Julia L. Montgomery, General Counsel, SBN 184083
Franchesca C. Herrera, Deputy General Counsel, SBN 239081
Michael I. Marsh, Attorney, SBN 232861
AGRICULTURAL LABOR RELATIONS BOARD
1325 J Street, Suite 1900 A
Sacramento, CA 95814-2944
Tel: (916) 653-2690
Julia.Montgomery@alrb.ca.gov
Franchesca.Herrera@alrb.ca.gov
Michael.Marsh@alrb.ca.gov

Jessica Arciniega, Regional Director, SBN 261169
AGRICULTURAL LABOR RELATIONS BOARD
1901 North Rice Avenue, Suite 300
Oxnard, CA 93030
Tel: (805) 973-5062
Fax: (831) 769-8039
Jessica.Arciniega@alrb.ca.gov

Attorneys for the General Counsel

STATE OF CALIFORNIA

AGRICULTURAL LABOR RELATIONS BOARD

| | |
|---|---|
| In the Matter of:<br><br>CINAGRO FARMS, INC.<br><br>Respondent,<br><br>and<br><br>MARISOL JIMENEZ,<br><br>Charging Party. | Case No.: 2017-CE-008-SAL<br><br>**GENERAL COUNSEL'S BRIEF ON THE APPLICABILITY OF *VELOX EXPRESS, INC.***<br><br>**GENERAL COUNSEL'S BRIEF ON THE APPLICABILITY OF *VELOX EXPRESS, INC.*** |

## I. INTRODUCTION

The General Counsel submits this brief in response to the Board's Administrative Order No. 2022-01, dated March 28, 2022. The Agricultural Labor Relations Board ("ALRB" or "Board") is not bound by the National Labor Relations Board's ("NLRB") decision in *Velox Express, Inc.*[1] because that decision is not applicable precedent, as set forth below. The Board should find that an agricultural employer's misclassification of agricultural employees as independent contractors constitutes a *per se* violation of Labor Code section 1153(a) because misclassification interferes with workers' rights under Section 1152 of the Act. Finally, the Board has authority under Labor Code section 226.8 to assess a civil penalty for the willful misclassification of agricultural employees as independent contractors.

## II. The ALRB is not bound by the NLRB's decision in *Velox Express, Inc.* as it is not applicable precedent.

While the Agricultural Labor Relations Act ("ALRA" or "Act") is patterned on the National Labor Relations Act ("NLRA") and the ALRB will generally follow NLRB precedent,[2] courts have found that the legislature intended that the ALRB diverge from NLRB precedent in those instances where California agriculture is different than the industries regulated by the NLRA.[3] The California Legislature "intended the board to select and follow only those federal precedents which are relevant to the particular problems of labor relations on the California labor scene."[4] The crucial question is "whether the particular NLRA precedent is 'applicable.'"[5]

---

[1] *Velox Express, Inc*. (2019) 368 NLRB No. 61.
[2] California Labor Code section 1148 requires the Board to "follow applicable precedents of the National Labor Relations Act…"
[3] *ALRB v. Superior Court* (1976) 16 Cal.3d 392, 413.
[4] *F & P Growers Assoc. v. ALRB* (1985) 168 Cal.App.3d 667, 673, citing to *ALRB v. Superior Court, supra* [finding that the NLRA's 'loss of majority' defense was inapplicable under the ALRA because the defense fails "to respond to the particular needs of the California agricultural scene."] See also *Cadiz v. ALRB* (Cal. App. 5th Dist. 1979) 92 Cal.App.3d 365, 374-375 [holding that the one-year decertification bar differs from the NLRA because sections of the ALRA are adapted to the peculiar conditions found in California agriculture."]
[5] *F & P Growers Assoc., supra*, p. 672-673, citing to *Perry Farms, Inc. v. ALRB* (1978) 86 Cal.App.3d 448.

### A. *Velox Express, Inc.* is not applicable precedent because the ALRA, and California's statutory scheme for agricultural labor differs from the NLRA and the federal scheme.

The NLRB's decision in *Velox Express, Inc*. is not applicable precedent and does not bind the Board because California's statutory scheme applicable to agricultural employees differs significantly from the federal standard in at least two ways important to this discussion. First, unlike the NLRA, the ALRA explicitly excludes labor contractors from coverage and instead holds the grower who engaged a farm labor contractor ("FLC") liable for the unfair labor practices ("ULP") of the FLC. The NLRA contains no such exclusion for contractors. Second, California law, unlike the federal standard, requires that employers provide employees with finely detailed notices and itemized wage statements. As shown below, these differences distinguish California such that *Velox Express, Inc*. is not applicable precedent.

#### 1. Unlike the NLRA, the ALRA's definition of employer excludes any person supplying agricultural workers to the employer.

The ALRA defines "agricultural employer" to "exclude any person supplying agricultural workers to an employer."[6] The NLRA has no such exclusion; contractors are employers under the NLRA.[7] The ALRA further states that the "employer engaging such labor contractor or person shall be deemed the employer for all purposes" under the Act.[8] This is important because a worker under the federal law is much more likely to know the name of the employer liable for a violation of the NLRA, namely, their direct employer. Not so under the ALRA. Farmworkers engaged by a FLC are hired and directly employed by a FLC who is not liable for violations under the ALRA.

California addresses this by requiring farm labor contractors, as defined in subdivision (b) of Labor Code section 1682,[9] to show the name and address of the legal entity securing the

---

[6] Cal. Lab. Code § 1140.4(c).
[7] 29 U.S.C. § 152(2).
[8] Cal. Lab. Code § 1140.4(c). See also *Gourmet Harvesting and Packing* (1978) 4 ALRB 14.
[9] Cal. Lab. Code § 1682(b), "'Farm labor contractor' designates any person who, for a fee, employs workers to render personal services in connection with the production of any farm products to, for, or under the direction of a third person, or who recruits, solicits, supplies, or hires workers on behalf of an employer engaged in the growing or producing of farm products…"

services of the FLC on the itemized wage statement.[10] The identity of the responsible party is thus more easily attainable by examining a paystub.

A FLC who misclassifies farmworkers denies those workers the paystub that would allow them to identify the grower who is ultimately responsible for violations under the Act. Without this information, workers may lose the ability to contact the person or entity responsible for addressing violations of the Act, who may be in a better position to rectify their complaints. The workers' bargaining power is thus diminished and protected concerted activity ("PCA") is chilled.

**2. California law requires employers to provide employees, but not independent contractors, with far more detailed notices and wage statements than federal law.**

The importance of detailed notices and wage statements is not limited to employees hired by FLCs. Any agricultural employer who misclassifies workers denies those workers the information they need to exercise their rights under the Act. Misclassification, itself, tends to chill PCA.

The federal Fair Labor Standards Act ("FLSA") does not require employers to provide a paystub to employees.[11] California law is vastly different. Labor Code section 226 requires California employers to provide employees with a detailed itemized wage statement.[12] California Industrial Welfare Commission Wage Order No. 14 also requires agricultural employers to provide employees with an itemized statement in writing showing wages and deductions.[13]

---

[10] As amended by the Wage Theft Prevention Act of 2011, (2011 Cal. Stats. ch. 655; Cal. AB 469.)

[11] Fair Labor Standards Act of 1938, 29 U.S.C. 201, et seq.

[12] Cal. Lab. Code § 226(a). The wage statement must contain, at minimum: 1) gross wages earned; 2) total hours worked; 3) the number of piece-rate units earned and any applicable piece rate; 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 the last four digits of his or her social security number or an employee identification 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.

[13] Cal. Industrial Welfare Commission Order No. 14-2001, Sec. 7(C), "Every employer shall…or at the time of each payment of wages furnish each employee…an itemized statement in writing showing: (1) all deductions; (2) the inclusive dates of the period for which the employee is paid; (3) the name of the employee or the employee's social security number; and (4) the name of the employer, provided all deductions made on written orders of the employee may be aggregated and shown as one item.

California employers must provide paystubs even if the employee is a foreign national without a valid work permit.[14] These requirements are so crucial to California's employment scheme that an employer who willfully fails to provide such a paystub is potentially liable to each employee for up to four thousand dollars ($4,000), plus an award of costs and reasonable attorney's fees.[15] Indeed, accurate wage statements allow employees to know whether they were paid correctly, thus facilitating their ability to individually or jointly seek redress for wages owed. This information is especially critical in agriculture, where workers tend to move among multiple employers in a given year, often earning variable piece rate amounts. Depriving farmworkers of this information significantly diminishes their ability to understand how much they are owed and to take collective action to obtain their unpaid wages.

California's scheme further differs from federal law because it requires employers to provide newly hired employees with a written notice that includes the pay information; the name of the employer, including "doing business as" names used by the employer; the physical address of the employer's main office; the employer's telephone number; the name, address, and telephone number of the employer's workers' compensation insurance carrier; and that an employee may accrue and use sick leave and has the right to file a complaint against an employer who retaliates against the employee for requesting or using sick leave.[16]

The notices and statements required by Labor Code sections 226 and 2810.5(a), as well as IWC Order 14, distinguish California law from federal law. California requires agricultural employers to provide employees with detailed information about their employment. Federal law does not. Denying workers this information, by misclassifying them as independent contractors,[17] thwarts farmworkers' exercise of their rights under the ALRA by depriving them of the information that they need to understand their pay and working conditions, compare their pay with their coworkers, and to complain collectively about their pay and working conditions.

---

[14] *Kao v. Holiday* (Cal. App. 1st Dist. 2017) 12 Cal. App. 5th 947, 960.
[15] Cal. Lab. Code § 226(e).
[16] Cal. Lab. Code § 2810.5(a). *But see* Section 1821(a) of the Migrant and Season Agricultural Worker Protection Act (29 U.S.C. 1801, et. seq.) which requires that agricultural employers provide a less detailed notice to migrant, but not seasonal agricultural workers.
[17] Cal. Lab. Code § 226(a), "Every employer shall…at the time of each payment of wages, furnish each of his or her *employees*…" (Emphasis added.)

Thus, misclassification reduces California farmworkers' bargaining power. Because of California's heightened notice requirements for farmworkers' wage statements, farmworkers in California who are misclassified as independent contractors are therefore deprived of significantly more information and bargaining power than misclassified workers covered by the NLRA. For these reasons, the NLRB's decision in *Velox Express, Inc*. is not applicable precedent under Section 1148 of the Act.

### B. *Velox Express, Inc.* is not applicable precedent because California's agricultural labor scene differs from those regulated by the NLRB.

California's agricultural labor scene differs significantly, on average, from the industries governed by the NLRB. An average of 425,000 people are employed as farmworkers in California each month and the agricultural industry employs over 850,000 unique individuals in California each year.[18] Approximately 98% of the workers are foreign born.[19] Over thirty percent of California's farmworkers are not legally authorized to work in the United States.[20] Less than 15% of California's farmworkers speak English.[21] And on average, California's crop workers have seven years of schooling.[22] These unique characteristics distinguish California's agricultural labor scene from the labor forces regulated by the NLRB.

The California Legislature "intended the board to select and follow only those federal precedents which are relevant to the particular problems of labor relations on the California labor scene."[23] California's agricultural labor scene amplifies the importance of notices—such as itemized pay statements, documents showing the grower's name, documents providing information about the employer, etc.—to farmworkers. These are notices required under California law, but not federal law. These notices inform workers, not only of their pay rate, but also the identity of their employer and grower, which allows workers to collectively bargain with their employer. These notices provide workers with the information they need to know if they are

---

[18] Philip L. Martin, "Immigration and Farm Labor: Challenges and Opportunities," June 2017, pp. 6-8.
[19] Philip L. Martin, "Immigration reform and California agriculture," Calif Agr. (2013).
[20] *Ibid*.
[21] Philip L. Martin, "Immigration and Farm Labor: Challenges and Opportunities," June 2017, p. 11.
[22] *Id*. p. 10.
[23] *F & P Growers Assoc. v. ALRB, supra.*

being paid correctly and who is responsible if they believe that they are not being paid correctly. These notices help catalyze workers. Unlike the federal system, in California, when an agricultural employer misclassifies workers as independent contractors, the employer denies the worker with the very notices that inform and help move workers to carry their complaints to the correct employer and/or grower. Because of these differences, *Velox Express, Inc.* is not applicable precedent.

### C. *Velox Express, Inc*. is further distinguishable because the NLRB regulates a multitude of different industries with differing employment structures and categories of employees, whereas the ALRB regulates a single industry.

In *Velox Express, Inc*., the Board found that complications in determining whether a person was an employee or an independent contractor was an "important legal and policy concern[] weigh[ing] against finding a stand-alone misclassification violation."[24] The NLRB regulates thousands of different industries with a multitude of different job classifications and employment structures, as well as a broad range of categories of workers, from those performing manual labor to highly-educated professionals. The question of whether an employer regulated by the NLRB has correctly classified a worker as an independent contractor is potentially much more complicated. The ALRB by contrast, regulates a single industry with an overwhelming majority of workers performing manual labor. Moreover, the Board has provided consistent direction regarding whether farmworkers are independent contractors.[25]

## III. <u>The Board should find consistent with its own precedent that employer actions that could be understood by employees to be restrictive of their right to file unfair labor practice charges with the ALRB and chill employees' rights under the ALRA violate the Act.</u>

The ALRA protects farmworker employees; independent contractors are not protected by the Act.[26] At its simplest, to misclassify a farmworker is to tell the worker that they have no rights under the ALRA. When an agricultural employer informs a farmworker that they cannot

---

[24] *Velox Express, Inc., supra,* p. 8.
[25] See *Henry A. Garcia Dairy* (2007) 33 ALRB No. 4; *Arie de Jong, dba Milky Way Dairy* (2003) 29 ALRB No. 4; *GH & G Zysling Dairy* (2006) 32 ALRB No. 2. See also *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal. 3d 341.
[26] *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal. 3d 341, 359.

file a charge or make use of the ALRB's processes, that is a violation of the Act.[27] In *T.T. Miyasaka, Inc*., the employer required workers to sign a binding arbitration agreement, prepared by the employer, which "reasonably could be understood by employees to be restrictive of their right to file unfair labor practice charges with the [Board], and to chill employees' rights under ALRA section 1152."[28] The Board found that the agreements violated the Act even though "Miyasaka's arbitration policy and standard arbitration agreement [did] not explicitly preclude employees from filing unfair labor practice charges with the ALRB."[29] The Board further found that "Miyasaka's discerning employees could still reasonably construe the language of its arbitration policy and agreement as a prohibition against the filing of ALRB charges. It is of no moment that Miyasaka did not intend to prohibit the filing of ALRB charges by its employees or that it made no effort to interfere with what [charging party] did here."[30]

Similarly, misclassification tends to chill workers' rights. Both employer schemes—requiring workers to sign arbitration agreements reasonably understood to deny workers access to the ALRB, and misclassification which is reasonably understood to deny workers those same rights—send a message to workers that they do not have the right to file a charge with the ALRB. Misclassification, like the arbitration agreement in *T.T. Miyasaka, Inc.* does not explicitly preclude agricultural employees from filing unfair labor practice charges, but a worker would reasonably understand, from the employer's actions, that they had no such right. Thus, both schemes tend to chill PCA and weaken collective bargaining.

An independent contractor has no rights under the Act. Independent contractors cannot form, join or assist unions for purposes of collective bargaining. Independent contractors cannot vote in an election for a collective bargaining representative. Independent contractors are not protected when they join with others for mutual aid and protection. Employers are free to discipline or terminate independent contractors for engaging in these activities. This creates an

---

[27] *T.T. Miyasaka, Inc.* (2016) 42 ALRB No. 5, p. 1. See companion case *Premiere Raspberries, LLC dba Dutra Farms* (2016) 42 ALRB No. 4.
[28] *Ibid.*
[29] *T.T. Miyasaka, Inc., supra*, Administrative Law Judge Decision ("ALJD") p. 16.
[30] *Id*. at p. 18.

incentive to willfully misclassify workers to deprive them of their rights.[31] The California Supreme Court also recognized the dangers of misclassifying farmworkers as independent contractors in *S.G. Borello & Sons, Inc.,* concluding "that the sharefarmers are 'independent contractors' under the [workers' compensation] Act would suggest a disturbing means of avoiding an employer's obligations under other California legislation intended for the protection of 'employees,' including laws enacted specifically for the protection of agricultural labor…These include the Agricultural Labor Relations Act…"[32]

Because willful misclassification can and has been used to deprive workers of their rights under the Act and sends a message to workers that they have not rights under the ALRA, the Board should find consistent with its decision in *T.T. Miyasaka, Inc.* that misclassification of workers is a standalone violation of Section 1153(a) of the Act.

## IV. The Board has authority under California Labor Code section 226.8 to assess civil penalties against any agricultural employer found to have willfully misclassified agricultural employees as independent contractors.

The Board has no authority *under the Act* to assess civil penalties.[33] Yet the plain language of Labor Code section 226.8 grants the ALRB separate and distinct authority to assess civil penalties against agricultural employers who willfully misclassify agricultural employees as independent contractors.

### A. The Board has authority to assess civil penalties under the plain language of Labor Code section 226.8.

Section 226.8(a) makes it unlawful for any person or employer to willfully misclassify an individual as an independent contractor. If the Labor and Workforce Development Agency ("LWDA") or a court issues a determination that a person or employer has willfully misclassified

[31] *Houston Chronicle Publishing Co.* (1952) 101 NLRB 1203, 1211-1215 [employer misclassified employees as independent contractors to defeat their union organizing activities]; *United Dairy Farms Coop. Assn.* (1979) 242 NLRB 1026, 1051 [employer unlawfully misclassified its drivers from employees to independent contractors to interfere with the driver's union organizing campaign.]
[32] *S.G. Borello & Sons, Inc., supra,* at p. 359.
[33] *Sunnyside Nurseries, Inc. v. ALRB* (1979) 93 Cal.App.3d 922, 940; *Laflin & Laflin v. ALRB* (1985) 166 Cal.App.3d 368, 380.

a person as an independent contractor, the person or employer shall be subject to a civil penalty of not less than five thousand dollars ($5,000) and not more than fifteen thousand dollars ($15,000) for each violation, in addition to any other penalties or fines permitted by law.[34]

The plain language of Section 226.8 shows that the California Legislature granted the ALRB the authority to assess such civil penalties. Section 226.8(i)(2) defines LWDA as the Labor and Workforce Development Agency or *any of its departments, divisions, commissions, boards, or agencies.* (Emphasis added.) It is indisputable that the ALRB is a board and agency of the LWDA. As Section 226.8(a) grants ALRB the authority to assess this civil penalty, it is thus empowered to enact regulations to establish procedures for the ALRB to investigate and adjudicate an alleged violation of this section.

## V. CONCLUSION

For the foregoing reasons, the Board is not bound by *Velox Express, Inc*. because that decision is not applicable precedent. The Board should find that an agricultural employer's misclassification of agricultural employees as independent contractors constitutes a *per se* violation of Labor Code section 1153(a). Furthermore, the Board has authority under Labor Code section 226.8 to assess a civil penalty for the willful misclassification of agricultural employees as independent contractors.

Dated this 27th day of May 2022, at Salinas, California.

AGRICULTURAL LABOR RELATIONS BOARD
JULIA L. MONTGOMERY
General Counsel

Michael I. Marsh
MICHAEL I. MARSH
Attorney

[34] Cal. Lab. Code §226.8(b). Furthermore, Section 226.8(c) imposes 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 where the person or employer engages in "a pattern or practice of these violations."

**State of California**
**Agricultural Labor Relations Board**
**PROOF OF SERVICE BY MAIL**
(8 Cal.Code Regs. Sec. 20164)

I am a citizen of the United States and a resident of the County of Tulare. I am over the age of eighteen years and not a party to the within entitled action. My business address is 1642 West Walnut Avenue, Visalia, CA 93277-5348.

On **May 27, 2022,** I served the within **GENERAL COUNSEL'S BRIEF ON THE APPLICABILITY OF VELOX EXPRESS, INC., Cinagro Farms, Inc., Case No. 2017-CE-008-SAL**, on the parties in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Visalia, California addressed as follows:

**ELECTRONIC DELIVERY**
Robert P. Roy
Ventura County Agricultural Association
916 W. Ventura Blvd.
Camarillo, CA 93010
rob-vcaa@pacbell.net

**CERTIFIED MAIL #7021 0350 0001 1316 5843**
Marisol Jimenez
1201 W. Gonzalez Road, Apt. 73
Oxnard, CA 93036

**E-FILE**
Santiago Avila-Gomez, Executive Secretary
Agricultural Labor Relations Board
1325 J Street, Suite 1900 B
Sacramento, CA 95814-2944
Efile@alrb.ca.gov

**ELECTRONIC DELIVERY**
Julia Montgomery, General Counsel
Agricultural Labor Relations Board
1325 J Street, Suite 1900 A
Sacramento, CA 95814
julia.montgomery@alrb.ca.gov

Executed on **May 27, 2022**, in Visalia, California. I declare under penalty of perjury that the foregoing is true and correct.

Laura Camero

Laura Camero