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March 2, 2020

SENT VIA CERTIFIED MAIL

TARGET CORPORATION
c/o C T Corporation System
Agent for Service of process
818 W. 7th St., Ste. 930
Los Angeles, CA 90017

**SENT VIA ELECTRONIC
SUBMISSION**

DEPARTMENT OF INDUSTRIAL
RELATIONS
Accounting Unit
455 Golden Gate Avenue, 10th Floor
San Francisco, CA 94102

Re: CALIFORNIA LABOR CODE § 2699.3 PAGA NOTICE
Arthur Barnes v. Target Corporation

To Whom It May Concern:

I am writing on behalf of the aggrieved employee Arthur Barnes who worked as an hourly non-exempt employee at one of Target's Distribution Centers in San Bernadino County, T-3806. This notice is being made to the California Labor & Workforce Development Agency ("LWDA") pursuant to the requirement of Labor Code section 2699.3, to notify the LWDA that Mr. Barnes (hereinafter referred to as the "PAGA Representative"), as well as other aggrieved current and former non-exempt employees that worked for Target Corporation (hereinafter the "Employer" or "Target") in one of its Distribution Centers in California (the "Aggrieved Employees") from March 21, 2019 to August 11, 2019 were: (1) not paid overtime after 8 hours of work in a day in violation of Labor Code §§ 510, 558, 1198, and 1199; (2) not timely paid for all wages in violation of Labor Code §§ 201, 202, 203, 204, 223, 510, 558, 1194, and 1198 and the Industrial Welfare Commission ("IWC") Wage Orders; (3) not provided accurate itemized wage statements in violation of Labor Code § 226(a); and (4) not paid all wages due at the time of termination in violation of Labor Code §§ 201-203.

The PAGA Representative's claim for unpaid overtime is in part based on Target's usage and reliance on Alternative Workweek Schedules ("AWS") that purportedly enabled Target to avoid paying overtime for employees working shifts in excess of 8 hours. Most of the Aggrieved Employees, including the PAGA Representative, worked an AWS of either 4 days a week, 10

hours a day (“4/10 Schedule”) or 3 days a week, 12 hours a day (“3/12 Schedule”) and were not paid overtime after 8 hours in a day. The PAGA Representative challenges the validity of Target’s AWS as the company failed to adhere to all procedural requirements prior to implementing these AWS.

An employer has the burden of establishing all the required elements if it seeks to rely on an AWS to evade its obligation to pay employees overtime after 8 hours of work in a day. Maldonado v. Epsilon Plastics, Inc., 22 Cal. App. 5th 1308 (2018). First, the proposal for the AWS must be in the form of a written agreement and must designate a regularly scheduled alternative workweek in which the specified number of workdays and work hours are regularly recurring. *Id.*; IWC Wage Orders § 3(C)(1). The employer may propose a single work schedule that would become the standard schedule for workers in the work unit, or a menu of work schedule options, from which each employee in the unit would be entitled to choose. Wage Orders § 3(C)(1). If the employer proposes a menu of work schedule options, the employee may, with the approval of the employer, move from one menu option to another. Wage Orders § 3(C)(1). In order to be valid, the proposed AWS must be adopted in a secret ballot election, before the performance of work, by at least a two-thirds (2/3) vote of the affected employees in the work unit. *Id.*; Wage Orders § 3(C)(2), see also Labor Code § 511. The PAGA Representative contends that Target failed to follow all these requirements.

Prior to the secret ballot vote, the employer is required to make a disclosure in writing to the affected employees, which must include the effects of the proposed arrangement on the employees’ wages, hours and benefits. Wage Orders § 3(C)(3). The disclosure shall include meetings, duly noticed and held at least 14 days prior to voting, for the specific purpose of discussing the effects of the alternative workweek schedule. *Id.*, Wage Orders § 3(C)(3). The employer must also provide the disclosure “in a non-English language, as well as in English, if at least 5% of the affected employees primarily speak that non-English language.” Wage Orders § 3(C)(3). The employer shall mail the written disclosures to employees who do not attend the meeting. The Wage Order clearly provides that the employer’s “failure to comply with this paragraph shall make the election null and void.” Wage Orders § 3(C)(3). The PAGA Representative contends that Target failed to follow all these requirements as well.

The Wage Orders and Labor Code § 511 also provide that only secret ballots may be cast by affected employees in the work unit, and the results of the election must be reported by the employer to the Office of Policy, Research and Legislation within 30 days after results are final.

In all of its AWS elections Target allowed employees to vote by absentee ballots. However, there is not a provision in the Wage Orders or Labor Code § 511 which allows employees in the defined work unit to vote by “absentee ballot.” The relevant portions of the Wage Orders expressly disallows for absentee voting as the regulation state: “In order to be valid... The election shall be held during regular working hours at the employees’ worksite.” It follows that if the election must occur “at the employees’ worksite,” only ballots cast “at the employees’ worksite” are valid. Given that the Wage Orders expressly states “[i]n order to be valid” the voting must take place “during regular working hours at the employees’ worksite” Target’s use of absentee ballots in its AWS elections renders those elections invalid.

Additionally, the employer cannot intimidate or coerce employees to vote either in support of or in opposition to the proposed alternative workweek schedule which Target did at some of the Distribution Center AWS elections in question. Wage Orders § 3(C)(8).

The PAGA Representative challenges the validity of Target's AWS. Employees that work pursuant to an AWS for Target were and are improperly denied overtime, including double time, after 8 hours of work in a day as required by state law.

The PAGA Representative's claim for violation of Labor Code § 203 is derivative of the unpaid overtime claim described above. It is a fundamental policy of California law that employees who are discharged or who resign are owed their final wages immediately, or within 72 hours, as prescribed by Labor Code Sections 201 and 202. (*Davis v. Morris*, 37 Cal.App.2d 269, 274 (1940).) Labor Code Section 203 provides for a penalty of daily wages for up to 30 calendar days. This 30-day period is calculated using a daily rate of pay – and multiplying by 30. (*Mamika v. Barca*, 68 Cal.App.4th 487, 493-94 (1998).) Section 203 does not require that the employer intended the action; merely that the action occurred and was within the employer's control. (8 C.C.R. § 13520; see also *Davis v. Morris*, 37 Cal.App.2d 269 (1940).) In other words, the PAGA Representative needs not establish that Target intended to underpay its employees. Rather, the PAGA Representative needs only prove that Target could have paid them all unpaid wages earned and failed to do so.

At Distribution Center (T-3806) where Mr. Barnes worked, Target held new AWS elections in February and March of 2019. This was a location where two-thirds (2/3) of the employees that were in the defined work unit for an AWS election that was held over a decade ago did not vote in favor of the proposed AWS, which as a matter of law invalidated the AWS election.

Following the new elections at T-3806 in February and March of 2019, two-thirds (2/3) of the employees voted in favor of the AWS. These new elections went into effect on April 7, 2019 for employees working a 3/12 schedule and April 9, 2019 for employees working a 4/10 schedule. Although Target conducted new AWS elections for its employees at T-3806, the employees at this location continued to work the same 4/10 and 3/12 AWS prior to, during and immediately following the new elections, without the payment of daily overtime. Thus, the employees were working the exact same AWS schedules that they were being asked to vote on again. Labor Code § 511 and the IWC Wage Orders, specifically provide that employees cannot work the AWS schedule that they are voting on prior to the election, but this is exactly what Target did in the new elections at T-3806. Thus, the new AWS elections for T-3806 are invalid for this reason as well.

On August 11, 2019, Target discontinued using the AWS schedules at all DCs in California, including the "new" AWS at T-3806, and began paying employees overtime after 8 hours of work.

March 2, 2020

Department Of Industrial Relations

Re: *Arthur Barnes v. Target Corporation*

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This letter sets forth the specific provisions of the California Labor Code and IWC Wage Orders that have been violated by Target and the facts and theories supporting those violations pursuant to California Labor Code section 2699.3.

Very truly yours,

Becerra Law Firm

A handwritten signature in blue ink, appearing to read 'J. Becerra', with a stylized flourish extending from the end.

Joseph R. Becerra