

1 DAVID G. SPIVAK (SBN 179684)

2 david@spivaklaw.com

3 CARL J. KAPLAN (SBN 323019)

4 carl@spivaklaw.com

5 THE SPIVAK LAW FIRM

6 16530 Ventura Blvd., Suite 203

7 Encino, CA 91436

8 Telephone (818) 582-3086

9 Facsimile (818) 582-2561

10 Attorneys for Plaintiff,

11 PAULA JOHNSON, and all others similarly situated

12 (Additional attorneys for Plaintiff on following page)

13 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

14 **FOR THE COUNTY OF SAN FRANCISCO**

15 **(UNLIMITED JURISDICTION)**

16 PAULA JOHNSON, on behalf of herself and
17 all others similarly situated, and as an
18 “aggrieved employee” on behalf of other
19 “aggrieved employees” under the Labor Code
20 Private Attorneys General Act of 2004,

21 *Plaintiff(s),*

22 vs.

23 NAN MCKAY AND ASSOCIATES, INC., a
24 California corporation; and DOES 1-50,
25 inclusive,

26 *Defendant(s).*

Case No.: CGC-20-586796

CLASS ACTION

FIRST AMENDED COMPLAINT FOR:

1. Failure to Provide Meal and Rest Periods (Lab. Code §§ 226.7, 512, and 1198);
2. Failure to Pay All Wages for All Hours Worked at the Correct Rates of Pay (Lab. Code §§ 221, 510, 1194, 1197, and 1198);
3. Failure to Provide Accurate Written Wage Statements (Lab. Code § 226);
4. Waiting Time Penalties (Lab. Code §§ 201-203);
5. Unfair Competition (Bus. & Prof. Code §§ 17200, *et seq.*); and
6. Civil Penalties (Lab. Code §§ 2698, *et seq.*).

JURY TRIAL DEMANDED



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(818) 582-3086 Tel
(818) 582-2561 Fax
SpivakLaw.com

ADDITIONAL ATTORNEY FOR PLAINTIFF

Walter Haines (SBN 71075)
whaines@uelglaw.com
UNITED EMPLOYEES LAW GROUP
5500 Bolsa Ave, Suite 201
Huntington Beach, CA 92649
Telephone: (562) 256-1047
Facsimile: (562) 256-1006



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(818) 582-3086 Tel
(818) 582-2561 Fax
SpivakLaw.com

1 Plaintiff PAULA JOHNSON (hereafter “Plaintiff”), on behalf of herself and all others
2 similarly situated, complains and alleges as follows:

3 **INTRODUCTION**

4 1. Plaintiff brings this class and representative action based on alleged violations of
5 the California Labor Code, Industrial Welfare Commission Order No. 4-2001 (hereafter “the
6 Wage Order”) and the Business and Professions Code against defendants NAN MCKAY AND
7 ASSOCIATES, INC., a California corporation; and DOES 1 through 50, inclusive (collectively
8 “Defendants”).

9 2. As set forth in more detail below, Plaintiff alleges that Defendants are liable to her
10 and other similarly situated current and former employees who worked in California as hourly
11 employees, including but not limited to customer service representatives and other employees of
12 Defendants in comparable positions at any time during the period beginning four years prior to
13 the filing of this action to the present, for unpaid wages, unlawfully deducted wages, unpaid meal
14 and rest break premium wages, statutory wages, civil penalties and other related relief. These
15 claims are based on Defendants’ alleged (1) failure to provide all rest and meal periods; (2) failure
16 to pay all wages earned for all hours worked at the correct rates of pay; (3) failure to provide
17 accurate written wage statements, (4) failure to timely pay wages upon termination of
18 employment, and (5) failure to fairly compete. Additionally, Plaintiff seeks civil penalties under
19 the California Labor Code Private Attorneys General Act, Labor Code §§ 2698, *et seq.* (“PAGA”).
20 Accordingly, Plaintiff now seeks to recover unpaid wages, unlawfully deducted wages, unpaid
21 meal and rest break premium wages, statutory penalties, civil penalties, and related relief through
22 this class action.

23 **JURISDICTION AND VENUE**

24 3. This Court has subject matter jurisdiction because the aggregate claims of Plaintiff
25 and the Class Members, inclusive of all relief, place more than \$25,000 in controversy.

26 4. There is no basis for federal question subject matter jurisdiction in this case.
27 Specifically, Plaintiff asserts claims on behalf of herself and the Class Members that solely arise
28 under California law, rather than federal law.

5. There is also no basis for federal diversity jurisdiction in this case.

6. Venue is proper in San Francisco County pursuant to California Code of Civil
Procedure § 395(a) and § 395.5 in that liability arose in San Francisco County because at least



1 some of the transactions that are the subject matter of this Complaint occurred therein and/or
2 because each defendant is found, maintains offices, transacts business, and/or has an agent
3 therein.

4 **PARTIES**

5 7. Plaintiff PAULA JOHNSON is a resident of California. At all relevant times,
6 Plaintiff was an “employee” within the meaning of Title 8 California Code of Regulations Section
7 11160 and an “aggrieved employee” within the meaning of Labor Code Section 2699(c).

8 8. Defendant NAN MCKAY AND ASSOCIATES, INC. is a corporation organized
9 and existing under the laws of California based on Plaintiff’s information and belief.

10 9. Plaintiff is ignorant of the true names, capacities, relationships, and extents of
11 participation in the conduct alleged herein, of the defendants sued as DOES 1-50, inclusive, but
12 is informed and believes and thereon alleges that said defendants are legally responsible for the
13 wrongful conduct alleged herein and therefore sues these defendants by such fictitious names.
14 Plaintiff will amend the Complaint to allege the true names and capacities of the DOE defendants
15 when ascertained.

16 10. Plaintiff is informed and believes and thereon alleges that, at all relevant times
17 herein, all Defendants were the agents, employees and/or servants, masters or employers of the
18 remaining Defendants, and in doing the things hereinafter alleged, were acting within the course
19 and scope of such agency or employment, and with the approval and ratification of each of the
20 other Defendants.

21 11. At all relevant times, in perpetrating the acts and omissions alleged herein,
22 Defendants, and each of them, acted pursuant to and in furtherance of a policy, practice, or a lack
23 of a practice which resulted in Defendants not paying Plaintiff and the Class in accordance with
24 applicable California labor laws as alleged herein.

25 12. Plaintiff is informed and believes and thereon alleges that each and every one of
26 the acts and omissions alleged herein were performed by, and/or are attributable to, all
27 Defendants, each acting as agents and/or employees, and/or under the direction and control of
28 each of the other Defendants, and that said acts and failures to act were within the course and
scope of said agency, employment, and/or direction and control.

CLASS ALLEGATIONS

13. This action has been brought and may be maintained as a class action pursuant to



1 California Code of Civil Procedure § 382 because there is a well-defined community of interest
2 among the persons who comprise the readily ascertainable class defined below and because
3 Plaintiff is unaware of any difficulties likely to be encountered in managing this case as a class
4 action.

5 14. **Class Definition:** The Class is defined as follows: all individuals Defendants
6 employed in California and paid on an hourly basis, including but not limited to customer service
7 representatives and workers employed in comparable positions, at any time during the period
8 beginning four years prior to the filing of this action and ending on the date that final judgment
9 is rendered in this action.

10 15. **Reservation of Rights:** Pursuant to Rule of Court 3.765(b), Plaintiff reserves the
11 right to amend or modify the class definitions with greater specificity, by further division into
12 subclasses and/or by limitation to particular issues.

13 16. **Numerosity:** The Class is so numerous that the joinder of each individual class
14 member is impractical. While Plaintiff does not currently know the exact number of the Class,
15 Plaintiff is informed and believes that the actual number exceeds the minimum required for
16 numerosity under California law.

17 17. **Commonality and Predominance:** Common questions of law and fact exist as
18 to all class members and predominate over any questions which affect only individual class
19 members. These questions include, but are not limited to:

20 A. Whether Defendants failed to provide the Class with all rest periods as
21 required by section 11 of the Wage Order;

22 B. Whether Defendants failed to provide the Class with all off-duty meal
23 periods as required by section 12 of the Wage Order;

24 C. Whether Defendants failed to compensate the Class Members at one
25 hour's pay on days when Defendants failed to provide them with one or more meal periods in a
26 workday.

27 D. Whether Defendants failed to compensate the Class Members at one
28 hour's pay on days when Defendants failed to provide them with one or more off-duty meal
periods in a workday;

E. Whether Defendants unlawfully collected wages from the Class;

F. Whether Defendants failed to pay all wages earned to Class Members for



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(818) 582-3086 Tel
(818) 582-2561 Fax
SpivakLaw.com

all hours worked at the correct rates of pay;

G. Whether Defendants knowingly and intentionally failed to provide the Class Members with accurate wage statements;

H. Whether Defendants failed to timely pay final wages upon termination of the Class Members' employment;

I. Whether Defendants engaged in unfair competition within the meaning of Business and Professions Code §§ 17200, *et seq.*, with respect to the Class;

J. Whether the Class Members are entitled to restitution of money or property that Defendants may have acquired from them through alleged Labor Code violations;

K. Whether the Class Members are entitled to prejudgment interest; and

L. Are the Class Members entitled to attorneys' fees?

18. **Typicality:** Plaintiff's claims are typical of the other Class Members' claims. Plaintiff is informed and believes and thereon alleges that Defendants have a policy, practice, or a lack of a policy which resulted in Defendants failing to comply with the California Labor Code and the Business and Professions Code as alleged herein.

19. **Adequacy of Class Representative:** Plaintiff is an adequate class representative in that she has no interests that are adverse to, or otherwise in conflict with, the interests of absent Class Members. Plaintiff is dedicated to vigorously prosecuting this action on behalf of the Class. Plaintiff will fairly and adequately represent and protect the interests of the Class.

20. **Adequacy of Class Counsel:** Plaintiff's counsel are adequate class counsel in that they have no known conflicts of interest with Plaintiff or absent Class Members, are experienced in class action litigation and are dedicated to vigorously prosecuting this action on behalf of Plaintiff and the absent Class.

21. **Superiority:** A class action is vastly superior to other available means for fair and efficient adjudication of class' claims and would be beneficial to the parties and the Court. Class action treatment will allow a number of similarly situated persons to simultaneously and efficiently prosecute their common claims in a single forum without the unnecessary duplication of effort and expense that numerous individual actions would entail. In addition, the monetary amounts due to many individual class members are likely to be relatively small and would thus make it difficult, if not impossible, for individual class members to both seek and obtain relief. Moreover, a class action will serve an important public interest by permitting class to effectively



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(818) 582-3086 Tel
(818) 582-2561 Fax
SpivakLaw.com

1 pursue the recovery of monies owed to them. Further, a class action will prevent the potential for
2 inconsistent or contradictory judgments inherent in individual litigation.

3 **STATEMENT OF FACTS**

4 22. On or about November 4, 2019, Defendants first employed Plaintiff to work in
5 San Francisco, California as an hourly customer service representative. Defendants continuously
6 employed Plaintiff in this role until on or about May 26, 2020, when her employment ended.

7 23. At all relevant times, Defendants employed Plaintiff and the Class at an hourly
8 rate of pay and issued their paychecks on a bi-weekly basis. At all relevant times, Defendants
9 classified Plaintiff and the Class as non-exempt employees entitled to the protections of both the
10 Labor Code and the Wage Order.

11 24. At all relevant times, Defendants required Plaintiff and the Class to perform work
12 while signed out from work. Plaintiff and the Class regularly received phone calls from customers
13 shortly before the end of their eight-hour shifts. Such calls often lasted beyond the end of their
14 shifts and circumstances did not permit Plaintiff and the Class to seek preapproval for overtime
15 hours spent on such calls. However, Defendants failed to pay Plaintiff and the Class for this time
16 spent working after the end of their shifts, and instead adjusted Plaintiff's and the Class Members'
17 time records to omit this extra time. In approximately April of 2020, Plaintiff asked her
18 supervisor why the time she spent working after the end of her shift was not reflected in her
19 paychecks. In response, Plaintiff's supervisor told her it was because the overtime was "not
20 approved."

21 25. At all relevant times, Defendants failed to consistently provide Plaintiff and the
22 Class with a daily 30-minute meal period within the first five hours of work. Due to the workloads
23 Defendants assigned, Plaintiff and the Class were frequently unable to take their meal periods
24 within the first five hours of work. Each day, Defendants assigned to Plaintiff and the Class a log
25 of phone calls it expected them to complete that day. The volume of calls Defendants assigned
26 to Plaintiff and the Class was often so great that Plaintiff and the Class were unable to take their
27 meal periods until well after the first five hours of work. Defendants further failed to authorize
28 and permit Plaintiff and the Class to take a ten-minute, paid, duty-free rest break every four hours
or major portion thereof. On information and belief, Defendant has not requested an exemption
from California's rest period law from the Division of Labor Standards Enforcement. Further,
neither Plaintiff nor the Class Members entered into on duty meal period agreements with



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(818) 582-3086 Tel
(818) 582-2561 Fax
SpivakLaw.com

Defendants.

26. Defendants failed to pay premium wages to Plaintiff and the Class for days on which Defendants failed to provide them with all timely, off-duty meal and rest periods.

27. For the reasons stated herein, Plaintiff alleges the following violations of the California Labor Code and Wage Order:

A. Defendants failed to provide Plaintiff and the Class with all off-duty meal periods;

B. Defendants failed to provide Plaintiff and the Class with all rest periods as required by law;

C. Defendants failed to pay Plaintiff and the Class an additional hour's pay for days on which Defendants failed to provide them with one or more meal periods in a workday;

D. Defendants failed to pay Plaintiff and the Class an additional hour's pay for days on which Defendants failed to provide them with one or more rest periods in a workday;

E. Defendants unlawfully collected wages due to Plaintiff and the Class;

F. Defendants failed to compensate Plaintiff and the Class for all hours worked at the correct rates of pay, including, but not limited to, regular and overtime wages for work they performed while signed out from work;

G. Defendants failed to provide Plaintiff and the Class with accurate and complete wage statements;

H. Defendants failed to timely pay Plaintiff and the Class all earned and unpaid wages during employment; and

I. Defendants failed to timely pay Plaintiff and those Class Members who are former employees all earned and unpaid wages at the time of separation from employment.

FIRST CAUSE OF ACTION

FAILURE TO PROVIDE REST BREAKS AND MEAL PERIODS

(Lab. Code §§ 226.7, 512, and 1198)

(By Plaintiff and the Class against all Defendants)

28. Plaintiff incorporates all paragraphs of this Complaint as if fully alleged herein.

29. At all relevant times during the applicable limitations period, Plaintiff and the Class Members have been employees of Defendants and entitled to the benefits and protections of California Labor Code §§ 226.7, 512, 1198, and the Wage Order.



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(818) 582-3086 Tel
(818) 582-2561 Fax
SpivakLaw.com

1 30. In relevant part, California Labor Code § 1198 states:

2 The maximum hours of work and the standard conditions of labor
3 fixed by the commission shall be the maximum hours of work and
4 the standard conditions of labor for employees. The employment
5 of any employee for longer hours than those fixed by the order or
6 under conditions of labor prohibited by the order is unlawful.

7 31. In relevant part, In relevant part, California Labor Code § 512 states:

8 An employer shall not employ an employee for a work period of
9 more than five hours per day without providing the employee with
10 a meal period of not less than 30 minutes, except that if the total
11 work period per day of the employee is no more than six hours, the
12 meal period may be waived by mutual consent of both the
13 employer and employee.

14 An employer shall not employ an employee for a work period of
15 more than 10 hours per day without providing the employee with
16 a second meal period of not less than 30 minutes, except that if the
17 total hours worked is no more than 12 hours, the second meal
18 period may be waived by mutual consent of the employer and the
19 employee only if the first meal period was not waived.

20 32. In relevant part, Section 12 of the Wage Order states:

21 **Rest Periods**

22 (A) “Every employer shall authorize and permit all employees
23 to take rest periods, which insofar as practicable shall be in the
24 middle of each work period. The authorized rest period time shall
25 be based on the total hours worked daily at the rate of ten (10)
26 minutes net rest time per four (4) hours or major fraction thereof.
27 However, a rest period need not be authorized for employees
28 whose total daily work time is less than three and one-half (3 1/2)
hours. Authorized rest period time shall be counted as hours
worked for which there shall be no deduction from wages.”

(B) If an employer fails to provide an employee a rest period in
accordance with the applicable provisions of this Order, the
employer shall pay the employee one (1) hour of pay at the
employee’s regular rate of compensation for each work day that
the rest period is not provided.”

33. In relevant part, Section 11 of the Wage Order states:

Meal Periods



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(818) 582-3086 Tel
(818) 582-2561 Fax
SpivakLaw.com

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

(A) “No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day’s work the meal period may be waived by mutual consent of the employee and the employer. Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an ‘on duty’ meal period and counted as time worked. An ‘on duty’ meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time.”

(B) If an employer fails to provide an employee a meal period in accordance with the applicable provisions of this Order, the employer shall pay the employee one (1) hour of pay at the employee’s regular rate of compensation for each work day that the meal period is not provided.”

34. In relevant part, California Labor Code § 226.7 states:

(b) An employer shall not require an employee to work during a meal or rest period mandated pursuant to an applicable statute, or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health.

(c) If an employer fails to provide an employee a meal period or rest period in accordance with a state law, including, but not limited to, an applicable statute or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health, the employer shall pay the employee one additional hour of pay at the employee’s regular rate of compensation for each work day that the meal or rest period is not provided.

35. Pursuant to California Labor Code § 512 and the Wage Order, Plaintiff and the Class Members were entitled to uninterrupted meal periods of at least 30 minutes for each day they worked five or more hours. Pursuant to California Labor Code § 512, they were also entitled to a second 30-minute meal period when they worked more than 10 hours in a workday.

36. Pursuant to the Wage Order, Plaintiff and the Class Members were entitled to be



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(818) 582-3086 Tel
(818) 582-2561 Fax
SpivakLaw.com

1 provided with net rest breaks of at least ten minutes for each four-hour period of work, or major
2 fraction thereof.

3 37. Defendants intentionally failed to provide Plaintiff and the Class Members with
4 all required 30-minute duty free meal periods and 10-minute rest periods in accordance with the
5 Wage Order.

6 38. Plaintiff is informed and believes and thereon alleges that, at all relevant times
7 within the applicable limitations period, Defendants had a policy, practice, or a lack of a policy
8 which resulted in Defendants not providing the Class with all off-duty meal periods and rest
9 breaks required by California law.

10 39. As a result of Defendants' unlawful conduct, Plaintiff and the Class have suffered
11 damages in an amount, subject to proof, to the extent they were not paid the full amount of wages
12 earned during each pay period during the applicable limitations period.

13 40. By reason of the above, pursuant to California Labor Code § 226.7, Plaintiff and
14 the Class Members are entitled to premium wages for workdays in which one or more off-duty
15 meal periods were not provided to them, and for workdays in which one or more rest breaks were
16 not provided to them.

17 **SECOND CAUSE OF ACTION**

18 **FAILURE TO PAY ALL WAGES EARNED FOR ALL HOURS WORKED**

19 **(Lab. Code §§ 221, 510, 1194, 1197, and 1198)**

20 41. Plaintiff incorporates all paragraphs of the Complaint as if fully alleged herein.

21 42. At all relevant times, Plaintiff and the Class Members have been non-exempt
22 employees of Defendants and entitled to the benefits and protections of California Labor Code §
23 § 221, 510, 1194, 1197, 1198, and the Wage Order.

24 43. Section 2 of the Wage Order defines "hours worked" as "the time during which an
25 employee is subject to the control of an employer, and includes all the time the employee is
26 suffered or permitted to work, whether or not required to do so."

27 44. Section 3 of the Wage Order states:

28 **(A) Daily Overtime - General Provisions**

(1) The following overtime provisions are applicable to employees
18 years of age or over and to employees 16 or 17 years of age who
are not required by law to attend school and are not otherwise
prohibited by law from engaging in the subject work. Such



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(818) 582-3086 Tel
(818) 582-2561 Fax
SpivakLaw.com

employees shall not be employed more than eight (8) hours in any workday or more than 40 hours in any workweek unless the employee receives one and one-half (1 ½) times such employee's regular rate of pay for all hours worked over 40 hours in the workweek. Eight (8) hours of labor constitutes a day's work. Employment beyond eight (8) hours in any workday or more than six (6) days in any workweek is permissible provided the employee is compensated for such overtime at not less than:

(a) One and one-half (1 ½) times the employee's regular rate of pay for all hours worked in excess of eight (8) hours up to and including 12 hours in any workday, and for the first eight (8) hours worked on the seventh (7th) consecutive day of work in a workweek.

(b) Double the employee's regular rate of pay for all hours worked in excess of 12 hours in any workday and for all hours worked in excess of eight (8) hours on the seventh (7th) consecutive day of work in a workweek.

(c) The overtime rate of compensation required to be paid to a nonexempt full-time salaried employee shall be computed by using the employee's regular hourly salary as one-fortieth (1/40) of the employee's weekly salary.

45. Section 4 of the Wage Order requires an employer to pay non-exempt employees at least the minimum wage set forth therein for all hours worked, which consist of all hours that an employer has actual or constructive knowledge that employees are working.

46. Labor Code section 510 states:

Eight hours of labor constitutes a day's work. Any work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek and the first eight hours worked on the seventh day of work in any one workweek shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee. Any work in excess of 12 hours in one day shall be compensated at the rate of no less than twice the regular rate of pay for an employee. In addition, any work in excess of eight hours on any seventh day of a workweek shall be compensated at the rate of no less than twice the regular rate of pay of an employee. Nothing in this section requires an employer to combine more than one rate of overtime compensation in order to calculate the amount to be paid to an employee for any hour of overtime work.



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(818) 582-3086 Tel
(818) 582-2561 Fax
SpivakLaw.com

1 47. California Labor Code § 1194 invalidates any agreement between an employer and
2 an employee to work for less than the minimum wage required under the applicable Wage Order.

3 48. California Labor Code § 1197 makes it unlawful for an employer to pay an
4 employee less than the minimum wage required under the applicable Wage Order for all hours
5 worked during a payroll period.

6 49. California Labor Code § 1198 makes it unlawful for an employer to employ an
7 employee under conditions that violate the Wage Order.

8 50. California Labor Code § 221 prohibits an employer from taking deductions from
9 an employee's wages without the employee's express written consent or other legal authority for
10 doing so.

11 51. In conjunction, these provisions of the California Labor Code require employers
12 to pay non-exempt employees no less than their agreed-upon or statutorily mandated wage rates
13 for all hours worked, including unrecorded hours when the employer knew or reasonably should
14 have known that employees were working during those hours. (See *Morillion v. Royal Packing*
15 *Co.* (2000) 22 Cal.4th 575, 585.)

16 52. At all relevant times during the applicable limitations period, Defendants failed to
17 compensate Plaintiff and the Class for all hours worked at the correct rates of pay, including but
18 not limited to all regular and overtime wages for work they performed while signed out from work
19 at the end of their shifts. Further, at all relevant times, Defendants unlawfully collected and
20 received part of Plaintiff's and the Class Members' wages in violation of California Labor Code
21 § 221.

22 53. Plaintiff is informed and believes and thereon alleges that, at all relevant times,
23 Defendants maintained a policy and/or practice, or lack thereof, which resulted in Defendants'
24 failure to compensate the Class for all hours worked at the correct rates of pay as required by
25 California law.

26 54. As a result of Defendants' unlawful conduct, Plaintiff and the Class Members have
27 suffered damages in an amount, subject to proof, to the extent that they were not paid the full
28 amount of wages earned during each pay period during the applicable limitations period,
including minimum, overtime, and double-time wages.

 55. Pursuant to California Labor Code § 1194, Plaintiff, on behalf of herself and Class
Members, seeks to recover unpaid wages, liquidated damages in amounts equal to the amounts of



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(818) 582-3086 Tel
(818) 582-2561 Fax
SpivakLaw.com

unpaid wages, interest thereon, and awards of reasonable costs and attorneys' fees, including interest thereon, as permitted by law, all in amounts subject to proof.

THIRD CAUSE OF ACTION

FAILURE TO PROVIDE ACCURATE WRITTEN WAGE STATEMENTS

(Lab. Code § 226)

(By Plaintiff and the Class against all Defendants)

56. Plaintiff incorporates all paragraphs of this Complaint as if fully alleged herein.

57. Pursuant to California Labor Code § 226(a), Plaintiff and the Class Members were entitled to receive, semimonthly or at the time of each payment of wages, an accurate itemized statement showing, among other items, 1) gross wages earned; 2) total hours worked, except for any employee whose compensation is solely based on a salary and who is exempt from payment of overtime under subdivision (a) of Section 515 or any applicable order of the Industrial Welfare Commission; 3) net wages earned; and 4) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee.

58. Pursuant to California Labor Code § 226(e), an employee is deemed to suffer injury if the employer fails to provide a wage statement. Additionally, an employee is deemed to suffer injury if the employer fails to provide accurate and complete information as required by California Labor Code § 226(a) and the employee cannot "promptly and easily determine" from the wage statement alone one or more of the following:

A. The amount of the gross wages or net wages paid to the employee during the pay period or any of the other information required to be provided on the itemized wage statement pursuant to California Labor Code § 226(a);

B. Which deductions the employer made from gross wages to determine the net wages paid to the employee during the pay period;

C. The name and address of the employer and, if the employer is a farm labor contractor, as defined in subdivision (b) of Section 1682 of the California Labor Code, the name and address of the legal entity that secured the services of the employer during the pay period; and

D. The name of the employee and only the last four digits of his or her social security number or an employee identification number other than a social security number.

59. "Promptly and easily determine," as stated in California Labor Code § 226(e),



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(818) 582-3086 Tel
(818) 582-2561 Fax
SpivakLaw.com

1 means a reasonable person would be able to readily ascertain the information without reference
2 to other documents or information.

3 60. At all relevant times during the applicable limitations period, Defendants violated
4 Labor Code § 226 because they did not properly and accurately itemize each Class Member's
5 gross wages earned, net wages earned, the total hours worked, the corresponding number of hours
6 worked at each rate by the employee, and other requirements of California Labor Code § 226.
7 Defendants failed to state in the wage statements they issued to Plaintiff and the Class all their
8 hours worked and wages earned, including but not limited to regular and overtime wages for
work they performed after signing out at the end of their shifts.

9 61. As alleged herein, Defendants failed to provide Plaintiff and the Class Members
10 all wages owed, including but not limited to, regular and overtime wages for work performed
11 after signing out at the end of their shifts. As is further alleged herein, Defendants adjusted
12 Plaintiff's and the Class' time records to omit time Plaintiff and the Class spent working after the
13 end of their shifts.

14 62. As a result, Defendants have failed to properly and accurately itemize each
15 employee's gross wages earned, net wages earned, the total hours worked, the corresponding
16 number of hours worked by employees, and other requirements of California Labor Code § 226.
As a result, Defendants have violated California Labor Code § 226.

17 63. Defendants' failure to provide Plaintiff and the Class Members with accurate
18 wage statements was knowing and intentional. Defendants had the ability to provide Plaintiff and
19 the Class with accurate wage statements but intentionally provided wage statements that
20 Defendants knew were not accurate.

21 64. As a result of being provided with inaccurate wage statements by Defendants,
22 Plaintiff and the Class have suffered injury. Their legal rights to receive accurate wage statements
23 were violated and they were misled about the amount of wages they had actually earned and were
24 owed. In addition, the absence of accurate information on their wage statements prevented
25 immediate challenges to Defendants' unlawful pay practices, has required discovery and
26 mathematical computations to determine the amounts of wages owed, has caused difficulty and
27 expense in attempting to reconstruct time and pay records and/or has led to the submission of
28 inaccurate information about wages to state and federal government agencies. Further, Plaintiff
and the Class Members were not able to ascertain from the wage statements whether Defendants



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(818) 582-3086 Tel
(818) 582-2561 Fax
SpivakLaw.com

1 complied with their obligations under California Labor Code § 226(a).

2 **FOURTH CAUSE OF ACTION**

3 **WAITING TIME PENALTIES**

4 **(Lab. Code §§ 201-203)**

5 **(By Plaintiff and the Class against all Defendants)**

6 65. Plaintiff incorporates all paragraphs of this Complaint as if fully alleged herein.

7 66. At all relevant times during the applicable limitations period, Plaintiff and the
8 Class Members have been non-exempt employees of Defendants and entitled to the benefits and
9 protections of California Labor Code §§ 201-203 and the Wage Order.

10 67. California Labor Code § 201 provides that all earned and unpaid wages of an
11 employee who is discharged are due and payable immediately at the time of discharge.

12 68. California Labor Code § 202 provides that all earned and unpaid wages of an
13 employee who quits after providing at least 72-hours notice before quitting are due and payable
14 at the time of quitting and that all earned and unpaid wages of an employee who quits without
15 providing at least 72-hours notice before quitting are due and payable within 72 hours.

16 69. By failing to pay all earned regular and overtime wages to Plaintiff and the Class
17 Members, Defendants failed to timely pay them all earned and unpaid wages in violation of
18 California Labor Code § 201 or § 202.

19 70. Plaintiff is informed and believes that Defendants' failures to timely pay all final
20 wages to her and the Class Members have been willful in that Defendants have the ability to pay
21 final wages in accordance with California Labor Code §§ 201 and 202 but have intentionally
22 adopted policies or practice that are incompatible with those requirements.

23 71. California Labor Code § 203 provides that the wages of an employee continue on
24 a daily basis as a penalty for up to 30 days where an employer willfully fails to timely pay earned
25 and unpaid wages to the employee in accordance with California Labor Code § 201 or § 202.

26 72. Plaintiff is informed and believes that Defendants' failures to timely pay Plaintiff
27 and the Class Members all of their earned and unpaid wages have been willful in that, at all
28 relevant times, Defendants have deliberately maintained policies and practices that violate the
requirements of the Labor Code and the Wage Order even though, at all relevant times, they have
had the ability to comply with those legal requirements.

73. Pursuant to California Labor Code § 203, Plaintiff seeks waiting time penalties



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(818) 582-3086 Tel
(818) 582-2561 Fax
SpivakLaw.com

on behalf of herself and the Class, in amounts subject to proof not to exceed 30 days of waiting time penalties for each Class Member.

FIFTH CAUSE OF ACTION

UNFAIR COMPETITION

(Bus. & Prof. Code §§ 17200, *et seq.*)

(By Plaintiff and the Class against all Defendants)

74. Plaintiff incorporates all paragraphs of this Complaint as if fully alleged herein.

75. At all relevant times, Plaintiff and the Class Members have been employees of Defendants and entitled to the benefits and protections of the Business and Professions Code §§ 17200, *et seq.*

76. The unlawful conduct of Defendants alleged herein amounts to and constitutes unfair competition within the meaning of California Business & Professions Code §§ 17200, *et seq.* Due to their unfair and unlawful business practices alleged herein, Defendants have unfairly gained a competitive advantage over other comparable companies doing business in California that comply with their legal obligations to, among other things, pay their employees premium wages for workdays in which they did not provide employees with one or more meal and rest period, and pay them all wages earned for all hours worked at the correct rates of pay.

77. As a result of Defendants' unfair competition as alleged herein, Plaintiff and the Class Members have suffered injuries in fact and have lost money or property. Defendants deprived Plaintiff and the Class Members of regular wages, overtime wages, premium wages for all workdays one or more meal periods was not provided, and premium wages for all workdays a rest period was not provided.

78. Pursuant to California Business & Professions Code § 17203, Plaintiff and the Class Members are entitled to restitution of all monies rightfully belonging to them that Defendants did not pay them or otherwise retained by means of their unlawful and unfair business practices.

79. Plaintiff and the Class are entitled to reasonable attorneys' fees in connection with their unfair competition claims pursuant to California Code of Civil Procedure § 1021.5, the substantial benefit doctrine and/or the common fund doctrine.

80. Accordingly, with respect to this cause of action, on behalf of herself and the Class, Plaintiff prays for the herein stated relief, and an award of all reasonable costs and



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(818) 582-3086 Tel
(818) 582-2561 Fax
SpivakLaw.com

attorneys' fees, including interest thereon, as permitted by law, all in amounts subject to proof.

SIXTH CAUSE OF ACTION

CIVIL PENALTIES

(By Plaintiff and the Class against all Defendants)

81. Plaintiff incorporates all paragraphs of this Complaint as if fully alleged herein.

82. The "Aggrieved Employees" are all members of the above-defined Class whom Defendants employed during the period beginning July 24, 2019 and ending on the date that final judgment is entered in this action.

83. Labor Code § 204 states

(a) All wages, other than those mentioned in Section 201, 201.3, 201.4, or 204.2, earned by any person in any employment are due and payable twice during each calendar month, on days designated in advance by the employer as the regular paydays. Labor performed between the 1st and 15th days, inclusive, of any calendar month shall be paid for between the 16th and 26th day of the month during which the labor was performed, and labor performed between the 16th and last day, inclusive, of any calendar month, shall be paid between the 1st and 10th day of the following month. . . .

(b) (1) Notwithstanding any other provision of this section, all wages earned for labor in excess of the normal work period shall be paid no later than the payday for the next regular payroll period.

(2) An employer is in compliance with the requirements of subdivision (a) of Section 226 relating to total hours worked by the employee, if hours worked in excess of the normal work period during the current pay period are itemized as corrections on the paystub for the next regular pay period. Any corrections set out in a subsequently issued paystub shall state the inclusive dates of the pay period for which the employer is correcting its initial report of hours worked.

(c) However, when employees are covered by a collective bargaining agreement that provides different pay arrangements, those arrangements shall apply to the covered employees.

(d) The requirements of this section shall be deemed satisfied by the payment of wages for weekly, biweekly, or semimonthly payroll if the wages are paid not more than seven calendar days following the close of the payroll period.

84. Defendants paid wages to employees on weekly intervals. Defendants failed to pay Plaintiff on such intervals for all wages earned and all hours worked. On information and belief, Plaintiff alleges that Defendants also failed to pay the Aggrieved Employees on such



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(818) 582-3086 Tel
(818) 582-2561 Fax
SpivakLaw.com

1 intervals for all wages earned and all hours worked.

2 85. During the applicable time period, Defendants violated California Labor Code §§
3 201, 202, 203, 204, 221, 226, 226.7, 510, 512, 1174, 1194, 1197, and 1198.

4 86. California Labor Code §§ 2699(a) and (g) authorize an aggrieved employee, on
5 behalf of themselves and other current or former employees, to bring a civil action to recover
6 civil penalties pursuant to the procedures specified in California Labor Code § 2699.3.

7 87. Pursuant to California Labor Code §§ 2699(a) and (f), Plaintiff and the Class are
8 entitled to recover civil penalties for each of Defendants' violations of California Labor Code §§
9 201, 202, 203, 204, 221, 226, 226.7, 510, 512, 1174, 1194, 1197, and 1198 during the applicable
10 limitations period in the following amounts: For violations of California Labor Code § 204, one
11 hundred dollars (\$100.00) for each aggrieved employee for each initial violation and two hundred
12 dollars (\$200.00) for each aggrieved employee for each subsequent, willful or intentional
13 violation (penalty amounts established by California Labor Code § 210).

14 A. For violations of California Labor Code § 204, one hundred dollars
15 (\$100.00) for each aggrieved employee for each initial violation and two hundred dollars
16 (\$200.00) for each aggrieved employee for each subsequent, willful or intentional violation
17 (penalty amounts established by California Labor Code § 210).

18 B. For violations of California Labor Code § 221, one hundred dollars
19 (\$100.00) for each aggrieved employee for each initial violation of California Labor Code § 221
20 (if found to be neither willful nor intentional) and two hundred dollars (\$200.00) for each
21 aggrieved employee (if found to be either willful or intentional) and for each subsequent violation
22 of California Labor Code § 221 (regardless of whether they are found to be willful or intentional)
23 (penalties set by California Labor Code § 225.5).

24 C. For violations of California Labor Code § 226(a), two hundred fifty dollars
25 (\$250.00) for each aggrieved employee for initial violations and one thousand dollars (\$1,000.00)
26 for each aggrieved employee for each subsequent violation (penalty amounts established by
27 California Labor Code § 226.3).

28 D. For violations of California Labor Code §§ 510 and 512, fifty dollars
(\$50.00) for each aggrieved employee for initial violations and one hundred dollars (\$100.00)
for each aggrieved employee for each subsequent violation, per pay period (penalty amounts
established by California Labor Code § 558).



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(818) 582-3086 Tel
(818) 582-2561 Fax
SpivakLaw.com

1 E. For violations of California Labor Code § 1174, five hundred dollars
2 (\$500.00) for each aggrieved employee for each violation (penalty amounts established by
3 California Labor Code § 1174.5).

4 F. For violations of California Labor Code § 1197, one hundred dollars
5 (\$100.00) for each aggrieved employee per pay period for each initial and intentional violation
6 and two hundred fifty dollars (\$250.00) for each aggrieved employee per pay period for each
7 subsequent violation (regardless of whether the initial violations were intentionally committed)
(penalty amounts established by California Labor Code § 1197.1).

8 G. For violations of California Labor Code §§ 201, 202, 203, 226.7, 1194,
9 and 1198, one hundred dollars (\$100.00) for each aggrieved employee per pay period for each
10 initial violation and two hundred dollars (\$200.00) for each aggrieved employee per pay period
11 for each subsequent violation (penalty amounts established by California Labor Code §
12 2699(f)(2)).

13 88. Plaintiff has complied with the procedures for bringing suit specified in California
14 Labor Code § 2699.3. By letter dated July 24, 2020, Plaintiff filed written notice online with the
15 Labor and Workforce Development Agency (“LWDA”) and gave written notice by certified mail
16 to Defendants of the specific provisions of the California Labor Code alleged to have been
17 violated, including the facts and theories to support the alleged violations. Plaintiff accompanied
18 her individual letter with a fee in the amount of \$75.00. A true and correct copy of Plaintiff’s
19 written notice to the LWDA, dated July 24, 2020, is attached hereto as **Exhibit A**. The LWDA
has not responded to Plaintiff’s letter.

20 89. Pursuant to California Labor Code § 2699(g), Plaintiff and the Aggrieved
21 Employees are entitled to an award of civil penalties, reasonable attorneys’ fees, and costs in
22 connection with their claims for civil penalties.

23 **PRAYER FOR RELIEF**

24 WHEREFORE, Plaintiff, on behalf of herself and the Class, prays for relief and judgment
25 against Defendants as follows:

- 26 A. An order that the action be certified as a class action;
- 27 B. An order that Plaintiff be appointed class representative;
- 28 C. An order that counsel for Plaintiff be appointed class counsel;
- D. Unpaid wages;



SPIVAK LAW

Employee Rights Attorneys
16530 Ventura Blvd., Ste. 203
Encino, CA 91436
(818) 582-3086 Tel
(818) 582-2561 Fax
SpivakLaw.com

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- E. Actual damages;
- F. Statutory damages;
- G. Liquidated damages;
- H. Restitution;
- I. Declaratory relief;
- J. Equitable relief;
- K. Statutory penalties;
- L. Civil Penalties;
- M. Pre-judgment and post-judgment interest;
- N. Costs of suit;
- O. Interest;
- P. Reasonable attorneys' fees; and
- Q. Such other relief as the Court deems just and proper.

DEMAND FOR JURY TRIAL

Plaintiff, on behalf of herself and all others similarly situated, hereby demands a jury trial on all issues so triable.

Respectfully submitted,

THE SPIVAK LAW FIRM

Dated: September 30, 2020

By: 

DAVID SPIVAK
CARL KAPLAN
Attorneys for Plaintiff, PAULA JOHNSON
and all others similarly situated

EXHIBIT A



SPIVAK LAW

SENT BY ELECTRONIC SUBMISSION AND CERTIFIED MAIL

July 24, 2020

Attn: PAGA Administrator
Labor and Workforce Development Agency
Attn: PAGA Administrator
<http://dir.tflaforms.net>
Via Electronic Submission

RE: *Paula Johnson / Nan McKay and Associates, Inc.*

To Whom It May Concern:

Pursuant to the California Labor Code Private Attorneys General Act of 2004, Labor Code § 2698, *et seq.*, Paula Johnson (hereafter “Johnson”) provides notice on behalf of herself and all individuals currently and formerly employed in California as non-exempt hourly employees, including but not limited to customer service representatives and workers employed in comparable positions (hereafter “Aggrieved Employees”) by Nan McKay and Associates, Inc., a California corporation (hereafter “Nan McKay”), of violations of Labor Code §§ 201, 202, 203, 204, 221, 226, 226.7, 510, 512, 1174, 1194, 1197, and 1198.

At all relevant times, Nan McKay has employed persons, conducted business in, and engaged in illegal payroll practices and policies in California. Johnson and the Aggrieved Employees are “employees” within the meaning of Wage Order 4-2001 (hereafter “the Wage Order”) § 2, subdivision (F) and “Aggrieved Employees” within the meaning of Labor Code § 2699, subdivision (c).

16530 VENTURA BLVD., STE 203
ENCINO, CA 91436

TEL (818) 582-3086
FAX (818) 582-2561

SPIVAKLAW.COM

Doc ID: bf10995ffde0c79ff47776a48bd05f8417dc2f31

Statement of Facts

On or about November 4, 2019, Nan McKay first employed Johnson to work in San Francisco, California as a customer service representative. Nan McKay continuously employed Johnson as a customer service representative until on or about May 26, 2020, when her employment ended.

At all relevant times, Nan McKay employed Johnson and the other Aggrieved Employees at an hourly rate of pay and issued their paychecks on a bi-weekly basis. At all relevant times, Nan McKay classified Johnson and the other Aggrieved Employees as non-exempt employees entitled to the protections of both the Labor Code and the Wage Order.

At all relevant times, Nan McKay required Johnson and the Aggrieved Employees to perform work while clocked out. Johnson and the Aggrieved Employees regularly received phone calls from customers shortly before the end of their eight-hour shifts. Such calls often lasted beyond the end of their shifts and circumstances did not permit Johnson and the Aggrieved Employees to seek preapproval for overtime hours spent on such calls. However, Nan McKay failed to pay Johnson and the Aggrieved Employees for this time spent working after the end of their shifts, and instead adjusted Johnson's and the Aggrieved Employees' time records to omit this extra time. In approximately April of 2020, Johnson asked her supervisor, Nerissa Abrams, why the time she spent working after the end of her shift was not reflected in her paychecks. In response, Ms. Abrams told Johnson it was because the overtime was "not approved."

At all relevant times, Nan McKay failed to consistently provide Johnson and the Aggrieved Employees with a daily 30-minute meal period within the first five hours of work. Due to the workloads Nan McKay assigned, Johnson and the Aggrieved Employees were frequently unable to take their meal periods within the first five hours of work. Each day, Nan McKay assigned to Johnson and the

Aggrieved Employees a log of phone calls it expected them to complete that day. The volume of calls Nan McKay assigned to Johnson and the Aggrieved Employees was often so great that Johnson and the Aggrieved Employees were unable to take their meal periods until well after the first five hours of work. Nan McKay further failed to authorize and permit Johnson and the Aggrieved Employees to take a ten-minute, paid, duty-free rest break every four hours or major portion thereof. Nan McKay has not requested an exemption from California's rest period law from the Division of Labor Standards Enforcement. Further, neither Johnson nor the aggrieved Employees entered into on duty meal period agreements with Nan McKay.

Nan McKay failed to pay premium wages for days on which it failed to provide Johnson and the Aggrieved Employees with all timely, off-duty meal and rest periods.

For the reasons stated herein, Johnson alleges the following violations of the California Labor Code and the Wage Order on behalf of herself and the Aggrieved Employees:

- a) Nan McKay failed to provide Johnson and the Aggrieved Employees with all meal periods as required by law;
- b) Nan McKay failed to provide Johnson and the Aggrieved Employees with all rest periods as required by law;
- c) Nan McKay failed to compensate Johnson and the Aggrieved Employees at one hour's pay on days when Nan McKay failed to provide them with one or more meal periods in a workday;

- d) Nan McKay failed to compensate Johnson and the Aggrieved Employees at one hour's pay on days when Nan McKay failed to provide them with one or more rest periods in a workday;
- e) Nan McKay failed to pay Johnson and the Aggrieved Employees for all hours worked at the correct rates of pay including, but not limited to, regular and overtime pay due to off-the-clock work;
- f) Nan McKay unlawfully deducted the wages Johnson and the Aggrieved Employees earned, including but not limited to regular and overtime wages;
- g) Nan McKay failed to timely pay Johnson and the Aggrieved Employees all earned and unpaid wages during employment;
- h) Nan McKay failed to provide Johnson and the Aggrieved Employees with accurate and complete wage statements; and
- i) Nan McKay failed to timely pay Johnson and the Aggrieved Employees all earned and unpaid wages at the time of separation of employment.

Accordingly, Johnson now seeks civil penalties on behalf of herself and the other Aggrieved Employees based on Nan McKay's violations of the California Labor Code.

The Wage Order

The Wage Order applies to “all persons employed in professional, technical, clerical, mechanical, and similar occupations whether paid on a time, piece rate, commission, or other basis[.]” § 1. The Wage Order defines “Professional, Technical, Clerical, Mechanical, and Similar Occupations” to include:

“professional, semiprofessional, managerial, supervisory, laboratory, research, technical, clerical, office work, and mechanical occupations. Said occupations shall include, but not be limited to, the following: accountants; agents; appraisers; artists; attendants; audio-visual technicians; bookkeepers; bundlers; billposters; canvassers; carriers; cashiers; checkers; clerks; collectors; communications and sound technicians; compilers; copy holders; copy readers; copy writers; computer programmers and operators; demonstrators and display representatives; dispatchers; distributors; door-keepers; drafters; elevator operators; estimators; editors; graphic arts technicians; guards; guides; hosts; inspectors; installers; instructors; interviewers; investigators; librarians; laboratory workers; machine operators; mechanics; mailers; messengers; medical and dental technicians and technologists; models; nurses; packagers; photographers; porters and cleaners; process servers; printers; proof readers; salespersons and sales agents; secretaries; sign erectors; sign painters; social workers; solicitors; statisticians; stenographers; teachers; telephone, radiotelephone, telegraph and call-out operators; tellers; ticket agents; tracers; typists; vehicle operators; x-ray technicians; their assistants and other related occupations listed as professional, semiprofessional, technical, clerical, mechanical, and kindred occupations ”

§ 2(O).

At all relevant times during the applicable limitations period, Nan McKay employed Johnson and the Aggrieved Employees to provide its customers with information and assistance. Accordingly, Johnson and the Aggrieved Employees are entitled to the protections afforded by the Wage Order.

Failure to Provide Meal Periods
(Lab. Code §§ 226.7, 512, and 1198)

In relevant part, California Labor Code § 1198 states:

The maximum hours of work and the standard conditions of labor fixed by the commission shall be the maximum hours of work and the standard conditions of labor for employees. The employment of any employee for longer hours than those fixed by the order or under conditions of labor prohibited by the order is unlawful.

In relevant part, California Labor Code § 512 states:

An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee.

An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

In relevant part, Section 11 of the Wage Order states:

Meal Periods:

- (A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and the employee.

...

- (D) If an employer fails to provide an employee a meal period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that the meal period is not provided.

California Labor Code § 226.7 states:

- (a) No employer shall require any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission.
- (b) If an employer fails to provide an employee a meal period or rest period in accordance with an applicable order of the Industrial Welfare Commission, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest period is not provided.

Nan McKay intentionally failed to provide all timely rest breaks and/or meal periods free from any work duties to Johnson and the Aggrieved Employees as required by law. In failing to do so, Nan McKay violated the provisions of California Labor Code §§ 226.7, 512, and 1198. Accordingly, Johnson seeks civil penalties on behalf of herself and the Aggrieved Employees as follows:

1. \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 226.7, and \$200 for each aggrieved employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2));
2. \$50 for each Aggrieved Employee for each initial violation of California Labor Code § 512, and \$100 for each aggrieved employee for each subsequent violation, per pay period in addition to an amount sufficient to recover underpaid wages (penalties set by California Labor Code § 558); and
3. \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 1198, and \$200 for each aggrieved employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2)).

Failure to Pay All Wages for All Hours Worked at the Correct Rates of Pay

(Lab Code §§ 510, 1194, 1197, and 1198)

Under California Labor Code § 1197, “The minimum wage for employees fixed by the commission is the minimum wage to be paid to employees, and the payment of a less wage than the minimum so fixed is unlawful.”

In relevant part, section 2(K) of the Wage Order states,

“Hours worked” means the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so[.]

In relevant part, California Labor Code § 1194 states,

- (a) Notwithstanding any agreement to work for a lesser wage, any employee receiving less than the [...] legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of [...] overtime compensation, including interest thereon, reasonable attorney’s fees, and costs of suit.

In relevant part, Section 3 of the Wage Order states,

(A) Daily Overtime - General Provisions

- (1) The following overtime provisions are applicable to employees 18 years of age or over and to employees 16 or 17 years of age who are not required by law to attend school and are not otherwise prohibited by law from engaging in the subject work. Such employees shall not be employed more than eight (8) hours in any workday or more than 40 hours in a workweek unless the employee receives one and one-half (1 ½) times such employee’s regular rate of pay for all hours worked over 40 hours in the workweek. Eight (8) hours of labor constitutes a day’s work. Employment beyond eight (8) hours in any workday or more than six (6) days in any workweek is permissible provided the employee is compensated for such overtime at not less than:

- (a) One and one-half (1 ½) times the employee's regular rate of pay for all hours worked in excess of eight (8) hours up to and including twelve (12) hours in any workday, and for the first eight (8) hours worked on the seventh (7th) consecutive day of work in a workweek.
- (b) Double the employee's regular rate of pay for all hours worked in excess of 12 hours in any workday and for all hours worked in excess of eight (8) hours on the seventh (7th) consecutive day of work in a workweek.

In relevant part, California Labor Code § 510 states,

Any work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek and the first eight hours worked on the seventh day of work in any one workweek shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee. Any work in excess of 12 hours in one day shall be compensated at the rate of no less than twice the regular rate of pay for an employee. In addition, any work in excess of eight hours on any seventh day of a workweek shall be compensated at the rate of no less than twice the regular rate of pay of an employee.

With respect to overtime wages, the regular rate of pay under California law must include “all remuneration for employment paid to, on behalf of, the employee.” O.L. 2002.06.14 (quoting 29 U.S.C. § 207(e)). This requirement includes, but is not limited, to, non-discretionary bonuses. See, e.g., *Huntington Memorial Hosp. v. Superior Court* (2005) 131 Cal. App. 4th 893, 904–05. Commissions and bonuses must be included in the regular rate whether they are

the sole source of the employee's compensation or are in addition to a guaranteed salary or hourly rate. 29 C.F.R. §§778.117, 778.208. See *Oliver v. Mercy Med. Ctr., Inc.* (9th Cir 1982) 695 F.2d 379.

Labor Code § 1198 prohibits employers from employing their employees under conditions prohibited by the Wage Order.

Employers must compensate non-exempt employees for “off-the-clock” work (before punching in or after punching out on a time clock) if the employers knew or should have known that the employees were working those hours. *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 585.

At all relevant times during the applicable limitations period, Nan McKay knowingly failed to pay Johnson and the Aggrieved Employees for all hours worked at the correct rates of pay, including, but not limited to, all regular and overtime wages for the work they performed after the end of their shifts.

Accordingly, Johnson seeks civil penalties on behalf of herself and the other Aggrieved Employees as follows:

1. \$50 for each Aggrieved Employee for each initial violation of California Labor Code § 510, and \$100 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 558);
2. \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 1198, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2));

3. \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 1194, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2)); and
4. \$100 for each Aggrieved Employee for each initial and intentional violation of California Labor Code § 1197, and \$250 for each Aggrieved Employee for each subsequent violation, per pay period (regardless of whether the initial violations were intentionally committed) (penalties set by California Labor Code § 1197.1).

Unlawful Collection of Wages
(Lab. Code § 221)

In relevant part, California Labor Code § 221 states:

It shall be unlawful for any employer to collect or receive from an employee any part of wages theretofore paid by said employer to said employee.

At relevant times during the applicable limitations period, Nan McKay has illegally and arbitrarily deducted several minutes from the records of Johnson and the Aggrieved Employees of their daily time worked and has reported less hours than Johnson's and the Aggrieved Employees' actual hours worked on their wage statements. As a result, Nan McKay collected and received part of Johnson's and the Aggrieved Employees' wages in violation of California Labor Code § 221.

Accordingly, Johnson seeks civil penalties on behalf of herself and the Aggrieved Employees as follows: \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 221 (if found to be neither willful nor intentional) and \$200 for each Aggrieved Employee for each initial violation of California Labor Code § 221 (if found to be either willful or intentional) and for each subsequent violation of California Labor Code § 221 (regardless of whether they are found to be either willful or intentional) (penalties set by California Labor Code § 225.5).

Failure to Provide Accurate Written Wage Statements
(Lab. Code § 226)

California Labor Code § 226 requires employers to furnish employees with accurate itemized written wage statements showing:

- 1) Gross wages earned
- 2) Total hours worked by the employee, except for any employee whose compensation is solely based on a salary and who is exempt from payment of overtime under subdivision (a) of Section 515 or any applicable order of the Industrial Welfare Commission;
- 3) The number of piece rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis;
- 4) All deductions, provided that all deductions made on written orders of the employee may be aggregated and shown as one item;
- 5) Net wages earned;
- 6) The inclusive dates of the period for which the employee is paid;

- 7) 'The name of the employee and only the last four digits of his or her social security number or an employee identification number;
- 8) 'The name and address of the legal entity that is the employer; and
- 9) All applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee.

At relevant times during the applicable limitations period, Nan McKay violated California Labor Code § 226 because it did not properly and accurately itemize each employee's gross wages earned, net wages earned, the total hours worked, the corresponding number of hours worked at each rate by the employee and other requirements of California Labor Code § 226. Nan McKay failed to state in the wage statements it issued to Johnson and the other Aggrieved Employees all their hours worked and wages earned, including, but not limited to, regular and overtime wages for work they performed after the end of their shifts.

Accordingly, Johnson now seeks civil penalties for the Labor Code violations that Nan McKay has committed against her and the other Aggrieved Employees as follows: \$250 for each Aggrieved Employee for each initial violation of California Labor Code § 226(a), and \$1,000 for each Aggrieved Employee for each subsequent violation (penalties set by California Labor Code § 226.3).

Failure to Timely Pay Wages
(Lab. Code § 204)

California Labor Code § 204 states all wages (other than those mentioned in Labor Code sections 201–202) earned by any person in any employment are due and payable twice during each calendar month, on days designated in advance by the employer as the regular paydays. Labor performed between the 1st and 15th

days, inclusive, of any calendar month shall be paid for between the 16th and the 26th day of the month during which the labor was performed, and labor performed between the 16th and the last day, inclusive, of any calendar month, shall be paid for between the 1st and 10th day of the following month. In addition, all wages for work performed in excess of the normal work period must be paid by no later than the following regular payday.

Because of Nan McKay's failure to pay Johnson and the Aggrieved Employees wages for off-the-clock work and premium wages for unprovided meal periods within the time periods set by California Labor Code § 204, Nan McKay failed to timely pay all wages due during employment. Accordingly, Johnson seeks civil penalties on behalf of herself and Aggrieved Employees as follows:

- (1) \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 204; and
- (2) \$200 for each Aggrieved Employee (penalties set by Labor Code § 210).

Failure to Maintain Accurate Employment Records
(Lab. Code §§ 1174, 1198)

Labor Code § 1174, which pertains to recordkeeping, states:

Every person employing labor in this state shall:

...

- (a) Keep a record showing the names and addresses of all employees employed and the ages of all minors.

(d) Keep, at a central location in the state or at the plants or establishments at which employees are employed, payroll records showing the hours worked daily by and the wages paid to, and the number of piece-rate units earned by and any applicable piece rate paid to, employees employed at the respective plants or establishments. These records shall be kept in accordance with rules established for this purpose by the commission, but in any case, shall be kept on file for not less than three years. An employer shall not prohibit an employee from maintaining a personal record of hours worked, or, if paid on a piece-rate basis, piece-rate units earned.

Labor Code § 1174.5 states:

Any person employing labor who willfully fails to maintain the records required by subdivision (c) of Section 1174 or accurate and complete records required by subdivision (d) of Section 1174, or to allow any member of the commission or employees of the division to inspect records pursuant to subdivision (b) of Section 1174, shall be subject to a civil penalty of five hundred dollars (\$500).

Section 7 of Wage Order 1 states:

(A) Every employer shall keep accurate information with respect to each employee including the following:

- (1) Full name, home address, occupation and social security number.
- (2) Birth date, if under 18 years, and designation as a minor.

- (3) Time records showing when the employee begins and ends each work period. Meal periods, split shift intervals and total daily hours worked shall also be recorded. Meal periods during which operations cease and authorized rest periods need not be recorded.
- (4) Total wages paid each payroll period, including value of board, lodging, or other compensation actually furnished to the employee.
- (5) Total hours worked in the payroll period and applicable rates of pay. This information shall be made readily available to the employee upon reasonable request.
- (6) When a piece rate or incentive plan is in operation, piece rates or an explanation of the incentive plan formula shall be provided to employees. An accurate production record shall be maintained by the employer.

Labor Code § 1198 prohibits employers from employing their employees under conditions prohibited by the Wage Order.

Nan McKay has willfully failed to maintain the records required by § 1174 and the Wage Order, including, but not limited to, the total premium wages earned for late meal periods and missed rest periods, and records pertaining to all unpaid hours worked by Johnson and the Aggrieved Employees. Accordingly, Johnson seeks civil penalties from Nan McKay on behalf of herself and other Aggrieved Employees as follows:

1. \$500 for each Aggrieved Employee for each violation of California Labor Code § 1174 (penalties set by Labor Code § 1174.5); and

2. \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 1198, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2)).

Conclusion

As noted above, this letter constitutes the required notice under the California Labor Code Private Attorneys General Act of 2004. Please be advised that I will seek both reasonable attorneys' fees and costs under Labor Code § 2699, subdivision (g) (1) in a civil action should the LWDA decline to pursue this matter. This letter also serves as a formal notice under the catalyst theory and Code of Civil Procedure §1021.5 to resolve this matter before litigation.

Sincerely,



David Spivak, Esq.

david@spivaklaw.com

Carl Kaplan, Esq.

carl@spivaklaw.com

cc: Paula Johnson

Walter Haines, Esq.

Nan McKay and Associates, Inc.

c/o Agent for Service of Process

John McKay

1810 Gillespie Way, Suite 202

El Cajon, CA 92020