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

RUBEN TAMAYO, an individual, on behalf
of himself and others similarly situated

PLAINTIFF,

v.

NEXGEN AIR CONDITIONING AND
HEATING, INC.; and DOES 1 thru 50,
inclusive,

DEFENDANTS.

CASE NO. 30-2021-01225463-CU-OE-CXC

**[Amended as a matter of right, pursuant to
Labor Code § 2699.3(a)(2)(C)]**

**FIRST AMENDED CLASS AND
REPRESENTATIVE ACTION
COMPLAINT**

1. Failure to Provide Meal Breaks Pursuant to Labor Code §§ 226.7 and 512
2. Failure to Provide Rest Breaks Pursuant to Labor Code § 226.7
3. Violation of Labor Code § 2802
4. Violation of Labor Code § 226(a)
5. Penalties Pursuant to Labor Code § 203
6. Violation of Business & Professions Code § 17200
7. Penalties Pursuant to Labor Code §2699, et seq.

1 Plaintiff RUBEN TAMAYO, an individual, on behalf of himself, all others similarly
2 situated, and on behalf of the people of the State of California and as an “aggrieved employee”
3 under Labor Code Private Attorneys General Act of 2004, §2699, *et seq.* (hereafter “PAGA”),
4 complains of Defendant NEXGEN AIR CONDITIONING AND HEATING, INC. (“Defendant”)
5 and each of them, as follows:

6 **I.**

7 **INTRODUCTION**

8 1. This is a Class and Representative Action, pursuant to Code of Civil Procedure §
9 382, and Labor Code §2699, *et seq.*, on behalf of Plaintiff and a Proposed Class defined as:

10 All non-exempt employees who are employed or have been
11 employed by NEXGEN AIR CONDITIONING AND HEATING,
12 INC., in the State of California who worked one or more pay periods
13 since four (4) years prior to the filing of this action to the present
14 plus any additional time during which the statutes of limitation for
the causes of action herein were tolled pursuant to Emergency Rule
9 of the California Rules of Court, the ‘Emergency Rules Related to
COVID-19’. (“Proposed Class”)

15 2. Any limitations period referenced in this complaint is extended pursuant to
16 Emergency Rule 9 (a) of the “Emergency Rules Related to COVID-19,” Appendix I to the
17 California Rules of Court, adopted effective April 6, 2020, which provides that the statutes of
18 limitation that exceed 180 days for civil actions are tolled from April 6, 2020 until October 1, 2020
19 [“Notwithstanding any other law, the statutes of limitations and repose for civil causes of action
20 that exceed 180 days are tolled from April 6, 2020 until October 1, 2020.”] Any reference to the
21 relevant time period or statute of limitations referenced in this complaint is extended into the past
22 by the number of days in which this tolling was in effect.

23 3. From at least four (4) years prior to the filing of this action and continuing to the
24 present, Defendant failed to apprise Plaintiff and the Proposed Class of their rights associated with
25 meal periods and failed to provide compliant meal periods. Further, Defendant failed to pay such
26 employees one (1) hour of pay at the employees’ regular rate of compensation for each workday
27 that the first meal period was not provided within the first (5) hours of the shift.

28 4. From at least four (4) years prior to the filing of this action and continuing to the

1 present, Defendant failed to apprise Plaintiff and the Proposed Class of their rights associated with
2 rest periods and failed to provide compliant rest periods. Defendant maintained a consistent policy
3 of failing to provide Plaintiff and the Proposed Class with rest breaks of not less than ten (10)
4 minutes per four (4) hour work period or major fraction thereof. Further, Plaintiff and the Proposed
5 Class were not compensated with one (1) hour of wages at the regular rate of compensation for
6 each missed rest period.

7 5. From at least four (4) years prior to the filing of this action and continuing to the
8 present, Plaintiff and the Proposed Class members were required to incur substantial expenses in
9 direct consequent of the discharge of their duties for Defendant without reimbursement. Defendant
10 has failed to reimburse Plaintiff and the Proposed Class the cost of using their personal cell phones
11 for business related purposes. These cell phones were not provided by Defendant and Defendant
12 failed to reimburse Plaintiff and the Proposed Class members for the costs associated with using
13 their personal cell phones.

14 6. For at least one (1) year prior to the filing of this action and continuing to the
15 present, Defendant has failed to comply with Industrial Welfare Commission (“IWC”) Wage Order
16 4-2001 and Labor Code § 226(a) by failing to provide Plaintiff and the Proposed Class accurate
17 itemized wage statements in writing showing the total hours worked and all applicable hourly rates
18 in effect during the pay period and the corresponding number of hours worked at each hourly rate
19 by the employee.

20 7. For at least three (3) years prior to the filing of this action continuing to the present,
21 Defendant has failed to pay all wages due at the time of termination or resignation to Plaintiff and
22 the Proposed Class.

23 8. Plaintiff, on behalf of himself and all Proposed Class members brings this action
24 pursuant to Labor Code §§ 201, 202, 203, 226(a), 226.7, 512, and 2802; Wage Order 4-2001; and
25 California Code of Regulations, Title 8, Section 11040, seeking meal and rest period penalties,
26 accurate itemized wage statements, unreimbursed expenses, all wages due upon termination, other
27 penalties, injunctive and other equitable relief, and reasonable attorneys’ fees and costs.

28 9. Plaintiff, on behalf of himself and all Proposed Class members, pursuant to

1 Business & Professions Code §§ 17200-17208, also seeks injunctive relief, restitution, and
2 disgorgement of all benefits Defendant enjoyed from its unlawful conduct as described herein.

3 10. For at least one (1) year prior to the date of the letter sent to the Labor Workforce
4 and Development Agency (“LWDA”) and Defendant giving notice of the claims pursuant to
5 PAGA and continuing to the present and as extended by Emergency Rule 9 referenced in paragraph
6 2 above, Defendant has violated Labor Code provisions, as detailed below, giving rise to a claim
7 pursuant to PAGA. Plaintiff, on behalf of himself and all aggrieved employees presently or
8 formerly employed by Defendant during the liability period as defined in his PAGA notice letter
9 (see Exhibit “1”), brings this representative action pursuant to Labor Code §2699, *et seq.* seeking
10 penalties for Defendant’s failure to provide lawful meal and rest periods, failure to reimburse
11 business expenses, failure to provide accurate itemized wage statements, and failure to pay all
12 wages due at the time of termination.

13 II.

14 JURISDICTION AND VENUE

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

20 12. This Court has personal jurisdiction over Defendant because Defendant has caused
21 injuries in the County of Orange and the State of California through their acts, and by their
22 violation of the California Labor Code, California state common law, and California Business &
23 Professions Code § 17200, *et seq.*

24 13. Venue as to each Defendant is proper in this judicial district, pursuant to Code of
25 Civil Procedure § 395. Defendant operates within California and does business within Orange
26 County. The unlawful acts alleged herein have a direct effect on Plaintiff and all Proposed Class
27 members within the State of California and the county of Orange.

28 14. This case should be classified as complex according to Rule 3.400 of the California

Rules of Court, and assigned to a complex litigation judge and department, as it will involve substantial documentary evidence, a large number of witnesses, and is likely to involve extensive motion practice raising difficult or novel issues that will be time-consuming to resolve and would require substantial post judgment judicial supervision.

15. Plaintiff files this amended complaint adding a claim for penalties pursuant to Labor Code §2699, *et seq.* as a matter of right. (See Labor Code § 2699.3(a)(2)(C)].)

III.

PARTIES

A. PLAINTIFF

16. Plaintiff RUBEN TAMAYO is a resident of California.

17. Plaintiff and all Proposed Class members, were regularly required to:

- a. Work without being provided compliant meal periods;
- b. Work without being provided compliant rest periods;
- c. Work without being reimbursed for necessary business-related expenses;

and,

- d. Work without being provided accurate itemized wage statements.

18. Defendant willfully failed to compensate Plaintiff and all Proposed Class members for wages at the termination of their employment with Defendant.

19. As a result of this conduct, Defendant has engaged in unfair competition and unlawful business practices.

20. Plaintiff and all aggrieved employees as defined in his notice letter to the LWDA are “aggrieved employees” within the meaning of Labor Code § 2699, *et seq.* (see Labor Code §2699(c).)

B. DEFENDANTS

21. Defendant NEXGEN AIR CONDITIONING AND HEATING, INC. is believed to be a California corporation operating within the State of California. Defendant’s corporate address is believed to be 700 North Valley Street, Suite K Anaheim, CA 92801. Upon information and belief, Defendant employed Plaintiff and similarly situated persons as non-exempt employees

1 within California. Defendant has done and does business throughout the State of California.

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

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

14 24. Furthermore, Defendants acted in all respects as the employers or joint employers
15 of the Proposed Class. Defendants, and each of them, exercised control over the wages, hours or
16 working conditions of the Proposed Class, or suffered or permitted the Proposed Class to work, or
17 engaged, thereby creating a common law employment relationship, with the Proposed Class.
18 Therefore, Defendants, and each of them, employed or jointly employed the Proposed Class.

19 **IV.**

20 **FACTUAL BACKGROUND**

21 25. Plaintiff and the Proposed Class are, and at all times pertinent hereto, have been
22 classified as non-exempt employees by Defendant.

23 26. Upon information and belief, Plaintiff and the Proposed Class are covered by
24 California Industrial Welfare Commission Occupational Wage Order No. 4-2001 (Title 8 Cal.
25 Code of Regs. § 11040).

26 27. Defendant failed to inform Plaintiff and the members of the Proposed Class of their
27 right to take compliant meal periods by way of a lawful policy. Plaintiff and all Proposed Class
28 members have been forced by Defendant to work over five (5) hours in one day without being

provided a compliant thirty (30) minute uninterrupted meal break and not being compensated one (1) hour of pay at their regular rate of compensation for each workday that a compliant meal period was not provided, all in violation of California labor laws, regulations, and Industrial Welfare Commission Wage Orders.

28. Defendant failed to inform Plaintiff and the members of the Proposed Class of their right to take compliant rest periods by way of a lawful policy. Defendant failed to provide Plaintiff and the Proposed Class members with compliant rest breaks of not less than ten (10) minutes per four (4) hour work period or major fraction thereof. Plaintiff and the Proposed Class were not compensated with one (1) hour of wages at the regular rate of compensation for each missed rest period as required.

29. Defendant failed to reimburse Plaintiff and the Proposed Class the cost of using their personal cell phones for business related purposes. Defendant required Plaintiff and the Proposed Class to download and pay for phone applications on their personal cell phones and consistently use these personal cell phones for necessary work-related purposes. Despite being necessary for work purposes, these cell phones were not provided by Defendant and Defendant failed to reimburse Plaintiff and the Proposed Class for the costs associated with using their personal cell phones.

30. Defendant has failed to comply with Industrial Welfare Commission ("IWC") Wage Order 4-2001(7) and Labor Code § 226(a) by failing to provide accurate itemized statements that include the total hours worked and all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate for Plaintiff and the Proposed Class.

31. Defendant willfully failed to pay wages and compensation, when Plaintiff and all Proposed Class members quit or were discharged. This failure was willful, without legal justification, and interfered with Plaintiff's and Class members' rights.

32. As a result of the acts alleged herein, Defendant violated Labor Code §2699, *et seq.*

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1 V.

2 CLASS ACTION ALLEGATIONS

3 33. Plaintiff brings this action on behalf of himself and all others similarly situated as
4 a Class Action pursuant to § 382 of the Code of Civil Procedure. Plaintiff seeks to represent a
5 proposed class composed of and defined as follows:

6 All non-exempt employees who are employed or have been
7 employed by NEXGEN AIR CONDITIONING AND HEATING,
8 INC., in the State of California who worked one or more pay periods
9 since four (4) years prior to the filing of this action to the present
10 plus any additional time during which the statutes of limitation for
the causes of action herein were tolled pursuant to Emergency Rule
11 9 of the California Rules of Court, the 'Emergency Rules Related to
COVID-19'. ("Proposed Class")

12 34. Plaintiff reserves the right under Rule 3.765(b) of the California Rules of Court to
13 amend or modify the class description with greater specificity, by division into subclasses, or by
14 limitation to particular issues.

15 35. This action has been brought and may properly be maintained as a class action
16 under the provisions of § 382 of the Code of Civil Procedure because there is a well-defined
community of interest in the litigation and the Proposed Classes are easily ascertainable.

17 **A. NUMEROSITY**

18 36. The potential members of the Proposed Class as defined are so numerous that
19 joinder of all the members of the Proposed Class is impracticable. While the precise number of
20 proposed Class Members has not been determined at this time, Plaintiff is informed and believes
21 that Defendant currently employ, and during the relevant time periods employed over 50 members
22 of the Proposed Class.

23 37. Plaintiff alleges that Defendant's employment records would provide information
24 as to the number and location of all Proposed Class members. Joinder of all members of the
25 Proposed Class is not practicable.

26 **B. COMMONALITY**

27 38. There are questions of law and fact common to the Proposed Class that predominate
28 over any questions affecting only individual Proposed Class members. These common questions

of law and fact include, without limitation:

a. Whether Defendant violated Labor Code §§ 226.7 and 512 and IWC Wage Order 4-2001 or other applicable IWC Wage Orders by failing to provide required meal periods throughout the term of employment and/or failing to compensate said employees one (1) hour of wages at their regular rate of compensation in lieu of meal periods;

b. Whether Defendant violated Labor Code § 226.7 and IWC Wage Order 4-2001 or other applicable IWC Wage Orders by failing to provide required rest periods throughout the term of employment and/or failing to compensate said employees one (1) hour of wages at their regular rate of compensation in lieu of rest periods;

c. Whether Defendant violated Labor Code § 2802 by failing to reimburse Plaintiff and the Proposed Class out of pocket expenses for the cost of personal cell phones;

d. Whether Defendant violated Labor Code § 226(a) and Wage Order 4-2001 or other applicable IWC Wage Orders, and Cal. Code Regs., Title 8, Section 11040 by failing to provide accurate itemized wage statements to Plaintiff and the members of the Proposed Class;

e. Whether Defendant violated §§ 201-203 of the Labor Code by failing to pay compensation due and owing at the time that any Proposed Class member's employment with Defendant terminated;

f. Whether Defendant violated § 17200, *et seq.* of the Business & Professions Code by engaging in the acts previously alleged; and

g. Whether Plaintiff and the members of the Proposed Class are entitled to equitable relief pursuant to Business & Professions Code § 17200, *et seq.*

h. Whether Defendant violated Labor Code § 2699, *et seq.* by engaging in the acts alleged herein.

C. TYPICALITY

39. The claims of Plaintiff are typical of the claims of the Proposed Class. Plaintiff and all members of the Proposed Class sustained injuries and damages arising out of and caused by Defendant's common course of conduct in violation of laws, regulations that have the force and effect of law, and statutes as alleged herein.

1 **D. ADEQUACY OF REPRESENTATION**

2 40. Plaintiff will fairly and adequately represent and protect the interests of the
3 members of the Proposed Class.

4 41. Counsel who represent Plaintiff and the Proposed Class are competent and
5 experienced in litigating large employment class actions.

6 **E. SUPERIORITY OF CLASS ACTION**

7 42. A class action is superior to other available means for the fair and efficient
8 adjudication of this controversy. Individual joinder of all Proposed Class members is not
9 practicable, and questions of law and fact common to the Proposed Class predominate over any
10 questions affecting only individual members of the Proposed Class. Each member of the Proposed
11 Class has been damaged and is entitled to recovery by reason of Defendant's illegal policy and/or
12 practice of failing to provide meal and rest periods, failing to provide accurate itemized wage
13 statements, failing to reimburse business-related expenses, and failing to pay all wages upon
14 resignation or termination.

15 43. Class action treatment will allow those similarly situated persons to litigate their
16 claims in the manner that is most efficient and economical for the parties and the judicial system.
17 Plaintiff is unaware of any difficulties that are likely to be encountered in the management of this
18 action that would preclude its maintenance as a class action.

19 **VI.**

20 **FIRST CAUSE OF ACTION**

21 **PLAINTIFF ON BEHALF OF HIMSELF AND THE PROPOSED CLASS**

22 **FAILURE TO PROVIDE MEAL PERIODS PURSUANT TO**

23 **LABOR CODE § 226.7 AND LABOR CODE § 512**

24 44. Plaintiff, on behalf of himself and the Proposed Class, realleges and incorporates
25 by reference all previous paragraphs.

26 45. Labor Code §§ 226.7 and 512 require an employer to pay an additional hour of
27 compensation for each meal period the employer fails to provide. Employees are entitled to a first
28 meal period of at least thirty (30) minutes for shifts over five (5) hours, to be provided within the

1 first five (5) hours of the shift. The meal period must be uninterrupted, free from all work duties,
2 and the employee must be free to leave the premises.

3 46. Defendant failed to maintain a policy informing Plaintiff and the Proposed Class of
4 these rights.

5 47. Plaintiff and the Proposed Class consistently worked shifts over five (5) hours.
6 Defendant failed to provide Plaintiff and the Proposed Class with compliant meal periods of not
7 less than thirty (30) minutes as required by the Labor Code during the relevant time period.

8 48. Defendant has had a consistent policy of failing to pay Plaintiff and the Proposed
9 Class one (1) hour of pay at the employees' regular rate of compensation for each workday that
10 the first meal period was not provided within the first (5) hours of the shift. On July 15, 2021, in
11 *Ferra v. Loews Hollywood Hotel, LLC*, the California Supreme Court set forth the formula for
12 calculating the one extra hour of premium pay that employees are owed if an employer fails to
13 provide a compliant meal period or rest break. Specifically, the Court held that those premium
14 payments must include the hourly value of any nondiscretionary earnings (such as a
15 nondiscretionary bonuses), and cannot simply be paid at an employee's base hourly rate.

16 49. Pursuant to Labor Code § 226.7, Plaintiff and the Proposed Class are entitled to
17 damages in an amount equal to one (1) hour of wages at the regular rate of compensation per
18 missed meal break, per day in a sum to be proven at trial.

19 **VII.**

20 **SECOND CAUSE OF ACTION**

21 **PLAINTIFF ON BEHALF OF HIMSELF AND THE PROPOSED CLASS**

22 **FAILURE TO PROVIDE REST PERIODS PURSUANT TO**

23 **LABOR CODE § 226.7**

24 50. Plaintiff, on behalf of himself and the Proposed Class, realleges and incorporates
25 by reference all previous paragraphs.

26 51. Labor Code § 226.7 and IWC Wage Order 4 require an employer to provide rest
27 periods or to pay an additional one (1) hour of wages for each rest period the employer fails to
28 provide. Employees are entitled to a ten (10) minute rest break for every four (4) hours worked or

major fraction thereof. Employees must be free to leave the premises during rest periods.

52. Defendant failed to maintain a policy informing Plaintiff and the Proposed Class of this right.

53. Defendant maintained a consistent policy of failing to provide Plaintiff and the Proposed Class with rest breaks of not less than ten (10) minutes per four (4) hour work period or major fraction thereof. Plaintiff and the Proposed Class have been required to work four-hour increments (or major fractions thereof) without being provided with compliant ten (10) minute rest periods.

54. Plaintiff and the Proposed Class were not compensated with one (1) hour of wages at the regular rate of compensation for each missed rest period as required by Labor Code § 226.7. *Ferra v. Loews Hollywood Hotel, LLC* requires the rest period premium payments must include the hourly value of any nondiscretionary earnings (such as a nondiscretionary bonuses), and cannot simply be paid at an employee's base hourly rate.

55. Pursuant to Labor Code § 226.7, Plaintiff and the Proposed Class are entitled to damages in an amount equal to one (1) hour of wages at the regular rate of compensation per missed rest break, per day in a sum to be proven at trial.

VIII.

THIRD CAUSE OF ACTION

PLAINTIFF ON BEHALF OF HIMSELF AND THE PROPOSED CLASS

FAILURE TO REIMBURSE EXPENSES PURSUANT TO

LABOR CODE § 2802

56. Plaintiff, on behalf of himself and the Proposed Class, realleges and incorporates by reference all previous paragraphs.

57. Labor Code § 2802 requires employers to indemnify employees for all necessary expenditures incurred by employees in the discharge of their duties.

58. Plaintiff and the Proposed Class members were required to incur substantial expenses in direct consequent of the discharge of their duties for Defendant without

1 reimbursement.

2 59. On a regular and consistent basis, Defendant has failed to reimburse Plaintiff and
3 the Proposed Class for the cost of using their personal cell phones for business related purposes.

4 60. Defendant required that Plaintiff and the Proposed Class members download and
5 pay for phone applications on their personal cell phones and consistently use their personal cell
6 phones for necessary work-related purposes.

7 61. These cell phones were not provided by Defendant and Defendant failed to
8 reimburse Plaintiff and the Proposed Class for the costs associated with using their personal cell
9 phones.

10 62. As a result of the unlawful acts of Defendant, Plaintiff and the Proposed Class have
11 been deprived of reimbursement in the amounts to be determined at trial, and are entitled to
12 recovery of such amounts, plus interest and penalties thereon, attorneys' fees, and costs.

13 **IX.**

14 **FOURTH CAUSE OF ACTION**

15 **PLAINTIFF ON BEHALF OF HIMSELF AND THE PROPOSED CLASS**

16 **VIOLATION OF LABOR CODE § 226(A)**

17 63. Plaintiff, on behalf of himself and the Proposed Class, realleges and incorporates
18 by reference all previous paragraphs.

19 64. California Labor Code § 226(a) requires employers to issue accurate itemized wage
20 statements that include the total hours worked by the employee and all applicable hourly rates in
21 effect during the pay period and the corresponding number of hours worked at each hourly rate by
22 the employee. (Labor Code §§ 226(a)(2) and (9).)

23 65. Defendant has failed to issue accurate itemized wage statements that show the total
24 hours worked by the employee under Labor Code § 226(a)(2) and all applicable hourly rates in
25 effect during the pay period and the corresponding number of hours worked at each hourly rate by
26 the employee under Labor Code § 226(a)(9).

27 66. Defendant's failure to provide accurate itemized wages statements according to
28 Labor Code § 226(a) was all done on a regular and consistent basis.

67. An employee suffering injury as a result of a knowing and intentional failure by an employer to comply with Labor Code § 226(a) is entitled to recover the greater of all actual damages or fifty dollars (\$50) for the initial pay period in which a violation occurs and one hundred dollars (\$100) per employee for each violation in a subsequent pay period, not exceeding an aggregate penalty of four thousand dollars (\$4,000) and is entitled to an award of costs and reasonable attorneys' fees.

X.

FIFTH CAUSE OF ACTION

PLAINTIFF ON BEHALF OF HIMSELF AND THE PROPOSED CLASS

WAITING TIME PENALTIES UNDER LABOR CODE § 203

68. Plaintiff, on behalf of himself and the Proposed Class, realleges and incorporates by reference all previous paragraphs.

69. Numerous members of the Proposed Class including the Plaintiff are no longer employed by Defendant. They were either fired or quit Defendant's employ.

70. Defendant's failure to pay wages, as alleged above was willful in that Defendant knew wages to be due but failed to pay them, thus entitling Plaintiff and the Proposed Class to penalties under Labor Code § 203, which provides that an employee's wages shall continue as a penalty until paid for a period of up to thirty (30) days from the time they were due.

71. Defendant has failed to pay Plaintiff and others a sum certain at the time of termination or within seventy-two (72) hours of their resignation, and have failed to pay those sums for thirty (30) days thereafter. Pursuant to the provisions of Labor Code § 203, Plaintiff and the Proposed Class are entitled to a penalty in the amount of Plaintiff's and the Proposed Class members' daily wage multiplied by thirty (30) days.

XI.

SIXTH CAUSE OF ACTION

PLAINTIFF ON BEHALF OF HIMSELF AND THE PROPOSED CLASS

UNFAIR COMPETITION PURSUANT TO BUSINESS & PROFESSIONS CODE § 17200

72. Plaintiff, on behalf of himself and the Proposed Class, realleges and incorporates

1 by reference all previous paragraphs.

2 73. This is a Class Action for Unfair Business Practices. Plaintiff, on behalf of himself,
3 on behalf of the general public, and on behalf of the Proposed Class, bring this claim pursuant to
4 Business & Professions Code § 17200, *et seq.* The conduct of Defendant as alleged in this
5 Complaint has been and continues to be unfair, unlawful, and harmful to Plaintiff, the general
6 public, and the Proposed Class. Plaintiff seeks to enforce important rights affecting the public
7 interest within the meaning of Code of Civil Procedure § 1021.5.

8 74. Plaintiff is a “person” within the meaning of Business & Professions Code § 17204,
9 and therefore has standing to bring this cause of action for injunctive relief, restitution, and other
10 appropriate equitable relief.

11 75. Business & Profession Code § 17200, *et seq.* prohibits unlawful and unfair business
12 practices.

13 76. California’s wage and hour laws express fundamental public policies. Providing
14 employees with proper wages and compensation are fundamental public policies of this State and
15 of the United States. Labor Code § 90.5(a) articulates the public policies of this State to enforce
16 vigorously minimum labor standards, to ensure that employees are not required or permitted to
17 work under substandard and unlawful conditions, and to protect law-abiding employers and their
18 employees from competitors who lower their costs by failing to comply with minimum labor
19 standards.

20 77. Defendant has violated statutes and public policies as alleged herein. Through the
21 conduct alleged in this Complaint, Defendant has acted contrary to these public policies, have
22 violated specific provisions of the Labor Code, and have engaged in other unlawful and unfair
23 business practices in violation of Business & Profession Code § 17200, *et seq.*, depriving Plaintiff,
24 and all persons similarly situated, and all interested persons of rights, benefits, and privileges
25 guaranteed to all employees under law.

26 78. Defendant’s conduct, as alleged hereinabove, constitutes unfair competition in
27 violation of § 17200, *et seq.* of the Business & Professions Code.

28 79. Defendant, by engaging in the conduct herein alleged, either knew or in the exercise

of reasonable care, should have known that the conduct was unlawful. As such it is a violation of § 17200, *et seq.* of the Business & Professions Code.

80. As a proximate result of the above-mentioned acts of Defendant, Plaintiff and others similarly situated have been damaged in a sum as may be proven.

81. Unless restrained, Defendant will continue to engage in the unlawful conduct as alleged above. Pursuant to the Business & Professions Code, this court should make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by Defendant, its agents, or employees, of any unlawful or deceptive practices prohibited by the Business & Professions Code, and/or, including but not limited to, restitution and disgorgement of profits which may be necessary to restore Plaintiff and members of the Proposed Class the money Defendant has unlawfully failed to pay.

XII.

SEVENTH CAUSE OF ACTION

PENALTIES PURSUANT TO LABOR CODE §2699, ET SEQ.

82. Plaintiff, on behalf of himself and all aggrieved employees, realleges and incorporates by reference all previous paragraphs.

83. As a result of the acts alleged above and specifically incorporated herein, Plaintiff seeks penalties under Labor Code §2699, *et seq.* because of Defendant's violation of Labor Code §§ 201, 202, 203, 226(a), 226.7, 512, 2802; Wage Order 4-2001; and California Code of Regulations, Title 8, Section 11040, which call for civil penalties.

84. For each such penalty, Plaintiff and the aggrieved employees are entitled to penalties in an amount to be shown at trial, subject to the following formula:

a. \$100 for the initial violation per employee per pay period.

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

85. These penalties shall be allocated seventy-five percent (75%) to the LWDA and twenty-five percent (25%) to the affected employees.

86. Pursuant to Labor Code § 2699.3(a)(1), Plaintiff uploaded a notice letter to the

1 LWDA¹ and mailed a letter by certified mail to Defendant Nexgen Air Conditioning and Heating,
2 Inc.'s entity address, which is 700 North Valley Street, Suite K Anaheim, CA 92801, as proscribed
3 by the Code on October 6, 2021, describing Defendant's conduct in violation of Labor Code §§
4 201, 202, 203, 226(a), 226.7, 512, and 2802. (see Exhibit "1.") Plaintiff obtained an e-filing
5 confirmation from the LWDA confirming receipt of the notice (see Exhibit "2").

6 87. As no letter evidencing the LWDA's intention to investigate was received by
7 Plaintiff's Counsel within sixty-five (65) calendar days, Plaintiff is entitled to commence a civil
8 action as though the LWDA had not chosen to investigate pursuant to Labor Code
9 §2699.3(a)(2)(A). Plaintiff will also provide the LWDA with a filed-stamped copy of the First
10 Amended Class and Representative Action Complaint immediately.

11 **RELIEF REQUESTED**

12 **WHEREFORE**, Plaintiff prays for the following relief:

13 1. For compensatory damages in the amount of Plaintiff's and each Proposed Class
14 members' hourly wage at the appropriate regular rate of compensation for each meal period that
15 Defendant failed to provide from at least four (4) years prior to the filing of this action to the
16 present as may be proven;

17 2. For compensatory damages in the amount of Plaintiff's and each Proposed Class
18 members' hourly wage at the appropriate regular rate of compensation for each rest period that
19 Defendant failed to provide from at least four (4) years prior to the filing of this action to the
20 present as may be proven;

21 3. For compensatory damages in the amount of Plaintiff's and each Proposed Class
22 Members' unreimbursed out of pocket expenses as a requirement of employment;

23 4. For penalties pursuant to Labor Code § 226(e) for violation of Labor Code § 226(a)
24 in the amount of fifty dollars (\$50) for the initial pay period in which a violation occurs and one
25 hundred dollars (\$100) per employee for each violation in a subsequent pay period, not exceeding
26 an aggregate penalty of four thousand dollars (\$4,000);

27 ¹ Plaintiff electronically filed a PAGA Claim Notice to the LWDA, via the State of California
28 Labor and Workforce Development Agency / Department of Industrial Relations website
(<https://dir.tfaforms.net/308>).

5. For penalties pursuant to Labor Code § 203 for all employees who were terminated or resigned equal to their daily wage times thirty (30) days;

6. An award of prejudgment and post judgment interest;

7. An order enjoining Defendant and its agents, servants, and employees, and all persons acting under, in concert with, or for it from providing Plaintiff with proper meal and rest periods, accurate itemized wage statements, reimbursement of expenses, and wages upon termination/resignation pursuant to Labor Code §§ 201, 202, 203, 226(a), 226.7, 512, 2802, and IWC 4-2001;

8. For restitution for unfair competition pursuant to Business & Professions Code § 17200, *et seq.*, including disgorgement or profits, in an amount as may be proven;

9. For penalties under Labor Code §2699, *et seq.* for Defendant's violation of Labor Code §§ 201, 202, 203, 226(a), 226.7, 512, 2802, and Wage Order 4-2001;

10. An award providing for payment of costs of suit;

11. An award of attorneys' fees; and

12. Such other and further relief as this Court may deem proper and just.

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial of his claims by jury to the extent authorized by law.

DATED: December 15, 2021

KINGSLEY & KINGSLEY, APC

By:

Kelsey M. Szamet
Attorneys for Plaintiff RUBEN TAMAYO and the
Proposed Class

EXHIBIT "1"

KINGSLEY & KINGSLEY

| L A W Y E R S |

October 6, 2021

LABOR & WORKFORCE DEVELOPMENT AGENCY
Attn. PAGA Administrator
1515 Clay Street, Ste. 801
Oakland, CA 94612

Nexgen Air Conditioning and Heating, Inc.
700 North Valley Street, Suite K
Anaheim, CA 92801

Re: Ruben Tamayo v. Nexgen Air Conditioning and Heating, Inc.
California Labor Code § 2699 Penalties

Gentlepersons:

This office represents Ruben Tamayo (“Plaintiff”) and a proposed group of current and former employees working for NEXGEN AIR CONDITIONING AND HEATING, INC. (“Defendant”) in the State of California. The purpose of this letter is to comply with the Private Attorneys General Act of 2004, pursuant to California Labor Code § 2698, *et. seq.* We herein set forth the facts and theories of California Labor Code violations which we allege Defendant engaged in with respect to Plaintiff and all of Defendant’s aggrieved employees.

Plaintiff wishes to bring a representative action on behalf of himself and the State of California as well as on behalf of a group of aggrieved employees defined as: All non-exempt employees who are employed or have been employed by NEXGEN AIR CONDITIONING AND HEATING, INC., in the State of California who worked one or more pay periods since one (1) year prior to the date of this letter and continuing to the present plus any additional time during which the statutes of limitation for the causes of action herein were tolled pursuant to Emergency Rule 9 of the California Rules of Court, the ‘Emergency Rules Related to COVID-19’. (“aggrieved employees”).

Any limitations period referenced in this letter is extended pursuant to Emergency Rule 9 (a) of the “Emergency Rules Related to COVID-19,” Appendix I to the California Rules of Court, adopted effective April 6, 2020, which provides that the statutes of limitation that exceed 180 days for civil actions are tolled from April 6, 2020 until October 1, 2020 [“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.”] Any reference to the relevant time period or statute of limitations referenced in this letter is extended into the past by the number of days in which this tolling was in effect.

Defendant has engaged in practices that violate Labor Code §§ 226.7 and 512 with respect to Plaintiff and all aggrieved employees. Labor Code §§ 226.7 and 512 require an employer to pay an additional hour of compensation for each meal period the employer fails to provide. Employees

LABOR & WORKFORCE DEVELOPMENT AGENCY

California Labor Code §2699 Penalties

October 6, 2021

Page 2 of 3

are entitled to a first meal period of at least thirty (30) minutes for shifts over five (5) hours, to be provided within the first five (5) hours of the shift. Pursuant to Labor Code § 226.7(c), if an employer fails to provide an employee with a lawful meal period, the employer must pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that a thirty (30) minute uninterrupted meal period was not provided, was not provided in full, or was not provided in a timely manner. Meal periods must be free of employer control, uninterrupted, and the employee must be free to leave the premises.

Defendant failed to apprise Plaintiff and the aggrieved employees of their rights associated with meal periods and failed to provide timely meal periods. In addition, Defendant has had a consistent policy of: (1) failing to provide Plaintiff and the aggrieved employees compliant meal periods; and (2) failing to pay such employees one (1) hour of pay at the employees' regular rate of compensation for each workday that the complaint meal period was not provided. Very recently, on July 15, 2021, in *Ferra v. Loews Hollywood Hotel, LLC*, the California Supreme Court set forth the formula for calculating the one extra hour of premium pay that employees are owed if an employer fails to provide a compliant meal period or rest break. Specifically, the Court held that those premium payments must include the hourly value of any nondiscretionary earnings (such as a nondiscretionary bonuses), and cannot simply be paid at an employee's base hourly rate.

Pursuant to Labor Code § 226.7 and Wage Order 4-2001, Defendant failed to provide Plaintiff and the aggrieved employees with rest breaks of not less than ten (10) minutes per four (4) hour work period or major fraction thereof. Defendant failed to maintain a policy informing Plaintiff and the aggrieved employees of this right. In addition, Plaintiff and all aggrieved employees have been required to work four-hour increments (or major fractions thereof) without being provided with a ten (10) minute rest period. As such, Defendant failed to provide Plaintiff and the Proposed Class with compliant rest periods. Further, Plaintiff and the aggrieved employees were not compensated with one (1) hour of wages at the regular rate of compensation for each missed rest period in violation of *Ferra*. As discussed above, *Ferra* requires the rest period premium payments must include the hourly value of any nondiscretionary earnings (such as a nondiscretionary bonuses), and cannot simply be paid at an employee's base hourly rate.

Labor Code § 2802 provides that an employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties. Defendant has failed to reimburse Plaintiff and aggrieved employees the cost of using their personal cell phones for necessary business related purposes. Defendant required that Plaintiff and the aggrieved employees download and pay for phone applications on their personal cell phones and consistently use these personal cell phones for necessary work-related purposes. These cell phones were not provided by Defendant and Defendant failed to reimburse Plaintiff and the aggrieved employees for the costs associated with using these personal cell phones.

Defendant also engaged in a practice of failing to provide accurate itemized wage statements in violation of Labor Code § 226(a), which requires that every employer shall, semimonthly or at the

LABOR & WORKFORCE DEVELOPMENT AGENCY

California Labor Code §2699 Penalties

October 6, 2021

Page 3 of 3

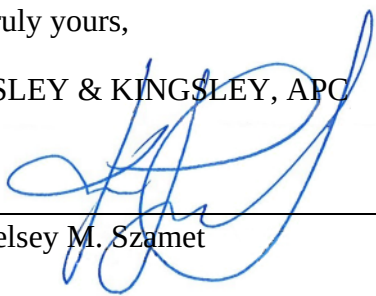
time of each payment of wages, furnish each employee an accurate itemized statement in writing showing a number of specific items, including total hours worked and all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee. Here, Defendant has failed to furnish accurate itemized wage statements that show total hours worked by the employee and all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee under Labor Code §§ 226(a)(2) and (9). Thus, Plaintiff is an aggrieved employee within the meaning of PAGA and Defendant has violated Labor Code §226(a) with respect to Plaintiff and all aggrieved employees.

Labor Code § 203 provides that if “an employer willfully fails to pay...any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but the wages shall not continue for more than 30 days.” Here, Plaintiff and all aggrieved employees were not paid all wages due upon their separation from Defendant’s employ. As such, Plaintiff is an aggrieved employee and Defendant failed to pay Plaintiff and all aggrieved employees all wages due at the time of termination or within seventy-two (72) hours of their resignation, and have failed to pay those sums for thirty (30) days thereafter in violation of Labor Code §203.

We are constrained to move forward with the filing of this complaint alleging causes of action pursuant to Labor Code §§ 201, 202, 203, 226(a), 226.7, 512, and 2802 with or without the PAGA claim. Thus, any action by the LWDA would not resolve the entirety of the case, and the interest of judicial economy will be served by allowing the case to proceed as a cohesive whole.

Very truly yours,

KINGSLEY & KINGSLEY, APC

By: 

Kelsey M. Szamet

KMS/km

- Cc:
1. LWDA Letter filed via Electronic Submission: <https://dir.tfaforms.net/308>
 2. NEXGEN AIR CONDITIONING AND HEATING, INC. via USPS Certified Mail # 7019 1640 0000 8115 0768

EXHIBIT "2"



State of California

Labor and Workforce Development Agency /
Department of Industrial Relations

Private Attorneys General Act (PAGA) – Filing

New PAGA Claim Notice

Your Information (Person Who is Filing)

Your First Name *

Kelsey

Your Last Name *

Szamet

Firm Name (if any) *

Kingsley & Kingsley, APC

(Enter "in pro per" if you are representing yourself)

Your Email Address *

service@kingsleykingsley.c

Your Street Name, Number and Suite/Apt *

16133 Ventura Blvd., Ste 1

Your Mobile Phone Number

8189908300

Your City *

Encino

Your Work Phone Number

Your State *

California

Your Zip/Postal Code *

91436

Plaintiff Information

Plaintiff/Aggrieved Employee Name *

Ruben Tamayo

Plaintiff/Aggrieved Employee Occupation *

Installer

[Add Additional Plaintiffs](#)

Employer Information

Employer Entity Type

Please select...

Employer Name *

Nexgen Air Conditioning and Heating, Inc.

Maximum 80 Character Limit

Employer Street Name, Number and Suite/Apt *

700 North Valley Street, Suite K

Employer City *

Anaheim

Employer State *	Employer Zip/Postal Code *
California ▼	92801
Employer Industry *	Employer Industry for "Other" *
Other ▼	Plumbing, Heating, and Ai

Add additional defendants

☐ Add any entity other than an individual

☐ Add an individual/sole proprietor employer

Notice General Information

Estimated Number of Employees Impacted by Violations *

50

Notice Violations – Check All that Apply *

- ☐ Child Labor
- ☐ Misclassification Employee Classified as Contractor
- ☐ Misclassification NonExempt Classified as Exempt
- ☐ Minimum Wage
- ☐ Overtime
- ☐ Not paid for all hours worked
- ☒ Not paid wages due on termination
- ☐ Other Unpaid Wages
- ☐ Tips or Gratuities
- ☒ Payment or Reimbursement of Employee Expenses
- ☐ Improper Form of Payment Including NSF Checks
- ☐ Kickbacks
- ☒ Meal and Rest Breaks
- ☐ Sick Leave
- ☐ Lactation Accommodation (Labor Code 1030–1033)
- ☐ Not providing required time off, other
- ☐ Pay Discrimination on basis of sex, (Labor Code 1197.5)
- ☐ No Wage Statements
- ☒ Improper or Incomplete Wage Statements
- ☐ Other Notice or Posting or Recordkeeping
- ☐ Public Works (Labor Code 1720 – 1815)
- ☐ Apprenticeship (Labor Code 3070 – 3098)
- ☐ Occupational Safety and Health (Labor Code 6300 et seq)
- ☐ No Workers' Compensation
- ☐ Licensing, Registration, or Permit
- ☐ Unfair Immigration Activities
- ☐ Agricultural Labor Relations
- ☐ Industrial Homework
- ☐ Retaliation for Protected Status or Activity (Specify)
- ☐ Other

Child Labor – Specify Ages

PAGA Claim Type – Check All that Apply *

- ☒ Notice asserts one or more Labor Code violations listed in Labor Code 2699.5– not curable subject to 2699.3(a)
- ☐ Notice asserts one or more OSHA violations subject to requirements of 2699.3(b)
- ☐ Includes one or more violations not listed in Labor Code 2699.5 – curable subject to 2699.3(c)

Filing Fee

A filing fee of \$75 is required to file a new PAGA claim notice.

IFP

☐ I wish to claim In Forma Pauperis and am attaching a Confidential Request to Waive Court Fees (Judicial Council Court Form FW-001) or similar form to this submission.

Billing information

Billing First Name *

Eric

Billing Last Name *

Kingsley

Billing Email *

service@kingsleykingsley.c

Billing Phone

8189908300

Billing Street Name, Number and Suite/Apt *

16133 Ventura Blvd., Suite 1200

Billing City *

Encino

Billing State *

California

Billing Zip/Postal Code *

91436

Credit Card Type *

Credit Card Number *

CVV Number *

Credit Card Expiration Month *

mm

Credit Card Expiration Year *

yyyy

Notice and Other Attachments

PAGA Claim Notice (must be a .pdf) *

Choose File

LWDA Letter – ...ating Inc.pdf

Other Attachment – (if any) (must be a .pdf)

Choose File

No file chosen

[Add Another Attachment](#)

Should you have questions regarding this online form, please contact PAGAInfo@dir.ca.gov

IMPORTANT NOTICE OF REDACTION RESPONSIBILITY: All filers must redact: Social Security or taxpayer identification numbers; personal addresses, personal telephone numbers, personal email addresses, dates of birth; names of minor children; & financial account numbers. This requirement applies to all documents, including attachments.

☒ I understand that, if I file, I must comply with the redaction rules consistent with this notice.

[Previous Page](#)[Submit](#)

Thank you. If you provided an email address with your submission, a confirmation regarding your submission will be emailed to you. Otherwise, you can search for the case to verify that your submission was properly received.

[Click Here](#) to Search Case

From: noreply@salesforce.com on behalf of LWDA DO NOT REPLY
<lwdadonotreply@dir.ca.gov>
Sent: Wednesday, October 6, 2021 9:56 AM
To: Service Email
Subject: Thank you for submission of your PAGA Case.

External Email!

10/6/2021

LWDA Case No. LWDA-CM-847483-21
Law Firm : Kingsley & Kingsley, APC
Plaintiff Name : Ruben Tamayo
Employer: Nexgen Air Conditioning and Heating, Inc.
Filing Fee : \$75.00
IFP Claimed : No

Item submitted: Initial PAGA Notice

Thank you for your submission to the Labor and Workforce Development Agency. Please make a note of the LWDA Case No. above as you may need this number for future reference when filing any subsequent documents for this Case.

If you have questions or concerns regarding this submission or your case, please send an email to pagainfo@dir.ca.gov.

DIR PAGA Unit on behalf of
Labor and Workforce Development Agency

Website:

https://nam10.safelinks.protection.outlook.com/?url=http%3A%2F%2Flabor.ca.gov%2FPrivate_Attorneys_General_Act.htm&data=04%7C01%7CKimberly%40kingsleykingsley.com%7C08d02bda15ff4a7ca9d508d988ea3d3c%7C121a7875dbeb4c0fb25c5baf6c6ac7a5%7C0%7C0%7C637691361916106769%7CUnknown%7CTWFpbGZsb3d8eyJWlloiMC4wLjAwMDAiLCJQIjoiV2luMzliLCJBTiI6Ikl1haWwiLCJXVCi6Mn0%3D%7C1000&data=Imr9%2FmiCSluVYcr3VbZNsZl7FKntPB5c2bWlApRcDBc%3D&reserved=0

From: noreply@salesforce.com on behalf of LWDA DO NOT REPLY
<lwdadonotreply@dir.ca.gov>
Sent: Wednesday, October 6, 2021 9:57 AM
To: Service Email
Subject: State of California - Department of Industrial Relations Customer Receipt / Purchase Confirmation

External Email!

Thank you for your payment.

Order Information

Merchant: State of California - Department of Industrial Relations

Case Number: LWDA-CM-847483-21

Order Number: ORD-000137863

Total:\$75.00

Card Type: XXXXXXXXXX

Date: 10/6/2021

Billing Information

Name: Eric Kingsley

Email: service@kingsleykingsley.com

Billing Address:

16133 Ventura Blvd., Suite 1200

Encino, California

91436