

1 **BLUMENTHAL NORDREHAUG BHOWMIK DE BLOUW LLP**

Norman B. Blumenthal (State Bar #068687)

2 Kyle R. Nordrehaug (State Bar #205975)

Aparajit Bhowmik (State Bar #248066)

3 Nicholas J. De Blouw (State Bar #280922)

2255 Calle Clara

4 La Jolla, CA 92037

Telephone: (858)551-1223

5 Facsimile: (858) 551-1232

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN BERNARDINO
SAN BERNARDINO DISTRICT

AUG - 5 2021

BY Anne Perry
ANNE PERRY, DEPUTY

6 **ELDESSOUKY LAW**

Mohamed Eldessouky (State Bar# 289955)

7 2400 E. Katella Ave., Suite 800

Anaheim, CA 92806

8 Telephone: (714) 409-8991

9 Facsimile: (562) 461-0998

COPY

Attorneys for Plaintiff

10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

11 **IN AND FOR THE COUNTY OF SAN BERNARDINO**

12
13 DEAN WALTZ, on behalf of the State of
California, as a private attorney general,

14
15 Plaintiff,

16 vs.

17 WAL-MART ASSOCIATES, INC., a
18 Corporation ; and DOES 1 through 50,
inclusive,

19
20 Defendants.

Case No. **CIV SB 2122560**

REPRESENTATIVE ACTION
COMPLAINT FOR:

1.Civil Penalties Pursuant to Labor Code
§ 2699, *et seq.* for violations of Labor
Code §§ 201, 202, 203, 204 *et seq.*, 210,
221, 226(a), 226.7, 227.3, 246, 351, 510,
512, 558(a)(1)(2), 1194, 1197, 1197.1,
1198, 2802, California Code of
Regulations, Title 8, Section 11040,
Subdivision 5(A)-(B)

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FAXED

1 Plaintiff Dean Waltz (“PLAINTIFF”), on behalf of the people of the State of California
2 and as an “aggrieved employee” acting as a private attorney general under the Labor Code
3 Private Attorney General Act of 2004, § 2699, *et seq.* (“PAGA”) only, alleges on information
4 and belief, except for his own acts and knowledge which are based on personal knowledge, the
5 following:

6 **INTRODUCTION**

7 1. PLAINTIFF brings this action against Defendant WAL-MART ASSOCIATES, INC.
8 (referred to as “DEFENDANT”) seeking only to recover PAGA civil penalties for himself, and
9 on behalf of all current and former aggrieved employees that worked for DEFENDANT.
10 PLAINTIFF does **not seek to recover anything other than penalties as permitted by**
11 **California Labor Code § 2699**. To the extent that statutory violations are mentioned for wage
12 violations, PLAINTIFF does not seek underlying general and/or special damages for those
13 violations, but simply the civil penalties permitted by California Labor Code § 2699.

14 2. California has enacted the PAGA to permit an individual to bring an action on
15 behalf of himself and on behalf of others for PAGA penalties *only*, which is the precise and sole
16 nature of this action.

17 3. Accordingly, PLAINTIFF seeks to obtain all applicable relief for
18 DEFENDANT’s violations under PAGA and solely for the relief as permitted by PAGA – that
19 is, penalties and any other relief the Court deems proper pursuant to the PAGA. Nothing in this
20 complaint should be construed as attempting to obtain any relief that would not be available in
21 a PAGA-only action.

22 **THE PARTIES**

23 4. Defendant Wal-Mart Associates, Inc. (“DEFENDANT”) is a corporation that at
24 all relevant times mentioned herein conducted and continues to conduct substantial business in
25 the state of California.

26 5. DEFENDANT is an American multinational retail corporation that operates a
27 chain of hypermarkets, discount department stores and distribution centers in California.
28

1 6. PLAINTIFF has been employed by DEFENDANT in California since September
2 of 2020 and has been at all times classified by DEFENDANT as a non-exempt employee, paid
3 on an hourly basis, and entitled to the legally required meal and rest periods and payment of
4 minimum and overtime wages due for all time worked.

5 7. PLAINTIFF, and such persons that may be added from time to time who satisfy
6 the requirements and exhaust the administrative procedures under the Private Attorney General
7 Act, brings this Representative Action on behalf of the State of California with respect to
8 himself and all individuals who are or previously were employed by DEFENDANT in a
9 California distribution center and classified as non-exempt employees ("AGGRIEVED
10 EMPLOYEES") during the time period of April 12, 2020 until a date as determined by the
11 Court (the "PAGA PERIOD").

12 8. PLAINTIFF, on behalf of himself and all AGGRIEVED EMPLOYEES presently
13 or formerly employed by DEFENDANT during the PAGA PERIOD, brings this representative
14 action pursuant to Labor Code § 2699, *et seq.* seeking fixed civil penalties for DEFENDANT's
15 violation of California Labor Code §§ 201, 202, 203, 204 *et seq.*, 210, 221, 226(a), 226.7, 227.3,
16 246, 351, 510, 512, 558(a)(1)(2), 1194, 1197, 1197.1, 1198, 2802, California Code of
17 Regulations, Title 8, Section 11040, Subdivision 5(A)-(B), and the applicable Wage Order(s).
18 Based upon the foregoing, PLAINTIFF and all AGGRIEVED EMPLOYEES are aggrieved
19 employees within the meaning of Labor Code § 2699, *et seq.*

20 9. The true names and capacities, whether individual, corporate, subsidiary,
21 partnership, associate or otherwise of defendants DOES 1 through 50, inclusive, are presently
22 unknown to PLAINTIFF who therefore sues these Defendants by such fictitious names pursuant
23 to Cal. Civ. Proc. Code § 474. PLAINTIFF will seek leave to amend this Complaint to allege
24 the true names and capacities of Does 1 through 50, inclusive, when they are ascertained.
25 PLAINTIFF is informed and believes, and based upon that information and belief alleges, that
26 the Defendants named in this Complaint, including DOES 1 through 50, inclusive, are
27 responsible in some manner for one or more of the events and happenings that proximately
28 caused the injuries and damages hereinafter alleged.

10. The agents, servants and/or employees of the Defendants and each of them acting on behalf of the Defendants acted within the course and scope of his, her or its authority as the agent, servant and/or employee of the Defendants, and personally participated in the conduct alleged herein on behalf of the Defendants with respect to the conduct alleged herein. Consequently, the acts of each Defendant are legally attributable to the other Defendants and all Defendants are jointly and severally liable to PLAINTIFF and the other AGGRIEVED EMPLOYEES, for the loss sustained as a proximate result of the conduct of the Defendants' agents, servants and/or employees.

THE CONDUCT

11. Pursuant to the Industrial Welfare Commission Wage Orders, DEFENDANT was required to pay PLAINTIFF and AGGRIEVED EMPLOYEES for all their time worked, meaning the time during which an employee is subject to the control of an employer, including all the time the employee is suffered or permitted to work. DEFENDANT requires PLAINTIFF and AGGRIEVED EMPLOYEES to work without paying them for all the time they are under DEFENDANT's control including, but not limited to, time spent undergoing mandatory drug testing or any other testing and/or examination required as a condition of employment. Among other things, DEFENDANT requires PLAINTIFF to work while clocked out during what is supposed to be PLAINTIFF's off-duty meal break. PLAINTIFF is from time to time interrupted by work assignments while clocked out for what should be PLAINTIFF's off-duty meal break. DEFENDANT, as a matter of established company policy and procedure, administers a uniform practice of rounding the actual time worked and recorded by PLAINTIFF and AGGRIEVED EMPLOYEES, always to the benefit of DEFENDANT, so that during the course of their employment, PLAINTIFF and AGGRIEVED EMPLOYEES are paid less than they would have been paid had they been paid for actual recorded time rather than "rounded" time. Additionally, during the PAGA PERIOD, DEFENDANT engages in the practice of requiring PLAINTIFF and the AGGRIEVED EMPLOYEES to perform work off the clock after clocking out of DEFENDANT's timekeeping system, in that DEFENDANT, as a condition of employment,

1 requires these employees to wait for and submit to loss prevention inspections, waiting in line
2 in order to pass through DEFENDANT's security checkpoints after clocking out at the end of
3 each scheduled shift for which DEFENDANT does not provide compensation for time spent
4 waiting for and submitting to DEFENDANT's loss prevention inspections off the clock.
5 Additionally, DEFENDANT requires PLAINTIFF and other AGGRIEVED EMPLOYEES to
6 wait in line and submit to mandatory temperature checks for COVID-19 screening prior to
7 passing through DEFENDANT's security checkpoint and prior to clocking into
8 DEFENDANT's timekeeping system for the workday. As a result, PLAINTIFF and other
9 AGGRIEVED EMPLOYEES forfeit minimum wage, overtime wage compensation, and off-
10 duty meal breaks by working without their time being correctly recorded and without
11 compensation at the applicable rates. DEFENDANT's policy and practice not to pay
12 PLAINTIFF and other AGGRIEVED EMPLOYEES for all time worked, is evidenced by
13 DEFENDANT's business records.

14 12. State and federal law provides that employees must be paid overtime and meal and
15 rest break premium pay at one-and-one-half times their "regular rate of pay." PLAINTIFF and
16 other AGGRIEVED EMPLOYEES are compensated at an hourly rate plus incentive pay that
17 is tied to specific elements of an employee's performance.

18 13. The second component of PLAINTIFF's and other AGGRIEVED EMPLOYEES'
19 compensation is DEFENDANT's non-discretionary incentive program that paid PLAINTIFF
20 and other AGGRIEVED EMPLOYEES incentive wages based on their performance for
21 DEFENDANT. The non-discretionary incentive program provided all employees paid on an
22 hourly basis with incentive compensation when the employees met the various performance
23 goals set by DEFENDANT. However, when calculating the regular rate of pay in order to pay
24 overtime and premiums for meal and rest break violations to PLAINTIFF and other
25 AGGRIEVED EMPLOYEES, DEFENDANT failed to include the incentive compensation as
26 part of the employees' "regular rate of pay" for purposes of calculating overtime pay and
27 premium pay for meal and rest break violations. Management and supervisors described the
28 incentive program to potential and new employees as part of the compensation package. As a

1 matter of law, the incentive compensation received by PLAINTIFF and other AGGRIEVED
2 EMPLOYEES must be included in the “regular rate of pay.” The failure to do so has resulted
3 in a underpayment of overtime compensation and meal and rest break premium pay to
4 PLAINTIFF and other AGGRIEVED EMPLOYEES by DEFENDANT.

5 14. As a result of their rigorous work schedules, PLAINTIFF and other AGGRIEVED
6 EMPLOYEES are from time to time unable to take thirty (30) minute off duty meal breaks and
7 are not fully relieved of duty for their meal periods. PLAINTIFF and other AGGRIEVED
8 EMPLOYEES are required from time to time to perform work as ordered by DEFENDANT for
9 more than five (5) hours during some shifts without receiving a meal break. Further,
10 DEFENDANT from time to time fails to provide PLAINTIFF and AGGRIEVED
11 EMPLOYEES with a second off-duty meal period for some workdays in which these employees
12 are required by DEFENDANT to work ten (10) hours of work. PLAINTIFF and other
13 AGGRIEVED EMPLOYEES therefore forfeit meal breaks without additional compensation
14 and in accordance with DEFENDANT’s corporate policy and practice.

15 15. During the PAGA PERIOD, PLAINTIFF and other AGGRIEVED EMPLOYEES
16 are also required from time to time to work in excess of four (4) hours without being provided
17 ten (10) minute rest periods. Further, these employees are denied their first rest periods of at
18 least ten (10) minutes for some shifts worked of at least two (2) to four (4) hours from time to
19 time, a first and second rest period of at least ten (10) minutes for some shifts worked of
20 between six (6) and eight (8) hours from time to time, and a first, second and third rest period
21 of at least ten (10) minutes for some shifts worked of ten (10) hours or more from time to time.
22 PLAINTIFF and other AGGRIEVED EMPLOYEES are also not provided with one hour wages
23 in lieu thereof. Additionally, the applicable California Wage Order requires employers to
24 provide employees with off-duty rest periods, which the California Supreme Court defined as
25 time during which an employee is relieved from all work related duties and free from employer
26 control. In so doing, the Court held that the requirement under California law that employers
27 authorize and permit all employees to take rest period means that employers must relieve
28 employees of all duties and relinquish control over how employees spend their time which

1 includes control over the locations where employees may take their rest period. Employers
2 cannot impose controls that prohibit an employee from taking a brief walk - five minutes out,
3 five minutes back. Here, DEFENDANT's policy restricts PLAINTIFF and other AGGRIEVED
4 EMPLOYEES from unconstrained walks and is unlawful based on DEFENDANT's rule which
5 states PLAINTIFF and other AGGRIEVED EMPLOYEES cannot leave the work premises
6 during their rest period.

7 16. During the PAGA PERIOD, DEFENDANT fails to accurately record and pay
8 PLAINTIFF and other AGGRIEVED EMPLOYEES for the actual amount of time these
9 employees work. Pursuant to the Industrial Welfare Commission Wage Orders, DEFENDANT
10 is required to pay PLAINTIFF and other AGGRIEVED EMPLOYEES for all time worked,
11 meaning the time during which an employee was subject to the control of an employer,
12 including all the time the employee was permitted or suffered to permit this work.
13 DEFENDANT requires these employees to work off the clock without paying them for all the
14 time they are under DEFENDANT's control. As such, DEFENDANT knew or should have
15 known that PLAINTIFF and the other AGGRIEVED EMPLOYEES are under compensated for
16 all time worked. As a result, PLAINTIFF and other AGGRIEVED EMPLOYEES forfeit time
17 worked by working without their time being accurately recorded and without compensation at
18 the applicable minimum wage and overtime wage rates. To the extent that the time worked off
19 the clock does not qualify for overtime premium payment, DEFENDANT fails to pay minimum
20 wages for the time worked off-the-clock in violation of Cal. Lab. Code §§ 1194, 1197, and
21 1197.1.

22 17. From time to time, DEFENDANT also fails to provide PLAINTIFF and the other
23 AGGRIEVED EMPLOYEES with complete and accurate wage statements which failed to
24 show, among other things, the correct gross and net wages earned. Cal. Lab. Code § 226
25 provides that every employer shall furnish each of his or her employees with an accurate
26 itemized wage statement in writing showing, among other things, gross wages earned and all
27 applicable hourly rates in effect during the pay period and the corresponding amount of time
28 worked at each hourly rate. PLAINTIFF and the other AGGRIEVED EMPLOYEES are paid

1 on an hourly basis. As such, the wage statements should reflect all applicable hourly rates
2 during the pay period and the total hours worked, and the applicable pay period in which the
3 wages are earned pursuant to California Labor Code Section 226(a). The wage statements
4 DEFENDANT provides to PLAINTIFF and other AGGRIEVED EMPLOYEES fail to identify
5 such information. Aside, from the violations listed above in this paragraph, DEFENDANT fails
6 to issue to PLAINTIFF an itemized wage statement that lists all the requirements under
7 California Labor Code 226 *et seq.* As a result, DEFENDANT from time to time provides
8 PLAINTIFF and the other AGGRIEVED EMPLOYEES with wage statements which violated
9 Cal. Lab. Code § 226.

10 18. Cal. Lab. Code § 204(d) provides, the requirements of this section shall be
11 deemed satisfied by the payment of wages for weekly, biweekly, or semimonthly payroll if the
12 wages are paid not more than seven calendar days following the close of the payroll period.
13 Cal. Lab. Code § 210 provides:

14 [I]n addition to, and entirely independent and apart from, any other penalty provided in
15 this article, every person who fails to pay the wages of each employee as provided in
16 Sections. . . 204. . . shall be subject to a civil penalty as follows: (1) For any initial
17 violation, one hundred dollars (\$100) for each failure to pay each employee; (2) For each
18 subsequent violation, or any willful or intentional violation, two hundred dollars (\$200)
19 for each failure to pay each employee, plus 25 percent of the amount unlawfully
20 withheld.

21 19. DEFENDANT from time to time fails to pay PLAINTIFF and the other
22 AGGRIEVED EMPLOYEES within seven (7) days of the close of the payroll period in
23 accordance with Cal. Lab. Code § 204(d).

24 20. DEFENDANT underpays sick pay wages to PLAINTIFF and other AGGRIEVED
25 EMPLOYEES by failing to pay such wages at the regular rate of pay. Specifically, PLAINTIFF
26 and other non-exempt employees earn non-discretionary remuneration, including but not limited
27 to, incentives, shift differential pay, and bonuses. Rather than pay sick pay at the regular rate
28 of pay, DEFENDANT underpays sick pay to PLAINTIFF and other AGGRIEVED
EMPLOYEES at their base rates of pay.

21. Pursuant to Cal. Lab. Code Section 221, “It shall be unlawful for any employer
to collect or receive from an employee any part of wages theretofore paid by said employer to

1 said employee.” DEFENDANT fails to pay all compensation due to PLAINTIFF and other
2 AGGRIEVED EMPLOYEES, makes unlawful deductions from compensation payable to
3 PLAINTIFF and the other AGGRIEVED EMPLOYEES, fails to disclose all aspects of the
4 deductions from compensation payable to PLAINTIFF and the other AGGRIEVED
5 EMPLOYEES, and thereby fails to pay these employees all wages due at each applicable pay
6 period and upon termination. PLAINTIFF and other AGGRIEVED EMPLOYEES seek
7 recovery of penalties related to all illegal deductions from wages according to proof, interest,
8 attorney fees and costs.

9 22. DEFENDANT intentionally and knowingly fails to reimburse and indemnify
10 PLAINTIFF and the other AGGRIEVED EMPLOYEES for required business expenses
11 incurred by the PLAINTIFF and other AGGRIEVED EMPLOYEES in direct consequence of
12 discharging their duties on behalf of DEFENDANT. Under California Labor Code Section
13 2802, employers are required to indemnify employees for all expenses incurred in the course
14 and scope of their employment. Cal. Lab. Code § 2802 expressly states that "an employer shall
15 indemnify his or her employee for all necessary expenditures or losses incurred by the employee
16 in direct consequence of the discharge of his or her duties, or of his or her obedience to the
17 directions of the employer, even though unlawful, unless the employee, at the time of obeying
18 the directions, believed them to be unlawful."

19 23. In the course of their employment PLAINTIFF and other AGGRIEVED
20 EMPLOYEES as a business expense, are required by DEFENDANT to use their own personal
21 cellular phones as a result of and in furtherance of their job duties as employees for
22 DEFENDANT but are not reimbursed or indemnified by DEFENDANT for the cost associated
23 with the use of their personal cellular phones for DEFENDANT’s benefit. Specifically,
24 PLAINTIFF and other AGGRIEVED EMPLOYEES are required by DEFENDANT to use their
25 personal cellular phones to for work related issues, including but not limited downloading
26 applications on their cellular phone to use for work purposes. As a result, in the course of their
27 employment with DEFENDANT, PLAINTIFF and other AGGRIEVED EMPLOYEES incurred
28 unreimbursed business expenses which included, but were not limited to, costs related to the use

1 of their personal cellular phones all on behalf of and for the benefit of DEFENDANT.

2 24. All of the conduct and violations alleged herein occurred during the PAGA
3 PERIOD. To the extent that any of the conduct and violations alleged herein did not affect
4 PLAINTIFF during the PAGA PERIOD, PLAINTIFF seeks penalties for those violations that
5 affected other AGGRIEVED EMPLOYEES pursuant to *Carrington v. Starbucks Corp.* 2018
6 AJDAR 12157 (Certified for Publication 12/19/18).

7
8 **JURISDICTION AND VENUE**

9 25. This Court has jurisdiction over this Action pursuant to California Code of Civil
10 Procedure, Section 410.10.

11 26. Venue is proper in this Court pursuant to California Code of Civil Procedure,
12 Sections 395 and 395.5, because PLAINTIFF worked in this County for DEFENDANT and
13 DEFENDANT (i) currently maintains and at all relevant times maintained offices and facilities
14 in this County and/or conducts substantial business in this County, and (ii) committed the
15 wrongful conduct herein alleged in this County against PLAINTIFF and the AGGRIEVED
16 EMPLOYEES.

17 **FIRST CAUSE OF ACTION**

18 **For Violation of the Private Attorneys General Act**

19 **[Cal. Lab. Code §§ 2698, *et seq.*]**

20 **(By PLAINTIFF and Against All Defendants)**

21 27. PLAINTIFF realleges and incorporates by this reference, as though fully set
22 forth herein, the prior paragraphs of this Complaint.

23 28. PAGA is a mechanism by which the State of California itself can enforce state
24 labor laws through the employee suing under the PAGA who do so as the proxy or agent of
25 the state's labor law enforcement agencies. An action to recover civil penalties under
26 PAGA is fundamentally a law enforcement action designed to protect the public and not to
27 benefit private parties. The purpose of the PAGA is not to recover damages or restitution,
28 but to create a means of "deputizing" citizens as private attorneys general to enforce the

1 Labor Code. In enacting PAGA, the California Legislature specified that "it was ... in the
2 public interest to allow aggrieved employees, acting as private attorneys general to recover
3 civil penalties for Labor Code violations ..." Stats. 2003, ch. 906, § 1. Accordingly, PAGA
4 claims cannot be subject to arbitration.

5 29. PLAINTIFF, and such persons that may be added from time to time who
6 satisfy the requirements and exhaust the administrative procedures under the Private
7 Attorney General Act, brings this Representative Action on behalf of the State of California
8 with respect to himself and all individuals who are or previously were employed by
9 DEFENDANT in a California distribution center and classified as non-exempt employees
10 ("AGGRIEVED EMPLOYEES") during the time period of April 12, 2020 until a date as
11 determined by the Court (the "PAGA PERIOD").

12 30. On April 12, 2021, PLAINTIFF gave written notice by electronic mail to the
13 Labor and Workforce Development Agency (the "Agency") and by certified mail to the
14 employer of the specific provisions of this code alleged to have been violated as required by
15 Labor Code § 2699.3. The statutory waiting period for PLAINTIFF to add these allegations
16 to the Complaint has expired. As a result, pursuant to Section 2699.3, PLAINTIFF may
17 now commence a representative civil action under PAGA pursuant to Section 2699 as the
18 proxy of the State of California with respect to all AGGRIEVED EMPLOYEES as herein
19 defined.

20 31. The policies, acts and practices heretofore described were and are an unlawful
21 business act or practice because DEFENDANT (a) failed to provide PLAINTIFF and the
22 other AGGRIEVED EMPLOYEES accurate itemized wage statements, (b) failed to
23 properly record and provide legally required meal and rest periods, (c) failed to pay
24 minimum wages, (d) failed to pay overtime and sick pay wages, and (e) failed to reimburse
25 employees for required expenses, all in violation of the applicable Labor Code sections
26 listed in Labor Code §§ 201, 202, 203, 204 *et seq.*, 210, 221, 226(a), 226.7, 227.3, 246, 351,
27 510, 512, 558(a)(1)(2), 1194, 1197, 1197.1, 1198, 2802, California Code of Regulations,
28 Title 8, Section 11040, Subdivision 5(A)-(B), and the applicable Wage Order(s), and thereby

1 gives rise to civil penalties as a result of such conduct.¹ PLAINTIFF hereby seeks recovery
2 of only civil penalties as prescribed by the Labor Code Private Attorney General Act of
3 2004 as the representative of the State of California for the illegal conduct perpetrated on
4 PLAINTIFF and the other AGGRIEVED EMPLOYEES.

5
6 **PRAYER FOR RELIEF**

7 WHEREFORE, PLAINTIFF prays for judgment against each Defendant, jointly and
8 severally, as follows:

9 1. On behalf of the State of California and with respect to all AGGRIEVED
10 EMPLOYEES:

11 A) Recovery of civil penalties as prescribed by the Labor Code Private
12 Attorneys General Act of 2004; and,

13 B) An award of attorneys' fees and cost of suit, as allowable under the
14 law, including, but not limited to, pursuant to Labor Code §2699.

15 Dated: August 4, 2021 BLUMENTHAL NORDREHAUG BHOWMIK DE BLOUW
16 LLP

17
18 By: _____
19 Norman B. Blumenthal
20 Attorneys for Plaintiff
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27 _____
28 ¹Plaintiff specifically excludes and/or does not allege any claims under California Labor
Code §558(a)(3).