



Advocates for Workplace Fairness

May 6, 2020

VIA ONLINE SUBMISSION

<http://www.dir.ca.gov/Private-Attorneys-General-Act/Private-Attorneys-General-Act.html>
California Labor & Workforce Development Agency
800 Capitol Mall, MIC-55
Sacramento, CA 95814

Re: PAGA Notice of California Labor Code Claims against Tawkify, Inc.

Dear PAGA Administrator:

Outten & Golden LLP represents Caitlin D'Aprano, who has worked for Tawkify, Inc. as a matchmaker from approximately June, 2017 through July, 2019.

As set forth below, Ms. D'Aprano alleges that (1) Tawkify misclassified her and other matchmakers as independent contractors when they are actually employees under California law; and (2) Tawkify violated a number of California Labor Code provisions applicable to her and other matchmakers.

Tawkify classifies matchmakers as independent contractors, even though they are actually employees under California law. Applying the test for determining employee status set forth in *Dynamex Operations West v. Superior Court*, 4 Cal. 5th 903 (2018) and codified at Cal. Lab. Code 2750.3, a hiring entity seeking to classify a worker as an independent contractor must show that the worker is (A) free from its control and direction, (B) performs work outside the usual course of its business, and (C) customarily engaged in an independently established business of the same nature as the work performed. The hiring entity must establish that each of the three prongs is met, otherwise the worker is properly classified as an employee.

Matchmakers do not satisfy any of the three components of the test. First, Tawkify controls matchmakers' work by, among other mechanisms, assigning matchmakers to Tawkify clients, providing detailed guidance on how matchmakers should interact with clients, and reserving the ability to fire and otherwise discipline matchmakers. Second, matchmakers perform work in the usual course of Tawkify's business: Tawkify sells matchmaking (dating) services and matchmakers create the matches it sells. Third, Tawkify prohibits its matchmakers from engaging in independent matchmaking businesses, considering it a conflict of interest for matchmakers to take on clients outside of Tawkify.

Because Tawkify misclassifies Ms. D'Aprano and other matchmakers as independent contractors, its compensation policies violate a number of other provisions of the Labor Code. Matchmakers are paid strictly on commission without a base salary or hourly rate, and, as a result, are not paid the minimum wage for each hour worked. Similarly, Tawkify does not pay matchmakers time and a half for hours worked beyond eight in one day or 40 in one week.¹ Matchmakers also incur necessary business expenses including, but not limited to, cell phone and internet usage, but Tawkify does not have a policy for reimbursing matchmakers for these expenses. Nor does Tawkify provide matchmakers with one 30 minute meal break and one 10 minute rest break for each four and a half hours worked.

Ms. D'Aprano was subject to these non-compliant policies while working for Tawkify, and was accordingly not paid all wages due. Ms. D'Aprano was not paid the minimum wage when she worked without base or hourly compensation. Ms. D'Aprano regularly worked more than eight hours in a day and 40 hours in a week without receiving time and a half compensation for those hours. Additionally, Ms. D'Aprano used her personal cell phone and internet plans for business purposes, but was not reimbursed for that usage. Further, Ms. D'Aprano's paystubs did not accurately reflect her hours and expense reimbursements.

This letter serves as notice of our intent to seek civil penalties pursuant to the Private Attorneys General Act ("PAGA"), Cal. Lab. Code §§ 2698 *et seq.*, on behalf of Ms. D'Aprano and similarly-situated matchmakers who worked for Tawkify in the State of California at any time since May 6, 2019. Ms. D'Aprano alleges that Tawkify violated numerous provisions of the California Labor Code, including, but not limited to: §§ 218.5, 218.6, 226, 226.3, 226.7, 226.8, 510, 512, 558, 1174, 1174.5, 1182.12, 1194, 1194.2, 1197, 1197.1, 1198, 1199, and 2802 and provisions of the applicable Wage Order. Ms. D'Aprano will seek all applicable civil penalties on behalf of herself and all similarly-situated matchmakers, including but not limited to, penalties pursuant to the aforementioned statutes and California Labor Code §§ 226.3, 226.6, 558.1, 1174.5, 2699, and 3700.5, and the applicable Wage Order.

The facts and claims contained herein are based on the information available at the time of this writing. Therefore, if through further review or informal or formal discovery, Ms. D'Aprano becomes aware of additional compensation or penalties owed to her and other current or former matchmakers or of additional claims against Tawkify, she reserves the right to revise these facts and/or add any new claims by amending this letter.

¹ The control Tawkify exerts over matchmakers' work prohibits them from exercising significant discretion in the matchmaking process, and, accordingly, the administrative exemption does not apply. See Cal. Lab. Code § 515(e). The administrative exemption also does not apply because matchmakers do not perform "work directly related to management policies or general business operations of [their] employer." See Cal. Code Regs. tit. 8, § 11010(2)(a)(i).

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Based on the foregoing, Ms. D'Aprano intends to file a civil action to pursue claims against Tawkify and to seek PAGA remedies for these violations. Ms. D'Aprano respectfully requests that the Labor & Workforce Development Agency notify her if it intends to investigate the above allegations pursuant to PAGA.

The \$75.00 filing fee required by Cal. Labor Code § 2699.3 is being concurrently mailed to the Accounting Unit of the Department of Industrial Relations under separate cover. Thank you for your attention. If you have any questions, please contact us.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Adam Koshkin', is positioned above the typed name and contact information.

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