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Labor and Workforce Development Agency
Department of Industrial Regulations
Attn: PAGA Administrator
1515 Clay St., Ste. 801
Oakland, CA 94612
via electronic submission

Re: New PAGA Claim Notice, *Amado Haro, et al. v. Walmart Inc.*

Dear PAGA Administrator:

Please let this letter serve as notice pursuant to the California Private Attorney Generals Act that Amado Haro and Rochelle Ortega intend to file suit against Walmart, Inc. for violations of the California Labor Code. Walmart, Inc. ("Walmart") implemented an illegal policy requiring its non-exempt workers to undergo a COVID-19 screening each shift without pay. This physical and medical examination constitutes compensable time that was worked but was not paid by Walmart. Walmart's conduct violates the state laws of California because Walmart failed to pay for all hours worked by its employees, failed to pay overtime wages, and failed to provide itemized wage statements as required by the California Labor Code and California Industrial Wage Commission Wage Orders. This letter shall serve as notice of our clients' allegations pursuant to the Private Attorney Generals Act of 2004 ("PAGA"). Lab. Code §§ 2699, 2699.3, and 2699.5. As "aggrieved employees," my clients will seek penalties under PAGA on behalf of themselves and other similarly aggrieved current and former employees in California.

FACTS

Following the outbreak of the Coronavirus, Walmart implemented a company-wide policy requiring each of its hourly, non-exempt employees to undergo a physical and medical examination to check for symptoms of the Coronavirus each shift. This examination was imposed by Walmart as a requirement to work each shift. The examination was conducted on the premises of Walmart, was required by Walmart, and was necessary for each employee to perform his/her work for Walmart. Unfortunately, Walmart refused to pay for this time. Walmart's conduct violates California law. This illegal conduct continues to this day.

Mr. Haro worked for Walmart as an hourly, non-exempt employee at Walmart Store Number 2039 in Merced, California. He worked in the furniture department and later performed online grocery pickup services. He was paid \$15.05 per hour. His normal shift was Monday through Friday, 7 am to 4 pm. He has worked for Walmart since May 2014.

Ms. Ortega worked for Walmart as an hourly, non-exempt employee at Walmart Store Number 4202 in Roseville, California. She worked in the meat department and was paid

\$18.25 per hour. Her normal shift was 8 hours per day for five days per week. She worked for Walmart from July 2018 to June 2020.

As hourly, non-exempt employees, Mr. Haro and Ms. Ortega were required to clock-in and clock-out each day. Unfortunately, Walmart did not pay for all hours that they worked. Prior to clocking in each day, Mr. Haro and Ms. Ortega were required to undergo a physical and medical examination to screen for COVID-19.

Walmart requires its employees to arrive at its retail stores and fulfillment centers prior to the start of their scheduled shifts. At the Walmart retail stores, the employees undergo a COVID-19 screening normally in the garden center of the store or the automobile center of the store. The employees are required to arrive at Walmart at least 30 minutes prior to the start of their scheduled shifts so that they can complete the COVID-19 screening with enough time to clock in by the start of their scheduled shifts. After arriving at Walmart, the employees enter the garden center or auto center where a line usually forms for employees to be screened.

The screening process involves another employee of Walmart taking the temperature of each employee whose shift is about to start and asking a series of questions related to their health condition, such as whether they had trouble breathing, were coughing, had a runny nose, chest pain, and other questions regarding their health. They were also asked questions such as (1) whether the employee has travelled recently, (2) whether the employee was exposed to someone with COVID-19, and (3) other similar questions. If the employee passes the examination, he/she is then given a sticker to wear with the date on it indicating that he/she has cleared the COVID-19 screening. The employee is also given a face mask and gloves that he/she must put on before entering the store. After the employee enters the store, the employee is allowed to clock-in for the day. The employees normally walked to the opposite end of the store where the time clocks were located.

If an employee does not initially pass the physical and medical examination, that employee is moved to another section where a second examination occurs. The employee is then asked a series of follow-up questions to identify whether the worker currently has symptoms of COVID-19 and poses a potential health hazard to the store. If the employee passes the second examination, the employee is then given a face mask and gloves and is allowed to clock-in for the day. If not, the employee is not permitted to work that day.

A similar screening process occurs at the Walmart fulfillment centers. After parking, the Walmart employee approaches the door of the fulfillment center and swipes the employee's security badge to enter. At that point, the employee approaches a security booth. At this checkpoint, the Walmart employee is asked a series of questions similar to those identified above. If the employee successfully answers the health questions, the employee's temperature is taken. If the employee does not have a fever, the employee is then given a face mask and is allowed to clock in for the day.

The amount of time it takes to undergo the COVID-19 examination is approximately 10 minutes to 15 minutes on average. This amount of time could be longer if there are other Walmart employees in line for the COVID-19 screening.

This COVID-19 screening should have been paid by Walmart because it constitutes compensable time worked. During this time, Mr. Haro, Ms. Ortega, and all other hourly employees in California were subject to the control of Walmart.

Mr. Haro, Ms. Ortega and all other hourly employees in California were required to follow Walmart's instructions while awaiting and during the COVID-19 screening. Walmart required every employee to complete the COVID-19 screening and it was not optional. Indeed, the COVID-19 screening was required by Walmart and its employees must comply under threat of discipline, including possible termination.

Additionally, Mr. Haro and Ms. Ortega were confined to the premises of Walmart when they waited for and during the examination. Moreover, Walmart compels its employees to perform specific tasks during the examination. They must answer questions, submit to have their temperature taken, and wear masks and gloves.

In other words, Walmart directs, commands, and restrains its employees during the COVID-19 examination; prevents them from using that time effectively for their own purposes; and they remain subject to Walmart's control during the examination. Under California law, the time spent undergoing the COVID-19 screening is compensable time that should have been paid by Walmart. *See Frlekin v. Apple, Inc.*, 8 Cal. 5th 1038, 457 P.3d 526 (2020).

The COVID-19 screenings were also necessary to the principal work performed by Mr. Haro and Ms. Ortega and were necessary to ensure a safe workplace. The COVID-19 examinations were also undertaken on Walmart's premises, were controlled and required by Walmart, and undertaken primarily for the benefit of Walmart. The Department of Labor has issued regulations stating that physical and health examinations, like the COVID-19 examination, constitutes time that should be paid for by employers. *See* 29 CFR § 785.43.

In an opinion letter, the Department of Labor has further stated as follows:

Time spent undergoing a physical examination is time during which the employee's freedom of movement is restricted for the purpose of serving the employer and time during which the employee is subject to the employer's discretion and control. It is immaterial whether the time spent in undergoing the required physical examination is during the employee's normal working hours or during nonworking hours. The physical examination is an essential requirement of the job and thus primarily for the benefit of the employer. **Therefore, it is our opinion that the time so spent must be counted as hours worked under the FLSA.**

DOL Wage and Hour Opinion Letter, January 26, 1998 (emphasis added).

Thus, Walmart has violated the law by failing to pay for the time spent undergoing the COVID-19 examinations. Specifically, Walmart has committed the following violations:

Failure to Pay for All Hours Worked
(Violation of Cal. Labor Code §§ 204, 1194, 1194.2, 1197, 1197.1, 1198)

At all relevant times, Walmart was required to compensate its hourly, non-exempt employees for all hours worked pursuant to the Industrial Welfare Commission Orders and California Labor Code sections 204, 1194, 1194.2, 1197, 1197.1, 1198.

Specifically, California law requires employers to pay their employees a minimum wage for all hours worked, which is defined as the “time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so.” *See Frlekin v. Apple, Inc.*, 8 Cal. 5th 1038, 457 P.3d 526 (2020). Section 4 of the applicable Industrial Welfare Commission Order requires Walmart to pay non-exempt employees at least at the minimum wage set forth therein for all hours worked, which consist of all hours that an employer has actual or constructive knowledge that employees are working.

Walmart failed to compensate Mr. Haro, Ms. Ortega and all other hourly employees in California for all hours that they worked. As noted above, Mr. Haro, Ms. Ortega and all other hourly employees in California were not paid for the time they spent in the COVID-19 screenings. Walmart also regularly, willfully, and repeatedly failed and continues to fail to make, keep, and preserve accurate time records required by the California Labor Code §§ 226 and 1174, with respect to Mr. Haro, Ms. Ortega and all other hourly employees in California.

Failure to Pay Overtime
(Wage Order No. 4-2001; California Labor Code §§ 510, 558, 1194)

At all relevant times, Walmart was required to compensate its non-exempt employees for all hours worked. Walmart was also required to compensate all of its employees for all overtime worked, at one-and-a-half times their regular rates of pay for hours worked more than eight (8) hours per day or forty (40) hours per workweek, and double-time for hours worked more than twelve (12) hours per day. Walmart was also required to pay one-and-a-half times the regular rate for the first eight (8) hours worked on the seventh day of a workweek.

At all relevant times, Walmart operated under and continues to operate under a common policy and plan of willfully, regularly, and repeatedly failing and refusing to pay Mr. Haro, Ms. Ortega and all other hourly employees in California for overtime at the rates required by California Labor Code § 510 and Wage Order No. 4-2001. Walmart knew or clearly should have known that Mr. Haro, Ms. Ortega and all other hourly employees in California were entitled to compensation for the time they spent in the COVID-19 screenings.

Walmart routinely required Mr. Haro, Ms. Ortega and all other hourly employees in California to work more than eight (8) hours per day or forty (40) hours per workweek. Despite the provisions of California’s overtime law, Walmart has willfully failed and refused to pay Mr. Haro, Ms. Ortega and all other hourly employees in California overtime wages for all of the overtime hours they worked during the statutory period covered by this lawsuit. Walmart’s conduct violates California Labor Code §§ 510 and 1194.

**Failure to Furnish Wage Statements
(California Labor Code §§ 226)**

Walmart knowingly and intentionally failed to furnish and continues to fail to furnish Mr. Haro, Ms. Ortega and all other hourly employees in California with timely, itemized wage statements that accurately reflect – among other things – the total number of hours worked and wages earned, as mandated by the California Labor Code § 226(a), which requires employers, semi-monthly or at the time of each payment of wages, to furnish each employee with a statement that accurately reflects the total number of hours worked and wages due.

**Failure to Pay All Wages Upon Separation from Employment
(California Labor Code §§ 201, 202, 203, 218)**

California Labor Code § 201 provides that any discharged employee is entitled to all wages due at the time of discharge. Walmart knowingly and willfully violated California Labor Code §§ 201 and 202 by failing to pay Plaintiff Ortega and other hourly employees in California who are no longer employed by Walmart all wages owed as alleged herein.

**Unlawful and/or Unfair Competition Law Violations
(California Business & Professions Code §§ 17200-17208)**

California Business & Professions Code § 17200 *et seq.* prohibits unfair competition in the form of any unlawful, unfair, deceptive, or fraudulent business practices. During all relevant times, Walmart committed unlawful, unfair, deceptive, and/or fraudulent acts as defined by California Business & Professions Code § 17200. Walmart's unlawful, unfair, deceptive, and/or fraudulent business practices include, without limitation, failing to pay for all hours worked, failing to pay all overtime wages, failing to provide itemized wage statements, and failing to pay all wages upon termination in violation of California law, as described throughout this Notice. As a result of this unlawful and/or unfair and/or fraudulent business practice, Walmart reaped unfair benefits and illegal profits at the expense of Mr. Haro, Ms. Ortega and all other hourly employees in California.

A copy of this letter is being sent to Walmart.

If I can be of any assistance, please do not hesitate to contact me. Thank you for your careful consideration of this matter.

Yours very truly,

/s/ Matthew S. Parmet

Matthew S. Parmet

cc: Walmart Inc. (c/o CT Corporation System, 818 W. Seventh St., Ste. 930, Los Angeles, CA 90017)
Walmart Inc. (702 SW 8th St., Bentonville, AR 72716)