

Chapter 7

Suitable Seating



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In this chapter, we explore issues related to recent litigation in California known as “suitable seating.”¹ We note that this topic is not directly related to either “wages” or “hours.” However, the issue is generally considered to fall within the wage and hour category for at least two reasons. First, the topic is directly related to employee protections in the workplace, the same goal as other wage and hour requirements. In addition, the relevant factors and the approaches to measure those factors have significant overlap with other wage and hour matters.

7.1 Background on Suitable Seating

In the last decade, employers in California have seen a new wave of litigation related to whether employers are legally required to provide seats for their employees while working. The basis for this litigation is language in the California Wage Orders² which states that employees must be provided suitable seats under certain circumstances. Specifically, the Wage Orders state, in part, that:³

- *All working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats.*
- *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*

¹We borrow much of the content for this chapter from a white paper we previously published on this topic (Arnold and Hanvey, 2017).

²The Wage Orders are California state laws which regulate wages, hours, and working conditions in certain industries or occupations.

³As explained in greater detail later, similar language is included in 14 of the 17 individual Wage Orders.

*permitted to use such seats when it does not interfere with the performance of their duties.*⁴

These provisions have existed in the Wage Orders for decades⁵ but were not enforced by the state and rarely even discussed until recently. Enforcement of these provisions began to change in 2004 when the State of California enacted the Private Attorneys General Act (PAGA).⁶ Among other things, PAGA empowers individual employees to sue their employers on behalf of themselves, other employees, and the state for any violation of the California Labor Code.⁷

In this chapter, we provide an overview of suitable seating regulations, PAGA, and notable suitable seating litigation. In later sections, we propose data collection methods to assess compliance with the suitable seating regulations.

7.2 History of Suitable Seating Regulations

Until 2004, an agency within California's Department of Industrial Relations called the Industrial Welfare Commission (IWC) was responsible for setting orders to regulate the wages, hours of work, and working conditions of California employees⁸. The IWC issued 17 wage orders (called "IWC Orders," or "Wage Orders"),⁹ each applicable to a specific industry or occupation. Every private employer in California is covered by one industry or occupation Wage Order and must comply with the applicable regulations. Fourteen of the Wage Orders contain nearly identical language regulating suitable seating.¹⁰ The IWC was defunded in 2004 and no longer exists;¹¹ however, the Wage Orders it produced remain in effect and are now enforced by California's Division of Labor Standards Enforcement (DLSE).¹²

Using PAGA, an employee can seek up to one year of civil penalties and attorney fees for violating any of the Wage Orders, including a civil penalty of \$100 for each impacted employee per pay period for the initial violation and \$200 for each impacted employee per pay period after that.¹³ Each pay period in which a violation occurs is typically considered to be a violation, making potential penalties for employers under PAGA significant. Penalties resulting from the litigation are divided between the state and the "aggrieved" employees.¹⁴

⁴IWC Wage Order 4-2001, Sec. 14.

⁵Department of Industrial Relations (2017a).

⁶James (2014).

⁷Private Attorneys General Act (2004).

⁸Department of Industrial Relations (2017b).

⁹Department of Industrial Relations (2017c).

¹⁰Koonin (2014).

¹¹Department of Industrial Relations (2017d).

¹²Department of Industrial Relations (2017b).

¹³Private Attorneys General Act (2004).

¹⁴Private Attorneys General Act (2004).

7.3 Notable Suitable Seating Litigation

One of the first suitable seating lawsuits was filed in 2005 and involved guest service agents at the San Francisco Hilton.¹⁵ Following that case, there was a string of similar lawsuits in the retail industry in California. In 2010, the Second Court of Appeals made a significant ruling in *Bright v. 99 Cents Only Stores*. This case involved a cashier who claimed that she and other employees should have been provided seats while working. The trial court dismissed the plaintiff's complaint, but the Second District Court of Appeals reversed this ruling and permitted employees to pursue monetary penalties under PAGA for violations of the Wage Orders.¹⁶ This decision opened the door to allow employees to pursue civil monetary penalties under PAGA when employers violate Wage Orders and therefore had a significant impact on the legal landscape.¹⁷

Bright and other early cases fueled a wave of litigation, which included well-known retail brands such as Home Depot¹⁸, Walgreens¹⁹, Rite Aid²⁰, Costco²¹, Walmart²², Kmart²³, and Blockbuster Video²⁴. As of fall 2017, more than 60 class and representative PAGA actions alleging violations of the suitable seating Wage Order have been filed against California employers, the majority of which remain pending.²⁵

7.3.1 California Supreme Court Clarifies Requirements

One of the challenges that employers and the court system have encountered in evaluating this regulation was the lack of detail in the Wage Orders about when suitable seating was required. On April 4, 2016, the California Supreme Court issued a much-anticipated ruling that clarified many important aspects of the suitable seating requirements.²⁶ The ruling was issued in response to two suitable seating lawsuits: *Kilby v. CVS Pharmacy* and *Henderson v. JPMorgan Chase Bank*. In both cases, the trial court rulings were appealed by plaintiffs to the ninth Circuit Court of Appeals.

¹⁵ *Hamilton v. San Francisco Hilton*.

¹⁶ Ryan and Drous (2011).

¹⁷ Ryan and Drous (2011).

¹⁸ *Home Depot USA v. Superior Court*.

¹⁹ *Zamora v. Walgreen Co.*

²⁰ *Hall v. Rite Aid Corp.*

²¹ *Justice v. Costco Wholesale Corp.*

²² *Brown et al. v. Wal-Mart Stores Inc.*

²³ *Garvey v. Kmart Corp.*

²⁴ *Currie-White v. Blockbuster Inc.*

²⁵ Wohl and Herald (2016).

²⁶ *Kilby v. CVS Pharmacy*.

Table 7.1 Relevant factors in a Totality of the Circumstances suitable seating evaluation

No.	Factor	Description
1	Job duties	Tasks and activities actually performed by employees, as well as the location within the workplace where the work is performed
2	Task frequency and duration	Frequency and duration of tasks performance at specific locations within the workplace
3	Impact of seating on job performance and work quality	The extent to which the presence of a seat interferes with an employee's ability to perform her or his work safely and effectively
4	Impact of seating on "customer service" duties	The extent to which the presence of a seat interferes with an employee's ability to provide quality customer service. Although related to the previous factor, this primary responsibility of retail employees was specifically mentioned in the ruling
5	Physical layout of the workplace	The physical layout of the workplace is a relevant factor, especially when the layout impacts the employee's job duties
6	Employer's business judgment	In particular, an employer may use business judgment to define the duties expected of her or his employees. However, the court also notes that business judgment is an objective standard that does not include an employer's mere preference

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 proper interpretation of "nature of the work" and "reasonably permits."

This Supreme Court ruling provided guidance to employers on how to interpret the suitable seating provisions within the Wage Orders. Specifically, the Supreme Court outlined several factors that, in totality, should be used to determine whether an employer has a legal obligation to provide seats for employees. That is, no single factor is dispositive in evaluating whether seats must be provided. Multiple factors should be considered in aggregate to make a reasonable assessment. This is evident from the court's repeated references to the "totality of the circumstances" as the standard for evaluating suitable seating requirements.

A review of the ruling reveals six key factors relevant to a totality of the circumstances inquiry. These factors are summarized in Table 7.1. The court noted that an analysis of these factors is not a rigid quantitative inquiry but a "qualitative" assessment of all relevant factors.²⁷ In later sections, we discuss methodological approaches to operationalize and measure each of these factors.

The court stated that seating requirements must be determined for specific job duties performed at a specific physical location within the workplace and not by an assessment of the various activities an employee may perform throughout the

²⁷ *Kilby v. CVS Pharmacy* (p. 18).

workday. To determine the nature of the work, one 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.”²⁸ This clarification is significant for researchers because it requires an examination of the work performed by employees at specific physical locations within the workplace. For example, even if a checker spends much of their workday stocking shelves (work for which seating is less feasible), an employer may still be required to provide a seat for that employee when they work at the register based on the nature of the work performed at that location, provided that the amount of time working at the register is not “negligible.”²⁹ In addition to the tasks performed by employees, the duration of those tasks and the frequency with which they are performed are cited repeatedly throughout the ruling as relevant factors.

Another factor relevant 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. Whether it is feasible to add a seat without impacting job performance is based on (1) whether providing a seat would unduly interfere with other standing tasks, (2) whether the frequency of transition from sitting to standing may interfere with the work, and (3) whether seated work would impact the quality and effectiveness of overall job performance.³⁰ Although related to the previous factor, an employee’s job responsibly to provide customers with quality service was specifically mentioned in the ruling. 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 court also identified secondary factors which are relevant for an evaluation. Among them is the physical layout of the workplace. To the extent the physical layout helps determine an employee’s job duties, this factor should be included in the analysis. Finally, the employer’s “business judgment” as to whether the employee should stand and the physical layout of the workplace should both be given some weight in the determination. However, the court added, this cannot be based on “mere preference... The standard is an objective one.”³¹ The business decision must be based on evidence related to the impact seating has on the performance of the employees and ultimately the business overall.

Beyond providing clarification regarding the language of the Wage Orders related to suitable seating, the ruling also stated that it is the employer’s responsibility to justify why seats are *not* provided. Specifically, when the nature of the work is

²⁸ *Kilby v. CVS Pharmacy* (p. 16).

²⁹ *Kilby v. CVS Pharmacy* (p. 16).

³⁰ Wohl and Herald (2016).

³¹ *Kilby v. CVS Pharmacy* (p. 21).

considered, the court stated that, "... if an employer argues there is no suitable seat available, the burden is on the employer to prove unavailability."³²

7.3.2 *Implications of the California Supreme Court Ruling*

At the time this chapter was written, no suitable seating cases have been litigated since the California Supreme Court's ruling. Thus, the ruling currently serves as the primary authoritative source for how to properly evaluate suitable seating requirements. While the Supreme Court's ruling contained substantial guidance on defining and evaluating suitable seating, it did not provide a definitive formula which employers can follow to assess "the nature of the work" or to determine whether that nature reasonably permitted seats.

The court stated that determining whether seating is necessary requires a qualitative assessment based on the "totality of the circumstances...The weight given to any relevant factor will depend upon the attendant circumstances."³³ No simple test was provided, and even with increased clarity, there is still uncertainty regarding implementing the information from the ruling as some of the language appears to be subject to interpretation.³⁴

Employers should be aware that the ruling states that employers cannot rely on job titles, job descriptions, or an employee's abilities in deciding whether to provide seating. Instead, employers must conduct a thorough analysis which includes reviewing different aspects of the workplace and the work performed by employees. While employers have many factors to consider when making this qualitative assessment, the ruling states that employers must at least conduct a reasonable evaluation before deciding not to provide seating for a particular task.³⁵

The assessment described by the court suggests that a comprehensive study of all tasks performed by employees is required. This should include a careful evaluation of job tasks performed at each physical location to determine whether it is feasible to provide seats to employees at those locations. In addition, documenting rationale that supports a decision not to provide seats to employees is likely to prove valuable.³⁶ In many cases, employers may benefit from engaging in this assessment before litigation arises.

³² *Kilby v. CVS Pharmacy* (p. 2).

³³ *Kilby v. CVS Pharmacy* (p. 20).

³⁴ Palmer and Colón (2016).

³⁵ Brown (2016).

³⁶ Brown (2016).

7.4 Approaches to Collecting Relevant Data

While the Supreme Court ruling has provided additional information regarding the factors which should be considered in an evaluation regarding suitable seating, some uncertainty remains regarding how to properly measure and evaluate these factors. In this section, we propose an approach to operationalizing and measuring each relevant factor.³⁷ The proposed approach applies three commonly used methods in other employment contexts to provide reliable data that directly address the relevant factors in this context.

7.4.1 *Time and Motion Observations*

The foundations for time and motion observations are described in Chap. 2. In this chapter, we focus our discussion on features of an observational study that are specific to the suitable seating context.

Observational methods are well suited for collecting detailed data showing the tasks employees perform, the frequency with which those tasks are performed, and the duration of those tasks. In addition, the specific location at which each task is performed can be recorded and analyzed. For example, an observational study could provide objective data to determine which tasks employees perform at a location, the frequency with which employees perform tasks at the check stand, the duration of those tasks, when (i.e., time of day) employees are at each location, and how much time employees spend at each location. Data such as the frequency, duration, and nature of customer interactions can also be collected and analyzed in an observation study. These data are likely to be relevant to the totality of the circumstances inquiry. Two examples of observation records are included in Table 7.2.

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 potentially 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 particular location in the store.

Observation studies can also be specifically designed to capture information regarding the physical demands (i.e., movements) associated with individual work tasks. For example, data can be collected to show the frequency with which

³⁷ We note that these approaches have not been subjected to legal scrutiny in the context of suitable seating. However, the methods are commonly used to address other wage and hour dispute and directly assess factors relevant to this issue.

Table 7.2 Portions of two sample observation records

Task start	Task end	Duration	Task	Location
<i>Example 1</i>				
11:14:20	11:15:40	0:01:20	Make change for cashier at register	Register
11:15:40	11:16:20	0:00:40	Ask employee to assist on register	Register
11:16:20	11:19:10	0:02:50	Approve cash checking for customer	Register
11:19:10	11:22:10	0:03:00	Gather and review safety information for training	Office
11:22:10	11:23:40	0:01:30	Review staff work schedule	Office
11:23:40	11:25:20	0:01:40	Compose email to district manager	Office
11:25:20	11:33:40	0:08:20	Train service manager on how to track holiday shipments online	Office
11:33:40	11:35:10	0:01:30	Email store supervisor to request more information about inventory report	Office
11:35:10	11:38:00	0:02:50	Talk with employee which employees have the copies of the keys to the safe	Office
11:38:00	11:40:10	0:02:10	Check off which employees have arrived on work schedules	Office
11:40:10	11:41:40	0:01:30	Place extra keys in safe	Office
<i>Example 2</i>				
16:14:50	16:15:20	0:00:30	Help cashier with questions about customer transaction	Register
16:15:20	16:16:00	0:00:40	Check lotto ticket for customer to see if he won	Register
16:16:00	16:39:20	0:23:20	Process customer transactions at register	Register
16:39:20	16:39:50	0:00:30	Direct employee to re-stocked specific products	Sales floor
16:39:50	16:42:00	0:02:10	Compose and send email to warehouse to find out if special order item is available	Office

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. These data can help to address the degree to which work at a specific location can be performed effectively and safely while seated.

7.4.2 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.³⁸

³⁸ See, e.g., Whetzel et al. (2012) for discussion of work simulations.

Work simulations may also provide useful data in the context of suitable seating. Specifically, simulations can be designed to assess the impact of seating on employee performance and productivity, factors relevant to the totality of the circumstances inquiry. For instance, different versions of the work environment can be created that differ only on key factors, such as seating, and job performance in terms of employee productivity and efficiency can be measured and compared. These data can also be compared to existing benchmarks, such as electronic register data from different time periods or locations, to provide additional points of comparison and evaluate the validity of the simulations.

Work simulations can be designed in a number of ways, depending on the employer and the work environment. In some circumstance, for example, “mock” customer purchases can be simulated using real registers after hours when a store is closed. Actual 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 relevant metrics. Additional relevant data can 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. This could be done in the absence of litigation or at stores not likely to be involved in active litigation (e.g., outside California). Data can then be collected from actual customers, and their perceptions of the customer service they received from seated employees could be gathered. Many companies in the retail industry already have existing processes for collecting customer feedback, such as invitations to participate in satisfaction surveys online after a purchase. These types of processes could also be leveraged to collect actual data regarding customer perception and the actual impact of modifications to the environment, such as the cashier being seated during the sales transaction.

7.4.3 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.³⁹ 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.

³⁹ See, e.g., Gael (1988).

Another noted component of this evaluation is the extent to which physical features in stores may impact the tasks performed by employees. As an 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 specific knowledge regarding the variety of store features and types and how those impact the tasks employees perform. In many companies, the appropriate SMEs work in positions such as local or regional management, operations, or facility design. In addition SME input can be useful in identifying which specific aspects of the work employees perform may be impacted by different store features. This information can then be used to isolate relevant pieces of an observation record, for example.

Each employer has a perspective on how providing seats to employees may impact the business. Some employers are particularly concerned about the impact it may have on employees' performance, such as reduced productivity and efficiency. Others may be more concerned that having customer-facing employees seated while they serve customers will negatively impact on customer satisfaction. Interviews can be conducted with company leadership to determine their specific areas of concern and to identify how to characterize their "business judgment" regarding the impact of providing seating to employees.

7.4.4 Literature Review and External Sources of Data

A significant amount of research has been conducted on the topic of "customer service," both generally and specific to various industries.⁴⁰ Given the desire of many businesses to grow and improve their customer service levels, different perspectives about how best to accomplish this can be found in academic, industry, and mainstream news and publications. It may be useful to investigate these publications for existing standards or "industry norms" around "reasonable level of customer service" expectations.

Research by different government agencies and other research institutions on topics such as workplace safety⁴¹ may also be relevant. A review of these studies may be useful in identifying some notable advantages and disadvantages of standing, sitting, and moving between the two. Accident and injury rates for different industries and workplace configurations are also available from other

⁴⁰For example, see extensive research published in the following journals: *Journal of Consumer Satisfaction, Dissatisfaction and Complaining Behavior*, *Journal of Customer Behaviour*, *Journal of Service Theory and Practice*, *Journal of Service Management*, *Journal of Service Research*, *Journal of Services Marketing*, *Journal of Strategic Marketing*, *Psychology and Marketing*, *Journal of Bank Marketing*, and *Journal of Retailing*.

⁴¹See, e.g., Occupational Safety and Health Administration (2014).

government sources, such as the Center for Disease Control, Occupational Health and Safety Administration, Bureau of Labor Statistics, and may provide useful data to analyze.

7.4.5 Additional Considerations Regarding Physical Layout

Information regarding the physical layout of the workplace can be integrated into the data collection methods described above. This process may be expedited through the collection and review of existing blueprints, diagrams, and/or schematics. These materials can provide useful data regarding the variety of physical layouts at stores.

Supplementing data collection with photos or video can also provide valuable information. These visual references can capture the work being performed as well as the physical store layout and can be valuable resources throughout the project. These photos and videos are fairly easily obtained using current wearable technology (e.g., phone cameras, Go-Pro video cameras).⁴² Photos can also be a compelling aspect of a written report that describes the assessment process and the rationale behind decisions. Existing store video collected for internal and external theft purposes may be useful to review; however, in our experience the quality of the video is sometimes insufficient.

Evaluating physical worksites can be an extensive task for employers who have multiple locations around the state, particularly if each location is unique. Some employers with multiple locations have at least some consistent patterns or “styles” of locations, driven by the age of the location, the local market needs, or special features. Sampling from each type or variety of type will contribute to a comprehensive evaluation.

7.5 Conclusion

In this chapter, we have provided an overview and background of the recent wave of litigation related to suitable seating. The California Supreme Court’s 2016 ruling regarding suitable seating requirements provided clarity regarding the factors that should be considered when evaluating an employer’s compliance. The ruling describes specific factors which appear to be relevant to a totality of the circumstances inquiry. Scientifically sound methodological approaches that will generate valid and reliable data to allow an objective evaluation of these relevant factors were also presented. Companies with operations in California should conduct a thorough assessment to determine what action, if any, they should take to ensure compliance with the suitable seating language in the Wage Orders.

⁴²Note: to the extent notices of videotaping already exist in the store, taking videos should not present any legal issues; however, we advise consulting counsel before taking any electronic images of customers.

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