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VIA ONLINE SUBMISSION ONLY TO:
https://dir.tfaforms.net/266 **(copy by certified mail to Aflac Incorporated [CAL. LAB. CODE § 2699.3])**

California Labor & Workforce Development Agency
Attn: PAGA Administrator
1515 Clay Street, Suite 801
Oakland, CA 94612

Aflac Incorporated
1932 Wynnton Rd.
Columbus, GA 31999

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275 Battery St., Ste. 2000
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Teresa L. White, President, Aflac U.S.
Beth Kimbrough, West Territory Vice President
1932 Wynnton Rd.
Columbus, GA 31999

Re: *Kenneth B. McPherson v. Aflac Incorporated. et al.*
Labor Code §§ 2698, et seq. Penalties -- PAGA Notice Letter

To Whom It May Concern:

Our firm represents Kenneth B. McPherson ("Mr. McPherson"). This letter is intended to comply with the requirements of California Labor Code Private Attorneys General Act of 2004 ("PAGA" or the "Act"), California Labor Code section 2698, *et seq.*, including section 2699.3, with respect to notice of violations of the Labor Code by (1) Aflac Incorporated ("Aflac" or the "Company"); (2) Teresa L. White ("Ms. White"); and (3) Beth Kimbrough ("Ms. Kimbrough") (collectively "Defendants"). Unless the Labor & Workforce Development Agency (the "LWDA") proceeds against Defendants, Mr. McPherson intends to pursue a civil action against Defendants on behalf of himself and all aggrieved employees ("Aggrieved Employees"), seeking attorneys' fees and penalties under PAGA.

Aflac's principal address is stated above. Despite the fact Aflac conducts extensive business in the State of California, based on the Secretary of State website it does not appear that Aflac is qualified to conduct business in California, and it does not appear that Aflac has designated an agent for service of process in California. Aflac is represented by attorney Mollie Burks, whose business address is above. We are unsure whether Ms. White and Ms. Kimbrough have counsel.

I. Relevant Facts

A. Mr. McPherson's Long and Successful Working Relationship with Aflac.

Mr. McPherson joined Aflac in September 1999. Aflac, a public traded company, is one of the largest providers of supplemental insurance in the country. Aflac provides supplemental insurance products both to individuals and to companies. Aflac sells its insurance products through internal sales representatives, and Aflac also sells its insurance products through a network of independent brokers and associates. Mr. McPherson worked continuously at Aflac for 20 years, first as a contracted independent associate, and then the last 10 years as an employee, until his abrupt termination in October 2019.

During Mr. McPherson's 20-year career at Aflac, he worked tirelessly for the company, relocating his family three times across the country and traveling extensively. Mr. McPherson made significant contributions to the company and received several promotions. In January 2013 he was elevated to State Sales Coordinator, then later elevated in October 2014 to Market Director, a position he held for the next six years. As Market Director, Mr. McPherson managed a large team of sales representatives in his region. Mr. McPherson was highly successful, routinely finishing at or near the top of other Market Directors. In 2017, Mr. McPherson set an all-time company record for single year growth, and as a result earned over $2 million in compensation.

Because of Mr. McPherson's well-deserved reputation at Aflac as a thought leader, he was appointed to and became one of the longest standing members of the Aflac Leadership Council (the "ALC"). The ALC is a group of 12 of the most influential and successful Market Directors in the company. The ALC meets three to four times per year to give feedback to the company's headquarters partners and executive leadership.

B. The "Butt-Spelling" Incident and Mr. McPherson's Complaint.

In April 2018, Aflac hired Beth Kimbrough as a Territory Vice President. Ms. Kimbrough became Mr. McPherson's supervisor.

On August 29, 2018, Mr. McPherson attended a meeting in Boise, Idaho, along with about 45 Aflac colleagues. Ms. Kimbrough presided over the planning meeting. Mr. McPherson arrived eight minutes late for the 8:00 a.m. meeting, not expecting his Uber ride to take 38 minutes. Ms. Kimbrough was upset that he arrived late, so as punishment, she made Mr. McPherson stand in front of his dozens of colleagues and wiggle his bottom to attempt to spell in cursive the word she wrote on the board. Mr. McPherson believes the word was "sustainable."

For Mr. McPherson—a consummate professional and father of four—it was a humiliating experience, particularly because it occurred in front of so many of his work colleagues, including subordinates. After the "butt-spelling" incident, multiple attendees told Mr. McPherson that they were embarrassed for him and considered it totally inappropriate.

Ms. Kimbrough was not finished intimidating Mr. McPherson. On September 13, 2018, Ms. Kimbrough came to Mr. McPherson's office unannounced. Ms. Kimbrough started by warning Mr. McPherson to watch his drinking of alcohol at company events. This warning made no sense, as Mr. McPherson had never had an issue/incident with alcohol and had never been remotely reprimanded for any alcohol-related incident in his 20 years with the company. Indeed, at the previous company event, he drank iced tea, while Ms. Kimbrough ironically had several cocktails.

Ms. Kimbrough then walked all of the way around Mr. McPherson's desk, gave him a hug, and kissed him on the cheek. Off guard, Mr. McPherson initially reciprocated the hug to avoid the awkwardness. When he let go of the hug, Ms. Kimbrough did not, holding the hug for an agonizing 8-10 seconds. Mr. McPherson perceived it as a pure power move, designed to put him in his place and intimidate him.

On October 18, 2018, Mr. McPherson made a formal complaint about the butt-spelling incident and the intimidation-meeting to Aflac Human Resources representative [redacted] To the best of Mr. McPherson's knowledge, and in dereliction of Aflac's legal obligations, the company never conducted any investigation into his complaint and instead ignored it. No one followed up with Mr. McPherson regarding his harassment complaint, and he believes no action was taken against Ms. Kimbrough.

C. <u>Mr. McPherson Blows the Whistle on Aflac's Conscious Promotion of Deceptive and Fraudulent Business Practices</u>.

Aflac is a publicly traded company. Aflac's stock value is driven in large measure by its reporting of premiums and new business. The higher the premiums and new business, the higher the company is valued, and the more highly executive leadership is bonused and compensated. This phenomenon has resulted in constant pressure for the company to report high premiums and new business, even if that new business is not real and actually fraudulent. Aflac has devised a compensation system for its sales representatives that encourages its sales representatives to hit quotas and bonus numbers by selling policies that they know will be cancelled, or even with policy holders who do not exist, or who are plainly ineligible for the coverage. Instead of promoting "persistency of business" with policyholders who are genuine and will renew, Aflac promotes a system where sales representatives are rewarded only for the short term. This results in a culture of fraud.

Indeed, Aflac been under investigation since 2012 for its sales practices by the insurance commissioners of Idaho, Minnesota, and Missouri, known as the "Tri-State Investigation." Aflac has paid fines exceeding one million dollars. The Tri-State Investigation has now expanded a Multi-State Investigation, with insurance commissioners of other states placing Aflac's business practices under increased scrutiny.

Mr. McPherson attended the February 2019 Aflac Leadership Council meeting. Teresa White, President of Aflac U.S., also attended. Ms. White asked the Council for feedback on how to address issues pertaining to the Multi-State Investigation. Mr. McPherson spoke up, vocalizing what was obvious to him and many others in the room: that the company's compensation model drives the widespread fraud that they all know is occurring. In that respect, as Mr. McPherson observed, Aflac executive management is complicit in this very fraud. Mr. McPherson explained that so long as Aflac places such high incentives on new sales instead of persistency of business, Aflac would continue to see its sales representatives—desperate to hold their jobs or receive bonuses—write plainly-fraudulent policies. Mr. McPherson told the group that Aflac must move away from the "Wells Fargo-like business practices" that defraud shareholders and continue getting the company in trouble with regulators.

Mr. McPherson's castigation of Aflac's business model at the February 2019 ALC caused a stir in leadership. However, other members of the Council told Mr. McPherson afterwards that he was right. In a sidebar with Ms. White at the meeting, Mr. McPherson again raised his concerns with the "Wells Fargo-like business practices" that Aflac was committing. Ms. White asked Mr. McPherson to express his concerns in an e-mail to her. Mr. McPherson wrote her that e-mail on February 21, 2019, expressing his concerns about the illegal activity Aflac was promoting:

> "I have always been aware of the principle that, incentives create behavior. I believe the current behavior of our field force is functioning perfectly to the incentives we have provided. They are directly attributable to our compensation design. The fraudulent activity, the high pressure tactics, the orphaned accounts, the poor service levels and even the massive budget deficit related to bonuses are a result of the rules we put into place."

Mr. McPherson blew the whistle again at a meeting in the summer of 2019, where he was one of six Marketing Directors invited to Aflac's World Wide Headquarters to receive Deloitte's findings after Deloite performed an analysis of the issues causing Aflac to receive so much regulatory oversight. During the meeting, Mr. McPherson stunned attendees by asking the consultants if they knew how much Aflac's annual sales should be categorized as fraud. Deloitte did not know. Mr. McPherson pressed the consultants why Aflac paid them over $1 million, and they could not even quantify this huge, mounting problem. Mr. McPherson then pointed to the "objectives" page of Deloitte's report, which focused on appeasing regulators, as opposed to actually tackling and ending the underlying fraud. Mr. McPherson lectured the unhappy group that Aflac and Deloitte should try to solve the problem and end the fraud, rather than put window dressing on the problem to protect the Aflac brand.

It soon became evident to Mr. McPherson that executive management was receiving his fraud complaints in a hostile manner. In June 2019, [redacted] the head of the Aflac Special Investigation Unit, called Mr. McPherson to schedule a one-hour recorded phone call regarding the email he had sent Ms. White. Mr. McPherson began to fear that he had jeopardized his job by raising these concerns. Mr. McPherson tried to take a more diplomatic approach with [redacted] to try to save his job. However, even with Mr. McPherson's more diplomatic approach, he was shaken with how the call ended, and fearful that his 20-year career at Aflac could be threatened. Specifically, at the end of the call, Mr. McPherson asked [redacted] why Ms. White had asked to interview him. [redacted] responded that because of Mr. McPherson's position and tenure with the company, and because of the company's concerns regarding the Multi-State Investigation, Aflac felt "vulnerable" by Mr. McPherson's knowledge and understanding of how Aflac's compensation system was driving the sales behavior about which Mr. McPherson had complained.

D. <u>Aflac Fabricates a Pretextual Reason to Terminate Mr. McPherson</u>.

Mr. McPherson's concerns about security of his job were well founded. On September 13, 2019, [redacted] of Aflac's HR Compliance team called him. [redacted] asked Mr. McPherson about a business suit contest that Aflac coordinates twice a year with Bespoke, a suit company. Under the contest, top Aflac producers receive a free suit, care of Aflac. [redacted] asked Mr. McPherson if he is eligible to win, and he explained he is not. [redacted] asked if there would be any reason to purchase more suits than the number of individual qualifiers. Mr. McPherson explained yes because sometimes he will personally buy a suit for himself, so that the total quantity of suits purchased will qualify for Bespoke's volume discount. Bespoke typically offers a $200 per suit discount if Aflac buys a minimum number of suits. Moreover, and as Mr. McPherson explained, suits are often purchased for an Aflac producer who qualified for the previous event but was not able to attend that event. This causes more suits to be purchased than actual qualifiers for that particular contest period.

Mr. McPherson explained that he would usually pay for the suits with the company credit card, but if the company card was maxed out he would use his personal credit card, or one of his Market Coordinators would pay with his or her card. As Mr. McPherson further explained to [redacted]

[redacted] he did not submit his own expenses. Instead, his Market Coordinators were responsible for submitting his expenses.

[redacted] asked Mr. McPherson to find out who received the "additional" suits for a Bespoke contest in July 2018, over a year earlier. Mr. McPherson was listed as one of the recipients of the suits. In working with his Market Coordinators, Mr. McPherson determined that five suits were purchased above the number of qualifiers during an 18-month period spanning contest events in July 2018, January 2019, and July 2019. Mr. McPherson learned and reported to [redacted] that Mr. McPherson's Marketing Coordinator was not reconciling the contest properly. The Marketing Coordinator was simply taking the gross amount of the bill for each contest and dividing equally amongst that contest periods qualifiers. So, if there were eight suits and six qualifiers (*i.e.*, six qualifiers plus two previous contest qualifiers) the six qualifiers had received a 1099 for an amount greater than the reward they received, and the two qualifiers that received their suits at the next event did not receive a 1099 at all for their suits. This was the case with four of the five suits in question.

Mr. McPherson discovered that he had received the fifth suit in July 2018, but he had not reimbursed the company which was his practice. The handful of times Mr. McPherson had purchased a suit in the past to reach the volume discount, he had always reimbursed the company for them. Mr. McPherson learned that he had not reimbursed the company for the suit in July 2018 because his Market Coordinator, [redacted] forgot to charge Mr. McPherson for the suit he received. [redacted] kept Mr. McPherson's personal credit card on file and had approval to use the card to pay his personal expenses. Mr. McPherson was completely unaware of [redacted] mistake which meant that he had not paid for the suit back in July 2018.

Upon discovering that he had not paid for the $964 suit, Mr. McPherson promptly called [redacted] and explained the mistake. Even though purchasing the extra suit had saved the company $1,400, it was true Mr. McPherson had inadvertently not paid for it. Accordingly, he promptly reimbursed the company, even though he had paid $4,200 for the suits for the July 2019 Bespoke contest on his own credit card, and the company still had not reimbursed him for advancing that expense. Thus, ironically, the company owed him more money for suits than he owed the company.

For a 20-year employee who had generated tens of millions of dollars for the company and served honorably on the Leadership Council, a $964 expense reimbursement mishap from over a year earlier, caused by his Market Coordinator, should not have warranted a minute's further attention. Mr. McPherson was shocked, however, when on October 7, 2019, Aflac terminated his employment and had a security guard escort him out of the office like a criminal.

When Mr. McPherson questioned how such a trivial mishap could warrant any discipline, much less termination, Human Resources explained to him that he had received a "final warning" from an incident in November 2015, four years earlier. The so-called final warning, however, was completely unwarranted and was not an expense reimbursement issue. Mr. McPherson had been disciplined because he had been cajoled to attend a gentlemen's club with another employee and several Aflac sales agents during non-work hours. Mr. McPherson did not charge Aflac for any the expenses at the gentleman's club, and no one had complained about it.

While Mr. McPherson understood that some people could disagree with the decision to go going to a gentlemen's club, he had never been told until that point that it was supposedly prohibited. Indeed, Mr. McPherson had visited gentlemen's clubs as the guest of members of his senior management in the past. This included a former Director of Sales, former Territory Vice Presidents, Territory Directors, Vice Presidents, 2nd VPs, and Senior Managers. These visits included large and small groups of both employees and contractors and on at least one occasion, Mr. McPherson was aware that company funds were used because an officer of the company handed him his corporate card and asked him to pay everyone's admission fee with it. Moreover, a former President of Aflac visited a gentlemen's club in Las Vegas with Aflac employees.

Mr. McPherson's "final warning" for the gentlemen's club visit stated: "This is a final warning that future conduct of this nature may lead to immediate termination." Mr. McPherson would have protested this discipline more, but he was perfectly fine never going to a gentlemen's club again, so he knew he would never engage in future conduct of that "nature." Moreover, Mr. McPherson did not want to throw under the bus and identify by name the many officers and executive leaders more senior than him who had taken groups to gentlemen's clubs.

Even though the $964 suit expense mishap several years later was not remotely similar in nature to the decision to go to a gentlemen's club, Aflac used this as the hook to terminate him. To add to the absurdity of this supposed motivation, Mr. McPherson's Market Coordinators, [redacted] and [redacted] both contend that no one from Aflac ever interviewed them in conjunction with Aflac's so-called investigation into the suits. If Aflac had interviewed them, it would have learned that [redacted] claims full responsibility for the suit mishap because of her clerical error. Aflac's so-called "investigation" was not an investigation at all, but instead a mission to find a reason to terminate him.

Further, the entire notion that Mr. McPherson was trying to defraud the company out of a $964 suit was completely undermined by the fact that Mr. McPherson was listed in the records as having received a suit. If Mr. McPherson—who earned on average over $1 million a year—wanted to swindle the company out of a suit, it would make no sense for him or his Market Coordinators to ***list himself*** as having received a suit. The fact that Aflac apparently audited Mr. McPherson's business expenses for a multi-year period, and could only find a single mistake made by his support staff, is better evidence that Mr. McPherson's expense reports were pristine rather than problematic.

E. Aflac Implicitly Admits to Terminating Mr. McPherson on Pretextual Grounds.

On October 8, 2019—the very next day after Aflac terminated Mr. McPherson—Ms. Kimbrough held a training session with about 12 Marketing Directors (who held the same position as Mr. McPherson did prior to his termination). Ms. Kimbrough told the Marketing Directors that if they want to find an excuse to fire an employee quickly without going through corrective action or a performance management plan, the Marketing Directors just need to review up to two years of the employee's expense reports. Ms. Kimbrough explained that the expenses reports will almost always contain some kind of problem that the company can use as a pretense to fire the employee.

Following the meeting, multiple Marketing Directors called Mr. McPherson, describing Ms. Kimbrough's training session, and telling him that they were upset and shell-shocked that Ms. Kimbrough would be so brazen as to give a training session on how to fire an employee for a pretextual reason, the very next day after Aflac had terminated Mr. McPherson using this approach. The Marketing Directors knew that Mr. McPherson had spoken up about company business practices, and they viewed Ms. Kimbrough's training session as intimidation tactic in case other Marketing Directors were to similarly inclined to speak out. The message from Aflac was clear: if you speak up, you can be disposed of—and Mr. McPherson was the exemplar.

Aflac did not terminate Mr. McPherson because of a $964 expense reimbursement mishap from July 2018. Ms. Kimbrough essentially told the Marketing Directors that this was Aflac's pretense to fire him. The real reason Aflac fired him was because he had repeatedly complained about sensitive company issues. First he complained that he was forced by his supervisor to give a "butt dance" at a meeting of about 45 people, and he complained that this same manager accosted him by kissing his cheek and holding him in a uncomfortably long and unwanted hug. Then Mr. McPherson repeatedly called out the company for maintaining a compensation system that promoted fraud, making Aflac effectively complicit in the fraud upon shareholders and others. Mr. McPherson blew the whistle on Aflac for promoting this fraud at the February 2019 Leadership Council, then later with Deloitte and in an e-mail to the Company's President. Aflac felt "vulnerable" by Mr. McPherson's knowledge of these practices and his growing outspokenness, and the company took action and terminated him. Not only did the company terminate him after 20 years of honorable service, canceling his family medical insurance that same day, but Aflac terminated him in the most humiliating way possible, marching him out with a security guard, as if he were a criminal.

II. Description Of Labor Code Violations

Mr. McPherson is informed and believes, and hereon alleges, that the issues he complained about on behalf of herself and all aggrieved employees were unlawful or a violation of regulations and laws. Defendants required or encouraged Mr. McPherson and the other Aggrieved Employees to participate in a compensation system that knowingly resulted in fraudulent or otherwise unlawful conduct, or conduct that Mr. McPherson and other employees had reasonable cause to believe was unlawful or which constitutes a violation of or noncompliance with federal, state, or local regulation, such as issuing policies that Aflac knew would be cancelled because sales agents had engaged in a range of wrongful conduct, such as writing policies for policy holders who did not request the coverage, writing policies for ineligible applicants, and writing policies for non-existent applicants, among other things. Several insurance commissioners are in the process of investigating Aflac for illegal activity of this nature, and Aflac did not want a senior member of management like Mr. McPherson adding validation to the charges. Mr. McPherson complained about this conduct that he believed in good faith to be illegal, and he complained in good faith about Ms. Kimbrough's sexual harassment of him, which he believed in good faith to be illegal.

Defendants retaliated against Mr. McPherson and other Aggrieved Employees for disclosing, reporting, refusing to participate in such activities, or for being perceived as having exercised their rights under the Labor Code. Specifically, Mr. McPherson and other Aggrieved Employees were harassed, denied employment rights, disciplined, discharged, or threatened to be discharged for having opposed or refused to participate in activities that Mr. McPherson and other Aggrieved Employees had reasonable cause to believe were unlawful or constituted violations of or noncompliance with federal, state, or local regulations.

Mr. McPherson believes he was retaliated against in violation of Labor Code §§ 1102.5, 98.6, and 232.5, among other Labor Code provisions.

Labor Code section 1102.5 mandates, *inter alia,* that an employer may not "make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, to a person with authority over the employee, or to another employee who has authority to investigate, discover, or correct the violation or noncompliance" or "retaliate against an employee for disclosing information to a government or law enforcement agency, to a person with authority over the employee, or to another employee who has authority to investigate, discover, or correct the violation or noncompliance" if the employee has reasonable cause to believe that the information discloses a violation of a state or federal statute, rule or regulation. Section 1102.5 further states that "an employer may not retaliate against an employee for refusing to participate in an activity that would result in a violation of state or federal statute, or a violation of or noncompliance with a state or federal rule or regulation."

It is Mr. McPherson's position that Defendants violated, among other applicable statutory provisions, Labor Code section 1102.5 by retaliating against Mr. McPherson for objecting to, complaining about and/or reporting violations of local, state and federal agencies, and for refusing to participate in an activity that would result in a violation of state and/or local law on behalf of himself and all aggrieved employees,.

Labor Code section 98.6 prohibits employers for discharging or discriminating against employees for making complaints about wages. It is Mr. McPherson's position that Defendants violated, among other applicable statutory provisions, Labor Code section 98.6 by retaliating against Mr. McPherson for complaining about the fraud and illegal practices of Defendants.

Labor Code section 232.5 mandates, *inter alia,* "no employer may . . . discharge, formally discipline, or otherwise discriminate against an employee who discloses information about the employer's working conditions." It is Mr. McPherson's position that Defendants violated, among other applicable statutory provisions, Labor Code section 232.5 by retaliating against him for complaining about his working conditions.

III. Conclusion

As a result of Defendants' conduct, Mr. McPherson and other Aggrieved Employees who disclosed, opposed, or refused to participate in unlawful activities were disciplined, discharged, threatened to be discharged, harassed, denied employment rights, or otherwise retaliated against.

As a further result of Defendants' conduct, Mr. McPherson has suffered severe emotional distress and other damages, including but not limited to, loss of back pay, front pay, and other financial losses. Mr. McPherson is thus entitled to seek on behalf of himself and all Aggrieved Employees applicable damages, penalties, attorneys' fees, and interest set forth in PAGA, Cal. Labor Code section 2698, *et seq.*

Mr. McPherson intends to file a complaint with respect to the above-referenced violations, and to include a claim under the Act on behalf of himself and all other Aggrieved Employees. Mr. McPherson will seek not only statutory damages, but all penalties, assessments, and/or additional compensation that have arisen from the above conduct.

This letter therefore provides the requisite notice under the Act to the LWDA and Defendants by setting forth the specific provisions of the Labor Code and related provisions Mr. McPherson alleges have been violated, including the facts and relevant theories alleged against Aflac Incorporated, Ms. White, and Ms. Kimbrough. To prevent the violations described in the Complaint and herein from occurring, and to remedy past violations, Mr. McPherson respectfully requests that the LWDA conduct an investigation into Defendants' employment practices in accordance with the Act.

We request that you advise us, by certified mail within sixty (60) days of the postmark on this letter, whether the LWDA intends to proceed with these claims or whether Mr. McPherson and the other Aggrieved Employees should include them as a claim under the Act in a civil lawsuit.

Very truly yours,

Edson K. McClellan
for RUTAN & TUCKER, LLP

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