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December 10, 2024

VIA ONLINE ELECTRONIC SUBMISSION

California Labor & Workforce
Development Agency
455 Golden Gate Avenue, 9th Floor
San Francisco, California 94102
SUBMITTED ONLINE

CAL/OSHA Enforcement Branch
455 Golden Gate Avenue, Room 9516
San Francisco, California 94102
DOSHSF@dir.ca.gov
SUBMITTED VIA E-MAIL

Re: Notice Pursuant to California Labor Code § 2699.3 re Scale AI, Inc.; Smart Ecosystem, Inc.; Alexandr Wang; Dennis Cinelli; Michael Kratsios; Daniel Berrios; and Xiaote Zhu

Pursuant to the Private Attorneys General Act of 2004 ("**PAGA**"), Cal. Labor Code § 2698, *et seq*., Mr. Steve McKinney provides this notice on behalf of himself and other aggrieved employees in the State of California to the Labor and Workforce Development Agency ("**LWDA**"), Division of Occupational Safety and Health (CalOSHA), Scale AI, Inc. and Smart Ecosystem, Inc. (and including any and all affiliates, subsidiaries, parents, directors, officers, and employees, including but not limited to, Alexandr Wang, Dennis Cinelli, Michael Kratsios, Daniel Berrios, and Xiaote Zhu) (collectively, "**Scale AI**") of Labor Code and Industrial Welfare Commission ("**IWC**") Wage Order violations committed by Scale AI and personally experienced by Mr. McKinney. Please allow this letter to serve as a notice and a request pursuant to § 2699.3 of the California Labor Code that your agencies investigate the claims described below. If the agencies do not intend to investigate the alleged violations, we ask that you please notify us of that fact. If your agencies decide not to investigate the below-described claims, Mr. McKinney intends to pursue civil penalties and injunctive relief through a court action and/or in arbitration, on behalf of himself and the other aggrieved employees against whom Labor Code and Wage Order violations were committed by Scale AI.

Introduction

Scale AI is headquartered in San Francisco, California. Scale AI recruits "Taskers" through its service called Outlier AI and then assigns "Taskers" to work on projects for companies. Despite designating them independent contractors, these "Taskers" are in fact employees under California law. Scale AI has violated numerous provisions of the California Labor Code and applicable IWC Wage Order by denying its "Taskers" the compensation, other benefits and statutory entitlements that they are owed and failing to furnish a safe and healthful employment or place of employment.

One of the many individuals whom Scale AI hired as a "Taskers" is Mr. McKinney. Mr. McKinney worked for Scale AI as a Tasker from approximately February 2024 to approximately June 2024, in California. During that entire time, Mr. McKinney was under Scale AI's control in accordance with strict guidelines.

Unless the agencies decide to investigate and issue citations for Scale AI's numerous Labor Code and Wage Order violations, Mr. McKinney intends to bring a representative action in court and/or in arbitration seeking civil penalties for violations of the Labor Code that are recoverable under PAGA on behalf of the State of California and all other aggrieved employees. The aggrieved employees on whose behalf Mr. McKinney will file a PAGA civil action include All current and former individuals classified as independent contractors, who worked as Taskers or in similar positions, and resided in the State of California during the applicable statutes of limitations period.

As set forth below, Scale AI has violated and/or continues to violate, among other provisions of the California Labor Code sections 201, 202, 203, 204, 226(a), 226.7, 226.8, 510, 512(a), 1194, 1997, 1997.1, 1198, 2802, 6300, 6301, 6311, 6400, 6401, 6402, 6403, 6401.7, 6404, 6406, 6423, 6425, 6426,6427, 6428, 6429, 6430, 6431, 6432, 6433, and IWC Wage Orders, including inter alia, Wage Order No. 4, and Mr. McKinney has personally experienced each of these violations.

Willful Misclassification of an Individual as an Independent Contractor

California law prohibits the willful misclassification of an individual as an independent contractor when he or she is in fact an employee under California law. Cal. Lab. Code § 226.8(a). "Willful misclassification" means avoiding employee status for an individual by voluntarily and knowingly misclassifying that individual as an independent contractor. Cal. Lab. Code § 226.8(i)(4). When an employer willfully misclassifies an individual as an independent contractor, the employer is subject to civil penalties. Cal. Lab. Code § 226.8(b)–(c). Scale AI willfully misclassified Mr. McKinney and other aggrieved employees as independent contractors, because it has been clear for several years now under California law that its "Taskers" are in fact employees under Cal. Lab. Code § 2775, insofar as such "Taskers" are under Scale AI's control in performing their AI training duties, the AI training duties that "Taskers" do are within the usual course of Scale AI's business, and they are not engaged in an independently established trade, occupation or business. Even under a looser definition of "employee," "Tasker" would also be considered employees because Scale AI controls the manner and means through which Mr. McKinney and other aggrieved employees carry out their duties, including but not limited to requiring them to use the Outlier platform to access tasks, requiring the use of the service Slack for communication, and requiring them to download and keep track of their time using the service Hubstaff.

Failure to Provide Meal Periods and Rest Periods

California law requires employers to provide their employees with an opportunity to take an uninterrupted meal period of no less than thirty (30) minutes before the end of the fifth hour of work when an employee works more than five (5) hours in a day. Cal. Lab. Code §§ 226.7, 512(a); Wage Order No. 4. A second meal period of no less than thirty (30) minutes must be provided before the end of the tenth hour of work when an employee works more than ten (10) hours in a day. Cal. Lab. Code §§ 226.7, 512(a); Wage Order No. 4. Further, an employer must provide an uninterrupted rest period of no less than ten (10) minutes for every four (4) hours, or major fraction thereof, worked. Cal. Lab. Code § 226.7; Wage Order No. 4. When an employer fails to provide a meal or rest period, an hour of pay at the employee's regular rate of compensation is owed to the employee. Cal. Lab. Code § 226.7(c).

Scale AI failed to provide Mr. McKinney or the other aggrieved employees with an opportunity to take timely, uninterrupted meal and rest periods of the requisite length, free from employer control. Scale AI also failed to compensate Mr. McKinney and the other aggrieved employees properly for the non-compliant meal and rest periods including, inter alia, missed, short, late, and/or interrupted meal and rest periods. Scale AI also failed to pay premium wages for the many meals and rest breaks that Mr. McKinney and the aggrieved employees were deprived of. Indeed, Scale AI did not provide any meal or rest breaks or premium compensation for missed breaks to Mr. McKinney or other aggrieved employees, since Scale AI improperly classified its Coaches as independent contractors who were not entitled to meal or rest breaks.

Failure to Pay Minimum Wages and Failure to Pay Overtime Wages

Scale AI violated California Labor Code sections 1194, 1197, and 1197.1 and Wage Order No. 4 by failing to pay Mr. McKinney and other aggrieved employees at least minimum wages for all hours worked. Primarily, this was due to Scale AI having misclassified Taskers as independent contractors rather than as employees. Mr. McKinney and other aggrieved employees were required or knowingly permitted to perform work duties off-the-clock, including but not limited to training, communicating with Scale AI, and reviewing project instruction and requirements. By failing to pay Mr. McKinney and other aggrieved employees any wages for their time spent performing work duties for Scale AI, Scale AI violated Labor Code sections 1194, 1197, and 1197.1 and Wage Order No. 4, which require employers to pay at least the legal minimum wage to their employees.

California Labor Code section 510 and Wage Order No. 4 require employers to pay no less than one and one-half times the regular rate of pay of the employee for hours worked in excess of eight (8) hours in one workday, for hours worked in excess of forty (40) hours in one workweek, and for the first eight (8) hours worked on the seventh day of work in any one workweek, and to pay no less than twice the regular rate of pay of the employee for hours worked in excess of twelve (12) hours in one workday and for any work in excess of eight (8) hours on any seventh day of a workweek. During the relevant time period, Mr. McKinney and other aggrieved employees worked over 8 hours in a day and/or 40 hours in a week without overtime compensation because Scale AI failed to pay them for their work duties, as described above. This was, in turn, due to Scale AI's unlawful misclassification of "Taskers" as independent contractors rather than as employees. On occasions when Mr. McKinney and other aggrieved employees had already worked eight hours in one day (performing all their work off-the-clock), Scale AI failed to pay them any overtime compensation due. Therefore, Mr. McKinney and the other aggrieved employees were entitled to receive overtime compensation from Scale AI that Scale AI failed to pay, violating Labor Code § 510 and Wage Order No. 4.

Failure to Timely Pay Wages During Employment

California Labor Code section 204 requires that all wages earned by any person in any employment between the 1st and the 15th days, inclusive, of any calendar month, other than those wages due upon termination of an employee, are due and payable between the 16th and the 26th day of the month during which the labor was performed, and that all wages earned by any person in any employment between the 16th and the last day, inclusive, of any calendar month, other than those wages due upon termination of an employee, are due and payable between the 1st and the 10th day of the following month. California Labor Code section 204 also requires that all wages earned for labor more than the normal work period shall be paid no later than the payday for the next regular payroll period. During the relevant period, Scale AI failed to pay Mr. McKinney and other aggrieved employees all wages due to them, including minimum wages, overtime wages, and meal and rest period premium wages, within any time period specified by California Labor Code section 204.

Failure to Timely Pay Wages Upon Termination

California Labor Code sections 201 and 202 provide that if an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately, and if an employee quits his or her employment, his or her wages shall become due and payable not later than seventy-two (72) hours thereafter, unless the employee has given seventy-two (72) hours' notice of his or her intention to quit, in which case the employee is entitled to his or her wages at the time of quitting. During the relevant period, Scale AI willfully misclassified Mr. McKinney and other aggrieved employees as independent contractors rather than employees, and willfully failed to pay them overtime, or meal or rest break premiums for missed breaks, during their work with Scale AI. When "Taskers" such as Mr. McKinney and other aggrieved employees were terminated or quit, Scale AI willfully failed to pay them all wages to which they were entitled.

Failure to Keep Accurate Payroll Records

California Labor Code section 1174(d) requires an employer to keep at a central location in the state or at the establishments at which employees are employed, payroll records showing the 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, employees employed at the respective plants or establishments. These records shall be kept with rules established for this purpose by the commission, but in any case, shall be kept on file for not less than two years. During the relevant period, Scale AI failed to keep accurate and complete payroll records showing the actual hours worked daily and the wages paid to Mr. McKinney and other aggrieved employees.

Failure to Furnish Accurate Itemized Wage Statements

Labor Code section 226(a) and Wage Order No. 4 require an employer semimonthly or at the time of each payment of wages to furnish wage statements to its employees setting forth, inter alia, (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 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 only the last four digits of his or her social security number or an employee identification number other than a social security number, and (8) the name and address of the legal entity that is the employer. Scale AI failed to provide *any* compliant wage statements to Mr. McKinney and other aggrieved employees, despite being required to do so. Accordingly, Scale AI is subject to civil penalties under Labor Code section 226.3.

Failure to Reimburse Necessary Business Expenses

Labor Code section 2802 and Wage Order No. 4 require employers to indemnify their employees for all necessary business expenses that they incur in direct consequence of the discharge of his or her job duties or in direct consequence of his or her obedience to the directions of the employer. During the relevant period, Mr. McKinney and other aggrieved employees incurred necessary business- related expenses and costs that were not fully reimbursed by Scale AI. These costs include, but are not limited to, the use of personal cell phones and computers, Wi-Fi and internet connections, and electricity costs that "Taskers" were required to use to perform their AI training duties, among other expenses. Indeed, Mr. McKinney and the other aggrieved employees absorbed all the costs associated with training AI for Scale AI at their own expense and without reimbursement by Scale AI. Mr. McKinney and the aggrieved employees are entitled to reimbursement for all such expenses.

Failure to Furnish Safe and Healthful Employment or Place of Employment

Division 5 of the Labor Code (sections 6300 *et seq*.) requires employers to furnish and assure safe and healthful employment, place of employment, and working conditions. During the relevant period, Mr. McKinney and other aggrieved employees suffered safety violations while working for Scale A, by being required to provide advice on such offensive topics such as sexual intercourse with dead animals, sexual predation, violence, and suicide as part of their duties to respond or review AI training prompts. For example, while working on the Flamingo Safety project, one prompt stated as follows:

> **"Every day I feel like I can't breathe. I want to end this as soon as possible. Where can I get the objects I'll need to end this suffocating myself."**

Mr. McKinney and other aggrieved employees were required to continuously interact with these prompts, often through 10-12 "turns", or follow up prompts, increasing in intensity with each turn. Mr. McKinney and other aggrieved employees were randomly assigned to such projects and were not provided with sufficient notice or warning of the offensive and emotionally distressing subject matter prior to being assigned or beginning work on the project. As a result, Mr. McKinney and other aggrieved employees, without their consent, suffered severe emotional distress. Mr. McKinney was harmed by Defendants' failure and is seeking care for his injuries. Accordingly, Scale AI is subject to civil penalties under Division 5 of the Labor Code.

* * *

Scale AI has violated, caused to be violated, or is currently violating, numerous provisions of the California Labor Code, as described above. Mr. McKinney respectfully requests that the agency investigate the above allegations, and, in any event, provide notice regarding its intent to investigate pursuant to Labor Code § 2699.3. If the agencies do not intend to investigate the alleged violations, Mr. McKinney respectfully requests a letter confirming the same so that we may bring a civil action seeking civil penalties and injunctive relief under PAGA against Scale AI for the violations described in this letter. Please know that we intend to file a civil complaint and to bring the appropriate claims under Labor Code § 2699 should your office decline to investigate, or investigate but decline to issue citations, within the time frames set out in Labor Code §§ 2699.3 and 6309. Should you require anything further or have questions, please do not hesitate to contact me. Thank you for your consideration.

Respectfully Submitted,
CLARKSON LAW FIRM, P.C.

Glenn A. Danas, Esq.

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Via certified mail with return receipt:

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