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October 5, 2020

VIA ONLINE SUBMISSION

California Labor & Workforce Development Agency
ATTN: PAGA Administrator
(<https://dir.tfaforms.net/295>)

Subject: *Samantha Fernandez v. Walmart Inc.*

Dear PAGA Administrator:

This office represents Samantha Fernandez in connection with her 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. As of August 2020, Ms. Fernandez is a current employee of WALMART INC. (“WALMART”).

The employer may be contacted directly at the address below:

WALMART INC.
708 SW 8TH STREET
BENTONVILLE AR 72716

Ms. Fernandez 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”). Ms. Fernandez seeks relief on behalf of herself, 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, a majority of WALMART stores utilize 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 similar 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 virtually 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/camping and hunting department checkstands, store entrances and/or exits, and vision centers.

Ms. Fernandez's Employment at WALMART

WALMART has employed Ms. Fernandez as an hourly paid, non-exempt employee since approximately March 2017. Ms. Fernandez works at WALMART's Discount retail store in Chula Vista, California, located at 1150 Broadway, Chula Vista, California 91911 (Store #5305). Ms. Fernandez worked for WALMART as a front-end cashier until around September 2018, and has worked as a customer service desk associate since September 2018. She typically works eight (8) hours a day, and five (5) days a week. As a customer service desk associate, Ms. Fernandez is assigned to a front-end checkstand at least two (2) hours per day. Her primary job duties as a customer service desk associate include, without limitation, resolving customer complaints, answering the phone, processing returns and exchanges, and ringing up purchases. Also, her job primary duties when assigned to a front-end checkstand as a front-end cashier include, 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 Ms. Fernandez performs at her assigned front-end checkstand can be performed from a seated position. However, at no time during her employment has WALMART provided Ms. Fernandez with a seat to use while performing her front-end checkstand duties.

Because WALMART has not provided Ms. Fernandez with a seat while performing cashier tasks at her front-end checkstand, the majority of which could reasonably have been performed from a seated

position, WALMART committed Labor Code violations against Ms. Fernandez, making her 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, customer service desks and/or courtesy desks, automotive care centers, cosmetics checkstands, 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/camping and hunting department checkstands, store entrances and/or exits, vision centers, and/or other workstations. WALMART could have provided Ms. Fernandez 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.

Throughout her employment, Ms. Fernandez has worked in some capacity at an assigned front-end checkstand. Her location-specific, front-end tasks include, without limitation, operating the cash register, scanning items, and bagging items—all of which could have been performed from a seated position without negatively affecting the quality or efficiency of her performance. Although her front-end cashier

¹ These facts, theories, and claims are based on Ms. Fernandez’s experience and counsel’s review of those records currently available relating to Ms. Fernandez’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, Ms. Fernandez reserves the right to supplement this letter with additional facts, theories, and claims if she becomes aware of them subsequent to the submission of this letter.

tasks could be performed from a seated position, Ms. Fernandez has been required to stand when working at the front-end checkstands.

Other aggrieved employees similarly spend a portion of their day at front-end checkstands, customer service desks and/or courtesy desks, automotive care centers, cosmetics checkstands, 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/camping and hunting department checkstands, store entrances and/or exits, vision centers, and/or other workstations. 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. Ms. Fernandez 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 Ms. Fernandez 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 Ms. Fernandez 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). Ms. Fernandez 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 Ms. Fernandez

and/or other aggrieved employees could have used during lulls in operations. WALMART could provide Ms. Fernandez and/or other aggrieved employees with a seat in its work areas, but instead denies employees seating and forces Ms. Fernandez and/or other aggrieved employees to stand throughout the day.

WALMART has not provided Ms. Fernandez and/or 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 are not engaged in active duties that require standing. For example, as a customer service associate and a front-end cashier, Ms. Fernandez has experienced lulls in her work at various times during a typical shift, especially when the store is not busy. Oftentimes, Ms. Fernandez's location experiences slower customer traffic near the opening of business, toward the beginning of her shift. Typically, there are fewer customers in the store during the first few hours the store is open. During these lulls when Ms. Fernandez is not actively checking out customers or providing customer service, Ms. Fernandez could have taken a moment to sit and rest her legs. But, because WALMART did not and continues to not furnish suitable seats in reasonable proximity to Ms. Fernandez's and/or other aggrieved employees' work areas, Ms. Fernandez and/or other aggrieved employees have not been permitted to sit during lulls in WALMART's operations.

WALMART's failure to provide suitable seating in reasonably proximity to Ms. Fernandez's and/or other aggrieved employees' work areas violates California Labor Code section 1198 and IWC Wage Order 7-2001, Section 14(B), for which Ms. Fernandez and/or 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.

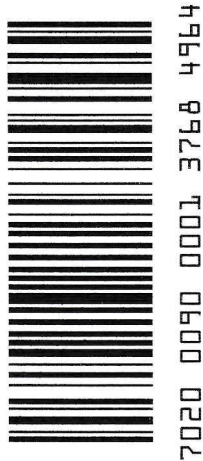
Best Regards,

A handwritten signature in black ink, appearing to read "Anthony Castillo". The signature is fluid and cursive, with a long horizontal stroke extending from the end.

Anthony Castillo

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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Denver, CO 80202

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Denver, CO 80202



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Robert J. Herrington, Esq.
Greenberg Traurig, LLP
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