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Clerk of the Superior Court
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of himself and others similarly situated

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF MERCED

PATRICK O’BEIRNE, on behalf of himself
and others similarly situated,

Plaintiffs,

v.

INSPERITY SUPPORT SERVICES, L.P., a
Delaware limited partnership; INSPERITY,
INC., a Delaware corporation; and DOES 1
through 100, inclusive,

Defendants.

Case No.: 23CV-00481

**REPRESENTATIVE ACTION
COMPLAINT FOR CIVIL PENALTIES
UNDER THE PRIVATE ATTORNEYS
GENERAL ACT (LABOR CODE §§ 2698,
ET SEQ.)**

Plaintiff PATRICK O’BEIRNE (“Plaintiff”) on behalf of the people of the State of California and as an “aggrieved employee” acting as a private attorney general under the Labor Code Private Attorneys General Act of 2004, sections 2698, *et seq.* (“PAGA”) complains of defendants Insperity Support Services, L.P. and Insperity, Inc. doing business as Insperity (collectively, “Defendants”) and each of them, as follows:

I. INTRODUCTION

1. This is a representative action brought pursuant to Labor Code sections 2699, *et seq.*, on behalf of the State of California and on behalf of aggrieved employees as follows: ***All current and former Business Performance Advisors who worked for Defendants, and/or their predecessor or merged entities, in the State of California within the longest applicable limitations period*** (the “Aggrieved Employees”).

2. Plaintiff and Defendants entered into a tolling agreement to toll all applicable statute of limitations; Plaintiff and Defendants agreed that the complaint shall be considered filed no later than September 14, 2021, rather than the actual filing date.

3. The Judicial Council of California (JCC)’s amended Emergency Rule 9 (effective May 29, 2020) provides: “Notwithstanding any other law, the statutes of limitations and repose for civil causes of action that exceed 180 days are tolled from April 6, 2020, until October 1, 2020.” The Advisory Committee Comment notes that: “Emergency rule 9 is intended to apply broadly to toll any statute of limitations on the filing of a pleading in court asserting a civil cause of action. The term “civil causes of action” includes special proceedings. (See Code Civ. Proc., §§ 312, 363 [“action,” as used in title 2 of the code (Of the Time of Commencing Civil Actions), is construed “as including a special proceeding of a civil nature”)] The rule also applies to statutes of limitations on filing of causes of action in court found in codes other than the Code of Civil Procedure.”

4. Throughout the time period involved in this case, ostensibly as a corporate policy, Defendants have been engaged in the widespread practice of misclassifying Business Performance Advisors as “outside salespersons” to sidestep many wage-and-hour obligations to the detriment of Plaintiff and Aggrieved Employees—including all provisions in the California Labor Code and

1 Industrial Welfare Commission (“IWC”) Occupational Wage Order Orders, such as minimum
2 wage protections and payment of overtime.

3 5. Throughout the time period involved in this case, Defendants willfully maintained
4 a policy and/or practice of failing to pay all wages, including minimum and overtime wages, for
5 all hours worked; failing to provide compliant duty-free meal periods; failing to authorize and
6 permit compliant duty-free rest breaks; failing to maintain and provide accurate itemized wage
7 statements; failing to reimburse business expenses; and failing to pay all wages owed timely and
8 upon separation of employment. Defendants’ conduct has given rise to claims for violation of
9 PAGA.

10 6. Plaintiff, on behalf of himself and Aggrieved Employees, brings this representative
11 action against Defendants to recover penalties owed pursuant to Labor Code section 2699.
12 Plaintiff was compelled to retain the services of counsel to file this action to protect his interests
13 and those of Aggrieved Employees and has thereby incurred attorneys’ fees and costs, which he is
14 entitled to recover under Labor Code section 2699.

15 **II. JURISDICTION**

16 7. This Court has subject matter jurisdiction over any and all causes of action asserted
17 herein pursuant to Article VI, section 10 of the California Constitution and California Code of
18 Civil Procedure section 410.10 by virtue of the fact that this is a civil action in which the matter in
19 controversy, exclusive of interest, exceeds \$25,000, and because each cause of action asserted
20 arises under the laws of the State of California or is subject to adjudication in the courts of the
21 State of California.

22 8. This Court has personal jurisdiction over Defendants because they have caused
23 injuries in Merced County and the State of California through their acts and by their violation of
24 the California Labor Code and California state common law. Defendants also transact business
25 throughout California and have obtained the benefits of the laws of the United States and the State
26 of California and are therefore subject to the personal jurisdiction of this Court. Defendants
27 transact at least \$500,000 dollars of business within the State of California.

28 ///

1 **III. VENUE**

2 9. Venue as to Defendants is proper in this judicial district pursuant to Code of Civil
3 Procedure section 395.5 because, upon information and belief, the obligations giving rise to
4 liability occurred in part in the County of Merced, State of California.

5 **IV. PARTIES**

6 10. Plaintiff is a resident of California. At all relevant times herein, Defendants
7 employed Plaintiff as a Business Performance Advisor, and subjected him to the same
8 employment policies and/or practices that affected Aggrieved Employees.

9 11. Plaintiff represents the State of California as well as Aggrieved Employees.

10 12. Plaintiff and Aggrieved Employees at all times pertinent hereto are or were
11 employees of Defendants during the statutory time period ("PAGA period").

12 13. Upon information and belief, Plaintiff and Aggrieved Employees are covered by
13 IWC Occupational Wage Order No. 4-2001.¹

14 14. Plaintiff is informed and believes, and based thereon alleges, that Defendants do
15 business in the State of California and, at all times hereinafter mentioned, were and are employers
16 as defined in and subject to the Labor Code and IWC Wage Orders, whose employees are engaged
17 throughout this county and the State of California. During the relevant period, Defendants
18 employed Plaintiff and Aggrieved Employees within the State of California.

19 15. The true names and capacities, whether individual, corporate, associate, or
20 otherwise, of defendants sued herein as DOES 1 through 100, inclusive, are currently unknown to
21 Plaintiff, who therefore sues defendants by such fictitious names under Code of Civil Procedure
22 section 474. Plaintiff is informed and believes and based thereon alleges that each of the
23 defendants designated herein as DOE is legally responsible in some manner for the unlawful acts
24 referred to herein. Plaintiff will seek leave of court to amend this Complaint to reflect the true
25

26 _____
27 ¹ Upon information and belief, Plaintiff alleges that Wage Order No. 4-2001 is applicable.
28 However, Plaintiff reserves the right to amend and/or allege any other applicable Wage Orders
that may be gleaned relevant after discovery.

1 names and capacities of the defendants designated hereinafter as DOES when such identities
2 become known.

3 16. Whenever, heretofore or hereinafter, reference is made to “Defendants,” it shall
4 include DOES 1 through 100 identified herein.

5 17. Plaintiff is informed and believes, and based thereon alleges, that each Defendant
6 acted in all respects pertinent to this action as the agent of the other Defendants, carried out a joint
7 scheme, business plan or policy in all respects pertinent hereto, and the acts of each Defendant are
8 legally attributable to other Defendants. Plaintiff is further informed and believes and based
9 thereon alleges that Defendants are joint employers in that they employed Plaintiff and Aggrieved
10 Employees at the same time and were operating as a joint enterprise and single entity at all
11 relevant time periods.

12 18. California courts have recognized that the definition of “employer” for purposes of
13 enforcement of the California Labor Code goes beyond the concept of traditional employment to
14 reach irregular working arrangements for the purpose of preventing evasion and subterfuge of
15 California’s labor laws. (*Martinez v. Combs* (2010) 49 Cal.4th 35, 65.) As such, anyone who
16 directly or indirectly, or through an agent or any other person, engages, suffers, or permits any
17 person to work or exercises control over the wages, hours, or working conditions of any person
18 may be liable for violations of the California Labor Code as to that person.

19 19. California law also permits and recognizes the piercing of a corporate veil between
20 sister companies under the single enterprise rule. (*Hasso v. Hapke* (2014) 227 Cal.App.4th 107,
21 155; *Greenspan v. LADT, LLC* (2010) 191 Cal.App.4th 486, 512.) The single enterprise rule
22 applies where “there are two or more personalities, there is but one enterprise; and that this
23 enterprise has been so handled that it should respond, as a whole, for the debts of certain
24 component elements of it.” (*Hasso, supra*, 227 Cal.App.4th at p. 155; *Greenspan, supra*, 191
25 Cal.App.4th at p. 512.)

26 20. At all times throughout their employment, Plaintiff and Aggrieved Employees were
27 regularly and consistently subject to the common policies and/or practices utilized by Defendants.
28

1 21. Accordingly, all Defendants engaged, suffered, and permitted Plaintiff and
2 Aggrieved Employees to perform services from which they benefitted. Moreover, the
3 aforementioned Defendants had the right to exercise control over the wages, hours, and/or
4 working conditions over Plaintiff and Aggrieved Employees at all relevant times herein, so as to
5 be considered joint employers. By reason of their status as joint employers, they are each liable for
6 civil penalties for violation of the California Labor Code as to Plaintiff and Aggrieved Employees
7 as set forth herein.

8 **V. REPRESENTATIVE ACTION ALLEGATIONS**

9 **Defendants Systematically Violated State Wage and Hour Laws**

10 22. Defendants employed over 100 individuals in California during the PAGA period.

11 23. Plaintiff and Aggrieved Employees are, and were at all times pertinent hereto,
12 hourly paid or non-exempt employees for the purposes of minimum wages, overtime wages, rest
13 breaks, meal periods, and the other underlying claims alleged herein.

14 24. Throughout the applicable period of time, Defendants employed Business
15 Performance Advisors in the State of California. From even before the COVID-19 pandemic
16 through the present, ostensibly as a corporate policy, Defendants have been engaged in the
17 widespread practice of misclassifying Plaintiff and Aggrieved Employees in order to avail of the
18 “outside salesperson” exemption. Indeed, by misclassifying Plaintiff and Aggrieved Employees to
19 Defendants’ benefit, Defendants sidestep many wage-and-hour obligations to the detriment of
20 Plaintiff and Aggrieved Employees—including all provisions in the Labor Code and Wage Orders,
21 such as minimum wage protections and payment of overtime.

22 25. According to IWC Wage Order No. 4-2001(2)(M), an “outside salesperson” is one
23 who “customarily and regularly works more than half the working time away from the employer’s
24 place of business selling tangible or intangible items or obtaining orders or contracts for products,
25 services or use of facilities.” Plaintiff and Aggrieved Employees, routinely work more than half
26 their working time at Defendants’ offices and—now that COVID-19 has reshaped the employment
27 landscape—at their respective home offices. Indeed, the practical impact of COVID-19 forced
28 Plaintiff and Aggrieved Employees to conduct their sales activities from home, whether by phone

1 or through video conferencing, given the general reluctance of most clients/customers to accept
2 sales visits at their offices. Under both federal and California law, “employer’s place of business”
3 is a broad construct that encompasses employees’ home offices. Furthermore, the narrowness of
4 the “outside salesperson” exemption was reinforced by the California Supreme Court in *Ramirez*
5 *v. Yosemite Water Co.*, (1999) 20 Cal.4th 785, when it held that the phrase “more than half the
6 employee’s working time” indicated that employees could not qualify for the California exemption
7 if they consistently worked more than one-half of their time on anything besides “outside sales”
8 work. As a consequence of Defendants’ classification error, Defendants have violated a host of
9 Labor Code provisions and applicable Wage Order(s).

10 26. Throughout the applicable period of time, Defendants did not pay Plaintiff and
11 Aggrieved Employees at least the California minimum wage for all hours worked. Labor Code
12 section 1197 states the California requirement that employees must be paid at least the minimum
13 wage fixed by the Commission, and any payment of less than the minimum wage is unlawful.
14 Similarly, Labor Code section 1194 entitles “any employee receiving less than the legal minimum
15 wage...to recover in a civil action the unpaid balance of the full amount of this minimum wage.”
16 IWC Wage Order No. 4-2001 also obligates employers to pay each employee minimum wages for
17 all hours worked.

18 27. These minimum wage standards apply to each hour employees worked for which
19 they were not paid. Therefore, an employer’s failure to pay for any particular hour of time worked
20 by an employee is unlawful, even if averaging an employee’s total pay over all hours worked, paid
21 or not, results in an average hourly wage above minimum wage. (*Armenta v. Osmose, Inc.* (2005)
22 135 Cal.App.4th 314, 324.)

23 28. Labor Code section 1194.2 authorizes employees to recover liquidated damages for
24 violations of Labor Code section 1194. Where an employee, like Plaintiff and Aggrieved
25 Employees, is not paid for all hours worked under Labor Code section 1194, the employee may
26 recover minimum wages and liquidated damages for the time for which he or she received no
27 compensation. (*Sillah v. Command Int’l Sec. Servs.* (N.D. Cal. 2015) 154 F.Supp.3d 891 [holding
28 that employees suing for failure to pay overtime could recover liquidated damages under § 1194.2

1 if they also showed they were paid less than minimum wage]; accord *Andrade v. Arby's Rest.*
2 *Grp., Inc.* (N.D. Cal. Dec. 12, 2016) No. 15-cv-03175 NC, 2016 U.S. Dist. LEXIS 172319, at *20-
3 21.) Since Defendants failed to provide Plaintiff and Aggrieved Employees with compensation for
4 all hours worked, they are entitled to recover liquidated damages under Labor Code section 1194.2
5 through PAGA.

6 29. Labor Code section 1197.1 authorizes employees who are paid less than the
7 minimum fixed by an applicable state or local law, or by an order of the commission, a civil
8 penalty, restitution of wages, and liquidated damages as follows: “(1) [f]or any initial violation
9 that is intentionally committed, one hundred dollars (\$100) for each underpaid employee for each
10 pay period for which the employee is underpaid....[and] (2) [f]or each subsequent violation for the
11 same specific offense, two hundred fifty dollars (\$250) for each underpaid employee for each pay
12 period for which the employee is underpaid regardless of whether the initial violation is
13 intentionally committed.” Accordingly, through PAGA and to the extent permitted by law,
14 Plaintiff and Aggrieved Employees are entitled to recover for violations of Labor Code section
15 1197.1.

16 30. Labor Code section 510 requires an employer to compensate an employee who
17 works more than eight (8) hours in one workday, forty (40) hours in a workweek, and for the first
18 eight (8) hours worked on the seventh consecutive day no less than one and one-half times the
19 employee’s regular rate of pay. Further, Labor Code section 510 obligates an employer to
20 compensate an employee at no less than twice the regular rate of pay when the employee works
21 more than twelve (12) hours in a day or more than eight (8) hours on the seventh consecutive day
22 of work. The regular rate for purposes of calculating overtime must include non-discretionary
23 forms of pay.

24 31. Throughout the applicable period of time, Defendants have had a policy and/or
25 practice of failing to pay overtime wages to Plaintiff and Aggrieved Employees for all overtime
26 hours they worked. The work times of Plaintiff and Aggrieved Employees have been, and
27 continue to be, greater than eight (8) hours per day and/or forty (40) hours per week. Yet, because
28 Defendants misclassified Business Performance Advisors as “outside salespersons,” Plaintiff and

Aggrieved Employees were deprived wages at overtime premium amounts attributable to overtime hours.

32. By their common policy and/or practice of requiring Plaintiff and Aggrieved Employees to work in excess of eight (8) hours in a workday and/or forty (40) hours in a workweek without compensating them at the applicable overtime rate of pay, Defendants willfully violated the provisions of Labor Code sections 510 and 1198, as well as the relevant IWC Wage Order(s).

33. Defendants failed to provide Plaintiff and Aggrieved Employees with timely duty-free meal periods. Labor Code sections 226.7, 512, and IWC Wage Order No. 4-2001 require employers to provide employees with a thirty (30) minute uninterrupted and duty-free meal period within the first five (5) hours of work. (*Brinker Rest. Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1042 [“Accordingly, first meal periods must start after no more than five hours.”].) Moreover, an employee who works more than ten (10) hours per day is entitled to receive a second thirty (30) minute uninterrupted and duty-free meal period. (*See* Labor Code § 512.)

34. Defendants denied Plaintiff and Aggrieved Employees meal periods that comply with Labor Code sections 226.7, 512, and IWC Wage Order No. 4-2001. Plaintiff and Aggrieved Employees suffered late, missed, short, interrupted and/or rounded first and second meal periods. (*See Donohue v. AMN Services, LLC* (2021) 11 Cal.5th 58 [the California Supreme Court reversed the Fourth Appellate District and set forth two clear rules: (1) employers are not permitted to round time records when determining if employees are entitled to meal premium pay, and (2) it is the employer’s burden to show that compliant meal periods were provided to employees if the time records show otherwise].) Plaintiff and Aggrieved Employees did not receive compliant meal periods within the first five (5) hours of their work, and did not receive compliant second meal periods when working shifts of ten (10) hours or more.

35. Defendants were also obligated but failed to provide Plaintiff and Aggrieved Employees with net ten (10) minute rest breaks for work shifts exceeding four (4) hours or a major fraction thereof worked as required by Labor Code section 226.7 and IWC Wage Order No. 4-2001. The California Supreme Court held in *Augustus v. ABM Security Services Inc.*, (2016) 2 Cal.

1 5th 257 that employees must be relieved of all duties during rest breaks pursuant to Labor Code
2 section 226.7 and Subdivision 12(A) of Wage Order No. 5-2001. The Court found that the Wage
3 Orders and the Labor Code require employers to “relinquish control over how employees spend
4 their time” and “relieve employees of all duties” during employees’ ten-minute rest periods.
5 Plaintiff and Aggrieved Employees did not receive compliant rest breaks.

6 36. In addition to failing to authorize and permit compliant meal and rest breaks,
7 Plaintiff and Aggrieved Employees were not compensated with one (1) hour’s worth of pay at
8 their regular rates of pay as premium pay when they were not provided with compliant meal and
9 rest breaks in accordance with Labor Code section 226.7(b). (*See Ferra v. Loews Hollywood*
10 *Hotel, LLC* (2021) 11 Cal.5th 858).

11 37. Defendants violated Labor Code sections 2800 and 2802 by failing to pay and
12 indemnify Plaintiff and Aggrieved Employees for their necessary business expenditures and losses
13 incurred in direct consequence of the discharge of their duties.

14 38. Labor Code section 203 provides “if an employer willfully fails to pay...any wages
15 of an employee who is discharged or who quits, the wages of the employee shall continue as a
16 penalty...” for up to 30 days. (Labor Code § 203; *Mamika v. Barca* (1998) 68 Cal.App.4th 487,
17 492.)

18 39. Due to Defendants’ non-compliant policies and/or practices described herein,
19 Plaintiff and Aggrieved Employees whose employment with Defendants concluded were not
20 compensated for all straight-time and overtime hours worked, and were not paid all meal and rest
21 break premiums at their regular rates of pay. Thus, Defendants have failed to pay Plaintiff and
22 Aggrieved Employees all wages owed, whose sums were certain, at the time of termination or
23 within seventy-two (72) hours of their resignation and have failed to pay those sums for thirty (30)
24 days thereafter in violation of Labor Code section 203.

25 40. Labor Code section 204 expressly requires employers who pay employees on a
26 weekly, biweekly, or semimonthly basis to pay all wages “not more than seven calendar days
27 following the close of the payroll period.”
28

1 41. Due to Defendants’ failure to pay Plaintiff and Aggrieved Employees minimum
2 and overtime wages, along with meal period and rest break premiums, as described above,
3 Defendants failed to timely pay employees within seven calendar days following the close of
4 payroll in accordance with Labor Code section 204 on a regular and consistent basis.

5 42. Plaintiff and Aggrieved Employees were not furnished with accurate itemized wage
6 statements that accurately showed their gross wages earned, net wages earned, premium payments
7 at their regular rates of pay for noncompliant meal and rest breaks, all applicable hourly rates and
8 corresponding number of hours worked at each hourly rate in effect during their pay periods, and
9 other information required by Labor Code section 226(a).

10 43. As a result of Defendants’ violation of Labor Code section 226(a), Plaintiff and
11 Aggrieved Employees suffered injury because, among other things: (a) the violations kept them
12 from determining the amounts of wages owed; (b) the violations caused them to have to perform
13 mathematical computations to determine the amounts of wages owed to them and made it
14 exponentially more difficult than if the wage statement contained the required accurate
15 information; and (c) the wage statements inaccurately understated the wages, hours, and wage
16 rates to which they were entitled.

17 44. In addition to Labor Code section 226(a), Defendants also knowingly and
18 intentionally failed to provide Plaintiff and Aggrieved Employees with accurate itemized wage
19 statements in violation of Labor Code section 226(e). Defendants undeniably knew that they were
20 not providing Plaintiff and Aggrieved Employees with wage statements required by California
21 law. (*See Garnett v. ADT LLC* (E.D. Cal. Oct. 6, 2015) 139 F.Supp. 1121, 1131 [finding that the
22 defendant knowingly and intentionally violated Labor Code § 226 because the “[d]efendant knew
23 that it was not providing total hours worked to plaintiff or other employees paid on commission”
24 even though it believed that employees paid solely on commission or commission and salary “are
25 exempt and therefore we do not record hours on a wage statement.”].)

26 45. Plaintiff and Aggrieved Employees are entitled to PAGA penalties under Labor
27 Code section 226(a). (*See Lopez v. Friant & Assocs., LLC* (2017) 15 Cal.App.4th 773, 788
28 [“hold[ing] a plaintiff seeking civil penalties under PAGA for a violation of Labor Code section

226(a) does not have to satisfy the ‘injury’ and ‘knowing and intentional’ requirements of section 226(e)(1).”]; *Willner v. Manpower Inc.* (N.D. Cal. 2014) 35 F.Supp.3d 1116, 1136 [To obtain judgment on a PAGA claim, “all [Plaintiffs] needs to establish is a violation of section 226(a), which she has done, as discussed above.”]; *McKenzie v. Fed Exp. Corp.* (C.D. Cal. 2011) 765 F.Supp.2d 1222, 1232 [holding that “for the purposes of recovering PAGA penalties, one need only prove a violation of Section 226(a), and need not establish a Section 226(e) injury.”]; *Aguirre v. Genesis Logistics* (C.D. Cal. July 3, 2013) 2013 U.S. Dist. LEXIS 189815, at *28 [“Plaintiffs do not need to establish a Cal. Lab. Code § 226(e) injury to recover penalties under § 2699(f) of PAGA.”].)

46. Following *Friant*, courts have found that employees can recover separate penalties under PAGA for a defendant’s violations of Labor Code section 226(a) and (e). (*See, e.g., Bell v. Home Depot U.S.A.* (E.D. Cal. Dec. 11, 2017) 2017 U.S. Dist. LEXIS 204493, at *5 [finding after *Friant* that “[t]o the extent the Court’s Order [granting summary judgment to Home Depot] was ambiguous, the Court now clarifies that it granted summary judgment on Plaintiffs’ derivative claim for [PAGA] penalties under section 226(e)...the Court’s Order should not be read to grant summary judgment on Plaintiffs’ claim for PAGA penalties based on violation of section 226(a).”].)

47. Further and in addition to the penalties outlined above, Labor Code section 226.3 provides that “[a]ny employer who violates subdivision (a) of Section 226 shall be subject to a civil penalty in the amount of two hundred fifty dollars (\$250) per employee per violation in an initial violation and one thousand dollars (\$1,000) per employee for each violation in a subsequent citation, for which the employer fails to provide the employee a wage deduction statement or fails to keep the records required in subdivision (a) of Section 226.” As explained in detail above, Defendants failed to provide Plaintiff and Aggrieved Employees with accurate itemized wage statements.

48. Accordingly, Plaintiff and Aggrieved Employees may also recover Labor Code section 226.3 penalties for Defendants’ violations of Labor Code section 226(a). (*See Finder v. Leprino Foods Co.* (E.D. Cal. Mar. 12, 2015) No. 1:13-CV-2059 AWI-BAM, 2015 WL 1137151,

1 at *7 [“the weight of authority counsels that violations of Section 226.3 may be the basis of a
2 PAGA claim.”]; *Pedroza v. PetSmart, Inc.*, No. ED CV 11-298 GHK DTB, 2012 WL 9506073, at
3 *6 (C.D. Cal. June 14, 2012) [“Lab. Code § 226.3 merely provides that failure to perform actions
4 mandated by § 226(a) may trigger civil penalties.”].)

5 49. Finally, California Labor sections 1174(d) and 1174.5 require an employer to keep,
6 at a central location in the state or at the plants or establishments at which employees are
7 employed, payroll records showing the hours worked daily by and the wages paid to employees
8 employed at the respective plants or establishments. These records shall be kept with rules
9 established for this purpose by the commission but in any case, shall be kept on file for not less
10 than three years. During the relevant time period, Defendants failed to keep accurate and complete
11 payroll records showing the actual hours worked daily and the wages earned by Plaintiff and
12 Aggrieved Employees, including earned and unpaid minimum, overtime, and premium wages
13 discussed herein.

14 **FIRST CAUSE OF ACTION**

15 **PENALTIES PURSUANT TO PRIVATE ATTORNEYS GENERAL ACT OF 2004**

16 **Cal. Labor Code §§ 2698, *et seq.***

17 **[On Behalf of Plaintiff and Aggrieved Employees against All Defendants]**

18 50. Plaintiff, on behalf of himself and Aggrieved Employees, re-alleges and
19 incorporates by reference all of the allegations contained in the previous paragraphs of this
20 Complaint as though fully set forth herein.

21 51. Plaintiff, on behalf of himself and Aggrieved Employees, brings this representative
22 action against Defendants to recover wages and penalties pursuant to PAGA.

23 52. Based on the above allegations incorporated by reference, Defendants have violated
24 Labor Code sections 201, 202, 203, 204, 210, 226, 226.3, 226.7, 510, 512, 558, 558.1, 1174,
25 1174.5, 1182.12, 1194, 1194.2, 1197, 1197.1, 1198, 1199, 2800, and 2802, as well as IWC Wage
26 Order No. 4-2001.

53. Under Labor Code sections 2699(f)(2) and 2699.5, Plaintiff and Aggrieved Employees are entitled to penalties in an amount to be shown at the time of trial subject to the following formula:

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

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

These penalties shall be allocated seventy-five percent (75%) to the Labor and Workforce Development Agency (LWDA) and twenty-five percent (25%) to Aggrieved Employees.

54. Defendants failed to provide Plaintiff and Aggrieved Employees with accurate itemized wage statements in compliance with Labor Code section 226(a). Plaintiff seeks separate PAGA penalties for Defendants' violations of Labor Code section 226(a) and (e). (*Lopez v. Friant & Assocs., LLC* (2017) 15 Cal.App.5th 773, 788; *Bell v. Home Depot U.S.A.* (E.D. Cal. Dec. 11, 2017) No. 2:12-cv-02499 JAM-CKD, 2017 U.S. Dist. LEXIS 204493, at *5 [finding after *Friant* that "[t]o the extent the Court's Order [granting summary judgment to *Home Depot*] was ambiguous, the Court now clarifies that it granted summary judgment on Plaintiffs' derivative claim for [PAGA] penalties under section 226(e)...the Court's Order should not be read to grant summary judgment on Plaintiffs' claim for PAGA penalties based on violation of section 226(a)."].) For violations of Labor Code section 226(a), Plaintiff seeks the default penalty provided by Labor Code section 226.3. Labor Code section 226.3 provides that "[a]ny employer who violates subdivision (a) of Section 226 shall be subject to a civil penalty in the amount of two hundred fifty dollars (\$250) per employee per violation in an initial violation and one thousand dollars (\$1,000) per employee for each violation in a subsequent citation, for which the employer fails to provide the employee a wage deduction statement or fails to keep the required records in subdivision (a) of Section 226." Accordingly, through PAGA and to the extent permitted by law Plaintiff and Aggrieved Employees are entitled to recover penalties for violations of Labor Code section 226.3 and seek default PAGA penalties for each of Defendants' numerous violations of Labor Code section 226(a).

55. Labor Code section 210 provides that "[i]n addition to, and entirely independent and apart from, any other penalty provided in this article, every person who fails to pay the wages

1 of each employee as provided in Sections...204...shall be subject to a civil penalty as follows: (1)
2 [f]or any initial violation, one hundred dollars (\$100) for each failure to pay each employee; (2)
3 [f]or each subsequent violation, or any willful or intentional violation, two hundred dollars (\$200)
4 for each failure to pay each employee, plus 25 percent of the amount unlawfully withheld.” As a
5 result of the faulty compensation policies and/or practices, Plaintiff and Aggrieved Employees are
6 also entitled to recover penalties under Labor Code section 210 through PAGA.

7 56. Labor Code section 1197.1 authorizes a civil penalty, restitution of wages, and
8 liquidated damages, in the amount of: “(1) [f]or any initial violation that is intentionally
9 committed, one hundred dollars (\$100) for each underpaid employee for each pay period for
10 which the employee is underpaid...[and] (2) [f]or each subsequent violation for the same specific
11 offense, two hundred fifty dollars (\$250) for each underpaid employee for each pay period for
12 which the employee is underpaid regardless of whether the initial violation is intentionally
13 committed.” Accordingly, through PAGA and to the extent permitted by law, Plaintiff and
14 Aggrieved Employees are entitled to recover pursuant to Labor Code section 1197.1.

15 57. Plaintiff has fully and completely exhausted his administrative remedies under
16 PAGA prior to proceeding with the PAGA claim. On September 14, 2021, Plaintiff filed his
17 PAGA Notice online with the LWDA and sent a letter by certified mail to Defendants setting forth
18 the facts and theories of the violations alleged against Defendants, as prescribed by Labor Code
19 sections 2698, *et seq.* As required by PAGA, Plaintiff submitted the \$75.00 filing fee to the
20 LWDA. Pursuant to Labor Code section 2699.3(a)(2)(A), no notice was received by Plaintiff from
21 the LWDA evidencing its intention to investigate within sixty-five (65) calendar days of the
22 postmark date of the PAGA Notice. Plaintiff is therefore entitled to commence and proceed with a
23 civil action pursuant to Labor Code section 2699.

24 58. Plaintiff, as a personal representative of the general public, will and does seek to
25 recover any and all penalties for each and every violation shown to exist or to have occurred
26 during the PAGA period, in an amount according to proof, as to those penalties that are otherwise
27 only available to public agency enforcement actions. Funds recovered will be distributed in
28

1 accordance with PAGA, with 75% of the penalties recovered being reimbursed to the State of
2 California and the LWDA.

3 59. Plaintiff was compelled to retain the services of counsel to file this action to protect
4 his interests and those of Aggrieved Employees, and to assess and collect the wages and penalties
5 owed by Defendants. Plaintiff has thereby incurred attorneys' fees and costs, which he is entitled
6 to recover under Labor Code section 2699(g)(1).

7 **PRAYER FOR RELIEF**

8 **WHEREFORE**, Plaintiff, on behalf of the State of California, prays for judgment against
9 Defendants as follows:

10 1. For penalties and other relief allowable under Labor Code section 2699, *et seq.*
11 because of Defendants' violation of Labor Code sections 201, 202, 203, 204, 210, 226, 226.3,
12 226.7, 510, 512, 558, 558.1, 1174, 1174.5, 1182.12, 1194, 1194.2, 1197, 1197.1, 1198, 1199,
13 2800, and 2802, as well as IWC Wage Order No. 4-2001;

14 2. A civil penalty against Defendants in the amount of \$100 for the initial violation
15 and \$200 for each subsequent violation as specified in section 2699(f)(2) of the California Labor
16 Code for Plaintiff and Aggrieved Employees for each and every pay period that occurred during
17 the PAGA period;

18 3. A civil penalty against Defendants pursuant to Labor Code section 1197.1 for the
19 initial violation that was committed, in the amount of one hundred dollars (\$100) for each
20 underpaid employee for each pay period for which the employee is underpaid, and for each
21 subsequent violation, two hundred fifty dollars (\$250) for each subsequent violation for each pay
22 period for which the employee is underpaid, for Plaintiff and Aggrieved Employees for each and
23 every pay period that occurred during the PAGA period;

24 4. A civil penalty against Defendants pursuant to Labor Code section 210 for the
25 initial violation that was committed, in the amount of one hundred dollars (\$100) for each
26 underpaid employee for each pay period for which the employee is underpaid, and for each
27 subsequent violation, two hundred dollars (\$200) for each underpaid employee for each pay period
28

1 for which the employee is underpaid, for Plaintiff and Aggrieved Employees for each and every
2 pay period that occurred during the PAGA period;

3 5. A civil penalty in the amount of \$50 for the initial violation and \$100 for each
4 subsequent violation as specified by Labor Code sections 2699(f) and 226(e) for Plaintiff and
5 Aggrieved Employees for each and every pay period that occurred during the PAGA period;

6 6. A civil penalty in the amount of \$250 for the initial violation and \$1,000 for each
7 subsequent violation as specified by Labor Code sections 2699(f) and 226.3 for Plaintiff and
8 Aggrieved Employees for each and every pay period that occurred during the PAGA period for
9 violations of Labor Code section 226(a);

10 7. An award of reasonable attorney's fees against Defendants as specified in Labor
11 Code section 2699(g) and Code of Civil Procedure section 1021.5, for all the work performed by
12 the undersigned counsel in connection with the PAGA claims;

13 8. An award of all costs incurred by the undersigned counsel for Plaintiff in
14 connection with Plaintiff's and Aggrieved Employees' claims against Defendants as provided for
15 in Labor Code section 2699(g)(1); and

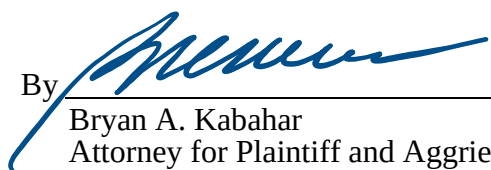
16 9. All other relief as this Court deems proper.

17
18 Respectfully submitted,

19 DATED: February 6, 2023

COUNSELONE, PC

20
21 By


Bryan A. Kabahar
Attorney for Plaintiff and Aggrieved
Employees