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Judge William Claster

CX-104

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

Daisy Mercedes Gonzalez, individually, on
behalf of the State of California, as a private
attorney general, and on behalf of all Aggrieved
Employees,

PLAINTIFF,

v.

GALLAGHER BASSETT SERVICES INC., A
DELAWARE CORPORATION; DOES 1 to 50,
inclusive,

DEFENDANT.

CASE NO. 30-2021-01236389-CU-OE-CXC

**PAGA REPRESENTATIVE ACTION
COMPLAINT FOR:**

**PENALTIES PURSUANT TO LABOR
CODE § 2699, ET SEQ. FOR
VIOLATIONS OF CALIFORNIA LABOR
CODE § 2802**

1 Plaintiff Daisy Mercedes Gonzalez (“Plaintiff”), on behalf of the State of California and
2 other “Aggrieved Employees” and acting as a private attorney general under the Labor Code
3 Private Attorneys General Act of 2004, § 2699, *et seq.* (“PAGA”) complains of Defendant
4 Gallagher Bassett Services Inc., and DOES 1 to 50 (collectively, “Defendants”) and each of them,
5 and alleges the following upon information and belief:

6 **INTRODUCTION**

7 1. This is a representative action brought pursuant to Labor Code § 2699, *et seq.*, on
8 behalf of the State of California and a group of Aggrieved Employees defined as follows:

9 **The “Aggrieved Employees”:**

10 Plaintiff and all other California residents who are or were employed as non-exempt
11 employees by Defendant and who were required to work from home because their offices
were closed for at least one pay period during the PAGA Period.

12 2. The “PAGA Period” is defined as the period from one year and six months¹ prior to
13 sending of Plaintiff’s LWDA Letter, which was sent on October 7, 2021, through the present and
14 ongoing. With the emergency rule 9 tolling, the PAGA Period is from April 1, 2020 to the present,
15 (“PAGA Period”).

16 3. Plaintiff, on behalf of herself and all Aggrieved Employees presently or formerly
17 employed by Defendant during the PAGA Period, bring this representative action pursuant to Labor
18 Code § 2699, *et seq.* seeking penalties for Defendant’s violation of California Labor Code § 2802.
19 Based upon the foregoing, Plaintiff and all Aggrieved Employees are Aggrieved Employees within
20 the meaning of Labor Code §2699, *et seq.*

21 **THE PARTIES**

22 4. Plaintiff Daisy Mercedes Gonzalez is a resident of California and at all times
23 pertinent hereto worked for Defendant, and she worked for Defendant from home during the
24 pandemic in 2020 and 2021.

25 5. Plaintiff and all Aggrieved Employees are, and at all times pertinent hereto, have
26 been classified as non-exempt employees by Defendant, and have been hired to work for Defendant
27

28 ¹ Emergency Rule 9 tolled the statute of limitations for civil causes of action from April 6, 2020 until October 1, 2020.
Therefore, the applicable one year statute of limitations on Plaintiff’s PAGA penalties claim is extended six months.

1 in California, performing office work in Defendant's offices before stay-at-home orders went into
2 effect.

3 6. Gallagher Bassett Services Inc. is a leader in insurance services, providing *inter alia*
4 worker's compensation insurance policies for businesses throughout California. Gallagher Bassett
5 Services Inc. has offices in Orange County. Defendant employed Plaintiff and similarly situated
6 persons as employees within California. Defendant has done and do business throughout the State
7 of California including in Orange County, during the PAGA Period.

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

15 8. Plaintiff is informed and believes, and based thereon alleges, that each Defendant
16 acted in all respects pertinent to this action as the agent of the other Defendants, carried out a joint
17 scheme, business plan or policy in all respects pertinent hereto, and the acts of each Defendant are
18 legally attributable to the other Defendants. Accordingly, all Defendants engaged, suffered, and
19 permitted Plaintiff and all other Aggrieved Employees to perform services from which they
20 benefitted. Moreover, the aforementioned entities had the right to exercise control over the wages,
21 hours and/or working conditions over Plaintiff and all Aggrieved Employees at all relevant times
22 herein, so as to be considered the joint employers of all of the Aggrieved Employees. By reason of
23 their status as joint employers, they are each liable for civil penalties for violation of the California
24 Labor Code as to the Plaintiff and other Aggrieved Employees as set forth herein.

25 **JURISDICTION AND VENUE**

26 9. This Court has subject matter jurisdiction over any and all causes of action asserted
27 herein pursuant to Article VI, § 10 of the California Constitution and California Code of Civil
28 Procedure § 410.10 by virtue of the fact that this is a civil action in which the matter in controversy,

1 exclusive of interest, exceeds \$25,000, and because each cause of action asserted arises under the
2 laws of the State of California or is subject to adjudication in the courts of the State of California.

3 10. This Court has personal jurisdiction over Defendant because Defendant has caused
4 injuries in the County of Orange and State of California through their acts, and by their violation of
5 the California Labor Code and California state common law.

6 11. Venue as to each Defendant is proper in this judicial district, pursuant to Code of
7 Civil Procedure § 395. Defendant operates within California and do business within Orange
8 County, California. The unlawful acts alleged herein have a direct effect on Plaintiff and all
9 “employees” within the State of California and Orange County.

10 12. Further, to the extent that Defendant may claim that Plaintiff has signed an
11 arbitration agreements or severance agreements, venue is still appropriate in the Superior Court of
12 Orange County as PAGA claims are not arbitrable as a matter of law and not subject to general
13 releases. *See Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348, 383 (2014) (holding “a
14 PAGA claim lies outside the FAA’s coverage because it is not a dispute between an employer and
15 an employee arising out of their contractual relationship. It is a dispute between an employer and
16 the state”); *See also, Kim v. Reins Int’l*, 9 Cal.5th 73 (2020). (settlement of individual claims does
17 not strip a plaintiff of PAGA standing).

18 **COMMON ALLEGATIONS**

19 13. From at least one year and six months ago and continuing into the present, during
20 which time various work from home orders were in effect, Plaintiff and the Aggrieved Employees,
21 at the direction of Defendant and/or with Defendant’s knowledge and acquiescence, have been
22 expected to work from home, have worked from home and incurred home office expenses
23 including, among other things, home internet expenses, electricity, and cell-phone expenses, in
24 order to perform necessary work-related duties. Plaintiff, who was employed by Defendant, was
25 not able to work on premises at Defendant’s offices but instead were expected to, and did, work
26 from home, like the other Aggrieved Employees. To be clear, Defendant sent home their
27 California-resident office-based employees during the period from at least one year ago and six
28 months ago to the present without affirmatively and proactively reimbursing them for a reasonable

1 portion of their monthly home internet and cell phone expenses.

2 14. During the COVID-19 stay at home orders and office closures, Plaintiff and the
3 aggrieved employees were thus expected by Defendant to work from home, did work from home
4 and were required to pay for, and have personally paid for, among other things, home internet
5 service, cell phone and work-related home electricity expenses in the discharge of their job duties
6 (the “home office expenses”). These expenses ranged, but typically amounted from \$50 to \$150
7 per month per aggrieved employee.

8 15. Defendant had no policy to affirmatively and proactively reimburse all of its
9 employees who were forced to work from home during the COVID-19 pandemic for their monthly
10 recurring home office expenses, other than one initial \$500 stipend specifically designated for home
11 office equipment. Notably, Defendant did not provide any monthly recurring stipend for
12 reimbursement thereafter for monthly home office expenses. In sum, Defendant’s expense-related
13 policies and/or practices require and expect, and/or with Defendant’s knowledge thereof permit,
14 Plaintiff and the Aggrieved Employees to pay for monthly home office expenses incurred in direct
15 consequence of discharging their necessary, reasonable and business-related job duties on behalf of
16 Defendant, without reimbursement in full by Defendant for such expenses, as required by
17 California law.

18 16. California Labor Code section 2802 requires an employer to "indemnify his or her
19 employee for all necessary expenditures or losses incurred by that employee in direct consequence
20 of the discharge of his or her duties." See Cal. Labor Code section 2802(a); *see also* 2802(c) where
21 necessary is defined to include all “reasonable” costs. “The elements of a claim under Section
22 2802 are: (i) the employee made expenditures or incurred losses; (ii) the expenditures or losses
23 were incurred in direct consequence of the employee's discharge of his or her duties, or obedience
24 to the directions of the employer; and (iii) the expenditures or losses were reasonable and
25 necessary.” *Marr v. Bank of America*, 2011 U.S. Dist. LEXIS 24868 (N.D. March 8,
26 2011) (*citing Gattuso v. Harte-Hanks Shoppers, Inc.*, 42 Cal.4th 554, 568 (2007)). “In addition, the
27 employer ‘must either know or have reason to know that the employee has incurred [the] expense.’”
28 *Id.* (*citing Stuart v. RadioShack Corp.*, 641 F.Supp. 2d 901 (N.D.Cal. 2009)). Where an employer

1 has knowledge that employees are incurring a reimbursable expense, the employer must “exercise
2 due diligence to ensure each employee is reimbursed.” *Marr*, at *1. The right of an employee to
3 expense reimbursements is not waivable. *See* Cal. Labor Code sections 2804 and 219(a). Any
4 contract to waive them is null and void. *Edwards v. Arthur Anderson*, 44 Cal. 4th 937, 951 (2008)

5 17. Furthermore, under Labor Code section 2802, employers must reimburse employees
6 for all necessary and/or reasonable work-related expenses, regardless of whether or not the
7 employees incurred any additional out-of-pocket expense from that work-related use. *See, Cochran*
8 *v. Schwan’s Home Service, Inc.*, 228 Cal.App.4th 1137 (Cal. Aug. 12, 2014) (“We hold that when
9 employees must use their personal cell phones for work-related calls, Labor Code section 2802
10 requires the employer to reimburse them. Whether the employees have cell phone plans with
11 unlimited minutes or limited minutes, the reimbursement owed is a reasonable percentage of their
12 cell phone bills.”); *see also, Herrera v. Zumiez*, F.3d, 2020 WL 1301057, at *11 (9th Cir. Mar. 19,
13 2020) (same). The same logic would obviously apply to monthly home internet expenses.

14 18. Where, as here, employees in California are expected or mandated to use their
15 internet at home for work, courts have held that they incurred cell phone expenses in “direct
16 consequence of the discharge of his or her duties” and were entitled to reimbursement. *See Aguilar*
17 *v. Zep, Inc.*, 2014 US Dist LEXIS 120315, *54 (N.D.Cal. Aug. 27, 2014) (Hon. Edward Chen)
18 (where outside sales reps used home internet and computers for work, and even admitted that they
19 would have incurred the same expenses without work duties, the court nevertheless held that the
20 employer was obligated to reimburse some reasonable portion of these expenses); *see also Ritchie*
21 *v. Blue Shield of California*, 2014 WL 6982943, at *21 (N.D.Cal. Dec. 9, 2014) (Hon. Edward
22 Chen) (certifying class of home office claims processors with 2802 phone reimbursement claims
23 for landline reimbursements where company required claims processors working from home to
24 have a landline, but rejecting certification of claims for home office supplies as individualized).

25 19. Where, as here, Defendant closed its California offices and sent employees to work
26 from home to use their home internet there, and thus, Defendant **knew** or had constructive
27 knowledge that business-related expenses were being incurred on a monthly basis by its employees,
28 it cannot simply hide behind a reimbursement policy allowing employees to seek expense

1 reimbursement, and fail to affirmatively and proactively reimburse employees for their work-
2 related home office expenses. *See Stuart v. RadioShack Corp.*, 641 F.Sup.2nd 901, 092-3 (April 30,
3 2009) (“The Court concludes that a fair interpretation of Sections 2802 and 2804 which produces
4 ‘practical and workable results,’ Gattuso, at 567, consistent with the public policy underlying those
5 sections, focuses not on whether an employee makes a request for reimbursement but rather on
6 whether the employer either knows or has reason to know that the employee has incurred a
7 reimbursable expense. If it does, it must exercise due diligence to ensure that each employee is
8 reimbursed.”); *See also Stuart v. RadioShack Corp.*, 259 F.R.D. 200, 202-205 (N.D. Cal. August
9 28, 2009) (“ ... RadioShack claims that, because Mr. Stuart (and presumably other class members)
10 did not submit reimbursement requests, it had no reason to believe that he had any expenses to
11 reimburse. ... However, this ignores the undisputed evidence that information about intercompany
12 store transfers ("ICSTs") was maintained in RadioShack’s database. The parties do not disagree that
13 RadioShack knew about the ICST information on the database and that RadioShack was able, for
14 the most part, to identify which employees had performed the ICSTs. Hence, given the records
15 in RadioShack’s position, RadioShack could not reasonably rely on employee failure to request
16 reimbursement”).

17 20. The “knew or should have known and failed to exercise due diligence to reimburse”
18 standard and the mechanics of how Section 2802 operates have been repeatedly adopted by other
19 courts since the issuance of Judge Chen’s thoughtful decisions in RadioShack. *See e.g., Wilson v.*
20 *Kieweit Pacific Co.*, 2010 W.L. 5059522 (N.D. Cal.) (Hon. Susan Illston)
21 (adopting *Radioshack* “knew or should have known” standard); *Abdullah et al. v. U.S. Security*
22 *Associates*, 09-CV-9554-GHK (C.D. Cal. 2011) (Hon. George King) (adopting the standard set
23 forth in *Radioshack*: “the law requires that once an employer knows or has reason to know that the
24 employee has incurred an expense, then it has the duty to exercise due diligence and take any and
25 all reasonable steps to ensure that the employee is reimbursed for the expense”); *Marr v. Bank of*
26 *America*, 2011 WL 845914 (N.D. Cal. 2011) (Hon. William Alsup) (adopting “knew or should
27 have known standard”); *Morse v. Servicemaster Global Holdings, Inc.*, 2011 WL 2470252
28 (N.D.Cal.2011) (Hon. Susan Illston) (rejecting strict liability “ensure” standard in favor of the

1 “knew or should have known” standard from *Radioshack*); see also *McLeod v. Bank of Am.*,
2 *N.A.*, 2017 U.S. Dist. LEXIS 205273 (N.D. Cal., December 13, 2027) (adopting the standard set
3 forth in *Radioshack*: “Plaintiff need only prove Defendant’s constructive knowledge that mileage
4 was being incurred without being reimbursed, not actual knowledge of each individual trip”).

5 21. Defendant was aware or should have been aware that Plaintiff and the Aggrieved
6 Employees regularly incurred and incur monthly home office expenses in the discharge of their
7 duties as employees by virtue of Defendant’s instructions to Plaintiff and the Aggrieved Employees
8 to work from home order and/by their announcements of office closures during the COVID-19
9 pandemic.² Specifically, Plaintiff and all other Aggrieved Employees were required on a daily basis
10 to use their personal cell phones for VPN authentication to access Defendant’s servers from their
11 home locations. Also, Plaintiff and the Aggrieved Employees could not perform their job duties at
12 home for Defendant without accessing Defendant’s servers and network via the internet. Defendant
13 nevertheless has, throughout the PAGA Period, and specifically during work from home orders and
14 office closures during the COVID-19 pandemic, failed and refused to affirmatively and proactively
15 reimburse Plaintiff and the Aggrieved Employees for such monthly recurring home internet, cell
16 phone, electricity and home office expenses incurred by them in connection with their work.

17
18 ² Numerous employment law firms representing California employers advised their clients to make monthly
19 reimbursement payments to workers working from home during the pandemic. See,
20 <https://www.fisherphillips.com/news-insights/covid-19-litigation-testing-limits-california-expense.html> (“When remote
21 work is mandatory – even if ordered by California or local authorities – employees must be reimbursed for the
22 necessary expenses they incur while working at home.”) (3/21/21); <https://www.morganlewis.com/-/media/files/publication/presentation/webinar/2020/californiaemploymentlawupdatejasscwebinar92920.pdf> (“In
23 response to lockdowns, employers have required employees to work from home. Strong argument that many expenses
24 needed to facilitate work from home are reimbursable.”) (Slide at p. 52); <https://www.acc.com/sites/default/files/2020-04/COVID-19%20CA%20Slides.pdf> (“Telecommuting Considerations Q. Must employers reimburse employees for
25 expenses incurred while teleworking? A. Yes. California employers are required to reimburse employees for “all
26 necessary expenditures or losses incurred by the employee” in the course of the employee’s job, as well as for any
27 expenses arising out of an employer’s directive. Cal. Labor Code section 2802. This question is likely to be implicated
28 if employees are asked to work from home. ...”) (Cozen O’Conner; Slide 23/28, 3/26/20); and <https://www.jdsupra.com/legalnews/when-how-much-to-pay-for-work-from-home-8302177/> (“During the pandemic
when workplaces were closed and employees had to work from home due to Covid-19 restrictions, employers were
required to either provide the equipment needed to work from home (such as internet access and a computer/phone), or
to reimburse employees for those costs. Case law interpreting Cal. Labor Code Section 2802 holds that employers
cannot benefit from employees’ use of their own equipment, even if it doesn’t cost the employee extra to use their
phone or internet. Bottomline: Some portion must be paid, typically in some sort of Work From Home or Phone
Allowance.”); See also Jackson Lewis, “Reimbursements”, <https://www.acc.com/sites/default/files/program-materials/upload/3.22%20Mini%20MCLE%20La-Law-palooza.pdf> (“recommend providing a flat rate (stipend), but
also allow for employees to request more if actual costs exceed the flat amount.”)

FIRST CAUSE OF ACTION
PENALTIES PURSUANT PAGA. LABOR CODE § 2699, *ET SEQ.*
FOR VIOLATIONS OF LABOR CODE § 2802
PLAINTIFF ON BEHALF OF LWDA AND ALL AGGRIEVED EMPLOYEES AGAINST DEFENDANT

22. Plaintiff, on behalf of herself and all Aggrieved Employees, realleges and incorporates by reference all previous paragraphs.

23. Based on the above allegations incorporated by reference, Defendant has violated Labor Code § 2802, throughout the PAGA period.

24. Under Labor Code §§ 2699(f)(2) and 2699.5, for each such violation, Plaintiff and all other Aggrieved Employees are entitled to penalties in an amount to be shown 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.

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

26. Pursuant to Labor Code § 2699.3 (a), on October 7, 2021, Plaintiff gave written notice by certified mail to Defendant and to the LWDA of their claims for violations of Labor Code § 2802, including theories supporting these claims as alleged herein. As of the date of this Complaint, the LWDA has not responded to Plaintiff's PAGA letter. Plaintiff has also paid the required \$75 filing fees. Accordingly, Plaintiff has fulfilled all administrative prerequisites to the filing and pursuit of their PAGA claims on behalf of themselves and all other current and former Aggrieved Employees of Defendant.

27. As a result of the acts alleged above, Plaintiff seek penalties under Labor Code § 2699, et seq. because of Defendant's violation of Labor Code § 2802.

RELIEF REQUESTED

WHEREFORE, Plaintiff prays for the following relief:

1. For penalties and other relief allowable under Labor Code § 2699, *et seq.* for Plaintiff, the LWDA, and all Aggrieved Employees because of Defendant's violation of Labor

1 Code § 2802;

2 2. A civil penalty against Defendant in the amount of \$100 for the initial violation and
3 \$200 for each subsequent violation as specified in section 2699(f)(2) of the California Labor Code
4 for Plaintiff and all Aggrieved Employees for each and every pay period during that occurred
5 during the PAGA Period;

6 3. An award of reasonable attorney's fees against Defendant as allowed by law,
7 including without limitation, in Labor Code § 2699(g)(1), for all the work performed by the
8 undersigned counsel in connection with the PAGA claims;

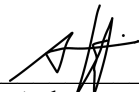
9 4. An award of all costs incurred by the undersigned counsel for Plaintiff in connection
10 with Plaintiff's, the LWDA's and the Aggrieved Employees' claims against Defendant as allowed
11 by law, including without limitation, Labor Code § 2699(g)(1);

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

13
14 Respectfully submitted,

15 ACKERMANN & TILAJEF, P.C.
16 EMPLOYMENT RIGHTS LAW GROUP, APC

17 Dated: December 15, 2021

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19 _____
20 Craig J. Ackermann, Esq.
21 Amir Seyedfarshi, Esq.
22 *Attorneys for Plaintiff, the LWDA, and the Aggrieved*
23 *Employees*
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