
Suitable Seating: Totality of the Circumstances Inquiry

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Introduction

In recent years, many employers in the retail industry have been confronted with litigation filed by current or former employees claiming that they should be provided a seat while performing various aspects of their jobs. The basis for these lawsuits is the language within the State of California Industrial Welfare Commission's Orders Regulating Wages, Hours and Working Conditions (hereinafter "Wage Orders"), mandating that employers must provide suitable seats to employees when the nature of the work reasonably permits.

Specifically, the Wage Orders¹ state:

(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.²

Though these provisions have existed in the Wage Orders for decades, they were rarely enforced by the state or even discussed. This began to change in 2004 when the State of California enacted the Private Attorneys General Act (PAGA).³ Among other things, PAGA provides employees the power to sue their employers on behalf of themselves, other employees, and the State of California for violations of the Labor Code.⁴

The suitable seating provisions within the Wage Orders creates significant exposure for many employers. In particular, the retail industry has been the target of the majority of these lawsuits because providing seats to retail employees is not a common practice. The legal question then becomes: Does the nature of the work reasonably permit the use of seats?

The answer to this question can be challenging for two primary reasons. First, the Wage Orders do not clearly specify which factors should be considered and measured when evaluating suitable seating. Second, an evaluation of these factors requires detailed and precise measurement of several aspects of the work environment. The California Supreme Court recently helped address the first challenge by providing a detailed opinion offering much-needed clarity around factors that should be considered when evaluating the "nature of the work." In this paper, we address the second challenge by describing scientifically based methods that can be designed to collect the type of data to address each relevant factor.

¹ The Industrial Welfare Commission has issued 17 different Wage Orders, each applicable to a specific industry. Similar language is included in 14 of the 17 Wage Orders.

² E.g., IWC Wage Order 4-2001, Sec. 14.

³ Ben James, "Workers Warn Calif. High Court On Seating Class Actions," Law360, New York (August 1, 2014), available at: <https://www.law360.com/articles/563484/workers-warn-calif-high-court-on-seating-class-actions>

⁴ State of California Labor and Workforce Development Agency, Private Attorney Generals Act, available at: http://labor.ca.gov/Private_Attorneys_General_Act.htm

California Supreme Court Opinion

Background

On April 4, 2016, the California Supreme Court issued a much-anticipated opinion that clarified many important aspects of the suitable seating requirements.⁵

The opinion is a result of two suitable seating lawsuits that were filed in recent years (*Kilby v. CVS Pharmacy*; *Henderson v. JPMorgan Chase Bank*). In both cases, the trial court rulings were appealed by plaintiffs to the Ninth Circuit Court of Appeals. To address the issues in these pending cases, the Ninth Circuit requested clarification from the California Supreme Court on the proper interpretation of three aspects of the suitable seating requirement, including the meaning of “nature of the work” and “reasonably permits.”

This Supreme Court opinion provided guidance to employers on how to evaluate whether they have a legal obligation to provide seats for their employees. Specifically, the Supreme Court outlined several factors that, in totality (i.e., “Totality of the Circumstances”), guide employers and the courts on suitable seating requirements. Because no suitable seating cases have been litigated since this opinion (as of the time of this writing), this opinion serves as the primary authoritative source for how to properly evaluate suitable seating requirements.

In the next section, we analyze the opinion and discuss the factors identified by the Supreme Court as relevant to a suitable seating inquiry. In later sections, we describe scientifically based methods for operationalizing and measuring these factors, based on our extensive experience studying work in a variety of contexts. We offer methods for collecting data directly relevant to a suitable seating “Totality of the Circumstances” analysis.

Totality of the Circumstances

Perhaps the most important conclusion that can be drawn from the Supreme Court opinion is that no single factor is dispositive in evaluating whether seats must be provided. Multiple factors should be considered in aggregate to make a reasonable assessment. The court repeatedly references the “Totality of the Circumstances” as the standard for evaluating suitable seating requirements. For example (emphasis added):⁶

Whether the nature of the work reasonably permits sitting is a question to be determined objectively based on the *totality of the circumstances*. (p. 2)

Whether an employee is entitled to a seat under section 14(A) depends on the *totality of the circumstances*. (p. 18)

This inquiry is not a rigid quantitative analysis based merely upon the counting of tasks or amount of time spent performing them. Instead, it involves a *qualitative assessment of all relevant factors*. (p. 18)

For each location where seating may be sought, the *totality of the circumstances test simply recognizes that numerous factors*, such as the frequency and duration of tasks, as well as the feasibility and practicability of providing seating, may play a role in the ultimate conclusion. (p. 20)

The court further discusses how the Totality of the Circumstances should be evaluated. In this discussion, specific factors are cited that are relevant to this inquiry. In the following section, we provide a summary of each factor cited by the court.

⁵ *Kilby v. CVS Pharmacy*, 368 P.3d 554, 63 Cal. 4th 1 (2016).

⁶ The page numbers below refer to the page of the Supreme Court’s opinion in *Kilby v. CVS Pharmacy*.

Relevant Factors in Totality of the Circumstances Inquiry

A review of the opinion reveals six key factors relevant to a Totality of the Circumstances inquiry. These factors are discussed below with supporting language from the opinion provided. In later sections, we discuss methodological approaches to operationalize and measure each factor.

Factor 1: Job duties performed at a specific location within a store

Similar to an evaluation of many wage and hour disputes, knowledge of the tasks and activities actually performed by employees is a key factor in the Totality of the Circumstances inquiry. In addition, the location where these tasks are performed is also a relevant factor. This is cited by the Supreme Court throughout the opinion (emphasis added):

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. (p. 2)

The inquiry 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. (p. 15)

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. (p. 16)

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. (p. 16)

In sum, the “nature of the work” under section 14(A) would include an employee’s *actual or expected tasks. If tasks are performed at a discrete location, those tasks should be considered together* in evaluating whether work there reasonably permits use of a seat. (pp. 17–18)

Whether an employee is entitled to a seat under section 14(A) depends on the totality of the circumstances. *Analysis begins with an examination of the relevant tasks, grouped by location*, and whether the tasks can be performed while seated or require standing. This task-based assessment is also balanced against considerations of feasibility. (p. 18)

Instead, tasks should be considered together based upon the discrete location where the tasks are performed. (p. 20)

Factor 2: Frequency and duration of location-specific tasks

In addition to the tasks actually performed by employees, the duration of those tasks and the frequency with which they are performed are cited repeatedly throughout the opinion as factors relevant to the Totality of the Circumstances inquiry (emphasis added):

Tasks performed with more frequency or for a longer duration would be more germane to the seating inquiry than tasks performed briefly or infrequently. (p. 16)

At the same time, consideration of all the actual tasks performed at a particular location would allow the court to consider the relationship between the standing and sitting tasks, 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 job performance. (p. 17)

For each location where seating may be sought, the totality of the circumstances test simply recognizes that numerous factors, *such as the frequency and duration of tasks*, as well as the feasibility and practicability of providing seating, may play a role in the ultimate conclusion. (p. 20)

Factor 3: The impact of seating on job performance and work quality

Another relevant factor to the Totality of the Circumstances inquiry is the impact of seating on employee job performance. The extent to which the presence of a seat interferes with an employee's ability to perform work effectively is an important consideration when evaluating whether the nature of the work reasonably permits a seat. This factor is also cited throughout the opinion (emphasis added):

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. (p. 2)

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*. (p. 16)

At the same time, consideration of all the actual tasks performed at a particular location would allow the court to consider the relationship between the standing and sitting tasks, 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 job performance*. (pp. 16–17)

Feasibility may include, for example, an assessment of whether providing a seat would unduly *interfere with other standing tasks, whether the frequency of transition from sitting to standing may interfere with the work*, or whether *seated work would impact the quality and effectiveness of overall job performance*. (p. 18)

An employer's evaluation of the *quality and effectiveness of overall job performance* is among the factors that can be objectively considered in light of the overall aims of the regulatory scheme, which has always been employee protection. (p. 21)

Factor 4: An evaluation of the “customer service” duties employees are expected to perform

Although related to the previous factor, an employee's responsibility to provide customers with quality service was specifically mentioned in the opinion. This factor is of particular relevance to employers in the retail industry, where customer service is often a primary duty of customer-facing employees. The opinion states that an employee's ability to effectively provide customer service is a relevant factor to a Totality of the Circumstances inquiry (emphasis added):

Providing a certain level of customer service is an *objective job duty* that an employer may reasonably expect. An employee's duty to provide a certain level of *customer service should be assessed*, along with other relevant tasks and obligations, in determining whether the nature of the work reasonably permits use of a seat at a particular location. *Providing “customer service” is an objective job function* comprised of different tasks, e.g., assisting customers with purchases, answering questions, locating inventory, creating a welcoming environment, etc. (p. 21)

Factor 5: An evaluation of how the physical layout of the workplace relates to the job duties of the employee

The court also stated that the physical layout of the workplace is a relevant factor to the Totality of the Circumstances inquiry, especially when the layout impacts the employee's job duties. Specifically, the opinion states (emphasis added):

An employer's business judgment and the *physical layout of the workplace* are relevant but not dispositive factors. (p. 2)

We conclude the *physical layout of a workspace* may be relevant in the totality of the circumstances inquiry. (p. 22)

A workspace's physical layout may inform the expectations of both the employer and employee with respect to job duties. To the extent it does, the physical workspace would be relevant in defining an employee's job duties and should be accounted for in the totality of the circumstances inquiry. (p. 22)

Factor 6: An employer's business judgment

The court also states that an employer's business judgment is a relevant factor in the Totality of the Circumstances inquiry. In particular, an employer may use business judgment to define the duties expected of its employees. However, the court also notes that business judgment is an objective standard that does not include an employer's mere preference. The court states (emphasis added):

An employer's *business judgment* and the physical layout of the workplace are relevant but not dispositive factors. (p. 2)

There is no question that an *employer may define the duties* to be performed by an employee. (p. 22)

However, "*business judgment*" in this sense does not encompass an employer's mere preference that particular tasks be performed while standing. The standard is an objective one. (p. 21)

An objective inquiry properly takes into account an employer's reasonable expectations regarding customer service and acknowledges an employer's role in setting job duties. It also takes into account any evidence submitted by the parties bearing on an employer's view that an objective job duty is best accomplished standing. It protects employees because it does not allow employers unlimited ability to arbitrarily define certain tasks as "standing" ones, undermining the protective purpose of the wage order. (p. 21)

Operationalizing and Measuring Factors

Over the years, we have developed and continuously refined methods to address critical questions in various wage and hour disputes, including overtime exemptions, off-the-clock-work, and meal and rest break compliance. These methods involve two important steps: operationalizing and measuring.

Operationalization is a term used in the scientific community to refer to the process of translating concepts that are not directly measurable (e.g., athletic ability) into specific, measurable phenomena (e.g., time to run one mile). Only after the relevant concepts have been operationalized can they be measured and the data analyzed.

The methods described here are designed to capture detailed information and precise measurements of different aspects of the work environment, including the tasks and activities employees actually perform, time spent performing

that work, and the context in which the work is performed. In this section, we describe how these well-established methodological approaches are useful for addressing the factors relevant to a Totality of the Circumstances inquiry in the context of suitable seating requirements.

Time and Motion Observations

For the purpose of evaluating suitable seating, a “time and motion” observation approach may be the most appropriate. Time and motion observations are based on scientific data-collection techniques going back more than a century as well as modern Job Analysis methodologies. This approach involves a trained job analyst directly observing and documenting a continuous record of all tasks an employee performs throughout the day, along with the duration of each task. An observational study is often favored because it yields a robust data set that many readers and fact finders find particularly compelling.

An important advantage of an observational approach is that data are collected from an objective professional who directly observes and documents the tasks performed in a given work environment. This ensures that data are free from self-report biases or memory decay that may lead to inaccurate self-reports.

Once collected, the individually recorded tasks can be grouped into different meaningful categories and analyzed to provide results that address the specific issues. This may include the percentage of time spent on different activities, total time spent on various activities, frequency that certain tasks are performed, or average duration of tasks. In addition, the location at which each task is performed can be recorded and analyzed. For example, an observational study could inform the court how often employees perform tasks at the check stand, which tasks employees perform at that location, when they are at this location, and how much time they spend at that location. In addition, data such as the frequency, duration, and nature of customer interactions can be collected and analyzed. All of these data are likely to be relevant to the Totality of the Circumstances inquiry.

In addition, observation studies can be designed to capture the physical and sensory demands associated with individual work tasks. For example, data can be collected to show the frequency with which employees are required to reach across the check stand or to the end of the belt to assist a customer with a purchase, activities that may be more difficult to perform while seated.

In some circumstances, the use of video technology may be useful to supplement live observation data. If not already present, video cameras can be strategically positioned to capture all events that take place at a specific location (e.g., the check stand). The recordings can then be coded and analyzed to evaluate the frequency and duration of many different tasks. Video observations have the advantage of capturing a large volume of data across different employees and time periods at a lower cost than live observations. Video observations tend to be most useful for capturing information about repetitive tasks that are clearly visible, such as physical tasks that are performed at a check stand.

Work Simulations

Work simulations are carefully designed exercises that replicate the actual employee work environment. Work simulations are a well-recognized technique commonly used in several employment contexts, such as assessing a job applicant’s ability to perform job-related tasks or evaluating the validity of a personnel selection procedure.

Work simulations can also provide useful data in the context of suitable seating. Specifically, simulations can be designed to assess the impact that seating has on employee performance and productivity, factors that were cited as relevant to the Totality of the Circumstances inquiry. For example, different versions of the work environment can be created that differ only on key factors, such as seating, then job performance of employees in each scenario can be measured and compared. These data can also be compared to existing benchmarks to provide additional points of comparison and evaluate the validity of the simulations.

Work simulations can be set up in a number of ways depending on the work environment. It may be possible to conduct “mock” customer purchases using real cash registers after hours when a store is closed. One or more employees can be asked to participate in the test, and actors or real customers could be used to replicate purchase transactions. During the testing period, the employee would be observed and measured to determine how his or her work performance is impacted by sitting down. Depending on the environment, work performance may be measured through efficiency and quantity of items scanned, accuracy of the transaction, or other metrics.

Additional relevant data may also be collected during the test, such as the number of times the employee had to stand during his or her time at the register to perform a particular task for a customer.

An alternative to conducting simulations during off-hours is to modify the work environment when stores are operating to assess their actual impact.⁷⁷ For example, customer service perceptions may be difficult to measure in a simulation but could be measured in an actual operating store with real customers. Depending on the design of the study, feedback can be collected from customers to describe their perceptions of the customer service they received from a seated employee. Many companies in the retail industry have existing processes for collecting customer feedback, such as invitations to participate in satisfaction surveys online after a purchase. These types of processes could be leveraged to collect actual customer data.

Subject-Matter Expert Interviews

A common approach for collecting information about various aspects of the work environment is conducting interviews with employees who have direct knowledge of the relevant topic, called Subject-Matter Experts (SMEs). Information collected from qualified SMEs is widely accepted as a valid source of data in organizational research. In the context of suitable seating, SMEs can serve as a valuable resource for collecting data relevant to certain factors in the Totality of the Circumstances inquiry.

Evaluation of Store Features. Another component of this evaluation is the extent to which physical features in stores may impact the tasks performed by employees. For example, some stores have self-checkout stands that will likely impact not only the amount of time employees spend interacting with customers, but also the nature of those interactions.

One approach to collecting information relevant to this evaluation is to conduct interviews with SMEs who have direct knowledge on how the type of store and variety of store features impact the tasks employees perform. In many organizations, the appropriate SMEs work in positions such as local or regional management, operations, or facility design. In addition to interview data, the observation data collected during the job analysis can be analyzed to identify tasks that may be linked to the different store factors identified by the SMEs.

Employer’s Business Judgment. Each employer has a perspective on how providing seats to employees may impact the business. Some employers are particularly concerned about the impact sitting may have on employees’ performance by reducing employees’ productivity or efficiency. Others may be more focused on how having customer-facing employees seated while they service customers could have a negative impact on the customer’s satisfaction with their experience at the location. Interviews can be conducted with company leadership to determine their specific areas of concern and to learn their characterization of “business judgment” regarding how seated employees will impact their business.

⁷⁷ Non-California locations similar in type and features of California locations could be used for this purpose.

Summary of Factors and Our Approach to Measurement

The following table provides a summary of the factors identified in the Supreme Court Opinion and our methods to assess each. When reviewed together, these data provide guidance to inform an employer’s decision regarding whether it is required to provide its employees with suitable seating.

No.	Factor	Method	Detail
1	Job duties performed at a specific location within a store	Observation Study	Data collection of task-level data can be focused on specific location(s) or include activities performed throughout the store.
2	Frequency and duration of location-specific tasks	Observation Study	Data collection of task-level data will be tracked, and the frequency in which different tasks are performed can be calculated.
3	The impact seating has on job performance and work quality	Work Simulations	Work simulations can be conducted with seated employees to measure how their performance is impacted.
4	An evaluation of “customer service”-related duties employees are expected to perform	Observation Study	Data collection of task-level data can be analyzed, and customer service tasks can be identified and quantified to determine frequency and duration.
5	An evaluation of how the physical layout of the workplace relates to the job duties of the employee	SME Interviews	Interview data collected from knowledgeable employees to assist in determining the tasks performed at different types of stores or stores with different features.
6	An employer’s business judgment	SME Interviews	Interview data collection from leadership to assist in providing the rationale for the employer’s business judgment around suitable seating being provided for employees.

Summary

The California Supreme Court’s 2016 opinion on suitable seating requirements provided clarity regarding the factors that should be considered when evaluating an employer’s compliance. Our review of the opinion reveals six factors that are relevant to the Totality of the Circumstances inquiry. In this paper, we have presented scientifically sound methods that help to generate valid and reliable data for an objective evaluation of the relevant factors.

Companies with operations in California should consider conducting a thorough assessment to determine what action, if any, they must take to ensure compliance with the suitable seating language in the Wage Orders. The Supreme Court opinion states, “An employer seeking to be excused from the requirement bears the burden of showing compliance is infeasible because no suitable seating exists,” suggesting that a study is necessary to reach and maintain a defensible position.

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Elizabeth Arnold is a director in BRG's Labor and Employment Practice and has been advising clients on issues related to labor law compliance for more than 15 years. She provides expert services to clients at leading law firms and companies nationwide on state and federal class action litigation and advisory (pre-litigation) projects across industries ranging from retail and beverage delivery to meat processing and gaming.

Ms. Arnold develops and implements customized research methodologies that address complex legal compliance issues, such as misclassification (i.e., exempt vs. non-exempt employees, independent contractor), donning and doffing, "suitable seating," off-the-clock work (compensable time), missed meal and rest break claims, On-Duty Meal Period Agreement evaluation, and "tip pooling."

Ms. Arnold has conducted more than 150 job analyses to address employment law compliance issues. Her engagements often include national research projects to determine the tasks and responsibilities of employees. Clients have used results from her studies to evaluate internal policies and practices and at multiple stages of active litigation, including mediation, class certification, and merit evaluation..

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Dr. Hanvey's wage and hour experience includes the evaluation of overtime exemptions (misclassification), meal and rest break compliance, employment status and off-the-clock work. His experience with employment discrimination claims includes the measurement of adverse impact and test validation in the contexts of hiring, promotion, performance evaluation, layoffs and compensation to evaluate alleged discrimination on the basis of protected class membership and disability. Dr. Hanvey has been retained by plaintiffs and defendants as an expert witness to provide his testimony on issues including wage and hour compliance, statistical sampling, statistical analysis, damages calculations, adverse impact and test validity.

Dr. Hanvey holds a PhD in Industrial/Organizational (I/O) psychology with a minor in quantitative methods (statistics). He has authored chapters and scholarly articles and regularly presents his work at professional conferences on the topics of wage and hour litigation, class certification, and statistical analyses. Most notably, he is the co-editor of Practitioner's Guide to Legal Issues in Organizations, a book that provides practical guidance to human resources practitioners and experts working in areas of employment law that are commonly litigated. He has also taught undergraduate courses in psychology and graduate courses in statistics and research design.

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