

Assigned for all purposes to: Governor George Deukmejian Courthouse, Judicial Officer: Michael Vicencia

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF LOS ANGELES

VICTOR HERNANDEZ, on behalf of the
State of California, as a private attorney
general,

Plaintiff,

vs.

MITSUBISHI CEMENT
CORPORATION, a Corporation; and
DOES 1 through 50, inclusive,

Defendants.

Case No. 21LBCV00476

**REPRESENTATIVE ACTION COMPLAINT
FOR:**

1.Civil Penalties Pursuant to Labor Code §
2699, *et seq.* for violations of Labor Code
§§ 201, 202, 203, 204 *et seq.*, 210, 221,
226(a), 226.7, 227.3, 246 *et seq.*, 351, 510,
512, 558(a)(1)(2), 1194, 1197, 1197.1,
1198, 2802, California Code of
Regulations, Title 8, Section 11040,
Subdivision 5(A)-(B)

1 Plaintiff Victor Hernandez (“PLAINTIFF”) on behalf of the people of the State of
2 California and as an “aggrieved employee” acting as a private attorney general under the Labor
3 Code Private Attorney General Act of 2004, § 2699, *et seq.* (“PAGA”) only, alleges on
4 information and belief, except for his own acts and knowledge which are based on personal
5 knowledge, the following:

6 **INTRODUCTION**

7 1. PLAINTIFF brings this action against Defendant Mitsubishi Cement Corporation
8 (referred to as “DEFENDANT”) seeking only to recover PAGA civil penalties for himself, and
9 on behalf of all current and former aggrieved employees that worked for DEFENDANT.
10 PLAINTIFF does **not seek to recover anything other than penalties as permitted by**
11 **California Labor Code § 2699**. To the extent that statutory violations are mentioned for wage
12 violations, PLAINTIFF does not seek underlying general and/or special damages for those
13 violations, but simply the civil penalties permitted by California Labor Code § 2699.

14 2. California has enacted the PAGA to permit an individual to bring an action on
15 behalf of himself and on behalf of others for PAGA penalties *only*, which is the precise and sole
16 nature of this action.

17 3. Accordingly, PLAINTIFF seeks to obtain all applicable relief for
18 DEFENDANT’s violations under PAGA and solely for the relief as permitted by PAGA – that
19 is, penalties and any other relief the Court deems proper pursuant to the PAGA. Nothing in this
20 complaint should be construed as attempting to obtain any relief that would not be available in
21 a PAGA-only action.

22 **THE PARTIES**

23 4. Defendant Mitsubishi Cement Corporation (“DEFENDANT”) is a corporation
24 that at all relevant times mentioned herein conducted and continues to conduct substantial
25 business in the state of California.

26 5. DEFENDANT manufactures all of the major types of Portland and Specialty
27 cement.
28

1 6. PLAINTIFF was employed by DEFENDANT from May of 2020 to May of 2021
2 and was at all times classified by DEFENDANT as a non-exempt employee, paid on an hourly
3 basis, and entitled to the legally required meal and rest periods and payment of minimum and
4 overtime wages due for all time worked.

5 7. PLAINTIFF, and such persons that may be added from time to time who satisfy
6 the requirements and exhaust the administrative procedures under the Private Attorney General
7 Act, brings this Representative Action on behalf of the State of California with respect to
8 himself and all individuals who are or previously were employed by DEFENDANT in
9 California and who were classified as non-exempt employees ("AGGRIEVED EMPLOYEES")
10 during the time period of June 11, 2020 until a date as determined by the Court (the "PAGA
11 PERIOD").

12 8. PLAINTIFF, on behalf of himself and all AGGRIEVED EMPLOYEES presently
13 or formerly employed by DEFENDANT during the PAGA PERIOD, brings this representative
14 action pursuant to Labor Code § 2699, *et seq.* seeking fixed civil penalties for DEFENDANT's
15 violation of California Labor Code §§ 201, 202, 203, 204 *et seq.*, 210, 221, 226(a), 226.7, 227.3,
16 246 *et seq.*, 351, 510, 512, 558(a)(1)(2), 1194, 1197, 1197.1, 1198, 2802, California Code of
17 Regulations, Title 8, Section 11040, Subdivision 5(A)-(B), and the applicable Wage Order(s).
18 Based upon the foregoing, PLAINTIFF and all AGGRIEVED EMPLOYEES are aggrieved
19 employees within the meaning of Labor Code § 2699, *et seq.*

20 9. The true names and capacities, whether individual, corporate, subsidiary,
21 partnership, associate or otherwise of defendants DOES 1 through 50, inclusive, are presently
22 unknown to PLAINTIFF who therefore sues these Defendants by such fictitious names pursuant
23 to Cal. Civ. Proc. Code § 474. PLAINTIFF will seek leave to amend this Complaint to allege
24 the true names and capacities of Does 1 through 50, inclusive, when they are ascertained.
25 PLAINTIFF is informed and believes, and based upon that information and belief alleges, that
26 the Defendants named in this Complaint, including DOES 1 through 50, inclusive, are
27 responsible in some manner for one or more of the events and happenings that proximately
28 caused the injuries and damages hereinafter alleged.

10. The agents, servants and/or employees of the Defendants and each of them acting on behalf of the Defendants acted within the course and scope of his, her or its authority as the agent, servant and/or employee of the Defendants, and personally participated in the conduct alleged herein on behalf of the Defendants with respect to the conduct alleged herein. Consequently, the acts of each Defendant are legally attributable to the other Defendants and all Defendants are jointly and severally liable to PLAINTIFF and the other AGGRIEVED EMPLOYEES, for the loss sustained as a proximate result of the conduct of the Defendants' agents, servants and/or employees.

THE CONDUCT

11. Pursuant to the Industrial Welfare Commission Wage Orders, DEFENDANT is required to pay PLAINTIFF and the AGGRIEVED EMPLOYEES for all their time worked, meaning the time during which an employee is subject to the control of an employer, including all the time the employee is suffered or permitted to work. DEFENDANT required PLAINTIFF and the AGGRIEVED EMPLOYEES to work from time to time while they were clocked out for what was supposed to be their off duty meal break. DEFENDANT required PLAINTIFF and the AGGRIEVED EMPLOYEES to work off the clock without paying them for all the time they performed duties while on their meal break, specifically by failing to provide enough labor hours to accomplish all the job tasks that DEFENDANT expected PLAINTIFF and the AGGRIEVED EMPLOYEES to complete on a daily and/or weekly basis. DEFENDANT requires PLAINTIFF and the AGGRIEVED EMPLOYEES to work off the clock during information pass downs to the next shift employees in order to perform tasks that included but were not limited to troubleshooting machines in the plant and informing the next shift employees about issues that arose during the previous shift. PLAINTIFF and the AGGRIEVED EMPLOYEES also worked off the clock with respect to time spent undergoing mandatory drug testing or any other testing and/or examination required as a condition of employment. Further, PLAINTIFF and the other AGGRIEVED EMPLOYEES from time to time were not paid wages for all time worked, including overtime wages, such that in the aggregate employees were

1 underpaid wages as a result of DEFENDANT's pattern and practice of unevenly rounding time
2 worked by its employees. Additionally, DEFENDANT engaged in the practice of requiring
3 PLAINTIFF and the AGGRIEVED EMPLOYEES to perform work off the clocking that
4 DEFENDANT, as a condition of employment, required these employees to complete mandatory
5 COVID-19 screening prior to clocking into DEFENDANT's timekeeping system for the
6 workday. As a result, PLAINTIFF and other AGGRIEVED EMPLOYEES forfeited minimum
7 wage and overtime compensation by from time to time working without their time being
8 accurately recorded and without compensation at the applicable minimum wage and overtime
9 rates. DEFENDANT's policy and practice not to pay PLAINTIFF and other AGGRIEVED
10 EMPLOYEES for all time worked is evidenced by DEFENDANT's business records.

11 12. As a result of their rigorous work schedules, PLAINTIFF and the AGGRIEVED
12 EMPLOYEES were also from time to time unable to take off duty meal breaks and were not
13 fully relieved of duty for meal periods. PLAINTIFF and other AGGRIEVED EMPLOYEES
14 were from time to time required to perform work as ordered by DEFENDANT for more than
15 five (5) hours during a shift without receiving an off-duty meal break. Further, DEFENDANT
16 failed to provide PLAINTIFF and the AGGRIEVED EMPLOYEES with a second off-duty
17 meal period from time to time in which these employees were required by DEFENDANT to
18 work ten (10) hours of work from time to time. PLAINTIFF and the other AGGRIEVED
19 EMPLOYEES therefore forfeited meal breaks without additional compensation and in
20 accordance with DEFENDANT's corporate policy and practice.

21 13. During the PAGA PERIOD, PLAINTIFF and the other AGGRIEVED
22 EMPLOYEES were also required from time to time to work in excess of four (4) hours without
23 being provided ten (10) minute rest periods. Further, these employees were denied their first
24 rest periods of at least ten (10) minutes for some shifts worked of at least two (2) to four (4)
25 hours from time to time, a first and second rest period of at least ten (10) minutes for some shifts
26 worked of between six (6) and eight (8) hours from time to time, and a first, second and third
27 rest period of at least ten (10) minutes for some shifts worked of ten (10) hours or more from
28 time to time. PLAINTIFF and the other AGGRIEVED EMPLOYEES were also not provided

1 with one hour wages in lieu thereof. As a result of their rigorous work schedules, PLAINTIFF
2 and the other AGGRIEVED EMPLOYEES were from time to time denied their proper rest
3 periods by DEFENDANT and DEFENDANT's managers. Additionally, the applicable
4 California Wage Order requires employers to provide employees with off-duty rest periods,
5 which the California Supreme Court defined as time during which an employee is relieved from
6 all work related duties and free from employer control. In so doing, the Court held that the
7 requirement under California law that employers authorize and permit all employees to take rest
8 periods means that employers must relieve employees of all duties and relinquish control over
9 how employees spend their time which includes control over the locations where employees
10 may take their rest period. Employers cannot impose controls that prohibit an employee from
11 taking a brief walk - five minutes out, five minutes back. Here, DEFENDANT's policy
12 restricted PLAINTIFF and the other AGGRIEVED EMPLOYEES from unconstrained walks
13 and was unlawful based on Defendant's rule which stated PLAINTIFF and other AGGRIEVED
14 EMPLOYEES could not leave the work premises during their rest period.

15 14. State law provides that employees must be paid overtime and meal and rest break
16 premiums at one-and-one-half times their "regular rate of pay." PLAINTIFF and other
17 AGGRIEVED EMPLOYEES were compensated at an hourly rate plus incentive pay that was
18 tied to specific elements of an employee's performance.

19 15. The second component of PLAINTIFF's and other AGGRIEVED EMPLOYEES'
20 compensation was DEFENDANT's non-discretionary incentive program that paid PLAINTIFF
21 and other AGGRIEVED EMPLOYEES incentive wages based on their performance for
22 DEFENDANT. The non-discretionary incentive program provided all employees paid on an
23 hourly basis with incentive compensation when the employees met the various performance
24 goals set by DEFENDANT. However, when calculating the regular rate of pay in order to pay
25 overtime and meal and rest break premiums to PLAINTIFF and other AGGRIEVED
26 EMPLOYEES, DEFENDANT failed to include the incentive compensation as part of the
27 employees' "regular rate of pay" for purposes of calculating overtime pay and the correct meal
28 and rest break premium pay. Management and supervisors described the incentive program to

1 potential and new employees as part of the compensation package. As a matter of law, the
2 incentive compensation received by PLAINTIFF and other AGGRIEVED EMPLOYEES must
3 be included in the “regular rate of pay.” The failure to do so has resulted in an underpayment
4 of overtime compensation and meal and rest break premium pay to PLAINTIFF and the other
5 AGGRIEVED EMPLOYEES by DEFENDANT.

6 16. DEFENDANT also failed to provide PLAINTIFF and the other AGGRIEVED
7 EMPLOYEES with complete and accurate wage statements which failed to show, among other
8 things, the correct gross and net wages earned. Cal. Lab. Code § 226 provides that every
9 employer shall furnish each of his or her employees with an accurate itemized wage statement
10 in writing showing, among other things, gross wages earned and all applicable hourly rates in
11 effect during the pay period and the corresponding amount of time worked at each hourly rate.
12 PLAINTIFF and the AGGRIEVED EMPLOYEES were paid on an hourly basis. As such, the
13 wage statements should reflect all applicable hourly rates during the pay period and the total
14 hours worked, and the applicable pay period in which the wages were earned pursuant to
15 California Labor Code Section 226(a). The wage statements DEFENDANT provided to
16 PLAINTIFF and other AGGRIEVED EMPLOYEES failed to identify such information. More
17 specifically, the wage statements failed to identify the accurate total hours worked each pay
18 period. When the hours shown on the wage statements were added up, they did not equal the
19 actual total hours worked during the pay period in violation Cal. Lab. Code Section 226(a)(2).
20 Aside, from the violations listed above, DEFENDANT failed to issue to PLAINTIFF an
21 itemized wage statement that lists all the requirements under California Labor Code 226 *et seq.*
22 As a result, DEFENDANT from time to time provided PLAINTIFF and the other AGGRIEVED
23 EMPLOYEES with wage statements which violated Cal. Lab. Code § 226.

24 17. Cal. Lab. Code § 204 provides that “[a]ll wages. . . earned by any person in any
25 employment are due and payable twice during each calendar month, on days designated in
26 advance by the employer as the regular paydays.” Further, Cal. Lab. Code § 204(d) expressly
27 requires employers to pay employees all wages owed within seven (7) days of the close of the
28 payroll period. DEFENDANT from time to time failed to pay PLAINTIFF and other

1 AGGRIEVED EMPLOYEES all wages owed to them within seven (7) days of the close of the
2 payroll period, including but not limited to for the "Gross Up Pay" wage payments.

3 18. Pursuant to Cal. Lab. Code Section 221, "It shall be unlawful for any employer
4 to collect or receive from an employee any part of wages theretofore paid by said employer to
5 said employee." DEFENDANT failed to pay all compensation due to PLAINTIFF and other
6 AGGRIEVED EMPLOYEES, made unlawful deductions from compensation payable to
7 PLAINTIFF and the AGGRIEVED EMPLOYEES, failed to disclose all aspects of the
8 deductions from compensation payable to PLAINTIFF and the AGGRIEVED EMPLOYEES,
9 and thereby failed to pay these employees all wages due at each applicable pay period and upon
10 termination.

11 19. DEFENDANT underpaid sick pay wages to PLAINTIFF and other AGGRIEVED
12 EMPLOYEES by failing to pay such wages at the regular rate of pay. Specifically, PLAINTIFF
13 and other non-exempt employees earn non-discretionary remuneration. Rather than pay sick
14 pay at the regular rate of pay, DEFENDANT underpaid sick pay to PLAINTIFF and other
15 AGGRIEVED EMPLOYEES at their base rates of pay.

16 20. DEFENDANT intentionally and knowingly failed to reimburse and indemnify
17 PLAINTIFF and the other AGGRIEVED EMPLOYEES for required business expenses
18 incurred by PLAINTIFF and other AGGRIEVED EMPLOYEES in direct consequence of
19 discharging their duties on behalf of DEFENDANT. Under California Labor Code Section
20 2802, employers are required to indemnify employees for all expenses incurred in the course
21 and scope of their employment. Cal. Lab. Code § 2802 expressly states that "an employer shall
22 indemnify his or her employee for all necessary expenditures or losses incurred by the employee
23 in direct consequence of the discharge of his or her duties, or of his or her obedience to the
24 directions of the employer, even though unlawful, unless the employee, at the time of obeying
25 the directions, believed them to be unlawful."

26 21. In the course of their employment PLAINTIFF and the other AGGRIEVED
27 EMPLOYEES as a business expense, were required by DEFENDANT to use their own personal
28 cellular phones and personal vehicles as a result of and in furtherance of their job duties as

1 employees for DEFENDANT but were not reimbursed or indemnified by DEFENDANT for the
2 cost associated with the use of their personal cellular phones and personal vehicles for
3 DEFENDANT's benefit. Specifically, PLAINTIFF and other AGGRIEVED EMPLOYEES
4 were required by DEFENDANT to use their personal cellular phones to respond to managers
5 while off the clock (which also results in minimum wage and overtime violations). As a result,
6 in the course of their employment with DEFENDANT, PLAINTIFF and other AGGRIEVED
7 EMPLOYEES incurred unreimbursed business expenses which included, but were not limited
8 to, costs related to the use of their personal cellular phones all on behalf of and for the benefit
9 of DEFENDANT.

10 22. In violation of the applicable sections of the California Labor Code and the
11 requirements of the Industrial Welfare Commission ("IWC") Wage Order, DEFENDANT as
12 a matter of company policy, practice and procedure, intentionally and knowingly failed to
13 compensate PLAINTIFF and the other AGGRIEVED EMPLOYEES for missed meal and rest
14 periods. This policy and practice of DEFENDANT is intended to purposefully avoid the
15 payment for all time worked as required by California law which allows DEFENDANT to
16 illegally profit and gain an unfair advantage over competitors who complied with the law. To
17 the extent equitable tolling operates to toll claims by the AGGRIEVED EMPLOYEES against
18 DEFENDANT, the PAGA PERIOD should be adjusted accordingly.

19 23. By reason of this conduct applicable to PLAINTIFF and all AGGRIEVED
20 EMPLOYEES, DEFENDANT engaged in a company-wide policy and procedure which fails
21 to accurately calculate and record all missed meal and rest periods and failed to pay all
22 minimum and overtime wages due to PLAINTIFF and the other AGGRIEVED EMPLOYEES.
23 The proper recording of these employees' missed meal and rest breaks is the DEFENDANT's
24 burden. As a result of DEFENDANT's intentional disregard of the obligation to meet this
25 burden, DEFENDANT fails to properly calculate and/or pay all required compensation for work
26 performed by the AGGRIEVED EMPLOYEES and violated the California Labor Code and
27 regulations promulgated thereunder as herein alleged.

28 24. All of the conduct and violations alleged herein occurred during the PAGA

1 PERIOD. To the extent that any of the conduct and violations alleged herein did not affect
2 PLAINTIFF during the PAGA PERIOD, PLAINTIFF seeks penalties for those violations that
3 affected other AGGRIEVED EMPLOYEES pursuant to *Carrington v. Starbucks Corp.* 2018
4 AJDAR 12157 (Certified for Publication 12/19/18).

5
6 **JURISDICTION AND VENUE**

7 25. This Court has jurisdiction over this Action pursuant to California Code of Civil
8 Procedure, Section 410.10.

9 26. Venue is proper in this Court pursuant to California Code of Civil Procedure,
10 Sections 395.5 and 393, because DEFENDANT operates in locations across California,
11 employs AGGRIEVED EMPLOYEES across California, including in this County, and
12 committed the wrongful conduct herein alleged in this County against AGGRIEVED
13 EMPLOYEES.

14 **FIRST CAUSE OF ACTION**

15 **For Violation of the Private Attorneys General Act**

16 **[Cal. Lab. Code §§ 2698, *et seq.*]**

17 **(By PLAINTIFF and Against All Defendants)**

18 27. PLAINTIFF realleges and incorporates by this reference, as though fully set
19 forth herein, the prior paragraphs of this Complaint.

20 28. PAGA is a mechanism by which the State of California itself can enforce state
21 labor laws through the employee suing under the PAGA who do so as the proxy or agent of
22 the state's labor law enforcement agencies. An action to recover civil penalties under
23 PAGA is fundamentally a law enforcement action designed to protect the public and not to
24 benefit private parties. The purpose of the PAGA is not to recover damages or restitution,
25 but to create a means of "deputizing" citizens as private attorneys general to enforce the
26 Labor Code. In enacting PAGA, the California Legislature specified that "it was ... in the
27 public interest to allow aggrieved employees, acting as private attorneys general to recover
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1 civil penalties for Labor Code violations ..." Stats. 2003, ch. 906, § 1. Accordingly, PAGA
2 claims cannot be subject to arbitration.

3 29. PLAINTIFF, and such persons that may be added from time to time who
4 satisfy the requirements and exhaust the administrative procedures under the Private
5 Attorney General Act, brings this Representative Action on behalf of the State of California
6 with respect to himself and all individuals who are or previously were employed by
7 DEFENDANT in California and who were classified as non-exempt employees
8 ("AGGRIEVED EMPLOYEES") during the time period of June 11, 2020 until a date as
9 determined by the Court (the "PAGA PERIOD").

10 30. On June 11, 2021, PLAINTIFF gave written notice by electronic mail to the
11 Labor and Workforce Development Agency (the "Agency") and by certified mail to the
12 employer of the specific provisions of this code alleged to have been violated as required by
13 Labor Code § 2699.3. The statutory waiting period for PLAINTIFF to add these allegations
14 to the Complaint has expired. As a result, pursuant to Section 2699.3, PLAINTIFF may
15 now commence a representative civil action under PAGA pursuant to Section 2699 as the
16 proxy of the State of California with respect to all AGGRIEVED EMPLOYEES as herein
17 defined.

18 31. The policies, acts and practices heretofore described were and are an unlawful
19 business act or practice because DEFENDANT (a) failed to provide PLAINTIFF and the
20 other AGGRIEVED EMPLOYEES accurate itemized wage statements, (b) failed to
21 properly record and provide legally required meal and rest periods, (c) failed to pay
22 minimum wages, (d) failed to pay overtime and sick pay wages, (e) failed to reimburse
23 employees for required expenses, and (f) failed to provide wages when due, all in violation
24 of the applicable Labor Code sections listed in Labor Code §§ 201, 202, 203, 204 *et seq.*,
25 210, 221, 226(a), 226.7, 227.3, 246 *et seq.*, 351, 510, 512, 558(a)(1)(2), 1194, 1197, 1197.1,
26 1198, 2802, California Code of Regulations, Title 8, Section 11040, Subdivision 5(A)-(B),
27 and the applicable Wage Order(s), and thereby gives rise to civil penalties as a result of such
28

1 conduct.¹ PLAINTIFF hereby seeks recovery of only civil penalties as prescribed by the
2 Labor Code Private Attorney General Act of 2004 as the representative of the State of
3 California for the illegal conduct perpetrated on PLAINTIFF and the other AGGRIEVED
4 EMPLOYEES.

5
6 **PRAYER FOR RELIEF**

7 WHEREFORE, PLAINTIFF prays for judgment against each Defendant, jointly and
8 severally, as follows:

9 1. On behalf of the State of California and with respect to all AGGRIEVED
10 EMPLOYEES:

11 A) Recovery of civil penalties as prescribed by the Labor Code Private
12 Attorneys General Act of 2004; and,

13 B) An award of attorneys' fees and cost of suit, as allowable under the
14 law, including, but not limited to, pursuant to Labor Code §2699.

15 Dated: September 13, 2021

BLUMENTHAL NORDREHAUG BHOWMIK DE
BLOUW LLP

17 By: /s/ Norman Blumenthal
18 Norman B. Blumenthal
19 Attorneys for Plaintiff

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28 ¹Plaintiff specifically excludes and/or does not allege any claims under California Labor
Code §558(a)(3).