

July 8, 2024

Via Certified U.S. Mail & Online Submission to LWDA

Labor and Workforce Development Agency

801 K Street, Suite 2101
Sacramento, CA 95814

Safeway, Inc.

C/O Agent for Service of Process

330 N Brand Blvd.
Glendale, CA 91203

Safeway, Inc.

20427 North 27th Avenue
Phoenix, AZ 95027-3241

**Re: Notice of Violations of California Labor Code Sections by Labor Code §§
1198, 2698, Applicable Industrial Welfare Commission Wage Orders, and
Pursuant to California Labor Code Section 2699.3**

To Whom It May Concern:

Judy Lee Tom works for Safeway, Inc. in its pharmacy department located in Millbrae, California. Ms. Tom has retained our offices to represent her interests and the interests of other aggrieved employees described herein. Ms. Tom contends that Safeway, Inc. failed to provide her, and other similarly situated employees working in the pharmacy department, with suitable seating, as required by California Labor Code Section 1198, the Labor Code Private Attorney General Act of 2004, Labor Code section 2698, et seq., and Wage Order 7-2001, Section 14(A, B). Said conduct, in addition to the forgoing, violated each Labor Code section as set forth in California Labor Code section 2699.5. The duties of employees working the pharmacy, include checking out customers at the registers, communicating with co-employees, providing instructions to customers, answering and responding to customer questions, filling customer prescriptions, speaking with – and responding to -- health care and insurance provider inquiries and instructions and staffing the pharmacy counter. Safeway, Inc. failed to provide a suitable seat to pharmacy employees even though the nature of the work performed by Ms. Tom and other similarly aggrieved pharmacy department employees reasonably permits/permitted the use of a suitable seat. Ms. Tom asked her managers, and human resources, respectively, to allow her to use a suitable seat while performing pharmacy work duties that could be performed while seated. The requests were denied. Ms. Tom was informed by her corporate management that she and other pharmacy employees had to be standing at all times.

Pursuant to Cal. Lab. Code section 2699.3, this notifies you that Ms. Tom intends to seek penalties against Safeway, Inc. and related DOE employers, presently unknown and subject to

discovery and amendment, for violation of the California Labor Code as outlined herein and based on the following facts.

Safeway, Inc. is a “brick and mortar” retail company. The nature of the work performed by Ms. Tom -- and other similarly situated employees working in the pharmacy department as described herein -- is work that may reasonably be performed while seated as defined by the California Supreme Court in *Kilby v. CVS Pharmacy, Inc.*, 63 Cal. 4th 1, 16 –19 (2016):

As we would in interpreting a statute, we begin by examining the words of the wage order as the best indicator of the IWC's intent. (See *Brinker, supra*, 53 Cal.4th at p. 1027; *Martinez v. Combs* (2010) 49 Cal.4th 35, 63) Both Wage Order No. 4–2001, section 14(A) and Wage Order No. 7–2001, section 14(A) (hereafter, collectively, section 14(A)) require “suitable seats” for working employees “when the nature of the work reasonably permits the use of seats.” Questions about the “nature of the work” and when that work “reasonably permits the use of seats” are analytically distinct. Yet, the answers to those questions are necessarily intertwined. What constitutes the “nature of the work” under section 14(A) cannot be meaningfully answered without consideration of the underlying purposes of the seating requirement, in light of the objective standards imposed by the wage orders.

Defendants argue 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. Under defendants' view, deciding whether an employee is entitled to a seat under section 14(A) would require weighing all of an employee's “standing” tasks against all of the “sitting” tasks. If this weighing of tasks favored providing a seat, the job would be classified a “sitting” job and the employee would be provided a seat. Otherwise, the job would be classified a “standing” job and the employee would be entitled to a seat only under section 14, subdivision (B) of Wage Orders No. 4–2001 and No. 7–2001 (hereafter, collectively, section 14(B)).

Defendants' argument sweeps too broadly and is inconsistent with the purpose of the seating requirement. As discussed, the IWC's wage orders were promulgated to provide a minimum level of protection for workers. The requirement's history reflects a determination by the IWC that “humane consideration for the welfare of employees requires that they be allowed to sit at their work or between operations when it is feasible for them to do so.” (IWC, Statement of Findings by the Industrial Welfare Commission of the State of Cal. in Connection with the Revision in 1976 of its Orders Regulating Wages, Hours, and Working Conditions (Aug. 13, 1976) p. 15.) Defendants' proposed consideration of *all* tasks included in an employee's job description ignores the duration of those tasks, as well as where, and how often, they are performed. This all-or-nothing approach could deprive an employee of a seat because most of his job duties are classified as “standing” tasks, even though the duration, frequency, and location of the employee's most common tasks would make seated work feasible while

performing them. There is no principled reason for denying an employee a seat when he spends a substantial part of his workday at a single location performing tasks that could reasonably be done while seated, merely because his job duties include other tasks that must be done standing.

Further, defendants' view could also result in different seating requirements for employees with different duties and job descriptions *while they perform the same work*. Consider an employee who spends most of his day stocking shelves, for which he must stand, but who occasionally assists at a cash register during busy periods. Under defendants' approach, though cash register duty may feasibly be performed while seated, this employee would not be entitled to a seat under section 14(A) while working at the cash register. Yet, another employee who spends most of his day at the cash register *would* be entitled to a seat there. Nothing in the language or history of the seating requirement allows such disparate treatment of employees performing the same tasks. Defendants' approach also shifts the focus away from the nature of the work to particular assignments given to an individual employee. (See pt. II.F.3., *post.*) The inquiry does not turn on the individual assignments given to each employee, but on consideration of the overall job duties performed at the particular location by *any* employee while working there, and whether those tasks reasonably permit seated work.

On the other hand, plaintiffs argue that whether the “nature of the work reasonably permits the use of seats” turns on a task-by-task evaluation of whether *a single task* may feasibly be performed seated. This view is too narrow and likewise inconsistent with the language and history of section 14(A). As discussed, the IWC modified the language now in section 14(A) in 1976 to add the word “reasonably” before the phrase “permits the use of seats.” The IWC explained in its accompanying findings: “The requirement for ‘suitable’ seats ‘where the nature of the work permits’ has long been a provision of I.W.C. orders and has proved to be useful and workable as the Division has reasonably enforced it. Testimony in public hearing made it clear that some kinds of work places would be covered by the new orders that were not covered by previous orders, and the Commission has made its requirement more flexible and more subject to administrative judgment as to what is reasonable.” (IWC, Statement of Findings by the Industrial Welfare Commission of the State of Cal. in Connection with the Revision in 1976 of its Orders Regulating Wages, Hours, and Working Conditions, *supra*, at p. 15.)

The seating requirement has always been “reasonably enforced,” and the 1976 modification only made explicit what was implicit in its enforcement history. The seating requirement has never been understood as absolute or doctrinaire. Plaintiffs' proposed examination of individual tasks in isolation is inconsistent with the flexibility envisioned by the IWC's reasonableness standard. Under this approach, if any single task could be performed while seated, an employee would be entitled to a seat, even if the duration and frequency of the seated task is

negligible. That approach also fails to account for whether being seated would unduly interfere with other standing tasks or the quality and effectiveness of overall job performance. The reasonableness standard, and its attendant flexibility, was intended to balance an employee's need for a seat with an employer's considerations of practicability and feasibility.

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 consider whether it is feasible for an employee to perform each set of location-specific tasks while seated. Courts should look to the actual tasks performed, or reasonably expected to be performed, not to abstract characterizations, job titles, or descriptions that may or may not reflect the actual work performed. Tasks performed with more frequency or for a longer duration would be more germane to the seating inquiry than tasks performed briefly or infrequently.

A focus on actual work done and tasks grouped by their location alleviates the problems created by both plaintiffs' and defendants' approaches. An employee may be entitled to a seat to perform tasks at a particular location even if his job duties include other standing tasks, so long as provision of a seat would not interfere with performance of standing tasks. At the same time, consideration of all the actual tasks performed at a particular location would allow the court to consider the relationship between the standing and sitting tasks done there, the frequency and duration of those tasks with respect to each other, and whether sitting, or the frequency of transition between sitting and standing, would unreasonably interfere with other standing tasks or the quality and effectiveness of overall job performance.

We clarify that, contrary to defendants' suggestion, the requirements of sections 14(A) and 14(B) are *not* mutually exclusive in terms of the protections afforded to a particular employee. Both provisions may apply at various times during the workday, though not at the *same* time. As noted, section 14(B) states 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.” As plaintiffs observe, the IWC has stated 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. (IWC, 1976 Wage Orders, Summary of Basic Provisions, Seats, p. 3.) Taking the two provisions together, if an employee's actual tasks at a discrete location make seated work feasible, he is entitled to a seat under section 14(A) while working there. However, if other job duties take him to a different location where he must perform standing tasks, he would be entitled to a seat under 14(B) during “lulls in operation.” Although the seating inquiries under sections 14(A) and 14(B) are analytically different, the seat provided to an employee under section 14(A) may satisfy the requirement of section 14(B) to the

extent it is within “reasonable proximity to the work area” (§ 14(B)) and is available when work is not required to be performed.

In sum, the “nature of the work” under section 14(A) would include an employee's actual or expected tasks. If tasks are performed at a discrete location, those tasks should be considered together in evaluating whether work there reasonably permits use of a seat.

Furthermore, Ms. Tom alleges that when she and other similarly situated employees working in the pharmacy department were not engaged in the active duties of employment, an adequate number of suitable seats were not placed in reasonable proximity to the pharmacy department, in violation of Wage Order 7, Section 14(B).

On August 4, 2004, the California Legislature passed SB 1809 to modify Labor Code Sections 2698-2699 by adding Labor Code Section 2699.3. Labor Code Section 2699.3 requires that a claimant first send a certified letter to the employer in question and the Labor and Workforce Development Agency setting forth the claims, and the basis for the claims, thereby giving the Labor and Workforce Development Agency an opportunity to investigate the claims and/or take any action it deems appropriate.

Ms. Tom provides this letter to notify the LWDA and Safeway, Inc. that Ms. Tom intends to seek statutory penalties and injunctive relief for violations of California Labor Code Section 1198 based on Safeway, Inc. alleged violations of Wage Order 7, Section 14(A) and 14(B). The penalties for the aforementioned statutory violations are set forth in California Labor Code Section 2699(f).

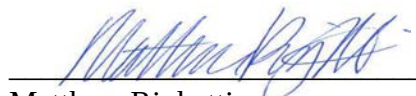
The purpose of this letter is to satisfy the requirement created by the Private Attorneys General Act prior to seeking penalties allowed by law for the aforementioned statutory violations. We look forward to determining whether the Labor and Workforce Development Agency intends to take any action in reference to these claims. We kindly ask that you respond to this notice according to the time frame contemplated by the code.

Ms. Tom intends to seek the aforementioned penalties – and appropriate injunctive relief per the PAGA -- on her own behalf and on behalf of other similarly situated California based employees who work/worked in the pharmacy department for Safeway, Inc. within one year of the date of this letter – and continuing through date of judgment -- as allowed by law.

Please feel free to contact me if you have any questions or concerns.

Very truly yours,

RIGHETTI GLUGOSKI, P.C.

A handwritten signature in blue ink, appearing to read "Matthew Righetti", is written over a horizontal line.

Matthew Righetti