

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN BERNARDINO
SAN BERNARDINO DISTRICT

JUL 23 2021

BY Leanne M. Landeros
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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN BERNARDINO**

JAMES PEVEY, as an individual and on
behalf of all others similarly situated,

Plaintiffs,

vs.

LUMBER CITY CORP., a California
corporation d/b/a DIY HOME CENTER;
and DOES 1 through 50, inclusive,

Defendants.

Case No.: CIVDS2010240

**SECOND AMENDED CLASS AND
REPRESENTATIVE ACTION COMPLAINT
FOR:**

1. **FAILURE TO PROVIDE REST PERIODS IN VIOLATION OF LABOR CODE § 226.7;**
2. **FAILURE TO PROVIDE MEAL PERIODS IN VIOLATION OF LABOR CODES §§ 226.7 AND 512;**
3. **FAILURE TO PROVIDE ACCURATE ITEMIZED WAGE STATEMENTS IN VIOLATION OF LABOR CODE § 226;**
4. **VIOLATION OF BUSINESS & PROFESSIONS CODE § 17200, ET SEQ.;**

5. **VIOLATION OF LABOR CODE § 2698, *ET SEQ.*;**
6. **DISABILITY DISCRIMINATION IN VIOLATION OF THE FEHA – GOVERNMENT CODE SECTION 12940, *ET SEQ.*;**
7. **FAILURE TO ACCOMODATE IN VIOLATION OF THE FEHA – GOVERNMENT CODE SECTION 12940, *ET SEQ.*;**
8. **RETALIATION IN VIOLATION OF THE FEHA;**
9. **WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY;**
10. **NEGLIGENT INFLECTION OF EMOTIONAL DISTRESS**

DEMAND OVER \$25,000.00

Plaintiff James Pevey and Anne Peterson (“Plaintiffs”) hereby submit this Class and Representative Action Complaint (“Complaint”) against Defendant Lumber City Corp., a California corporation d/b/a DIY Home Center and Does 1 through 50 (collectively, “Defendants”) on behalf of themselves and all other similarly situated current and former employees of Defendants, for penalties and/or damages for failure to provide duty-free rest periods, and failure to provide complete and accurate itemized wage statements in violation of the California Labor Code, among other violations detailed below, as follows:

INTRODUCTION

1. This class and representative action is within the Court’s jurisdiction under California Labor Code §§ 201–03, 226, 226.7, 512, and 2698, *et seq.*, and California’s Fair Employment Housing Act (the “FEHA”).

2. This Complaint challenges systemic illegal employment practices resulting in violations of the California Labor Code against individuals who worked for Defendants.

3. Plaintiff is informed and believes, and based thereon alleges, that Defendants, jointly and severally, have acted intentionally and with deliberate indifference and conscious disregard to the rights of all employees by failing to provide complete and accurate itemized

1 wage statements and failing to provide duty-free rest periods, and failing to properly account for
2 meal periods by improperly rounding time keeping records of Plaintiffs and Class Members.

3 4. Plaintiffs are informed and believe, and based thereon allege, that Defendants
4 have engaged in, among other things a system of willful violations of the California Labor Code
5 by creating and maintaining policies, practices, and customs that knowingly deny its employees
6 the above stated rights and benefits.

7 5. The policies, practices and customs of defendants described above and below
8 have resulted in unjust enrichment of Defendants and an unfair business advantage over
9 businesses that routinely adhere to the strictures of the California Labor Code.

10 **JURISDICTION AND VENUE**

11 6. The Court has jurisdiction over the violations of California Labor Code §§ 201–
12 03, 226, 226.7, 512, and 2698, *et seq.*, and the FEHA.

13 7. Venue is proper because Defendants do business in San Bernardino County and
14 Plaintiff Pevey worked for Defendants in San Bernardino County, specifically in Big Bear Lake,
15 California.

16 8. Plaintiff Peterson has met all the jurisdictional requirements for proceeding with
17 her claims under the FEHA, including without limitation, California Government Code §§ 12960
18 and 12965, by timely filing an administrative complaint against Defendants with the California
19 Department of Fair Employment and Housing (the “DFEH”) on or about September 18, 2020.
20 On September 18, 2020, Plaintiff received her right-to-sue letter from the DFEH against
21 Defendants. True and correct copies of the DFEH complaint and right-to-sue letter are
22 collectively attached hereto as Exhibit A.

23 **PARTIES**

24 9. Plaintiff Pevey was employed by Defendants as a salesperson from about April
25 2019 until on or about May 2020. Throughout his employment with Defendants, Plaintiff Pevey
26 was employed as an hourly, non-exempt employee.

27 10. Plaintiff Peterson was an employee of LUMBER CITY DBA DIY HOME
28 CENTER, and she was employed by them from January 11, 2017, to July 1, 2020, when she was

wrongfully terminated. Plaintiff worked at the Defendants' Lake Tahoe, California store, as a non-exempt full-time employee.

11. Plaintiffs were and are the victim of the policies, practices, and customs of Defendants complained of in this action in ways that have deprived them of the rights guaranteed by California Labor Code §§ 201–03, 226, 226.7, 512, and 2698, *et seq.*

12. Plaintiff is informed and believes, and based thereon alleges, that DIY Home Center is a privately owned hardware store chain. Plaintiff is informed and believes, and based thereon alleges, that Defendant operates and maintains business locations and facilities across the State of California, including facilities in San Bernardino, California and Lake Tahoe, California.

13. Defendant LUMBER CITY CORP., A CALIFORNIA CORPORATION DBA DIY HOME CENTER is a hardware store chain operating throughout California. At all times mentioned herein, Lumber City is a business entity that employed 100 or more employees. As such, Lumber City is subject to the FEHA pursuant to California Government Code § 12926(d).

14. Plaintiffs are informed and believe and thereon allege that at all times herein mentioned Defendants and Does 1 through 50, are and were corporations, business entities, individuals, and partnerships, licensed to do business and actually doing business in the State of California. As such, and based upon all the facts and circumstances incident to Defendants' business, Defendants are subject to California Labor Code §§ 226, 226.7, 512, and 2698, *et seq.*

15. Plaintiffs do not know the true names or capacities, whether individual, partner or corporate, of the defendants sued herein as Does 1 through 50, inclusive, and for that reason, said defendants are sued under such fictitious names, and Plaintiffs pray for leave to amend this Complaint when the true names and capacities are known. Plaintiffs are informed and believe and based thereon allege that each of said fictitious defendants were responsible in some way for the matters alleged herein and proximately caused Plaintiffs and members of the general public and class to be subject to the illegal employment practices, wrongs, and injuries complained of herein.

16. At all times herein mentioned, each of said Defendants participated in the doing of the acts hereinafter alleged to have been done by the named Defendants; and furthermore, the

1 Defendants, and each of them, were the agents, servants and employees of each of the other
2 Defendants, as well as the agents of all Defendants, and at all times herein mentioned, were
3 acting within the course and scope of said agency and employment.

4 17. Plaintiffs are informed and believe, and based thereon allege, that at all times
5 material hereto, each of the Defendants named herein was the agent, employee, alter ego, and/or
6 joint venturer of, or working in concert with each of the other co-Defendants and was acting
7 within the course and scope of such agency, employment, joint venture, or concerted activity.
8 To the extent said acts, conduct, and omissions were perpetrated by certain Defendants, each of
9 the remaining Defendants confirmed and ratified said acts, conduct, and omissions of the acting
10 Defendants.

11 18. At all times herein mentioned, Defendants, and each of them, were members of,
12 and engaged in, a joint venture, partnership and common enterprise, and acting within the course
13 and scope of, and in pursuance of, said joint venture, partnership and common enterprise.

14 19. At all times herein mentioned, the acts and omissions of various Defendants, and
15 each of them, concurred and contributed to the various acts and omissions of each and all of the
16 other Defendants in proximately causing the injuries and damages as herein alleged. At all times
17 herein mentioned, Defendants, and each of them, ratified each and every act or omission
18 complained of herein. At all times herein mentioned, Defendants, and each of them, aided and
19 abetted the acts and omissions of each and all of the other Defendants in proximately causing the
20 damages as herein alleged.

21 CLASS ACTION ALLEGATIONS

22 20. **Definition:** The named individual Plaintiffs seek class certification, pursuant to
23 California Code of Civil Procedure § 382. Plaintiffs propose the following Classes:

- 24 a. Current and former non-exempt employees of Defendants in the State of
25 California who worked 3.5 hours or more in any shift, between April 6, 2016,
26 through class certification or final judgment (the “Rest Period Class”);
27 b. Current and former non-exempt employees of Defendants in the State of
28 California who worked 5 hours or more in any shift, between April 6, 2016,

1 through class certification or final judgment (the “Meal Period Class”);

2 c. Current and former employees of Defendants in the State of California who
3 Defendant paid any wages between April 6, 2019, through class certification or
4 final judgment (the “Wage Statement Class”); and

5 d. Current and former non-exempt employees of Defendants in the State of
6 California who were paid any hourly wages at any time from April 6, 2019,
7 through the present (the “Hourly Wage Statement Class”).

8 21. Plaintiffs further reserve the right to amend the Class definitions based upon
9 further discovery.

10 22. **Numerosity and Ascertainability:** The members of the Class are so numerous
11 that joinder of all members would be impractical, if not impossible. The identities of the
12 members of the Class are readily ascertainable by review of Defendants’ records, including
13 payroll records. Plaintiffs are informed and believe, and based thereon allege, that Defendants
14 failed to provide accurate itemized wage statements to employees that identified the applicable
15 rates of pay for hourly wages and the pay period start and/or end date, whenever wages were
16 paid, in violation of Labor Code § 226(a). The number of individuals in the Meal Period Class
17 and Rest Period Class are similarly so numerous that joinder of all members would be
18 impractical, if not impossible.

19 23. **Adequacy of Representation:** The named Plaintiffs are fully prepared to take all
20 necessary steps to represent fairly and adequately the interests of the Class defined above.
21 Plaintiffs’ attorneys are ready, willing, and able to represent the Classes and the individual
22 Plaintiffs fully and adequately. Plaintiffs’ attorneys have prosecuted and settled wage-and-hour
23 class actions in the past and currently have a number of wage-and-hour class actions pending in
24 California state and federal courts.

25 24. Defendants uniformly administered a corporate policy and practice of failing to
26 provide accurate itemized wage statements to Plaintiff and the Class that identified the applicable
27 rates of pay and inclusive pay period dates, in violation of Labor Code § 226(a). Defendants also
28 uniformly enforced a policy of requiring employees to remain on premises during their rest

1 periods, which amounted to such control that rest periods were not duty-free as required by the
2 California Labor Code and precedent interpreting it. Plaintiffs were not suffered or permitted to
3 take duty-free rest periods because they were required to remain on Defendants' premises during
4 rest periods in violation of Labor Code § 226.7, and did not receive all wages due and owing on
5 separation of employment, as a result. Plaintiffs also were not provided full and complete meal
6 periods because of Defendant's illegal policy of rounding time keeping records as it relates to
7 meal periods in violation of Labor Code §§ 226.7 and 512. As a result, Plaintiffs did not receive
8 all wages due and owing on separation of employment.

9 25. Plaintiffs are informed and believe, and based thereon allege, that this corporate
10 conduct is accomplished with the advance knowledge and designed intent to willfully and
11 intentionally fail to accurately record proper rates of pay and inclusive pay period dates, and
12 intentionally fail to provide duty-free rest periods and properly account for meal periods.

13 26. Plaintiff is informed and believes, and based thereon alleges, that Defendants had
14 a consistent and uniform policy, practice, and procedure of willfully failing to comply with
15 Labor Code § 201-3, 226(a), 226.7, and 512.

16 27. **Common Question of Law and Fact:** There are predominant common questions
17 of law and fact and a community of interest amongst Plaintiffs and the claims of the Classes
18 concerning Defendants' policy and practice of failing to provide accurate itemized wage
19 statements to Plaintiffs and the Classes that identified the applicable rates of pay and inclusive
20 pay period dates in violation of Labor Code § 226(a). Additional common questions of law and
21 fact predominate this action because Defendants uniformly failed to permit the Class to leave the
22 premises during rest periods in California during the proposed Class period, and failed to pay rest
23 period premiums. Plaintiffs also allege that Defendants uniformly failed to track the Class's start
24 and stop time for meal periods, and, instead, used an improper and unlawful rounding system.

25 28. **Typicality:** The claims of Plaintiffs are typical of the claims of all members of
26 the Classes in that Plaintiffs suffered the harm alleged in this Complaint in a similar and typical
27 manner as the Class Members. As with other California employees, Plaintiffs were paid on an
28 hourly basis. Whenever wages were paid, however, the wage statements provided to Plaintiffs

1 simply identified the hours worked and gross wages paid. No hourly rates of pay were listed, in
2 violation of Labor Code § 226(a)(9). Further, the wage statements provided to Plaintiffs
3 identified one date as the “pay period date,” rather than listing a pay period start and end date, in
4 violation of Labor Code § 226(a)(6). Therefore, Plaintiffs are members of the Class and have
5 suffered the alleged violations of California Labor Code § 226(a). Similarly, Defendants
6 uniformly failed to permit Plaintiffs and the Class to leave the premises during rest periods in
7 California during the proposed Class period and failed to pay rest period premiums. Plaintiffs
8 and the Class were also not permitted to properly record their meal periods because of
9 Defendants’ unlawful rounding system, which did not comply with the requirements of Labor
10 Code §§ 226.7 and 512, and the cases interpreting it.

11 29. The California Labor Code upon which Plaintiffs base these claims is broadly
12 remedial in nature. These laws and labor standards serve an important public interest in
13 establishing minimum working conditions and standards in California. These laws and labor
14 standards protect the average working employee from exploitation by employers who may seek
15 to take advantage of superior economic and bargaining power in setting onerous terms and
16 conditions of employment.

17 30. The nature of this action and the format of laws available to Plaintiffs and
18 members of the Class identified herein make the class action format a particularly efficient and
19 appropriate procedure to redress the wrongs alleged herein. If each employee were required to
20 file an individual lawsuit, the corporate Defendants would necessarily gain an unconscionable
21 advantage since it would be able to exploit and overwhelm the limited resources of each
22 individual plaintiff with their vastly superior financial and legal resources. Requiring each Class
23 Member to pursue an individual remedy would also discourage the assertion of lawful claims
24 by employees who would be disinclined to file an action against their former and/or current
25 employer for real and justifiable fear of retaliation and permanent damage to their careers at
26 subsequent employment.

27 31. The prosecution of separate actions by the individual Class Members, even if
28 possible, would create a substantial risk of (a) inconsistent or varying adjudications with respect

1 to individual Class Members against the Defendants and which would establish potentially
2 incompatible standards of conduct for the Defendants, and/or (b) adjudications with respect to
3 individual Class Members which would, as a practical matter, be dispositive of the interest of the
4 other Class Members not parties to the adjudications or which would substantially impair or
5 impede the ability of the Class Members to protect their interests. Further, the claims of the
6 individual Class Members are not sufficiently large to warrant vigorous individual prosecution
7 considering all of the concomitant costs and expenses.

8 32. Such a pattern, practice and uniform administration of corporate policy regarding
9 illegal employee compensation described herein is unlawful and creates an entitlement to
10 recovery by Plaintiffs and the Classes identified herein, in a civil action, for applicable penalties,
11 reasonable attorneys' fees, and costs of suit according to the mandate of California Labor Code
12 § 201–03, 226, 226.7, and Code of Civil Procedure § 1021.5.

13 33. Proof of a common business practice or factual pattern, which the named
14 Plaintiffs experienced and are representatives of, will establish the right of each of the members
15 of the Classes to recovery on the causes of action alleged herein.

16 **FACTUAL ALLEGATIONS SPECIFIC TO PLAINTIFF PETERSON**

17 34. Plaintiff Peterson began working for Defendants in approximately July 2017, at
18 their South Lake Tahoe location. Plaintiff Peterson began as a floor associate, but within six
19 months quickly progressed to become the head of the Paint Department in Defendants' hardware
20 store. Plaintiff Peterson performed her duties well and received good performance reviews from
21 her supervisors.

22 35. Sometime around August 2019, Defendants brought in a new manager, Justin
23 Ramsey, from another store to work in South Lake Tahoe.

24 36. In March 2020, Plaintiff Peterson was exposed to someone with the COVID-19
25 virus, and was advised to self-quarantine for two weeks, beginning on or around March 22, 2020.
26 Plaintiff Peterson informed Defendants and/or their agents of her condition and that she was
27 required to self-quarantine. Plaintiff Peterson called in periodically to inform Defendants of her
28 condition and told various managers at the store. On information and belief, Plaintiff Peterson

1 informed Steven Oliver, Justin Ramsey, Rose Ramos, and/or Jon Lynch of her quarantine. At
2 the end of March 2020, Plaintiff Peterson continued to exhibit symptoms associated with
3 COVID-19, such that she presented to the emergency room. She was tested and received a
4 negative result.

5 37. On April 4, 2020, Plaintiff Peterson returned to work and continued to perform
6 her duties with the skill and care required of her position for the next several months.

7 38. On June 16, 2020, Plaintiff Peterson conferred with her colleagues about writing a
8 group letter to management regarding what she and others believed to be inadequate
9 management by Mr. Ramsey. Mr. Ramsey heard of this and called Plaintiff in for a closed-door
10 meeting to discuss these issues. Mr. Ramsey and Plaintiff Peterson discussed the issues and
11 Plaintiff Peterson returned to complete her shift.

12 39. On June 17, 2020, Plaintiff Peterson took the day off because she suffered from
13 an illness. June 18 and June 19, 2020 were Plaintiff Peterson's regularly scheduled days off. On
14 June 20, 2020, Plaintiff Peterson took the day off because she suffered from an illness.

15 40. On June 21, 2020, Plaintiff Peterson reported for her shift, and was told by Jon
16 Lynch that she could not return to work without a doctor's note. On June 22, 2020, Defendants
17 informed Plaintiff Peterson that she could return without a doctor's note but would need to have
18 a COVID test performed with a negative result. Plaintiff Peterson used her time off in the
19 following days to self-isolate considering Defendants' request for a negative COVID test.

20 41. Plaintiff Peterson told Defendants that she had a doctor's appointment on June 29,
21 2020 and would not be able to attend work. On June 29, 2020, Plaintiff Peterson treated with her
22 physician because of bone spurs she suffered in her feet that made it difficult for her to stand.
23 She obtained a note from her physician providing for modified duty at work. Plaintiff Peterson's
24 physician explained that Plaintiff Peterson could not walk or stand on her feet for more than 10
25 minutes at a time for each one hour worked through July 13, 2020.

26 42. On June 30, 2020, Plaintiff Peterson provided her physician's modified work duty
27 request to Defendants by delivering it to Steven Oliver. On the same date, Defendants provided
28 Plaintiff Peterson a notice of Investigatory Suspension ("Notice"), which purported to suspend

1 her from June 30, 2020, through July 2, 2020. The Notice required her to report to the manager's
2 office on July 3, 2020. Defendants did not provide a reason for her suspension.

3 43. On July 3, 2020, Plaintiff Peterson returned to work to pick up her paycheck and
4 meet with Defendants. Defendants terminated her under the guise of insubordination because of
5 her interactions with Mr. Ramsey, but in reality terminated her because of her request for an
6 accommodation to stand for no more than 10 minutes per hour, as provided by her physician
7 and/or related to her prior actual and/or perceived disabilities.

8 44. Defendants dated the termination July 1, 2020—one day after receiving Plaintiff
9 Peterson's doctor's note. Prior to that, Defendants advised her to come back on July 3, 2020 to
10 discuss the alleged suspension. Defendants did not institute any progressive discipline or
11 otherwise discipline her for alleged insubordination prior to unlawfully terminating her on July 1,
12 2020.

13 45. Defendants' afore-referenced conduct and act of unlawfully terminating Plaintiff
14 Peterson's employment amounted to illegal discrimination and retaliation in violation of
15 California's Fair Employment and Housing Act; California Government Code Section 12940, et
16 seq.

17 46. Within one year of the last date of discrimination alleged by Plaintiff Peterson
18 against Defendants, Plaintiff filed charges of unlawful discrimination and retaliation with the
19 Department of Fair Employment and Housing ("DFEH").

20 **FIRST CAUSE OF ACTION**

21 **FAILURE TO PROVIDE REST PERIODS IN VIOLATION OF LABOR CODE § 226.7**
22 **(BY PLAINTIFFS AND THE REST PERIOD CLASS AGAINST DEFENDANTS)**

23 47. Plaintiffs re-alleges and incorporate by reference the paragraphs set forth above,
24 as though fully set forth herein.

25 48. Pursuant to the IWC wage orders applicable to Plaintiffs' and Class Members'
26 employment by Defendants, "Every employer shall authorize and permit all employees to take
27 rest periods, which insofar as practicable shall be in the middle of each work period....[The]
28 authorized rest period time shall be based on the total hours worked daily at the rate of ten (10)

1 minutes net rest time per four (4) hours worked or major fraction thereof....Authorized rest
2 period time shall be counted as hours worked, for which there shall be no deduction from
3 wages.”

4 49. Labor Code § 226.7(a) prohibits an employer from requiring any employee to
5 work during any rest period mandated by an applicable order of the IWC. Defendants were
6 required to authorize and permit employees such as Plaintiff and Class Members to take rest
7 periods during shifts in excess of 3.5 hours, based upon the total hours worked at a rate of ten
8 (10) minutes net rest per four (4) hours worked, or major fraction thereof, with no deduction
9 from wages.

10 50. Despite said requirements of the IWC wage orders applicable to Plaintiffs’ and
11 Class Member’s employment with Defendants, Defendants failed and refused to authorize and
12 permit Plaintiffs and Class Members to take lawful, net ten (10) minute rest periods for every
13 four (4) hour worked, or major fraction thereof. On information and belief, such rest breaks,
14 when provided, were frequently untimely or less than net ten minutes because of the work
15 requirements and productivity demands that Defendants imposed. Defendants also required
16 Plaintiffs and the Class Members to stay on premises during their rest periods, which resulted in
17 an inability to take a duty-free rest period.

18 51. Defendants’ exercise of control over the aggrieved employees during periods of
19 rest is inconsistent with the mandates of the Labor Code and Wage Order, as set forth in
20 *Augustus v. ABM*, 2 Cal. 5th 257 (2016).

21 52. Defendants did not pay Plaintiffs one additional hour of pay at the regular rate of
22 pay for each day that a rest period violation occurred. On information and belief, the other
23 members of the Class endured similar violations as a result of Defendants’ rest period policies
24 and practices and Defendants did not pay said Class Members premium pay as required by law.

25 53. By their failure to authorize and permit Plaintiffs and the Class Members to take a
26 lawful, net ten (10) minute rest period free from work duties every four (4) hours or major
27 fraction thereof worked, including failure to provide two (2) total rest periods on six to ten hour
28 shifts and three (3) total ten (10) minute rest periods on days on which Plaintiff and the other

1 Class Members work(ed) work a third rest period for shifts in excess of ten (10) hours, and by
2 their failure to provide compensation for such unprovided rest periods as alleged herein,
3 Defendants willfully violated the provisions of Labor Code § 226.7 and the applicable IWC
4 Wage Order(s).

5 54. Defendants' failure to pay rest period premiums as described above also resulted
6 in members of the Rest Period Class who are no longer employed to not receive all wages due
7 and owing at the conclusion of their employment. As such, Defendants are subject to waiting
8 time penalties, pursuant to Labor Code § 203.

9 55. As a result of the unlawful acts of Defendants, Plaintiffs and the Class they seek
10 to represent have been deprived of premium wages in amounts to be determined at trial, and are
11 entitled to recovery of such amounts, plus interest and penalties thereon, attorneys' fees, and
12 costs under Labor Code §§ 218.6 and 226.7, the applicable IWC Wage Orders, and Civil Code
13 § 3287.

14 **SECOND CAUSE OF ACTION**

15 **VIOLATION OF LABOR CODE §§ 226.7 AND 512**

16 **(BY PLAINTIFFS, THE CLASS, AND THE MEAL PERIOD CLASS AGAINST ALL**
17 **DEFENDANTS)**

18 56. Plaintiff re-alleges and incorporates by reference the preceding paragraphs as
19 though fully set forth herein.

20 57. At all relevant times, Defendants failed in their affirmative obligation to ensure
21 that Plaintiff and Class members had the opportunity to take and were provided with off-duty
22 meal periods in accordance with the mandates of the California Labor Code and the applicable
23 IWC Wage Order. At all relevant times, Plaintiffs and Class members were suffered and
24 permitted to work through legally required meal breaks because Defendants failed to properly
25 account for Plaintiffs and the Class members meal periods because of an improper and unlawful
26 rounding system used by Defendants to track employees' clock-in and clock-out times. As
27 explained by the California Supreme Court such a rounding policy "is not neutral. It never
28 provides employees with premium pay when such pay is not owed, but it does not always trigger

premium pay when such pay is owed.” *Donohue v. AMN Servs., LLC*, No. S253677, 2021 WL 728871, at *9 (Cal. Feb. 25, 2021). As such, Defendants are responsible for paying premium compensation for missed meal periods pursuant to Labor Code § 226.7 and the applicable IWC Wage Order. Defendants, as a matter of corporate policy and procedure, regularly failed to pay such premium compensation for each meal period Plaintiffs and the Class members missed.

58. At all relevant times, Plaintiffs and Class members regularly worked in excess of five (5) hours per day and accordingly had a right to take a 30-minute meal period each day worked in excess of five (5) hours.

59. Such a pattern, practice and uniform administration of corporate policy as described herein is unlawful and creates an entitlement to recovery by the Plaintiffs and Class members identified herein, in a civil action, for the unpaid balance of the unpaid premium compensation pursuant to Labor Code §§ 226.7 and 512, and the applicable IWC Wage Order, including interest thereon, penalties, and costs of suit.

60. Plaintiffs are informed and believe, and based thereon allege, that Defendants’ willful failure to provide all meal period premium wages due and owing to Plaintiffs and Class Members upon separation from employment results in a continued payment of wages up to thirty (30) days from the time the wages were due. Therefore, Plaintiffs and other members of the Class who have separated from employment are entitled to compensation pursuant to Labor Code § 203.

THIRD CAUSE OF ACTION

VIOLATION OF LABOR CODE § 226(A)

(BY PLAINTIFFS, THE REST PERIOD CLASS, THE WAGE STATEMENT CLASS, AND HOURLY WAGE STATEMENT CLASS AGAINST ALL DEFENDANTS)

61. Plaintiffs re-alleges and incorporates by reference the preceding paragraphs as though fully set forth herein.

62. Labor Code § 226(a) requires employers to provide itemized wage statements to its employees that identify accurate information, including without limitation, all applicable hourly rates in effect during the pay period and the inclusive pay period dates. Defendants failed

1 in their affirmative obligation to provide accurate itemized wage statements to Plaintiffs and the
2 Class in violation of Labor Code § 226(a).

3 63. Plaintiffs and the Class were paid hourly. As such, the wage statements should
4 have reflected the accurate hourly rates of pay. Whenever wages were paid, however,
5 Defendants failed to identify the applicable rates of pay on wage statements issued to Plaintiffs
6 and the Class. Instead, Defendants had a policy and practice of only identifying the number of
7 hours worked and amount of gross wages earned as a lump sum, without any breakdown as to
8 the hourly rates. This policy and practice is a direct violation of Labor Code § 226(a)(9).
9 Further, said wage statements failed to include the start and end dates of the pay period. Instead,
10 the wage statements only identified one date as the “pay period date.” Further, as a result of the
11 violations described above, Plaintiffs and the Class’s wage statements were inaccurate because
12 they did not reflect the premium pay owed to class members who were not afforded a duty free
13 rest period.

14 64. Such a pattern, practice and uniform administration of corporate policy as
15 described herein is unlawful and creates an entitlement to recovery by Plaintiffs and the Class
16 identified herein, in a civil action, for all damages or penalties pursuant to Labor Code § 226,
17 including interest thereon, attorneys’ fees, and costs of suit according to the mandate of
18 California Labor Code § 226.

19 **FOURTH CAUSE OF ACTION**

20 **VIOLATION OF BUSINESS AND PROFESSIONS CODE §§ 17200, *ET SEQ.***
21 **(BY PLAINTIFFS AND THE REST PERIOD CLASS AGAINST DEFENDANTS)**

22 65. Plaintiffs re-allege and incorporate by reference the paragraphs above, as though
23 fully set forth herein.

24 66. Defendants’ conduct, as alleged in this complaint, has been, and continues to be,
25 unfair, unlawful, and harmful to Plaintiffs and Class Members, Defendants’ competitors, and the
26 general public. Plaintiffs also seeks to enforce important rights affecting the public interest
27 within the meaning of the California Code of Civil Procedure § 1021.5.

28 67. Defendants’ policies, activities, and actions as alleged herein are violations of

1 California law and constitute unlawful business acts and practices in violation of California
2 Business and Professions Code §§ 17200, et seq.

3 68. A violation of California Business and Professions Code §§ 17200, et seq. may be
4 predicated on the violation of any state or federal law.

5 69. The state law violations, including violations of the relevant IWC Wage Order,
6 detailed herein above are the predicate violations for this cause of action.

7 70. By way of example only, in the instant case Defendants' policy of failing to
8 lawfully provide Plaintiffs and the Class with duty- and control-free rest periods or pay one (1)
9 hour of premium pay when a rest period was not lawfully provided violates Labor Code § 226.7
10 and the IWC Wage Orders. Defendants similarly violated the law and gained unfair business
11 advantage by failing to properly account for employees' meal periods by implementing an
12 unlawful rounding policy.

13 71. Defendants further violated the law through their policies of failing to fully and
14 accurately compensate Plaintiffs and the Class Members for rest period premiums as specified
15 above.

16 72. Plaintiffs and the Class Members have been personally aggrieved by Defendants'
17 unlawful and unfair business acts and practices alleged herein by the loss of money.

18 73. Pursuant to California Business and Professions Code §§ 17200, et seq., Plaintiffs
19 and the Class Members are entitled to restitution of the wages withheld and retained by
20 Defendants during a period that commences four (4) years prior to the filing of this complaint, an
21 award of attorneys' fees pursuant to California Code of Civil Procedure § 1021.5, interest, and an
22 award of costs.

23 **FIFTH CAUSE OF ACTION**

24 **VIOLATION OF LABOR CODE § 2698, *ET SEQ.***

25 **(BY PLAINTIFFS AND AGGRIEVED EMPLOYEES AGAINST ALL DEFENDANTS)**

26 74. Plaintiffs re-allege and incorporate by reference the preceding paragraphs as
27 though fully set forth herein.

28 75. Plaintiffs bring this cause of action as a proxy for the State of California and in

1 this capacity, seeks penalties on behalf of all Aggrieved Employees from May 21, 2019, through
2 the present, for Defendants' violation of Labor Code § 226(a) as alleged above. Specifically,
3 Defendants violated Labor Code § 226(a) by failing to provide accurate itemized wage
4 statements to Plaintiff and other Aggrieved Employees that identified the applicable hourly rates
5 of pay and inclusive pay period dates whenever such wages were paid.

6 76. Plaintiffs are "aggrieved employees" pursuant to Labor Code § 2699, as Plaintiffs
7 have suffered at least one of the violations of Labor Code § 226(a) alleged above.

8 77. On or about May 21, 2020, Plaintiff Pevey sent written notice to the California
9 Labor & Workforce Development Agency ("LWDA") of Defendants' violation of Labor Code
10 § 226(a), pursuant to Labor Code § 2698, *et seq.*, the Private Attorneys General Act ("PAGA").
11 As of the date of the filing of this Complaint, the LWDA has not responded to Plaintiff Pevey's
12 written notice nor indicated whether it intends to investigate the Labor Code violations provided
13 for in the written notice. Pursuant to Labor Code § 2699.3, Plaintiff Pevey also sent written
14 notice of Defendants' violations of the Labor Code to Defendants via certified mail.

15 78. Plaintiffs also bring this cause of action as a as a proxy for the State of California
16 and in this capacity, seek penalties on behalf of all Aggrieved Employees from April 6, 2019,
17 through the present, for Defendants' violation of Labor Code §§ 201-203, and 226.7, based on
18 the allegations set forth above.

19 79. On or about September 1, 2020, Plaintiff Peterson sent written notice to the
20 California Labor & Workforce Development Agency ("LWDA") of Defendants' violations of
21 Labor Code §§ 201-203, 226, and 226.7, pursuant to Labor Code §§ 2698, *et seq.*, the Private
22 Attorneys General Act ("PAGA"). To date, the LWDA has not responded to said Notice.

23 80. On or about March 11, 2021, Plaintiff Peterson sent an amended written notice to
24 the LWDA of Defendants' violations of Labor Code §§ 201-203, 226, 226.7, 512, 1174, 1198,
25 and 1199, and Sections 7 & 11 of the applicable IWC Wage Order pursuant to Labor Code §§
26 2698, *et seq.*, the PAGA.

27 81. Defendants violated Labor Code §§ 1174, 1198 and 1199 and §§ 7 & 11 of the
28 applicable IWC Wage Order by failing to maintain accurate time records showing when

1 Plaintiffs and other similarly situated aggrieved employees begin and end each meal period.
2 Specifically, Defendants rounded the times that each employee clocked out and in for each meal
3 period.

4 82. As such, pursuant to Labor Code § 2699(a), Plaintiffs seek recovery of any and all
5 applicable civil penalties for Defendants' violations of Labor Code §§ 201-203, 226, 226.7, 512,
6 1174, 1198, and 1199, and Sections 7 & 11 of the applicable IWC Wage Order for the time
7 periods described above, on behalf of themselves and other Aggrieved Employees.

8 **SIXTH CAUSE OF ACTION**

9 **DISABILITY DISCRIMINATION IN VIOLATION OF THE FEHA**

10 **(BY PLAINTIFF PETERSON AGAINST DEFENDANTS)**

11 83. Plaintiff Peterson re-alleges and incorporates by reference the paragraphs above,
12 as though fully set forth herein.

13 84. The FEHA codified in Government Code §§ 12900, et seq. makes it unlawful for
14 an employer to discriminate against an employee on the basis of the employee's disability.

15 85. Government Code § 12926.1(b) also protects employees from disability
16 discrimination due to conditions that are perceived as a disability or potentially disabling.

17 86. Plaintiff Peterson was a qualified individual with a disability. Plaintiff Peterson
18 was also regarded as or treated by Defendants as being disabled and/or having a physical
19 condition that made achievement of a major life activity difficult.

20 87. Plaintiff Peterson is informed and believes and based thereon alleges that her
21 disability was a motivating factor in Defendants' decision to terminate her employment in
22 violation of Government Code § 12940(a).

23 88. As a proximate result of Defendants' actions, Plaintiff Peterson has suffered and
24 continues to suffer substantial losses in earnings, employment benefits and medical expenses all
25 to her damage in an amount to be proven at trial.

26 89. As a further proximate result of Defendants' actions against Plaintiff Peterson,
27 Plaintiff Peterson has suffered and will continue to suffer emotional pain, humiliation, mental
28 anguish, decline in physical health and enjoyment of life all to her damage in an amount to be

1 proven at trial.

2 90. Defendants' conduct as described above was willful, knowing, and intentional and
3 done with reckless indifference to those statutorily protected rights of Plaintiff Peterson;
4 accordingly, Plaintiff Peterson seeks an award of punitive and exemplary damages in an amount
5 according to proof.

6 91. Defendants' actions against Plaintiff Peterson have also caused and will continue
7 to cause Plaintiff Peterson harm in that Plaintiff Peterson has or will incur attorney's fees and
8 costs of suit, including expert witness fees, which will be claimed in an amount to be proven
9 following trial.

10 **SEVENTH CAUSE OF ACTION**

11 **FAILURE TO ACCOMMODATE IN VIOLATION OF THE FEHA** 12 **(BY PLAINTIFF PETERSON AGAINST DEFENDANTS)**

13 92. Plaintiff Peterson re-alleges and incorporates by reference the paragraphs above,
14 as though fully set forth herein.

15 93. California Government Code § 12940(m) requires an employer to make
16 reasonable accommodations for physical and/or mental disabilities of an employee. An
17 employer who perceives an employee as disabled must provide reasonable accommodation, even
18 if the employee is not actually disabled. *Gelfo v. Lockheed Martin Corp.*, 140 Cal. App. 4th 34,
19 55-60 (2006) (holding that "an employer must reasonably accommodate an applicant or
20 employee whom it regards as disabled"). Plaintiff Peterson requested reasonable
21 accommodation in the form of asking Defendants to assign her modified duties; specifically,
22 Plaintiff Peterson was not to walk or stand on her feet for more than 10 minutes at a time for
23 each hour worked through July 13, 2020. After being presented with a doctor's note with the
24 request for modified work duty, Defendants terminated Plaintiff Peterson on the basis of her
25 disability and/or perceived disability, instead of engaging with Plaintiff Peterson and discussing
26 what reasonable accommodations might permit her to continue to working for Defendants. At
27 all times, Plaintiff Peterson was able to perform essential job duties.

28 94. As a proximate result of Defendants' failure to accommodate Plaintiff Peterson,

1 she has suffered and continues to suffer compensatory damages, including without limitation,
2 lost wages, loss of future earnings and earning capacity, loss of bonuses and deferred
3 compensation, emotional distress, mental anguish, embarrassment, humiliation, and loss of
4 future advancement, in the amount of at least \$25,000.00, according to proof at the time of trial,
5 which is in excess of the jurisdictional minimum for this lawsuit to qualify as an unlimited civil
6 action. Plaintiff Peterson claims such amounts as damages, together with prejudgment interest
7 accruing from the date of the filing of this action pursuant to California Civil Code §§ 3281
8 and/or 3288, and/or any other provision of law providing for prejudgment interest.

9 95. As a proximate result of Defendants' failure to accommodate Plaintiff Peterson,
10 she has been forced to hire attorneys to prosecute the claims alleged herein, and has incurred and
11 is expected to continue to incur attorneys' fees. Pursuant to California Government Code
12 § 12965(b), Plaintiff Peterson requests the award of attorneys' fees against Defendants.

13 96. Defendants committed the acts alleged herein maliciously, fraudulently, and
14 oppressively, callously, in bad faith, with the wrongful intent of injuring Plaintiff Peterson, and
15 in conscious disregard of Plaintiff Peterson's rights and safety. As such, Plaintiff Peterson is
16 entitled to an award of punitive damages in an amount according to proof.

17 **EIGHTH CAUSE OF ACTION**

18 **RETALIATION IN VIOLATION OF THE FEHA**

19 **(BY PLAINTIFF PETERSON AGAINST DEFENDANTS)**

20 97. Plaintiff Peterson re-alleges and incorporates by reference the paragraphs above,
21 as though fully set forth herein.

22 98. California Government Code § 12940(m) prohibits employers from retaliating
23 against an employee for requesting accommodation for his or her physical or mental disability,
24 regardless of whether the request was granted.

25 99. Defendants are liable under Labor Code § 12940(m) for retaliating against
26 Plaintiff Peterson because she exercised her right to a reasonable accommodation in the
27 workplace for her disability. In retaliation for taking/requesting a leave of absence, Defendants
28 wrongfully terminated Plaintiff Peterson from her employment.

100. As a proximate result of Defendants' retaliation against Plaintiff Peterson, she has suffered and continues to suffer compensatory damages, including without limitation, lost wages, loss of future earnings and earning capacity, loss of bonuses, emotional distress, mental anguish, embarrassment, humiliation, loss of future advancement, and damage to her reputation in the business community, in the amount of at least \$25,000.00, according to proof at the time of trial, which is in excess of the jurisdictional minimum for this lawsuit to qualify as an unlimited civil action. Plaintiff Peterson claims such amounts as damages, together with prejudgment interest accruing from the date of the filing of this action pursuant to California Civil Code §§ 3281 and/or 3288, and/or any other provision of law providing for prejudgment interest.

101. As a proximate result of Defendants' retaliation against Plaintiff Peterson, she has been forced to hire attorneys to prosecute the claims alleged herein, and has incurred and is expected to continue to incur attorneys' fees. Pursuant to California Government Code § 12965(b), Plaintiff Peterson requests the award of attorneys' fees against Defendants.

102. Defendants committed the acts alleged herein maliciously, fraudulently, and oppressively, callously, in bad faith, with the wrongful intent of injuring Plaintiff Peterson, and in conscious disregard of Plaintiff Peterson's rights and safety. As such, Plaintiff Peterson is entitled to an award of punitive damages from the Defendants in an amount according to proof.

NINTH CAUSE OF ACTION

WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY
(BY PLAINTIFF PETERSON AGAINST DEFENDANTS)

103. Plaintiff Peterson re-alleges and incorporates by reference the paragraphs above, as though fully set forth herein.

104. At all times mentioned herein, the public policy of the State of California, as codified, expressed and mandated in the FEHA, prohibits employers from discriminating and retaliating against employees because of their protected characteristics, including their disabled status and/or because they exercised rights available under the FEHA. Cal. Govt. Code §§ 12940(a), et seq.

105. Nevertheless, Defendants violated these public policies by terminating Plaintiff

Peterson on or about July 1, 2020, because of her disability and/or perceived disability and because she exercised her right to request a reasonable accommodation under the FEHA.

106. As a proximate result of Defendants' wrongful termination of Plaintiff Peterson, she has suffered and continues to suffer compensatory damages, including without limitation, severe emotional distress, lost wages, benefits, and compensation, and loss of future earnings and earning capacity in the amount of at least \$25,000.00, according to proof at the time of trial, which is in excess of the jurisdictional minimum for this lawsuit to qualify as an unlimited civil action. Plaintiff Peterson claims such amounts as damages, together with prejudgment interest accruing from the date of the filing of this action pursuant to California Civil Code §§ 3281 and/or 3288, and/or any other provision of law providing for prejudgment interest.

107. Further, because the wrongful acts against Plaintiff Peterson were carried out, authorized, or ratified by Defendants' directors, officers, and/or managing agents, acting with malice, oppression, or fraud, or were deliberate, willful, and in conscious disregard of the probability of causing injury to Plaintiff Peterson, she seeks punitive damages to deter Defendants from committing said illegal acts in the future.

TENTH CAUSE OF ACTION

NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

(BY PLAINTIFF PETERSON AGAINST DEFENDANTS)

108. Plaintiff Peterson re-alleges and incorporates by reference the paragraphs above, as though fully set forth herein.

109. When the Defendants committed the acts described above, they knew, or should have known, that their failure to exercise due care in the performance of their role as employer, manager, supervisor would cause Plaintiff Peterson to suffer emotional distress. The Defendants knew or should have known that the termination under the alleged circumstances would cause Plaintiff Peterson severe emotional distress.

110. The above-said acts of the Defendants constituted negligent infliction of emotional distress against Plaintiff Peterson and such conduct of the Defendants was a substantial or determining factor in causing damage and injury to Plaintiff Peterson.

111. As a result of Defendants' negligent infliction of emotional distress, Plaintiff Peterson has suffered and continues to suffer substantial loss and damages including, loss of salary, future advancement, bonuses, benefits, embarrassment, humiliation, and mental anguish in an amount to be determined at trial.

112. The Defendants committed said negligent infliction of emotional distress alleged herein against Plaintiff Peterson, maliciously, fraudulently, and oppressively with the wrongful intent of injuring Plaintiff Peterson for an improper and evil motive which constitutes a malicious and conscious disregard of Plaintiff Peterson's rights. Plaintiff Peterson is thereby entitled to punitive damages from the Defendants in an amount to be determined at trial.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment for themselves and all others on whose behalf this suit is brought against Defendants, jointly and severally, as follows:

1. For an order certifying the proposed Classes;
2. For an order appointing Plaintiffs as the representatives of the Classes;
3. For an order appointing Counsel for Plaintiffs as Class Counsel;
4. On the First Cause of Action, for one hour of premium pay for each day in which a required rest period was not lawfully authorized and permitted, for reasonable attorneys' fees and costs pursuant to statute, and for such other and further relief as the Court deems proper;
5. On the Second Cause of Action, for one hour of premium pay for each day in which a required meal period was not lawfully authorized, permitted, and/or recorded, for reasonable attorneys' fees and costs pursuant to statute, and for such other and further relief as the Court deems proper;
6. Upon the Third Cause of Action, for penalties and/or damages pursuant to California Labor Code § 226, *et seq.*, and for interest, costs and attorneys' fees;
7. On the Fourth Cause of Action, that Defendants, jointly and/or severally, pay restitution and/or disgorgement of sums to Plaintiffs and the Classes for Defendants' failure to pay premium wages for their failure to provide lawful rest periods and/or pay a premium, for reasonable attorneys' fees and costs pursuant to statute, and for such other and further relief as

1 the Court deems proper;

2 8. Upon the Fifth Cause of Action, for civil penalties according to proof pursuant to
3 the PAGA, Labor Code § 2698, et seq., Labor Code § 226.3, and for costs and attorneys' fees;

4 9. Upon Causes of Action Six through Nine, for lost wages, benefits, penalties, and
5 other monetary relief in an amount to be proven at trial;

6 10. Upon Causes of Action Six through Ten, for general damages resulting from
7 suffered humiliation, embarrassment, disgrace, loss of reputation, mental anguish, and emotional
8 and physical distress in an amount to be proven at trial;

9 11. Upon Causes of Action Six through Ten, for punitive and exemplary damages in
10 an amount according to proof at the time of trial;

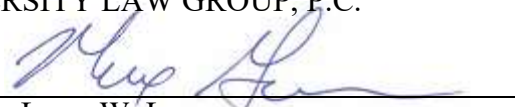
11 12. Upon Causes of Action Six through Ten, for interest on the sum of the damages
12 awarded, calculated from the date of termination to the date of judgment;

13 13. On all causes of action for attorneys' fees and costs as provided by California
14 Labor Code §§ 226, and 2699, the FEHA, and Code of Civil Procedure § 1021.5; and

15 14. For such other and further relief that the Court may deem just and proper.
16

17 DATED: July 19, 2021

DIVERSITY LAW GROUP, P.C.

18 By: 
19

Larry W. Lee

Max W. Gavron

20 Attorneys for Plaintiffs, the Class, and Aggrieved
21 Employees
22
23
24
25
26
27
28

1 **PROOF OF SERVICE**

2 **(Code of Civil Procedure Sections 1013a, 2015.5)**

3
4 STATE OF CALIFORNIA]
5 COUNTY OF LOS ANGELES]ss.
6]

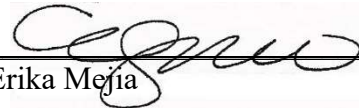
7 I am employed in the County of Los Angeles, State of California. I am over the age of
8 18 and not a party to the within action; my business address is 515 S. Figueroa Street, Suite
9 1250, Los Angeles, California 90071.

10 On July 19, 2021, I served the following document(s) described as: **SECOND**
11 **AMENDED CLASS AND REPRESENTATIVE ACTION COMPLAINT** on the interested
12 parties in this action as follows:

13 Ron S. Brand
14 rbrand@kahanafeld.com
15 Avi Attal
16 aattal@kahanafeld.com
17 Benjamin Smith
18 bsmith@kahanafeld.com
19 KAHANA & FELD LLP
20 2603 Main Street, Suite 350
21 Irvine, California 92614
22 *Attorneys for Defendant*

23 X BY ELECTRONIC MAIL: by personally sending a true and correct copy
24 of the above-described document(s) to the party(ies) listed above or on the attached mailing list
25 from the e-mail server diversitylaw.com, to the electronic transmission address of the recipient(s)
26 indicated above or on the attached mailing list. I certify that said electronic transmission was
27 completed and that all pages were received by the party(ies) identified herein or on the attached
28 mailing list.

I declare under penalty of perjury under the laws of the State of California that the
above is true and correct. Executed on July 19, 2021, at Los Angeles, California.

24 
25 Erika Mejia