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August 24, 2020

VIA ONLINE SUBMISSION

California Labor & Workforce Development Agency
ATTN: PAGA Administrator
(<https://dir.tfaforms.net/266>)

Subject: *Michael Jacobi v. Walmart Inc.*

Dear PAGA Administrator:

This office represents Michael Jacobi in connection with his claims under the California Labor Code, and this letter is sent in compliance with the notice requirements of the California Labor Code Private Attorneys General Act, California Labor Code section 2699.3. Until August 2020, Mr. Jacobi was an employee of WALMART INC. ("WALMART").

The employer may be contacted directly at the address below:

WALMART INC.
708 SW 8TH STREET
BENTONVILLE AR 72716

Mr. Jacobi intends to seek civil penalties, attorney's fees, costs, and other available relief for violations of the California Labor Code, which are recoverable under sections 2698, *et seq.*, the Labor Code Private Attorneys General Act of 2004 ("PAGA"). Mr. Jacobi seeks relief on behalf of himself, the State of California, and other persons who are or were employed by WALMART as a non-exempt, hourly paid employee in a WALMART California retail store location, including WALMART's Neighborhood Market stores, Discount stores, and Supercenter stores ("aggrieved employees").

WALMART's Store Types and Workstations

WALMART operates the nation's largest chain of retail stores, including Neighborhood Market stores (grocery), Discount stores (general merchandise and limited grocery), and Supercenter stores (general merchandise and grocery). In California, there are approximately 78 Neighborhood Market stores, 71 Discount stores, and 142 Supercenter stores. Specifically, WALMART's Neighborhood Market stores, which are each around 38,000 sq. ft., employ approximately 100 associates. WALMART's Neighborhood Markets sell fresh produce, meat and dairy products, bakery and deli items, household supplies, health and beauty aids, and pharmacy items. WALMART's Discount stores, which are each around 106,000 sq. ft., employ approximately 200 associates. WALMART's Discount stores sell electronics, apparel, toys, home furnishings, health and beauty aids, hardware, and limited food and

grocery items. WALMART's Supercenter stores, which are each around 182,000 sq. ft., employ approximately 300 associates. Most Supercenters are open 24 hours a day, and combine grocery store offerings, including fresh produce and bakery, deli, and dairy products, with electronics, apparel, toys, and home furnishings.

While WALMART's California Neighborhood Market, Discount, and Supercenter stores vary by size and by the services and merchandise they offer, the three (3) store types share generally similar checkstand and workspace designs and configurations. For example, each WALMART store type utilizes a mix of front-end checkstands, including traditional checkstands, traditional checkstands with carousel bagging stations, Scan & Go self-checkout stations with miniature conveyor belts, and/or corralled Scan & Go self-checkout stations. Some WALMART stores have more front-end checkstands, some have less. Some have more Scan & Go self-checkout stations, some have less. But regardless of the number of checkstands and checkstand types in a particular store, the layout and design of the various front-end checkstands are the same in WALMART Neighborhood Market, Discount, and Supercenter stores.

Similarly, all WALMART Supercenter stores have fitting rooms in their apparel departments and fitting-room attendant workstations that have the same or a similar design. And WALMART's Supercenter stores often have Lawn & Garden departments with checkstands adjacent to the entrance of the Lawn & Garden department. The design and configuration of WALMART's Lawn & Garden checkstands do not vary by store; rather, WALMART uses the same checkstand designs and configurations in all of its California Supercenter stores, regardless of the department.

The nature of the work performed at a number of workstations in WALMART's Supercenter stores, Discount stores and Neighborhood Market stores would reasonably permit the use of a seat. Specifically, the WALMART workstations where the nature of the work performed would reasonably permit the use of a seat include, but are not limited to, WALMART's front-end checkstands, automotive care centers, cosmetics checkstands, customer service desks and/or courtesy desks, entertainment/electronics departments, fine jewelry departments, fitting rooms, lawn and garden center checkstands, money centers, paint departments, personal care checkstands, pharmacies, photo centers, pickups, returns, sporting center/campaign and hunting department checkstands, store entrances and/or exits, and vision centers.

Mr. Jacobi's Employment at WALMART

WALMART employed Mr. Jacobi as an hourly paid, non-exempt employee from approximately November 2019 to August 2020. Mr. Jacobi worked at WALMART's Supercenter retail store in Highland, California, located at 4210 East Highland Avenue, Highland, California 92346 (Store #1914). Mr. Jacobi worked for WALMART as a front-end cashier and typically worked seven (7) hours or more a day, four (4) to five (5) days a week. His primary job duties as a front-end cashier included, without limitation, ringing up customer purchases at the cash register, scanning items, bagging purchases, and providing customer service in the front-end checkstand area.

Many of the tasks that Mr. Jacobi performed at his assigned checkstand could have been performed from a seated position. However, at no time during his employment did WALMART provide Mr. Jacobi with a seat to use while performing his duties. While employed, on several occasions, Mr. Jacobi asked his supervisors for a seat at his front-end checkstand, but, in each instance, the answer was "no." For example, Mr. Jacobi asked at least four (4) different supervisors, on separate occasions, for a seat at his checkstand. [REDACTED]

[REDACTED] Not one of them provided him with a seat.

Because WALMART refused to let Mr. Jacobi use a seat while performing cashier tasks at his checkstand, the majority of which could reasonably have been performed from a seated position, WALMART committed Labor Code violations against Mr. Jacobi, making him an “aggrieved employee” pursuant to California Labor Code section 2699(c).¹

Violation of California Labor Code § 1198 and California Code of Regulations Title 8, Section 11070 Subdivision 14(A) – Failure to Provide Suitable Seating

California Labor Code section 1198 makes it illegal to employ an employee under conditions of labor that are prohibited by the applicable wage order. California Labor Code section 1198 requires that “. . . the standard conditions of labor fixed by the commission shall be the . . . standard conditions of labor for employees. The employment of any employee . . . under conditions of labor prohibited by the order is unlawful.” California Code of Regulations, Title 8, section 11070(14)(A) provides that “[a]ll working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats.”

“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. 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.” *Kilby v. CVS Pharmacy, Inc.*, 368 P.3d 554, 558 (Cal. 2016). “Whether the nature of the work reasonably permits sitting is a question to be determined objectively based on the totality of the circumstances. An employer’s business judgment and the physical layout of the workplace are relevant but not dispositive factors. The inquiry focuses on the nature of the work, not an individual employee’s characteristics.” *Id.* The burden of proof to show suitable seating is not available is on the employer. *Id.* at 568. In other words, the employer must show that compliance is “infeasible because no suitable seating exists.” *See id.*

There was, and continues to be, space at various workstations in WALMART’s three (3) store types that could accommodate seats (with reasonable or no modification), which cashiers and customer service employees could use while performing various location-specific tasks. These WALMART workstations include, but are not limited to, front-end checkstands, automotive care centers, cosmetics checkstands, customer service desks and/or courtesy desks, entertainment/electronics departments, fine jewelry departments, fitting rooms, lawn and garden center checkstands, money centers, paint departments, personal care checkstands, pharmacies, photo centers, pickups, returns, sporting center/campaign and hunting department checkstands, store entrances and/or exits, vision centers, and/or other work stations. WALMART could have provided Mr. Jacobi and other aggrieved employees with a seat at these workstations, but instead denied and continues to deny aggrieved employees seats altogether or denies them suitable seats. WALMART only permits an employee to use a seat if they have a doctor’s note stating that the employee should be allowed to sit while working.

During his employment, Mr. Jacobi worked for the most part at an assigned front-end checkstand. His location-specific tasks included, without limitation, operating the cash register, scanning items, and

¹ These facts, theories, and claims are based on Mr. Jacobi’s experience and counsel’s review of those records currently available relating to Mr. Jacobi’s employment. Discovery conducted in litigation of claims such as these often reveals additional claims that the aggrieved employee was not initially aware of (because the aggrieved employee was not aware of the law’s requirements, the employer misinformed its employee of the law’s requirements, or because the employer effectively hid the violations). Thus, Mr. Jacobi reserves the right to supplement this letter with additional facts, theories, and claims if he becomes aware of them subsequent to the submission of this letter.

bagging items—all of which could have been performed from a seated position without negatively affecting the quality or efficiency of his performance. As stated, Mr. Jacobi asked for a seat from WALMART’s supervisors on multiple [REDACTED] [REDACTED] Not one of them provided him with a seat. As a result, Mr. Jacobi was required to stand throughout his shifts.

Other aggrieved employees similarly spent a substantial portion of their day at front-end checkstands, automotive care centers, cosmetics checkstands, customer service desks and/or courtesy desks, entertainment/electronics departments, fine jewelry departments, fitting rooms, lawn and garden center checkstands, money centers, paint departments, personal care checkstands, pharmacies, photo centers, pickups, returns, sporting center/campaign and hunting department checkstands, store entrances and/or exits, vision centers, and/or other work stations. The nature of the work of an employee performing cashier, greeter, entrance and/or exit security, fitting room monitoring and assistance, money center transactions, self-checkout monitoring and assistance, and/or other customer service duties can reasonably be accomplished from a seated position. Mr. Jacobi and other aggrieved employees could have handled transactions, provided customer service, monitored fitting rooms, and performed other similar tasks at these workstations at any of WALMART’s stores while seated without interfering with their ability to perform their job duties. WALMART’s failure to furnish seats to Mr. Jacobi and/or other aggrieved employees at or near their workstations has occurred, and continues to occur, systematically and on a company-wide basis at all of its stores.

WALMART’s failure to provide suitable seating to Mr. Jacobi and other aggrieved employees when the nature of their work reasonably permits seats violates California Labor Code section 1198 and Industrial Welfare Commission (“IWC”) Wage Order 7-2001, Section 14(A). Mr. Jacobi and other aggrieved employees are therefore entitled to recover civil penalties in the amount of one hundred dollars (\$100) for each aggrieved employee per pay period for the initial violation and two hundred dollars (\$200) for each aggrieved employee per pay period for each subsequent violation, attorney’s fees, costs, and interest thereon, pursuant to Labor Code sections 2699(a), (f)-(g). Subsequent penalties appear appropriate in light of the judgment and \$65 million in civil penalties awarded in *Brown v. Wal-Mart Stores, Inc.*, Case No. 5:09-cv-03339-EJD (N.D. Cal. 2019).

Violation of California Labor Code § 1198 and California Code of Regulations Title 8, Section 11070 Subdivision 14(B) – Failure to Provide Suitable Seating

California Labor Code section 1198 makes it illegal to employ an employee under conditions of labor that are prohibited by the applicable wage order. California Labor Code section 1198 requires that “. . . the standard conditions of labor fixed by the commission shall be the . . . standard conditions of labor for employees. The employment of any employee . . . under conditions of labor prohibited by the order is unlawful.” California Code of Regulations, Title 8, section 11070(14)(B) provides that “[w]hen 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 IWC states that section 14(B) applies during “lulls in operation” when an employee, while still on the job, is not then actively engaged in any duties. *Kilby v. CVS Pharmacy, Inc.*, 368 P.3d 554, 565 (Cal. 2016), citing IWC, 1976 Wage Orders, Summary of Basic Provisions, Seats. When taken together, an employee is entitled to a seat under section 14(A) if his or her actual tasks at a discrete location make seated work feasible, while working there. *Id.* However, if other job duties take the employee to a different location where he or she must perform tasks requiring standing, the employee would be entitled to a seat under section 14(B) during “lulls in operation.” *Id.*

There was, and continues to be, space near employees' work areas (with reasonable or no modification to work areas) in WALMART's three (3) store types that could accommodate seats that Mr. Jacobi and other aggrieved employees could have used during lulls in operations. WALMART could provide Mr. Jacobi and other aggrieved employees with a seat in its work areas, but instead denies employees seating and forces Mr. Jacobi and other aggrieved employees to stand throughout the day.

WALMART did not provide Mr. Jacobi and other aggrieved employees with seats in reasonable proximity to their work areas to allow them to use seats when it would not interfere with the performance of their duties during times when they were not engaged in active duties that require standing. For example, as a front-end cashier, Mr. Jacobi experienced lulls in his work at various times during a typical shift, especially when the store was not busy. Oftentimes, Mr. Jacobi's location would experience slower customer traffic near the close of business, toward the end of his shift. Typically, there were fewer customers in the store during the last hour the store was open. During these lulls when Mr. Jacobi was not actively checking out customers, Mr. Jacobi could have taken a moment to sit and rest his legs and back. But, because WALMART did not and continues to not furnish suitable seats in reasonable proximity to Mr. Jacobi's and other aggrieved employees' work areas, or at all for that matter, Mr. Jacobi and other aggrieved employees were not permitted to sit during lulls in WALMART's operations.

WALMART's failure to provide suitable seating in reasonably proximity to Mr. Jacobi's and other aggrieved employees' work areas violates California Labor Code section 1198 and IWC Wage Order 7-2001, Section 14(B), for which Mr. Jacobi and other aggrieved employees are entitled to recover civil penalties in the amount of one hundred dollars (\$100) for each aggrieved employee per pay period for the initial violation and two hundred dollars (\$200) for each aggrieved employee per pay period for each subsequent violation, attorney's fees, costs, and interest thereon, pursuant to Labor Code sections 2699(a), (f)-(g).

Thank you for your attention to this matter.

Best Regards,

A handwritten signature in black ink, appearing to read "Mao Shiokura", with a stylized flourish at the end.

Mao Shiokura

Copy: WALMART INC. (via U.S. Certified Mail); Brian L. Duffy, Esq. & Naomi G. Beer, Esq., Greenberg Traurig, LLP, 1144 15th Street, Suite 3300, Denver, CO 80202 (via U.S. Certified Mail); Robert J. Herrington, Esq., Greenberg Traurig, LLP, 1840 Century Park East, Suite 1900, Los Angeles, CA 90067 (via U.S. Certified Mail)



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Brian L. Duffy, Esq. & Naomi G. Beer, Esq.
Greenberg Traurig, LLP
1144 15th Street, Suite 3300
Denver, CO 80202



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Greenberg Traurig, LLP
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Denver, CO 80202



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Greenberg Traurig, LLP
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| ☐ Certified Mail Restricted Delivery | \$ |
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