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July 9, 2025

Filed Via LWDA's PAGA Claim Notice Online Form

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PACIFICA LOGISTICS GROUP, LLC
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PACIFICA TRUCKS, LLC
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C/O Ailan Liu, Registered Agent
310 Golden Shore, Suite 400
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Re: ***Rolando Solis v. Pacifica Trucks, LLC and Pacifica Logistics Group, LLC***
California Labor Code § 226.8 & 2699 Penalties; Notice of Intent to File Suit

To Whom It May Concern:

This letter is the written notice required by the California Labor Code Private Attorneys General Act of 2004 ("PAGA"), California Labor Code Section 2698 *et seq.,* including without limitation California Labor Code Sections 2699.3(a)(1), 2699.3(b)(1), and/or 2699.3(c)(1) of the California Labor Code, and any other applicable provision of statute, rule, or law. This letter is being sent simultaneously via online filing to the California Labor and Workforce Development Agency. This letter is an important formal legal notice which may lead to immediate action against you and your company in a court of law and in administrative proceedings, or both, and the imposition of substantial penalties and other order and remedies against you and your company.

This office represents Plaintiff Rolando Solis ("Plaintiff") and a proposed group of current and former drivers associated with Pacifica Trucks, LLC and/or Pacifica Logistics Group, LLC ("Pacifica" or "Defendant"), defined below, who are or were California residents and whose pay was reported by Defendant on an IRS Form 1099 basis who worked as truck drivers for Pacifica in California. Under *Noe v. Superior Court*, 237 Cal. App. 4th 316 (2015), the penalties for California's misclassification law codified in Labor Code 2775, *et seq*. set forth in Labor Code § 226.8 can be sought via PAGA. Because Plaintiff is alleging a pattern or practice claim, he further seeks penalties of $10,000 to $25,000 per driver under § 226.8(c).

Plaintiff also seeks PAGA penalties for Defendant's underlying violations of Labor Code sections 204, 210, 226, 226.2, 1194, and 2802. *See* Labor Code section 2699(f) (as amended by AB 2288).

Plaintiff wishes to bring a PAGA representative action on behalf of himself and the State of California as well as on behalf of the following group of aggrieved employees:

> All individuals who are or were California residents, who worked for Pacifica Trucks, LLC and/or Pacifica Logistics Group, LLC as drivers, or in any similar capacity, and whose pay was reported on an IRS Form 1099 basis from one year prior to the date of this letter and continuing into the present (the "PAGA Covered Period").

This group of individuals is collectively referred to herein as "aggrieved employees," "Aggrieved Employees," and/or "all aggrieved employees," where appropriate. The purpose of this letter is to comply with PAGA, pursuant to California Labor Code § 2698 *et seq.* We herein set forth some of the facts and theories of California Labor Code violations which we allege Defendant engaged in with respect to our client and all aggrieved employees.

a. <u>Factual Background</u>

Defendant is a trucking company with operations in California. Plaintiff has worked for Defendant since September 27, 2023. Plaintiff, like the other Aggrieved Employee, has been tasked with driving a truck for Defendant as part of Defendant's trucking company business. Although Plaintiff owns his truck, his schedule and destinations are set by Defendant, and he is generally controlled on a day-to-day basis by Defendant's dispatchers and managers. During the PAGA Period, Plaintiff and Aggrieved Employees have been paid a flat amount "per load" with no additional pay for non-driving tasks including but not limited to pre-and post-trip inspections, waiting time, detention time up to two hours, fueling, cleaning, and completing paperwork. In addition, Plaintiff and the Aggrieved Employees incurred insurance, fuel, cell phone, and other business-related expenses on behalf of Defendant without receiving reimbursement. Lastly, Plaintiff and the Aggrieved Employees were not issued compliant wage statements and not paid all timely wages.

b. <u>Claims Asserted by Plaintiff</u>

i. Plaintiff and the Aggrieved Employees were Misclassified as Independent Contractors

Plaintiff and the Aggrieved Employees are presumed to be employees rather than independent contractors. *See Narayan v. EGL, Inc.*, 616 F.3d 895, 900 (9th Cir. 2010) ("[U]nder California law, once a plaintiff comes forward with evidence that he provided services for an employer, the [plaintiff] has established a prima facie case that the relationship was one of employer/employee." The burden then shifts to the employer to "prove, if it can, that the presumed employee was an independent contractor.") The ABC test applies to determine whether Defendant can establish its drivers are independent contractors. *Cal. Trucking Ass'n v. Bonta*, 996 F.3d 644, 653 (9th Cir. 2020) ("On December 13, 2019, several weeks before AB-5 took effect, the state sent letters to businesses notifying them that, under AB-5, the ABC test 'must be used to determine the appropriate classification of workers in most occupations.'"); *Dynamex Operations W. v. Superior Ct.*, 4 Cal. 5th 903 (2018). The California Supreme Court in *Dynamex Operations West, Inc., v. Superior Court*, 4 Cal. 5th 903, 956-57 (Cal. 2018) initially set forth the "ABC" standard for determining whether an individual performing work is an independent contractor or an employee, as follows:

> … we conclude it is appropriate, and most consistent with the history and purpose of the suffer or permit to work standard in California's wage orders, to interpret that standard as: (1) placing the burden on the hiring entity to establish that the worker is an independent contractor who was not intended to be included within the wage order's coverage; and (2) requiring the hiring entity, in order to meet this burden, to establish *each* of the three factors embodied in the ABC test — namely (A) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; *and* (B) that the worker performs work that is outside the usual course of the hiring entity's business; *and* (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed. [citations omitted].

The ABC Test has since been codified by the Legislature as Labor Code section 2775. Under the ABC Test, Defendant has the burden of establishing that Plaintiff and the Aggrieved Employees are independent contractors and not intended to be included within the wage order's coverage. Further, Defendant must establish that Plaintiff and the Aggrieved Employees meet all three factors of the ABC Test, which as discussed below, they cannot meet.

<u>Prong A. Plaintiff and the Aggrieved Employees Were Subject to Defendant's Direction and Control</u>: Defendant cannot demonstrate that Plaintiff and the Aggrieved Employees were free from the direction and control of the Defendant. At all times, Defendant retained and retains the right to control the method and manner of how Plaintiff and Aggrieved Employees perform their job duties and retained and retains all necessary control over Plaintiff and the Aggrieved Employees during their employment. Among other things, Plaintiff and Aggrieved Employees are required to follow detailed requirements imposed on them by Defendant governing their interaction with dispatch, managers, customers and their deliveries. Defendant retained all necessary control over Plaintiff and the other drivers' work; Defendant controlled the drivers' rates (by paying them a fixed amount per shipment) and schedules, dictating the times the drivers had to start their shifts, the times they had to drop off each load and be back at a warehouse for another load, and the shift end times; Defendant controlled the drivers' appearance, requiring them to wear vests inside its facilities and yard; because Plaintiff delivered hazardous materials, the nature of his work was such that he could not control his own routes and had to follow specific routes to transport the materials (e.g., he could not drive near schools); Defendant closely monitored and supervised the work of its drivers, requiring them to attend meetings and follow detailed instructions including with respect to interactions with customers, and communicated with drivers either over text message, phone calls, or over a phone application called Trinium, wherein managers and/or dispatchers would frequently require updates from the drivers on the status of their deliveries and routes; their jobs did not require substantial skill; although Defendant paid the drivers on a per-load basis, this payment plan resembled a pay arrangement similar to an employee's pay arrangement; and drivers, like Plaintiff, often stay and drive for Defendant full-time and for years.

Furthermore, Courts have held that, in the logistics industry, a company controls the manner and means of a driver's work where it arranges the customers, determines pricing, controls which assignments a driver is given, assigns additional drivers to work with the driver, controls the delivery schedules, and closely monitors its drivers. *See Garcia v. Seacon Logix, Inc.*, 238 Cal.App.4th 1476, 1485-86 (2015); *Ruiz v. Affinity Logistics Corp.*, 754 F. 3d 1093, 1101-03 (9th Cir. 2014). In both *Garcia* and *Ruiz*, trucking companies were found to have controlled the manner and means of work where they provided the customers, determined the prices to be charged, retained discretion over which assignments to give drivers. *See Garcia* at 1485; *Ruiz* at 1101. Here, Defendant likewise controlled the work as it provided the customers and determined the prices to be charged.

In *Garcia* and *Ruiz*, the courts found further evidence of control where the company required the drivers to attend meetings and maintained regular contact with its drivers and monitored them while they were on the road. *See Garcia* at 1485; *Ruiz* at 1102. Here, Defendant similarly required drivers to attend appointments and/or meetings and supervised their performance through regular requested updates; contact by dispatchers and managers; and performance evaluations. By controlling the assignments and rates per load, delivery schedules, subcontracting power, and then monitoring drivers once they were on the road, Defendant retained control over the means and manner of its drivers work throughout the process.

Defendant could also terminate Plaintiff and the Aggrieved Employees at-will, and in some cases unilaterally. First, "[strong] evidence in support of an employment relationship is the right to discharge at will, without cause. . . . because [t]he power of the principal to terminate the services of the agent gives him the means of controlling the agent's activities." *Garcia*, 238 Cal. App. 4th at 1486 (citations and internal quotations omitted); *see also*, *Taylor v. Shippers Transp. Express, Inc.*, 2014 U.S. Dist. LEXIS 180061, at *29-30 (C.D. Cal. Sept. 30, 2014) ("[p]erhaps the strongest evidence of the right to control is whether the hirer can discharge the worker for cause"); *Alexander v. FedEx Ground Package Sys.*, 765 F.3d 981, 988 (9th Cir. 2014) ("The right to terminate at will, without cause, is '[s]trong evidence in support of an employment relationship.'"). In *Garcia*, even though the transportation agreement required 30-days' notice or written notice prior to termination, and the defendant therefore argued the drivers were not dischargeable at will, the drivers' testimony could show that despite the clauses in the agreement, the defendant exercised its right to terminate at will. *Id.* at 1481-82, 1486-87 (noting further that one of the drivers was terminated after the defendant's insurance company declined to insure them and they obtained their own policy). Second, the facts here regarding termination are similar to the facts in *Estrada v. FedEx Ground Package Sys., Inc.*, 154 Cal. App. 4th 1 (2007). In *Estrada*, the Operating Agreement allowed for termination:

> at any time by mutual consent, by FedEx for 'intentional misconduct or reckless or willfully negligent operation' of equipment, by either party for breach of the Operating Agreement's obligations, by either party if FedEx stops doing business or reduces its operations at the driver's terminal, and by a driver on 30 days' written notice. The driver has the right to challenge his termination by an arbitration at which, if he prevails, he may be awarded reinstatement or damages or both.

Id. at 6. The court held that "[a]lthough the Operating Agreement provides for termination with cause, it also provides for nonrenewal without any cause at all—and substantial evidence established that FedEx discharges drivers at will." Here, too, the evidence does and will show that Defendant could terminate, and in fact did terminate, the Aggrieved Employees at will, with or without cause, and without the additional right to challenge a termination as discussed in *Estrada*.

Moreover, Plaintiff and the Aggrieved Employees were even paid on a payroll timeline akin to an employee; Defendant maintained regular paydays and paid its drivers on a per-load basis. *See*, *e.g.*, Labor Code Section 226.2 (discussing piece-rate compensation systems); *see also*, *Cardenas v. McLane FoodServices, Inc.*, (C.D. Cal. 2011) 796, F.Supp.2d 1246 (granting summary judgment for in an action alleging that the employer's piece-rate pay formula failed to compensate separately for pre- and post-shift duties); *Bluford v. Safeway Stores, Inc.*, (Cal. Ct. App. May 8, 2013) 216 Cal. App. 4th 864 (reversing the trial court's denial of class certification and finding that an employer's compensation system based on truck drivers' miles driven and performance of specific tasks failed to account for rest periods).

In sum, Defendant retained and retains the right to control the method and manner of how Plaintiff and Aggrieved Employees performed his and their job duties, and retained and retains all necessary control over Plaintiff and the Aggrieved Employees during his and their employment and with respect to termination. Among other things, Plaintiff and Aggrieved Employees are required to follow detailed requirements imposed on them by Defendant governing their interaction with managers, dispatchers, customers and their deliveries. Further, Defendant sets drivers' rates, and directs when and where to make their deliveries. As a result, Plaintiff and Aggrieved Employees were and are employees of Defendant. *See*, *e.g.* Labor Code sections 2775 and 226.8*; see also Ayala v. Antelope Valley Newspapers, Inc.*, 59 Cal. 4th 522, 531 (2014) ("[T]he fact that a certain amount of freedom of action is inherent in the nature of the work does not change the character of the employment where the employer has general supervision and control over it.") (citations omitted); *Ruiz v. Affinity Logistics, Corp.,* 754 F.Supp.3d 1093 (9th Cir. 2014) (employer's right to control detail of drivers' work supported finding of employer-employee relationship); *Alexander v. FedExGround Package System, Inc.*, 765 F.3d 981 (9th Cir. 2014) (rejecting FedEx's arguments regarding worker flexibility, ability to take on more work, ability to hire others to do the work, and general "entrepreneurial opportunities" provided to the FedEx drivers, and holding that drivers were employees as a matter of law where FedEx obtained the clients in need of delivery service, arranged for a worker to carry out the service, assigned the worker to a designated territory, set prices, controlled times drivers worked, and controlled aspects of when packages would be delivered,); *JKH Enterprises, Inc. v. Department of Industrial Relations*, 142 Cal. App. 4th 1046, 1064 (2006) ("By obtaining the clients in need of the service and providing the workers to conduct it, [hiring defendant] retained all necessary control over the operation as a whole."); *see also Taylor v. Shippers Transport Express, Inc.,* 2014 W.L. 7499046 (C.D. Cal. 2014) (finding employee status for drivers as a matter of law); *Villapando v. Excel Direct, Inc.,* 2015 W.L. 15179486 (N.D. Cal. 2015) (granting summary judgment to plaintiffs on the defendants' defense that the drivers at issue were independent contractors).

Therefore, under prong A of the ABC test, Plaintiff and the Aggrieved Employees were misclassified as independent contractors. Based upon the case law cited above and sections 2775 and 226.8 of the Labor Code, Plaintiff and the aggrieved employees were subject to control and were thus employees of Defendant.

Prong B. Plaintiff and the Aggrieved Employees Performed Work Within the Usual Course of the Defendant's Business: As described by the Court in *Dynamex,* the work performed within the course of the defendants business is described thusly, "Workers whose roles are most clearly comparable to those of employees include individuals whose services are provided within the usual course of the business of the entity for which the work is performed and thus who would ordinarily be viewed by others as working in the hiring entity's business and not as working, instead, in the worker's own independent business." *Dynamex Operations W. v. Superior Court*, *supra*, 4 Cal. 5th at 959. By way of example, the Supreme Court held that:

> Thus, on the one hand, when a retail store hires an outside plumber to repair a leak in a bathroom on its premises or hires an outside electrician to install a new electrical line, the services of the plumber or electrician are not part of the store's usual course of business and the store would not reasonably be seen as having suffered or permitted the plumber or electrician to provide services to it as an employee. [citations] On the other hand, when a clothing manufacturing company hires work-at-home seamstresses to make dresses from cloth and patterns supplied by the company that will thereafter be sold by the company [citations], or when a bakery hires cake decorators to work on a regular basis on its custom-designed cakes (*cf., e.g., Dole v. Snell* (10th Cir. 1989) 875 F.2d 802, 811), the workers are part of the hiring entity's usual business operation and the hiring business can reasonably be viewed as having suffered or permitted the workers to provide services as employees. In the latter settings, the workers' role within the hiring entity's usual business operations is more like that of an employee than that of an independent contractor. *Id.* at 959-960.

In other words, if Defendant is in the transportation business, which it is here, and the drivers are engaged in transportation (deliveries), then Defendant cannot overcome the presumption that they are employees for purposes of Prong B of the ABC test. *See, e.g.*, *People v. Uber Technologies, Inc.*, 56 Cal. App. 5th 266 (2020). In *Uber Technologies, Inc.*, decided prior to the passage of Prop 22, the California Court of Appeals recognized that Uber's business model was "different from that traditionally associated with employment, particularly with regard to drivers' freedom to work as many or as few hours as they wish, when and where they choose…" 56 Cal. App. 5th at 294. The court nonetheless concluded that Uber's drivers were misclassified as independent contractors as they performed services in the regular course of Uber's business. The court reasoned that "the parties' characterization of their relationship is not dispositive because their 'actions determine the relationship, not the labels they use.'" *Id.* at 295; *accord Vendor Surveillance Corp. v. Henning*, 62 Cal. App. 5th 59, 83 (Cal. Ct. App. Mar. 18, 2021)

Here, Defendant similarly cannot establish that Plaintiff and the Aggrieved Employees perform work outside the Defendant's normal course of business. To the contrary, Plaintiff and the Aggrieved Employees were performing work completely within Defendant's normal course of business, since Defendant is in the business of providing transportation and delivery logistics services,[1] and Plaintiff and the Aggrieved Employees drove trucks for Defendant and made

[1] "Pacifica Logistics is a dependable leader in the drayage service sector, and serving the ports of Los Angeles and Long Beach." *We Are Pacifica Logistics*, Pacifica, available at https://www.pacificatrucks.com/aboutus.html. "Pacifica Logistics offers a drayage service supported by hybrid model of employee drivers and independent licensed

deliveries to Defendant's customers.

For this additional reason, under prong B of the ABC test, Plaintiff and the Aggrieved Employees were misclassified erroneously as independent contractors. Based upon the case law cited above and Section 2775 of the Labor Code, Plaintiff and the aggrieved employees were working within Defendant's business and were thus employees.

Prong C. Plaintiff and the Aggrieved Employees Were Not Customarily Engaged in an Independently Established Trade, Occupation, Or Business of the Same Nature as the Work Performed: As with the A and B prongs of the ABC Test, Defendant cannot establish that Plaintiff and the Aggrieved Employees are or were employees customarily engaged in an independent occupation, or business. *See Dynamex Operations W. v. Superior Court*, *supra*, 4 Cal. 5th at 962.

Here, Defendant's drivers, including Plaintiff and the Aggrieved Employees, were not customarily considered part of an independently established business while delivering shipments to Defendant's customers. Indeed, many, if not all, of the drivers among the Aggrieved Employees worked full-time for Defendant. Moreover, few, if any, of the Aggrieved Employees held themselves out to the world as operating independent trucking companies.

Thus, under the three prongs of the ABC test, Plaintiff and the Aggrieved Employees are clearly "employees" and not "independent contractors." *See Dynamex Operations West, Inc., v. Superior Court* (2018) 4 Cal. 5th 903, 956-958.

Even under the prior *Borello* test, which was less favorable to plaintiffs than the ABC test, Defendant could not disprove Plaintiff and the Aggrieved Employees' presumed employee status or meet its burden of proving that Plaintiff was an independent contractor rather than an employee. *See S. G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal. 3d 341 (1989). For the last thirty years, every trucking company to litigate the issue of misclassification was determined to have misclassified their drivers when, as here, they treated them as independent contractors. *See e.g.*, *Garcia v. Seacon Logix, Inc*., 238 Cal.App.4th 1476, 1485-86 (2015) (four individual plaintiffs won between $19,000 and $38,000 at trial seeking 2802 reimbursements based on their claim that they were employees rather than independent contractors, and the judgment was affirmed on appeal); *Alexander v. Fed Ex*, 765 F.3d 981 (9th Cir. 2014) (reversing a motion for summary judgment granted to a trucking company because the drivers were employees as a matter of law); *Ruiz v. Affinity Logistics*, 754 F.3d 1093 (9th Circ. 2013) (reversing decision for company after 3-day bench trial and ruling as a matter of law that the delivery drivers were employees and not independent contractors); *see also Estrada v. FedEx*, 154 Cal.App.4th 1 (Cal. App. 2007) (holding that drivers were employees under Labor Code Section 2802 because of the company's control over their work, entitling the driver employees to out-of-pocket expenses and work accident insurance premiums); *JHK Enterp. v. Dept of Ind. Relations*, 142 Cal.App.4th 1046 (Cal.App. 2006) (drivers were employees even though they used their own cars because the work they performed, delivering papers or packages, did not require a high degree of skill; and the company obtained the clients for services and provided the workers to conduct it); and *Toyota*

motor carriers. . . . Pacifica Logistics guarantees efficient deliveries, utilizing a tier-1 transportation management system (TMS) which is integrated with the port terminals and customers. . . " *Leader in Drayage Services - Drayage*, Pacifica, available at https://www.pacificatrucks.com/index.html.

Motor Sales v. Sup. Ct., 220 Cal.App.3d 864 (Cal.App. 1990) (holding that even if the delivery driver could determine the routes he took for deliveries, and even though he provided his own car, expenses, and insurance, the delivery driver was an employee where the employer paid the driver a commission and "determined what would be delivered, when and to whom and what price would be charged.").

In all of the cases referenced above decided under common law and/or the *Borello* test, the courts ruled the company misclassified the drivers because, *inter alia*, they could fire at will; they set the work schedule; they had company rules regarding safety and customer service; they had delivery schedules or manifests; they had rules regarding the appearance of drivers and trucks; and, in many cases, the drivers drove exclusively or primarily for the companies. The courts held that these factors, individually and collectively, suggested that the company "controlled" the drivers' work—the primary factor under the *Borello* test—sufficiently for them to be considered employees.

Since Defendant cannot meet any part of the ABC test, it is clear that Defendant intentionally and willfully misclassified Plaintiff and Aggrieved Employees as independent contractors in violation of Labor Code Sections 226.8(a) and 2775.

Section 226.8 of the Labor Code lists specific penalties in the event of a finding of willful misclassification. Where a court determines that "a person or an employer . . . has engaged in a pattern or practice of [willful misclassification], the person or employer shall be subject to a civil penalty of not less than ten thousand dollars ($10,000) and not more than twenty-five thousand dollars ($25,000) for each violation, in addition to any other penalties or fines permitted by law." Labor Code § 226.8(c). That is the case here, though, even if Plaintiff cannot prove willfulness, Defendant is still subject to penalties of between $5,000 and $15,000 per violation. *Id.* at § 226.8(b).

Defendant will be subject to the higher penalties here. Since all of Defendant's drivers were misclassified as contractors, Plaintiff has a strong argument that a "pattern or practice" existed here. In the discrimination context, the federal government has noted that "courts have found a 'pattern or practice' when the evidence establishes that the discriminatory actions were the defendant's ***regular practice, rather than an isolated instance.*** This does not mean that the [plaintiffs] has to prove that a defendant always discriminates or that a large number of people have been affected. A 'pattern or practice' means that the defendant has ***a policy*** of discriminating, even if the policy is not always followed." U.S. D.O.J. Civil Rights Div., "A Pattern or Practice of Discrimination," https://www.justice.gov/crt/pattern-or-practice-discrimination (Jan. 2022); *see also Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977) (holding that to prove a "pattern or practice" the plaintiff must show illegal conduct that is the "company's standard operating procedure rather than the unusual practice.")

Here, classifying truck drivers as contractors was Defendant's regular practice, rather than an isolated instance, and it had a consistent policy to do so. Indeed, as far as Plaintiff is aware, Defendant consistently used the same IC Agreement and rules to govern its relationships with all its California truck drivers. Thus, if the matter is litigated fully and Plaintiff prevails, the stepped-up penalties of $10,000 to $25,000 are likely to apply.

These penalties are recoverable in a private action brought by a PAGA representative plaintiff pursuant to Labor Code section 2698(a) and 2699, which allows one person to pursue penalty claims on behalf of other similarly situated individuals. *See Noe v. Superior Court*, 237 Cal. App. 4th 316, 337-38 (2015) (misclassification claims for penalties are enforceable either in an action initiated by the Labor Commissioner or through a PAGA representative action brought pursuant to Labor Code section 2698(a) et seq.).

This misclassification was also part of a pattern and practice that applied to all Aggrieved Employees, and not just to Plaintiff, thereby triggering the heightened penalty amounts in Section 226.8(c) (which are recoverable through a PAGA representative action).

ii. Plaintiff and the Aggrieved Employees Were Not Compensated for All Hours Worked

California Labor Code §226.2 governs compensation paid to piece-rate employees, like Plaintiff and the Aggrieved Employees. It states, in the relevant part:

> This section shall apply for employees who are compensated on a piece-rate basis for any work performed during a pay period. This section shall not be construed to limit or alter minimum wage or overtime compensation requirements, or the obligation to compensate employees for all hours worked under any other statute or local ordinance. For the purposes of this section, "applicable minimum wage" means the highest of the federal, state, or local minimum wage that is applicable to the employment, and "other nonproductive time" means time under the employer's control, exclusive of rest and recovery periods, that is not directly related to the activity being compensated on a piece-rate basis.
>
> (a) For employees compensated on a piece-rate basis during a pay period, the following shall apply for that pay period:
>
> (1) Employees shall be compensated for rest and recovery periods and other nonproductive time separate from any piece-rate compensation.
> (2) The itemized statement required by subdivision (a) of Section 226 shall, in addition to the other items specified in that subdivision, separately state the following, to which the provisions of Section 226 shall also be applicable: . . .
> (B) Except for employers paying compensation for other nonproductive time in accordance with paragraph (7), the total hours of other nonproductive time, as determined under paragraph (5), the rate of compensation, and the gross wages paid for that time during the pay period.
> (4) Employees shall be compensated for other nonproductive time at an hourly rate that is no less than the applicable minimum wage.
> (5) The amount of other nonproductive time may be determined either through actual records of the employer's reasonable estimates, whether for a group of employees or for a particular employee, of other

nonproductive time worked during the pay period.

Thus, according to Cal. Labor Code §226.2, which codifies the decision in *Armenta v. Osmose, Inc*. (Cal. App. 2d Dist. 2005) 135 Cal. App. 4th 314, employees who are paid on a piece-rate basis, such as Plaintiff and the Aggrieved Employees, must be compensated for all the hours that they work, including non-productive time, such as pre and post trip inspections and detention time under two hours. *See also Cardenas v. McLane FoodServices, Inc*. 796 F.Supp.2d 1246, 1252 (C.D. Cal. 2011) (piece-rate pay system that did not separately and hourly pay truck drivers for non-driving tasks violates California law requiring compensation for each hour worked); *Gonzalez v. Downtown LA Motors, LP*, 215 Cal. App. 4th 36, 49 (2013) (favorably citing and adopting *Cardenas*); *Ridgeway v. Wal-Mart Stores, Inc.*, 2015 WL 3451966 (N.D. Cal. 2015) (granting summary judgment to plaintiffs on their claim that Wal-Mart's piece-rate mileage pay system of compensation applicable to truck drivers violated California law by not having separate and hourly pay for time spent on inspections, fueling, washing, weighing, paperwork and layovers).

Due to Defendant's misclassification of Plaintiff and the Aggrieved Employees as independent contractors, Defendant failed to pay its drivers separately and hourly for cleaning time, fueling time, loading and unloading time, pre- and post-trip inspection time, detention time up to at least two hours, and paperwork time (the "Non-Driving Tasks") in violation of Labor Code §§ 1194 and 226.2. Instead, drivers were compensated on a piece-rate "per load" flat rate basis where they were paid per the load that they transported for Defendant (and, according to Plaintiff, by rates determined by Defendant's customers). Plaintiff and his fellow current and former truck drivers routinely spent several hours per day conducting pre- and post-trip inspections, fueling, completing paperwork, loading and unloading, and waiting. Moreover, Plaintiff often spent up to 2 hours of uncompensated time waiting at the port of Long Beach for Defendant to pay the Long Beach Clean Truck Fund ("CTF") Fee, requiring Plaintiff to idle at the terminal while he waited for the fee to be paid~~,~~ using up fuel that he also paid for since he could not simply park the truck anywhere due to the hazardous material loads he carried in his truck.

iii. Defendant's Violation of Labor Code §§ 226(a), 226.2, and 226.3

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]
>
> (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.

[2] Section 2699(f), which was recently amended by AB 2288 and provides for PAGA penalties for violations of Section 226 in certain scenarios, provides that if the employee can still "promptly and easily determine" the required information in a wage statement, then the penalty is $25 per employee per pay period; however, because Plaintiff and the Aggrieved Employees did not receive any wage statements at all, the penalties in Section 226(e) apply. *See* Labor Code Section 2699(f)(2)(A)(i) ("This subdivision does not apply if the employer has failed to provide an itemized payroll statement during any of the pay periods at issue.").

Defendant's failure to provide Plaintiff and his current and former fellow truck drivers with wage statements constitutes a violation of Labor Code §§ 226(a) and 226.2. Compliant wage statements should have included total hours worked, all applicable hourly rates in effect during the pay period, the corresponding number of hours worked at each hourly rate, and all time spent on Non-Driving Tasks, but without wage statements that include that information, Defendant is in violation of Labor Code Sections 226(a) and 226.2. Courts in California have held, in the summary judgment context, even before the passage of Labor Code section 226.2, that drivers' hours must be reported on their paystubs, even in cases where drivers are paid on a piece-rate basis. *See, Cicairos v. Summit Logistics*, 133 Cal. App. 4th 949, 960-61 (2005).

In addition to violating Labor Code § 226(a), Defendant also knowingly and intentionally failed to provide Plaintiff and the Aggrieved Employees with accurate itemized wage statements in violation of Labor Code § 226(e). Defendant undeniably knew that they were not providing Plaintiff and the other Aggrieved Employees with compliant wage statements required by California law. *See Garnett v. ADT LLC* 139 F. Supp. 3d 1121, 1131 (E.D. Cal. Oct. 6, 2015) (finding that the defendant knowingly and intentionally violated Labor Code § 226 because the "[d]efendant knew that it was not providing total hours worked to plaintiff or other employees paid on commission" even though it believed that employees paid solely on commission or commission and salary "are exempt and therefore we do not record hours on a wage statement.").

For purposes of establishing a claim for PAGA penalties based on Labor Code section 226, Plaintiff need not establish any "injury" other than showing that the paystubs lacked the hours worked required by Labor Code section 226(a)(2).[3] *See McKenzie v. Fed. Express Corp.,* 765 F. Supp.2 d 1222 (C.D. 2011); *Lopez v. Friant & Assocs., LLC,* 15 Cal. App. 5th 773 (2017) (plaintiffs seeking PAGA penalties for § 226(a) violations do not have to establish "injury" or "knowing and intentional" elements of § 226(e)).

It is also possible, alternatively, that Plaintiff and the Aggrieved Employees could recover the stepped-up penalties set forth in Labor Code section 226.3. 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 records required in subdivision (a) of Section 226." *See Finder v. Leprino Foods Co.* (E.D. Cal. Mar. 12, 2015) 2015 WL 1137151, at *7 ["the weight of authority counsels that violations of Section 226.3 may be the basis of a PAGA claim."]; *Pedroza v. PetSmart, Inc.,* 2012 WL 9506073, at *6 (C.D. Cal. June 14, 2012) ("Lab. Code § 226.3 merely provides that failure to perform actions mandated by § 226(a) may trigger civil penalties."). Since Defendant arguably did not provide any wage statements, the penalties in section 226.3 may apply here. *See*, *e.g.*, *Raines v. Coastal Pac. Food. Distribs.*, 23 Cal. App. 5th 667 (2018); *see also*, *Gunther v. Alaska Airlines, Inc.*, 72 Cal. App. 5th 334 (2021).

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[3] Although new PAGA reform legislation (AB 2288 and SB 92) now requires employees to show they "personally suffered" each violation they are pursuing in a PAGA representative action, they do not need to prove personal injury resulting from that violation to pursue a PAGA claim under Section 226. *See* Labor Code Section 2699(c)(1).

iv. Defendant's Violation of Labor Code § 2802

As noted above, Plaintiff and the Aggrieved Employees regularly incurred expenses during their employment, such as phone usage as well as fuel and other truck-related expenses, including gas and insurance expenses.

Cal. Labor Code §2802 (a) 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 requires that its truck drivers in California use their personal cell phones for work purposes without offering any reasonable reimbursement to drivers for their data usage, wear and tear, and other expenses associated with maintaining their devices. Defendant requires its truck drivers to download a mobile application. Defendant never provided cell phones to its drivers, and Defendant did not provide devices to its drivers that could utilize the mobile application. As a result, Plaintiff and other current and former drivers employed by Defendant incurred personal cell phone related expenses, but have not been reimbursed a reasonable portion of their personal cell phone bills in clear violation of section 2802 of the California Labor Code. *See Cochran v. Schwan's Home Services, Inc.*, Case No. B247160 (Cal.App.Ct. (2nd Dist) Aug. 12, 2014) ("We hold that when employees must use their personal cell phones for work related calls, Labor Code section 2802 requires the employer to reimburse them. Whether the employees have cell phone plans with unlimited minutes or limited minutes, the reimbursement owed is a reasonable percentage of their cell phone bills"). After all, the purpose of 2802 is to "prevent employers from passing along their operating expenses onto their employees." *Gattuso v. Harte-Hanks Shoppers, Inc.,* (2007) 42 Cal. 4^{th} 554, 562.

In addition, Defendant did not reimburse Plaintiff and the Aggrieved Employees for their gas mileage expenses incurred in connection with fueling their trucks, which were substantial, especially because Plaintiff and the Aggrieved Employees were forced to drive around the Long Beach terminal while carrying hazardous materials and waiting several hours for Defendant to pay the Clean Truck Fee at the port. Lastly, Plaintiff and the Aggrieved Employees had to "\procure and maintain, at their sole cost and expense, their own insurance coverage.

Therefore, Plaintiff is an aggrieved employee within the meaning of PAGA and Defendant has violated § 2802 with respect to Plaintiff and the Aggrieved Employees.

v. Defendant's Violation of Labor Code §§ 204 and 210

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 all minimum wages due to Plaintiff and all Aggrieved Employees, Defendant failed to timely pay Plaintiff and all Aggrieved Employees all wages owed within seven (7) days of the close of each payroll period in accordance with Labor Code § 204(d) on a regular and consistent basis.

Labor Code § 210 provides that "[i]n addition to, and 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 [Section 204] shall be subject to a civil penalty as follows: (1) For any initial violation, one hundred dollars ($100) for each failure to pay each employee; (2) For each subsequent violation, or any willful or intentional violation, two hundred dollars ($200) for each failure to pay each employee, plus 25% of the amount unlawfully withheld."

As a result of the faulty compensation policies and practices described in detail above and Defendant's failure to pay Plaintiff and all Aggrieved Employees all minimum wages owed, 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* (2008) 163 Cal.App.4th 1157, 1209 (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).

c. <u>Conclusion</u>

Pursuant to Labor Code § 2699.3, we write to inform you and the Labor and Workforce Development Agency, with whom this PAGA Notice has been filed, of our intent to pursue a PAGA representative action against Defendant seeking PAGA penalties under Labor Code sections 226.8 and 2699 to be brought by Plaintiff, individually and on behalf of all Aggrieved Employees, as defined above.

Nevertheless, it is the policy of this firm to attempt to negotiate an early resolution of all matters where possible and beneficial to the Aggrieved Employees. If Defendant is interested in attempting to resolve this matter on a PAGA representative basis, or potentially a class basis (for the PAGA Covered Employees), please have your outside counsel contact me on or before **August 1, 2025** so that we can discuss an informal discovery plan and the possibility of early mediation. If we do not hear from you on or before August 1, 2025, we will proceed with this matter with the understanding that Defendant does not wish to negotiate an early resolution of this matter.

Respectfully submitted,

Avi Kreitenberg