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CLASS ACTIONS, MASS TORTS & CATASTROPHIC INJURIES

Marcus J. Bradley
Kiley L. Grombacher

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Labor and Workforce Development Agency
Attn: PAGA Administrator
455 Golden Gate Avenue, 9th Floor
San Francisco, CA 94102
Filed Online and Courtesy Copy Delivered
via Certified Mail

Re: ***Amended*** **Written Notice – Private Attorney General Act ("PAGA") – Labor Code section 2698 *et seq.***
Yolanda Martinez v. Sam's West, Inc. dba Sam's Club
LWDA Case No. LWDA-CM-877820-22

PAGA Administrator:

Amended Notice is hereby provided that, pursuant to Labor Code section 2699.3, Yolanda Martinez ("Employee") contends Sam's West dba Sam's Club ("Sam's") has violated, and continues to violate, provisions of the Labor Code and wage orders promulgated by the Industrial Welfare Commission ("IWC wage order"), including, but not limited to, Labor Code sections 201-203, 221-223, 226, 226.7, 510, 512, 11741182, 1194, 1197, 1198, 2802 and the applicable IWC wage order.

In accordance with the required notice under Labor Code section 2699.3 of the Private Attorney General Act ("PAGA"), this letter shall serve as formal written notice to the Labor and Workforce Development Agency ("LWDA").

Employee was hired by Sam's in approximately December 2020. Employee worked for Sam's in San Bernardino, California until her date of separation in approximately February 2022. Employee was employed in the café and most recently worked in "Home Meal Solutions."

Employee is an "aggrieved employee" as defined in Labor Code section 2699(a) and brings this action on behalf of herself and all other aggrieved employees of Sam's. Employee, also on behalf of herself and all other aggrieved employees, seeks penalties under PAGA for Sam's violations of the Labor Code.

Sam's Club is an American chain of membership-only retail warehouse "clubs" owned and operated by Walmart. Sam's has employed thousands of other similarly situated individuals in

Bradley/Grombacher LLP
31365 Oak Crest Drive
Suite 240
Westlake Village CA 91361
T: (805) 270-7100
F: (805) 270-7589

California as "Associates" in its retail club locations. Associates work a variety of job positions inside Sam's clubs including as cashiers, stockers, meat cutters and wrappers, among other positions ("Associates").

Sam's Club is an Arkansas corporation that does business in California.

Employee and other aggrieved employees seek penalties and other compensation from Sam's for the relevant time period because Sam's:

1. Failed to pay Employee and aggrieved employees all minimum wages (Lab. Code, §§ 1182.11, 1182.12, 1194, 1197 and 1197.1);
2. Failed to pay Employee and aggrieved employees for all hours worked (Lab. Code, §§ 221-223);
3. Failed to pay Employee and aggrieved employees overtime wages (Lab. Code, § 510);
4. Failed to provide Employees and aggrieved employees with accurate, itemized wage statements and failed to maintain accurate records (Lab. Code, § 226(a));
5. Failed to Provide Employees with Compliant Meal Periods (*Lab. Code* §§ 226.7, 512, 516 and 1198);
6. Failed to Provide Employees with Compliant Rest Periods (*Lab. Code* §§ 226.7, 512, 516 and 1198);
7. Failed to Provide Sick Pay at the Regular Rate (*Lab. Code* § 246);
8. Failed to timely pay Employees and aggrieved employees all final wages in a timely manner (Labor Code, §§ 201-203).

Below please find the relevant facts and legal theories to support the aforementioned violation.

<u>Failure to Pay for All Minimum Wages</u>

At all times relevant hereto, California Labor Code §§1182.11, 1182.12 and 1197 and the Minimum Wage Order were in full force and effect and required that aggrieved employees receive at least the minimum wage 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.

The right to minimum wage cannot be waived. California Labor Code §1194 states:

> Notwithstanding any agreement to work for a lesser wage, any employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney's fees, and costs of suit.

Sam's willfully engaged in and continues to engage in a policy and practice of not compensating Employee and aggrieved employees for all hours worked or spent in its control.

Sam's failure to compensate Employee and aggrieved employees at all for this time results in the denial of the aggrieved employees' statutorily-mandated minimum wages for those periods of work, in violation of the Labor Code provisions cited herein.

Because of Sam's policies and practices with regard to compensating Employee and aggrieved employees, Sam's has failed to pay minimum wages as required by law. Employee and aggrieved employees frequently work time for which they are compensated below the statutory minimum, as determined by the Industrial Welfare Commission.

Labor Code §1194.2 provides that, in any action under §1194 to recover wages because of the payment of a wage less than minimum wage fixed by an order of the commission, an employee shall be entitled to recover liquidated damages in an amount equal to the wages unlawfully unpaid and interest thereon.

Pursuant to Labor Code §218.6 or Civil Code §3287(a), Employee and aggrieved employees are entitled to recover pre-judgment interest on wages earned, but not paid every pay period.

As a direct and proximate result of the unlawful acts and/or omissions of Sam's, Employee and aggrieved employees have been deprived of minimum wages in an amount to be determined at trial, and are entitled to a recovery of such amount, plus liquidated damages, plus interest thereon, attorneys' fees, and costs of suit pursuant to Labor Code §§ 1194, 1194.2 and 1197.1.

Sam's regularly failed to pay at least minimum wages to Employee and other aggrieved employees for all of the hours they worked in violation of Labor Code sections 1194, 1197, 1197.1 and 1198. Employee and other aggrieved employees are entitled to recover civil penalties, attorney's fees, costs, and interest thereon, pursuant to Labor Code sections 1197.1 and/or 2699(a), (f)-(g).

Failure to Pay for All Hours Worked

At all times relevant hereto, California Labor Code §§221-223 prohibit employers from withholding and deducting wages, or otherwise artificially lowering the wage scale of an employee.

Employee and other aggrieved employees are entitled to civil penalties, attorney's fees, costs, and interest thereon, pursuant to Labor Code sections 2699(a), (f)-(g).

Failure to Pay Overtime

California Labor Code §§ 510 and 1198, and the IWC Wage Order provides that employees in California shall not be employed more than eight (8) hours in any workday or forty (40) hours in any workweek unless they receive additional compensation beyond their regular wages in amounts specified by law.

Employee and aggrieved employees have worked overtime hours for Sam's without being paid overtime premiums in violation of the Labor Code, applicable IWC Wage Orders, and other applicable law.

Failure to Provide Compliant Meal Breaks

Meal breaks were typically missed, late or interrupted. Employee and aggrieved employees would work more than five hours without a meal period.

Under the foregoing, California employers must provide meal periods and authorize and permit rest periods to all employees during their shifts. In *Augustus v. ABM Security Services, Inc.* (2016) 2 Cal.5th 257, the California Supreme Court reaffirmed that the required meal and rest periods must be "off-duty," which means that employees must be relieved of "all work-related duties," including the duty to remain "on call," and they must be "free from employer control" over how they "spend their time." *Id*. at 264, 269. Employees must have the freedom to use meal and rest periods for their own purposes. *Id*. at 270; *Brinker Rest. Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1038-39.

When employees must either "remain at the ready and capable of being summoned to action," "respond when the employer seeks contact with [them]," "perform other work if the employer so requires," and/or remain "on call" during their meal and rest periods, the employees have not been "relieve[d] … of all work-related duties and employer control." *Augustus*, *supra*, 2 Cal.5th at 270. Such a meal or rest period is not "off duty" and therefore is "impermissible." *Ibid*.

The Supreme Court's decision in *Augustus* is just the latest in a series of meal and rest break cases that have affirmed California's broad, protective standard for employees.

Moreover, as the mere existence of a facially lawful meal and rest break policy is unavailing if there are practical constraints and pressures on employees to perform their duties in ways that omit breaks. *See Brinker*, *supra*, 53 Cal.4th at 1040.

Yet, Employer did and does not provide Employee and aggrieved employees with meal periods during which they are completely relieved of duty for at least thirty (30) minutes by the fifth hour of work and again by the tenth hour of work.

Thus, Employer has failed to perform its obligations to provide Employee and aggrieved employees with off-duty meal periods by the end of the fifth hour of work and a second meal period by the end of the tenth hour of work. Employer also has failed to pay Employee and aggrieved employees one (1) hour of pay at the regular rate for each off-duty meal period that they have been denied.

On July 15, 2021, the California Supreme Court issued a decision in *Ferra v. Loews Hollywood Hotel, LLC* (2021) 11 Cal.5th 858 where the court unanimously held that employers must pay premium payments to employees for missed meal, rest, and recovery breaks at the employee's "regular rate of pay" instead of their base hourly rate. The regular rate of pay may be higher than the base hourly rate because the regular rate of pay must include all nondiscretionary incentive payments, including nondiscretionary bonuses.

Employer knew or should have known that as a result of its policies and/or practices, that Employee and aggrieved employees were not actually relieved of all duties to take timely, uninterrupted meal periods. Employer further knew or should have known that it did not pay Employee and aggrieved employees all meal period premiums when meal periods were missed, late, short, and/or interrupted. Furthermore, Employee has engaged in a company-wide practice and/or policy of not paying meal period premiums owed when compliant meal periods are not provided. Because of this practice and/or policy, Employee and aggrieved employees have not received all premium pay for missed, interrupted, or late meal periods. Accordingly, Employer failed to provide all meal periods in violation of *Labor Code* §§ 226.7, 512(a), 516, and 1198.

Employee and other aggrieved employees are entitled to civil penalties, attorney's fees, costs, and interest thereon, pursuant to *Labor Code* §§ 2699(a), (f)-(g).

Failure to Provide Compliant Rest Breaks

Labor Code §§ 226.7, 516, and 1198, and the applicable IWC Wage Order require employers to provide rest periods and to pay an employee one (1) additional hour of pay at the employee's regular rate for each work day that a meal or rest period is not provided. *Labor Code* § 226.7 provides that no employer shall require an employee to work during any rest period mandated by an applicable order of the IWC. The applicable IWC wage order, section 11 provides that "[e]very employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period" and that the "rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof" unless the total daily work time is less than three and one-half (3 ½) hours.

To comply with its obligation to authorize and permit rest periods under *Labor Code* § 226.7 and the applicable IWC wage order, an employer must "relinquish any control over how employees spend their break time, and relieve their employees of all duties—including the obligation that an employee remain on call. A rest period, in short, must be a period of rest." *Augustus et al. v. ABM Security Services, Inc*. (2016) 2 Cal.5th 257, 269-270.

During the relevant time period, Employer regularly failed to authorize and permit Employee and other aggrieved employees to take a ten (10) minute rest period per each four (4) hour period worked or major fraction thereof.

As a result of Employer's practices and policies, Employee and other aggrieved employees worked shifts in excess of 3.5 hours, in excess of 6 hours, and/or in excess of 10 hours without receiving all uninterrupted 10-minute rest periods to which they were entitled.

Employer also has engaged in a company-wide practice and/or policy of not paying rest period premiums owed when compliant rest periods are not authorized and permitted. Because of this practice and/or policy, Employee and other aggrieved employees have not received premium pay for all non-compliant rest periods.

Accordingly, Employer failed to authorize and permit all rest periods in violation of *Labor Code* §§ 226.7, 516, and 1198. Employee and other aggrieved employees are entitled to civil penalties, attorney's fees, costs, and interest thereon, pursuant to *Labor Code* §§ 2699(a), (f)-(g).

Failure to Pay All Sick Wages

Sick pay must be compensated at the employee's regular rate of pay, for the workweek in which the paid leave was taken, or at a rate determined by averaging over 90-days. (Lab. Code § 246(1)).

Employer failed to pay Employee and aggrieved employees sick pay at the correct rate. Employee received compensation in addition to hourly wages, but those additional amounts were not included when calculating sick pay wages.

Failure to Reimburse Business Expenses

At all times relevant hereto, Employer had company-wide policies and/or practices whereby non-exempt employees were required to undertake expenses on Employer's behalf.

Accordingly, Employer regularly failed to reimburse Employee and other aggrieved employees for all expenses they incurred in facilitating their job duties in violation of *Labor Code* § 2802.

Wage Statements

Labor Code section 226(a) requires employers to make, keep, and provide true, accurate, and complete wage records. Sam's has not provided Employee and other aggrieved employees with properly itemized wage statements. Labor Code section 226(e) provides that if an employer fails to comply with providing an employee with properly itemized wage statements as set forth in section 226(a), then the employee is entitled to recover the greater of all actual damages or $50 for the initial pay period in which a violation occurs and $100 per employee for each violation in a subsequent pay period, not to exceed $4,000. Further, Labor Code section 226.3 provides that any employer who violates section 226(a) shall be subject to a civil penalty in the amount of $250 per employee per violation in an initial citation and $1,000 per employee for each violation in a subsequent citation, for which the employer fails to provide the employee a wage statement or fails to keep the required records pursuant to section 226(a).

During the relevant time period, Sam's knowingly and intentionally provided Employee and other aggrieved employees with uniform, incomplete, and inaccurate wage statements. For example, Sam's issued uniform wage statements to Employee and other aggrieved employees that fail to correctly list: gross wages earned; total hours worked; net wages earned; and all applicable hourly rates in effect during the pay period, including rates of pay for overtime wages and/or meal and rest period premiums, and the corresponding number of hours worked at each hourly rate.

Specifically, Sam's violated sections 226(a)(1), 226(a)(2), 226(a)(5), and 226(a)(9). Because Sam's did not record the time Employee and other aggrieved employees spent working off-the-clock, Sam's did not list the correct amount of gross wages and net wages earned by Employee and other aggrieved employees in compliance with section 226(a)(1) and section 226(a)(5), respectively. For the same reason, Sam's failed to accurately list the total number of hours worked by Employee and other aggrieved employees, in violation of section 226(a)(2), and failed to list the applicable hourly rates of pay in effect during the pay period and the corresponding accurate number of hours worked at each hourly rate, in violation of section 226(a)(9). For the same reason, Sam's also failed to list the correct amount of net wages in violation of section 226(a)(5).

Employee and other aggrieved employees are entitled to recover civil penalties, attorney's fees, costs, and interest thereon pursuant to Labor Code sections 226.3, 1174.5, and/or 2699(a), (f)-(g).

Failure to Timely Pay Final Wages Upon Termination

As a pattern and practice, Sam's regularly failed to pay Employee and aggrieved employees their final wages pursuant to Labor Code sections 201-203.

Labor Code sections 201 and 202 provide that if an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately, and that if an employee voluntarily leaves his or her employment, his or her wages shall become due and payable not later than seventy-two (72) hours thereafter, unless the employee has given seventy-two (72) hours previous notice of his or her intention to quit, in which case the employee is entitled to his or her wages at the time of quitting.

On information and belief, Sam's has a company-wide practice or policy of failing to pay all accrued wages to departing employees and don't adhere to the time requirements set forth in Labor Code sections 201 and 202.

Sam's willfully failed to pay Employee and aggrieved employees the earned and unpaid wages set forth above, including but not limited to minimum wages, either at the time of discharge, or within seventy-two (72) hours of their leaving Sam's employ.

Employee respectfully requests that the LWDA notify this office within sixty (60) days if it wishes to investigate this matter further. A copy is being sent via certified mail to Sam's. Should you have any questions or concerns or require additional information, please do not hesitate to contact the undersigned.

Thank you for your time and consideration.

Very truly yours,

BRADLEY/GROMBACHER, LLP

Kiley Grombacher
Kiley L. Grombacher, Esq.

cc: Sam's West, Inc.
702 SW 8th Street
Bentonville AR 72716

CT Corporation System:
Agent for Service of Process for
Sam's West Inc.
330 N Brand Blvd Ste 700
Glendale CA 91203