to pay the employee for the work performed;

6. Companies fulfill the requirements of the California Wage and Hour Law by allowing employees who are under the control of the employer to take meal periods at anytime and rest breaks whenever needed;
7. It doesn't matter how much time an employee spends performing supervisory duties, if they hire, fire or direct two or more employees, they are exempt from overtime;
8. Employees are entitled to be reimbursed for **all** "business expenses" under California Labor Code Section 2802 whether or not they are necessary and reasonable; and
9. Employers can wait to pay an employee who is fired until the next pay day instead of expediting payment upon termination because the accounting office is closed at the time the employee is discharged.

When you have to make the hard employment and wage and hour decisions, consult THE GOLDSTEIN LAW FIRM – EXPERIENCE AND SUCCESSFUL REPRESENTATION OF EMPLOYERS COUNTS.

The Legal Practice Areas of the Goldstein Law Firm

Employment Law, Wage and Hour Law, Labor Law,

Business Litigation, Contract Disputes, Arbitrations, Corporate and Transactional Law, Shareholder Disputes, Commercial Law, Appellate Law, Corporate Investigations, Wrongful Death, Training & Workshops

The Goldstein Law Firm
8912 Burton Way
Beverly Hills, California 90211
Telephone: (310) 553-4746
Facsimile: (310) 282-8070

cgoldsteinesq@gmail.com
josephgoldsteinesq@gmail.com
jonathangoldsteinesq@gmail.com