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LABOR & WORKFORCE DEVELOPMENT AGENCY
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Via Electronic Submission: https://dir.tfaforms.net/308

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Via Certified Mailing # 9589 0710 5270 1148 9687 30

We Love Berries LLC
C/O Lucio Vargas
1240 Professional Pkwy B
Nipomo, CA 93444
Via Certified Mailing # 9589 0710 5270 1148 9687 47

Re: Romulo Agustin-Chavez v. We Love Berries LLC
California Labor Code § 2699 Penalties

Gentlepersons:

This office represents Romulo Agustin-Chavez ("Plaintiff") and a proposed group of current and former employees working for We Love Berries LLC ("Defendant") in the State of California. The purpose of this letter is to comply with the Private Attorneys General Act of 2004, pursuant to California Labor Code § 2698, *et. seq.* We herein set forth the facts and theories of California Labor Code violations which we allege Defendant engaged in with respect to Plaintiff and all of Defendant's aggrieved employees.

Plaintiff wishes to bring a representative action on behalf of himself and the State of California as well as on behalf of a group of aggrieved employees defined as: All persons who are employed or have been employed as a non-exempt employee by We Love Berries LLC, in the State of California since one (1) year prior to the date of this letter and continuing to the present. ("aggrieved employees").

Plaintiff and the aggrieved employees worked for Defendant in or near Santa Barbara County, California as seasonal agricultural workers. Plaintiff and the aggrieved employees worked in the cultivation and harvesting of strawberries, and doing other agricultural work on land owned, leased, managed, and/or operated, harvested, or otherwise made productive by Defendant. Plaintiff and the aggrieved employees were paid on an hourly basis and also earned a piece rate for work picking crops.

Defendant has violated Labor Code §§ 510, 1194, 1194.2 and 1199. These statutes require an employer to compensate its employees at the minimum wage rate for all hours worked and at a rate of no less than one and one-half times the *regular rate of pay* for any work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek. Any work in excess of 12 hours in one day shall be compensated at the rate of no less than twice the *regular rate of pay*. California law also requires that any compensation must be included in the regular rate of pay for the purposes of determining correct overtime rates.

Here, Defendant has had a consistent policy of failing to pay wages and/or overtime to Plaintiff and all aggrieved employees. Plaintiff and other aggrieved employees were not properly compensated for all hours worked over eight (8) hours in one day or forty (40) hours in one week. Plaintiff and the aggrieved employees were not properly compensated for all hours worked, because Defendant failed to pay Plaintiff and the aggrieved employees for each and every hour worked. Plaintiff and the aggrieved employees routinely worked “off the clock” and performed compensable activities before, during, and after each working shift for which no pay was provided as detailed below.

With regard to pre-shift work, Plaintiff and the aggrieved employees are required to report to work prior to their scheduled shift and perform work but are routinely told by Defendant to wait before Plaintiff and the aggrieved employees can begin their scheduled shifts. Plaintiff and the aggrieved employees are required to arrive to the ranch at least ten minutes up to an hour early. Plaintiff and the aggrieved employees were told to start the harvest before the official clock-in time but were not paid for this time worked. In addition, Plaintiff and the aggrieved employees are required to walk ten (10) to thirty (30) minutes every day from their cars to the field and spend time prepping materials and boxes for the day of work, all of which is performed while “off the clock” and no pay is provided. This required “off the clock” pre-shift work is performed daily and Plaintiff and the aggrieved employees are not compensated for this wait time or worked performed. During winter, Plaintiff and the aggrieved employees are required to wait between ten (10) to fifteen (15) minutes at least three times during the season before they begin their scheduled shifts. This required waiting time is not compensated by Defendant. These activities and time are compensable, but Defendant fails to pay Plaintiff and the aggrieved employees for this time worked.

In the middle of shifts, Defendant required Plaintiff and the aggrieved employees to travel between fields once Plaintiff and the aggrieved employees are done picking at one field. Plaintiff and the aggrieved employees are required to use their own vehicles(s) to travel between fields per shift, at least once per season. The time spent by Plaintiff and the aggrieved employees to travel between fields took about ten (10) minutes. Plaintiff and the aggrieved employees are not compensated for this travel time, nor are Plaintiff and the aggrieved employees reimbursed for their use of their personal vehicle to perform required work.

With regard to post-shift work, at the end of each working shift, Plaintiff and the aggrieved employees are instructed by the foreman to continue working to finish their boxes and wait for the foreman to count the boxes manually before they could be dismissed. Plaintiff and the aggrieved employees worked from approximately ten (10) minutes to thirty (30) minutes frequently after the end of their shift in order to finish their boxes and wait for the foreman to count the boxes. Additionally, after the foreman announces the end of the shift, the employees are required to line up with their boxes to drop off at the truck. Packing and lining up to drop off their boxes takes between five (5) to twenty (20) minutes every day. This time spent finishing their boxes, lining up with their boxes, and returning them to the truck was performed after being "clocked out" and as such, Plaintiffs and the aggrieved employees are not compensated for this time even though this time is compensable.

Additionally, Defendant has had a consistent policy of failing to pay wages and/or overtime to Plaintiff and the aggrieved employees at the appropriate rate of pay. Plaintiff and other aggrieved employees were not properly compensated for all hours worked over eight (8) hours in one day or forty (40) hours in one week because Defendant failed to pay travel time and include work performed off-the-clock. Therefore, failed to compensate Plaintiff and the aggrieved employees for all hours worked.

Pursuant to Labor Code § 226.7 and Wage Order 14-2001, Defendant failed to provide Plaintiff and the aggrieved employees with rest breaks of not less than ten (10) minutes per four (4) hour work period, or major fraction thereof. Defendant failed to appraise Plaintiff and the aggrieved employees of their rights associated with rest periods and failed to provide all required ten (10) minute rest periods. Plaintiff and the aggrieved employees did not receive a <u>second</u> rest period despite Defendant regularly requiring Plaintiff and the aggrieved employees to work over six (6) hours. Defendant failed to provide Plaintiff and the aggrieved employees with second rest periods during the 2022-2023 seasons.

In addition, Plaintiff and the aggrieved employees were not compensated with one (1) hour of wages for each compliant rest period not provided as required by Labor Code § 226.7. In *Ferra v. Loews Hollywood Hotel, LLC*, the California Supreme Court set forth the formula for calculating the one extra hour of premium pay that employees are owed if an Employer fails to provide a compliant meal period or rest break. Specifically, the Court held that those premium payments must include the hourly value of any nondiscretionary earnings (such as a nondiscretionary bonuses), and cannot simply be paid at an employee's base hourly rate. Here, Defendant has had a consistent policy of failing to pay rest period premiums in compliance with

California law. Defendant has had a consistent policy of failing to pay rest premiums in violation of Labor Code § 226.7.

In addition, Labor Code § 2802 provides that an employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful.

Defendant has failed to reimburse Plaintiff and aggrieved employees the cost of using their personal tools for business related purposes. Defendant requires Plaintiff and the aggrieved employees to purchase a variety of tools in order to perform their work adequately. These tools/equipment include (1) harvest cart - $60.00 per season; (2) tires for harvest cart - $25.00, four times per season; (3) specialized knife - $12.00, twice per season; (4) gloves - $28.00, up to fifteen times per season; (5) boots - $45.00, twice per season. None of these tools are provided by Defendant. Defendant did provide Plaintiff and the aggrieved employees with scissors, but they were in poor condition, so most employees had to purchase their own. Defendant failed to reimburse Plaintiff and the aggrieved employees for the costs associated with purchasing and using these tools/equipment.

Defendant also required Plaintiff and all aggrieved employees to travel between fields to perform work tasks. Because Defendant did not provide buses or other transportation to workers so that they could travel from field to field in the middle of their shifts, Plaintiff and the aggrieved employees used their own vehicles to travel from field to field. Defendant did not reimburse Plaintiff and the aggrieved employees for their vehicle use or gas for travel between Defendant's job sites during the course of a work shift, in violation of California law.

As a result of the claims alleged above, Defendant engaged in a practice of failing to provide accurate itemized wage statements in violation of Labor Code § 226(a) which requires that every employer shall, semimonthly or at the time of each payment of wages, furnish each of his or her employees, an accurate itemized statement in writing showing all applicable hourly rates in effect during the pay period, and the corresponding number of hours worked at each hourly rate by the employee.

Labor Code §226(a)(2) requires that every employer shall semimonthly or at the time of each payment of wages, furnish each of his or her employees, an accurate itemized statement in writing showing the total hours worked by the employee. Plaintiff and the aggrieved employees are issued wage statements that do not include the total hours worked by the employee. As such, Plaintiff is an aggrieved employee within the meaning PAGA and Defendants has violated Labor Code §226(a) with respect to Plaintiff and all aggrieved employees.

Also, Defendant issued to Plaintiff and the aggrieved employees itemized wage statements that did not include all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee, in violation of Labor Code § 226(a)(9). The itemized wage statements provided to Plaintiff and the aggrieved employees did not include the hours worked at each hourly rate.

Labor Code § 203 provides that 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 from the due date thereof at the same rate until paid or until an action therefor is commenced; but the wages shall not continue for more than 30 days." Here, Plaintiff and all aggrieved employees were not paid all wages due upon their separation from Defendant's employ or upon each seasonal lay off. As such, Plaintiff is an aggrieved employee and Defendant failed to pay Plaintiff and all aggrieved employees all wages due at the time of termination, seasonal lay off, or within seventy-two (72) hours of their resignation, and have failed to pay those sums for thirty (30) days thereafter in violation of Labor Code §203. As such, Defendant failed to pay Plaintiff and all aggrieved employees all wages due at the time of termination, seasonal lay off, or within seventy-two (72) hours of their resignation, and have failed to pay those sums for thirty (30) days thereafter in violation of Labor Code §§201, 202, and 203. (See *Huff v. Securitas Security Services USA, Inc.* (2018) 23 Cal.App.5th 745, 754, reh'g denied (June 13, 2018), review denied (Aug. 8, 2018), allowing named Plaintiffs to pursue PAGA penalties for violations not personally suffered. .). In cases involving seasonal layoffs due to the end of harvest seasons, courts have routinely found employees discharged from seasonal agricultural work are entitled to waiting time penalties for each seasonal layoff. See *Doe v. D.M. Camp & Sons*, No. CIV-F051417AWISMS, 2009 WL 921442, at *12 (E.D. Cal. Mar. 31, 2009) (*citing Smith v. Sup. Ct*., 39 Cal.4th 77, 86 (2006)); *Valenzuela v. Giumarra Vineyards Corp.*, 614 F. Supp. 2d 1089, 1103 (E.D. Cal. 2009). This comports with the public policy that favors the full and prompt payment of earned wages. *See, e.g.*, *Barnhill v. Robert Saunders & Co.* (1981) 125 Cal.App.3d 1, 7; *Mamika, supra,* 68 Cal.App.4th at 492.

Further, under Labor Code § 2699.3(c)(2)(A), Defendant may cure the alleged violations within thirty-three (33) calendar days of the postmark date of this notice and within that period, give notice by certified mail if the alleged violation is cured, including a description of actions taken.

We are constrained to move forward with the filing of this complaint alleging causes of action pursuant to Labor Code §§ 201, 202, 203, 226(a), 226.7, 510, 1194, 1194.2, 1199, and 2802, with or without the PAGA claim. Thus, any action by the LWDA would not resolve the entirety of the case, and the interest of judicial economy will be served by allowing the case to proceed as a cohesive whole.

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Very truly yours,

KINGSLEY SZAMET EMPLOYMENT LAWYERS

By: ______________________________
Kelsey M. Szamet

[KMS/tg]
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