

May 20, 2020

Filed online with LWDA

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

Sent via Certified Mail to:

Lyft, Inc.
C/O Candace Bertoldi
Seyfarth Shaw LLP
601 South Figueroa Street, Suite 3300
Los Angeles, California 90017-5793

Re: Written Notice Pursuant to Labor Code, sections 2698, *et seq.* by Richard Ho

To Whom It May Concern:

Pursuant to California Labor Code § 2698, *et seq.*, Richard Ho submits this written notice of Labor Code and Industrial Welfare Commission Wage Order violations by Lyft, Inc. (“Lyft”). Pursuant to Labor Code § 2698, *et seq.*, Mr. Ho, who last drove for Lyft on **March 16, 2020**, seeks to represent himself and other aggrieved employees in a PAGA action against Lyft as set forth below. For purposes of this notice, Mr. Ho contends “aggrieved employees” includes individuals who drove for Lyft in California in the last year and continuing.

Authority for Written Notice of Claims

Labor Code, § 2699.3, subdivision (a) requires employees seeking to file a claim under PAGA to provide written notice to the Labor and Workforce Development Agency and the employer for violations of codes identified in Section 2699.5:

- (a) A civil action by an aggrieved employee pursuant to subdivision (a) or (f) of section 2699 alleging a violation of any provision listed in section 699.5 shall commence only after the following requirements have been met: (1) the aggrieved employee or representative shall give written notice by certified mail to the labor and workforce development agency and the employer of the specific provisions of this code alleged to have been violated, including the facts and theories to support the alleged violation.

Legal Claims Applicable to Labor Code §2699.3(a) Written Notice Requirement

Lyft has violated and continues to violate the following Labor Codes, all of which appear in Section 2699.5 and thus require written notice consistent with Section 2699.3(a):

- Labor Code section 2750.3 (AB 5) I.W.C. Wage Order 9-2001 – Worker Status
- Labor Code section 226.8 – Intentional Misclassification
- Labor Code section 2802 – Failure to Fully Reimburse Expenses
- Labor Code sections 201-203 – Failure to Pay All Wages Owed at Termination
- Labor Code section 226 – Knowing and Intentional Failure to Provide Accurate, Itemized Wage Statements
- Labor Code section 226.7 – Failure to Provide Rest Breaks
- Labor Code section 226.7 – Failure to Provide Rest Breaks
- Labor Code section 1174 – Failure to Keep Accurate Records
- Labor Code sections 510 and 1194 – Failure to Pay Overtime Wages
- Labor Code section 1194 – Failure to Pay Minimum Wages

Legal and Factual Basis to Support Claims

Labor Code section 2750.3 (A.B. 5), and I.W.C. Wage Order 9-2001

California Legislature enacted Assembly Bill 5, which took effect on January 1, 2020. (Assembly Bill No. 5 (2019-2020 Reg. Sess.) (“A.B. 5”).) A.B. 5 codified and extended the California Supreme Court’s landmark, unanimous decision in *Dynamex Operations W., Inc. v. Superior Court* (2018) 4 Cal.5th 903, rehearing denied (June 20, 2018) (“*Dynamex*”). It is now clear that under California’s Wage Orders, Labor Code, and Unemployment Insurance Code, workers are generally presumed to be employees unless the hiring entity overcome this presumption by establishing each of the three factors embodied in the strict “ABC” test.

Lyft cannot overcome this presumption with respect to their drivers. Lyft is a traditional employer of these misclassified employees. They hire and fire them. They control which drivers have access to which possible assignments. They set driver quality standards, monitor drivers for compliance with those standards, and discipline drivers for not meeting them. They set the fares passengers can be charged and determine how much drivers are paid.

Under the ABC test announced in *Dynamex*, for a worker to be properly classified as an independent contractor rather than an employee, Lyft has the burden of establishing that all of the following three conditions are satisfied: (A) the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; (B) the worker performs work that is outside the usual course of the hiring entity’s business; and (C) the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed. (Lab. Code, § 2750.3(a)(1); see generally *Dynamex, supra*, 4 Cal.5th at p. 957.) Lyft must establish all three parts of the ABC test in order to lawfully classify its drivers as an

independent contractor. Lyft's failure to satisfy any one part of the ABC test results in Lyft drivers being classified as employees rather than independent contractors.

Since it first began doing business in California, Lyft has misclassified, and continues to misclassify, its drivers as independent contractors instead of employees. Lyft requires its drivers, as a pre-condition of providing rides through Lyft's app, to agree to standard-form contracts and addenda. Each Lyft driver must agree to certain standardized terms and conditions with Lyft containing boilerplate language unilaterally designating each Lyft driver as an independent contractor.

Lyft cannot meet their burden of showing that their drivers are independent contractors under California's ABC test for misclassification as adopted in *Dynamex, supra*, 4 Cal.5th 903, and as codified in A.B. 5. Under Part A of the ABC test, Lyft exercises control over its drivers through its Apps, which, in combination with their policies, function like algorithmic managers that effectively supervise Lyft drivers like human managers. Under Part B of the ABC test, Lyft drivers perform services within Lyft's usual course of business of providing on-demand rides. Under Part C of the ABC test, Lyft cannot show that its drivers have established independent businesses.

Pursuant to Labor Code section 2750.3 (A.B. 5), I.W.C. Wage Order 9-2001, and Cal. Bus. Prof. Code section 17200, Lyft owes Mr. Ho and the rest the Lyft drivers in California in the last year the following: unpaid minimum wage, meal and rest period premiums, overtime pay, paid sick leave, healthcare expenditures, paid parental leave, unemployment insurance, workers compensation and expense reimbursement.

Labor code section 226.8

Section 226.8 provides:

(a) It is unlawful for any person or employer to engage in any of the following activities:

- (1) Willful misclassification of an individual as an independent contractor.
- (2) Charging an individual who has been willfully misclassified as an independent contractor a fee, or making any deductions from compensation, for any purpose, including for goods, materials, space rental, services, government licenses, repairs, equipment maintenance, or fines arising from the individual's employment where any of the acts described in this paragraph would have violated the law if the individual had not been misclassified.

(b) If the Labor and Workforce Development Agency or a court issues a determination that a person or employer has engaged in any of the enumerated violations of subdivision (a) the person or employer shall be subject to a civil penalty of not less than five thousand dollars (\$5,000) and not more than fifteen thousand dollars (\$15,000) for each violation, in addition to any other penalties or fines permitted by law.

(c) If the Labor and Workforce Development Agency or a court issues a determination that a person or employer has engaged in any of the enumerated violations of subdivision (a) and the person or employer has engaged in or is engaging in a pattern or practice of these violations, the person or employer shall be subject to a civil penalty of not less than ten thousand dollars (\$10,000) and not more than twenty-five thousand dollars (\$25,000) for each violation, in addition to any other penalties or fines permitted by law.

Labor Code section 2802

The law requires Lyft drivers to be paid or reimbursed for the necessary expenses in performing their work. This includes mileage, vehicle expenses (wear-and-tear, registration, insurance, gas, maintenance, repairs, etc.) and phone and data expenses associated with using Lyft's Apps. 100. The Internal Revenue Service publishes a "standard mileage rate," which currently estimates the cost of operating a vehicle for business purposes **at 57.5 cents per mile.**

Lyft has failed, and continue to fail, to meet these expense reimbursement obligations with respect to their drivers.

Labor Code sections 201- 203

Mr. Ho last drove for Lyft on March 16, 2020. Labor Code §§ 201-203 requires employers to pay all outstanding wages owed to employees at termination or resignation. If the employee resigns, the employer has approximately 72 hours to make final payment; if the employee is terminated, payment is due immediately. Labor Code §203. Lyft owes Mr. Ho one month's pay as a penalty under section 203.

Labor Code section 226

Labor Code section 226 states:

(a) Every employer shall, semimonthly or at the time of each payment of wages, furnish each of his or her employees, either as a detachable part of the check, draft, or voucher paying the employee's wages, or separately when 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 for any employee whose compensation is solely based on a salary and who is exempt from payment of overtime under subdivision (a) of Section 515 or any applicable order of the Industrial Welfare Commission, (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 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, if the employer is a farm labor contractor, as defined in subdivision (b) of Section 1682, the name and

address of the legal entity that secured the services of 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. The deductions made from payment of wages shall be recorded in ink or other indelible form, properly dated, showing the month, day, and year, and a copy of the statement and the record of the deductions shall be kept on file by the employer for at least three years at the place of employment or at a central location within the State of California...

(e) An employee suffering injury as a result of a knowing and intentional failure by an employer to comply with subdivision (a) is entitled to recover the greater of all actual damages or fifty dollars (\$50) for the initial pay period in which a violation occurs and one hundred dollars (\$100) per employee for each violation in a subsequent pay period, not exceeding an aggregate penalty of four thousand dollars (\$4,000), and is entitled to an award of costs and reasonable attorneys fees.

Mr. Ho alleges Lyft has never provided any of the required information to its drivers, and knowingly and intentionally failed to comply with subsection (a), and Mr. Ho is therefore owed damages pursuant to subsection (e).

Rest and Meal Breaks

Mr. Ho contends Lyft instituted policies and practices that did not comply with Labor Code §§ 512, 226.7 and Industrial Welfare Commission Wage Order 5-2001(11) (meal periods). Labor Code § 512 and Wage Order 5-2001 requires employers to provide their employees with 30 minutes meal periods in which the employee is free of all work duties and free to leave the premises for any shifts six hours or more. The meal period must take place within the first five hours worked and can only be waived by mutual consent. If an employer implements practices and procedures that prevent the employee from a meaningful choice for a meal period, then the employer must pay one hour of pay to the employee for each day in which the meal period is not provided. See Wage Order 5-2001(11); see also *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1040 (“On the other hand, an employer may not undermine a form policy of providing meal breaks by pressuring employees to perform their duties in ways that omit breaks.”); see also, *Jamiez v. Daijohs USA, Inc.* (2010) 181 Cal.App.4th 1286, 1304-1305 (violation can be proved by showing common scheduling policy that made taking breaks extremely difficult.)

Mr. Ho contends that he was regularly prevented him from having the ability to take a 30-minute meal period within the first five hours of any shift greater than six hours. Mr. Ho often worked straight through without a 30-minute break in which he was free to leave the premises. Mr. Ho contends Lyft failed to accurately record when he was not able to take a meal period.

Lyft did not have any policy or practice to follow through if there was a meal period violation. Mr. Ho was never paid one hour of pay for each day he was denied a meal period. Mr.

Ho suffered injury by being required to work through his meal periods without being appropriately compensated for doing so.

Mr. Ho contends Lyft also instituted policies and practices that did not comply with Labor Code § 226.7 and Industrial Welfare Commission Wage Order 5-2001(12) (rest breaks).

Labor Code § 226.7 requires employers to provide employees with rest breaks consistent with the IWC Wage Orders. Wage Order 5-2001 requires employers to authorize and permit employees to take rest breaks of 10 minutes net rest time per every four (4) hours worked. For each day in which an employer fails to authorize or permit a rest break, the employer owes the employee one hour of pay. Mr. Ho and other similarly situated Lyft drivers were not able to take rest breaks and Lyft had no policy for its drivers to take such rest breaks.

Labor Code, section 1174

Labor Code § 1174 requires employers to keep “payroll records showing the hours worked daily by and the wages paid to the employee”. An employer may be liable under § 1174 if it fails to record when employees report to work, the start and end time of their shifts, and the total hours worked or meal periods. (See *Carrillo v. Schneider Logistics, Inc.*, (2011) 823 F. Supp.2d 1040, 1044.)

Mr. Ho contends Lyft failed to keep accurate records of the hours employees worked each day. Lyft did not record the actual hours its hourly, non-exempt employees worked each day and failed to record regular hours, overtime, meal periods, or shifts less than two hours. Mr. Ho contends his pay records did not show an hour’s pay for any days in which she was not free to take a 30 minutes meal period or ten minute rest break.

Failure to Pay Overtime

Labor Code §§ 510 and 1194 require employers to pay employees for minimum wage and overtime wages for hours worked over eight (8) per day and/or over 40 per week.

Mr. Ho contends Lyft required employees to work over eight (8) hours per work day and/or 40 hours per work week. Additionally, because Mr. Ho failed to record actual hours worked, hours that were not recorded were essentially compensated at an amount below California’s minimum wage requirements. Mr. Ho contends that he and other hourly, non-exempt employees were not paid for overtime hours worked.

Labor Code section 1194

Labor Code section 1194(a) provides:

Notwithstanding any agreement to work for a lesser wage, any employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of

the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney's fees, and costs of suit.

As set forth above, Mr. Ho and the rest of Lyft's drivers in California are misclassified and have not been paid minimum wages ever by Lyft. Mr. Ho is entitled to the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon.

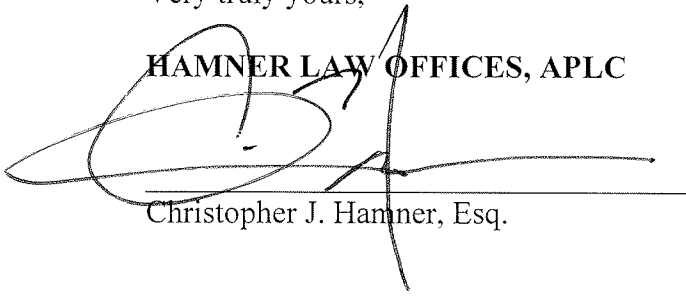
Conclusion

Pursuant to Labor Code, section 2699, subdivision (a), if the LWDA does not respond to this Notice within 60 days from today's date, Mr. Ho will move forward with his PAGA claims on behalf of himself and the State of California.

If you have any questions or concerns, please do not hesitate to contact me.

Very truly yours,

HAMNER LAW OFFICES, APLC



Christopher J. Hamner, Esq.

CJH/vv