

March 6, 2023

Labor and Workforce Development Agency
Attn: PAGA Administrator
455 Golden Gate Avenue, 9th Floor
San Francisco, CA 94102
*Filed Online and Courtesy Copy Delivered
via Certified Mail*

Re: Written Notice – Private Attorney General Act (“PAGA”)
Labor Code section 2698 et seq.
Herrera v. Del Taco LLC

PAGA Administrator:

Notice is hereby provided that, pursuant to Labor Code section 2699.3, Elvia Herrera (“Employee”) contends that Del Taco, LLC (“Del Taco”) has violated, and continues to violate, provisions of the Labor Code and wage orders promulgated by the Industrial Welfare Commission (“IWC wage order”), including, but not limited to, Labor Code sections 201-203, 204, 221, 223, 226, 226.7, 510, 512, 1182, 1194, 1197, 1198, and the applicable wage order.

In accordance with the required notice under Labor Code section 2699.3 of the Private Attorney General Act (“PAGA”), this letter shall serve as formal written notice to the Labor and Workforce Development Agency (“LWDA”).

Employee worked for Del Taco from approximately 2002 through 2004 and again from 2012 through February 9, 2023. Employee worked for Del Taco in Glendale, California, and her latest position was shift manager.

Employee is an “aggrieved employee” as defined in Labor Code section 2699(a) and brings this action on behalf of herself and all other aggrieved employees of Del Taco. Employee, also on behalf of herself and all other aggrieved employees, seek penalties under PAGA for Del Taco’s violations of the Labor Code.

Del Taco is a California limited liability company that does business in California.

Del Taco is an American fast food restaurant chain which specializes in American-style Mexican cuisine and American foods. Del Taco is headquartered in Lake Forest, California. At all relevant times, Del Taco issued and maintained uniform, standardized scheduling and timekeeping practices and procedures for all aggrieved, hourly paid employees in California, including Employee and others similarly situated, regardless of their location or position.

Employee and other aggrieved employees seek penalties and other compensation from Del Taco for the relevant time period because Del Taco:

1. Failed to pay Employee and aggrieved employees for all overtime (Lab. Code, §§ 510, 1198);
2. Failed to pay Employee and aggrieved employees for all hours worked (Lab. Code, §§ 1182, 1194, 1197, 1198);
3. Failed to provide Employee and aggrieved employees with compliant meal periods (Lab. Code, §§ 226.7, 512);
4. Failed to provide Employee and aggrieved employees with compliant rest periods (Lab. Code, §§ 226.7, 512);
5. Failed to provide Employee and aggrieved employees with accurate, itemized wage statements and failed to maintain accurate records (Lab. Code, §§ 226(a), 1174);
6. Failure to provide Employee and aggrieved employees suitable seating (Lab. Code, §1198);
7. Failed to timely pay Employee and aggrieved employees' wages during employment (Lab. Code, § 204);
8. Failed to timely pay Employee and aggrieved employees all final wages in a timely manner (Lab. Code, §§ 201-203).

Below please find the relevant facts and legal theories to support the aforementioned violations.

Failure to Pay Overtime

During the Relevant Time Period, upon information and belief, Del Taco had, and continues to have, a company-wide policy of discouraging and impeding Employee and other aggrieved employees from recording hours worked that were outside of their scheduled shifts in order to limit the amount of overtime employees could accrue. On information and belief, this policy of limiting overtime, led Employee and other aggrieved employees to work off-the-clock before their scheduled shift times. For example, if Employee or aggrieved employees were asked to arrive prior to the start of their shifts, or if they arrived any time before their shift was to start, they were unable to clock in. Specifically, the time clock would not permit anyone to clock in early and Employee and aggrieved employees were unable to request for this time to be compensated. Employee typically arrived early

for her shift due to her heavy workload and would have to assist crew members with counting the register.

At all times, Employee and other aggrieved employees remained under the control of Del Taco. Del Taco could have recorded this off-the-clock work but refused to do so to avoid paying Employee and aggrieved employees overtime wages.

Del Taco knew or should have known that as a result of these company-wide practices and/or policies, Employee and other aggrieved employees were performing assigned duties off-the-clock and were suffered or permitted to perform work for which they were not paid. Because Employee and other aggrieved employees worked shifts of eight (8) hours a day or more or forty (40) hours a week or more, some of this off-the-clock work qualified for overtime premium pay.

California Labor Code sections 510 and 1198 and the applicable Industrial Welfare Commission (“IWC”) wage order require employers to pay employees working more than eight (8) hours in a day or more than forty (40) hours in a workweek at the rate of one-and-one-half (1½) times the regular rate of pay for all hours worked in excess of eight (8) hours in a day or more than forty (40) hours in a workweek. The applicable IWC wage order further provides that employers are required to pay employees working more than twelve (12) hours in a day overtime compensation at a rate of two (2) times their regular rate of pay. An employee’s regular rate of pay includes all remuneration for employment paid to, or on behalf of, the employee, including nondiscretionary bonuses and incentive pay.

Accordingly, Del Taco regularly failed to pay overtime wages to Employee and other aggrieved employees for all overtime hours worked in violation of Labor Code sections 510 and 1198. Employee and other aggrieved employees are entitled to recover civil penalties, attorney’s fees, costs, and interest thereon, pursuant to Labor Code sections 1197.1 and/or 2699(a), (f)-(g).

Failure to Pay All Wages

As stated above, during the relevant time period, as a result of Del Taco’s policy of limiting the amount of overtime employees could accrue, Employee and other aggrieved employees were forced to work off-the-clock before their scheduled shift times. For example, if Employee or aggrieved employees were asked to arrive prior to the start of their shifts, or if they arrived any time before their shift was to start, they were unable to clock in. Specifically, the time clock would not permit anyone to clock in early and Employee and aggrieved employees were unable to request for this time to be compensated. Employee typically arrived early for her shift due to her heavy workload and would have to assist crew members with counting the register.

Thus, Del Taco did not pay at least minimum wages for all hours worked by Employee and other aggrieved employees.

Labor Code section 1194(a) provides in relevant part: “[n]otwithstanding any agreement to work for a lesser wage, any employee receiving less than the legal minimum wage ... is entitled to

recover in a civil action the unpaid balance of the full amount of this minimum wage ... including interest thereon, reasonable attorney's fees, and costs of suit."

Labor Code section 1194.2(a) provides in relevant part: "[i]n any action under section 1193.6 or section 1194 to recover wages because of the payment of a wage less than the minimum wage fixed by an order of the commission, an employee shall be entitled to recover liquidated damages in an amount equal to the wages unlawfully unpaid and interest thereon."

Labor Code section 1197 provides: "[t]he minimum wage for employees fixed by the commission is the minimum wage to be paid to employees, and the payment of a less wage than the minimum so fixed is unlawful."

Employee is informed and believes, and therefore alleges, that Del Taco's compensation schemes do not fairly compensate Employee and aggrieved employees for all hours spent performing their job duties.

The failure to pay at least minimum wages to Employee and aggrieved employees for each and every hour worked violates Labor Code sections 1182.11-1182.12, 1194, 1194.2, and 1197; the applicable IWC wage order.

The failure to pay designated wages to Employee and aggrieved employees for each and every hour worked violates Labor Code sections 221 and 223; and the applicable IWC wage order.

Accordingly, Del Taco regularly failed to pay at least minimum wages to Employee and other aggrieved employees for all of the hours they worked in violation of Labor Code sections 1194, 1197, 1197.1 and 1198. Employee and other aggrieved employees are entitled to recover civil penalties, attorney's fees, costs, and interest thereon, pursuant to Labor Code sections 1197.1 and/or 2699(a), (f)-(g).

Failure to Provide Compliant Meal Breaks

Employee and aggrieved employees were forced to work in excess of five (5) hours before taking a meal period. Specifically, Employee would get called back to the floor if the restaurant was busy or if she needed to assist crew members.

Under the foregoing, California employers must provide meal periods and authorize and permit rest periods to all employees during their shifts. In *Augustus v. ABM Security Services, Inc.* (2016) 2 Cal.5th 257, the California Supreme Court reaffirmed that the required meal and rest periods must be "off-duty," which means that employees must be relieved of "all work-related duties," including the duty to remain "on call," and they must be "free from employer control" over how they "spend their time." *Id.* at 264, 269. Employees must have the freedom to use meal and rest periods for their own purposes. *Id.* at 270; *Brinker Rest. Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1038-39.

When employees must either “remain at the ready and capable of being summoned to action,” “respond when the employer seeks contact with [them],” “perform other work if the employer so requests,” and/or remain “on call” during their meal and rest periods, the employees have not been “relieve[d] ... of all work-related duties and employer control.” *Augustus, supra*, 2 Cal.5th at 270. Such a meal or rest period is not “off duty” and therefore is “impermissible.” *Ibid*.

The Supreme Court’s decision in *Augustus* is just the latest in a series of meal and rest break cases that have affirmed California’s broad, protective standard for employees.

Moreover, as the mere existence of a facially lawful meal and rest break policy is unavailing if there are practical constraints and pressures on employees to perform their duties in ways that omit breaks. *See Brinker, supra*, 53 Cal.4th at 1040.

Yet Del Taco did and does not provide Employee and aggrieved employees with meal periods during which they are completely relieved of duty for at least thirty (30) minutes by the fifth hour of work and again by the tenth hour of work.

Thus, Del Taco has failed to perform its obligations to provide Employee and aggrieved employees with off-duty meal periods by the end of the fifth hour of work and a second meal period by the end of the tenth hour of work. Del Taco also has failed to pay Employee and aggrieved employees one (1) hour of pay at the regular rate for each off-duty meal period that they have been denied.

On July 15, 2021, the California Supreme Court issued a decision in *Ferra v. Loews Hollywood Hotel, LLC* (2021) 11 Cal.5th 858 where the court unanimously held that employers must pay premium payments to employees for missed meal, rest, and recovery breaks at the employee’s “regular rate of pay” instead of their base hourly rate. The regular rate of pay may be higher than the base hourly rate because the regular rate of pay must include all nondiscretionary incentive payments, including nondiscretionary bonuses.

Del Taco knew or should have known that as a result of its policies and/or practices, that Employee and aggrieved employees were not actually relieved of all duties to take timely, uninterrupted meal periods. Employee further knew or should have known that it did not pay Employee and aggrieved employees all meal period premiums when meal periods were missed, late, short, and/or interrupted. Furthermore, Employee has engaged in a company-wide practice and/or policy of not paying meal period premiums owed when compliant meal periods are not provided. Because of this practice and/or policy, Employee and aggrieved employees have not received all premium pay for missed, interrupted, or late meal periods. Accordingly, Del Taco failed to provide all meal periods in violation of Labor Code sections 226.7, 512(a), 516, and 1198.

Employee and other aggrieved employees are entitled to civil penalties, attorney’s fees, costs, and interest thereon, pursuant to Labor Code sections 2699(a), (f)-(g).

Failure to Provide Compliant Rest Breaks

Labor Code sections 226.7, 516, and 1198, and the applicable IWC Wage Order require employers to provide rest periods and to pay an employee one (1) additional hour of pay at the employee's regular rate for each work day that a meal or rest period is not provided. Labor Code section 226.7 provides that no employer shall require an employee to work during any rest period mandated by an applicable order of the IWC. The applicable IWC wage order, section 11 provides that "[e]very employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period" and that the "rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof" unless the total daily work time is less than three and one-half (3 ½) hours.

To comply with its obligation to authorize and permit rest periods under Labor Code section 226.7 and the applicable IWC wage order, an employer must "relinquish any control over how employees spend their break time, and relieve their employees of all duties—including the obligation that an employee remain on call. A rest period, in short, must be a period of rest." *Augustus et al. v. ABM Security Services, Inc.* (2016) 2 Cal.5th 257, 269-270.

During the relevant time period, Del Taco regularly failed to authorize and permit Employee and other aggrieved employees to take a ten (10) minute rest period per each four (4) hour period worked or major fraction thereof. Specifically, Employee alleges that meal breaks were combined with rest breaks and were provided within the first hour worked. In addition to these rest breaks being interrupted or missed entirely, Employee and aggrieved employees were not permitted to take second rest breaks.

As a result of Del Taco's practices and policies, Employee and other aggrieved employees worked shifts in excess of 3.5 hours, in excess of 6 hours, and/or in excess of 10 hours without receiving all uninterrupted 10-minute rest periods to which they were entitled.

Del Taco also has engaged in a company-wide practice and/or policy of not paying rest period premiums owed when compliant rest periods are not authorized and permitted. Because of this practice and/or policy, Employee and other aggrieved employees have not received premium pay for all non-compliant rest periods.

Accordingly, Del Taco failed to authorize and permit all rest periods in violation of Labor Code sections 226.7, 516, and 1198. Employee and other aggrieved employees are entitled to civil penalties, attorney's fees, costs, and interest thereon, pursuant to Labor Code sections 2699(a), (f)-(g).

Wage Statements

Labor Code section 226(a) requires employers make, keep, and provide true, accurate, and complete wage records. Del Taco has not provided Employee and other aggrieved employees with properly itemized wage statements. Labor Code section 226(e) provides that if an employer fails to

comply with providing an employee with properly itemized wage statements as set forth in 226(a), then the employee is entitled to recover the greater of all actual damages or \$50 for the initial pay period in which a violation occurs and \$100 per employee for each violation in a subsequent pay period, not to exceed \$4,000. Further, Labor Code section 226.3 provides that any employer who violates section 226(a) shall be subject to a civil penalty in the amount of \$250 per employee per violation in an initial citation and \$1,000 per employee for each violation in a subsequent citation, for which the employer fails to provide the employee a wage statement or fails to keep the required records pursuant to section 226(a).

During the relevant time period, Del Taco has knowingly and intentionally provided Employee and other aggrieved employees with uniform, incomplete, and inaccurate wage statements. For example, Del Taco issued uniform wage statements to Employee and other aggrieved employees that fail to correctly list: gross wages earned; total hours worked; net wages earned; and all applicable hourly rates in effect during the pay period, including rates of pay for overtime wages and/or meal and rest period premiums, and the corresponding number of hours worked at each hourly rate.

Specifically, Del Taco violated sections 226(a)(1), 226(a)(2), 226(a)(5), and 226(a)(9). Because Del Taco did not record the time Employee and other aggrieved employees spent working off-the-clock, Del Taco did not list the correct amount of gross wages and net wages earned by Employee and other aggrieved employees in compliance with section 226(a)(1) and section 226(a)(5), respectively. For the same reason, Del Taco failed to accurately list the total number of hours worked by Employee and other aggrieved employees, in violation of section 226(a)(2), and failed to list the applicable hourly rates of pay in effect during the pay period and the corresponding accurate number of hours worked at each hourly rate, in violation of section 226(a)(9). For the same reason, Del Taco also failed to list the correct amount of net wages in violation of section 226(a)(5). Del Taco also failed to correctly list all applicable hourly rates in effect during the pay period, namely, correct rates of pay for overtime wages and/or meal period premiums, in violation of section 226(a)(9). Further, on Employee's wage statement dated 12/30/22, Del Taco failed to provide hours worked or rates of pay.

As a result of not having kept accurate records, Employee and aggrieved employees suffered injuries in the form of confusion over whether they received all wages owed to them, and difficulty and expense in reconstructing pay records in addition to other injuries which may come to light during the discovery process.

Labor Code section 1198 provides that the maximum hours of work and the standard conditions of labor shall be those fixed by the Labor Commissioner and as set forth in the applicable IWC wage order. Section 1198 further provides that "[t]he employment of any employees for longer hours than those fixed by the order or under conditions of labor prohibited by the order is unlawful." Pursuant to the applicable IWC wage order, employers are required to keep accurate time records showing when the employee begins and ends each work period and meal period.

Employee and other aggrieved employees are entitled to recover civil penalties, attorney's fees, costs, and interest thereon pursuant to Labor Code sections 226.3, 1174.5, and/or 2699(a), (f)-(g).

Failure to Provide Suitable Seating

Del Taco 's California restaurants are generally similar in their layout and design and there was, and continues to be, space in the restaurants to allow for the presence and use of a seat or stool by Employee and aggrieved employees (with reasonable or no modification to these work areas) during the performance of their work duties. Del Taco could provide Employee and aggrieved employees with a seat or stool, but instead denies them seating and forces aggrieved employees to stand throughout the day. Employee and aggrieved employees spent a substantial portion of their day standing, regardless of their actual job title or description. The nature of the work of an employee performing their job duties can reasonably be accomplished from a seated position. However, Del Taco systematically, and on a company-wide basis, did not provide seats or stools at or near counters, forcing Employee and aggrieved employees to stand throughout their work shifts.

Del Taco did not provide Employee and aggrieved employees with seats or stools in reasonable proximity to their work areas to allow them to use seats when it would not interfere with the performance of their duties for times when they were not engaged in active duties that require standing. In other words, to the extent Employee and aggrieved employees engaged in duties in which the nature of the work required standing, Del Taco denied them the use of seats nearby during lulls in their work duties. Moreover, Del Taco did not inform Employee and aggrieved employees of their rights to a seat or stool under California law.

Failure to Timely Pay Wages During Employment

Labor Code section 204 requires that all wages earned by any person in any employment between the 1st and the 15th days, inclusive, of any calendar month, other than those wages due upon termination of an employee, are due and payable between the 16th and the 26th day of the month during which the labor was performed, and that all wages earned by any person in any employment between the 16th and the last day, inclusive, of any calendar month, other than those wages due upon termination of an employee, are due and payable between the 1st and the 10th day of the following month.

Labor Code section 204 also requires that all wages earned for labor in excess of the normal work period shall be paid no later than the payday for the next regular payroll period. Alternatively, Labor Code section 204 provides that the requirements of this section are deemed satisfied by the payment of wages for weekly, biweekly, or semimonthly payroll if the wages are paid not more than seven (7) calendar days following the close of the payroll period.

During the Relevant Time Period, Del Taco willfully failed to pay Employee and aggrieved employees all wages due including, but not limited to, overtime wages, minimum wages, and/or meal and rest period premiums, within the time periods specified by Labor Code section 204.

Failure to Timely Pay Final Wages Upon Termination

As a pattern and practice, Del Taco regularly failed to pay Employee and aggrieved employees their final wages pursuant to Labor Code sections 201-203.

Labor Code sections 201 and 202 provide that if an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately, and that if an employee voluntarily leaves his or her employment, his or her wages shall become due and payable not later than seventy-two (72) hours thereafter, unless the employee has given seventy-two (72) hours previous notice of his or her intention to quit, in which case the employee is entitled to his or her wages at the time of quitting.

On information and belief, Del Taco has a company-wide practice or policy of failing to pay all accrued wages to departing employees and don't adhere to the time requirements set forth in Labor Code sections 201 and 202.

Del Taco willfully failed to pay Employee and aggrieved employees the earned and unpaid wages set forth above, including but not limited to, overtime wages, minimum wages, and/or meal rest period premiums, either at the time of discharge, or within seventy-two (72) hours of their leaving Del Taco's employ.

Conclusion

Enclosed please find a copy of the class action complaint that is in the process of being filed in the Superior Court for the State of California, Los Angeles County. Employee respectfully requests that the LWDA notify this office within sixty (60) days if it wishes to investigate this matter further. A copy is being sent via certified mail to Del Taco. Should you have any questions or concerns or require additional information, please do not hesitate to contact the undersigned.

Thank you for your time and consideration.

Very truly yours,

BRADLEY/GROMBACHER, LLP



Marcus J. Bradley, Esq.

cc: Jack T Tang
Agent of Service of Process for:
Del Taco LLC
25521 Commercentre Dr. Suite 200
Lake Forest, CA 92630