

November 7, 2023

**VIA ELECTRONIC SUBMISSION;
VIA CERTIFIED MAIL AND EMAIL TO OPPOSING PARTY**

California Labor and Workforce Development Agency
Attn: PAGA Administrator
455 Golden Gate Avenue, 9th Floor
San Francisco, CA 94102

Steve Dennis
Reid, Dennis & Frick
2626 Cole Avenue, Suite 300
Dallas, Texas 75204
sdennis@reiddennis.com

Re: Notice of Claim Under Private Attorneys General Act (“PAGA”)

To Whom It May Concern:

My firm represents Kayla Arney (“Plaintiff”) and all other aggrieved employees who intend to file an action against Benchmark Group of Companies, LLC (“Defendant”) in connection with Defendant’s violations of the California Labor Code. This letter shall serve as notice, and a request, pursuant to Labor Code section 2699.3, *et seq.* (“PAGA”), that the Labor and Workforce Development Agency (“LWDA”) investigate the violations by Defendant described herein against Plaintiff and other current and/or former employees. If LWDA does not intend to investigate the violations described herein, we respectfully request that the agency specifically notify our office of the same at your earliest possible opportunity.

Statement of Specific Provisions of the Labor Code Violated

Plaintiffs intend to prosecute a civil action against Defendant for violations of sections 226, subdivision (a), 226.7, 226.8, subdivision (a), 515, 558, and 2750.3

Facts and Theories in Support of Violations

Defendant provides direct marketing services and is registered to do business in the State of California. Defendant employed Plaintiff from on or about May 2022 through approximately August 2023. Plaintiff worked as a recruiter and administration service provider.

Plaintiff’s position as a recruiter and administration service provider, and her duties, which included booking interviews, sourcing candidates, and onboarding sales representatives are within the purview of Defendant’s usual course of business as a direct marketing company.

Moreover, Defendant exercised requisite control over Plaintiff by setting Plaintiff's hours and requiring her to work onsite. As a result, Plaintiff was Defendant's employee.

However, Defendant misclassified Plaintiff as an independent contractor when it hired her in 2022. Defendant willfully misclassified Plaintiff in an attempt to avoid providing Plaintiff with meal and rest breaks, overtime, and accurate wage statements. Plaintiff is informed and believes, and on that basis alleges, that Defendant misclassified many of its other employees as independent contractors, as well.

Misclassification as an Independent Contractor

Pursuant to Labor Code section 226.8, it is unlawful for an employer to willfully misclassify an individual as an independent contractor.

An employer in violation of section 226.8 is subject to civil penalties. (*See* Lab. Code § 226.8, subds. (b)-(c).) The California Supreme Court has set forth the stringent requirements for an individual to be considered an independent contractor. (*Dynamex Operations v. Superior Court* (2018) 4 Cal.5th 903.) The "ABC test" as articulated in *Dynamex* requires the following:

- (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;
- (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.

These requirements have been codified in Labor Code section 2750.3. Because the test is phrased in the conjunctive, all three prongs of the ABC test must be answered in the affirmative for a worker to be lawfully classified as an independent contractor.

Here, none of the prongs are satisfied. Plaintiff and other recruiters working for Defendant were undoubtedly employees and not independent contractors under the ABC test. First, the employees' schedules were set by Defendant and Defendant directed the work they would perform. Although Plaintiff's "Independent Contractor Agreement" states that "The Contractor is not required to solicit and/or acquire recruits for any minimum number of hours," in actuality Plaintiff was required to work 9:00 am to 5:00 pm every weekday onsite at Defendant's Sacramento office. The same was true of Defendant's other recruiters who were also misclassified as independent contractors.

Second, Plaintiff (a "recruiter" and "administration service provider") and Defendant's other recruiters performed recruitment services. Simply put, Plaintiff's job duties of recruiting, providing administrative services, and training sales representatives fall squarely within

Defendant's business as a direct marketing company. The same is true of Defendant's other misclassified employees, which include recruiters and sales representatives.

Finally, recruitment and administrative services are not independently established trades, nor were Plaintiff or Defendant's other employees providing such services to other companies or individuals. Nearly all of these employees worked only for Defendant.

Penalties for Unpaid Wages

Pursuant to Labor Code section 558, subdivision (a), and employer who violates "any provision regulating hours and days of work in any order of the Industrial Welfare Commission shall be subject to a civil penalty." (Lab. Code § 558, subd. (a).)

An employer's initial violation is subject to a "fifty dollar penalty (\$50) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages." *Ibid.* Thereafter, each subsequent violation is subject to a penalty of "one hundred dollars (\$100) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages." *Ibid.*

Here, Defendant's personnel were often required to work more than 8 hours per day to complete work dictated by Defendant. Because Defendant misclassified them, they were not paid their earned overtime. Defendant is therefore liable for civil penalties under section 558, subdivision (a).

Unlawful Failure to Provide Uninterrupted Off-Duty Meal and Rest Periods

Plaintiff and similarly situated employees regularly worked in excess of five hours per day without being provided at least one half-hour meal period in which they were relieved of all duties. (Lab. Code §§ 226.7, 512; *see also* Industrial Welfare Commission Order No. 4-2001.) Plaintiff and similarly situated employees also regularly worked in excess of four hours without being provided at least a ten-minute rest period in which they were relieved of all their duties. (Lab. Code §§ 226.7, 512; *see also* Industrial Welfare Commission Order No. 4-2001.)

Throughout Plaintiff's employment, she was not able to take uninterrupted off-duty meal and rest periods in accordance with Labor Code. Defendant did not maintain a policy that ensured Plaintiff received requisite meal and rest periods until the final months of Plaintiff's employment. Furthermore, Defendant caused Plaintiff to miss meal and rest periods and failed to pay her the premium compensation mandated by Labor Code section 226.7, subdivisions (b)-(c). As a result of these Labor Code violations, Defendant is liable for civil penalties. (Lab. Code § 2698, *et seq.*)

Failure to Provide Accurate Wage Statements

Pursuant to Labor Code section 226 (“Section 226”), subdivision (a), an employer is required to provide itemized wage statements. Defendant failed to provide any wage statements for both Plaintiff and its other employees throughout the duration of Plaintiff’s employment.

Conclusion

As described above, Defendant has violated numerous wage and hour provisions of the Labor Code. As a result, Defendant is liable to Plaintiff and other current and former employees for civil penalties, attorney’s fees, and costs, pursuant to Labor Code sections 226, subdivision (a), 226.7, 226.8, subdivision (a), 515, 558, and 2750.3.

This letter shall serve as Plaintiff’s notice pursuant to Labor Code section 2699.3 and we ask that LWDA conduct an investigation concerning the violations described herein. Alternatively, if LWDA does not intend to investigate these violations, we ask that it issue a notification letter to our office confirming the same so that we may proceed with our civil action asserting the PAGA claims described herein.

Please feel free to contact me if you have any questions or if you would like to discuss this matter further. Nothing in this letter is intended to be, or should be construed as, an admission against the interests of Plaintiff or other current or former employees of Defendant and shall not be construed as a waiver of their rights, remedies, claims, or defenses, all of which are expressly reserved.

Sincerely,



Camron Dowlatshahi

cc: Steve Dennis <sdennis@reiddennis.com>