

1 **ACKERMANN & TILAJEF, P.C.**
2 Craig J. Ackermann (SBN 229832)
3 cja@ackermanntilajef.com
4 1180 South Beverly Drive, Suite 610
5 Los Angeles, California 90035
6 Telephone: (310) 277-0614
7 Facsimile: (310) 277-0635

8 **PROXY LAW FIRM LLP**
9 Rana Nader (SBN 247182)
10 nader@proxylawfirm.com
11 Hengameh S. Safaei (SBN 248048)
12 safaei@proxylawfirm.com
13 10880 Wilshire Boulevard, Suite 1101
14 Los Angeles, California 90024
15 Telephone: (310) 948-9871
16 Facsimile: (310) 861-5931

17 *Attorneys for Plaintiff, and as a proxy for the LWDA and all Aggrieved Employees*

18 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
19 **FOR THE COUNTY OF ALAMEDA**

20 WILLIAM A. CORNEJO, an individual on
21 behalf of the State of California, as private
22 attorney general,

23 PLAINTIFF,

24 v.

25 RALPHS GROCERY COMPANY, an Ohio
26 Corporation; and DOES 1 to 50, inclusive,

27 DEFENDANTS.
28

ELECTRONICALLY FILED

Superior Court of California,
County of Alameda

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By: Cheryl Clark, Deputy Clerk

CASE NO. **21CV001388**

**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, and 1199, as well as IWC
Wage Order No. 7-2001**

1 Plaintiff WILLIAM CORNEJO (“Plaintiff”), on behalf of the people of the State of
2 California and as an “Aggrieved Employee” acting as private attorney general under the Labor
3 Code Private Attorneys General Act of 2004, § 2699, *et seq.* (“PAGA”) complains of Defendants
4 RALPHS GROCERY COMPANY (“Ralphs”) and the Doe Defendants (collectively,
5 “Defendant”), and each of them, as follows:

6 I. INTRODUCTION

7 1. This is a representative action brought pursuant to Labor Code § 2699, *et seq.*, on
8 behalf of the State of California and the Aggrieved Employees defined as follows:

9 The “Aggrieved Employees”:

10 *Plaintiff and all other non-exempt, hourly-paid employees who are or were*
11 *employed by Defendant Ralphs Grocery Company in California, and who worked*
12 *at least one shift, from March 16, 2020 to the present (the “PAGA Period”).¹*

13 2. Plaintiff, on behalf of the State of California as a private attorney general, brings
14 claims for alleged Labor Code violations committed against himself and all Aggrieved
15 Employees presently or formerly employed by Defendant during the liability period pursuant to
16 Labor Code § 2699, *et seq.* seeking penalties for Defendant’s violations of California Labor Code
17 §§ 201, 202, 203, 204, 210, 226(a), 226(e), 226.3, 1194, 1197, 1197.1, and 1199, as well as IWC
18 Wage Order No. 7-2001.

19 3. Based upon the allegations herein, Plaintiff and all Aggrieved Employees are
20 Aggrieved Employees within the meaning of Labor Code § 2699, *et seq.*

21 4. Plaintiff was and is a former non-exempt, hourly employee of Defendant when he
22 filed his initial PAGA Notice with the LWDA on August 24, 2021, but he worked for Defendant
23 during the statutory period applicable to the claims at issue in this action.

24 II. JURISDICTION AND VENUE

25 5. This Court has subject matter jurisdiction over any and all causes of action
26 asserted herein pursuant to Article VI, § 10 of the California Constitution and California Code of

27 ¹ The normal one-year PAGA period prior to Plaintiff’s LWDA letter is extended an additional six months back to
28 the onset of the pandemic, by Emergency Rule 9, which tolled all statutes of limitations related to civil actions from
April 6, 2020 until October 1, 2020.

1 Civil Procedure § 410.10 by virtue of the fact that this is a civil action in which the matter in
2 controversy, exclusive of interest, exceeds \$25,000, and because each cause of action asserted
3 arises under the laws of the State of California or is subject to adjudication in the courts of the
4 State of California.

5 6. This Court has personal jurisdiction over Defendant because Defendant has caused
6 violations in the County of Alameda, California through its acts, and by its violation of the
7 California Labor Code and California state common law.

8 7. Venue as to each Defendant is proper in this judicial district, pursuant to Code of
9 Civil Procedure § 395. Defendant operates within California and does business within Alameda
10 County, California. The unlawful acts alleged herein have a direct effect on Plaintiff and all
11 “employees” within the State of California and Alameda County.

12 **III. PARTIES**

13 8. Plaintiff WILLIAM CORNEJO is a resident of California. Plaintiff worked for
14 Defendant from approximately June of 2006 until approximately May of 2021, i.e., during the
15 statutory period applicable to the Aggrieved Employees’ claims.

16 9. Plaintiff and all Aggrieved Employees are, and at all times pertinent hereto have
17 been, classified as non-exempt employees by Defendant, and have been hired to work for
18 Defendant in California.

19 10. Defendant RALPHS GROCERY COMPANY is believed to be an Ohio
20 Corporation with its principal place of business located at 1100 W. Artesia Boulevard, Compton,
21 California 90220. Upon information and belief, Ralphs employed Plaintiff and the Aggrieved
22 Employees as employees within California. Defendant has done and does business throughout the
23 State of California, including Alameda County.

24 11. The true names and capacities, whether individual, corporate, associate, or
25 otherwise, of Defendants sued herein as DOES 1 to 50, inclusive, are currently unknown to
26 Plaintiff, who therefore sues Defendants by such fictitious names under Code of Civil Procedure
27 § 474. Plaintiff is informed and believes, and based thereon alleges, that each of the Defendants
28 designated herein as a DOE is legally responsible in some manner for the unlawful acts referred

1 to herein. Plaintiff will seek leave of court to amend this Complaint to reflect the true names and
2 capacities of the Defendants designated hereinafter as DOES when such identities become
3 known.

4 12. Plaintiff is informed and believes, and based thereon alleges, that each Defendant
5 acted in all respects pertinent to this action as the agent of the other Defendants, carried out a joint
6 scheme, business plan or policy in all respects pertinent hereto, and the acts of each Defendant are
7 legally attributable to the other Defendants. Accordingly, all Defendants engaged, suffered, and
8 permitted Plaintiff and all other Aggrieved Employees to perform services from which they
9 benefitted. Moreover, the aforementioned entities had the right to exercise control over the wages,
10 hours and/or working conditions over Plaintiff and all Aggrieved Employees at all relevant times
11 herein, so as to be considered the joint employers of all of the Aggrieved Employees. By reason
12 of their status as joint employers, they are each liable for civil penalties for violation of the
13 California Labor Code as to the Plaintiff and other Aggrieved Employees, as set forth herein.

14 IV. FACTUAL ALLEGATIONS

15 13. Defendant operates and, at all times during the PAGA Period, has done business in
16 California as a chain of grocery stores. Defendant, in the course of operating its business in
17 California during the PAGA Period, employed Plaintiff and more than 25,000 Aggrieved
18 Employees.

19 14. Upon information and belief, Plaintiff and the other Aggrieved Employees are
20 covered by California Industrial Welfare Commission Occupational Wage Order No. 7-2001.

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

27 16. These minimum wage standards apply to each hour employees worked or were
28 subject to control by the employer for which they were not paid. Therefore, an employer’s failure

1 to pay for any particular hour of time worked by an employee or subject to the employer's control
2 is unlawful, even if averaging an employee's total pay over all hours worked, paid or not, results
3 in an average hourly wage above minimum wage. *Armenta v. Osmose, Inc.*, 135 Cal. App. 4th
4 314, 324 (2005). Time spent by employees pre-shift under the control of an employer is certainly
5 compensable, yet unpaid.

6 17. Here, Defendant required Plaintiff and all Aggrieved Employees to regularly
7 perform work-off-the-clock for which they did not receive any compensation. Specifically, as part
8 of the Aggrieved Employees' employment, from March 2020 to the present, Defendant required
9 Plaintiff and all Aggrieved Employees to undergo COVID-19 temperature checks prior to the
10 start of their shift, and before they "clock in." Although Defendant maintained a common policy
11 and practice of requiring Plaintiff and the Aggrieved Employees to stand/wait in line for COVID-
12 19 temperature checks, or to do such temperature checks before clocking in, and then walk to
13 their timeclocks, Defendant failed to compensate Plaintiff and the other Aggrieved Employees for
14 such time.

15 18. Employees must be paid for all "hours worked." "Hours worked" is considered
16 "the time during which an employee is subject to the control of an employer, and includes all the
17 time the employee is suffered or permitted to work, whether or not required to do so." *See Wage*
18 *Order 7-2001, Subd. 2(G); see also Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal. 4th
19 833. "[I]t is only necessary that the worker be subject to the control of the employer in order to be
20 entitled to compensation." *Morillion v. Royal Packing Co.*, 22 Cal. 4th 575, 584 (2000). An
21 employee is under the employer's control and entitled to compensation when the employer
22 "directs, commands or restrains" an employee." *Morillion*, 22 Cal. 4th at 583 (citation omitted).

23 19. As the California Supreme Court made clear in *Morillion*, when determining
24 whether an employee's activity is under the employer's control entitling him or her to
25 compensation, the touchstone is not whether the employer requires the activity and thus whether
26 employees can avoid it, but the level of control employers exert over employees during the
27 activity: "The level of the employer's control over its employees, *rather than the mere fact that*
28 *the employer requires the employees' activity, is determinative.*" *Morillion*, 22 Cal. 4th at 587

1 (emphasis added).

2 20. In *Frlekin v. Apple Inc.*, 8 Cal. 5th 1038, 1056 (2020) (citing *Morillion*, 22 Cal. 4th
3 at 587), the California Supreme Court found that time employees spent undergoing bag searches
4 at the end of their shifts was compensable. The Court reasoned its decision by analyzing factors in
5 determining whether an employer has exerted compensable control over employees:

6 We also emphasize that whether an activity is required remains probative in
7 determining whether an employee is subject to the employer's control. But, at least
8 with regard to cases involving *onsite* employer-controlled activities, the mandatory
9 nature of an activity is not the only factor to consider. We conclude that courts
10 may and should consider additional relevant factors—including, but not limited to,
11 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.

12 *Frlekin*, 8 Cal. 5th at 1056 (italics in original).

13 21. To be free of the employer's control for purposes of "hours worked," the employee
14 must be free to use his or her time "effectively for his or her own purposes." *Morillion*, 22 Cal.
15 4th at 583.

16 22. Here, as in *Frlekin*, the Class and Aggrieved Employees could not avoid
17 Defendant's COVID-19 temperature checks (which took place on or just outside Defendant's
18 premises and before employees could clock in) and could not then use their time effectively for
19 their own purposes. As such, Defendant exercised compensable control over the Aggrieved
20 Employees who underwent COVID-19 temperature checks, and stood in line to do so, and owes
21 wages to the Aggrieved Employees for this time.

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

1 24. The California Department of Industrial Relations (“DIR”) recently issued
2 guidance regarding pre-shift worksite temperature checks. *See* Cal. Dept. of Industrial Relations,
3 Safe Reopening FAQs for Workers and Employers (July 8, 2021), available at
4 https://www.dir.ca.gov/covid19/FAQs_COVID-19_Safe_Reopening.htm. The DIR provides the
5 following in FAQ #10 titled “Medical Checks, Testing, and Vaccinations”:

6 Q: Must my employer pay me for time spent at my employer’s worksite
7 completing certain medical checks (including temperature checks) before
8 beginning a shift?

9 A: Yes. Employers must pay workers for all hours worked, including time that a
10 worker is under the control of the employer. Employers that require their workers
11 to complete a medical check in order to begin a shift, even if it is recommended
12 under public health orders, must compensate workers for that time worked.

13 The term “hours worked” means the time during which a worker is subject to the
14 control of an employer and includes all the time the worker is suffered or
15 permitted to work, whether or not required to do so. Under this definition, one
16 way to determine whether time a worker spends performing a task is
17 compensable—that is, whether it is time “worked”—is whether the employer
18 exercised control over the worker by requiring the worker to perform that task.

19 If an employer requires that all workers perform a medical check (such as a
20 temperature check) onsite before beginning a shift, the time completing the
21 medical check, including any time waiting in line, would constitute time worked.
22 This requirement applies even if such tasks were performed pursuant to a state or
23 local public health guideline, because the check is done at the request and thus
24 under the control of the employer.

25 25. The United States Department of Labor has also said that temperature checks are
26 compensable if they are “necessary” to the employee’s job. *See*
27 <https://www.dol.gov/agencies/whd/flsa/pandemic>. The Department provided the following
28 example:

1
2 For many employees, undergoing a temperature check before they begin work
3 must be paid because it is necessary for their jobs. For example, if a nurse who
4 performs direct patient care services at a hospital is required to check her
5 temperature upon arrival at the hospital before her shift, the time that she spends
6 checking her temperature upon entry to the worksite is likely compensable because
7 such a task is necessary for her to safely and effectively perform her job during the
8 pandemic.

9 26. In sum, Defendant's policy and practice of requiring Plaintiff and the Aggrieved
10 Employees to undergo pre-shift COVID-19 temperature checks clearly violates Labor Code §
11 1194. As a result of Defendant's policy and practices described above, Defendant regularly failed
12 to pay Plaintiff and all Aggrieved Employees for all hours worked in violation of Labor Code §
13 1194 and 1197. Defendant required pre-shift temperature checks at all of its grocery stores in
14 California during the PAGA Period.

15 27. Labor Code Section 1197.1, subdivision (a), authorizes employees who are paid
16 less than the minimum fixed by an applicable state or local law, or by an order of the commission
17 a civil penalty, restitution of wages, and liquidate damages as follows: (1) for any initial violation
18 that is intentionally committed, one hundred dollars (\$100) for each underpaid employee for each
19 pay period for which the employee is underpaid . . . [and] (2) [f]or each subsequent violation for
20 the same specific offense, two hundred fifty dollars (\$250) for each underpaid employee for each
21 pay period for which the employee is underpaid regardless of whether the initial violation is
22 intentionally committed. As set forth above, Defendant failed to compensate Plaintiff and all
23 Aggrieved Employees for all hours worked. Accordingly, through PAGA, Plaintiff and all
24 Aggrieved Employees are entitled to recover liquidated damages for violations of Labor Code §
25 1197.1. Based upon these same factual allegations, Plaintiff and all Aggrieved Employees are
26 entitled to penalties under Labor Code Section 1199.

27 28. Similarly, Labor Code § 1194.2 authorizes employees to recover liquidated
28 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, as well as PAGA penalties for not having received pay for such time.

1 29. As to Plaintiff and all Aggrieved Employees, due to the non-inclusion of pre-shift
2 time in “hours worked” and earnings, Defendant also failed to provide accurate itemized wage
3 statements in accordance with Labor Code § 226(a). Labor Code § 226 obligates employers,
4 semi-monthly or at the time of each payment to furnish an itemized wage statement in writing
5 showing:

- 6 (1) gross wages earned;
7 (2) total hours worked by the employee;
8 (3) the number of piece-rate units earned and any applicable piece rate if the
9 employee is paid on a piece rate;
10 (4) all deductions, provided that all deductions made on written orders of the
11 employee may be aggregated and shown as one item;
12 (5) net wages earned;
13 (6) the inclusive dates of the period for which the employee is paid;
14 (7) the name of the employee and only the last four digits of his or her social
15 security number or an employee identification number other than a social security
16 number;
17 (8) the name and address of the legal entity that is the employer...;
18 (9) all applicable hourly rates in effect during the pay period and the
19 corresponding number of hours worked at each hourly rate by the employee...

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

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

27 (2) (A) An employee is deemed to suffer injury for purposes of this subdivision if the
28 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

1 security number or an employee identification number other than a social security
2 number.

3 31. Defendant knowingly and intentionally failed to include on Aggrieved Employees’
4 wage statements all pay due to Plaintiff and all Aggrieved Employees for all minimum wages
5 associated with time spent pre-shift on COVID-19 temperature checks. Moreover, Plaintiff and
6 all Aggrieved Employees also suffered legal “injury” for purposes of Labor Code section 226(e)
7 insofar as they were unable to readily and easily determine the information required to be set
8 forth by Section 226(a). Specifically, Plaintiff and the Aggrieved Employees were unable to
9 determine the actual and accurate total hours worked by the employees, the gross wages earned,
10 and the net wages earned, since time spent on COVID-19 temperature checks and waiting in line
11 was always done off the clock and pre-shift.

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

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

28 34. Labor Code § 204 expressly requires that “[a]ll wages...earned by any person in

1 any employment are due and payable twice during each calendar month, on days designated in
2 advance by the employer as the regular paydays.”

3 35. Due to Defendant’s failure to pay Plaintiff and all Aggrieved Employees on timely
4 and bi-monthly basis for all applicable minimum wages, Defendant failed to timely pay Plaintiff
5 and all Aggrieved Employees all wages owed within seven (7) days of the close of the payroll
6 period in accordance with Labor Code § 204(d) on a regular and consistent basis.

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

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

21 38. Under Labor Code §§ 201-202, an employer must provide an employee wages at
22 the time of discharge or within up to seventy-two (72) hours of their resignation. Labor Code §
23 203 provides “If an employer willfully fails to pay . . . any wages of an employee who is
24 discharged or who quits, the wages of the employee shall continue as a penalty. . .” for up to 30
25 days. Labor Code § 203; *Mamika v. Barca*, 68 Cal. App. 4th 487, 492 (1998).

26 39. In addition, Labor Code § 256 provides that the Labor Commissioner “shall
27 impose a civil penalty in an amount not exceeding 30 days’ pay as waiting time under the terms
28 of Section 203. The California Supreme Court and California Court of Appeal have both

1 specifically recognized the ability of an aggrieved employee to recover civil penalties under
2 Labor Code § 256 for a defendant's willful violation of Labor Code § 201 and 202 under PAGA.
3 In *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348, 381 (2014), the California
4 Supreme Court acknowledged that PAGA penalties for the untimely payment of wages included
5 the 30 days of pay as waiting time pursuant to Labor Code § 256. *See also Esparza v. KS*
6 *Industries, L.P.*, 13 Cal. App. 5th 1228, 1242 (2017) (explaining that the Labor Code § 256
7 penalties only exist if the employer's failure to timely pay wages upon separation was willful as a
8 "civil penalty" "recovered or imposed by the Labor Commissioner.").

9 40. Defendant failed to pay Plaintiff and other Aggrieved Employees whose
10 employment with Defendant has now ended, all wages owed, including but not limited to
11 minimum wages for COVID-19 screening time pre-shift within the time constraints proscribed in
12 Labor Code §§ 201-202 at the time of their termination/separation. Thus, as result of Defendant's
13 faulty policies described above, Plaintiff and all Aggrieved Employees who are no longer
14 employed by Defendant left their employment with Defendant without being compensated for
15 each and every hour worked at the appropriate rate in violation of Labor Code §§ 201, 202, 203.

16 41. Plaintiff has fully and completely exhausted his administrative remedies under
17 PAGA prior to proceeding with this action. Specifically, Plaintiff filed his PAGA Notice online
18 with the Labor Workforce Development Agency ("LWDA") and sent it by certified mail to
19 Defendant setting forth the facts and theories of the violations alleged against Defendant, as
20 prescribed by Labor Code § 2699 *et seq.* on August 24, 2021 (See **Exhibit A**).

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

26 43. Plaintiff, by this action, seeks to recover on behalf of himself and all other current
27 and former Aggrieved Employees of Defendant the civil penalties provided by PAGA, as
28 specified in Labor Code § 2699(f). Plaintiff seeks to recover the PAGA civil penalties through a

1 representative action as permitted by PAGA and the California Supreme Court in *Arias v.*
2 *Superior Court*, 46 Cal. 4th 969 (2009). Class certification of the PAGA claims is not required.
3 *Id.*

4 **V. FIRST CAUSE OF ACTION**

5 **PLAINTIFF AND ALL AGGRIEVED EMPLOYEES AGAINST ALL DEFENDANTS**
6 **FOR PENALTIES PURSUANT TO LABOR CODE § 2699, ET SEQ. FOR VIOLATIONS**
7 **OF LABOR CODE §§ 201, 202, 203, 204, 210, 226(a), 226(e), 226.3, 1194, 1197, 1197.1, AND**
8 **1199, AS WELL AS IWC WAGE ORDER NO. 7-2001**

9 44. Plaintiff, on behalf of himself, all Aggrieved Employees, and the State of
10 California, realleges and incorporates by reference all previous paragraphs.

11 45. As a result of the acts alleged above, Plaintiff seeks penalties under Labor Code
12 § 2699, *et seq.* because of Defendant's violations of Labor Code §§ 201, 202, 203, 204, 210,
13 226(a), 226(e), 226.3, 1194, 1197, 1197.1, and 1199, as well as IWC Wage Order No. 7-2001.

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

18 \$100 for the initial violation per employee per pay period; and

19 \$200 for each subsequent violation per employee per pay period.

20 47. Courts in California have held that the stepped-up \$200 per pay period PAGA
21 penalties are only triggered after Plaintiff's LWDA letter is submitted and Defendant is thus
22 placed on notice of the claim. *See Amaral v. Cintas Corp. No. 2*, 163 Cal. App. 4th 1157, 1209
(2008); *see also Bernstein v. Virgin Am., Inc.*, No. 19-15382, 2021 WL 867583 (9th Cir. Feb. 23,
2021) (stepped up penalties only triggered by ruling against employer on the merits).

23 48. These PAGA penalties shall be allocated seventy-five percent (75%) to the Labor
24 and Workforce Development Agency (LWDA) and twenty-five percent (25%) to the affected
25 employees, as set forth in Labor Code section 2699(i).

26 49. Labor Code § 210 provides that "in addition to, an entirely independent and apart
27 from, any other penalty provided in this article, every person who fails to pay the wages of each
28 employee as provided in Sections . . . 204 . . . shall be subject to a civil penalty as follows: (1) For

1 any initial violation, one hundred dollars (\$100) for each failure to pay each employee[;] (2) For
2 each subsequent violation, or any willful or intentional violation, two hundred dollars (\$200) for
3 each failure to pay each employee, plus 25 percent of the amount unlawfully withheld.” As a
4 result of the faulty compensation policies and practices described in detail above, the State of
5 California is entitled to recover penalties under Labor Code § 210 through PAGA.

6 **VI. RELIEF REQUESTED**

7 **WHEREFORE**, Plaintiff prays for the following relief:

8 1. For penalties and other relief allowable under Labor Code § 2699, *et seq.* for
9 Plaintiff and all Aggrieved Employees because of Defendant’s violation of, without limitation,
10 Labor Code §§ 201, 202, 203, 204, 210, 226(a), 226(e), 226.3, 1194, 1197, 1197.1, and 1199, as
11 well as IWC Wage Order No. 7-2001.

12 2. A civil penalty against Defendant in the amount of \$100 for the initial violation
13 and \$200 for each subsequent violation as specified in section 2699(f)(2) of the California Labor
14 Code for Plaintiff and all Aggrieved Employees for each and every pay period during that
15 occurred between March 16, 2020, and the present;

16 3. An award of reasonable attorney’s fees against Defendant as allowed by law,
17 including without limitation, in Labor Code § 2699(g)(1), for all the work performed by the
18 undersigned counsel in connection with the PAGA claims;

19 4. An award of all costs incurred by the undersigned counsel for Plaintiff in
20 connection with Plaintiff’s and the Aggrieved Employees’ claims against Defendant as allowed
21 by law, including without limitation, Labor Code § 2699(g)(1);

22 5. Such other and further relief as this Court may deem proper and just.

23 Dated: November 1, 2021

ACKERMANN & TILAJEF, P.C.
PROXY LAW FIRM LLP

24
25 By: 

CRAIG J. ACKERMANN, ESQ.
RANA NADER, ESQ.
HENGAMEH SAFAEI, ESQ.
Attorneys for Plaintiff and the Aggrieved
Employees

EXHIBIT A

August 24, 2021

Filed Via LWDA's PAGA Claim Notice Online Form

Copies Sent Via Certified Mail to:

Human Resources
Ralphs Grocery Company
1100 West Artesia Boulevard
Compton, California 90220

Human Resources
Ralphs Grocery Company
1014 Vine Street
Cincinnati, Ohio 45202

Re: *William A. Cornejo v. Ralphs Grocery Company*
California Labor Code §2699.3; Notice of Intent to File Suit

Gentlepersons:

Our firm, Ackermann & Tilajef, P.C. along with our co-counsel, Proxy Law Firm LLP, represents William A. Cornejo ("Plaintiff") in connection with his individual and PAGA representative claims against Defendant Ralphs Grocery Company ("Defendant" or "Ralphs") based on underlying violations of Labor Code sections 201, 202, 203, 204, 210, 226, 1194, 1198, and 1199.

Plaintiff intends to pursue claims for PAGA penalties during the period of time from one year and six months ago and ongoing (the "PAGA Period") in a PAGA representative action to be filed in the Superior Court of California (the "Action").¹

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 Ralphs Grocery Company, 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.

Defendant's 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. 9-2001 obligates employers to pay each employee minimum wages for all hours worked.

¹ The PAGA Period in this case goes back an additional six months because Emergency Rule 9 tolled the statute of limitations for civil causes of action from April 6, 2020 until October 1, 2020.

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 v. Osmose, Inc.*, 135 Cal. App. 4th 314, 324 (2005).

Defendant 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 Aggrieved Employees' employment, from March 2020 to the present, Defendant required Plaintiff and all Aggrieved Employees to undergo COVID-19 temperature checks prior to the start of their shift. Although Defendant maintained a common policy and practice of requiring Plaintiff and the Aggrieved Employees to stand/wait in line for COVID-19 temperature checks, or do such temperature checks before clocking in, Defendant failed to compensate Plaintiff and the other 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

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

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 Defendant's COVID-19 temperature checks (which took place on or just outside 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 owes wages to the Aggrieved Employees for this time.

The California Department of Industrial Relations recently issued guidance that supports Plaintiff's claim that Defendant unlawfully failed to pay him and the Aggrieved Employees for time associated with worksite temperature checks before clocking in for their shifts. See Cal. Dept. of Industrial Relations, Safe Reopening FAQs for Workers and Employers (July 8, 2021), available at https://www.dir.ca.gov/covid19/FAQs_COVID-19_Safe_Reopening.htm, which provides the following in regard to FAQ #10 (titled "Medical Checks, Testing, and Vaccinations"):

10. Q: Must my employer pay me for time spent at my employer's worksite completing certain medical checks (including temperature checks) before beginning a shift?

A: Yes. Employers must pay workers for all hours worked, including time that a worker is under the control of the employer. Employers that require their workers to complete a medical check in order to begin a shift, even if it is recommended under public health orders, must compensate workers for that time worked.

The term "hours worked" means the time during which a worker is subject to the control of an employer, and includes all the time the worker is suffered or permitted to work, whether or not required to do so. Under this definition, one way to determine whether time a worker spends performing a task is compensable—that is, whether it is time "worked"—is whether the employer exercised control over the worker by requiring the worker to perform that task.

If an employer requires that all workers perform a medical check (such as a temperature check) onsite before beginning a shift, the time completing the medical check, including any time waiting in line, would constitute time worked. This requirement applies even if such tasks were performed pursuant to a state or local public health guideline, because the check is done at the request and thus under the control of the employer.

The United States Department of Labor has also said that temperature checks are compensable if they are "necessary" to the employee's job.

<https://www.dol.gov/agencies/whd/flsa/pandemic> The Department provided the following example:

For many employees, undergoing a temperature check before they begin work must be paid because it is necessary for their jobs. If a nurse who performs direct patient care services at a hospital is required to check her temperature upon arrival at the hospital before her shift, the time that she spends checking her temperature upon entry to the worksite is likely compensable because such a task is necessary for her to safely and effectively perform her job during the pandemic.

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, in light of new technologies allowing time-tracking with specificity, 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*, 8 Cal. 5th at 1046 (defining “hours worked” 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[,]” including time spent on-site undergoing security checks).

Notably, through its policy and practice of requiring Plaintiff and the Aggrieved Employees to undergo pre-shift COVID-19 temperature checks, Defendant clearly violated Labor Code § 1194. As a result of Defendant’s policy and practices described above, Defendant 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 Defendant 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, Defendant 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, as well as PAGA penalties for not having received pay for such time.

Defendant's Failure to Issue Accurate/Itemized Wage Statements

As to Plaintiff and all Aggrieved Employees, Defendant 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:

- (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.

Defendant knowingly and intentionally failed to pay Plaintiff and all Aggrieved Employees all minimum wages associated with time spent pre-shift on COVID-19 temperature checks. 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 temperature checks 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) holding “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.

Defendant’s 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 Defendant’s failure to pay Plaintiff and all Aggrieved Employees on timely and bi-monthly basis for all applicable minimum wages, Defendant 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, subdivision (a), 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 percent of the amount unlawfully withheld.”

As a result of the faulty compensation policies and practices described in detail above and Defendant’s 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).

Defendant’s 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.”).

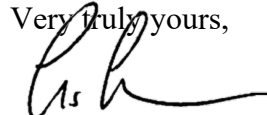
As described in detail above, Defendant failed to pay Plaintiff and other Aggrieved Employees whose employment with Defendant has now ended, all wages owed, including but not limited to minimum wages for COVID-19 screening time pre-shift within the time constraints proscribed in Labor Code §§ 201-202 at the time of their termination/separation. Thus, as result of Defendant’s faulty policies described above, Plaintiff and all Aggrieved Employees left their employment with Defendant 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 Defendant 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.

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: Rana Nader (by email)
Hengameh Safaei (by email)