

November 29, 2010

### California Court Rules that PAGA Penalties Available for Employer's Failure to Provide "Suitable Seats"

In [Bright v. 99¢ Only Stores](#), No. B220016 (November 12, 2010), a California Court of Appeal held that penalties under the Private Attorneys General Act ("PAGA") are available for violations of a little-known California law that requires retailers to provide employees with "suitable seating." At issue in the case was California Industrial Welfare Commission Wage Order 7-2001, which covers the Mercantile Industry. Section 14 of the Wage Order requires employers to provide employees with "suitable seats when the nature of the work reasonably permits the use of seats." This section further provides that when the nature of the work requires standing, employers must provide seats in reasonable proximity to work areas so that employees can use the seats when they are not actively engaged in their duties or when their use of seats would not otherwise interfere with job duties. The Wage Order authorizes a civil penalty for violations of the Wage Order that result in an employee being "underpaid." Until now, no appellate court had ruled on whether employees could recover these or other penalties for seating violations.

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Eugenia Bright, a 99¢ Only Stores cashier, filed suit under PAGA claiming that the employer failed to provide seats for its cashiers. PAGA authorizes an employee to act as a private attorney general to recover civil penalties for Labor Code violations individually and on behalf of other employees without meeting class action requirements. Any penalties awarded are split between the aggrieved employees (who get 25%) and the California Labor and Workforce Development Agency. Employees can also recover their attorneys' fees.

The trial court held that Ms. Bright was not "underpaid" as a result of the employer's alleged failure to provide seating and, therefore, could not collect penalties under the Wage Order penalty provision. The trial court also denied her claim for PAGA penalties, on the ground that PAGA does not provide a separate penalty when there is already an applicable penalty in place (e.g., the Wage Order's penalty for underpaid employees).

The Court of Appeal reversed. Although the appellate court agreed with the lower court that the Wage Order did not provide a penalty applicable to seating violations, it ruled that violations of Wage Order 7 also amount to violations of Labor Code section 1198. That

statute makes it unlawful to employ workers under conditions of labor prohibited by a wage order -- such as failure to provide seating. And because section 1198 does not specify a civil penalty, PAGA both supplies a civil penalty and allows aggrieved employees to sue to recover it.

Employers should note that the appellate court only addressed the issue of available penalties for violations, and neither clarified the requirements of the seating provision nor decided whether 99¢ Only Stores violated the provision. Nevertheless, to avoid problems -- including PAGA actions seeking penalties on behalf of current and former employees -- employers covered by Wage Order 7 are encouraged to review whether their employees (such as cashiers and store sales personnel) are entitled to “suitable seating.”

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