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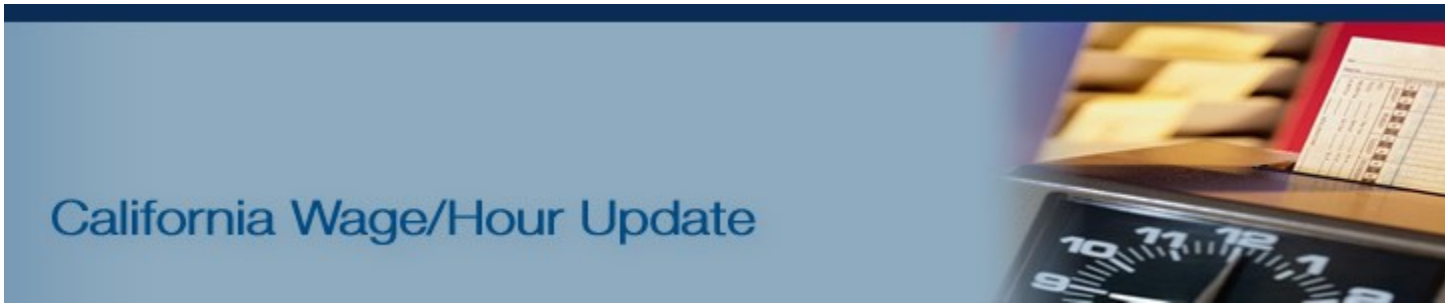

Employers on the Hot Seat

By Jennifer Achtert

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Employers with a California presence already know that they need to monitor their wage and hour practices carefully. Now that many employers have reached compliance in areas such as meal- and rest-period laws, plaintiff attorneys are on the prowl for new battlegrounds for litigation. For example, two recent California appellate decisions added yet another hurdle for California employers to leap and additional fuel for employees (and their lawyers) looking to file class actions. *Bright v. 99¢ Only Stores;* and *Home Depot USA, Inc. v. Superior Court.*

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Nearly all of the California wage orders include a requirement that employees be provided with "suitable seats" when the nature of the work reasonably permits sitting while working. For employees whose work requires standing, the wage orders state that employees must be provided with "an adequate number of suitable seats … in reasonable proximity to the work area." (The only exceptions are most employees in the agricultural industry and some employees in the construction, drilling, logging, and mining industries.)

While the seating provisions have attracted little attention – from anyone – in the past, that is changing. In the past year or two, employees have started bringing class actions asserting that an employer's failure to provide adequate seating can give rise to penalties under the Private Attorneys General Act of 2004 (PAGA). In defending these cases, employers have argued that there can be no penalties awarded under PAGA for seating violations. Although there are some older decisions holding that there are no PAGA penalties available for these claims, the current trend appears to be in favor of employees.

In November 2010, and again in December 2010, the California Court of Appeal held that employees can seek penalties under PAGA for seating violations. In the *Bright* case, the court reversed the Superior Court's order throwing the case out. In *Home Depot*, the appellate court affirmed the lower court's decision to let that case go forward. At least three federal district courts have also refused to throw out seating cases within the past 18 months. These decisions mean that – at least until we hear further from the courts – employers will not be successful in any efforts to eliminate these causes of action early in the lawsuit as being purely frivolous.

The stakes involved in these disputes are high, because penalties under PAGA are steep: $100 for each aggrieved employee per pay period for the initial violation, and $200 for each aggrieved employee per pay period for each subsequent violation, plus attorneys' fees to the prevailing employee.

Employers are likely to be faced with an increasing number of these claims – along with meal- and-rest period claims. The first targets have been large retailers – but nearly every employer could be a target at some point. You cannot afford to ignore this new breed of cases.

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