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December 18, 2020

**SENT VIA ELECTRONIC
SUBMISSION**

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

SENT VIA CERTIFIED MAIL

RALPH'S GROCERY COMPANY
c/o CSC – Lawyers Incorporating Service
(C1592199)
Agent for Service of process
2710 Gateway Oaks Dr., Suite 150N
Sacramento, CA 95833

SENT VIA CERTIFIED MAIL

THE KROGER CO.
c/o CSC – Lawyers Incorporating Service
(C1592199)
Agent for Service of process
2710 Gateway Oaks Dr., Suite 150N
Sacramento, CA 95833

Re: Eric Diaz v. The Kroger Co. and Ralph's Grocery Company
California Labor Code section 2698, *et seq.* violations

To Whom It May Concern:

I am writing on behalf of aggrieved employee Eric Diaz ("Diaz"). This notice is being made to the Labor & Workforce Development Agency pursuant to the requirement of Labor Code section 2698 *et al.* that Diaz, and other Aggrieved Employees, who were employed by The Kroger Co. and Ralph's Grocery Company (collectively "Kroger"), classified as non-exempt hourly employees and worked at Kroger warehouses and distribution centers throughout California were: 1) not paid for mandatory post-shift activities performed at the direction or, and under the control of Kroger in violation of Labor Code §§ 223, 510, 558, 1194, 1194.2, 1198 and 1199 as well as the IWC Wage Orders, 2) not paid all wages at the time of termination in

violation of Labor Code §§ 201-203; and 3) were issued inaccurate wage statements in violation of Labor Code § 226(a).

Diaz, and each of the Aggrieved Employees described above, suffered from one or more of the following Labor Code violations by their current or former employer Kroger.

Diaz's employment with Kroger began in or around 2007 where he worked for over the next 12 years. Diaz and other Aggrieved Employees' employment with Kroger was governed by the California Wage Orders, and California Labor Code §§ 201-203, 223, 226, 510, 558, 1194, 1194.2, 1198 and 1199.

Diaz worked for Kroger as a warehouse worker in one of Kroger's distribution centers in Southern California. Warehouse workers at Kroger, including Diaz, regularly work more than 8 hours in a day and/or 40 hours in a work week. Warehouse workers who work for Kroger are required to perform a series of specific time-consuming activities at the direction of Kroger, after clocking out at the end of their shifts and after they clock out for meal periods if they decide to leave the facility. Diaz and the other Aggrieved Employees are required to, after clocking out on Kroger's Biometric timekeeping system, walk to the locker room to doff their PPE (usually a cold suit), and then walk the long route to the security desk to wait in line for the mandatory bag check and security screening to ensure that no one stole anything from Kroger. The security checks includes inspection of their cold suit, bags, jackets/coats and lunch box, after which Diaz and the other Aggrieved Employees are allowed to badge out at a metal turnstile. Additionally, Diaz and the other Aggrieved Employees were subject to random vehicle inspections, in which Kroger's security guards would randomly stop employees after exiting in order to search their vehicle preventing the employee from leaving until the search was complete. Diaz and the other Aggrieved Employees are not paid for any of the time spent submitting to these procedures, and as such are not paid for the time from when s/he clocks out on the Biometric timekeeping system to the time that s/he badges out at the metal turnstile. During the time spent undergoing these activities Diaz and the other Aggrieved Employees were under the control of Kroger and as such that time was compensable, but Diaz and the other Aggrieved Employees were unlawfully not paid for that time. Frlekin v. Apple Inc. (2020) 8 Cal.5th 1038, reh'g denied (May 13, 2020)

Diaz is informed and believes that it is Kroger's uniform practice and procedure to pay only for the time Diaz and the other Aggrieved Employees spend clocked in and to not pay for any of the above-described post-shift activities performed at Kroger's direction. While performing the activities discussed above, Diaz and the other Aggrieved Employees were under Kroger's control, were subject to Kroger's workplace rules and policies, and were instructed by Kroger to perform the activities. Diaz and the other Aggrieved Employees could be written up if they failed to perform any of the above tasks. Furthermore, Diaz and the other Aggrieved Employees are not permitted to leave the facility without complying with Kroger's security

screening procedures. Diaz is informed and believes that Kroger knows or should know that the above discussed post-clock out activities are compensable under California law and intentionally refuses to pay Diaz and the other Aggrieved Employees for the time spent under its control. By refusing to pay Diaz and the other Aggrieved Employees for this time, Kroger is willfully failing to pay a minimum wage, straight time wages, and overtime wages for all hours worked.

The specified wage order and regulations provide that Diaz and the other Aggrieved Employees shall not be employed more than eight (8) hours in any workday or more than forty (40) hours in any workweek unless the employee receives one and one-half (1 1/2) times his regular rate of pay, and shall not be employed more than twelve (12) hours in any workday or more than eight (8) hours on the seventh (7th) consecutive workday in any workweek unless the employee receives double his regular rate pay. Diaz and the other Aggrieved Employees often worked more than eight (8) hours in a workday and if the time spent undergoing the aforementioned post-clock out activities was accounted for Diaz and the other Aggrieved Employees would, in most instances, be entitled to overtime pay and in many instances double time pay. Kroger willfully and intentionally refused, and continues to refuse, to pay Diaz and the other Aggrieved Employees for all the straight time, overtime and double time they are entitled to under California law.

The California Supreme Court has repeatedly made it clear that all time employees spend under an employer's control is compensable. Frlekin v. Apple Inc. (2020) 8 Cal.5th 1038, reh'g denied (May 13, 2020); Troester v. Starbucks Corp. (2018) 5 Cal.5th 829, as modified on denial of reh'g (Aug. 29, 2018). In Troester the California Supreme Court ruled that the Labor Code and Wage Orders do not allow employers to require employees to routinely work for minutes off the clock without compensation. Troester 5 Cal.5th 829 at 848. Troester dealt with Starbucks's post shift closing activities, which many times took less than a minute, ruling that even small amounts of time worked off the clock are compensable. In Frlekin the California Supreme Court reiterated the position that all time spent under an employer's control is compensable. Specifically, the Court ruled that "[t]ime employees spent on employer's premises waiting for, and undergoing, mandatory exit searches of bags, packages, or personal employer-based technology devices, such as smart-phones, voluntarily brought to work purely for personal convenience was employer-controlled activity, and therefore it was compensable as 'hours worked'" Frlekin 8 Cal.5th 1038 at 1047. Here Kroger subjects Diaz and the other Aggrieved Employees to a much more restrictive exit search than at issue in Frlekin and a much more time-consuming exit process than at issue in Troester. The law is clear that Kroger's refusal to pay for all of the time Diaz and the other Aggrieved Employees spend under its control is in violation of California law.

Because Diaz and the other Aggrieved Employees were not paid all proper straight time, overtime and/or double time pursuant to California law Kroger failed to remit all wages earned

by many of the Aggrieved Employees at the time of termination. At the time of termination, Kroger failed to pay certain Aggrieved Employees who no longer worked for Kroger all wages owed pursuant to California Labor Code §§ 201-203, because they were not paid all wages, including overtime, that they earned for the reasons described above. Thus, they are also entitled to up to 30 days of wages pursuant to California Labor Code sections 201, 202 and 203.

Labor Code section 226 requires an employer to furnish its employees with an accurate itemized wage statement in writing showing, among other things, gross wages earned, net wages earned, all applicable hourly rates in effect during each respective pay period and the corresponding number of hours worked at each hourly rate by each respective individual. As a pattern and practice, in violation of Labor Code section 226(a), Kroger did not furnish accurate itemized wage statements to Diaz and the other Aggrieved Employees because these wage statements failed to provide an accurate number of hours worked at each applicable rate, failed to provide an accurate amount of total hours worked, failed to provide an accurate amount of net wages. These violations stem from Kroger's willful failure to pay for all time spent under its control as described above, and as such Kroger has provided inaccurate wage statements in connection with its failure to pay all minimum, straight, and overtime wages.

Very truly yours,

Becerra Law Firm

Joseph R. Becerra

