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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF RIVERSIDE
HISTORIC COURTHOUSE**

PAOLA TORRES, individually, and on behalf
of all other aggrieved employees,

Plaintiff,

v.

KIMCO STAFFING SERVICES, INC., a
California corporation; PERFORMANCE
TEAM, LLC., a Delaware limited liability
company; and DOES 1 through 50, inclusive,

Defendants.

CASE NO.: **CVRI2105228**

**COMPLAINT FOR VIOLATION OF THE
CALIFORNIA LABOR CODE PRIVATE
ATTORNEYS GENERAL ACT OF 2004
("PAGA")**

[California Labor Code § 2698 *et seq.*]

1 This is a representative action brought by Paola Torres, individually and on behalf of all other
2 aggrieved employees ("Plaintiff"), relating to systemic violations of California wage and hour laws
3 by her employers Kimco Staffing Services, Inc. ("Kimco"), and Performance Team, LLC.,
4 ("Performance", individually and collectively referred to as, "Defendants"). Plaintiff makes the
5 following allegations on information and belief, except as to allegations pertaining to Plaintiff
6 individually, which are based on her personal knowledge.

7 INTRODUCTION

8 1. Kimco is a private staffing company that assigns employees out to work for other
9 businesses.

10 2. Performance operates fulfillment and distribution warehouses where a variety of
11 products are stored, and then merchandise are picked, packaged, sorted, and transported to the
12 intended recipient.

13 3. As private, for-profit businesses, Defendants have jointly implemented common
14 policies and practices that have resulted in systemic violations of California's wage and hour laws.

15 4. Defendants have implemented unlawful written policies with respect to meal and rest
16 breaks. Defendants also require their non-exempt employees, who are informed that the needs of the
17 businesses take top priority, to work through meal and rest breaks, to take untimely meal periods and
18 to remain on call during such breaks. As a result, Plaintiff and other aggrieved employees have been
19 denied the ability to take the meal and rest breaks that they were and are legally entitled to take.

20 5. Moreover, Defendants have uniformly failed to pay Plaintiff and other aggrieved
21 employees proper overtime wages due the fact that they improperly calculate the regular rate of pay,
22 and willfully turn a blind eye to off-the-clock work that Plaintiff and other non-exempt employees
23 perform as a direct consequence of Defendants' understaffing and imposition of an unreasonable
24 workload.

25 JURISDICTION AND VENUE

26 6. The Superior Court of the State of California has jurisdiction in this matter because
27 Plaintiff and Defendants are citizens of the State of California. No federal question is at issue
28 because Plaintiff's claims are based solely on California law.

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7. Venue is proper in this judicial district and the County of Riverside, California because Plaintiff resides in the County of Riverside and Defendant Performance maintain a 11905 Landon Dr, Mira Loma, California 91752. Moreover, many of Defendants' unlawful actions and omissions, as set alleged herein, occurred in the County of Riverside.

8. Defendants employed Plaintiff and other aggrieved employees within the State of California and the unlawful acts alleged herein have a direct effect on Plaintiff and other aggrieved employees.

9. The State of California, Riverside County, has jurisdiction in this matter because the individual claims are under the seventy-five thousand dollar (\$75,000.00) individual jurisdictional threshold and the five million dollar (\$5,000,000.00) aggregate jurisdictional threshold for federal court diversity jurisdiction. Further, there is no federal question at issue as the issues herein are based solely on the California Labor Code, Industrial Welfare Commission Wage Orders, Code of Civil Procedure and Rules of Court. Thus, the State of California, Riverside County Superior Court maintains the appropriate jurisdiction to hear this matter.

THE PARTIES

10. Plaintiff was employed as an hourly, non-exempt worker by Defendants. Defendant Kimco Staffing Services, Inc. assigned Plaintiffs and other Aggrieved Employees to work at Defendant, Performance Team LLC's warehouse located in Mira Loma, California.

11. Plaintiff is informed and believes, and thereon alleges, that Defendant Kimco Staffing Services, Inc. is, and at all times relevant hereto was, a corporation organized and existing under the laws of the State of California and license to do business in the State of California.

12. Plaintiff is informed and believes, and thereon alleges, that Defendant Performance Team LLC is, and at all times relevant hereto was, a limited liability company organized and existing under the laws of the State of Delaware and licensed to do business in the State of California.

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

1 employer and/or joint employer of Plaintiff and the other Aggrieved Employees.

2 14. Plaintiff is further informed and believes, and based thereon alleges, that each
3 Defendant acted in all respects as the agent, servant, partner, joint venture, alter-ego, employee,
4 proxy. Managing agent, and/or principal of the co-Defendants, and in performing the acts mentioned
5 below was acting, at least in part, within the course and scope of that authority as such agent, proxy,
6 servant, partner, joint venture, employee, alter-ego, managing agent, and/or principal with the
7 permission and consent of the above co-Defendants. Plaintiff also alleges that the acts of each
8 Defendant are legally attributable to the other Defendants.

9 15. The true names and capacities of DOES 1 through 50, inclusive, are unknown to
10 Plaintiff at this time, and Plaintiff therefore sues such defendants under fictitious names. Plaintiff is
11 also informed and believe, and thereon allege, that each defendant designated as a DOE is in some
12 manner highly responsible for the occurrences alleged herein, and that Plaintiff and the other
13 aggrieved employees' injuries and damages, as alleged herein, were proximately caused by the
14 conduct of such DOE defendants. Plaintiff will seek leave of the Court to amend this Complaint to
15 allege the true names and capacities of such DOE defendants when ascertained.

16 16. As a direct and proximate result of the unlawful actions of Defendants, Plaintiff and
17 the other Aggrieved Employees have suffered and continue to suffer penalties in amounts as yet
18 unascertained but subject to proof at trial and within the jurisdiction of this Court.

19 **NOTICE PURSUANT TO CALIFORNIA LABOR CODE §2810.3(d)**

20 17. On September 8, 2021, Plaintiff provided Defendants with notice pursuant to California
21 Labor Code §2810.3(d) and Plaintiff's intent to file suit based upon the alleged violations of the
22 California Labor Code and seek penalties pursuant to PAGA. In particular, Plaintiff notified
23 Defendants that in the event liability is determined against Defendant, Kimco, Defendant Performance
24 shall share any and all civil responsibility and civil liability for all workers supplied by Defendant,
25 Kimco, based upon the failure to comply with the California Labor Code and all related regulations
26 and all applicable IWC Wage Orders.

27 18. More than thirty (30) days has expired since notice pursuant to Labor Code §2810.3(d)
28 and the alleged violations was provided to Defendants prior to filing this suit.

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1 much work to complete that they regularly miss or otherwise take non-compliant meal periods. As a
2 direct consequence of this understaffing, Plaintiff and aggrieved employees have so much work to
3 complete within their scheduled shifts that they are forced to skip their meal periods altogether, to
4 take them after working longer than five (5) hours, to perform work during their meal periods, or
5 return to work after taking less than a thirty (30) minute meal period. Moreover, Defendants did not
6 have a policy providing non-exempt, hourly employees with two (2) meal periods of not less than
7 thirty (30) minutes for a work period longer than ten (10) hours.

8 23. There are also frequently occasions when Plaintiff and aggrieved employees need to
9 perform other duties immediately before the time during which they are legally entitled to take a meal
10 period. Pursuant to Defendants' policies, Plaintiff and aggrieved employees cannot simply drop their
11 urgent job duties to take a meal period. Consequently, Plaintiff and aggrieved employees regularly
12 miss meal periods, take late meal periods, return early from meal periods, clock out for meal periods
13 but continue working, and Defendants illegally round meal periods to make it appear that Plaintiff
14 and other aggrieved employees are taking thirty (30) minute meal periods.

15 24. Plaintiff and aggrieved employees need to first secure permission before taking a meal
16 period. Plaintiff and aggrieved employees often cannot simply stop working and take their meal
17 period, and their inability to secure coverage regularly causes them to regularly miss and otherwise
18 take non-compliant meal periods.

19 25. Despite the foregoing, Defendants have implemented a policy and practice of actively
20 discouraging the issuance of meal period premium payments, and in the process, Defendants have
21 also violated California Labor Code §§ 226.7, § 11 of the applicable IWC Wage Order, by failing to
22 compensate Plaintiff and aggrieved employees who were not authorized and permitted to take a
23 complete, timely, uninterrupted meal periods, one additional hour of compensation at the proper
24 regular rate of pay for each workday that such a meal period was not authorized or permitted.

25 26. Defendants also implemented an unlawful meal period policy by compensating
26 Plaintiff and aggrieved employees for interrupted meal periods only for their actual work time, as
27 opposed to paying them legally required premiums.

Failure to Provide Required Rest Breaks

[Cal. Lab. Code §§ 226.7, 512; § 12 of the Applicable IWC Wage Order]

27. During the statute of limitations period, as part of Defendants' illegal policies and practices to minimize labor costs and maximize corporate profits, Defendants have failed to authorize and permit Plaintiff and other aggrieved employees to take rest breaks as required under California Labor Code §§ 226.7 and 512, and § 12 of the applicable IWC Order.

28. The same common policies and practices that deprive Plaintiff and other aggrieved employees from taking their meal periods, as alleged herein, similarly deprive them of their ability to take their first and second and third rest breaks. As alleged herein, Defendants understaff their facilities, which creates so much work for Plaintiff and other aggrieved employees that they are frequently unable to take rest breaks. Moreover, Plaintiff and other aggrieved employees need to secure permission before taking a rest break, which is often denied by supervisors.

29. Defendants also do not provide adequate training regarding their legal obligations with respect to the provision of rest breaks, do not implement a schedule regarding rest breaks for non-exempt employees, Performance does not post the required wage and hour posters, including but not limited to the appropriate IWC Wage Order poster, at the workplace, nor did Performance provide adequate training regarding its legal obligations to provide rest breaks, and Performance did not implement an adequate schedule regarding rest breaks for non-exempt employees. In short, Defendants essentially have a non-existent rest break policy, as there is no guidance or specification as to when Plaintiff and other aggrieved employees are authorized and permitted to take rest breaks during their shifts. This common policy (or lack thereof) has caused widespread missed rest breaks and systematic violations of California Labor Code §§ 226.7 and 512, and IWC Order No. 9-2001, § 12.

30. Defendants also violated California Labor Code § 226.7, § 12 of the applicable IWC Order, by failing to pay Plaintiff and other aggrieved employees who were not provided with a rest break, in accordance with the applicable wage order, one additional hour of compensation at the proper regular rate of pay for each workday that a rest break was not provided.

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Failure to Pay Overtime Wages

[Cal. Lab. Code §§ 510, 1194, 1198; § 3 of the Applicable IWC Wage Order]

31. Pursuant to California Labor Code §§ 510, 1194, and § 3 of the applicable IWC Order, Defendants are required to compensate Plaintiff and other aggrieved employees for all overtime, which is calculated at one and one-half (1 ½) times the regular rate of pay for all hours worked in excess of eight (8) hours per day and/or forty (40) hours per week, and for the first eight (8) hours on the seventh consecutive workday, with double time for all hours worked in excess of twelve (12) hours in any workday and for all hours worked in excess of eight (8) hours on the seventh consecutive day of work in any workweek.

32. During the statute of limitations period, Defendants have failed to compensate Plaintiff and other aggrieved employees for all overtime hours worked as required under the foregoing provisions of the California Labor Code and IWC Wage Order by, among other methods: failing to pay overtime at one and one-half (1 ½) or double the regular rate of pay as provided by California Labor Code §§ 510, 1194 and § 3 of the applicable IWC Order, requiring, permitting or suffering Plaintiff and other aggrieved employees to work off-the-clock, and to work through meal and rest breaks, but not compensating them for this time, improperly calculating the regular rate of pay based on shift differential and other remuneration, illegally rounding time worked by Plaintiff and the other aggrieved employees in such a way that favored Defendants, and other methods to be discovered.

33. In a short-sighted attempt to maximize profits, Defendants have understaffed their facilities. Not only has this practice resulted in widespread missed meal and rest breaks, but it has also caused Plaintiff and other aggrieved employees to perform work while off-the-clock. Defendants have actual or constructive knowledge of this off-the-clock work and subtly condone it. Plaintiff and other aggrieved employees routinely arrive to work early to check so that they are prepared and ready to begin performing their duties promptly at the start of their shifts, as they must be pursuant to Defendants' requirements. Defendants know that Plaintiff and other aggrieved employees perform this work off-the-clock.

34. Plaintiff and other aggrieved employees must get to work by no later than the start of

1 their shifts – and usually earlier. Thus, they are not afforded the benefit of clocking in for work a few
2 minutes late. Likewise, Plaintiff and other aggrieved employees are in a rush to complete their
3 mandatory job duties, so they are rarely afforded the benefit of clocking out early at the end of their
4 shifts. This results in the widespread underpayment of time worked.

5 35. Defendants have knowingly and willfully refused to perform their obligations to
6 compensate Plaintiff and other aggrieved employees for all wages earned and all hours worked in
7 violation of California Labor Code §§ 510, 1194 and 1198 and § 3 of the applicable IWC Order.

8 **Failure to Pay Minimum Wages**

9 **[Cal. Lab. Code §§ 1194, 1197; § 4 of the IWC Wage Orders]**

10 36. Pursuant to Cal. Lab. Code §§ 1194, 1197, and § 4 of the applicable IWC Wage Order,
11 payment to an employee of less than the applicable minimum wage for all hours worked in a payroll
12 period is unlawful.

13 37. Based on this common practice, Defendants failed to pay Plaintiff and other aggrieved
14 employees minimum wages for all hours worked by requiring, permitting or suffering Plaintiff and
15 other aggrieved employees to work off the clock, such as requiring them to work through meal and
16 rest breaks but not compensating them for this time, and failing to include this time in all hours
17 worked, illegally rounding time worked by Plaintiff and the other aggrieved employees in such a way
18 that favored Defendants and other methods to be discovered.

19 38. Defendants' conduct described herein violates Cal. Lab. Code §§ 1194, 1197, and § 4
20 of the applicable IWC Wage Order. As a proximate result of the aforementioned violations, Plaintiff
21 and other aggrieved employees have been damaged in an amount according to proof at trial.
22 Therefore, pursuant to California Labor Code §§ 200, 203, 226, 558, 1194, 1197.1, and any other
23 applicable law, Plaintiff and other aggrieved employees are entitled to recover the unpaid balance of
24 wages owed to them by Defendants, plus interest, penalties, attorneys' fees, expenses, and costs of
25 suit.

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Abstract

1 accrued wages and other compensation to Plaintiff and other aggrieved employees in accordance with
2 California Labor Code §§ 201 and 202. Defendants do not have a sufficient policy to provide Plaintiff
3 and other aggrieved employees with their final paychecks within the timeframes required under
4 California law. In addition, because Defendants have failed and continue to fail to properly
5 compensate Plaintiff and other aggrieved employees for all hours worked when due, overtime wages,
6 and compensation for non-compliant meal and rest breaks, Defendants have also willfully failed and
7 continue to fail to pay accrued wages and other compensation to Plaintiff and other aggrieved
8 employees in accordance with California Labor Code §§ 201 and 202.

9 **Failure to Furnish Accurate Itemized Wage Statements**

10 **[Cal. Lab. Code §§ 226(a); 248.2; and § 7 of the Applicable IWC Wage Order]**

11 45. During the statute of limitations period, Defendants have routinely failed to provide
12 Plaintiff and other aggrieved employees with timely and accurate itemized wage statements.
13 Defendants' pay stubs violate Labor Code § 226 on their face by, among other things, illegally
14 rounding time worked by Plaintiff and the other aggrieved employees in a way that favored
15 Defendants and depriving Plaintiff and the other aggrieved employees all of their wages which in turn
16 causes Defendants' wage statements to be inaccurate. Defendants fail to provide Plaintiff and other
17 aggrieved employees, with meal periods and rest breaks and intentionally fails to include in their
18 wage statements one (1) additional hour of compensation at their regular rates of pay for each non-
19 compliant meal period or rest break, fail to set forth the applicable rate of pay for sick leave, the
20 regular rate of pay for sick leave, available supplemental COVID-19 sick leave and the amount taken,
21 and other California Labor Code violations yet to be discovered.

22 46. In order to conceal its wage theft, Defendants knowingly and intentionally failed to
23 provide Plaintiff and other aggrieved employees with timely and accurate itemized wage statements
24 in accordance with Labor Code § 226(a) and § 7 of the applicable IWC Order.

25 47. Plaintiff and other aggrieved employees suffered injury as a result of Defendants'
26 failure to provide timely and accurate itemized wage statements prevented them from discovering the
27 scope and extent of Defendants' violations of California wage and hour laws, prevented them from
28 being able to determine the gross wages earned, the total hours worked, all deductions made, the net

1 wages earned, all applicable hourly rates in effect during each pay period and the corresponding
2 number of hours worked at each hourly rate, the accurate rate of pay, available supplemental COVID-
3 19 sick leave and amount taken, and other violations yet to be discovered.

4 **Failure to Maintain Required Records**

5 **[Cal. Lab. Code §§ 226(a), 248.2, 1174(d); § 7 of the Applicable IWC Wage Order]**

6 48. During the statute of limitations period, as part of Defendants' illegal payroll policies
7 and practices to deprive Plaintiff and other aggrieved employees of all wages earned and due,
8 Defendants knowingly and intentionally failed to maintain records as required under California Labor
9 Code §§ 226(a) and 1174(d) and § 7 of the applicable IWC Order, including but not limited to the
10 following records: total daily hours worked by each employee; applicable rates of pay; all deductions;
11 meal periods; time records showing when each employee begins and ends each work period; and
12 accurate itemized statements. Defendants had knowledge that it was not providing its non-exempt
13 employees with proper meal and rest periods, but knowingly failed to include in the wage statements
14 one (1) extra hour of compensation for each missed meal and rest period. Defendants also illegally
15 rounded and inaccurately recorded the time in which Plaintiff and other aggrieved employees
16 worked. Defendants have also failed to maintain accurate, itemized wage statements, failed
17 maintained records relating to supplemental COVID-19 sick leave and amount taken as alleged
18 above, and other violations of the California Labor Code which have not been discovered.

19 **Failure to Pay COVID-19 Supplemental Sick Leave**

20 **[Cal. Lab. Code §§ 248.1, 248.2]**

21 49. Plaintiff is informed and believes, during the statute of limitations period, Defendant
22 failed to provide 80 hours of COVID-19 Supplemental Paid Sick leave and compensate Aggrieved
23 Employees at their regular rate of pay for supplemental sick leave, i.e., their highest regular rate of
24 pay, taking into consideration non-discretionary bonuses, etc., in violation of California Labor Code §
25 248.1(b)(3)(A). Defendant also failed to provide COVID-19 Supplemental Sick Leave to aggrieved
26 employees in violation of California Labor Code § 248.1(b)(2)(D). Defendant also failed to
27 accurately reflect any offset and/or the current amount of COVID-19 Supplemental Sick Leave
28

1 available to aggrieved employees on their wage statements, in violation of California Labor Code §§
2 248.1(b)(2)(D), 248.2 and for the reasons provided herein.

3 **FIRST CAUSE OF ACTION**

4 **VIOLATION OF THE PRIVATE ATTORNEYS GENERAL ACT**

5 **[Cal. Lab. Code § 2698 *et seq.*]**

6 (On Behalf of Plaintiff against Defendant)

7 50. Plaintiff incorporates herein by specific reference, as though fully set forth, the
8 allegations in paragraphs 1 through 49.

9 51. Plaintiff is an “aggrieved employee” within the meaning of California Labor Code §
10 2699(c), and a proper representative to bring a civil action on behalf of herself and other current and
11 former non-exempt employees of Defendants pursuant to the procedures specified in Labor Code §
12 2699.3, because Plaintiff was employed by Defendants and one or more of the alleged California
13 Labor Code violations was committed against Plaintiff during the statute of limitations period.

14 52. Plaintiff seeks to recover civil penalties through a representative action permitted by
15 PAGA and the California Supreme Court in *Arias v. Superior Court* (2009) 46 Cal.4th 969. Thus,
16 class certification is not required.

17 53. Pursuant to California Labor Code §§ 2698-2699.5, Plaintiff seeks to recover civil
18 penalties from Defendants in a representative action for the violations set forth above, including but
19 not limited to violations of California Labor Code §§ 201, 202, 203, 226(a), 226.7, 510, 512, 558
20 (penalties only), 1174(d), 1194, 1197, and 1198.

21 54. Pursuant to California Labor Code § 2699(a), Plaintiff seeks to recover civil penalties
22 for Defendants’ violations of California Labor Code provisions for which a civil penalty is
23 specifically provided, including but not limited to, the following:

- 24 a. Pursuant to California Labor Code § 210, for violations of California Labor
25 Code § 204, Defendants are subject to a civil penalty in the amount of one
26 hundred dollars (\$100) for the initial violation for each failure to pay each
27 employee, and two hundred dollars (\$200) per employee for violations in
28 subsequent pay periods.

- 1 b. Pursuant to California Labor Code § 226.3, for violations of California Labor
2 Code § 226(a), Defendants are subject to a civil penalty in the amount of two
3 hundred and fifty dollars (\$250) per aggrieved employee for the initial pay
4 period where a violation occurs and one thousand dollars (\$1,000) per
5 aggrieved employee for violations in subsequent pay periods.
- 6 c. Pursuant to California Labor Code § 1174.5, for violations of California Labor
7 Code § 1174(d), Defendants are subject to a civil penalty of five hundred
8 dollars (\$500).
- 9 d. Pursuant to California Labor Code § 1197.1, an employer who pays or causes
10 to be paid to any employee a wage less than the minimum fixed by an order of
11 the commission, shall be subject to a civil penalty as follows: for any initial
12 violation that is intentionally committed, one hundred dollars (\$100) for each
13 underpaid employee for each pay period for which the employee is underpaid;
14 and for each subsequent violation of the same offense, two hundred fifty
15 dollars (\$250) for each underpaid employee for each pay period for which the
16 employee is underpaid regardless of whether the initial violation was
17 intentionally committed.

18 55. California Labor Code § 2699(f) provides that for all California Labor Code violations
19 for which a civil penalty is not specifically provided, the following civil penalties are established: one
20 hundred dollars (\$100) for each aggrieved employee per pay period for the initial violation and two
21 hundred dollars (\$200) for each aggrieved employee per pay period for each subsequent violation.

22 56. Plaintiff seeks to recover such civil penalties under California Labor Code § 2699(f)
23 for Defendants' violations of California Labor Code provisions for which a civil penalty is not
24 specifically provided, including but not limited to, California Labor Code §§ 201, 202, 203, 226.7,
25 248.2, 1194, 1197, and 1198.

26 57. Plaintiff additionally seeks reasonable attorneys' fees and costs pursuant to California
27 Labor Code § 2699(g)(1) and California Code of Civil Procedure § 1021.5.

1 **PRAYER FOR RELIEF**

2 WHEREFORE, Plaintiff, individually and on behalf of all other aggrieved employees, prays
3 for relief against Defendants as follows:

4 1. For civil penalties according to proof, including but not limited to the amount of any
5 unpaid wages of Plaintiff and other aggrieved employees and all penalties authorized by California
6 Labor Code §§ 210, 226.3, 558 (penalties only), 1174.5, 1197.1, and 2699(a) and (f);

7 2. For interest at the legal rate pursuant to Labor Code §§ 218.6, 1194, California Civil
8 Code §§ 3287, 3288, and/or any other applicable provision providing for pre-judgment interest;

9 3. For reasonable attorneys' fees and costs pursuant to California Labor Code § 2699(g),
10 California Code of Civil Procedure § 1021.5, and/or any other applicable provisions providing for
11 attorneys' fees and costs; and

12 4. For such further relief that the Court may deem just and proper.

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14 DATED: November 15, 2021

THE LAW OFFICE OF SCOTT E. WHEELER

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16 By: 

SCOTT ERNEST WHEELER

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18 *Attorney for Plaintiff and Aggrieved Employees*
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