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Kern County Superior Court

By Rebecca Saldivar, Deputy

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JENNA OJEDA on behalf of
herself, all aggrieved employees, and the State
of California as a Private Attorneys General

SUPERIOR COURT OF THE STATE OF CALIFORNIA

KERN COUNTY

JENNA OJEDA, an individual, on behalf of
herself, all aggrieved employees, and the State
of California as a Private Attorneys General,

Plaintiffs,

vs.

MASHBURN TRANSPORTATION
SERVICES, INC., a California corporation,
and DOES 1-50, inclusive,

Defendants.

Case No.: BCV-20-100972

REPRESENTATIVE ACTION

**Violation of the Private Attorneys General
Act of 2004, Cal. Labor Code §2698 *et seq.***

Plaintiff JENNA OJEDA brings this PAGA representative action complaint on behalf of
herself, all aggrieved employees, and the State of California as a Private Attorneys General, and
alleges as follows:

NATURE OF THE ACTION

1
2 1. Plaintiff JENNA OJEDA worked for defendant MASHBURN TRANSPORTATION
3 SERVICES, INC., and Does 1-50 (collectively "Defendants") until May of 2019. Plaintiff brings
4 this action pursuant to the Private Attorneys General Act of 2004 ("PAGA"), Cal. Labor Code
5 §2698 *et seq.*, on a representative basis. All current and former employees of Defendants within
6 one year of serving notice on the LWDA to the present are aggrieved employees.

7 2. Defendants failed to comply with California Labor Code requirements due to erroneous,
8 willful, and intentional employment practices and policies. Plaintiff brings this representative
9 action on behalf of herself, all others similarly situated aggrieved employees, and the State of
10 California, based upon the claims articulated below. Plaintiff provided notice of her claims
11 pursuant to §2698 *et. seq.*, to the Labor and Workforce and Development Agency ("LWDA"), as
12 illustrated by the attached Exhibit. The LWDA has not provided any notice to Plaintiff following
13 the exhaustion of the 65-day notice period required by 2699.3(a)(2)(B). Accordingly, Plaintiff now
14 brings this Complaint for civil penalties under the Private Attorneys General Act ("PAGA"), Labor
15 Code §2698 *et seq.*

16 3. Defendants have had a consistent policy and/or practice of: (1) failing to pay for all hours
17 worked, including overtime hours worked; (2) underpaying overtime due to failing to include
18 nondiscretionary bonuses into employees' regular rate of pay for purposes of calculating overtime
19 due; (3) failing to reimburse for required business expenses; (4) failing to timely pay all wages
20 owed; and (5) failing to provide accurate wage statements and maintain accurate payroll records.
21 Defendants are therefore liable for civil penalties under the Cal. Labor Code, including the Private
22 Attorney General Act ("PAGA"), Labor Code §2698 *et seq.*, as described more fully herein.

THE PARTIES

24 7. Plaintiff JENNA OJEDA is a resident of the State of California and was employed as an
25 hourly, nonexempt employee of Defendants until May 6, 2019.

26 8. Defendant MASHBURN TRANSPORTATION SERVICES, INC. is a California
27 corporation doing business in California with the capacity to sue and to be sued and doing business,
28 in Kern County, State of California.

1 9. Plaintiff is unaware of the true names, capacities, relationships, and extent of
2 participation in the conduct alleged herein, of the Defendants sued as DOES 1 through 50, but is
3 informed and believes and thereon alleges that said Defendants are legally responsible for the
4 wrongful conduct alleged herein and therefore sues these Defendants by such fictitious names,
5 Plaintiffs will amend this complaint when their true names and capabilities are ascertained.

6 10. Plaintiff is informed and believes and thereon alleges that each Defendant, directly or
7 indirectly, or through agents or other persons, employed Plaintiff and other aggrieved employees
8 of the representative class, and exercised control over their wages, hours, and working conditions.
9 Plaintiff is informed and believes and thereon allege that each Defendant acted in all respects
10 pertinent to this action as the agent of the other Defendants, carried out a joint scheme, business
11 plan or policy in all respects pertinent hereto, and the acts of each Defendants are legally
12 attributable to the other Defendants.

13 JURISDICTION AND VENUE

14 11. Venue is proper in this judicial district because Defendants conduct business in this
15 county, and each defendant has legal obligations to Plaintiff and many of the aggrieved employees
16 in this case that arose in this county.

17 12. The statutory penalties sought by Plaintiff exceeds the minimum jurisdictional limits
18 of the Superior Court and will be established according to proof at trial. Based on information,
19 investigation, and analysis, Plaintiff alleges that the amount in controversy, including claims for
20 monetary damages, penalties, and attorney's fees, is more than twenty-five thousand dollars
21 (\$25,000).

22 13. The California Superior Court has jurisdiction in this matter because Plaintiff is a
23 resident of California, and Defendants are incorporated in and/or qualified to do business in
24 California and regularly conduct business in California. Further, there is no federal question at
25 issue as the claims herein are based solely on California law.

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1 **PAGA REPRESENTATIVE ACTION ALLEGATIONS**

2 14. During the relevant period, Defendants committed various violations of the California
3 Labor Code as alleged below in more detail. Defendants enforce multiple policies that violate state
4 law, which is intended to increase profits to the detriment of aggrieved employees.

5 15. Defendant MASHBURN TRANSPORTATION SERVICES, INC. operates a trucking
6 and transportation business where Plaintiff worked as a Dispatcher, and later as a Dispatcher
7 Advisor. Defendants employed Plaintiff and over 100 current and former aggrieved employees.

8 16. For at least one (1) year prior to the date of service notice on the LWDA, and continuing
9 to the present, Defendants engaged in unlawful employment practices that resulted in violations of
10 numerous Labor Code sections, as set forth more fully below.

11 17. Plaintiff and all current and former employees within one year of filing this action to
12 the present are aggrieved employees within the meaning of Labor Code 2699, *et seq.* (See Labor
13 code §2699(c).)

14 18. Defendants, and each of them, have committed the following violations of the
15 California Labor Code:

16 **Failure to Pay for All Hours Worked, Including Overtime Hours Worked**

17 (Cal. Labor Code §§218, 510, 512, 558, 1194, 1197, 1197.1, 1198, 1199, 2698 *et seq.*)

18 19. Plaintiff reasserts and realleges all preceding paragraphs as if fully set forth and
19 incorporate said paragraphs herein by reference.

20 20. Section 2(H) of Wage Order 9 defines “hours worked” as “the time during which an
21 employee is subject to the control of an employer, and including all the time the employee is
22 suffered or permitted to work, whether or not required to do so.” Plaintiff and aggrieved employees
23 were not paid for all hours worked, including overtime hours worked because of Defendants’
24 policy of shaving timecard entries due to rounding and calling and texting employees while off the
25 clock. Defendant also failed to include nondiscretionary bonuses in the average rate of pay for
26 purposes of calculating overtime and failed to reimburse employees for required personal cell
27 phone use.
28

21. Defendants have been engaged in many unlawful employment practices which resulted in underpayment for hours worked each pay period, including penalty pay and overtime hours worked, as more fully set forth below:

22. Time Shaving and Rounding. Defendants round employee timecard entries to the nearest ¼ hour, although Defendants use high-tech facial recognition timeclocks that could easily capture the exact minute employees present for work. Below is a screenshot from Plaintiff's May 7, 2019, wage statement, illustrating that all time hours worked are rounded to the nearest 15 minutes.

Earnings and Hours	Qty	Rate	Current
DISPATCHER HR	66:15	23.00	1,523.75
DISPATCHER HR OT	8:15	34.50	284.83
HOURLY SICK	5:30	23.00	126.50
HOURLY VACATION	17:52	23.00	410.83
MEAL ADJUSTMENT	1:00	23.00	23.00
HOLIDAY PAY			0.00
BONUS HR			0.00
BONUS HR OT			0.00
REFERRAL			0.00
	98:52		2,368.81

The California Supreme Court has rejected the *de minimis* argument frequently echoed by employers, confirming that employees are entitled to payment for all hours (and minutes) worked. Indeed, California law will permit a "rounding policy only 'if the rounding policy is fair and neutral on its face and 'it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked.'" (*Troester v. Starbucks Corporation*, (2018) 5 Cal. 5th 829, 846, citing *See's Candy*, 210 Cal.App.4th at p. 907.) The policy utilized by Defendants is neither fair nor neutral, as it consistently shaved time from Plaintiff and aggrieved employees' hours worked. The policy utilized by Defendants was neither fair nor neutral, as it consistently favored the employer, resulting in a failure to compensate Plaintiff and aggrieved employees for all hours and overtime hours worked.

23. Pre and Post-Shift Work and Off-the-Clock Communications. Plaintiff and aggrieved employees frequently worked off the clock and were routinely subjected to periods wherein they were under Defendants' control but not compensated for their time. At the beginning of the shift, when Plaintiff and aggrieved employees were opening the facility, they are required to unlock the

1 facility, disarm the alarm, turn on all lights in the warehouse, then clock in. This process takes a
2 1-3 minutes daily. In addition, Plaintiff and aggrieved employees frequently received calls and text
3 messages from Defendants on their time off. For example, Plaintiff has received text messages
4 from Defendants on her way to work. She was also required to take calls with her employer on her
5 personal time on her way home from work, and while at home. These communications were about
6 matters related to work. Plaintiff and aggrieved employees were not paid for time spent
7 communicating with their employer while off the clock, nor were they paid for use of their phones
8 for work purposes, as discussed below.

9 24. This resulted in many unpaid hours worked for all aggrieved employees required to
10 communicate regarding work matters with their employer while off the clock. Defendants violated
11 Labor Code §§510 1194, and 1198, and Wage Order 9. Defendants are liable for civil penalties
12 pursuant to Labor Code §§558 and 2698 *et seq.*

13 25. Failure to Pay Wages- Required Minimum Wage. Defendants failed to pay Plaintiff
14 and aggrieved employees for all hours worked as a result of Defendants' timecard rounding and
15 time shaving practices, as well as Defendants' practice of requiring employees to communicate
16 via phone and text with Defendants while employees were off the clock. Plaintiffs further
17 miscalculated the regular rate for purposes of calculating overtime, as discussed below. Based on
18 Defendants' unlawful conduct described above, and because Plaintiff and the aggrieved
19 employees were paid at or near minimum wage, Defendants' failure to pay for all hours worked,
20 including overtime, resulted in a payment of less than the minimum wage for all hours worked, in
21 violation of Labor Code §1197, 1197.1, 1199 and Wage Order 9-2001 4(B). Defendants are liable
22 for civil penalties pursuant to Labor Code §§558 and 2699 *et seq.*

23 26. Failure to Pay Overtime Wages. Defendants have required, as a result of the practices
24 alleged herein, Plaintiff and others to work hours in excess of eight hours in a day and forty in a
25 week, but has not paid these employees overtime compensation at one and one-half times the
26 regular rate of pay in violation of Labor Code §510. Further, Plaintiff and aggrieved employees
27 have been required to work more than 12 hours in one day without being compensated at a rate of
28 twice the regular rate of pay. §510. As a result, Plaintiff and aggrieved employees have been denied

1 “the unpaid balance of the full amount of this... overtime compensation” as required by Cal. Labor
2 Code. §1194. Defendants are liable for civil penalties pursuant to Labor Code §§558 and 2699 *et*
3 *seq.*

4 **Failure to Include Nondiscretionary Bonuses in Regular**

5 **Rate of Pay to Calculate Overtime**

6 (Cal. Labor Code §§200, 207, 218, 510, 558, 1194, 1197, 1197.1, 1198, 2699 *et seq.*)

7 27. Pursuant to Labor Code §200(a) “‘Wages’ includes all amounts for labor performed by
8 employees of every description, whether the amount is fixed or ascertained by the standard of time,
9 task, piece, commission basis, or other method of calculation.”

10 28. Defendants have a policy and practice of issuing nondiscretionary bonuses to Plaintiff
11 and aggrieved employees but fails to include bonuses when calculating the regular rate of pay for
12 purposes of calculating overtime. It is well established that non-discretionary bonuses retroactively
13 increase the employee’s “regular rate” of pay for purposes of calculating overtime. (Labor Code
14 §207) The “regular rate” is calculated by dividing the hours worked in a week by all the
15 compensation earned for that week. When an employee is later paid a bonus that is partly due to
16 work performed in that week, this additional pay must be added into the total compensation for
17 the week, increasing the employee’s regular rate of pay. (*Marin v. Costco Wholesale Corp.* (2008)
18 169 CA4th 804, 807.)

19 29. Plaintiff and aggrieved employees received nondiscretionary quarterly incentive
20 bonuses (Plaintiff’s was \$500) when they met established criteria. They also received team
21 bonuses of \$250 if the entire team completed their weekly reports.

22 30. Defendant did not make any adjustments to overtime rates to incorporate the
23 nondiscretionary bonuses, and this failure is reflected in Plaintiff and aggrieved employees’
24 paystubs. Plaintiff and other employees have been denied “the unpaid balance of the full amount
25 of this... overtime compensation” as required by Cal. Labor Code. §1194. Additionally,
26 Defendants have violated Cal. Labor Code §218 and §510 and applicable Industrial Welfare
27 Commission Wage Orders at sections (3)(A)(1) for failure to pay overtime, as well as §1198 which
28

1 makes it a violation of the labor code to fail to comply with a wage order. Defendants are liable
2 for civil penalties pursuant to Cal. Labor Code §558 and 2698 *et seq.*

3 **Failure to Reimburse For Required Business Expenses**

4 **(Cal. Labor Code §§1198, 2802, 2699 *et seq.*)**

5 31. Labor Code §2802 requires employers to indemnify employees for necessary
6 expenditures or losses incurred by employees in direct consequence of the discharge of duties.

7 32. Plaintiff and aggrieved employees would receive calls from supervisors on their
8 personal time, while not at work. Plaintiff would receive calls on her way home from work, and,
9 on occasion, her boss would text her before she got to work. Defendant required Plaintiff and
10 employees to utilize their personal cell phones for work purposes but failed to reimburse Plaintiff
11 and employees for this use as required by the Labor Code. As a result of these practices,
12 Defendants are liable for civil penalties under Cal. Lab. Code §2698 *et seq.* Plaintiff also seeks
attorneys' fees and costs pursuant to Labor Code §§558 and 2699(g)(1).

13 **Failure to Timely Pay All Wages Owed**

14 **(Cal. Labor Code §§201, 202, 203, 558, and 2698 *et seq.*)**

15 33. Defendants knowingly and willfully failed to pay all compensation due and owing to
16 Plaintiff and aggrieved employees at the time employment terminated. Defendants willfully failed
17 to pay employees who are no longer employed by it all compensation due upon termination of
18 employment as required by Cal. Lab. Code §§201 and 202.

19 34. Plaintiff believes that other employees who separated from the company, whether
20 voluntary or involuntary, were also denied payment of wages in a timely manner as required by
21 §203. Plaintiff seeks civil penalties pursuant to §558 (a)(3) for each violation of §203 and civil
22 penalties under PAGA pursuant to §2698 *et. seq.*, on behalf of the Labor and Workforce and
23 Development Agency (LWDA).

24 35. Pursuant to §§203, Plaintiff and similarly situated individuals are now also entitled to
25 recover up to thirty (30) days of wages due to Defendants' "willful" failure to comply with the
26 statutory requirements of §§201 and 202 of the Labor Code. Moreover, because Defendants
27 violated §§201, 202 and 203, Defendants are liable for civil penalties pursuant to Cal. Lab. Code
28 § 2698 *et. seq.*

1 36. Defendants were required to pay Plaintiff and employee all wages earned twice during
2 each calendar month pursuant to Labor Code §204(a). Defendants failed to pay all wages earned
3 to employees as a result of the unlawful employment policies and practices discussed herein. As a
4 result of these practices, aggrieved employees were underpaid for hours worked, including
5 overtime wages, and this underpayment resulted in a failure to pay all wages owed twice per
6 month.

7 **Civil Penalties For Failure to Furnish and Maintain Accurate Payroll Records**

8 (Civil Penalties under Labor Code §§ 226(a), 226.3, 1174, 1174.5, 2698 *et seq.*)

9 37. Plaintiff reasserts and realleges all preceding paragraphs as if fully set forth and
10 incorporate said paragraphs herein by reference.

11 38. California Labor Code § 226(a) provides that “[e]very employer shall, semimonthly or
12 at the time of each payment of wages, furnish each of his or her employees...an accurate itemized
13 statement in writing showing (1) gross wages earned, (2) total hours worked..., (3) the number of
14 piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis,
15 (4) all deductions ... , (5) net wages earned, (6) the inclusive dates of period for which the employee
16 is paid, (7) the name of the employee and his or her social security number..., (8) the name and
17 address of the legal entity that is the employer, and (9) all applicable hourly rates in effect during
18 the pay period and the corresponding number of hours worked at each hourly rate by the
19 employee.”

20 39. Labor Code § 1174 provides that “[e]very employer employing labor in this state shall
21 ... (c) [k]eep a record showing the names and addresses of all employees employed and the ages
22 of all minors [and] (d) [k]eep at a central location in the state or at the plants or establishments at
23 which employees are employed, payroll records showing the hours worked daily by and the wages
24 paid to, and the number of piece-rate units earned by and any applicable piece rate paid to,
25 employees employed at the respective plants or establishments. These records shall be kept in
26 accordance with rules established for this purpose by the commission, but in any case shall be kept
27 on file for not less than two years.”
28

1 40. Defendants knowingly and intentionally failed to provide timely, accurate, itemized
2 wage statements to Plaintiff and the aggrieved employees in accordance with Labor Code §§ 226
3 and 1174. Derivative of the claims alleged above, the statements provided to Plaintiff and
4 aggrieved employees have not accurately reflected actual gross wages earned, including overtime,
5 phone reimbursement, and total hour worked. Such failures caused injury to Plaintiff and aggrieved
6 employees, by, among other things, impeding them from knowing the total hours worked and the
7 amount of wages to which they are and were entitled, nor the accurate rate of overtime pay they
8 were entitled to.

9 41. Labor Code § 226.3 provides, “[a]ny employer who violates subdivision (a) of Section
10 226 shall be subject to a civil penalty in the amount of two hundred fifty dollars (\$250) per
11 employee per violation in an initial citation and one thousand dollars (\$1,000) per employee for
12 each violation in a subsequent citation, for which the employer fails to provide the employee a
13 wage deduction statement or fails to keep the records required in subdivision (a) of Section 226.
14 The civil penalties provided for in this section are in addition to any other penalty provided by
15 law.”

16 42. Defendants are liable for civil penalties under §226.3 for violation of §226(a).

17 43. Plaintiff alleges on information and belief that Defendants knowingly and intentionally
18 failed to furnish aggrieved employees with accurate itemized statements for each pay period that
19 they worked and failed to maintain accurate payroll records of the aggrieved employees as
20 mandated by Labor Code §§ 226.

21 44. Defendants failed to timely furnish final wages upon separation as required under
22 Labor Code §201-202, resulting in waiting time penalties when final wages were ultimately paid.
23 As a result, Defendants issued inaccurate final wage statements to aggrieved employees.

24 45. Through this representative action, Plaintiff will advance the interests of hundreds of
25 current and former employees, such that joinder is impracticable. These current and former
26 employees can be readily be identified through a review of Defendants’ payroll records and the
27 records of the company that handles payroll for Defendants.

1 46. Plaintiff seeks to recover the PAGA civil penalties through a representative action
2 permitted by PAGA and the California Supreme Court in *Arias v. Superior Court* (2009) 46 Cal.
3 4th 969. Therefore, class certification of the PAGA claims brought herein is not required.

4 **FIRST CAUSE OF ACTION**

5 **Against All Defendants for Violation of the Private Attorneys General Act (“PAGA”)**
6 **(California Labor Code §2698 *et seq.*)**

7 47. Plaintiff reasserts and realleges all preceding paragraphs as if fully set forth and
8 incorporate said paragraphs herein by reference.

9 48. Plaintiff is an “aggrieved employee” under PAGA, as she was employed by Defendants
10 during the applicable statutory period and suffered one or more of the Labor Code violations set
11 forth herein. Accordingly, Plaintiff seeks to recover on behalf of herself and all other current and
12 former aggrieved employees of Defendants, the civil penalties provided by PAGA, plus reasonable
13 attorneys’ fees and costs.

14 49. Plaintiff seeks to recover the PAGA civil penalties through a representative action
15 permitted by PAGA and the California Supreme Court in *Arias v. Superior Court* (2009) 46 Cal.
16 4th 969. Therefore, class certification of the PAGA claims brought herein is not required.

17 50. Plaintiff seeks civil penalties pursuant to PAGA for violations of the following Labor
18 Code provisions:

- 19 a. Failure to Pay for All Hours Worked, Including Overtime Hours Worked (Cal.
20 Labor Code §§218, 510, 558, 1194, 1197, 1197.1, 1198, 1199, 2698 *et seq.*)
- 21 b. Failure to Include Nondiscretionary Bonuses in Regular Rate of Pay to Calculate
22 Overtime (Cal. Labor Code §§200, 207, 218, 510, 558, 1194, 1197, 1197.1, 1198,
23 2699 *et seq.*)
- 24 c. Failure to Reimburse for Required Business Expenses (Cal. Labor Code §§1198,
25 2802, 2699 *et seq.*)
- 26 d. Failure to Timely Pay All Wages Owed (Cal. Lab. Code §§201, 202, 203, 204(a),
27 2698 *et seq.*);
- 28

1 e. Failure to Provide Accurate Itemized Wage Statements and Maintain Accurate
2 Records (Cal. Labor Code §§ 226, 226.3, 1174, 1174.5, 2698 *et seq.*).

3 51. With respect to violations of Labor Code §226(a), Labor Code §226.3 imposes a civil
4 penalty in addition to any other penalty provided by law of two hundred fifty dollars (\$250) per
5 aggrieved employee for the first violation and one thousand dollars (\$1,000) per aggrieved
6 employee for each subsequent violation of Labor Code §226(a).

7 52. With respect to violations of Labor Code §510, Labor Code §558 imposes a civil
8 penalty in addition to any other penalty provided by law of fifty dollars (\$50) for initial violations
9 for each underpaid employee for each pay period for which the employee was underpaid, and one
10 hundred dollars (\$100) for subsequent violations for each underpaid employee for each pay period
11 for which the employee was underpaid. Plaintiff only seeks penalties under §558 and does not seek
12 underpaid wages under §558, which are not available in PAGA actions.

13 53. Labor Code §2698 *et seq.* imposes a civil penalty of one hundred dollars (\$100) per
14 pay period, per aggrieved employee for initial violations, and two hundred dollars (\$200) per pay
15 period, per aggrieved employee for subsequent violations for all Labor Code provisions for which
16 a civil penalty is not specifically provided.

17 54. Plaintiff and the other current and former employees of Defendants are aggrieved
18 employees. They were or are employed by Defendants, and each of them, and the violations alleged
19 herein were committed against them. Plaintiff brings this action on behalf of herself and all other
20 current and former aggrieved employees.

21 55. At the time of each violation, Defendants employed one or more employees.

22 56. As a result of the aforesaid wrongful and illegal conduct of Defendants, and each of
23 them, Plaintiff and aggrieved employees are entitled to civil penalties in an amount to be
24 determined at trial, pre-judgment interest, costs, and attorneys' fees.

25 57. Plaintiff has complied with all procedural requirements of Labor Code §2699.3 prior
26 to filing this Complaint. By the Notice attached as Exhibit 1, submitted online to the Labor and
27 Workforce Development Agency ("LWDA") and served by certified mail upon Defendants,
28 Plaintiff through counsel notified the LWDA and Defendants of the specific Labor Code

1 provisions that Defendants have violated. The LWDA did not respond to Plaintiff's Notice within
2 the statutory timeframe, and Plaintiff has therefore exhausted administrative remedies. Pursuant to
3 Labor Code §2699.3, Plaintiff may now pursue her PAGA claims in this action on behalf of
4 aggrieved employees and the State of California.

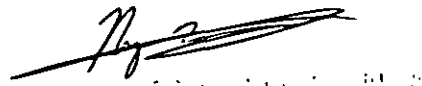
5 **PRAYER FOR RELIEF**

6 WHEREFORE, Plaintiff, individually and on behalf of the aggrieved employees, prays for
7 judgement against Defendants as follows:

- 8 1. An award of civil penalties pursuant to PAGA and the Cal. Labor Code in an amount to be
9 determined at trial, but at least the jurisdictional amount of this Court;
- 10 2. An award of reasonable attorneys' fees and costs pursuant to California Labor Code §2699(g)
11 and/or other applicable law;
- 12 3. For civil penalties as provided under Labor Code §§226.3 and 558, and/or other applicable
13 law;
- 14 4. Pre-judgement and post-judgement interest as provided by law; and
- 15 5. Such other and further relief that the Court may deem just and proper.

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17 DATED: March 26, 2020

**KOUL LAW FIRM
LAW OFFICES OF SAHAG MAJARIAN II**

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22 BY: Nazo Koulloukian, Esq.
23 Attorneys for Plaintiff JENNA OJEDA, and all
24 aggrieved employees
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EXHIBIT A



Nazo@Koullaw.com

P (213) 761 – 5484

F (818) 561 – 3938

3435 WILSHIRE BLVD

SUITE 1710

LOS ANGELES, CA 90010

www.koullaw.com

January 20, 2020

Via E-filing:

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

Via Certified U.S. Mail:

Mashburn Transportation Services, Inc.
22140 Rosedale Highway
Bakersfield, CA 93314

Re: PAGA Notice Pursuant to California Labor Code §2698 *et seq.*
Claimant: Jenna Ojeda
Employer: Mashburn Transportation Services, Inc.

Dear Sir or Madam:

Jenna Ojeda ("Claimant") has retained Nazo Koulloukian, Esq. of the KOUL LAW FIRM to represent her, and all other aggrieved employees, for wage and hour claims against her former employer, Mashburn Transportation Services, Inc. (hereafter "Employer" or "Mashburn.")

Mashburn is a trucking and transportation services company based in Bakersfield, California. Claimant worked for Mashburn first as a Dispatcher, and then as a Dispatcher Advisor, until she was separated on May 6, 2019. Claimant is an aggrieved employee and her proposed PAGA representative action would represent numerous current and former aggrieved employees.

Employer has violated, and/or has caused to be violated, several Labor Code provisions, and it is therefore liable for civil penalties under Cal. Labor Code §2698 *et seq.* We request that your agency investigate the claims alleged below, or permit claimant to seek civil penalties under the Private Attorney General Act ("PAGA"), Labor Code §2698 *et seq.*, on behalf of the Labor and Workforce and development Agency ("LWDA") and the State of California in a representative action. This letter will serve as notice of these allegations pursuant to Cal. Lab. Code §2699.3.

Failure to Pay for All Hours Worked, Including Overtime Hours Worked

(Cal. Labor Code §§218, 510, 558, 1194, 1197, 1197.1, 1198, 1199, 2699 *et seq.*)

Section 2(H) or Wage Order 9 “hours worked” as “the time during which an employee is subject to the control of an employer, and including all the time the employee is suffered or permitted to work, whether or not required to do so.”

Claimant and aggrieved employees were not paid for all hours worked, including overtime hours worked because of Employer’s policy of shaving timecard entries due to rounding and calling and texting employees while off the clock. Employer also failed to include nondiscretionary bonuses in the average rate of pay for purposes of calculating overtime and failed to reimburse employees for required personal cell phone use.

Employer has been engaged in many unlawful employment practices which resulted in underpayment for hours worked each pay period, including overtime hours worked, as more fully set forth below:

Time Shaving and Rounding

Mashburn rounds employee timecard entries to the nearest ¼ hour, although Mashburn uses high-tech facial recognition timeclocks that could easily capture the exact minute employees present for work. Below is a screenshot from Claimant’s May 7, 2019, wage statement, illustrating that all time hours worked are rounded to the nearest 15 minutes.

Earnings and Hours	Qty	Rate	Amount
DISPATCHER HR	66:15	23.00	1,523.75
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HOURLY VACATION	17:52	23.00	410.96
MEAL ADJUSTMENT	1:00	23.00	23.00
HOLIDAY PAY			0.00
BONUS HR			0.00
BONUS HR OT			0.00
REFERRAL			0.00
	96:52		2,368.81

The California Supreme Court has rejected the *de minimis* argument frequently echoed by employers, confirming that employees are entitled to payment for all hours (and minutes) worked. Indeed, California law will permit a “rounding policy only ‘if the rounding policy is fair and neutral on its face and ‘it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked.’” (*Troester v. Starbucks Corporation*, (2018) 5 Cal. 5th 829, 846, citing *See’s Candy*, 210 Cal.App.4th at p. 907.) The policy utilized by Employer is neither fair nor neutral, as it consistently shaved time from claimant and aggrieved employees’ hours worked.

The policy utilized by Mashburn was neither fair nor neutral, as it consistently favored the employer, resulting in a failure to compensate Claimant and aggrieved employees for all hours and overtime hours worked.

Pre- and Post-Shift Work and Off-the-Clock Communications

Claimant and aggrieved employees frequently worked off the clock and were routinely subjected to periods wherein they were under the Employer's control but not compensated for their time.

At the beginning of the shift, when Claimant and aggrieved employees were opening the facility, they are required to unlock the facility, disarm the alarm, turn on all lights in the warehouse, then clock in. This process takes a 1-3 minutes daily. In addition, Claimant and aggrieved employees frequently received calls and text messages from Employer on their time off. For example, Claimant has received text messages from Employer on her way to work. She was also required to take calls with her employer on her personal time on her way home from work, and while at home. These communications were about matters related to work. Claimant and aggrieved employees were not paid for time spent communicating with their employer while off the clock.

This resulted in many unpaid hours worked for all aggrieved employees required to communicate regarding work matters with their employer while off the clock. Employer has violated Labor Code §§510 1194, and 1198, and Wage Order 9. Employer is liable for civil penalties pursuant to Labor Code §§558 and 2698 *et seq.*

Failure to Pay Wages- Required Minimum Wage

Employer failed to pay Claimant and aggrieved employees for all hours worked as a result of Employer's timecard rounding and time shaving practices, as well as Employer's practice of requiring employees to communicate via phone and text with Employers while employees were off the clock. Claimants further miscalculated the regular rate for purposes of calculating overtime, as discussed below. Based on Employer's unlawful conduct described above, and because Claimant and the aggrieved employees were paid at or near minimum wage, Employer's failure to pay for all hours worked, including overtime, resulted in a payment of less than the minimum wage for all hours worked, in violation of Labor Code §1197, 1197.1, 1199 and Wage Order 9-2001. Employer is liable for civil penalties pursuant to Labor Code §§558 and 2699 *et seq.*

Failure to Include Nondiscretionary Bonuses in Regular

Rate of Pay to Calculate Overtime

(Cal. Labor Code §§200, 207, 218, 510, 558, 1194, 1197, 1197.1, 1198, 2699 *et seq.*)

Pursuant to Labor Code §200(a) "'Wages' includes all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation."

Employer has a policy and practice of issuing nondiscretionary bonuses to Claimant and aggrieved employees but fails to include bonuses when calculating the regular rate of pay for purposes of calculating overtime. It is well established that non-discretionary bonuses retroactively increase the employee's "regular rate" of pay for purposes of calculating overtime.

(Labor Code §207) The “regular rate” is calculated by dividing the hours worked in a week by all the compensation earned for that week. When an employee is later paid a bonus that is partly due to work performed in that week, this additional pay must be added into the total compensation for the week, increasing the employee’s regular rate of pay. (*Marin v. Costco Wholesale Corp.* (2008) 169 CA4th 804, 807.)

Claimant and aggrieved employees received nondiscretionary quarterly incentive bonuses (Claimant’s was \$500) when they met established criteria. They also received team bonuses of \$250 if the entire team completed their weekly reports.

Employer did not make any adjustments to overtime rates to incorporate the nondiscretionary bonuses, and this failure is reflected in Claimant and aggrieved employees’ paystubs. Claimant and other employees have been denied “the unpaid balance of the full amount of this... overtime compensation” as required by Cal. Labor Code. §1194. Additionally, Employer has violated Cal. Labor Code §218 and §510 and applicable Industrial Welfare Commission Wage Orders at sections (3)(A)(1) for failure to pay overtime, as well as §1198 which makes it a violation of the labor code to fail to comply with a wage order. Employer is liable for civil penalties pursuant to Cal. Labor Code §558 and 2698 *et seq.*

Failure to Reimburse for Required Business Expenses

(Cal. Labor Code §§1198, 2802, 2699 *et seq.*)

Labor Code §2802 requires employers to indemnify employees for necessary expenditures or losses incurred by employees in direct consequence of discharge of duties.

Claimant and aggrieved employees would receive calls from supervisors on their personal time, while not at work. Claimant would receive calls on her way home from work, and, on occasion, her boss would text her before she got to work.

Employer required Claimant and employees to utilize their personal cell phones for work purposes but failed to reimburse Claimant and employees for this use as required by the Labor Code. Accordingly, Employer is liable for civil penalties under PAGA §2699 *et seq.*

Failure to Timely Pay All Wages Owed

(Cal. Lab. Code §§201, 202, 203, 204(a) and 2698 *et seq.*)

Failure to Pay Wages Due Upon Termination

As set forth above, due to Employer’s unlawful employment practices, Employer knowingly and willfully failed to pay all compensation due and owing to Claimant at the time employment terminated. Employer willfully failed to pay aggrieved employees who are no longer employed by it all compensation due upon termination of employment as required by Cal. Lab. Code §§201 and 202. Pursuant to §§203, Claimant and similarly situated individuals are now also entitled to recover up to thirty (30) days of wages due to Employer’s “willful” failure to comply with the statutory requirements of §§201 and 202 of the Labor Code. Moreover, because Employer

violated §§201, 202 and 203, Employer is liable for civil penalties pursuant to Cal. Lab. Code § 2698 *et. seq.*

Claimant believes that other employees who separated from the company, whether voluntary or involuntary, were also denied payment of wages in a timely manner as required by §203.

Claimant will seek restitution pursuant to §558 (a)(3) for herself and other aggrieved employees for each violation of §203 and will seek civil penalties under PAGA pursuant to §2698 *et. seq.*, on behalf of the Labor and Workforce and Development Agency (LWDA) against Employer if authorized to file a representative action on behalf of the State of California.

Failure to Pay All Wages Owed Twice Per Month

Employer was required to pay Claimant and aggrieved employees all wages earned twice during each calendar month pursuant to Labor Code §204(a). Employer failed to pay all wages earned to employees because of employer's failure to properly calculate and pay overtime wages as set forth above. As a result of these practices, Employees were underpaid for hours worked, including overtime and penalty wages, and this underpayment resulted in a failure to pay all wages owed twice per month resulting in liability under Labor Code §210 for violation of §204.

Failure to Furnish and Maintain Accurate Wage Statements and Payroll Records

(Cal. Labor Code §§ 226(a), 226.3, 1174, 1174.5, 2698 *et seq*)

Employer knowingly and intentionally failed to provide timely, accurate, itemized wage statements to Claimant and the aggrieved employees in accordance with Labor Code §§ 226, 226.3, 1174, and 1174.5. Derivative of the claims alleged above, the statements provided to Claimant and aggrieved employees have not accurately reflected actual gross wages earned, including overtime, phone reimbursement, and total hour worked. Such failures caused injury to Claimant and aggrieved employees, by, among other things, impeding them from knowing the total hours worked and the amount of wages to which they are and were entitled, nor the accurate rate of overtime pay they were entitled to. Employer is liable for civil penalties pursuant to Labor Code § 2698 *et seq.*

Conclusion

Employer has violated several California wage and hour laws. Claimant respectfully requests that the agency investigate the above allegations and hereby provides notice of the allegations pursuant to PAGA's provisions. Alternatively, Claimant requests that the agency inform her if it does not intend to investigate these violations so that she may pursue her claims as a representative action in civil court.

Sincerely,



Nazo Koulloukian, Esq.,
Attorney for Claimant