

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN BERNARDINO
SAN BERNARDINO CIVIL DIVISION

JUN 22 2021

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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN BERNARDINO**

JOVI HERNANDEZ, an individual on behalf
of the State of California, as private attorney
general,

PLAINTIFF,

v.

BEST BUY STORES, L.P., a Virginia
Limited Partnership; KELLY SERVICES
USA, LLC, a Michigan Limited Liability
Company; and DOES 1 to 50, inclusive,

DEFENDANTS.

CASE NO. **CIV SB 2117979**

**PLAINTIFF'S REPRESENTATIVE PAGA
ACTION COMPLAINT FOR:**

**Penalties Pursuant to Labor Code § 2699, et
seq. for violations of Labor Code §§ 201,
202, 203, 204, 210, 226(a), 226(e), 226.3,
1194, 1197, 1197.1, 1198, 1199, and 2802, as
well as IWC Wage Order Nos. 7-2001 or 9-
2001**

1. Plaintiff JOVI HERNANDEZ, on behalf of the people of the State of California and as “aggrieved employees” acting as private attorney general under the Labor Code Private Attorneys General Act of 2004, § 2698, *et seq.* (“PAGA”) complains of Defendants BEST BUY STORES, L.P. (“Best Buy”), KELLY SERVICES USA, LLC (“Kelly Services”), and the Doe Defendants (collectively, “Defendants”), and each of them, as follows:

I. INTRODUCTION

2. This is a representative action brought pursuant to Labor Code § 2698, *et seq.*, on behalf of the State of California and the aggrieved employees defined as follows:

Plaintiff and all other California residents who are or were employed by Defendant Best Buy Stores, L.P. and/or jointly employed or employed by Defendant and/or staffing agencies who contracted with Defendant Best Buy Stores, L.P., specifically including Kelly Services USA, LLC, as warehouse workers, or in any similar capacity at one or more of Defendant's warehouses in California, and who worked at least one shift in California from April 1, 2020 to the present (the "Aggrieved Employees").

3. Plaintiff, on behalf of the State of California as a private attorney general, brings claims for alleged Labor Code violations committed against herself and all Aggrieved Employees presently or formerly employed by Defendant during the liability period pursuant to Labor Code § 2698, *et seq.* seeking penalties for Defendant violations of California Labor Code §§ 201, 202, 203, 204, 210, 226(a), 226(e), 226.3, 1194, 1197, 1197.1, 1198, 1199, and 2802, as well as IWC Wage Order Nos. 7-2001 and 9-2001.

4. Based upon the allegations herein, Plaintiff and all Aggrieved Employees are Aggrieved Employees within the meaning of Labor Code § 2698, *et seq.*

5. Plaintiff and all Aggrieved Employees worked for Defendants at one or more of its warehouse locations in California. Plaintiff worked for Defendants from approximately June of 2020 until approximately March 4, 2021, i.e., during the statutory period applicable to the Aggrieved Employees' claims.

6. Plaintiff was jointly employed by Kelly Services, an agency that provided warehouse workers to Best Buy, and Best Buy Stores, with her earnings reported on an IRS Form W-2 from Kelly Services, from June to September 2020. Thereafter, Plaintiff worked directly for

1 Best Buy Stores, with her earnings reported thereafter until March 2021 reported on an IRS Form
2 W-2 from Best Buy Stores, L.P.

3 7. Plaintiff was and is a former employee of Defendants when she filed her initial
4 PAGA Notice with the LWDA on April 1, 2021, but she worked for Defendants during the
5 statutory period applicable to the claims at issue in this action.

6 **II. FACTUAL BACKGROUND**

7 8. Plaintiff and the Aggrieved Employees are and were at all times relevant hereto
8 employed by BEST BUY STORES, L.P. and/or KELLY SERVICES USA, LLC and the Doe
9 Defendants. Plaintiff and all Aggrieved Employees were employed by Defendants within the
10 statutory PAGA period from April 1, 2020 to the present.

11 9. Upon information and belief, Plaintiff and the other Aggrieved Employees are
12 covered by California Industrial Welfare Commission Occupational Wage Order Nos. 7-2001
13 and/or 9-2001.

14 10. Labor Code § 1197 states the California requirement that employees must be paid
15 at least the minimum wage fixed by the Commission or by any applicable state or local law, and
16 any payment of less than the minimum wage is unlawful. Similarly, Labor Code § 1194 entitles
17 “any employee receiving less than the legal minimum wage...to recover in a civil action the
18 unpaid balance of the full amount of this minimum wage.” IWC Wage Order No. 7-2001
19 obligates employers to pay each employee minimum wages for all hours worked.

20 11. These minimum wage standards apply to each hour employees worked for which
21 they were not paid. Therefore, an employer’s failure to pay for any particular hour of time worked
22 by an employee is unlawful, even if averaging an employee’s total pay over all hours worked,
23 paid or not, results in an average hourly wage above minimum wage. *Armenta v. Osmose, Inc.*,
24 135 Cal.App.4th 314, 324 (2005).

25 12. At all times relevant hereto, Defendants required Plaintiff and all Aggrieved
26 Employees to regularly perform work-off-the-clock for which they did not receive any
27 compensation. Specifically, as part of warehouse workers’ employment, from March 2020 to the
28 present, Defendants required Plaintiff and all Aggrieved Employees to undergo COVID-19

1 temperature checks and questioning before entering Defendants' warehouse(s) at the start of their
2 shifts. Although Defendants maintained a common policy and practice of requiring Plaintiff and
3 the Aggrieved Employees to stand/wait in line pre-shift for COVID-19 temperature checks and
4 questioning, Defendants failed to compensate Plaintiff and the other Aggrieved Employees for
5 such time. Additionally, those Aggrieved Employees who had smartphones were required to
6 download a cell application and answer four to five questions or (if they had no smart phone) to
7 answer questions from a manager before they were able to clock in for the start of their shifts.
8 Defendants failed to compensate Plaintiff and the Aggrieved Employees for such time.

9 13. Employees must be paid for all "hours worked." "Hours worked" is "the time
10 during which an employee is subject to the control of an employer, and includes all the time the
11 employee is suffered or permitted to work, whether or not required to do so." *See* Wage Order 9-
12 2001, Subd. 2(K); *see also Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal. 4th 833. "[I]t
13 is only necessary that the worker be subject to the control of the employer in order to be entitled
14 to compensation." *Morillion v. Royal Packing Co.*, 22 Cal. 4th 575, 584 (2000). An employee is
15 under the employer's control and entitled to compensation when the employer "directs,
16 commands or restrains' an employee." *Morillion*, 22 Cal. 4th at 583 (citation omitted).

17 14. As the California Supreme Court made clear in *Morillion*, when determining
18 whether an employee's activity is under the employer's control entitling him or her to
19 compensation, the touchstone is not whether the employer requires the activity and thus whether
20 employees can avoid it, but the level of control employers exert over employees during the
21 activity: "The level of the employer's control, *rather than the mere fact that the employer*
22 *requires the employees' activity is determinative.*" *Morillion*, 22 Cal.4th at 587 (emphasis added).

23 15. In *Frlekin v. Apple Inc.*, 8 Cal. 5th 1038, 2020 Cal. LEXIS 1591 (Cal. Feb. 13,
24 2020), the California Supreme Court reaffirmed its holding in *Morillion* that "[t]he level of the
25 employer's control over its employees, rather than the mere fact that the employer requires the
26 employees' activity, is determinative" concerning whether an activity is compensable under the
27 "hours worked" control clause. *Id.* at 1056. In *Frlekin*, the California Supreme Court found that
28 time employees spent undergoing bag searches at the end of their shifts was compensable. *Id.* at

1 1056-1057. The Court reasoned its decision by analyzing factors in determining whether an
2 employer has exerted compensable control over employees:

3 We also emphasize that whether an activity is required remains probative in determining
4 whether an employee is subject to the employer's control. But, at least with regard to
5 cases involving onsite employer-controlled activities, the mandatory nature of an activity
6 is not the only factor to consider. We conclude that courts may and should consider
7 additional relevant factors—including, but not limited to, the location of the activity, the
8 degree of the employer's control, whether the activity primarily benefits the employee or
9 employer, and whether the activity is enforced through disciplinary measures—when
10 evaluating such employer-controlled conduct. *Id.* at 1056.

11 To be free of the employer's control for purposes of "hours worked," the employee must be free
12 to use his or her time "effectively for his or her own purposes." *Morillion*, 22 Cal.4th at 583.

13 16. Here, as in *Frlekin*, Defendants' Aggrieved Employees could not avoid
14 Defendants' COVID-19 temperature checks and questioning (which took place on Defendants'
15 premises and before they could clock in) and could not then use their time effectively for their
16 own purposes. As such, Defendants exercised compensable control over Aggrieved Employees
17 undergoing and who underwent COVID-19 temperature checks and questioning and owes wages
18 to the Aggrieved Employees for this time.

19 17. Notably, there is no *de minimis* defense to exclude such time from being
20 compensable. *See Troester v. Starbucks Corp.*, 5 Cal.5th 829 (2018) (the California Supreme
21 Court held that the *de minimis* principle was not applicable in the context of an alleged policy
22 requiring employees to work minutes off the clock routinely; *see also Frlekin*, 8 Cal. 5th at 1056
(hours work is defined as the time during which an employee is subject to the control of an
23 employer, and includes all the time the employee is suffered or permitted to work, whether or not
24 required to do so).

25 18. Notably, through its policy and practice of requiring Plaintiff and the Aggrieved
26 Employees to undergo pre-shift COVID-19 temperature checks and questioning, Defendants
27 clearly violated Labor Code § 1194. As a result of Defendants' policy and practices described
28 above, Defendants regularly failed to pay Plaintiff and all Aggrieved Employees for all hours
worked in violation of Labor Code § 1194 and 1197. Accordingly, Plaintiff is an Aggrieved
Employee within the meaning of PAGA and Defendants have violated Labor Code §§ 1194 and

1 1197 with respect to Plaintiff and the Aggrieved Employees.

2 19. Labor Code § 1197.1 authorizes employees who are paid less than the minimum
3 fixed by an applicable state or local law, or by an order of the commission a civil penalty,
4 restitution of wages, and liquidate damages as follows: (1) for any initial violation that is
5 intentionally committed, one hundred dollars (\$100) for each underpaid employee for each pay
6 period for which the employee is underpaid....[and] (2) [f]or each subsequent violation for the
7 same specific offense, two hundred fifty dollars (\$250) for each underpaid employee for each pay
8 period for which the employee is underpaid regardless of whether the initial violation is
9 intentionally committed. As set forth above, Defendants failed to compensate Plaintiff and all
10 Aggrieved Employees for all hours worked and/or all hours under Defendant's control.
11 Accordingly, through PAGA and to the extent permitted by law Plaintiff and all Aggrieved
12 Employees are entitled to recover liquidated damages for violations of Labor Code § 1197.1.
13 Based upon these same factual allegations, Plaintiff and the other Aggrieved Employees are
14 entitled to penalties under Labor Code § 1199.

15 20. Similarly, Labor Code § 1194.2 authorizes employees to recover wages to recover
16 liquidated damages for violations of Labor Code § 1194. Where an employee, as Plaintiff and the
17 other Aggrieved Employees experienced on a regular basis, are not paid for all hours worked
18 under Labor Code § 1194, the employees may recover minimum wages for the time for which
19 they received no compensation.

20 21. Defendants do not maintain an expense reimbursement policy and/or practice
21 stating that Defendant will automatically affirmatively reimburse Plaintiff and the Aggrieved
22 Employees for their known business expenses incurred on behalf of Defendants, including a
23 reasonable portion of monthly cell phone expenses as required by Labor Code sections 2802(a)
24 and (c) and the holding of *Cochran v. Schwan's Home Service, Inc.*, 228 Cal.App.4th 1137 (Cal.
25 Aug. 12, 2014). The employer's obligation to reimburse employees for monthly cell phone
26 expenses arises when an employer "knew or should have known" that employees are or were
27 using their cell phones to answer work related COVID-19 questions. *See Stuart v. RadioShack*
28 *Corp.*, 2009 U.S. Dist. Lexis 41658 (N.D. Cal. 2009).

1 22. Specifically, California Labor Code section 2802 requires an employer in
2 California to "indemnify his or her employee for all necessary expenditures or losses incurred by
3 that employee in direct consequence of the discharge of his or her duties." *See* Cal. Labor Code
4 section 2802(a); *see also* 2802(c) where "necessary" is defined to include all "reasonable" costs.
5 "The elements of a claim under Section 2802 are: (i) the employee made expenditures or incurred
6 losses; (ii) the expenditures or losses were incurred in direct consequence of the employee's
7 discharge of his or her duties, or obedience to the directions of the employer; and (iii) the
8 expenditures or losses were reasonable and necessary." *Marr v. Bank of America*, 2011 U.S. Dist.
9 LEXIS 24868 (N.D. March 8, 2011) (citing *Gattuso v. Harte-Hanks Shoppers, Inc.*, 42 Cal.4th
10 554, 568 (2007). "In addition, the employer 'must either know or have reason to know that the
11 employee has incurred [the] expense.'" *Id.* (citing *Stuart v. RadioShack Corp.*, 641 F.Supp. 2d 901
12 (N.D.Cal. 2009). Where an employer has knowledge that employees are incurring a reimbursable
13 expense, the employer must "exercise due diligence to ensure each employee is reimbursed."
14 *Marr*, at *1. The right of an employee to expense reimbursements from his or her employer is not
15 waivable. *See* Cal. Labor Code section 2804; *Edwards v. Arthur Anderson*, 44 Cal. 4th 937, 951
16 (2008).

17 23. Furthermore, under California Labor Code section 2802, employers must
18 reimburse employees for all reasonable work-related expenses, including a reasonable portion of
19 their work-related monthly cell phone expenses, regardless of whether or not employees incurred
20 any additional out-of-pocket cost from work-related use. *See Cochran v. Schwan's Home Service,*
21 *Inc.*, 228 Cal.App.4th 1137 (Cal. Aug. 12, 2014) ("We hold that when employees must use their
22 personal cell phones for work-related calls, Labor Code section 2802 requires the employer to
23 reimburse them. Whether the employees have cell phone plans with unlimited minutes or limited
24 minutes, the reimbursement owed is a reasonable percentage of their cell phone bills."); *see also*
25 *Ritchie v. Blue Shield of California*, 2014 WL 6982943, at *21 (N.D.Cal. Dec. 9, 2014) (Hon.
26 Edward Chen) (certifying class of claim processors working from home with section 2802 claims
27 for landline phone reimbursements where their employer required them to work from home and
28 to have a home landline for work).

1 24. Under California Labor Code Section 2699(f)(2), which is part of California's
2 Private Attorney General Act ("PAGA"), a California employer is subject to a civil penalty of
3 \$100 per pay period per employee for the initial violation of an underlying Labor Code violation,
4 like the Section 2802 violations described herein, and an additional penalty of \$200 per pay
5 period per employee for each subsequent pay period where a violation occurred.

6 25. Here, Defendants require Plaintiff and the Aggrieved Employees to download a
7 cell phone application on their smartphones to answer COVID-19 questionnaires daily.
8 Additionally, Defendants require Plaintiff and the Aggrieved Employees to use their cell phone
9 data plan to complete such COVID-19 questionnaires daily. Defendants did not affirmatively
10 reimburse Plaintiff and the Aggrieved Employees in any amount for any such cell phone expenses
11 incurred throughout the PAGA Period.

12 26. In short, Defendants' policies and/or practices require and expect, and/or with
13 Defendants' knowledge thereof permit, Plaintiff and the Aggrieved Employees to pay for cell
14 phone expenses incurred in direct consequence of discharging their duties on behalf of
15 Defendants, without reimbursement in full by Defendants for such expenses and to be subject to
16 Defendant's control during uncompensated pre-shift temperature check and COVID questioning
17 time. Defendants have maintained their policies and/or practices of denying reimbursement in full
18 of Plaintiff's and the Aggrieved Employees' necessarily incurred business expenses, or
19 substantially similar policies, throughout California and throughout the PAGA Period.

20 27. Defendants are aware or should have been aware that Plaintiff and the Aggrieved
21 Employees regularly incur and have incurred cell phone business expenses in the discharge of
22 their duties, since they required Plaintiff and the Aggrieved Employees to download a cell
23 application and complete the COVID-19 questionnaires within daily, by virtue of Defendants'
24 instructions to Plaintiff and the aggrieved employees. Defendants nevertheless have, throughout
25 the PAGA Period, failed and refused to reimburse Plaintiff and the Aggrieved Employees for
26 such cell phone business expenses incurred by them in connection with their work.

27 28. As to Plaintiff and all Aggrieved Employees, Defendants also failed to provide
28 accurate itemized wage statements in accordance with Labor Code § 226(a). Labor Code § 226

obligates employers, semi-monthly or at the time of each payment to furnish an itemized wage statement in writing showing:

- (1) gross wages earned;
- (2) total hours worked by the employee;
- (3) the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece rate;
- (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...;
- (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...

29. Similarly, Labor Code § 226(e) provides:

(1) 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 to exceed an aggregate penalty of four thousand dollars (\$4,000), and is entitled to an award of costs and reasonable attorney's fees.

(2) (A) An employee is deemed to suffer injury for purposes of this subdivision if the employer fails to provide a wage statement.

(B) An employee is deemed to suffer injury for purposes of this subdivision if the employer fails to provide accurate and complete information as required by any one or more of items (1) to (9), inclusive, of subdivision (a) and the employee cannot promptly and easily determine from the wage statement alone one or more of the following:

(i) The amount of the gross wages or net wages paid to the employee during the pay period or any of the other information required to be provided on the itemized wage statement pursuant to items (2) to (4), inclusive, (6), and (9) of subdivision (a).

(ii) Which deductions the employer made from gross wages to determine the net wages paid to the employee during the pay period. Nothing in this subdivision alters the ability of the employer to aggregate deductions consistent with the requirements of item (4) of subdivision (a).

(iii) The name and address of 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 during the pay period.

(iv) 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.

30. Defendants knowingly and intentionally failed to pay Plaintiff and all Aggrieved Employees all minimum wages associated with COVID-19 temperature checks and questioning.

1 Moreover, Plaintiff and all Aggrieved Employees also suffered legal “injury” for purposes of
2 Labor Code section 226(e) insofar as they were unable to readily and easily determine the
3 information required to be set forth by Section 226(a). Specifically, Plaintiff and the Aggrieved
4 Employees were unable to determine the actual and accurate total hours worked by the
5 employees, the gross wages earned, the net wages earned, since time spent on COVID-19
6 questions and waiting in line was always done off the clock and pre-shift.

7 31. Plaintiff and the Aggrieved Employees will prevail on their claim for PAGA
8 penalties under Labor Code § 226(a) without having to show injury or willfulness. *See Lopez v.*
9 *Friant & Assocs., LLC*, 15 Cal.App.5th 773, 788 (2017) (“hold[ing] a plaintiff seeking civil
10 penalties under PAGA for a violation of Labor Code section 226(a) does not have to satisfy the
11 ‘injury’ and ‘knowing and intentional’ requirements of section 226(e)(1).”); *Raines v. Coastal*
12 *Pacific Food Distributors, Inc.*, 23 Cal.App.5th 667, 679 (2018) (finding that the “requirements
13 for a section 226(e) claim do not apply to a PAGA claim for a violation of section 226(a).”).

14 32. Labor Code § 226.3 provides that “[a]ny employer who violates subdivision (a) of
15 Section 226 shall be subject to a civil penalty in the amount of two hundred fifty dollars (\$250)
16 per employee per violation in an initial violation and one thousand dollars (\$1,000) per employee
17 for each violation in a subsequent citation, for which the employer fails to provide the employee a
18 wage deduction statement or fails to keep the required in subdivision (a) of Section 226.” As
19 explained in detail above, Defendants failed to provide Plaintiff and the other Aggrieved
20 Employees with accurate itemized wage statements. Accordingly, Plaintiff and the other
21 Aggrieved Employees may recover Labor Code § 226.3 penalties under PAGA for Defendants’
22 violations of Labor Code § 226(a).

23 33. Labor Code § 204 expressly requires that “[a]ll wages...earned by any person in
24 any employment are due and payable twice during each calendar month, on days designated in
25 advance by the employer as the regular paydays.”

26 34. Due to Defendants’ failure to pay Plaintiff and all Aggrieved Employees on timely
27 and bi-monthly basis for all applicable minimum wages, Defendants failed to timely pay Plaintiff
28 and all Aggrieved Employees all wages owed within seven (7) days of the close of the payroll

1 period in accordance with Labor Code § 204(d) on a regular and consistent basis.

2 35. Labor Code § 210 provides that “in addition to, an entirely independent and apart
3 from, any other penalty provided in this article, every person who fails to pay the wages of each
4 employee as provided in Sections...204...shall be subject to a civil penalty as follows: (1) For
5 any initial violation, one hundred dollars (\$100) for each failure to pay each employee; (2) For
6 each subsequent violation, or any willful or intentional violation, two hundred dollars (\$200) for
7 each failure to pay each employee, plus 25% of the amount unlawfully withheld.”

8 36. As a result of the faulty compensation policies and practices described in detail
9 above and Defendants’ failure to pay Plaintiff all Aggrieved Employees for all time, including
10 pre-shift COVID-19 screening time within seven (7) days of the close of the payroll period, the
11 State of California is entitled to recover penalties under Labor Code § 210 through PAGA. *See*
12 *Amaral v. Cintas Corp. No. 2*, 163 Cal.App.4th 1157, 1209 (2008) (affirming an award of Labor
13 Code section 210 penalties under PAGA due to the employer’s failure to timely pay wages at the
14 proper rate in accordance with a local wage ordinance).

15 37. Under Labor Code §§ 201-202, an employer must provide an employee wages at
16 the time of discharge or within up to seventy-two (72) hours of their resignation. Labor Code §
17 203 provides “if an employer willfully fails to pay . . . any wages of an employee who is
18 discharged or who quits, the wages of the employee shall continue as a penalty. . .” for up to 30
19 days. Lab. Code § 203; *Mamika v. Barca*, (1998) 68 Cal.App.4th 487, 492.

20 38. In addition, Labor Code § 256 provides that the Labor Commissioner “shall
21 impose a civil penalty in an amount not exceeding 30 days’ pay as waiting time under the terms
22 of Section 203. The California Supreme Court and California Court of Appeal have both
23 specifically recognized the ability of an aggrieved employee to recover civil penalties under
24 Labor Code § 256 for a defendant’s willful violation of Labor Code § 201 and 202 under PAGA.
25 In *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal.4th 348, 381 (2014), the California
26 Supreme Court acknowledged that PAGA penalties for the untimely payment of wages included
27 the 30 days of pay as waiting time pursuant to Labor Code § 256. *See also Esparza v. KS*
28 *Industries, L.P.*, 13 Cal.App.5th 1228, 1242 (2017) (explaining that the Labor Code § 256

1 penalties only exist if the employer's failure to timely pay wages upon separation was willful is a
2 "civil penalty" "recovered or imposed by the Labor Commissioner.").

3 39. Defendants failed to pay Plaintiff and other Aggrieved Employees whose
4 employment with Defendant has now ended, all wages owed, including but not limited to
5 minimum wages for COVID-19 screening time pre-shift within the time constraints proscribed in
6 Labor Code §§ 201-202 at the time of their termination/separation. Thus, as result of Defendants'
7 faulty policies described above, Plaintiff and all Aggrieved Employees left their employment with
8 Defendants without being compensated for each and every hour worked at the appropriate rate in
9 violation of Labor Code §§ 201, 202, 203.

10 40. Plaintiff has fully and completely exhausted her administrative remedies under
11 PAGA prior to proceeding with this action. Specifically, Plaintiff filed her PAGA Notice online
12 with the Labor Workforce Development Agency ("LWDA") and sent it by certified mail to
13 Defendants setting forth the facts and theories of the violations alleged against Defendants, as
14 prescribed by Labor Code § 2698 *et seq.* on April 1, 2021 (See **Exhibit A**). Subsequently, on
15 April 2, 2021, Plaintiff filed a supplemental/amended PAGA Notice of the claims herein online
16 with the LWDA and sent such supplemental/amended Notice by certified mail to Defendants (See
17 **Exhibit B**).

18 41. As required by PAGA, Plaintiff also submitted the \$75.00 filing fee to the LWDA
19 by regular mail. Pursuant to Labor Code § 2699.3(a)(2)(A), no notice was received and/or will
20 have been received by Plaintiff from the LWDA evidencing its intention to investigate within
21 sixty-five (65) calendar days of the postmark date of the PAGA notice. Plaintiff is/was therefore,
22 entitled to commence and proceed with a civil action pursuant to Labor Code § 2699.

23 **III. JURISDICTION AND VENUE**

24 42. This Court has subject matter jurisdiction over any and all causes of action
25 asserted herein pursuant to Article VI, § 10 of the California Constitution and California Code of
26 Civil Procedure § 410.10 by virtue of the fact that this is a civil action in which the matter in
27 controversy, exclusive of interest, exceeds \$25,000, and because each cause of action asserted
28 arises under the laws of the State of California or is subject to adjudication in the courts of the

1 State of California.

2 43. This Court has personal jurisdiction over Defendants because Defendants have
3 caused injuries in the County of San Bernardino, California through their acts, and by their
4 violation of the California Labor Code and California state common law.

5 44. Venue as to each Defendants is proper in this judicial district, pursuant to Code of
6 Civil Procedure § 395. Defendants operate within California and do business within San
7 Bernardino County, California. The unlawful acts alleged herein have a direct effect on Plaintiff
8 and all “employees” within the State of California and San Bernardino County.

9 **IV. PARTIES**

10 **A. PLAINTIFF**

11 45. Plaintiff JOVI HERNANDEZ is a resident of California and at all times pertinent
12 hereto worked for Defendants in San Bernardino County and was harmed by Defendants’
13 activities in San Bernardino County.

14 46. Plaintiff and all Aggrieved Employees are, and at all times pertinent hereto, have
15 been classified as employees by Defendants. Defendants hire employees to work in California.

16 47. Upon information and belief, Plaintiff and all Aggrieved Employees are covered
17 by California Industrial Welfare Commission Occupational Wage Orders Nos. 7-2001 and 9-
18 2001.

19 48. Plaintiff represents the state of California in prosecuting claims against Defendants
20 on behalf of a group of employees defined as:

21 *Plaintiff and all other California residents who are or were employed by*
22 *Defendant Best Buy Stores, L.P. and/or jointly employed or employed by*
23 *Defendant and/or staffing agencies who contracted with Defendant Best Buy*
24 *Stores, L.P., specifically including Kelly Services USA, LLC, as warehouse*
25 *workers, or in any similar capacity at Defendant’s warehouses in California, and*
who worked at least one shift in California from April 10, 2020 to the present (the
“Aggrieved Employees”).

26 **B. DEFENDANTS**

27 49. Defendant BEST BUY STORES, L.P. is believed to be a Virginia Limited
28 Partnership operating within the State of California including within San Bernardino County.

1 Defendant BEST BUY STORES, L.P.'s principal place of business is believed to be 7601 Penn
2 Avenue South, Richfield, MN 55423. Defendant has done and does business throughout the State
3 of California including San Bernardino County.

4 50. Defendant KELLY SERVICES USA, LLC is believed to be a Michigan Limited
5 Liability Company operating within the State of California including within San Bernardino
6 County. Defendant KELLY SERVICES USA, LLC's principal place of business is believed to be
7 999 West Big Beaver Road, Suite 601A, Troy, Michigan 48084. Defendant has done and does
8 business throughout the State of California including San Bernardino County.

9 51. The true names and capacities, whether individual, corporate, associate, or
10 otherwise, of Defendants sued herein as DOES 1 to 50, inclusive, are currently unknown to
11 Plaintiff, who therefore sues Defendants by such fictitious names under Code of Civil Procedure
12 § 474. Plaintiff is informed and believes, and based thereon alleges, that each of the Defendants
13 designated herein as a DOE is legally responsible in some manner for the unlawful acts referred
14 to herein. Plaintiff will seek leave of court to amend this Complaint to reflect the true names and
15 capacities of the Defendants designated hereinafter as DOES when such identities become
16 known.

17 52. Plaintiff is informed and believes, and based thereon alleges, that each Defendants
18 acted in all respects pertinent to this action as the agent of the other Defendants, carried out a joint
19 scheme, business plan or policy in all respects pertinent hereto, and the acts of each Defendant are
20 legally attributable to the other Defendants. Furthermore, Defendants in all respects acted as the
21 employer and/or joint employer of Plaintiff and the other Aggrieved Employees.

22 **V. FIRST CAUSE OF ACTION**
23 **PLAINTIFF AND ALL AGGRIEVED EMPLOYEES AGAINST ALL DEFENDANTS**
24 **FOR PENALTIES PURSUANT TO LABOR CODE § 2698, ET SEQ. FOR VIOLATIONS**
25 **OF LABOR CODE §§ 201, 202, 203, 204, 210, 226(a), 226(e), 226.3, 1194, 1197, 1197.1,**
26 **1198, 1199, AND 2802, AS WELL AS IWC WAGE ORDER NOS. 7-2001 AND 9-2001**

27 53. Plaintiff, on behalf of the State of California, realleges and incorporates by
28 reference all previous paragraphs.

54. As a result of the acts alleged above, Plaintiff seeks penalties under Labor Code
§ 2698, *et seq.* because of Defendants' violations of Labor Code §§ 201, 202, 203, 204, 210,

226(a), 226(e), 226.3, 1194, 1197, 1197.1, 1198, 1199, and 2802, as well as IWC Wage Order Nos. 7-2001 and 9-2001.

55. Under Labor Code §§ 2699(f)(2) and 2699.5, for each such violation, Plaintiff and all other Aggrieved Employees are entitled to penalties in an amount to be shown at the time of trial subject to the following formula unless a civil penalty is already proscribed under the Labor Code:

\$100 for the initial violation per employee per pay period; and

\$200 for each subsequent violation per employee per pay period.

These penalties will be allocated 75% to the Labor Workforce Development Agency and 25% to the affected employees.

56. Labor Code § 210 provides that “in addition to, an 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 Sections...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, or any willful or intentional violation, two hundred dollars (\$200) for each failure to pay each employee, plus 25% of the amount unlawfully withheld.” Pursuant to Labor Code § 210, “[t]welve and one-half percent of the penalty recovered shall be paid into a fund within the Labor and Workforce Development Agency dedicated to educating employers about state labor laws, and the remainder shall be paid into the State Treasury to the credit of the General Fund.” As a result of the faulty compensation policies and practices described in detail above, the State of California is entitled to recover penalties under Labor Code § 210 through PAGA.

VI. RELIEF REQUESTED

WHEREFORE, Plaintiff prays for the following relief:

1. For penalties under Labor Code § 2698, *et seq.* for Plaintiff and all Aggrieved Employees because of Defendants’ violation of Labor Code §§ 201, 202, 203, 204, 210, 226(a), 226(e), 226.3, 1194, 1197, 1197.1, 1198, 1199, and 2802, as well as IWC Wage Order Nos. 7-2001 and 9-2001.

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2. An award providing for payment of costs of suit;
3. An award of attorneys' fees; and
4. Such other and further relief as this Court may deem proper and just.

Dated: June 21, 2021

ACKERMANN & TILAJEF, P.C.

By: 
CRAIG J. ACKERMANN
Attorney for Plaintiff and the Aggrieved Employees

EXHIBIT A

April 1, 2021

Filed Via LWDA's PAGA Claim Notice Online Form

Copies Sent Via Certified Mail to:

Human Resources
Best Buy Stores, L.P.
7601 Penn Avenue South
Richfield, Minnesota 55423

Human Resources
Kelly Services, Inc.
999 West Big Beaver Road
Troy, Michigan 48084

Re: *Jovin Hernandez Gonzalez v. Best Buy Stores, L.P. and Kelly Services, Inc.*
California Labor Code §2699.3; Notice of Intent to File Suit

Gentlepersons:

Our firm, Ackermann & Tilajef, P.C. along with our co-counsel, the Law Office of Tatiana Hernandez, P.C., represents Jovin Hernandez Gonzalez ("Plaintiff") in connection with her individual and PAGA representative claims against Best Buy Stores, L.P. and Kelly Services, Inc. ("Defendants") based on underlying violations of Labor Code sections 201, 202, 203, 204, 210, 226, 1194, 1198, 1199 and 2802.¹

Plaintiff intends to pursue claims for PAGA penalties during the period of time from one year ago and ongoing (the "PAGA Period") in a PAGA representative action to be filed in the Superior Court of California (the "Action").

In connection with the PAGA claim, Plaintiff represents the State of California's LWDA and the following group of aggrieved employees: *Plaintiff and all other California residents who are or were employed by Defendant Best Buy Stores, L.P. and/or jointly employed or employed by Defendant and/or staffing agencies who contracted with Defendant Best Buy Stores, L.P., specifically including Kelly Services, Inc., as warehouse workers, or in any similar capacity at Defendant's warehouses, and who worked at least one shift in California from one year ago and ongoing* (the "Aggrieved Employees"). All such aggrieved employees were subject to Defendant's unlawful policies, as described in further detail below.

Defendants' Failure to Pay Minimum Wages

Labor Code § 1197 states the California requirement that employees must be paid at least

¹ Plaintiff was employed by Kelly Services, Inc., an agency that provided warehouse workers to Best Buy Stores, L.P. from June to September 2020. Thereafter, Plaintiff worked as a direct W-2 employee for Best Buy Stores, L.P.

the minimum wage fixed by the Commission or by any applicable state or local law, and any payment of less than the minimum wage is unlawful. Similarly, Labor Code § 1194 entitles “any employee receiving less than the legal minimum wage...to recover in a civil action the unpaid balance of the full amount of this minimum wage.” IWC Wage Order No. 17-2001 obligates employers to pay each employee minimum wages for all hours worked.

These minimum wage standards apply to each hour employees worked for which they were not paid. Therefore, an employer’s failure to pay for any particular hour of time worked by an employee is unlawful, even if averaging an employee’s total pay over all hours worked, paid or not, results in an average hourly wage above minimum wage. *Armenta*, 135 Cal.App.4th at 324.

Defendants required Plaintiff and all Aggrieved Employees to regularly perform work-off-the-clock for which they did not receive any compensation. Specifically, as part of warehouse workers’ employment, from March 2020 to the present, Defendants required Plaintiff and all Aggrieved Employees to undergo COVID-19 temperature checks and questioning when entering Defendants’ warehouse at the start of their shift. Although Defendants maintained a common policy and practice of requiring Plaintiff and the Aggrieved Employees to stand/wait in line for COVID-19 temperature checks and questioning, Defendants failed to compensate Plaintiff and the other Aggrieved Employees for such time. Additionally, those Aggrieved Employees who had smartphones were required to download a cell application and answer four to five questions or (if they had no smart phone) to answer questions from a manager before they were able to click in for the start of their shift. Defendants failed to compensate Plaintiff and the Aggrieved Employees for such time.

Employees must be paid for all “hours worked.” Hours worked is “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* Wage Order 9-2001, Subd. 2(K); *see also Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal. 4th 833. “[I]t is only necessary that the worker be subject to the control of the employer in order to be entitled to compensation.” *Morillion v. Royal Packing Co.* 22 Cal. 4th 575, 584 (2000). An employee is under the employer’s control and entitled to compensation when the employer “‘directs, commands or restrains’ an employee.” *Morillion*, 22 Cal. 4th at 583 (citation omitted).

As the California Supreme Court made clear in *Morillion*, when determining whether an employee’s activity is under the employer’s control entitling him or her to compensation, the import is not whether the employer requires the activity and thus whether employees can avoid it, but the level of control employers exert over employees during the activity: “The level of the employer’s control, *rather than the mere fact that the employer requires the employees’ activity is determinative.*” *Morillion*, 22 Cal.4th at 587 (emphasis added).

In *Frlekin v. Apple Inc.*,² the California Supreme Court reaffirmed its holding in *Morillion* that “[t]he level of the employer’s control over its employees, rather than the mere fact that the employer requires the employees’ activity, is determinative” concerning whether an

²(2020) 8 Cal. 5th 1038, 1051 (citing *Morillion*, 22 Cal.4th at 587).

activity is compensable under the “hours worked” control clause. In *Frlekin*, the California Supreme Court found that time employees spent undergoing bag searches at the end of their shifts was compensable. The Court reasoned its decision by analyzing factors in determining whether an employer has exerted compensable control over employees:

We also emphasize that whether an activity is required remains probative in determining whether an employee is subject to the employer’s control. But, at least with regard to cases involving *onsite* employer-controlled activities, the mandatory nature of an activity is not the only factor to consider. We conclude that courts may and should consider additional relevant factors—including, but not limited to, the location of the activity, the degree of the employer’s control, whether the activity primarily benefits the employee or employer, and whether the activity is enforced through disciplinary measures—when evaluating such employer-controlled conduct.

To be free of the employer’s control for purposes of “hours worked,” the employee must be free to use his or her time “effectively for his or her own purposes.” *Morillion*, 22 Cal.4th at 583.

Here, as in *Frlekin*, Defendant’s aggrieved employees could not avoid Defendants’ COVID-19 temperature checks and questioning (which took place on Defendant’s premises and before they could clock in) and could not then use their time effectively for their own purposes. As such, Defendant exercised compensable control over aggrieved employees undergoing and who underwent COVID-19 temperature checks and questioning and owes wages to the Aggrieved Employees for this time. Notably, there is no de minimis defense for such time. *See, Troester v. Starbucks Corp.*, 5 Cal.5th 829 (2018) (the California Supreme Court held that the de minimis principle was not applicable in the context of an alleged policy requiring employees to work minutes off the clock routinely; *see also, Frlekin*, 2020 Cal. LEXIX 547 (February 13, 2020) (hours work 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).

Notably, through its policy and practice of requiring Plaintiff and the Aggrieved Employees to undergo pre-shift COVID-19 temperature checks and questioning, Defendants clearly violated Labor Code § 1194. As a result of Defendants’ policy and practices described above, Defendants regularly failed to pay Plaintiff and all aggrieved employees for all hours worked in violation of Labor Code § 1194 and 1197. Accordingly, Plaintiff is an aggrieved employee within the meaning PAGA and Defendants have violated Labor Code §§ 1194 and 1197 with respect to Plaintiff and the Aggrieved Employees.

Labor Code § 1197.1 authorizes employees who are paid less than the minimum fixed by an applicable state or local law, or by an order of the commission a civil penalty, restitution of wages, and liquidate damages as follows: (1) for any initial violation that is intentionally committed, one hundred dollars (\$100) for each underpaid employee for each pay period for which the employee is underpaid....[and] (2) [f]or each subsequent violation for the same

specific offense, two hundred fifty dollars (\$250) for each underpaid employee for each pay period for which the employee is underpaid regardless of whether the initial violation is intentionally committed. As set forth above, Defendants failed to compensate Plaintiff and all aggrieved employees for all hours worked. Accordingly, through PAGA and to the extent permitted by law Plaintiff and all aggrieved employees are entitled to recover liquidated damages for violations of Labor Code § 1197.1. Based upon these same factual allegations, Plaintiff and the other aggrieved employees are entitled to penalties under Labor Code § 1199.

Similarly, Labor Code § 1194.2 authorizes employees to recover wages to recover liquidated damages for violations of Labor Code § 1194. Where an employee, as Plaintiff and the other aggrieved employees experienced on a regular basis, are not paid for all hours worked under Labor Code § 1194, the employees may recover minimum wages for the time for which they received no compensation.

Defendants' Failure to Reimburse for Employees' Business Expenses Incurred on Behalf of Defendants

Defendants do not maintain an expense reimbursement policy and/or practice stating that Defendant will affirmatively reimburse Plaintiff and the aggrieved employees for their business expenses incurred on behalf of Defendants, including a reasonable portion of monthly cell phone expenses as required by Labor Code sections 2802(a) and (c) and the holding of *Cochran v. Schwan's Home Service, Inc.*, 228 Cal.App.4th 1137 (Cal. Aug. 12, 2014). The employer's obligation to reimburse employees for monthly cell phone expenses arises when an employer "knew or should have known" that employees are or were using their cell phones to answer work related COVID-19 questions. See *Stuart v. RadioShack Corp.*, 2009 U.S. Dist. Lexis 41658 (N.D. Cal. 2009).

Specifically, California Labor Code section 2802 requires an employer in California to "indemnify his or her employee for all necessary expenditures or losses incurred by that employee in direct consequence of the discharge of his or her duties." See Cal. Labor Code section 2802(a); *see also* 2802(c) where "necessary" is defined to include all "reasonable" costs. "The elements of a claim under Section 2802 are: (i) the employee made expenditures or incurred losses; (ii) the expenditures or losses were incurred in direct consequence of the employee's discharge of his or her duties, or obedience to the directions of the employer; and (iii) the expenditures or losses were reasonable and necessary." *Marr v. Bank of America*, 2011 U.S. Dist. LEXIS 24868 (N.D. March 8, 2011) (*citing Gattuso v. Harte-Hanks Shoppers, Inc.*, 42 Cal.4th 554, 568 (2007)). "In addition, the employer 'must either know or have reason to know that the employee has incurred [the] expense.'" *Id.* (*citing Stuart v. RadioShack Corp.*, 641 F.Supp. 2d 901 (N.D.Cal. 2009)). Where an employer has knowledge that employees are incurring a reimbursable expense, the employer must "exercise due diligence to ensure each employee is reimbursed." *Marr*, at *1. The right of an employee to expense reimbursements from his or her employer is not waivable. See Cal. Labor Code section 2804; *Edwards v. Arthur Anderson*, 44 Cal. 4th 937, 951 (2008).

Furthermore, under California Labor Code section 2802, employers must reimburse

employees for all reasonable work-related expenses, including a reasonable portion of their work-related monthly cell phone expenses, regardless of whether or not employees incurred any additional out-of-pocket cost from work-related use. *See, Cochran v. Schwan's Home Service, Inc.*, 228 Cal.App.4th 1137 (Cal. Aug. 12, 2014) (“We hold that when employees must use their personal cell phones for work-related calls, Labor Code section 2802 requires the employer to reimburse them. Whether the employees have cell phone plans with unlimited minutes or limited minutes, the reimbursement owed is a reasonable percentage of their cell phone bills.”); see also *Ritchie v. Blue Shield of California*, 2014 WL 6982943, at *21 (N.D.Cal. Dec. 9, 2014) (Hon. Edward Chen) (certifying class of claim processors working from home with section 2802 claims for landline phone reimbursements where their employer required them to work from home and to have a home landline for work).

Under California Labor Code Section 2699(f)(2), which is part of California’s Private Attorney General Act (“PAGA”), a California employer is subject to a civil penalty of \$100 per pay period per employee for the initial violation of an underlying Labor Code violation, like the Section 2802 violations described herein, and an additional penalty of \$200 per pay period per employee for each subsequent pay period where a violation occurred.

Here, Plaintiff and the Aggrieved Employees are required by Defendants to download a cell phone application on their smartphones to answer COVID-19 questionnaires daily. Additionally, Defendants require Plaintiffs and the Aggrieved Employees to use their cell phone data plan to complete such COVID-19 questionnaires daily. Defendants did not affirmatively reimburse Plaintiff and the aggrieved employees in any amount for any such cell phone expenses incurred throughout the PAGA Period.

In short, Defendants’ policies and/or practices require and expect, and/or with Defendants’ knowledge thereof permit, Plaintiff and the aggrieved employees to pay for cell phone expenses incurred in direct consequence of discharging their duties on behalf of Defendants, without reimbursement in full by Defendants for such expenses. Defendants have maintained their policies and/or practices of denying reimbursement in full of Plaintiff’s and the aggrieved employees’ necessarily incurred business expenses, or substantially similar policies, throughout California and throughout the PAGA Period.

Defendants are aware or should have been aware that Plaintiff and the aggrieved employees regularly incur and have incurred cell phone business expenses in the discharge of their duties, since they required Plaintiff and the Aggrieved Employees to download a cell application and complete the COVID-19 questionnaires within daily, by virtue of Defendants’ instructions to Plaintiff and the aggrieved employees. Defendants nevertheless have, throughout the PAGA Period, failed and refused to reimburse Plaintiff and the aggrieved employees for such cell phone business expenses incurred by them in connection with their work.

Defendants’ Failure to Issue Accurate/Itemized Wage Statements

As to Plaintiff and all aggrieved employees, Defendants also failed to provide accurate itemized wage statements in accordance with Labor Code § 226(a). Labor Code § 226 obligates

employers, semi-monthly or at the time of each payment to furnish an itemized wage statement in writing showing:

- (1) gross wages earned;
- (2) total hours worked by the employee;
- (3) the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece rate;
- (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...;
- (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...

Similarly, Labor Code § 226(e) provides:

- (e) (1) 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 to exceed an aggregate penalty of four thousand dollars (\$4,000), and is entitled to an award of costs and reasonable attorney's fees.
- (2) (A) An employee is deemed to suffer injury for purposes of this subdivision if the employer fails to provide a wage statement.
- (B) An employee is deemed to suffer injury for purposes of this subdivision if the employer fails to provide accurate and complete information as required by any one or more of items (1) to (9), inclusive, of subdivision (a) and the employee cannot promptly and easily determine from the wage statement alone one or more of the following:
- (i) The amount of the gross wages or net wages paid to the employee during the pay period or any of the other information required to be provided on the itemized wage statement pursuant to items (2) to (4), inclusive, (6), and (9) of subdivision (a).
 - (ii) Which deductions the employer made from gross wages to determine the net wages paid to the employee during the pay period. Nothing in this subdivision alters the ability of the employer to aggregate deductions consistent with the requirements of item (4) of subdivision (a).
 - (iii) The name and address of 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 during the pay period.
 - (iv) 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.

Defendants knowingly and intentionally failed to pay Plaintiff and all aggrieved employees all minimum wages associated with COVID-19 temperature checks and questioning. Moreover, Plaintiff and all aggrieved employees also suffered legal “injury” for purposes of Labor Code section 226(e) insofar as they were unable to readily and easily determine the information required to be set forth by Section 226(a). Specifically, Plaintiff and the aggrieved employees were unable to determine the actual and accurate total hours worked by the employees, the gross wages earned, the net wages earned, since time spent on COVID-19 questions and waiting in line was always done off the clock and pre-shift.

Plaintiff and the aggrieved employees will prevail on their claim for PAGA penalties under Labor Code § 226(a) without having to show injury or willfulness. *See Lopez v. Friant & Assocs., LLC*, 15 Cal.App.5th 773, 788 (2017) (“hold[ing] a plaintiff seeking civil penalties under PAGA for a violation of Labor Code section 226(a) does not have to satisfy the ‘injury’ and ‘knowing and intentional’ requirements of section 226(e)(1).”); *Raines v. Coastal Pacific Food Distributors, Inc.*, 23 Cal.App.5th 667, 679 (2018) (finding that the “requirements for a section 226(e) claim do not apply to a PAGA claim for a violation of section 226(a).”).

Labor Code § 226.3 provides that “[a]ny 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 violation 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 required in subdivision (a) of Section 226.” As explained in detail above, Defendant failed to provide Plaintiff and the other aggrieved employees with accurate itemized wage statements. Accordingly, Plaintiff and the other aggrieved employees may recover Labor Code § 226.3 penalties under PAGA for Defendant’s violations of Labor Code § 226(a) in lieu of the normal penalties provided for in Section 226.

Defendants’ Failure to Pay Timely Wages

Labor Code § 204 expressly requires that “[a]ll wages...earned by any person in any employment are due and payable twice during each calendar month, on days designated in advance by the employer as the regular paydays.”

Due to Defendants’ failure to pay Plaintiff and all aggrieved employees on timely and bi-monthly basis for all applicable minimum wages, Defendants failed to timely pay Plaintiff and all aggrieved employees all wages owed within seven (7) days of the close of the payroll period in accordance with Labor Code § 204(d) on a regular and consistent basis.

Labor Code § 210 provides that “in addition to, an 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 Sections...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, or any willful or intentional violation, two hundred dollars (\$200) for

each failure to pay each employee, plus 25% of the amount unlawfully withheld.”

As a result of the faulty compensation policies and practices described in detail above and Defendants’ failure to pay Plaintiff all aggrieved employees for all time, including pre-shift COVID-19 screening time within seven (7) days of the close of the payroll period, the State of California is entitled to recover penalties under Labor Code § 210 through PAGA. *See Amaral v. Cintas Corp. No. 2*, 163 Cal.App.4th 1157, 1209 (2008) (affirming an award of Labor Code section 210 penalties under PAGA due to the employer’s failure to timely pay wages at the proper rate in accordance with a local wage ordinance).

Defendants’ Failure to Pay Final Wages

Under Labor Code §§ 201-202, an employer must provide an employee wages at the time of discharge or within up to seventy-two (72) hours of their resignation. Labor Code § 203 provides “if an employer willfully fails to pay . . . any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty. . .” for up to 30 days. Lab. Code § 203; *Mamika v. Barca*, (1998) 68 Cal.App.4th 487, 492.

In addition, Labor Code § 256 provides that the Labor Commissioner “shall impose a civil penalty in an amount not exceeding 30 days’ pay as waiting time under the terms of Section 203. The California Supreme Court and California Court of Appeal have both specifically recognized the ability of an aggrieved employee to recover civil penalties under Labor Code § 256 for a defendant’s willful violation of Labor Code § 201 and 202 under PAGA. In *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal.4th 348, 381 (2014), the California Supreme Court acknowledged that PAGA penalties for the untimely payment of wages included the 30 days of pay as waiting time pursuant to Labor Code § 256. *See also Esparza v. KS Industries, L.P.* 13 Cal.App.5th 1228, 1242 (2017) (explaining that the Labor Code § 256 penalties only exist if the employer’s failure to timely pay wages upon separation was willful is a “civil penalty” “recovered or imposed by the Labor Commissioner.”).

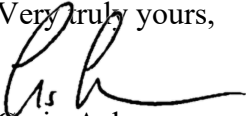
As described in detail above, Defendants failed to pay Plaintiff and other aggrieved employees whose employment with Defendant has now ended, all wages owed, including but not limited to minimum wages for COVID-19 screening time pre-shift within the time constraints proscribed in Labor Code §§ 201-202 at the time of their termination/separation. Thus, as result of Defendants’ faulty policies described above, Plaintiff and all aggrieved employees left their employment with Defendants without being compensated for each and every hour worked at the appropriate rate in violation of Labor Code §§ 201, 202, 203.

Therefore, pursuant to Labor Code § 2699.3, we write to inform you and the Labor and Workforce Development Agency of our intent to pursue a PAGA representative action against Defendants that will include a PAGA claim for civil penalties under Labor Code § 2699 to be brought by the Plaintiff, individually and on behalf of the State of California’s LWDA and the aggrieved employees from at least one year ago through the present for the PAGA claims.

Nevertheless, it is the policy of this firm to attempt to negotiate an early resolution of all

matters. If Defendants are interested in attempting to resolve this matter on a PAGA representative basis, or class basis, please contact me or have your lawyer contact me **on or before May 1, 2021**, so that we can discuss an informal discovery plan and the possibility of early mediation.

If you have any questions, please do not hesitate to call.

Very truly yours,

Craig Ackermann

CC: Tatiana Hernandez (by email)

EXHIBIT B

April 1, 2021

Filed Via LWDA's PAGA Claim Notice Online Form

Copies Sent Via Certified Mail to:

Human Resources
Best Buy Stores, L.P.
7601 Penn Avenue South
Richfield, Minnesota 55423

Human Resources
Kelly Services USA, LLC
999 West Big Beaver Road, Suite 601A
Troy, Michigan 48084

Re: *Jovi Hernandez Gonzalez v. Best Buy Stores, L.P. and Kelly Services USA, LLC*
California Labor Code §2699.3; Supplemental Notice of Intent to File Suit
LWDA Case No. LWDA-CM-827719-21

Gentlepersons:

Our firm, Ackermann & Tilajef, P.C. along with our co-counsel, the Law Office of Tatiana Hernandez, P.C., represents Jovi Hernandez Gonzalez ("Plaintiff") in connection with her individual and PAGA representative claims against Best Buy Stores, L.P. and Kelly Services USA, LLC ("Defendants") based on underlying violations of Labor Code sections 201, 202, 203, 204, 210, 226, 1194, 1198, 1199 and 2802.¹ This supplemental letter is intended to correct the incorrectly named Defendant in Plaintiff's initial letter submitted on April 1, 2021.

Plaintiff intends to pursue claims for PAGA penalties during the period of time from one year ago and ongoing (the "PAGA Period") in a PAGA representative action to be filed in the Superior Court of California (the "Action").

In connection with the PAGA claim, Plaintiff represents the State of California's LWDA and the following group of aggrieved employees: *Plaintiff and all other California residents who are or were employed by Defendant Best Buy Stores, L.P. and/or jointly employed or employed by Defendant and/or staffing agencies who contracted with Defendant Best Buy Stores, L.P., specifically including Kelly Services USA, LLC, as warehouse workers, or in any similar capacity at Defendant's warehouses, and who worked at least one shift in California from one year ago and ongoing* (the "Aggrieved Employees"). All such aggrieved employees were subject to Defendant's unlawful policies, as described in further detail below.

¹ Plaintiff was employed by Kelly Services USA, LLC, an agency that provided warehouse workers to Best Buy Stores, L.P. from June to September 2020. Thereafter, Plaintiff worked as a direct W-2 employee for Best Buy Stores, L.P.

Defendants' Failure to Pay Minimum Wages

Labor Code § 1197 states the California requirement that employees must be paid at least the minimum wage fixed by the Commission or by any applicable state or local law, and any payment of less than the minimum wage is unlawful. Similarly, Labor Code § 1194 entitles “any employee receiving less than the legal minimum wage...to recover in a civil action the unpaid balance of the full amount of this minimum wage.” IWC Wage Order No. 17-2001 obligates employers to pay each employee minimum wages for all hours worked.

These minimum wage standards apply to each hour employees worked for which they were not paid. Therefore, an employer’s failure to pay for any particular hour of time worked by an employee is unlawful, even if averaging an employee’s total pay over all hours worked, paid or not, results in an average hourly wage above minimum wage. *Armenta*, 135 Cal.App.4th at 324.

Defendants required Plaintiff and all Aggrieved Employees to regularly perform work-off-the-clock for which they did not receive any compensation. Specifically, as part of warehouse workers’ employment, from March 2020 to the present, Defendants required Plaintiff and all Aggrieved Employees to undergo COVID-19 temperature checks and questioning when entering Defendants’ warehouse at the start of their shift. Although Defendants maintained a common policy and practice of requiring Plaintiff and the Aggrieved Employees to stand/wait in line for COVID-19 temperature checks and questioning, Defendants failed to compensate Plaintiff and the other Aggrieved Employees for such time. Additionally, those Aggrieved Employees who had smartphones were required to download a cell application and answer four to five questions or (if they had no smart phone) to answer questions from a manager before they were able to click in for the start of their shift. Defendants failed to compensate Plaintiff and the Aggrieved Employees for such time.

Employees must be paid for all “hours worked.” Hours worked is “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* Wage Order 9-2001, Subd. 2(K); *see also Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal. 4th 833. “[I]t is only necessary that the worker be subject to the control of the employer in order to be entitled to compensation.” *Morillion v. Royal Packing Co.* 22 Cal. 4th 575, 584 (2000). An employee is under the employer’s control and entitled to compensation when the employer “‘directs, commands or restrains’ an employee.” *Morillion*, 22 Cal. 4th at 583 (citation omitted).

As the California Supreme Court made clear in *Morillion*, when determining whether an employee’s activity is under the employer’s control entitling him or her to compensation, the import is not whether the employer requires the activity and thus whether employees can avoid it, but the level of control employers exert over employees during the activity: “The level of the employer’s control, *rather than the mere fact that the employer requires the employees’ activity is determinative.*” *Morillion*, 22 Cal.4th at 587 (emphasis added).

In *Frlekin v. Apple Inc.*,² the California Supreme Court reaffirmed its holding in *Morillion* that “[t]he level of the employer’s control over its employees, rather than the mere fact that the employer requires the employees’ activity, is determinative” concerning whether an activity is compensable under the “hours worked” control clause. In *Frlekin*, the California Supreme Court found that time employees spent undergoing bag searches at the end of their shifts was compensable. The Court reasoned its decision by analyzing factors in determining whether an employer has exerted compensable control over employees:

We also emphasize that whether an activity is required remains probative in determining whether an employee is subject to the employer’s control. But, at least with regard to cases involving *onsite* employer-controlled activities, the mandatory nature of an activity is not the only factor to consider. We conclude that courts may and should consider additional relevant factors—including, but not limited to, the location of the activity, the degree of the employer’s control, whether the activity primarily benefits the employee or employer, and whether the activity is enforced through disciplinary measures—when evaluating such employer-controlled conduct.

To be free of the employer’s control for purposes of “hours worked,” the employee must be free to use his or her time “effectively for his or her own purposes.” *Morillion*, 22 Cal.4th at 583.

Here, as in *Frlekin*, Defendant’s aggrieved employees could not avoid Defendants’ COVID-19 temperature checks and questioning (which took place on Defendant’s premises and before they could clock in) and could not then use their time effectively for their own purposes. As such, Defendant exercised compensable control over aggrieved employees undergoing and who underwent COVID-19 temperature checks and questioning and owes wages to the Aggrieved Employees for this time. Notably, there is no de minimis defense for such time. *See, Troester v. Starbucks Corp.*, 5 Cal.5th 829 (2018) (the California Supreme Court held that the de minimis principle was not applicable in the context of an alleged policy requiring employees to work minutes off the clock routinely; *see also, Frlekin*, 2020 Cal. LEXIX 547 (February 13, 2020) (hours work 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).

Notably, through its policy and practice of requiring Plaintiff and the Aggrieved Employees to undergo pre-shift COVID-19 temperature checks and questioning, Defendants clearly violated Labor Code § 1194. As a result of Defendants’ policy and practices described above, Defendants regularly failed to pay Plaintiff and all aggrieved employees for all hours worked in violation of Labor Code § 1194 and 1197. Accordingly, Plaintiff is an aggrieved employee within the meaning of PAGA and Defendants have violated Labor Code §§ 1194 and 1197 with respect to Plaintiff and the Aggrieved Employees.

Labor Code § 1197.1 authorizes employees who are paid less than the minimum fixed by

²(2020) 8 Cal. 5th 1038, 1051 (citing *Morillion*, 22 Cal.4th at 587).

an applicable state or local law, or by an order of the commission a civil penalty, restitution of wages, and liquidate damages as follows: (1) for any initial violation that is intentionally committed, one hundred dollars (\$100) for each underpaid employee for each pay period for which the employee is underpaid....[and] (2) [f]or each subsequent violation for the same specific offense, two hundred fifty dollars (\$250) for each underpaid employee for each pay period for which the employee is underpaid regardless of whether the initial violation is intentionally committed. As set forth above, Defendants failed to compensate Plaintiff and all aggrieved employees for all hours worked. Accordingly, through PAGA and to the extent permitted by law Plaintiff and all aggrieved employees are entitled to recover liquidated damages for violations of Labor Code § 1197.1. Based upon these same factual allegations, Plaintiff and the other aggrieved employees are entitled to penalties under Labor Code § 1199.

Similarly, Labor Code § 1194.2 authorizes employees to recover wages to recover liquidated damages for violations of Labor Code § 1194. Where an employee, as Plaintiff and the other aggrieved employees experienced on a regular basis, are not paid for all hours worked under Labor Code § 1194, the employees may recover minimum wages for the time for which they received no compensation.

Defendants' Failure to Reimburse for Employees' Business Expenses Incurred on Behalf of Defendants

Defendants do not maintain an expense reimbursement policy and/or practice stating that Defendant will affirmatively reimburse Plaintiff and the aggrieved employees for their business expenses incurred on behalf of Defendants, including a reasonable portion of monthly cell phone expenses as required by Labor Code sections 2802(a) and (c) and the holding of *Cochran v. Schwan's Home Service, Inc.*, 228 Cal.App.4th 1137 (Cal. Aug. 12, 2014). The employer's obligation to reimburse employees for monthly cell phone expenses arises when an employer "knew or should have known" that employees are or were using their cell phones to answer work related COVID-19 questions. See *Stuart v. RadioShack Corp.*, 2009 U.S. Dist. Lexis 41658 (N.D. Cal. 2009).

Specifically, California Labor Code section 2802 requires an employer in California to "indemnify his or her employee for all necessary expenditures or losses incurred by that employee in direct consequence of the discharge of his or her duties." See Cal. Labor Code section 2802(a); *see also* 2802(c) where "necessary" is defined to include all "reasonable" costs. "The elements of a claim under Section 2802 are: (i) the employee made expenditures or incurred losses; (ii) the expenditures or losses were incurred in direct consequence of the employee's discharge of his or her duties, or obedience to the directions of the employer; and (iii) the expenditures or losses were reasonable and necessary." *Marr v. Bank of America*, 2011 U.S. Dist. LEXIS 24868 (N.D. March 8, 2011) (*citing Gattuso v. Harte-Hanks Shoppers, Inc.*, 42 Cal.4th 554, 568 (2007)). "In addition, the employer 'must either know or have reason to know that the employee has incurred [the] expense.'" *Id.* (*citing Stuart v. RadioShack Corp.*, 641 F.Supp. 2d 901 (N.D.Cal. 2009)). Where an employer has knowledge that employees are incurring a reimbursable expense, the employer must "exercise due diligence to ensure each employee is reimbursed." *Marr*, at *1. The right of an employee to expense reimbursements

from his or her employer is not waivable. *See* Cal. Labor Code section 2804; *Edwards v. Arthur Anderson*, 44 Cal. 4th 937, 951 (2008).

Furthermore, under California Labor Code section 2802, employers must reimburse employees for all reasonable work-related expenses, including a reasonable portion of their work-related monthly cell phone expenses, regardless of whether or not employees incurred any additional out-of-pocket cost from work-related use. *See, Cochran v. Schwan's Home Service, Inc.*, 228 Cal.App.4th 1137 (Cal. Aug. 12, 2014) ("We hold that when employees must use their personal cell phones for work-related calls, Labor Code section 2802 requires the employer to reimburse them. Whether the employees have cell phone plans with unlimited minutes or limited minutes, the reimbursement owed is a reasonable percentage of their cell phone bills."); *see also Ritchie v. Blue Shield of California*, 2014 WL 6982943, at *21 (N.D.Cal. Dec. 9, 2014) (Hon. Edward Chen) (certifying class of claim processors working from home with section 2802 claims for landline phone reimbursements where their employer required them to work from home and to have a home landline for work).

Under California Labor Code Section 2699(f)(2), which is part of California's Private Attorney General Act ("PAGA"), a California employer is subject to a civil penalty of \$100 per pay period per employee for the initial violation of an underlying Labor Code violation, like the Section 2802 violations described herein, and an additional penalty of \$200 per pay period per employee for each subsequent pay period where a violation occurred.

Here, Plaintiff and the Aggrieved Employees are required by Defendants to download a cell phone application on their smartphones to answer COVID-19 questionnaires daily. Additionally, Defendants require Plaintiffs and the Aggrieved Employees to use their cell phone data plan to complete such COVID-19 questionnaires daily. Defendants did not affirmatively reimburse Plaintiff and the aggrieved employees in any amount for any such cell phone expenses incurred throughout the PAGA Period.

In short, Defendants' policies and/or practices require and expect, and/or with Defendants' knowledge thereof permit, Plaintiff and the aggrieved employees to pay for cell phone expenses incurred in direct consequence of discharging their duties on behalf of Defendants, without reimbursement in full by Defendants for such expenses. Defendants have maintained their policies and/or practices of denying reimbursement in full of Plaintiff's and the aggrieved employees' necessarily incurred business expenses, or substantially similar policies, throughout California and throughout the PAGA Period.

Defendants are aware or should have been aware that Plaintiff and the aggrieved employees regularly incur and have incurred cell phone business expenses in the discharge of their duties, since they required Plaintiff and the Aggrieved Employees to download a cell application and complete the COVID-19 questionnaires within daily, by virtue of Defendants' instructions to Plaintiff and the aggrieved employees. Defendants nevertheless have, throughout the PAGA Period, failed and refused to reimburse Plaintiff and the aggrieved employees for such cell phone business expenses incurred by them in connection with their work.

Defendants' Failure to Issue Accurate/Itemized Wage Statements

As to Plaintiff and all aggrieved employees, Defendants also failed to provide accurate itemized wage statements in accordance with Labor Code § 226(a). Labor Code § 226 obligates employers, semi-monthly or at the time of each payment to furnish an itemized wage statement in writing showing:

- (1) gross wages earned;
- (2) total hours worked by the employee;
- (3) the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece rate;
- (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...;
- (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...

Similarly, Labor Code § 226(e) provides:

- (e) (1) 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 to exceed an aggregate penalty of four thousand dollars (\$4,000), and is entitled to an award of costs and reasonable attorney's fees.
- (2) (A) An employee is deemed to suffer injury for purposes of this subdivision if the employer fails to provide a wage statement.
- (B) An employee is deemed to suffer injury for purposes of this subdivision if the employer fails to provide accurate and complete information as required by any one or more of items (1) to (9), inclusive, of subdivision (a) and the employee cannot promptly and easily determine from the wage statement alone one or more of the following:
 - (i) The amount of the gross wages or net wages paid to the employee during the pay period or any of the other information required to be provided on the itemized wage statement pursuant to items (2) to (4), inclusive, (6), and (9) of subdivision (a).
 - (ii) Which deductions the employer made from gross wages to determine the net wages paid to the employee during the pay period. Nothing in this subdivision alters the ability of the employer to aggregate deductions consistent with the requirements of item (4) of subdivision (a).
 - (iii) The name and address of 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 during the pay period.

(iv) 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.

Defendants knowingly and intentionally failed to pay Plaintiff and all aggrieved employees all minimum wages associated with COVID-19 temperature checks and questioning. Moreover, Plaintiff and all aggrieved employees also suffered legal “injury” for purposes of Labor Code section 226(e) insofar as they were unable to readily and easily determine the information required to be set forth by Section 226(a). Specifically, Plaintiff and the aggrieved employees were unable to determine the actual and accurate total hours worked by the employees, the gross wages earned, the net wages earned, since time spent on COVID-19 questions and waiting in line was always done off the clock and pre-shift.

Plaintiff and the aggrieved employees will prevail on their claim for PAGA penalties under Labor Code § 226(a) without having to show injury or willfulness. *See Lopez v. Friant & Assocs., LLC*, 15 Cal.App.5th 773, 788 (2017) (“hold[ing] a plaintiff seeking civil penalties under PAGA for a violation of Labor Code section 226(a) does not have to satisfy the ‘injury’ and ‘knowing and intentional’ requirements of section 226(e)(1).”); *Raines v. Coastal Pacific Food Distributors, Inc.*, 23 Cal.App.5th 667, 679 (2018) (finding that the “requirements for a section 226(e) claim do not apply to a PAGA claim for a violation of section 226(a).”).

Labor Code § 226.3 provides that “[a]ny 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 violation 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 required in subdivision (a) of Section 226.” As explained in detail above, Defendant failed to provide Plaintiff and the other aggrieved employees with accurate itemized wage statements. Accordingly, Plaintiff and the other aggrieved employees may recover Labor Code § 226.3 penalties under PAGA for Defendant’s violations of Labor Code § 226(a) in lieu of the normal penalties provided for in Section 226.

Defendants’ Failure to Pay Timely Wages

Labor Code § 204 expressly requires that “[a]ll wages...earned by any person in any employment are due and payable twice during each calendar month, on days designated in advance by the employer as the regular paydays.”

Due to Defendants’ failure to pay Plaintiff and all aggrieved employees on timely and bi-monthly basis for all applicable minimum wages, Defendants failed to timely pay Plaintiff and all aggrieved employees all wages owed within seven (7) days of the close of the payroll period in accordance with Labor Code § 204(d) on a regular and consistent basis.

Labor Code § 210 provides that “in addition to, an 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 Sections...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, or any willful or intentional violation, two hundred dollars (\$200) for each failure to pay each employee, plus 25% of the amount unlawfully withheld.”

As a result of the faulty compensation policies and practices described in detail above and Defendants’ failure to pay Plaintiff all aggrieved employees for all time, including pre-shift COVID-19 screening time within seven (7) days of the close of the payroll period, the State of California is entitled to recover penalties under Labor Code § 210 through PAGA. *See Amaral v. Cintas Corp. No. 2*, 163 Cal.App.4th 1157, 1209 (2008) (affirming an award of Labor Code section 210 penalties under PAGA due to the employer’s failure to timely pay wages at the proper rate in accordance with a local wage ordinance).

Defendants’ Failure to Pay Final Wages

Under Labor Code §§ 201-202, an employer must provide an employee wages at the time or discharge or within up to seventy-two (72) hours of their resignation. Labor Code § 203 provides “if an employer willfully fails to pay . . . any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty. . .” for up to 30 days. Lab. Code § 203; *Mamika v. Barca*, (1998) 68 Cal.App.4th 487, 492.

In addition, Labor Code § 256 provides that the Labor Commissioner “shall impose a civil penalty in an amount not exceeding 30 days’ pay as waiting time under the terms of Section 203. The California Supreme Court and California Court of Appeal have both specifically recognized the ability of an aggrieved employee to recover civil penalties under Labor Code § 256 for a defendant’s willful violation of Labor Code § 201 and 202 under PAGA. In *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal.4th 348, 381 (2014), the California Supreme Court acknowledged that PAGA penalties for the untimely payment of wages included the 30 days of pay as waiting time pursuant to Labor Code § 256. *See also Esparza v. KS Industries, L.P.* 13 Cal.App.5th 1228, 1242 (2017) (explaining that the Labor Code § 256 penalties only exist if the employer’s failure to timely pay wages upon separation was willful is a “civil penalty” “recovered or imposed by the Labor Commissioner.”).

As described in detail above, Defendants failed to pay Plaintiff and other aggrieved employees whose employment with Defendant has now ended, all wages owed, including but not limited to minimum wages for COVID-19 screening time pre-shift within the time constraints proscribed in Labor Code §§ 201-202 at the time of their termination/separation. Thus, as result of Defendants’ faulty policies described above, Plaintiff and all aggrieved employees left their employment with Defendants without being compensated for each and every hour worked at the appropriate rate in violation of Labor Code §§ 201, 202, 203.

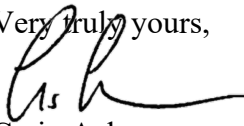
Therefore, pursuant to Labor Code § 2699.3, we write to inform you and the Labor and Workforce Development Agency of our intent to pursue a PAGA representative action against Defendants that will include a PAGA claim for civil penalties under Labor Code § 2699 to be

brought by the Plaintiff, individually and on behalf of the State of California's LWDA and the aggrieved employees from at least one year ago through the present for the PAGA claims.

Nevertheless, it is the policy of this firm to attempt to negotiate an early resolution of all matters. If Defendants are interested in attempting to resolve this matter on a PAGA representative basis, or class basis, please contact me or have your lawyer contact me **on or before May 1, 2021**, so that we can discuss an informal discovery plan and the possibility of early mediation.

If you have any questions, please do not hesitate to call.

Very truly yours,

A handwritten signature in black ink, appearing to read 'CA', with a long horizontal flourish extending to the right.

Craig Ackermann

CC: Tatiana Hernandez (by email)