

March 14, 2024

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VIA ONLINE SUBMISSION:

California Labor & Workforce Development Agency
www.dir.ca.gov

VIA U.S. CERTIFIED MAIL:

Walmart Inc.
c/o CT Corporate System
330 N. Brand Blvd.
Glendale, CA

RE: PAGA Notice Pursuant to California Labor Code § 2699

To Whom It May Concern:

We represent Fardin Karamkhail (“Plaintiff”) in connection with potential claims against Walmart Inc. (“Walmart”), arising from Walmart’s serial violations of the California Labor Code.

This letter shall serve as notice of Plaintiff’s allegations pursuant to the Private Attorneys General Act of 2004 (“PAGA”), Lab. Code §§ 2699, 2699.3, and 2699.5. Plaintiff intends to file a PAGA and class action lawsuit on behalf of himself and similarly situated employees who, like Plaintiff, have worked for Walmart in California as drivers and/or in substantially similar positions (collectively “drivers”). As “aggrieved employees,” Plaintiff may seek penalties under PAGA on behalf of himself and other similarly aggrieved current and former Walmart employees in California.

I. Factual Background

Walmart’s Spark Driver platform is a delivery service that provides drivers who can be scheduled and dispatched through a mobile phone application or through Walmart’s website. The drivers can shop for and pick up orders and deliver them to customers.

As described further below, Walmart has misclassified Plaintiff and other similarly situated drivers as independent contractors¹ and, in so doing, has violated multiple provisions of the California Labor Code.

A. Walmart’s Spark Driver Platform Is a Delivery Company

Walmart is in the business of providing grocery, pharmacy, and general merchandise shopping and delivery services.² Walmart claims customers can have drivers deliver products such as “cleaning supplies” and “toiletries.”³ Walmart’s website boasts that the Spark Driver platform facilitates Walmart “serv[ing] customers in new ways through reliable, convenient delivery offerings.”⁴

Walmart advertises that the Spark Driver platform has grown to become Walmart’s largest delivery service provider.⁵ Walmart employs drivers across the country and “in all 50 U.S. states . . . with the ability to reach 84% of U.S. households.”⁶

B. Walmart Controls Driver’s Job Duties

Drivers are not free from the control and direction of Walmart in the performance of their work. Rather, Walmart directs drivers’ work in detail, instructing drivers where to report for their shifts within a zone, where to go to pick up deliveries, how to substitute items, and how to interact with customers.

Walmart tracks its drivers’ performance by tracking the rate at which they arrive at a store on time, the rate at which they drop orders before the scheduled pick-up time, the rate at which they accept orders, and their customer ratings. Drivers are required to follow requirements imposed on them by Walmart. Walmart customers cannot request a specific shopper and must place their orders through Walmart rather than with any particular shopper.

C. Walmart Spark Drivers Are Not Customarily Engaged in an Independently Established Trade, Occupation, or Business

Walmart’s drivers perform work that is within the usual course of Walmart’s business. Walmart’s drivers incur no opportunity for “profit” or “loss”; rather, Walmart manages the business operation, attracts investors, advertises, and obtains customers. The drivers’ investment is minor when compared to Walmart’s investments. The drivers have made no capital investment

¹ <https://corporate.walmart.com/news/2023/06/07/the-spark-driver-platform-celebrates-5-years-of-growth> (last accessed March 14, 2024).

² <https://drive4spark.walmart.com/> (last accessed March 14, 2024).

³ <https://drive4spark.walmart.com/spark-driver-faq> (last accessed March 14, 2024).

⁴ <https://corporate.walmart.com/news/2023/06/07/the-spark-driver-platform-celebrates-5-years-of-growth> (last accessed March 14, 2024).

⁵ *Id.*

⁶ *Id.*

in Walmart's facilities, advertising, maintenance, staffing, or electronic systems. Walmart provides investment and risk capital. The drivers do not. But for Walmart's investments, the drivers would earn little or nothing from their relatively minor expenditures.

Indeed, in connection with the delivery work described herein, Plaintiff and the other aggrieved employees do not exercise the skills and initiative of persons in business for themselves. Drivers do not need special qualifications or experience apart from being 18 years of age or older and having: proof of auto insurance, a vehicle, and a mobile device.⁷ Drivers do not exercise business management skills; drivers made no investments of any significance; drivers do not engage in an independently established trade, occupation, or business; drivers do not maintain any separate business structures or facilities; drivers did not incur any opportunity for "profit" or "loss"; and drivers do not hire assistants or subcontract anyone to provide additional services, as independent contractors in business for themselves would in order to increase their revenues.

Plaintiff does not own delivery enterprises. Throughout the time when Plaintiff has worked for Walmart as a driver, Plaintiff has not taken any steps to establish or promote an independent delivery business, such as: (1) incorporating a delivery business entity; (2) obtaining any business license for a delivery business entity; (3) advertising to the general public regarding delivery services; and/or (4) making offerings to provide services of the independent business to the public or to a number of potential customers. Moreover, Plaintiff has never had any of his own customers or clients for delivery services.

D. Walmart Misclassifies Drivers

Walmart has misclassified Plaintiff and other similarly situated drivers as independent contractors and, in so doing, has violated multiple provisions of the California Labor Code.⁸ Although classified as independent contractors, Walmart drivers like Plaintiff are actually employees. Walmart is in the business of providing pharmacy, food, and grocery shopping and delivery services to customers, and this is the very service its drivers provide. The drivers' services are fully integrated into Walmart's business, and without the drivers, Walmart's shopping and delivery business would not exist. On April 30, 2018, the California Supreme Court issued its decision in *Dynamex*, which makes clear that Walmart drivers should be classified as employees rather than as independent contractors under California law for purposes of wage-and-hour statutes like the ones at issue here. Under the "ABC" test adopted in *Dynamex*, in order to justify classifying the drivers as independent contractors, Walmart would have to prove that its drivers perform services outside its usual course of business, which it cannot do. Notwithstanding this decision, Walmart has willfully continued to misclassify its drivers as independent contractors.⁹

⁷ <https://drive4spark.walmart.com/spark-driver-faq> (last accessed March 14, 2024).

⁸ See Section II, *infra*, detailing violations.

⁹ The California Supreme Court will further consider the scope of *Dynamex* in the upcoming appeal of *Castellanos et. al v. California*, No. A163655.

E. Walmart Underpays Drivers

After each delivery, Walmart collects the payment from the customer. It pays drivers on a weekly basis via direct deposit.¹⁰ Drivers do not receive an hourly rate. Sometimes drivers are compelled to wait at a specified location for long periods.¹¹ Drivers sometimes receive little or no pay for a shift because they receive few deliveries or travel great distances for a relatively inexpensive order. Furthermore, when drivers work more than eight (8) hours per day or more than forty (40) hours per week, they do not receive time-and-a-half their regular rate of pay for their overtime hours.

As such, Walmart has not compensated Plaintiff and the other aggrieved employees for all hours worked, including without limitation for: (1) time spent performing services for customers; (2) time spent maintaining and preparing vehicles, equipment, and supplies for job assignments; (3) time spent driving to and from stores and customer locations; and/or (4) time spent performing various other pre- and post-service activities. Moreover, the drivers routinely work over eight (8) hours per day and/or forty (40) hours per week, but Walmart has not paid the drivers one and one-half their regular rate of pay for overtime work. Walmart has failed to pay the drivers all minimum wages earned each pay period, and all overtime wages owed for all overtime hours worked each pay period.

Walmart has failed to pay Plaintiff and other aggrieved individuals compensation that was due and owing (including minimum wages and overtime) upon discharge and/or within seventy-two (72) hours of the shopper's termination of employment by resignation.

F. Walmart Charges Drivers for Its Own Business Expenses

Based on Walmart's misclassification as independent contractors, Walmart has required Plaintiff and other drivers to bear many of the expenses of their employment, including expenses for their vehicles, auto insurance, gas, smartphone, phone data, and other expenses. Specifically, drivers must provide or pay for their own smartphone in order to run Walmart's application and receive delivery requests. Furthermore, drivers must provide or pay for their own vehicle in order to make deliveries. Walmart also requires drivers to pay for their own auto insurance.

G. Walmart Failed to Provide Paid Sick Days, Off-Duty Meal and Rest Breaks, and Accurate Wage Statements

Walmart has not had policies and procedures for the drivers to accrue and take paid sick days. Moreover, Walmart has not secured workers' compensation for the drivers.

¹⁰ <https://support.branchapp.com/hc/en-us/articles/4404305650587-Spark-Driver-When-am-I-going-to-receive-my-first-payment> (last accessed March 14, 2024).

¹¹ <https://www.businessinsider.com/walmart-spark-drivers-over-hour-waiting-orders-in-parking-lots-2023-9> (last accessed March 14, 2024).

Walmart has failed to maintain a policy that provides the drivers with off-duty meal and rest periods as required by California law. The drivers regularly work in excess of four (4) hours or major fraction thereof during work days without being provided at least a ten-minute rest period during which they are relieved of all duties. Walmart has failed to provide the drivers any compensation for these missed rest periods.

Walmart has failed to provide the drivers with timely, accurate wage statements showing (1) gross wages earned; (2) total hours worked; (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; (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; 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. Moreover, Walmart has failed to keep, at a central location in the state, payroll records showing the accurate hours worked daily by and the wages paid to and the number of piece-rate units earned by and any applicable piece rate paid to, drivers employed by Walmart.

In sum, the violations described above and herein are and have been part of an unlawful policy, pattern, and practice of Walmart. Walmart's policy, pattern, and practice of misclassifying Plaintiff and others in the same job position as "independent contractors" has resulted in numerous violations of law, including without limitation the violation of sick day requirements, the failure to secure workers' compensation, the failure to pay minimum wages, the failure to pay for all hours worked, the failure to pay overtime, the failure to reimburse expenses, the failure to furnish timely, accurate, itemized wage statements and payroll records, the failure to pay compensation that was due and owing upon resignation or discharge, and the failure to pay all wages owed every pay period. Plaintiff's claims are typical of the claims of the others whom Plaintiff seeks to represent. Walmart's common course of conduct in violation of law as alleged herein has caused Plaintiff and the other aggrieved individuals to sustain the same or similar injuries and damages. Plaintiff's claims are representative of and co-extensive with the claims of the other aggrieved individuals.

II. Potential Claims Against Walmart

These practices are unlawful on a number of grounds. Walmart's policies or practices violate several provisions of the California Labor Code and other California law. Pursuant to California Labor Code §558.1, Walmart may be held liable for the wage and hour violations described herein. Plaintiff intends to seek remedies pursuant to PAGA for the following violations.

A. Failure to Pay Minimum Wages

At all relevant times, Walmart has been required to pay the drivers minimum wages under California law, including without limitation pursuant to the Industrial Welfare Commission Wage Order Nos. 4, 5, 9, 15 and/or 17 (the "Wage Orders"). Nevertheless, Walmart has failed to ensure that the drivers receive the applicable state minimum wage for all hours worked. Accordingly,

Walmart has violated California Labor Code §§ 216, 558, 1194, 1197, 1197.1, 1198, and the Wage Orders. Therefore, because of Walmart's failure to pay the legal minimum wage as required by state law, as alleged herein, Walmart is liable for civil penalties under Labor Code §§ 558, 1194, 1197, 1197.1, 1198, the Wage Orders, and/or PAGA for each aggrieved employee per pay period.

B. Failure to Pay Overtime

Walmart has failed to maintain a policy that compensates the drivers for all hours worked, including overtime. The drivers routinely work over eight (8) hours per day and/or forty (40) hours per week but are not paid one and one-half their regular rate of pay for overtime work, in violation of California Labor Code §§ 510, 554, 1194, 1198, and the Wage Orders. Accordingly, Walmart is liable for civil penalties pursuant to Labor Code §§ 510, 558, 1194, 1198, the Wage Orders and/or PAGA for each aggrieved employee per pay period.

C. Failure to Reimburse Expenses

Walmart has required drivers to bear many of the expenses of their employment, including without limitation expenses for vehicles, gas, parking, phone usage, vehicle wear and tear, vehicle maintenance, traffic tickets, tolls, parking fines, vehicle insurance, other insurance, supplies, equipment, including personal protective equipment (PPE), cleaning supplies, bags, containers, storage, and expenses resulting from collisions, accidents, and/or legal claims. Walmart has failed to indemnify the drivers for all necessary expenditures or losses incurred by the drivers, in violation of California Labor Code § 2802 and/or the Wage Orders, which requires the employer to indemnify employees for all necessary expenditures or losses incurred by employees in direct discharge of their duties. Accordingly, Walmart is liable for civil penalties pursuant to Labor Code §§ 558, 1197.1, 2802, the Wage Orders and/or PAGA for each aggrieved employee per pay period.

D. Violations of Paid Sick Day Requirements

By not having policies and procedures for drivers to accrue and take paid sick days Walmart violated Labor Code §§ 245-49. Because of Walmart's violations of the paid sick day requirements, Walmart is liable for civil penalties under California Labor Code §§ 248.5, 558 and/or PAGA.

E. Failure to Provide Uninterrupted Off-Duty Meal and Rest Periods

Walmart has failed to maintain a policy that provides the drivers with off-duty meal and rest periods as required by California law. The drivers regularly work in excess of four (4) hours or major fraction thereof during work days without being provided at least a ten-minute rest period and/or thirty-minute meal period during which they are relieved of all duties as required by California Labor Code §§ 226.7, 512, 1198, and the Wage Orders. As a result, Walmart is liable for civil penalties pursuant to Labor Code §§ 226.7, 512, 558, the Wage Orders, and/or PAGA for each aggrieved employee per pay period.

F. Failure to Secure Compensation

Walmart did not secure workers' compensation for the drivers, in violation of Labor Code §§ 3700, 3700.5, 3712, 3715. Because of Walmart's violations of those statutes, Walmart is subject to civil penalties pursuant to Labor Code §§ 3700, 3700.5, 3712, 3715 and/or PAGA for each aggrieved employee per pay period.

G. Failure to Furnish Timely, Accurate, Itemized Wage and Payroll Records

Walmart has failed and continues to fail to provide timely, accurate itemized wage statements to the drivers in violation of California Labor Code § 226(a)-(e) and/or the Wage Orders. Walmart's failure to provide timely, accurate, itemized wage statements to Plaintiff and other current and former employees in accordance with the California Labor Code is and has been knowing and intentional. Moreover, Walmart has failed to keep, at a central location in the state, payroll records showing the accurate hours worked daily by and the wages paid to, and the number of piece-rate units earned by and any applicable piece rate paid to, drivers employed by Walmart. Accordingly, Walmart is liable for civil penalties under Labor Code §§ 226(a)-(e), 226.3, 558, 1174, and/or PAGA for each aggrieved employee per pay period.

H. Willful Misclassification

In light of the California Supreme Court's decision in *Dynamex* and AB 5, it is clear that Walmart should classify the drivers as employees rather than as independent contractors. Under the "ABC" test, in order to justify classifying the drivers as independent contractors, Walmart would have to establish (a) that the shopper 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 shopper performs work that is "outside the usual course of [Walmart's] business"; and (c) that the shopper is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed. Walmart cannot prove that. Accordingly, Walmart's continued misclassification of its drivers as independent contractors is willful. As a result, Walmart has violated California Labor Code §§ 226.8 (a)(1) and (a)(2). Therefore, Plaintiff seeks recovery of civil penalties under Labor Code §§ 226.8 and/or PAGA.

I. Waiting Time Penalties

Plaintiff and other aggrieved individuals were not paid full compensation, including minimum wages and overtime, for all hours worked, as alleged above, and those who were discharged or resigned were not paid that compensation that was due and owing upon discharge and/or within seventy-two (72) hours of the employee's termination of employment by resignation. Thus, Walmart has failed and refused, and continues to willfully fail and refuse, to timely pay compensation and wages in violation of California Labor Code §§ 201, 202, and 203. As a result, Walmart is liable for civil penalties under Labor Code §§ 201, 202, 203, 256, 1197.1 and/or PAGA.

J. Failure To Pay All Wages Owed Every Pay Period

Plaintiff and the other aggrieved individuals were employees of Walmart covered by Labor Code § 204. Pursuant to Labor Code § 204, Plaintiff and the other aggrieved individuals were entitled to receive on regular paydays all wages earned for the pay period corresponding to the payday. Walmart failed to pay Plaintiff and the other aggrieved individuals all wages earned each pay period. At all times relevant during the liability period, Walmart maintained a policy or practice of not paying Plaintiff and the other aggrieved individuals all minimum wages and overtime wages owed for all overtime hours worked. That violates Labor Code § 204. As a result of Walmart's unlawful conduct, Walmart is liable for civil penalties under Labor Code § 204, 210, and/or PAGA for each aggrieved employee per pay period.

K. Unfair Business Practices

California law prohibits "unfair competition," including "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." Cal. Bus. & Prof. Code § 17200 *et seq.* (the "UCL"). Each of Walmart's foregoing policies and practices constitute unfair business practices within the meaning of the UCL. Plaintiff may therefore seek appropriate injunctive relief and restitution. Moreover, Walmart has placed a clause purporting to require arbitration in its employment agreements. To the extent that Walmart attempts to compel arbitration, that constitutes an independent and additional unfair business practice.

III. Conclusion

This letter serves as notice of our intent to seek civil penalties pursuant to PAGA on behalf of Plaintiff and a putative class. We believe there are numerous drivers at issue. Because of the size and scope of the case, we expect to expend significant time and resources pursuing these claims.

The facts and claims contained herein are based on the limited information available at the time of this writing. Therefore, if through discovery and/or expert review, Plaintiff becomes aware of additional compensation or penalties owed to them and other current or former Walmart drivers, Plaintiff reserves the right to revise these facts and/or add any new claims by amending this letter. Based on the foregoing, Plaintiff may file a civil action to pursue claims against Walmart and to seek PAGA remedies for these violations.¹²

Plaintiff requests that the LWDA notify them if it intends to investigate the above allegations pursuant to PAGA. Please advise this office within the sixty (60) day statutory period if your office will be investigating this matter. We would appreciate hearing from the LWDA as soon as possible. Please direct all communications and correspondence regarding this matter to

¹² Please be advised that California Labor Code § 2699.3 provides the employer(s) with an opportunity to cure certain violations of law.

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our office going forward. If you have any questions, please do not hesitate to contact us at (415) 956-1000. Thank you for your time and consideration in this matter.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Daniel M. Hutchinson". The signature is fluid and cursive, with a large, sweeping loop at the end.

Daniel M. Hutchinson

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