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## Have a Seat: The California Supreme Court Clarifies the Wage Orders' Suitable Seating Rules

By Thomas J. Barton and Philippe A. Lebel

On April 4, 2016, the California Supreme Court issued an opinion concerning the Industrial Welfare Commission's (IWC) Wage Orders' suitable seating rules. According to the California Supreme Court, whether an employer must provide seating while employees are actively engaged in duties depends on employees' tasks performed at given work locations. The Court determined that if the tasks being performed at any given location reasonably permit sitting, and provision of a seat would not interfere with performance of any other tasks that may require standing, an employer must provide a seat. The Court held that the determination of whether work "reasonably permits" sitting is a question to be resolved objectively, based on the totality of the circumstances. While an employer's business judgment and the physical layout of the workplace are relevant factors, they are not dispositive. However, an employer's preference that employees stand and/or individual employees' physical characteristics are not to be considered. Finally, the Court held that the burden of establishing that no suitable seating is available falls on the employer.

### The Wage Orders' Seating Provisions

Over a century ago, the California Legislature established the IWC to investigate various industries and to promulgate Wage Orders establishing minimum wages, maximum work hours, and conditions of labor. The majority of Wage Orders currently in effect contain a section devoted to the provision of seating to employees—Section 14. Section 14(A) of the Wage Orders in question provides that "employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats." Section 14(B) provides that "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."

### The Issues from *Kilby* and *Henderson*

The certified questions before the California Supreme Court arose from two related federal appeals, *Kilby v. CVS Pharmacy, Inc.* and *Henderson v. JPMorgan Chase Bank NA*. The cases involved application of identical seating provisions contained in Wage Orders 7 (Mercantile Industry) and 4 (Professional, Technical, Clerical, Mechanical and Similar Occupations), respectively.

In *Kilby*, the plaintiff, a CVS Pharmacy, Inc. (CVS), customer service representative, sought to represent other CVS retail employees who, like her, were denied seats while performing their jobs. The plaintiff's duties in *Kilby* included operating a cash register, straightening and stocking shelves, organizing products in front of and behind the sales counter, cleaning the register, vacuuming, gathering shopping baskets, and removing trash. The district court concluded that Sections 14(A) and 14(B) of the applicable Wage Order were mutually exclusive. It reasoned that section 14(A) applied when an employee was actually engaged in work, while section 14(B) applied when an employee was not actively working. In evaluating the "nature of the work" under Section 14(A), the district court held that an employee's entire range of assigned duties had to be considered together. Because it was undisputed that some of the performed duties required the employee to stand, the district court ruled that the plaintiff was not entitled to seating during her work time and granted summary judgment for CVS. The plaintiff appealed.

*Henderson* was a putative class action brought by three bank tellers at JPMorgan Chase Bank NA (Chase). Chase tellers had duties associated with their teller stations, including accepting deposits, cashing checks, and handling withdrawals. They also had duties away from their stations, such as escorting customers to safety deposit boxes, working at the drive-up teller window, and making sure that automatic teller machines were working properly. These duties varied,

depending on the shift or branch location and on whether the employee was a lead or regular teller. On the basis of these differences, the district court denied class certification, and the plaintiffs appealed.

Faced with *Kilby* and *Henderson*, the Ninth Circuit certified three questions for the California Supreme Court to answer:

- Does the phrase “nature of the work” (used in Section 14 of most Wage Orders) refer to individual tasks that are performed throughout the workday, or to the entire range of an employee’s duties that are performed during a given day or shift?
- When determining whether the nature of the work “reasonably permits” use of a seat, what factors should courts consider? Specifically, are an employer’s business judgment, the physical layout of the workplace, and the characteristics of a specific employee relevant factors?
- If an employer has not provided any seat, must a plaintiff prove that a suitable seat is available in order to show that the employer has violated the seating provision?

## A Location-Driven “Nature of the Work” Standard

As to the first certified question, the defendants argued that examining when the “nature of the work reasonably permits the use of seats” requires consideration of an employee’s job as a whole, i.e., a “holistic” consideration of all of an employee’s tasks and duties throughout a shift. In the defendants’ eyes, if the majority of an employee’s duties favored standing, no seat would be required. By contrast, the plaintiffs argued that whether the “nature of the work reasonably permits the use of seats” turns on a task-by-task evaluation of whether any single task may feasibly be performed seated. In their eyes, if any individual task could be done sitting down, a seat had to be provided.

The California Supreme Court, however, took a middle-of-the-road approach instead. The Court held 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 must consider whether it is feasible for an employee to perform each set of location-specific tasks while seated. According to the Court, the focus should be on the actual tasks performed by employees (or those reasonably expected to be performed), as opposed to abstract characterizations, job titles, or job descriptions. In the Court’s view, tasks that are performed with more frequency or for a longer duration are more germane to the seating inquiry than tasks performed briefly or infrequently.

The Court also clarified that Section 14(A) and 14(B) of the Wage Orders are not mutually exclusive, although

they do not apply at the same time. If an employee’s actual tasks at a discrete location make seated work feasible, he or she is entitled to a seat under Section 14(A) while working there. However, if other job duties take the employee to a different location where he or she must perform tasks while standing, the employee would be entitled to a seat under Section 14(B) during “lulls in operation.”

## The Multifactor “Reasonably Permits” Analysis

According to the California Supreme Court, whether an employee is entitled to a seat under Section 14(A) depends on the totality of the circumstances. The analysis starts with an examination of the relevant tasks, grouped by location, and whether the tasks can be performed while seated or require standing. In undertaking this analysis, consideration must be given to the feasibility of providing seats. Feasibility considerations 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. The analysis is to be qualitative in nature—not a rigid counting of tasks or amount of time spent performing them.

The Court held that an employer’s business judgment about the nature of work could be considered. However, the Court rejected the notion that an employer’s mere preference for standing—as opposed to sitting—could be part of the analysis.

As to work location, the Court held that the physical characteristics of the area where the work is performed should be part of the assessment. On the other hand, just as an employer’s preference for standing could not constitute a relevant “business judgment,” the Court held that employers are not permitted to deliberately design workspaces to further a preference for standing or to deny a seat that might otherwise be reasonably suited for the contemplated tasks.

Finally, the Court held that the analysis should focus on the nature of the tasks at issue and should take into account the location where they are to be performed, as opposed to specific employees’ experiences and abilities in performing tasks. Thus, whether a seat is required depends on the work, as opposed to the physical characteristics of any employees.

## Showing That Seating Is Not Feasible Is an Employer’s Burden

The California Supreme Court also held that an employer that seeks to be excused from Section 14(A) bears the burden of showing that compliance is infeasible because no suitable seating exists. There is no obligation on plaintiffs to demonstrate that they requested a seat or that it would be feasible to provide seating for any position.

## Takeaways

While the California Supreme Court's opinion clarifies the Wage Orders' seating requirements, it may require many California employers to dramatically alter their work environments by providing employees with seats. The decision has particularly significant implications for employers in customer-facing environments where seating may be less common and more difficult to implement, including in the retail and hospitality industries.

In light of this new guidance, employers who do not currently provide seats at all times should examine

the nature of their employees' job duties and work environments to determine whether certain types of work (and work locations) are amenable to seated employees. In addition, employers should ensure that they have suitable seats for employees when they are not actively engaged in their duties. For assistance with ensuring compliance, employers should seek advice from qualified California employment counsel.

For further information about this alert, please contact the authors below or any member of our Labor and Employment Practice Group.

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