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Filed online with LWDA:

California Labor and Workforce
Development Agency
Attn. PAGA Administrator
1515 Clay Street, Ste. 801
Oakland, CA 94612

Sent via certified mail to:

ALDI Inc.
Attn: Legal Dept.
1200 North Kirk Road
Batavia, IL 60510

Re: Written Notice Pursuant to Labor Code, sections 2698, *et seq.* by Thomas Dudgeon

To whom it may concern:

Pursuant to California Labor Code § 2698, *et seq*., **Thomas Dudgeon** ("Claimant") submits this written notice of Labor Code and Industrial Welfare Commission Wage Order violations by Claimant's former employer, **ALDI, Inc**. ("Employer"). Pursuant to Labor Code § 2698, *et seq.,* Claimant, a misclassified "exempt" for Employer, seeks to represent himself and other aggrieved employees in a PAGA action against Employer as set forth below. For purposes of this notice, Claimant contends "aggrieved employees" also include all individuals who worked for Employer as "independent contractors."

Written Notice of Claims

Labor Code, § 2699.3(a) requires employees seeking to file a claim under PAGA to provide written notice to the Labor and Workforce Development Agency and the employer identifying violations of Labor Codes. Section 2699.5 provides:

(a) A civil action by an aggrieved employee pursuant to subdivision (a) or (f) of section 2699 alleging a violation of any provision listed in section 699.5 shall commence only after the following requirements have been met: (1) the aggrieved employee or representative shall give written notice by certified mail to the labor and workforce development agency and the employer of the specific provisions of this code alleged to have been violated, including the facts and theories to support the alleged violation.

(b)

Legal Claims Applicable to Labor Code §2699.3(a) Written Notice Requirement

Claimant alleges Employer has violated the following Labor Codes, all of which appear in Section 2699.5, and thus require written notice consistent with Section 2699.3(a):

- Labor Code § 226 – Knowing and Intentional Failure to Provide Accurate, Itemized Wage Statements;
- Labor Code § 226.7 – Failure to Provide Lunch Breaks;
- Labor Code § 226.7 – Failure to Provide Rest Breaks;
- Labor Code § 1174 – Failure to Keep Accurate Records;
- Labor Code §§ 226, 510, 1194 and 1197 – Failure to Pay Overtime and Minimum Wages
- Labor Code § 2802 – Failure to Reimburse Business Expenses
- Labor Code § 226.8 – Willful Misclassification
- Violation of AB 5, codified as Labor Code § 2750.3

Legal and Factual Basis to Support Claims

Wage Statement Violations

Labor Code section 226 states:

> (a) Every employer shall, semi-monthly or at the time of each payment of wages, furnish each of his or her employees, either as a detachable part of the check, draft, or voucher paying the employee’s wages, or separately when wages are paid by personal check or cash, an accurate itemized statement in writing showing (1) gross wages earned, (2) total hours worked by the employee, except for any employee whose compensation is solely based on a salary and who is exempt from payment of overtime under subdivision (a) of Section 515 or any applicable order of the Industrial Welfare Commission, (3) the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis, (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 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 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, and (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. The deductions made from payment of wages shall be recorded in ink or other indelible form, properly dated, showing the month, day, and year, and a copy of the statement and the record of the deductions shall be kept on file by the employer for at least three years at the place of employment or at a central location within the State of California.

> (e) 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 exceeding an aggregate penalty of four thousand dollars ($4,000), and is entitled to an award of costs and reasonable attorneys fees.

Employer did not provide the required information to its workers like Claimant and has knowingly and intentionally failed to comply with subsection Labor Code section 226(a).

Meal Periods

Claimant contends Employer instituted policies and practices that did not comply with Labor Code §§ 512, 226.7 and Industrial Welfare Commission Wage Order 5-2001(11) (meal periods).

Labor Code § 512 and Wage Order 5-2001 require employers to provide their employees with 30 minutes meal periods in which the employee is free of all work duties and free to leave the premises for any shifts six hours or more. The meal period must take place within the first five hours worked and can only be waived by mutual consent. If an employer implements practices and procedures that prevent the employee from a meaningful choice for a meal period, then the employer must pay one hour of pay to the employee for each day in which the meal period is not provided. See Wage Order 5-2001(11); see also *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1040 ("On the other hand, an employer may not undermine a policy of providing meal breaks by pressuring employees to perform their duties in ways that omit breaks."); see also, *Jamiez v. Daiohs USA, Inc.* (2010) 181 Cal.App.4th 1286, 1304-1305 (violation can be proved by showing a common scheduling policy that made taking breaks extremely difficult.)

Claimant contends that Claimant was regularly provided workloads that prevented Claimant from having the ability to take a timely 30 minute meal period within the first five hours of any shift greater than six hours. In order to meet time deadlines, it was often necessary to work straight through without a timely 30 minute meal period. Claimant contends Employer failed to accurately record when Claimant was not able to take a timely meal period.

Employer apparently did not have any policy or practice to follow if there was a meal period violation. Claimant was never paid one hour of pay for each day Claimant was denied a meal period. Claimant suffered injury by being required to work through Claimant's meal periods without being appropriately compensated for doing so.

Rest Breaks

Claimant contends Employer instituted policies and practices that did not comply with Labor Code § 226.7 and Industrial Welfare Commission Wage Order 5-2001(12) (rest breaks).

Labor Code § 226.7 requires employers to provide employees with rest breaks consistent with the IWC Wage Orders. Wage Order 5-2001 requires employers to authorize and permit employees to take rest breaks of 10 minutes net rest time per every four (4) hours worked. For each day in which an employer fails to authorize or permit a rest break, the employer owes the employee one hour of pay.

Employer did not have any policy or practice to follow if there was a rest period violation. Claimant was never paid one hour of pay for each day Claimant was denied a rest period. Claimant suffered injury by being required to work through Claimant's rest periods or receiving late rest periods without being appropriately compensated for doing so.

Labor Code Section 1174 Pay Records

Labor Code § 1174 requires employers to keep "payroll records showing the hours worked daily by and the wages paid to the employee". An employer may be liable under § 1174 if it fails to record when employees report to work, the start and end times of their shifts, and the total hours worked or meal periods. See *Carrillo v. Schneider Logistics, Inc.,* (2011) 823 F. Supp.2d 1040, 1044.

Claimant contends Employer failed to keep accurate records of the hours employees worked each day. Employer did not record the actual hours its hourly, non-exempt employees worked each day and failed to accurately record regular hours, overtime, meal periods, or shifts less than two hours. Claimant contends Claimant's pay records did not show an hour's pay for any days in which he was not free to take a 30 minutes meal period or 10 minute rest break.

Unpaid Wages and Overtime

Employer failed to all hourly wages due and failed to pay overtime wages to Claimant and other similarly situated workers, and in so doing, Employer willfully violated the provisions of Labor Code sections 226, 510, 1194, 1198, 1199, IWC Wage Orders, and California Code of regulations, Title 8, section 11160(3). Labor Code §§ 510, 1194 and 1197 require employers to pay employees for minimum wage and overtime wages for hours worked over 8 per day and/or over 40 hours per week.

California law requires employers to pay overtime compensation to all non-exempt employees for all hours worked over 8 in a day or 40 per week for overtime pay, and over 12 in a day at double-time pay.

Employer failed to accurately record overtime hours and / or changed or edited hours recorded to show no overtime worked by Claimant and Employer's similarly situated workers.

Because these hours were not recorded and / or were changed or edited by Employer, Claimant and all similarly situated workers for Employer were at times compensated at an amount below California's minimum wage requirements. Claimant contends that he and other similarly situated workers for Employer were not paid for all overtime hours worked, and as a result, were also not paid minimum wage as required by law. Claimant and other workers like Claimant did not receive the legal minimum wage for all hours worked. Claimant and other workers like her for Employer have not been paid all wages, and overtime compensation, including interest thereon.

Failure to Reimburse Business Expenses

Cal. Labor Code section 2802 requires Employer to reimburse Claimant and Claimant's fellow aggrieved employees for reasonable business expenses. Claimant alleges that Employer's workers are not, and have not been, reimbursed for business expenses, including but not limited to, mileage reimbursement. Claimant alleges the failure to reimburse these business expenses is a violation of section 2802.

Willful Misclassification

To the extent claimant alleges that Employer improperly classifies its workers as independent contractors in violation of Labor Code section 226.8, Employer's workers do not and cannot be classified as exempt independent contractors based on AB 5 (as discussed below). "Willful misclassification" is defined as "avoiding employee status for an individual by voluntarily and knowingly misclassifying that individual as an independent contractor." Labor Code section 226.8(i)(4). Claimant alleges a pattern and practice of willful misclassification. Claimant, all of Employer's workers, and the LWDA or owed full and maximum damages penalties set forth in section 226.8.

Violation of AB 5, codified as Labor Code § 2750.3

Assembly Bill 5 (AB 5) is a California law that went into effect on January 1, 2020. It codifies the ABC test, which came from the California Supreme Court's decision in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*, (2018) 4 Cal.5th 903. This decision determines whether workers are employees or independent contractors.

Under the ABC test, codified in § 2750.3 of the Labor Code, a worker is considered an employee and not an independent contractor unless the hiring entity demonstrates that all three of the following conditions are satisfied:

A) 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) The worker performs work that is outside the usual course of the hiring entity's business.

C) The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

A violation of AB 5 would occur if a company is treating a worker as an independent contractor, but the relationship fails to meet all three of these criteria. Claimant alleges Employer has misclassified its workers and cannot successfully meet the ABC test because, among other reasons, Employer's workers, like most gig economy workers, are not free from the control and direction of the employer and do not satisfy any of the three prongs set out in AB 5. As such, Employer's workers cannot reasonably be classified as exempt under AB 5.

Conclusion

Claimant expressly reserves the right to pursue Claimant's PAGA claims individually or on behalf of only the alleged aggrieved employees including or not including Claimant. Pursuant to Labor Code, section 2699(a), if the LWDA does not respond to this notice in 60 days, Claimant will move forward with Claimant's PAGA claims in court.

Very truly yours,

HAMNER LAW OFFICES, APLC

Chris Hamner

Christopher J. Hamner, Esq.

CJH/vv