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County of Santa Clara  
20CV371493  
Reviewed By: R. Walker

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**IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**FOR THE COUNTY OF SANTA CLARA**

MARI VOGEL, individually and on behalf of all  
others similarly situated,

PLAINTIFF,

v.

Itutorgroup Inc., a Delaware Corporation, and  
DOES 1 to 100, inclusive,

DEFENDANTS.

**CASE NO: 20CV371493**

**REPRESENTATIVE ACTION COMPLAINT  
FOR:**

**1. Penalties Pursuant to Labor Code § 2699, *et seq.* for violations of Labor Code §§ 226.8, 2802, 204, 226, 226.8, 1197, 1194, 1198, 510, 226.7, 512, 1174 and the applicable IWC Wage Order, sections 11 and 12;**

1 Plaintiff MARI VOGEL, (“Plaintiff”), on behalf of the people of the State of California and  
2 as an “Aggrieved Employee” acting as a private attorney general under the California Labor Code  
3 Private Attorneys General Act of 2004, § 2698, *et seq.*, (“PAGA”) complains of Defendant  
4 Itutorgroup Inc. (“Defendant”) as follows:

5 **OVERVIEW OF CLAIMS**

6 1. Plaintiff brings this representative action on behalf of herself, and on behalf of the  
7 State of California and the Aggrieved Employees, as defined below, against Defendant Itutorgroup  
8 Inc. (“Itutorgroup” or “Defendant”) and Does 1 to 100 (collectively, “Defendants”) for PAGA  
9 penalties based on Defendant’s misclassification of its on-line teachers who resided in California  
10 as independent contractors in violation of Cal. Labor Code § 226.8; failure to reimburse these  
11 teachers for their business expenses in violation of Labor Code § 2802; failure to ensure that  
12 teachers receive minimum wage for all hours worked in violation of Labor Code § 1194; failure to  
13 pay teachers the appropriate overtime premium for all overtime hours worked beyond forty hours  
14 per week or eight hours per day in violation of Ca. Lab. Code §§1194, 1198, 510, and 554; failure  
15 to pay teachers twice per month in accordance with Labor Code section 204; failing to issue  
16 itemized wage statements in accordance with Labor Code § 226; failure to provide meal and rest  
17 breaks in violation of §§226.7 and 512 and §§ 11 and 12 of the applicable IWC Wage Order; and  
18 failure to keep accurate payroll records for teachers in violation of Cal. Lab. Code §§1174,  
19 1174.5.. Plaintiff brings her claims pursuant to the Private attorney General Act (“PAGA”), Cal.  
20 Lab. Code §2699, *et seq.*, on behalf of the state of California and all other aggrieved employees  
21 who have been misclassified by Itutorgroup in California since August 1, 2019. As a result of the  
22 foregoing, Defendants have violated California statutory laws as described below.

23 2. The “PAGA Period” is designated as the period from one year prior to Plaintiff’s  
24 mailing and submission of her LWDA notice letter (*i.e.* August 1, 2019) through the present.

25 **VENUE**

26 3. Venue is proper in this county under section 395.5 of the California Code of Civil  
27 Procedure as Defendant is located in the County of Santa Clara and their main place business is  
28

1 situated in the city of Santa Clara. Venue is therefore proper in Santa Clara County.

## 2 **JURISDICTION**

3 4. This Court has jurisdiction over Plaintiff's PAGA claim pursuant to California  
4 Code of Civil Procedure §410.10.

5 5. The monetary relief which Plaintiff seeks is in excess of the jurisdictional minimum  
6 required by this Court and will be established according to proof at trial.

## 7 **THE PARTIES**

8 6. Plaintiff Mari Vogel is an adult resident of Los Angeles, California where she  
9 resided and worked on-line as an Itutorgroup teacher in 2020.

10 7. Plaintiff represents the State of California and the following group of employees:  
11 *Plaintiff and all other California residents who work or worked for Defendant Itutorgroup, Inc. as*  
12 *teachers or tutors and who were classified by Defendant Itutorgroup, Inc. as independent*  
13 *contractors for IRS tax reporting purposes from August 1, 2019 to the present* (the "Aggrieved  
14 Employees").

15 8. Defendant Itutorgroup is a Delaware Corporation that has offered on-line services  
16 to students throughout California. Defendant also utilized and paid for numerous teachers,  
17 including Plaintiff and the Aggrieved Employees, who were all California residents.

18 9. The true names and capacities, whether individual, corporate, associate, or  
19 otherwise, of Defendant sued herein as DOES 1 to 100 inclusive, are currently unknown to  
20 Plaintiff, who therefore sues Defendant by such fictitious names under Code of Civil Procedure §  
21 474. Plaintiff is informed and believes, and based thereon alleges, that each of the Defendants  
22 designated herein as a DOE is legally responsible in some manner for the unlawful acts referred to  
23 herein. Plaintiff will seek leave of court to amend this Complaint to reflect the true names and  
24 capacities of the Defendants designated hereinafter as DOES when such identities become known.

25 10. Plaintiff is informed and believes, and based thereon alleges, that each Defendant  
26 acted in all respects pertinent to this action as the agent of the other Defendants, carried out a joint  
27 scheme, business plan or policy in all respects pertinent hereto, and the acts of each Defendant are  
28

1 legally attributable to the other Defendants. Furthermore, Defendants in all respects acted as the  
2 employer and/or joint employer of Plaintiff, and the other Aggrieved Employees. Further, Labor  
3 Code § 558.1 explicitly allows Plaintiff to name any owner, director, officer, or managing agent of  
4 Pegasus as a Doe Defendant for violations of Labor Code § 2802.

### 5 **FACTUAL ALLEGATIONS**

6 11. Defendant operates and, at all times during the PAGA Period, has done and does  
7 business in California by operating an online teaching platform where teachers, including  
8 numerous California residents, teach numerous classes to students online. *See*  
9 [http://itutorgroup.com/about\\_1.html](http://itutorgroup.com/about_1.html).

10 12. Defendant Itutorgroup classifies teachers as “independent contractors” for IRS tax  
11 reporting purposes, and also enters into Independent Contractor agreements with tutors who are  
12 paid to teach for Defendant on-line in accordance with the terms of those contracts, but under  
13 California law these on-line teachers who are residents of California should all be classified as  
14 employees. *See* Labor Code section 226.8; *see also* *Dynamex Operations W. v. Superior Court*, 4  
15 Cal. 5th 903, 956-57 (Cal. 2018) (explaining *inter alia* that, if a worker provides the same service  
16 to a company that is of the same type of service that the company provides to the public in the  
17 usual course of its business – here on-line teaching -- then that worker should be classified as an  
18 employee under California law and cannot be an independent contractor).

19 13. Defendants’ teachers provide and have provided their on-line tutoring and teaching  
20 services in the usual course of Defendant Itutorgroup’s usual business because Itutotrgroup is an  
21 online educational service that provides a wide range of classes to its customers, and teachers such  
22 as Mari Vogel perform and provide that educational service for Defendant and its customers.  
23 Itutorgroup holds itself out to be an education service on its website, and it generates its revenue  
24 primarily from customers paying for the very classes that its teachers teach on-line. Without  
25 teachers to teach these classes, Itutorgroup would not exist.

26 14. Notably, Itutorgroup teachers are not typically engaged in their own teaching  
27 business outside of Defendants’ platform.  
28

1           15. Itutorgroup also requires its teachers to abide by a number of policies and rules  
2 designed to control the teacher's work performance, including insisting on certain teaching  
3 requirements; insisting on compliance with the timely and prompt appearances of teachers for  
4 customers, and doing so for at least 5 hours per week; and requiring that teachers have a computer  
5 and internet access for their on-line courses. Thus, Itutorgroup regularly exercises control over the  
6 teachers' work.

7           16. Teachers cannot negotiate the amount that they will be paid per class and are  
8 instead paid according to Itutorgroup's formula, which includes components of Base Pay,  
9 Completion Bonuses and Contribution Bonuses. As teachers acquire more tenure, their pay  
10 increases. Teachers are paid only once per month, on the tenth of the month. See  
11 <https://join.itutorgroup.com/>

12           17. Itutorgroup tracks the number of classes taught by teachers, generates and provides  
13 each teachers' approval rating, monitors the number of cancellations over multiple contracts, and  
14 uses this data to determine which teachers are eligible for raises.

15           18. Itutorgroup requires that teachers work straight through multiple lessons without  
16 being allowed to take rest breaks after 3.51 hours of work or meal break on or before the 5<sup>th</sup> hour  
17 of work.

18           19. Itutorgroup does not reimburse teachers for any expenses they may incur while  
19 working for Itutorgroup, including but not limited to the cost of their computer, a reasonable  
20 portion of their home internet expenses, a reasonable portion of their work-related cell phone  
21 expenses, and/or a reasonable portion of their electricity expenses and the cost of other teaching  
22 gadgets and materials. Teachers incur these costs as a necessary expenditure incurred in the  
23 discharge of their duties working for Itutorgroup, which California law requires employers to  
24 reimburse.

25           20. As California Supreme Court's decision in *Dynamex Operations W. v. Superior*  
26 *Court*, 4 Cal. 5th 903, 956-57 (Cal. 2018) and newly codified statute, Labor Code section 226.8,  
27 formerly AB5, make clear that Itutorgroup teachers should be classified as employees, rather than  
28

1 independent contractors, for the purpose of the Labor Code and applicable IWC Wage Order..  
2 Under the ABC test set forth in the *Dynamex* case, in order to justify classifying its teachers as  
3 non-employees, Itutorgroup would have to prove that its teachers perform services outside and  
4 different from Defendants' usual course of business, which Defendant cannot do here. Likewise,  
5 Itutorgroup cannot satisfy its burden to prove that teachers have been customarily engaged in an  
6 independently established trade, occupation, or business of the same nature as the work they  
7 performed for Defendant. Additionally, Itutorgroup cannot satisfy its burden to demonstrate that  
8 teachers are free from Itutorgroup control and direction, both under their contacts and in fact.

9 21. Defendant only paid its teachers during the PAGA period once per month in  
10 violation of Labor Code section 204, and failed to issue accurate itemized wage statements to them  
11 in compliance with Labor Code section 226.

12 22. Plaintiff has fully and completely exhausted and completed her administrative  
13 remedies under PAGA in order to proceed with the filing of her PAGA representative action in  
14 Court. On August 1, 2020, Plaintiff filed her PAGA Notice online with the Labor Workforce  
15 Development Agency ("LWDA") and sent a letter by certified mail to Defendant setting forth the  
16 facts and theories of the violations alleged against Defendant, as prescribed by Labor Code § 2698  
17 *et seq.*

18 23. As required by PAGA, Plaintiff also submitted the seventy-five dollars (\$75.00)  
19 filing fee with the LWDA by regular mail. Pursuant to Labor Code § 2699.3(a)(2)(A), as of the  
20 end of October 6, 2020, Plaintiff fully satisfied her administrative pre-requisites after sixty-five  
21 (65) calendar days had elapsed following the postmark date of the PAGA notice.

22 **FIRST CAUSE OF ACTION**  
23 **LABOR CODE PRIVATE ATTORNEY GENERAL ACT**  
24 **[CAL. LABOR CODE §§ 2698-2699.5]**  
25 **On Behalf of Plaintiff, the LWDA and the Aggrieved Employees**  
26 **Against All Defendants**

27 24. Plaintiff, on behalf of herself, the State of California's LWDA, and all Aggrieved  
28 Employees, realleges and incorporates by reference each and every allegation set forth in the  
preceding paragraphs.

1           25.     Based on the above allegations incorporated by reference, Itutorgroup teachers are  
2 entitled to penalties for Itutorgroup's violation of Cal. Lab. Code §§ 226.8, 2802, 1194, 204, 226,  
3 226.7, 1198, 510, 1198 and various provisions of the applicable IWC Wage Order, as set forth by  
4 Cal. Lab. Code §2699(f). Specifically, as explained above, Plaintiff seeks civil penalties pursuant  
5 to PAGA for (1) misclassifying its teachers as independent contractors in violation of Labor Code  
6 § 226.8; (2) failing to reimburse teachers for all necessary expenditures incurred in performing  
7 their duties, including but not limited to the cost of their computers, cell-phone, home internet and  
8 teaching materials in violation of Cal. Lab. Code §2802; (3) failing to pay teachers twice per  
9 month in accordance with Labor Code § 204; (4) failing to pay teachers for all time worked,  
10 including preparation time before, and paperwork time after, each on-line course in violation of  
11 Labor Code § 1194; (5) failing to provide rest and meal breaks in accordance with Labor Code  
12 226.7, 512 and Sections 11 and 12 of the applicable IWC Wage Order; (6) failing to pay teachers  
13 twice per month in violation of Labor Code section 204; (7) failing to issue accurate and complete  
14 wage statements to its teachers in compliance with Labor Code section 226and (8) failing to  
15 assure that all teachers received the appropriate overtime pay for all overtime hours worked  
16 beyond forty per week or eight hours per day in violation of Cal. Lac. Code §1194, 1198, 510  
17 and/or 554.

18           26.     Labor Code section 226.8 provides for penalties of \$5,000 to \$25,000 for the willful  
19 misclassification of workers as independent contractors. In this case, Defendant engaged in a  
20 pattern or practice of willfully misclassifying its teachers as independent contractors, as opposed to  
21 employees, in violation of Labor Code section 226.8 and the *Dynamex* decision. These penalties  
22 are recoverable in a PAGA representative action, like the instant case.

23           27.     Although there is no direct private right of action for a violation of Labor Code  
24 section 226.8, Plaintiff may seek civil penalties for violations of Section 226.8 under PAGA. *See*  
25 *Noe v. Superior Court*, 237 Cal.App.4<sup>th</sup> 316, 339 (2015).

26           28.     Cal. Lab. Code §2699(f) provides for civil penalties for violation of all Labor Code  
27 provisions for which no civil penalty is specifically provided.  
28

1           29.     There is no specific civil penalty for violations of Cal. Lab. Code §2802. With  
2 respect to overtime violation under Labor Code §510, the statute imposes a civil penalty in  
3 additional to any other penalty provided by law of fifty dollar (\$50) for initial violations or each  
4 underpaid employee or each pay period for which the employee was underpaid in addition to an  
5 amount sufficient to recover unpaid wages, and one hundred dollar (\$100) for subsequent  
6 violations for each underpaid employee for each pay period for which the employee was underpaid  
7 in addition to an amount sufficient to recover underpaid wages.

8           30.     The civil penalties for violation of Labor Code section 226(a) are set forth in Labor  
9 Code section 226.3. The civil penalties for violation of Labor Code section 204 are set forth in  
10 Labor Code section 210. There are no civil penalties set forth for violations of Labor Code  
11 sections 226.7, 512, or 1194; therefore, the PAGA default penalties apply.

12           31.     Plaintiff seeks to recover the PAGA civil penalties through a representative action  
13 as permitted by PAGA and the California Supreme Court in *Arias v. Superior Court* (2009), 46  
14 Cal.4th 969.

15           32.     Under Labor Code §§ 2699(f)(2) and 2699.5, for each violation for which no civil  
16 penalty is specified, Plaintiff and all other Aggrieved Employees are entitled to penalties in an  
17 amount to be shown at the time of trial subject to the following formula:

18                     \$100 for the initial violation per employee per pay period; and

19                     \$200 for each subsequent violation per employee per pay period.

20           33. These penalties, if and when recovered, shall be allocated seventy-five  
21 percent (75%) to the Labor and Workforce Development Agency (LWDA) and twenty-five  
22 percent (25%) to the affected employees. See Labor Code section 2699(i) and (j).

### 23                                     **PRAYER FOR RELIEF**

24           Wherefore, Plaintiff, on behalf of herself, the LWDA, and the aggrieved employees, prays  
25 for judgment against Defendant as follows:

26           1.     On the First Cause of Action:

27                 a.     Civil penalties against Defendants and in favor of Plaintiff and the LWDA  
28

1 and the Aggrieved Employees in the amount of \$5,000 to \$15,000 for each misclassification  
2 during the PAGA period of an Aggrieved Employee or, assuming Plaintiff can show a pattern or  
3 practice of such misclassifications, of \$10,000 to \$25,000 for each misclassified Aggrieved  
4 Employee who worked for Defendant during the PAGA Period from August 1, 2019 through date  
5 of trial;

6 b. A civil penalty against Defendant, in favor of Plaintiff and the LWDA and  
7 the Aggrieved Employees, in the amount of \$100 for each initial violation of the Labor Code  
8 (where no underlying penalty is specified) and \$200 for each subsequent violation (where no  
9 underlying penalty is specified) as specified in section 2699(f)(2) of the California Labor Code for  
10 Plaintiff and the Aggrieved Employees for all of the pay periods from August 1, 2019 through  
11 date of trial;

12 c. Civil penalties against Defendants and in favor of Plaintiff and the LWDA  
13 and the Aggrieved Employees as specified in the Labor Code for violations of Labor Code section  
14 510, 226 and/or 204 for all of the pay periods of the Aggrieved Employees from August 1, 2019  
15 through date of trial;

16 d. An award of reasonable attorney's fees against Defendant as specified in  
17 Labor Code § 2699(g)(1), for all the work performed by the undersigned counsel in connection  
18 with the PAGA claims;

19 e. An award of all costs incurred by the undersigned counsel for Plaintiff in  
20 connection with Plaintiff's and the aggrieved employees' PAGA claim against Defendant, as  
21 provided for in Labor Code § 2699(g)(1); and

22 2. All other relief as this Court deems proper.

23  
24 Dated: October 8, 2020

Respectfully submitted,  
ACKERMANN & TILAJEF, P.C.  
EMPLOYMENT RIGHTS LAW GROUP, APC

25  
26  
27 By:

  
\_\_\_\_\_  
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