



Matthew R. Eason
Kyle K. Tambornini
Erin M. Lillis
Jennifer A. Eason

1819 K Street, #200
Sacramento, CA 95811
(916) 438 – 1819
Fax (916) 438 - 1820

Writer's e-mail
matthew@capcitylaw.com

March 5, 2024

Via Certified Mail

Labor and Workforce Development Agency
Attn: PAGA Administrator
1515 Clay Street, Ste. 801
Oakland, CA 94612

Via Certified Mail

Ball Metal Beverage Container Corp.
Attn: Agent for Service of Process
CT Corporation System
818 West Seventh Street, Suite 930
Los Angeles, CA 90017

Via Certified Mail

Ball Metal Beverage Container Corp.
Attn: Agent for Service of Process
PO Box 9005
Broomfield, CO 80021-0905

Re: *Robert Westfall v. Ball Metal Beverage Container Corporation – Amended LWDA Submission*

Dear Labor Commissioner,

As counsel for, and on behalf of, Robert Westfall (hereinafter referred to as “Claimant”), I am writing to provide you and Ball Metal Beverage Container Corp. (hereafter “Defendant”) notice pursuant to California Labor Code section 2699.3, Private Attorney General Act (“PAGA”), and to amend Claimant’s September 8, 2016 LWDA submission.

I am setting forth the facts and theories to support each of the counts found within this letter. Please notify us of your intent to investigate any or all of the claims alleged herein against any of the above identified Defendant. Should you decide not to investigate, we request that you allow us to seek civil penalties on behalf of the Labor Commissioner, Claimant, and all similarly situated current and former aggrieved employees, pursuant to California Labor Code section 2699(a). A \$75.00 filing fee is being submitted to Department of Industrial Relations, Accounting Unit, 455 Golden Gate Avenue, 10th Floor, San Francisco, CA 94102 via the online PAGA filing portal.

A. FACTS

Defendant is in the business of manufacturing metal beverage and food containers. Claimant and similarly situated employees worked for Defendant as non-exempt employees in California and either held the positions of "Electronic Technician," "Machinist/Mechanic," and/or "Maintenance," or worked in non-exempt positions in the production, engineering, and production support departments in the Fairfield Plant. Claimant and similarly situated employees were paid on an hourly basis.

During their employment, Claimant and other aggrieved employees have been made to suffer numerous violations of the California Labor Code, including (1) the failure to pay all wages owed, including minimum wage, overtime and sick pay, at the regular rate of pay, as well as vested but unpaid vacation wages; (2) the failure to provide meal breaks or premium payments at the regular rate of pay in lieu thereof; (3) the failure to provide rest breaks or premium payments at the regular rate of pay in lieu thereof; (4) the failure to provide itemized wage statements; and (5) waiting time penalties for willful non-payment of wages due upon separation of employment.

1. Defendant's failure to pay overtime at the regular rate due to the EVA Bonus

Defendant has been paying annual bonuses to Claimant and other aggrieved employees, which bonuses are paid in mid-February annually. The amount of the bonus paid to each employee differs. Some employees' bonuses are calculated with reference to the employee's gross income for the preceding year and/or their cumulative overtime hours for the preceding year. Conversely, other employees' bonuses are calculated based on number of overtime hours worked.

Claimant and other aggrieved employees worked scheduled weeks of four (4) consecutive twelve (12) hour workdays, followed by four (4) days off work. The first eight hours of every day would be scheduled regular time, and the last four hours would be paid and scheduled as mandatory overtime. Employees were encouraged to volunteer for fifth and sixth days for such shifts. If insufficient employees volunteered, then employees would be assigned mandatory overtime. Whether mandatory or voluntary, fifth days and sixth days on shifts were paid as straight overtime for all twelve hours. Defendant's employees at the Fairfield location averaged about 400 hours of overtime a year. Defendant does not spread the bonus across the non-overtime and/or mandatory hours for the previous year, in order to calculate the regular rate. Rather, overtime is paid at the regular rate of 1.5x the straight hourly pay. As a result of these violations, Defendant failed to pay overtime at the regular rate of pay.

2. Defendant's failure to comply with the Sick Pay Act and failure to pay Sick Pay at the regular rate due to the EVA Bonus

EVA IC pay was made through two pay statements: one reflecting the BBPNCA bonus and one reflecting the "Corporate" bonus. Those pay statements violated § 226, because the pay statements failed to show the "hours worked" underlying the bonus. The pay statements further failed to show "all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee," § 226(a)(9). Because the EVA payments fail to reflect which earnings

are, and which earnings are not, increased by the “percentage bonus,” Claimant and other aggrieved employees are unaware that they are not being compensated regular rate pay on certain bases of pay, including sick time. As a result of these violations, Defendant failed to pay, or supplement, sick pay at the correct regular rate of pay.

3. Defendant’s failure to pay meal and rest period pay at the regular rate and wages owed resulting from shift turnover meetings

Defendant’s Fairfield plant manufactures cans, and employees in the engineering, production and support departments generally work a rotating schedule working twelve-hour shifts, four days on, four days off. Defendant utilized a paging system to communicate with employees of the needs and changes to the production line. The paging system had a speaker in the breakroom. The applicable Wage Order requires that “suitable resting facilities shall be provided in an area separate from the toilet rooms and shall be available to employees during work hours.” The same Wage Order requires that “if a meal period occurs on a shift beginning or ending at or between the hours of 10:00 p.m. and 6:00 a.m., facilities shall be available for securing hot food and drink or for heating food or drink, and a suitable sheltered place shall be provided in which to consume such food or drink.” While Defendant provided a room that complied on its face with these two portions of the Wage Order, when the employees used the suitable resting facilities, they did so on the condition that they remained vigilant and continued to work by monitoring pages, thus depriving them of meal and rest breaks free from duties. Employees are owed a meal break premium and rest break premium for each day that they worked.

As a result of Defendant failing to provide meal and rest breaks free from duty as a result of its paging system, each meal period should be considered an on-duty meal period and paid. Since employees were already working a twelve-hour shift, wages for an on-duty meal period should be paid at the applicable overtime rate. In addition, employees were required to attend turnover meetings to advise the oncoming shift of important events that had transpired. Employees were not always paid for this time which extended beyond their scheduled twelve-hour shift. Employees are owed wages at the overtime rate for this time.

As a result of these violations, Defendant did not pay Claimant and other aggrieved employees for working during their rest and meal breaks, did not provide uninterrupted meal and rest breaks free from all duties, did not accurately record their hours worked, did not pay Claimant and other aggrieved employees for all hours worked, did not pay Claimant and other aggrieved employees overtime in accordance with California law, and did not pay meal and rest period pay at the correct regular rate.

4. Defendant’s exposure to derivative itemized wage statement and waiting time penalty claims

As a result of these violations, Defendant also did not provide Claimant and similarly situated employees legally compliant wage statements noting, among other things, total hours worked, gross wages earned, the applicable hourly rates in effect during the pay period, and the corresponding number of hours worked at each hourly rate. Also, as a result of these violations, Defendant failed to pay Claimant

and similarly situated employees their final wages timely in accordance with the requirements of Labor Code section 201 and 202.

Claimant is informed and believes that Defendant committed numerous other violations of the California Labor Code, including but not limited to those identified in this letter. Pursuant to *Huff v. Securitas Sec. Servs. USA, Inc.* (2018) 23 Cal. App. 5th 745, Claimant intends to seek civil penalties for all violations of the California Labor Code, whether he experienced them personally or not.

B. VIOLATIONS OF THE LABOR CODE EXPERIENCED BY CLAIMANT AND SIMILARY SITUATED EMPLOYEES

Violation of Labor Code §§ 1194, 1197.1; IWC Wage Order No. 5-2001, § 4 (Failure to Pay Minimum Wages)

During the period Claimant and similarly situated employees were employed by Defendant they were entitled to be paid at least the State's minimum wage rate for each hour that they worked. See, e.g., IWC Wage Order MW-2014, MW-2017; IWC Wage Order No. 5-2001, section (4); Cal. Lab. Code §§ 1194, 1197.1. For the reasons stated above, Defendant did not pay Claimant and similarly situated employees at least minimum wage for all hours worked. Thus, Claimant and similarly situated employees were not paid at least the applicable state minimum wage for all hours worked in violation of the Labor Code.

Violation of Labor Code §§ 510, 1194; IWC Wage Order No. 4-2001, § 3 (Failure to Pay Overtime Wages)

Labor Code sections 510 and 1194 require employers to pay employees overtime for any work in excess of eight (8) hours in one workday and any work in excess of forty (40) hours in any one workweek. Employers must also pay overtime for the first eight (8) hours worked on the seventh day of work in any one workweek. Finally, employers must pay double time for all hours worked in excess of twelve (12) hours in any workday and for all hours worked in excess of eight (8) hours on the seventh day of work in any one workweek. As stated above, Claimant and similarly situated employees worked over eight (8) hours per day and forty (40) hours per week and were not paid, or were underpaid, overtime wages. Claimant and all similarly situated employees are entitled to recover all unpaid and/or underpaid overtime wages.

Violation of Labor Code § 1174 (Failure to Keep Accurate Time Records)

Labor Code section 1174(d) requires employers to keep "payroll records showing the hours worked daily by and the wages paid to . . . employees . . . These records shall be kept in accordance with rules established for this purpose by the commission, but in any case, shall be kept on file for not less than three years." Defendant did not keep accurate information regarding all hours worked by Claimant and similarly situated employees, largely by failing to accurately record all time worked on their time records. This was in violation of the Labor Code.

Violation of Labor Code § 226.7 and IWC Wage Order No. 4-2001, § 11(A) (Failure to Provide Meal Periods)

Labor Code section 226.7 and IWC Wage Order No. 4-2001, section 11(A) require employers to provide employees meal periods of thirty (30) minutes per five (5) hours worked. For the reasons stated above, Claimant and similarly situated employees were not authorized and permitted to take legally compliant meal periods pursuant to California law. Defendants also failed to pay, or underpaid, meal period premiums for its failure to provide meal periods.

Violation of Labor Code § 226.7 and IWC Wage Order No. 5-2001, § 12(A) (Failure to Provide Rest Periods)

Labor Code section 226.7 and IWC Wage Order No. 5-2001, section 12(A) require employers to provide employees paid off-duty rest periods of ten (10) minutes per four (4) hours or major fraction thereof worked. For the reasons stated above, Claimant and similarly situated employees were not authorized and permitted to take legally compliant rest periods pursuant to California law in violation of the Labor Code. Defendants also failed to pay, or underpaid, rest period premiums for their failure to provide rest periods.

Violation of Labor Code §§ 226, 226.3 (Failure to Provide Accurate Wage Statements)

Labor Code section 226 requires employers to furnish to employees with “an accurate itemized statement in writing showing (1) gross wages earned, (2) total hours worked by the employee, . . . (3) the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis, (4) all deductions, provided that all deductions made on written orders of the employee may be aggregated and shown as one item, (5) net wages earned, (6) the inclusive dates of the period for which the employee is paid, (7) the name of the employee and only the last four digits of his or her social security number or an employee identification number other than a social security number, (8) the name and address of the legal entity that is the employer . . . and (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee” For the reasons stated above, Defendants failed to comply with these requirements with respect to Claimant and similarly situated employees in violation of the Labor Code.

Violation of Labor Code §§ 201–203, 256 (Failure to Pay Final Wages)

Labor Code sections 201–203 require that all wages, including minimum wages and meal and rest period premiums, be paid to employees upon separation and/or termination of employment. Here, for the reasons stated above, Claimant and similarly situated employees did not receive all final wages due and owing to them at the time of termination or seventy-two (72) hours thereafter as required by Labor Code sections 201–203. This is in violation of the Labor Code.

Violation of Labor Code §§ 558, 558.1 (Provisions Regulating Hours and Days of Work in Any Industrial Welfare Commission Order)

Labor Code section 558 states that it is unlawful for any employer, or other person acting on behalf of an employer, to violate or cause to be violated any of sections 500 to 558.1 of the Labor Code or any order of the Industrial Welfare Commission. As described above, Defendants, by and through its agents, violated Claimant's and similarly situated employees' rights provided for under Labor Code sections 558 and 558.1 as well as the incorporated Wage Orders and incorporated statutes therein.

Violation of Labor Code § 246 (Failure to Provide Paid Sick Leave and Pay Sick Pay)

Labor Code section 233 (commonly referred to as the "Kin Care" law) requires an employer to allow an employee to use accrued and "available" sick leave (which is the amount that would accrue during a six-month period) for the purposes specified in the paid sick leave law. Labor Code section 234 provides that "[a]n employer absence control policy that counts sick leave taken pursuant to Section 233 as an absence that may lead to or result in discipline, discharge, demotion, or suspension is a per se violation of Section 233." Labor Code section 246 states, "[a]n employee shall accrue paid sick days at the rate of not less than one hour per every 30 hours worked." Labor Code section 246.5(c)(1) states, "[a]n employer shall not deny an employee the right to use accrued sick days, discharge, threaten to discharge, demote, suspend, or in any manner discriminate against an employee for using accrued sick days, attempting to exercise the right to use accrued sick days, filing a complaint with the department or alleging a violation of this article, cooperating in an investigation or prosecution of an alleged violation of this article, or opposing any policy or practice or act that is prohibited by this article." For the reasons stated above, Defendants failed to comply with these requirements with respect to Claimant and similarly situated employees in violation of the Labor Code.

Other Violations of the Labor Code

Pursuant to *Huff v. Securitas Sec. Servs. USA, Inc.*, 23 Cal. App. 5th 745, 761, 233 Cal. Rptr. 3d 502, 513 (Ct. App. 2018), reh'g denied (June 13, 2018), review denied (Aug. 8, 2018), Claimant intends to seek civil penalties for all violations of the California Labor Code, whether he experienced them personally or not.

If you have any questions or require any further information regarding the facts and theories to support these claims, do not hesitate to contact my office. Pursuant to Labor Code section 2699.3, please notify Defendant and this law office within 60 calendar days of the postmark date of this notice whether the Agency intends to investigate the alleged violations.

Eason & Tambornini, ALC

 for
Matthew R. Eason 