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VIA LWDA ONLINE PORTAL
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Labor and Workforce Dev. Agency
Attn: PAGA Administrator
1515 Clay Street, Ste. 801
Oakland, CA 94612

Alfredo Cresci v. Cox Automotive Corporation Services, LLC et al.

Our Client: Alfredo Cresci

Our File No.: 4-089

Subject: Private Attorneys General Act Notice of Labor Code Violations

To Whom It May Concern:

We are writing on behalf of our client, Alfredo Cresci (“Plaintiff”), regarding Cox Automotive Corporation Services, LLC and Cox Enterprises, Inc.’s (“Employer(s)” or “Defendant(s)”) violations of the California Labor Code, for which Plaintiff intends to seek “civil penalties” in a civil action under the California Labor Code Private Attorneys General Act of 2004 (“PAGA”) on behalf of herself, other current or former aggrieved employees, and the State of California. This notice is sent to the employer pursuant to the PAGA. As used in this PAGA notice, the term “violation” applied to Labor Code statutes has the same meaning as Labor Code § 22.

The PAGA statute only requires the PAGA representative to be an employee “against whom one or more of the alleged violations was committed,” meaning a PAGA plaintiff need only have experienced just one of the alleged violations, not all of them. *Huff v. Securitas Sec. Servs. USA, Inc.*, 23 Cal. App. 5th 745, 753 (2018); *Jeske v. Maxim Healthcare Servs.*, 2012 WL 78242, *13 (E.D. Cal. Jan. 10, 2012); *Holak v. K Mart Corp.*, No. 1:12-CV-00304-AWI-MJ) 2015 WL 2384895, at *5 (E.D. Cal. May 19, 2015) (“By the plain language of the statute, an aggrieved employee need only suffer one of the Labor Code violations alleged against his or her employer to be able to bring a PAGA claim on behalf of himself or herself and current or former employees who suffered any Labor Code violation at the hands of the employer. Plaintiff need not have actually suffered all of the Labor Code violations that he alleges to have taken place for purposes of seeking PAGA penalties.”).

And a corporate employer's owner, president, secretary, and directors are liable for civil penalties as an "other person" who caused violations of the Labor Code, even if there is no allegation that the alter ego doctrine applies or that there is any other basis on which to pierce the corporate veil. *Atempa v. Pedrazzani*, 27 Cal. App. 5th 809 (2018).

Factual Background

Plaintiff worked for Defendant as a remote account manager from February 7, 2018, until January 14, 2020. During Plaintiff's employment, Plaintiff worked over eight (8) hours per day and over forty (40) hours or more hours a week, without being paid overtime wages. Plaintiff also used his personal cell phone for work related purposes. Defendants failed to reimburse Plaintiff for cell phone use. Other account managers also worked over eight (8) hours per day and over forty (40) hours or more hours a week, without being paid overtime wages. Other account managers used their personal cell phone for work related purposes and Defendants failed to reimburse them.

Labor Code Violations Providing Civil Penalties Established Pursuant to 2699(f)(2): §§ 2802, 510, 204, 1198, 226(a), 1174

§ 2802

"An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer." Lab. Code § 2802(a). In *Cochran v. Schwan's*, the court held:

If an employee is required to make work-related calls on a personal cell phone, then he or she is incurring an expense for purposes of section 2802. It does not matter whether the phone bill is paid for by a third person, or at all. In other words, it is no concern to the employer that the employee may pass on the expense to a family member or friend, or to a carrier that has to then write off a loss. It is irrelevant whether the employee changed plans to accommodate work-related cell phone usage. Also, the details of the employee's cell phone plan do not factor into the liability analysis. Not only does our interpretation prevent employers from passing on operating expenses, it also prevents them from digging into the private lives of their employees to unearth how they handle their finances vis-à-vis family, friends and creditors. To show liability under section 2802, an employee need only show that he or she was required to use a personal cell phone to make work-related calls, and he or she was not reimbursed.

Cochran v. Schwan's Home Serv., Inc., 228 Cal. App. 4th 1137, 1144–45 (2014), review denied (Nov. 25, 2014).

Here, like in *Cochran*, if an employee is required to do work-related activities on a personal cell phone, then she is incurring an expense for purposes of section 2802. Here, as in *Cochran*, to show liability under section 2802, an employee need only show that she was required or directed to use a personal cell phone to do work-related activities and was not reimbursed.



Plaintiff and aggrieved employees were required or directed to use personal cell phones to do work-related activities and were not reimbursed for any portion of their cell phone expenses, in violation of Labor Code § 2802(a).

“Any employer or other person acting on behalf of an employer, who violates, or causes to be violated, any provision regulating minimum wages or hours and days of work in any order of the Industrial Welfare Commission, or violates, or causes to be violated, Sections 203, 226, 226.7, 1193.6, 1194, or 2802, may be held liable as the employer for such violation.” Lab. Code § 558.1(a). It is currently unknown who caused Defendant to violate Labor Code § 2802.

Labor Code § 2802 does not have a civil penalty specifically provided. Thus, Labor Code § 2699(f) is applicable to impose civil penalties of one hundred dollars (\$100) for each aggrieved employee per pay period for the initial violation and two hundred dollars (\$200) for each aggrieved employee per pay period for each subsequent violation.

§ 510

Labor Code § 510(a) provides that “Any work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek and the first eight hours worked on the seventh day of work in any one workweek shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee.”

As set forth above, Plaintiff, and co-workers, worked over eight (8) hours per day and over forty (40) hours per week, without being paid overtime wages in violation of Labor Code § 510(a). Labor Code § 510 does not provide for its own self-contained civil penalty within the statute. Thus, Labor Code § 2699(f)(2) applies to provide a civil penalty of \$100 for each aggrieved employee per pay period for the initial violation and \$200 for each aggrieved employee per pay period for each subsequent violation.

“Any employer or other person acting on behalf of an employer, who violates, or causes to be violated, any provision regulating minimum wages or hours and days of work in any order of the [IWC], or violates, or causes to be violated, Sections 203, 226, 226.7, 1193.6, 1194, or 2802, may be held liable as the employer for such violation.” Lab. Code § 558.1(a). It is currently unknown who caused Defendant to violate Labor Code § 510.

§ 204

Labor Code § 204(b)(1) provides 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.”

As set forth above, Plaintiff, and the other co-workers, worked over eight (8) hours per day and over forty (40) hours per week, without being paid overtime wages. Defendant violated Labor Code § 204(b)(1) by failing to pay Plaintiff and her co-workers for all the overtime wages that they earned which were in excess of the normal work period, by the next payday which followed the overtime work. Labor Code § 204 does not provide for its own self-contained civil penalty within the statute. Thus, Labor Code § 2699(f)(2) applies to provide a civil penalty of \$100 for each aggrieved employee per pay period for the initial violation and \$200 for each



aggrieved employee per pay period for each subsequent violation.

§ 1198

Labor Code § 1198 provides that the maximum hours of work and the standard conditions of labor fixed by the IWC shall be the maximum hours of work and the standard conditions of labor for employees. Further, the “employment of any employee for longer hours than those fixed by the order or under conditions of labor prohibited by the order is unlawful.” Lab. Code § 1198.

Sections 3(A)(1) of IWC Order Nos. 1-2001, 2-2001, 3-2001, 4-2001, 5-2001, 6-2001, 7-2001, 8-2001, 9-2001, 10-2001, 11-2001, 12-2001, 13-2001, 16-200, and Section 4 of IWC Order No. 17-2001, provide that “employees shall not be employed more than eight (8) hours in any workday or more than 40 in a workweek unless the employee receives one and one half (1 1/2) times such employee’s regular rate of pay for all hours worked over 40 hours in the workweek.”

As set forth above, Plaintiff, and the other co-workers, worked over eight (8) hours per day and over forty (40) hours per week, without being paid overtime wages in violation of IWC Wage Orders. As such, Defendants violated California Labor Code section 1198 by violating relevant Wage Orders of the IWC.

Labor Code § 1198 does not provide for its own self-contained civil penalty within the statute. Thus, Labor Code § 2699(f)(2) applies to provide a civil penalty of \$100 for each aggrieved employee per pay period for the initial violation and \$200 for each aggrieved employee per pay period for each subsequent violation.

“Any employer or other person acting on behalf of an employer, who violates, or causes to be violated, any provision regulating minimum wages or hours and days of work in any order of the [IWC], or violates, or causes to be violated, Sections 203, 226, 226.7, 1193.6, 1194, or 2802, may be held liable as the employer for such violation.” Lab. Code § 558.1(a). It is currently unknown who caused Defendant to violate wage orders.

Other aggrieved employees are any current or former California employees who worked more than eight hours per day or forty hours per week without being paid all overtime compensation.

§ 226(a)

“An employer, semimonthly or at the time of each payment of wages, shall furnish to his or her employee, either as a detachable part of the check, draft, or voucher paying the employee’s wages, or separately if wages are paid by personal check or cash, an accurate itemized statement in writing showing (1) gross wages earned, (2) total hours worked by the employee, except as provided in subdivision (j), (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.” Lab. Code § 226(a).

Defendant failed to provide Plaintiff and the other co-workers with *accurate* itemized wage statements showing (a) total hours worked and (b) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate. Defendant also failed to keep itemized wage statement records of the foregoing.

Labor Code § 226 does not provide for its own self-contained “civil” penalty within the statute. Thus, Labor Code § 2699(f)(2) applies to provide a civil penalty of \$100 for each aggrieved employee per pay period for the initial violation and \$200 for each aggrieved employee per pay period for each subsequent violation.

“Any employer or other person acting on behalf of an employer, who violates, or causes to be violated, any provision regulating minimum wages or hours and days of work in any order of the IWC, or violates, or causes to be violated, Sections 203, 226, 226.7, 1193.6, 1194, or 2802, may be held liable as the employer for such violation.” Lab. Code § 558.1(a). It is currently unknown who caused Defendant to violate Labor Code § 226.

§ 1174(d)

Labor Code Section 1174(d) provides that every person employing labor in this state shall keep payroll records showing the hours worked daily by and the wages paid to employees employed for not less than three years. “Person” means any person, association, organization, partnership, business trust, limited liability company, or corporation. Lab. Code § 18.

Defendant failed to maintain records showing the actual and accurate hours worked by Plaintiff and the other co-workers, in violation of Labor Code Section 1174. Labor Code Section 1174 does not provide for its own self-contained civil penalty within the statute. Thus, Labor Code Section 2699(f)(2) applies to provide a civil penalty of \$100 for each aggrieved employee per pay period for the initial violation and \$200 for each aggrieved employee per pay period for each subsequent violation.

Labor Code Violations Providing Civil Penalties Pursuant to 2699(a): §§ 558, 210, 226.3, 1174.5

§ 558

Pursuant to Labor Code § 558(a) any employer or other person acting on behalf of an employer who violates, or causes to be violated, [Labor Code section 510, 512] or any provision regulating hours and days of work in any order of the IWC shall be subject to a civil penalty as follows:

- (1) For any initial violation, fifty dollars (\$50) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages.



(2) For each subsequent violation, one hundred dollars (\$100) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages.

As set forth above, Defendant violated Labor Code §§ 510, 512 and 1198, and violated the above-referenced as IWC wage orders as applicable. As such, Defendant is subject to civil penalties for the initial violation and subsequent violations. Those subject to Labor Code § 558 penalties include any “person acting on behalf of” Defendant who caused Defendant to violate the Labor Code. *Reynolds v. Bement*, 36 Cal. 4th 1075, 1094 (2005); *Atempa v. Pedrazzani*, 27 Cal. App. 5th 809 (2018).

§ 210

Pursuant to Labor Code § 210(a), in addition to, and entirely independent and apart from, any other penalty provided in this article, every person who fails to pay the wages of each employee as provided in Section 204 shall be subject to a civil penalty as follows:

- (1) For any initial violation, one hundred dollars (\$100) for each failure to pay each employee.
- (2) For each subsequent violation, two hundred dollars (\$200) for each failure to pay each employee, plus 25 percent of the amount unlawfully withheld.

As set forth above, Defendant violated Labor Code § 204. As such, Defendant is subject to civil penalties “plus 25 percent of the amount unlawfully withheld,” as civil penalties pursuant to Section 210(a).

§ 226.3

“Any employer who violates subdivision (a) of section 226 shall be subject to a civil penalty in the amount of two hundred fifty dollars (\$250) per employee per violation in an initial citation and one thousand dollars (\$1,000) per employee for each violation in a subsequent citation, for which the employer fails to provide the employee a wage deduction statement or fails to keep the records required in subdivision (a) of Section 226.” Lab. Code § 226.3. This section “sets out a civil penalty for *all* violations of section 226.” *Raines v. Coastal Pacific Food Distribs., Inc.*, 23 Cal. App. 5th 667, 675 (2018). Because Defendants violated California Labor Code section 226(a), Defendants are subject to civil penalties under section 226.3 applicable to Plaintiff and other current and former aggrieved employees.

§ 1174.5

Pursuant to Labor Code Section 1174.5, any person employing labor who willfully fails to maintain accurate and complete records required by subdivision (d) of Section 1174 shall be subject to a civil penalty of five hundred dollars (\$500). As discussed above, Defendant violated Labor Code Labor Code Section 1174(d). Defendant willfully failed to maintain records showing the accurate hours worked daily by Plaintiff and other coworkers. Thus, Defendant is subject to civil penalties.



Civil Action

Plaintiff intends to commence a civil action, on behalf of herself, other current and former aggrieved employees, and the State of California to seek civil penalties in a cause of action under the PAGA.

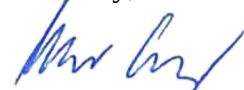
A PAGA claim “is fundamentally a law enforcement action.” *Arias v. Super. Ct.*, 46 Cal. 4th at 986 (2009); *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal.4th 348, 386-387 (2014) (“[E]very PAGA action, whether seeking penalties for Labor Code violations as to only one aggrieved employee—the plaintiff bringing the action—or as to other employees as well, is a representative action on behalf of the state.”). The PAGA conforms to the traditional criteria of qui tam actions, “except that a portion of the penalty goes not only to the citizen bringing the suit but to all employees affected by the Labor Code violation.” *Id.* at 382. As a law enforcement action, the issue is the employer’s conduct, not whether the employees suffered injury or harm. This is because the “harm” or “injury” at issue in a PAGA action is the harm to the public interest in “maximum compliance with the state labor laws.” *Arias*, 46 Cal. 4th at 980.

“When an employee brings a representative action under PAGA, he or she does so ‘as the proxy or agent of the state’s labor law enforcement agencies, not other employees.’ (*Esparza v. KS Industries, L.P.* (2017) 13 Cal.App.5th 1228, 1241 [221 Cal. Rptr. 3d 594].)” *Huff v. Securitas Sec. Servs. USA, Inc.*, No. H042852, 2018 Cal. App. LEXIS 474, at *6 (Ct. App. May 23, 2018). “The purpose of the PAGA is not to recover damages or restitution, but to create a means of ‘deputizing’ citizens as private attorneys general to enforce the Labor Code. [Citation.] (*Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489, 501 [128 Cal. Rptr. 3d 854].) The relief provided by the statute is [*7] designed to benefit the general public, not the party bringing the action. (*Ibid.*).” *Huff*, at *6-7.

The civil action will be a representative action and, as held by the California Supreme Court in *Arias*, need not meet the requirements for class certification. Moreover, the PAGA has no notice requirements for unnamed aggrieved employees in federal courts, unlike Rule 23 of the Federal Rules of Civil Procedure, nor may such employees opt out of a PAGA action. *Baumann v. Chase Inv. Services Corp.*, 747 F.3d 1117 (9th Cir. Mar. 13, 2014). Further, in a PAGA action, the court does not inquire into the named plaintiff’s and class counsel’s ability to fairly and adequately represent unnamed employees. *Id.*

Based on the foregoing, Plaintiff requests an immediate notification from the LWDA, so he may pursue civil penalties on behalf of the State of California. In the meantime, Plaintiff demands that Defendant immediately change its above-referenced wage practices and become compliant with Labor Code sections by reclassifying its account managers as non-exempt employees.

Sincerely,



Matthew Gutierrez, Esq.

MG:gd



cc:

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