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Attorneys for Plaintiff Nestor Hernandez,
on behalf of himself and in his representative
capacity as private attorney general

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO**

NESTOR HERNANDEZ, an individual, on
behalf of himself and in his representative
capacity as private attorney general,

Plaintiff,

v.

RALPHS GROCERY COMPANY, INC., an
OHIO Corporation; (dba Kroger Company) and
DOES 1 through 50, inclusive,

Defendants.

Case No.:

**REPRESENTATIVE ACTION
COMPLAINT FOR:**

1. Civil Penalties Pursuant To The Private Attorneys General Act of 2004, Labor Code § 2698, et seq.

DEMAND FOR JURY TRIAL

Plaintiff Nestor Hernandez ("Plaintiff"), on behalf of himself and in his representative capacity as private attorney general, complains of Defendant Ralphs Grocery Company, Inc. [dba Kroger company] ("Defendant" or "Ralphs") and alleges as follows:

I. INTRODUCTION

1. This is a representative action for recovery of civil penalties only under the Private Attorneys General Act of 2004 ("PAGA") codified by California Labor Code sections 2698, et seq. The PAGA

1 permits "aggrieved employees" to bring a lawsuit as a representative action on behalf of themselves and
2 all other current and former aggrieved employees to recover civil penalties and address an employer's
3 violations of the California Labor Code.

4 2. In this case, Defendant violated various provisions of the California Labor Code and Industrial
5 Welfare Commission ("IWC") Wage Orders. Specifically, on information and belief, Ralphs maintained
6 and implemented policies and practices which result in the failure to authorize and permit paid rest periods
7 under section 226.7 and the applicable wage order; failure to provide Meal breaks in violation of Labor
8 code 512; failure to pay all wages owed upon separation under sections 201, 202, and 203; failure to pay
9 timely wages in violation of labor code 204, failure to provide accurate, itemized wage statements under
10 section 226; failure to pay minimum wages and overtime wages under sections 510 and 1194; failure to
11 pay the correct vacation, PTO, Bonus, meal and rest break premiums, overtime, and sick leave rates in
12 violation of Labor Code sections 246, 227; and violation of Private Attorneys General Act of 2004, Labor
13 Code § 2698, et seq.

14 3. Plaintiff was employed with Ralphs in California from January 2017 to June 13, 2020 as a non-
15 exempt All Purpose Clerk. Plaintiff brings this action on behalf of himself and all other aggrieved
16 employees employed by Ralphs as non-exempt All Purpose Clerk and other similarly situated California
17 employees who were employed by Ralphs as non-exempt employees (the "Aggrieved Employees").

18 **II. JURISDICTION AND VENUE**

19 4. This Court has jurisdiction over this action pursuant to California Constitution Article VI, Section
20 10, which grants the Superior Court "original jurisdiction in all cases except those given by statute to other
21 trial courts."

22 5. This Court has subject matter jurisdiction over this action pursuant to Code of Civil Procedure
23 section 410.10.

24 6. This Court has personal jurisdiction over Defendant in that Defendant is a California Corporation
25 and has sufficient minimum contacts with the State of California so as to render the exercise of jurisdiction
26 over Defendant by the California courts consistent with traditional notions of fair play and substantial
27 justice.
28

1 7. Venue is proper in this judicial district pursuant to Code of Civil Procedure section 395.5 because
2 Defendant conducts business and commits Labor Code violations in San Diego County, and Defendant
3 employs numerous employees in San Diego County and throughout the State of California.

4 8. On February 18, 2021, Plaintiff complied with the notice requirements pursuant to California
5 Labor Code § 2699.3 and gave written notice via online filing and certified mail of the specific provisions
6 alleged to have been violated to the Labor and Workforce Development Agency (“LWDA”) and
7 Defendant. A true and correct copy of the notice is attached hereto as **Exhibit A** and incorporated herein
8 by reference.

9 9. Sixty-five (65) days has passed since Plaintiff provided written notice required by Labor Code §
10 2699.3. Therefore, Plaintiff may commence a civil action pursuant to Labor Code § 269.3(a)(1)-(2).

11 **III. THE PARTIES**

12 10. Plaintiff is a resident of California and was employed by Ralphs from January, 2017 to June 13,
13 2020 as an All Purpose Clerk in San Diego, California.

14 11. Defendant Ralphs Grocery Company, Inc. is an Ohio corporation registered to do business in
15 California, and at all times relevant herein conducted and continues to conduct substantial and regular
16 business throughout the state of California.

17 12. Ralphs is in the business of operating a grocery store, and has multiple locations throughout the
18 State of California.

19 13. The true names and capacities of Defendants, whether individual, corporate, associate, or
20 otherwise, sued herein as DOES 1 through 50, inclusive, are currently unknown to Plaintiff, who therefore
21 sues such Defendants by such fictitious names under Code of Civil Procedure section 474. Plaintiff is
22 informed and believes, and based thereon alleges that each of the Defendants designated herein as a DOE
23 is legally responsible in some manner for the unlawful acts referred to herein. Plaintiff will seek leave of
24 court to amend this Complaint to reflect the true names and capacities of the Defendants designated
25 hereinafter as DOES when such identities become known.

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

3 **IV. FACTUAL ALLEGATIONS**

4 15. At all times during the liability period, Ralphs has conducted business by providing grocery stores
5 and related services in San Diego County and elsewhere within California.

6 16. Plaintiff was employed by Ralphs from January, 2017 to June 13, 2020 as an All Purpose Clerk in
7 San Diego, California. Plaintiff work(ed) in non-exempt, non-managerial positions, such as an All
8 Purpose Clerk, however titled, and similar and incidental positions in California.

9 17. Plaintiff is informed and believes, and based thereon alleges, Defendant currently employs and
10 during the relevant period has employed hundreds of employees in the State of California in non-exempt
11 positions, such as an All Purpose Clerk and/or other similar positions.

12 18. Plaintiff is, and at all times pertinent hereto, has been a non-exempt employee within the meaning
13 of the California Labor Code, and the implementing rules and regulations of the IWC California Wage
14 Orders.

15 19. Plaintiff is informed and believes, and based thereon alleges, that All Purpose Clerks are
16 compensated by an hourly rate and were paid bonuses, and upon information and belief, these employees
17 have not been paid wages for all hours worked, and for all bonuses earned.

18 20. In addition, on information and belief Ralphs did not compensate Plaintiff for all hours worked as
19 a result of rounding.

20 21. In addition, on information and belief Ralphs failed to pay Plaintiff an accurate overtime rate by
21 failing to include the Bonus Pay.

22 22. In addition, as a result of Ralphs' policies, as well as productivity requirements and work schedules
23 implemented and enforced by Ralphs Plaintiff was often unable to take an uninterrupted lawful net-ten-
24 minute rest period for every four hours worked or major fraction thereof, and/or lawful 30 minuet meal
25 breaks for work period of more than five hours per day, and a second 30 minuet meal break for work
26 periods of more than ten hours per day.

27 23. On information and belief, Ralphs did not relieve Plaintiff of all duties during meal and rest periods
28 nor did it relinquish control over how Plaintiff spent the break time.

1 24. On information and belief Plaintiff was not paid one additional hour of pay at the employee's
2 regular rate of pay for each workday that the meal or rest period was not provided.

3 25. On information and belief, Ralphs did not pay the correct Vacation, Overtime, Double-time, PTO,
4 Sick Leave, and Premium Wage rates. The rates paid did not take into account all of Plaintiff's wages
5 including Bonuses.

6 26. On information and belief, the pay stubs were not compliant with California law, as they failed to
7 provide all the necessary information including without limitation the total hours worked, per Labor Code
8 §226.

9 27. On information and belief, Defendant knew or should have known that it is improper and unlawful
10 to commit the following acts:

- 11 a. failing to authorize and permit a paid ten-minute rest period for every four hours worked
12 or a major fraction thereof;
- 13 b. failing to compensate employees with one (1) hour of pay at the regular rate of
14 compensation for each workday that a legally compliant rest period was not provided;
- 15 c. failing to authorize and permit a lawful 30 minute meal break for work period of more than
16 five hours per day;
- 17 d. failing to compensate employees with one (1) hour of pay at the regular rate of
18 compensation for each workday that a legally compliant meal or rest period was not
19 provided;
- 20 e. failing to pay all wages due and owing upon separation from Defendant's employ;
- 21 f. failing to pay timely wages;
- 22 g. failing to provide accurate, itemized wage statements;
- 23 h. failure to pay minimum and overtime wages; and
- 24 i. failure to pay the correct rate of pay for Vacation, PTO, Sick Leave, Overtime, Double
25 Time, and Premium wages.

26 28. Plaintiff is informed and believes, and thereon alleges, that Defendant is and was advised by skilled
27 lawyers and other professionals, employees, and advisors with knowledge of the requirements of
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California's wage and employment laws. Accordingly, Plaintiff is informed and believes that such violations during the liability periods were willful and deliberate.

V. CAUSES OF ACTION

FIRST CAUSE OF ACTION

Violation of Private Attorneys General Act of 2004, Labor Code § 2698, Et Seq.

(Against all Defendants)

29. Plaintiff incorporates the above allegations as if fully set forth herein.

30. Pursuant to California Labor Code § 2699.3,

(a) A civil action by an aggrieved employee pursuant to subdivision (a) or (f) of Section 2699 alleging a violation of any provision listed in Section 2699.5 shall commence only after the following requirements have been met:

(1) (A) The aggrieved employee or representative shall give written notice by online filing with the Labor and Workforce Development Agency and by certified mail to the employer of the specific provisions of this code alleged to have been violated, including the facts and theories to support the alleged violation.

(2) (A) The agency shall notify the employer and the aggrieved employee or representative by certified mail that it does not intend to investigate the alleged violation within 60 calendar days of the postmark date of the notice received pursuant to paragraph (1). Upon receipt of that notice or if no notice is provided within 65 calendar days of the postmark date of the notice given pursuant to paragraph (1), the aggrieved employee may commence a civil action pursuant to Section 2699.

31. On February 19, 2021, Plaintiff complied with the notice requirements pursuant to California Labor Code § 2699.3 and gave written notice via online filing and certified mail of the specific provisions alleged to have been violated to the Labor and Workforce Development Agency ("LWDA") and Defendant. A true and correct copy of the notice is attached hereto as **Exhibit A** and incorporated herein by reference.

32. Sixty-five (65) days has passed since Plaintiff provided written notice required by Labor Code § 2699.3. Therefore, Plaintiff may commence a civil action pursuant to Labor Code § 269.3(a)(1)-(2).

33. Plaintiff is an aggrieved employee as defined in Labor Code § 2699(c). Plaintiff brings this action on his own behalf and on behalf of other Aggrieved Employees. On information and belief Plaintiff regularly worked in excess of four hours or major fraction thereof a day without being provided a rest

1 period of not less than 10 minutes in which he was relieved of all duties, as required by California Labor
2 Code §§ 226.7 and Wage Order No. 7-2001. Similarly Plaintiff or the aggrieved employees was/were not
3 provided with a lawful 30 minuet meal break, in violation of California Labor Code §§ 512 and Wage
4 Order No. 7-2001.

5 34. On information and belief as a consequence of Ralph's productivity requirements and work
6 schedules implemented and enforced by Ralphs Plaintiff was often unable to take a lawful uninterrupted
7 net-ten-minute rest period for every four hours worked or major fraction thereof and/or lawful 30 minuet
8 meal breaks for every five hours worked. As a result of violations of California Labor Code § 226.7, 512
9 and Wage Order No. 7-2001, Ralphs is liable for civil penalties pursuant to California Labor Code §
10 2698 *et seq.*

11 35. On information and belief Defendant has violated California Labor Code §§ 510, 1194 and IWC
12 Wage Order 7-2001 by willfully failing to pay for all hours worked, including hourly wages as a result
13 of Rounding. Defendant further failed to pay an accurate rate by failing to include the Off-the-Clock
14 work (Due to Rounding), and by failing to include the Bonus pay in the overtime and Sick pay leave. In
15 addition, the Aggrieved Employees are entitled to liquidated damages equal to unlawfully unpaid
16 minimum wages with interest pursuant to Labor Code § 1194.2. As a result of violations of California
17 Labor Code § 510, 1194 and Wage Order No. 7-2001, Ralphs is liable for civil penalties pursuant to
18 California Labor Code § 2698 *et seq.*

19 36. On information and belief Defendant failed to pay an accurate rate of compensation for
20 Vacations, PTO, Sick leave, Overtime, Double time and premium wages paid to those who had missed a
21 meal break. Specifically Defendant paid a rate which did not take into account all of Plaintiff's wages
22 including Bonuses, in Violation of Labor Code §§ 246 and 227.

23 37. On information and belief Defendant has violated California Labor Code §§ 201 and 202 by
24 willfully failing to pay all compensation due and owing to Plaintiff at the time employment was
25 terminated. Defendant failed to pay Plaintiff all compensation due upon termination of employment as
26 required under California Labor Code §§ 201 and 202, including meal and rest period premium pay and
27 the correct rate of pay for other stated wages. Accordingly, Defendant has violated California Labor Code
28 §§ 201, 202, and 203, Defendant is liable for civil penalties pursuant to Labor Code § 2698 *et seq.*

38. On information and belief Defendant has violated California Labor Code § 204 by willfully failing to pay all compensation due and owing to Plaintiff within the time allocated (7-10 Days) under the labor code. Defendant is liable for civil penalties pursuant to Labor Code § 2698 *et seq.*

39. On information and belief Defendant has violated Labor Code § 226(a) by willfully failing to furnish Plaintiff with accurate, itemized wage statements showing the actual hours worked. As described above, Defendant deliberately failed to pay all wages for time worked, failed to list the correct rate of pay, failed to pay the correct rate of pay for premiums, sick, PTO, Overtime, Double time, and vacation, and, therefore, knew or should have known that the wage statements were inaccurate. As a result of violations of California Labor Code § 226(a), Defendant is liable for civil penalties pursuant to California Labor Code § 2698 *et seq.*

40. Labor Code § 558 provides:

“An employer or other person acting on behalf of an employer who violates, or causes to be violated, a section of this chapter or any provision regulating hours and days of work in any order of the Industrial Welfare Commission shall be subject to a civil penalty as follows:

“(1) For any initial violation, fifty dollars (\$50) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages.

(2) For each subsequent violation, one hundred dollars (\$100) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recovery underpaid wages.”

Plaintiff is not claiming any wages under Labor Code § 558.

41. Labor Code § 2699(f) provides:

(f) For all provisions of this code except those for which a civil penalty is specifically provided, there is established a civil penalty for a violation of these provisions, as follows:

(1) If, at the time of the alleged violation, the person does not employ one or more employees, the civil penalty is five hundred dollars (\$500).

(2) If, at the time of the alleged violation, the person employs one or more employees, the civil penalty is one hundred dollars (\$100) for each aggrieved employee per pay period for the initial violation and two hundred dollars (\$200) for each aggrieved employee per pay period for each subsequent violation.

42. As a direct and proximate result of Defendant's conduct as alleged above, Plaintiff and the Aggrieved Employees are entitled to a civil penalty of at least fifty dollars (\$50) for the initial pay period, and at least one hundred dollars (\$100) for each subsequent pay period for which Defendant violated the Labor Code and applicable Wage Order as alleged herein.

43. Pursuant to Labor Code § 2698, *et seq.*, Plaintiff seeks to recover civil penalties only as prescribed by the Labor Code Private Attorneys General Act of 2004 as the representative of the State of California for the illegal conduct perpetrated on Plaintiff and the Aggrieved Employees.

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a jury trial on issues triable to a jury.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment as follows:

1. For recovery of civil penalties as prescribed by the Labor Code Private Attorneys General Act of 2004, Labor Code § 2698, *et seq.*;
2. An award of penalties, attorneys' fees and costs of suit, as allowable under the law, including, but not limited to, pursuant to Labor Code sections 2698, *et seq.*; and
3. For such other and further relief as the Court deems just and proper.

Dated: March 12, 2021

Respectfully submitted,

JAMES HAWKINS APLC

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