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Superior Court of California,
County of San Diego
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Clerk of the Superior Court
By Jimmy Siharath, Deputy Clerk

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

WHITNEY BEGLE, individually and on
behalf of other aggrieved employees,

Plaintiff,

v.

R. W. SELBY & CO., INC., a corporation;
and DOES 1 through 50, inclusive,

Defendants.

Case No. 37-2022-00017612-CU-OE-CTL

Representative Action Complaint

1. Failure to Pay All Overtime Wages
2. Meal Period Violations
3. Rest Period Violations
4. Paid Sick Leave Violations
5. Supplemental Paid Sick Leave Violations
6. Failure to Reimburse Business Expenses
7. Untimely Payment of Wages
8. Wage Statement Violations
9. Waiting Time Penalties
10. Recordkeeping Violations

1 Plaintiff WHITNEY BEGLE (“Plaintiff”), individually as the State of California’s
2 designated proxy under the Private Attorneys General Act (“PAGA”), and on behalf of other
3 current and former aggrieved employees, brings this representative action against Defendants
4 R. W. SELBY & CO., INC., a corporation registered to do business in California, and DOES 1
5 through 50 (collectively, “Defendants”), alleging as follows:

6 **INTRODUCTION**

7 1. This case is filed by Plaintiff, an aggrieved employee, seeking civil penalties
8 against Defendants for violations of the California Labor Code. Plaintiff’s claims are premised
9 upon Defendants’ failure to include all forms of remuneration in the “regular rate of pay” or
10 “regular rate of compensation” used to lawfully calculate and pay certain wages and premiums to
11 its employees.

12 2. In connection with Plaintiff’s employment and the employment of others within
13 the State of California, Defendants committed numerous systemic Labor Code violations for
14 which Plaintiff now seeks to receiver civil penalties pursuant to Labor Code § 2698 *et seq.*

15 **JURISDICTION & VENUE**

16 3. Jurisdiction of this action is proper in this Court under Article VI, Section 10 of
17 the California Constitution.

18 4. Plaintiff is informed and believes that her *individual* PAGA claims do not arise to
19 the necessary amount in controversy to implicate traditional jurisdiction under 28 U.S.C. section
20 1332(a) or jurisdiction under the Class Action Fairness Act.

21 5. Venue as to each defendant is proper in this judicial district because Defendants
22 employed Plaintiff and aggrieved employees in this county, and committed some of the alleged
23 Labor Code violations in this county.

24 **PARTIES**

25 6. Plaintiff worked for Defendants in San Diego County from October 2018 through
26 January 2022 as an hourly, non-exempt employee. During her employment with Defendants,
27 Plaintiff held the position of Assistant Property Manager.
28

1 7. Defendant R.W. SELBY & CO., INC does business and employs aggrieved
2 employees throughout California, including in San Diego County.

3 8. The true names and capacities, whether individual, corporate, or otherwise, of the
4 parties sued as DOES 1 through 50, are presently uncertain to Plaintiff, who sues them by such
5 fictitious names under Code of Civil Procedure section 474. Plaintiff is informed, believes, and
6 alleges that each of the fictitiously-named defendants is responsible in some manner for the acts
7 and omissions alleged herein.

8 9. Plaintiff is informed, believes, and alleges that all defendants in this action are
9 employers and/or joint employers and part of an integrated employer enterprise, as each defendant
10 exercises control over the wages, hours, and working conditions of Plaintiff and the aggrieved
11 employees, suffers and permits them to work, and engages the workforce creating a common law
12 employment relationship. Additionally, all defendants have common ownership, common
13 management, interrelationship of operations, and centralized control over labor relations and are
14 therefore part of an integrated enterprise and thus jointly and severally responsible for the acts
15 and omissions alleged herein.

16 10. Plaintiff is informed, believes, and alleges that each defendant acted in all respects
17 pertinent to this action as an alter-ego, agent, servant, joint employer, joint venturer, co-
18 conspirator, partner, in an integrated enterprise, or in some other capacity on behalf of all other
19 co-defendants, such that the acts and omissions of each defendant are legally attributable to all
20 others.

21 11. Plaintiff is informed, believes, and alleges that the above-mentioned defendants
22 violated and/or caused to be violated Labor Code and IWC Wage Order provisions and/or
23 regulating minimum wages and days of work and other provisions of the Labor Code with respect
24 to the aggrieved employees. As a result, they may be held personally liable under Labor Code
25 sections 558, 558.1, and 1197.1. (*See, e.g., Atempa v. Pedrazzani* (2018) 27 Cal. App. 5th 809.)

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1 17. Within 33 calendar days of the postmark date of the notice sent by Plaintiff,
2 Defendants did not give written notice by certified mail to Plaintiff providing a description of any
3 actions taken to cure the alleged violations.

4 18. Now that at least 65 days have passed from Plaintiff notifying Defendants of these
5 violations, without any notice of cure from Defendants or notice from the LWDA of its intent to
6 investigate the alleged allegations and issue the appropriate citations to Defendant, Plaintiff
7 exhausted all prerequisites and commences this civil action under Labor Code § 2699.

8 19. Any allegations regarding violations of the IWC Wage Orders are enforceable as
9 violations of Labor Code section 1198, which states: “[t]he employment of any employee for
10 longer hours than those fixed by the order or under conditions of labor prohibited by the order is
11 unlawful.”

12 **GENERAL ALLEGATIONS**

13 20. Defendants paid Plaintiff and other aggrieved employee hourly compensation plus
14 other forms of remuneration, including, but not limited to sales commissions. When Defendants
15 paid overtime and/or doubletime to Plaintiff and the aggrieved employees, Defendants failed to
16 include employees’ additional remuneration (*e.g.*, commissions) in the regular rate of pay.

17 21. In those pay periods, Defendants paid employees at the straight time hourly rate
18 for the overtime hours, failing to pay overtime hours “at the rate of no less than one and one-half
19 times the regular rate of pay for an employee[,]” or “at the rate of no less than twice the regular
20 rate of pay for an employee” for any applicable double time hours, as required by Labor Code
21 § 510, the IWC Wage Orders.

22 22. One illustrative example of this regular rate of pay violation is found on the wage
23 statement Defendants issued to Plaintiff for the pay period from May 25, 2021 through June 9,
24 2021. During this pay period, Plaintiff earned \$350.00 in commissions and worked overtime.
25 Defendants failed to include Plaintiff’s commissions in her “regular rate of pay” and instead paid
26 Plaintiff’s overtime at \$33.42, which is 1.5x her base hourly rate.

27 23. Additionally, Defendants failed to consistently provide timely, off-duty 30-minute
28 meal periods to Plaintiff and the aggrieved employees within the first five hours of work, and

1 timely second off-duty 30-minute meal periods to the extent they worked shifts of 10 hours or
2 more, in violation of Labor Code sections 226.7, 512 and section 11 of the applicable IWC Wage
3 Orders.

4 24. “[T]ime records showing noncompliant meal periods raise a rebuttable
5 presumption of meal period violations, including at the summary judgment stage.” *Donohue v.*
6 *AMN Services, LLC* (2021) 11 Cal. 5th 58, 61.

7 25. Plaintiff’s time records (and those of other aggrieved employees) establish meal
8 period violations throughout the duration of her employment.

9 26. When Defendants did not provide fully compliant meal periods, Defendants failed
10 to pay Plaintiff and the aggrieved employees a meal period premium at the regular rate of
11 compensation in violation of Labor Code section 226.7. *See Ferra v. Loews Hollywood Hotel,*
12 *LLC* (2021) 11 Cal. 5th 858, 863 (“We hold that the terms are synonymous: “regular rate of
13 compensation” under section 226.7(c), like “regular rate of pay” under section 510(a),
14 encompasses all nondiscretionary payments, not just hourly wages”). Instead of paying meal
15 period premiums at the regular rate of compensation, Defendants paid such premiums at
16 employees’ straight time hourly rate.

17 27. Defendants’ practice of not paying all meal period premiums at the lawful rate (*i.e.*,
18 including all forms of remuneration in the “regular rate of compensation”) is a matter of common
19 corporate policy and payroll administration such that it applies and affected Plaintiff and other
20 aggrieved employees and are evident from the time records maintained by Defendants, which
21 show late, short and missed meal periods without an associated meal period premium at the lawful
22 rate on the corresponding employee wage statement.

23 28. Moreover, Defendants failed to authorize or permit ten-minute rest periods for
24 every four hours of work or major fraction thereof as required by Labor Code section 226.7 and
25 516 and section 12 of the applicable IWC Wage Order. When Defendants did not provide a fully
26 compliant rest periods to Plaintiff or other employees, Defendants failed to pay Plaintiff and other
27 aggrieved employees a rest period premium at the lawful “regular rate of compensation” in
28 violation of Labor Code section 226.7.

1 29. In pay periods where Defendants provided Plaintiff and other employees with
2 remuneration in addition to their respective base hourly rate for hours worked (such as sales
3 commissions)—excluding any forms of pay subject to any applicable statutory exclusions from
4 the “regular rate”—Defendants failed to properly calculate and pay paid sick leave at the
5 appropriate regular rate of pay, in violation of Labor Code § 246. Defendants paid sick leave at
6 employees’ straight time hourly rate instead of one of the methods authorized by statute, which
7 required Defendants to factor in employees’ additional remuneration, such as commissions.

8 30. One example of Defendants sick leave violations occurs during the pay period of
9 August 25, 2021 to September 9, 2021. In this pay period, Plaintiff earned commissions in the
10 amount of \$550.00 and also used 22 hours of paid sick leave. Defendants paid Plaintiff’s sick
11 leave at her straight time hourly rate of \$22.28 rather than one of the methods authorized by
12 statute.

13 31. Furthermore, Defendants also failed to pay Covid-19 Supplemental Sick Leave at
14 a rate authorized by statute because when paying such leave, Defendants failed to factor in
15 employees’ commissions and other compensation. On information and belief, Defendants instead
16 paid Supplemental Sick Leave at employees’ straight time hourly rate rather than by one of the
17 methods authorized by Labor Code sections 248.2 and 248.6.

18 32. Defendants’ workforce frequently worked from home, but Defendants did not
19 maintain a lawful reimbursement policy, in violation of Labor Code section 2802. Defendants
20 required Plaintiff and the aggrieved employees to incur costs for work-related purposes, including
21 expenses associated with their cell phones, data, and/or cell phone apps and internet. Defendants
22 required Plaintiff and the other aggrieved employees to use their personal cell phones for work-
23 related purposes. While Defendants did provide some aggrieved employees with cell phones,
24 residents, the company, vendors, and supervisors would continue to contact aggrieved employees
25 like Plaintiff on their personal cell phones. Additionally, Plaintiff and other aggrieved employees
26 were not reimbursed for internet attributed to work-from-home costs. In direct consequence of
27 their job duties, Plaintiffs and the aggrieved employees unavoidably and necessarily incurred
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1 losses, expenditures, costs and expenses that Defendants did not reimburse as a matter of policy
2 and practice.

3 33. Defendants also issued non-compliant wage statements, as the wage statements
4 fail to correctly state the gross and net wages earned and the correct hourly rates in effect for paid
5 sick leave hours or meal/rest period premiums, in violation of Labor Code § 226(a)(1), (5), and
6 (9). This is because Defendants provided paid sick leave and Labor Code § 226.7 premiums at
7 the incorrect hourly rate, resulting in an inaccurate hourly rate on the paystubs, along with
8 inaccurate and depreciated gross and net wages actually earned.

9 34. During the pay periods when employees worked overtime, were paid
10 commissions, and Defendants failed to include the commission payments in the regular rate of
11 pay, Defendants issued non-compliant wage statements, as the wage statements issued fail to
12 correctly state the gross and net wages earned and the correct hourly rates in effect, in violation
13 of Labor Code § 226(a)(1), (5), and (9).

14 35. Defendants' wage statement issues described above rendered the wage statements
15 inaccurate and confusing to Plaintiff and the aggrieved employees, concealing the underpayments
16 and presenting a false portrayal of accuracy on the wage statements relied upon by Plaintiff and
17 the aggrieved employees as the sole documentary evidence of their respective earnings. Plaintiff
18 and, on information and belief, other employees were misinformed and misled by the wage
19 statements wages, hours, rates, and earnings. Defendants' wage statement violations were
20 knowing and intentional as a matter of law with respect to Plaintiff and the aggrieved employees
21 given that the legal obligation was not disputed, the wage statement and wage laws are clear and
22 unambiguous as written, and because Defendants nevertheless failed to comply despite the means
23 and ability to do so.

24 36. Defendants' pattern, practice, and uniform administration of corporate company
25 policy regarding payroll, regular rate of pay/compensation calculations, sick leave calculations,
26 and non-compliant wage statement formats, as described herein, results in Defendants' liability
27 for civil penalties to the State of California and the aggrieved employees, along with interest,
28 attorneys' fees, and costs of suit.

1 37. As a result of the foregoing regular rate violations, Defendants failed to pay all
2 overtime wages, sick leave wages, and premiums in each pay period in which they were earned
3 by Plaintiff and aggrieved employees, in violation of Labor Code § 204 and/or 204b (for any
4 weekly employees), which requires timely payment of all wages each regularly scheduled pay
5 period.

6 38. As a further result of the foregoing regular rate violations, Defendants failed to
7 pay all overtime wages, paid sick leave wages, and Labor Code § 226.7 premiums due to Plaintiff
8 and the aggrieved employees upon separation of employment, or within 72 hours thereof.
9 Defendants have thus violated Labor Code § 201, which requires that if an employer fires an
10 employee all wages must be paid immediately; and, Labor Code § 202, which requires that if an
11 employee quits without providing at least 72 hours' notice, his or her final wages must be paid no
12 later than 72 hours thereafter; or, if at least 72 hours' notice is provided, then the employer must
13 pay the wages immediately upon the employee's final day of employment. Defendants have thus
14 violated Labor Code §§ 201 and 202 because they failed to pay all overtime, paid sick leave
15 wages, and premium pay during the PAGA Period at the "regular rate" resulting in
16 underpayments. As a result, Defendants are also liable for civil penalties associated with Labor
17 Code §§ 201 through 203.

18 39. Because of the violations set forth in this Complaint, including Defendants' failure
19 to accurately maintain records of pay for all hours worked at the appropriate lawful rates of pay
20 (i.e., unrecorded off-the-clock hours), Defendants violated Labor Code section 1174 and the IWC
21 Wage Orders by failing to maintain records showing accurate daily hours worked at the
22 corresponding wage rate, and the wages paid to each employee.

23 **FIRST CAUSE OF ACTION**

24 **CIVIL PENALTIES FOR FAILURE TO PAY ALL OVERTIME**

25 **Labor Code §§ 2698, et seq.**

26 40. Plaintiff incorporates all outside paragraphs of this Complaint as if set forth herein.

27 41. Defendants failed in their affirmative obligation to pay Plaintiff and aggrieved
28 employees no less than one and one-half times their respective "regular rate of pay" for all hours

1 worked in excess of eight hours in one day, 40 hours in one week, or the first eight hours worked
2 on the seventh day of work in any one workweek, and no less than twice their respective “regular
3 rate of pay” for all hours over 12 hours in one day and any work in excess of eight hours on any
4 seventh day of a workweek in violation of Labor Code sections 510 and 1198 and the IWC Wage
5 Orders and the IWC Wage Orders (the “Hours and Days of Work” sections of the applicable
6 orders).

7 42. As a result, Defendants violated the Labor Code and IWC Wage Orders and are
8 liable to Plaintiff, the aggrieved employees and the State of California for civil penalties as
9 required by Labor Code sections 558 and 2699(a) and (f)(2), in addition to interest, attorneys’
10 fees, and costs to the extent permitted by law, including under Labor Code section 2699(g).

11 **SECOND CAUSE OF ACTION**

12 **CIVIL PENALTIES FOR MEAL PERIOD VIOLATIONS**

13 **Labor Code §226.7**

14 43. Plaintiff incorporates all outside paragraphs of this Complaint as if set forth herein.

15 44. Defendants willfully failed in their affirmative obligation to consistently provide
16 Plaintiff and aggrieved employees compliant, duty-free meal periods of not less than 30 minutes
17 beginning before the fifth hour of hour for each work period of more than five hours per day and
18 a second duty-free meal period of not less than 30 minutes beginning before the tenth hour of
19 hour of work in violation of Labor Code sections 226.7, 512, 1198 and the IWC Wage Orders
20 (the “Meal Periods” sections of the applicable orders).

21 45. Further, Defendants willfully failed in their affirmative obligation to consistently
22 pay Plaintiff and aggrieved employees one additional hour of pay at the respective regular rate of
23 compensation for each workday that a fully compliant meal period was not provided, in violation
24 of Labor Code sections 226.7 and the IWC Wage Orders.

25 46. As a result, Defendants violated the Labor Code and IWC Wage Orders and are
26 liable to Plaintiff, the aggrieved employees and the State of California for civil penalties as
27 required by Labor Code sections 558 and 2699(a) and (f)(2), in addition to interest, attorneys’
28 fees, and costs to the extent permitted by law, including under Labor Code section 2699(g).

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1 54. Labor Code section 246(l) governs how Defendants were required to calculate paid
2 sick leave:

3 [A]n employer shall calculate paid sick leave using any of the following
4 calculations:

5 (1) Paid sick time for nonexempt employees shall be calculated in
6 the same manner as the regular rate of pay for the workweek in which
7 the employee uses paid sick time, whether or not the employee
8 actually works overtime in that workweek.

9 (2) Paid sick time for nonexempt employees shall be calculated by
10 dividing the employee's total wages, not including overtime
11 premium pay, by the employee's total hours worked in the full pay
12 periods of the prior 90 days of employment.

13 (3) Paid sick time for exempt employees shall be calculated in the
14 same manner as the employer calculates wages for other forms of
15 paid leave time.

16 55. Labor Code section 246(i) requires employers to provide employees with written
17 notice every pay period "that sets forth the amount of paid sick leave available, or paid time off
18 in lieu of sick leave." The notice can either be on the employees' wage statements or a separate
19 written notice.

20 56. Defendants failed to pay sick leave to Plaintiff and the aggrieved employees at the
21 correct rate as required by section 246, which should have factored in employees' commissions
22 and other forms of remuneration. Defendants instead paid sick leave at the straight time hourly
23 rate.

24 57. As a result, Defendants violated the Labor Code and are liable to Plaintiff, the
25 aggrieved employees and the State of California for civil penalties as required by Labor Code
26 section 2699(a) and (f)(2), in addition to interest, attorneys' fees, and costs to the extent permitted
27 by law, including under Labor Code section 2699(g). Plaintiff is also entitled to penalties under
28

1 Labor Code section 248.5. Plaintiff and the aggrieved employees are entitled to recover to these
2 amounts in addition to interest, attorneys' fees, and costs to the extent permitted by law.

3 **FIFTH CAUSE OF ACTION**

4 **CIVIL PENALTIES FOR SUPP. PAID SICK LEAVE VIOLATIONS**

5 **Labor Code § 246 *et seq.***

6 58. Plaintiff incorporates all outside paragraphs of this Complaint as if set forth herein.

7 59. Defendants knowingly and intentionally failed in their affirmative obligation to
8 provide notice of and provide and pay Covid-19 Supplemental Sick Leave to Plaintiff and the
9 aggrieved employees in violation of Labor Code sections 246, 247, 247.5, 248.2, and 248.6.

10 60. Pursuant to Labor Code section 248.2, Defendants were required to provide up to
11 80 hours of Covid-19 Supplemental Paid Sick Leave for the period of January 1, 2021 through at
12 least September 30, 2021. Labor Code section 248.6 extended Covid sick leave protections and
13 requires employers to provide up to 80 hours of Covid-19 Supplemental Paid Sick Leave for the
14 period of January 1, 2022 to September 30, 2022, and may be extended thereafter.

15 61. Under Labor Code section 248.2, non-exempt employees must be paid Covid-19
16 supplemental paid sick leave according to the highest of the following four methods: (1) the
17 regular rate of pay for the workweek in which the employee uses COVID-19 supplemental paid
18 sick leave, (2) the employee's total wages in a 90-day period divided by total hours worked,
19 (3) the state minimum wage, or (4) the local minimum wage.

20 62. Labor Code section 248.6 requires employers to pay Covid-19 supplemental sick
21 leave under either one of the following methods (1) regular rate of pay or (2) the employee's total
22 wages in a 90-day period divided by total hours worked.

23 63. As with paid sick leave, Defendants failed to pay Covid-19 Supplemental Sick
24 Leave at the correct rate because Defendants failed to factor in employees' commissions and other
25 forms of remuneration. Defendants instead paid such sick leave at the straight time hourly rate
26 rather than one of the methods authorized by statute.

27 64. As a result, Defendants violated the Labor Code and are liable to Plaintiff, the
28 aggrieved employees and the State of California for civil penalties as required by Labor Code

1 section 2699(a) and (f)(2), in addition to interest, attorneys' fees, and costs to the extent permitted
2 by law, including under Labor Code section 2699(g). Plaintiff is also entitled to penalties under
3 Labor Code section 248.5. Plaintiff and the aggrieved employees are entitled to recover to these
4 amounts in addition to interest, attorney's fees and costs to the extent permitted by law.

5 **SIXTH CAUSE OF ACTION**

6 **CIVIL PENALTIES FOR FAILURE TO REIMBURSE BUSINESS EXPENSES**

7 **Labor Code § 2802**

8 65. Plaintiffs incorporate all outside paragraphs of this Complaint as if set forth herein.

9 66. Defendants willfully failed in their affirmative obligation to reimburse Plaintiffs
10 and aggrieved employees for all necessary expenditures, losses, expenses, and costs incurred by
11 them in direct discharge of the duties of their employment, in violation of Labor Code section
12 2802.

13 67. As a result, Defendants violated the Labor Code and are liable to Plaintiffs, the
14 aggrieved employees and the State of California for civil penalties as required by Labor Code
15 section 2699(a) and (f)(2), in addition to interest, attorneys' fees, and costs to the extent permitted
16 by law, including under Labor Code section 2699(g).

17 **SEVENTH CAUSE OF ACTION**

18 **CIVIL PENALTIES FOR UNTIMELY PAYMENT OF WAGES**

19 **Labor Code § 204, *et seq.***

20 68. Plaintiff incorporates all outside paragraphs of this Complaint as if set forth herein.

21 69. Defendants willfully failed in their affirmative obligation to timely pay all wages,
22 sick leave, and premiums earned by Plaintiff and aggrieved employees twice during each calendar
23 month on days designated in advance by the employer as regular paydays (for employees paid on
24 a non-weekly basis) and on the regularly-scheduled weekly payday for any weekly employees, as
25 applicable, in violation of Labor Code sections 204 and 204b and the IWC Wage Orders (the
26 "Minimum Wages" sections of the applicable orders).

27 70. As a result, Defendant violated the Labor Code and IWC Wage Orders and are
28 liable to Plaintiff, the aggrieved employees and the State of California for civil penalties as

1 required by Labor Code sections 558 and 2699(a) and (f)(2), in addition to interest, attorneys'
2 fees, and costs to the extent permitted by law, including under Labor Code section 2699(g).

3 **EIGHTH CAUSE OF ACTION**

4 **CIVIL PENALTIES FOR WAGE STATEMENT VIOLATIONS**

5 **Labor Code § 226**

6 71. Plaintiff incorporates all outside paragraphs of this Complaint as if set forth herein.

7 72. Labor Code section 226.3 provides: "Any employer who violates subdivision (a)
8 of Section 226 shall be subject to a civil penalty in the amount of two hundred fifty dollars (\$250)
9 per employee per violation in an initial citation and one thousand dollars (\$1,000) per employee
10 for each violation in a subsequent citation, for which the employer fails to provide the employee
11 a wage deduction statement or fails to keep the records required in subdivision (a) of Section 226.
12 The civil penalties provided for in this section are in addition to any other penalty provided by
13 law."

14 73. Defendants knowingly and intentionally failed in their affirmative obligation
15 provide accurate itemized wage statements to Plaintiff and aggrieved employees, resulting in to
16 Plaintiff and the aggrieved employees. Specifically, the wage statements issued to Plaintiff and
17 the aggrieved employees did not accurately state each pay period all of the information required
18 by Labor Code section 226(a)(1)-(9).

19 74. Defendants' unlawful acts and omissions deprived Plaintiff and aggrieved
20 employees of accurate itemized wage statements, causing confusion and concealing wage and
21 premium underpayments.

22 75. As a result, Defendants violated the Labor Code and IWC Wage Orders and are
23 liable to Plaintiff, the aggrieved employees and the State of California for civil penalties as
24 required by Labor Code sections 226.3 and 2699(a) and (f)(2), in addition to interest, attorneys'
25 fees, and costs to the extent permitted by law, including under Labor Code section 2699(g).

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1 **NINTH CAUSE OF ACTION**

2 **FAILURE TO TIMELY PAY ALL WAGES UPON SEPARATION**

3 **Labor Code §§ 201 through 203**

4 76. Plaintiff incorporates all outside paragraphs of this Complaint as if set forth herein.

5 77. Defendants willfully failed in their affirmative obligation to pay all wages earned
6 and unpaid to Plaintiff and aggrieved employees immediately upon termination of employment
7 or within 72 hours thereafter for employees who did not provide at least 72 hours prior notice of
8 his or her intention to quit, and further failed to pay those sums for 30 days thereafter in violation
9 of Labor Code sections 201 through 203 and the IWC Wage Orders. The wages remaining unpaid
10 are those due to Defendants' failure to pay employees for overtime at the correct rate, for sick
11 leave at the correct rate, and for meal and rest period premiums.

12 78. As a result, Defendants violated the Labor Code and IWC Wage Orders and are
13 liable to Plaintiff, the aggrieved employees and the State of California for civil penalties as
14 required by Labor Code sections 558 and 2699(a) and (f)(2), in addition to interest, attorneys'
15 fees, and costs to the extent permitted by law, including under Labor Code section 2699(g).

16 **TENTH CAUSE OF ACTION**

17 **RECORDKEEPING VIOLATIONS**

18 **Labor Code § 1174**

19 79. Plaintiff incorporates all outside paragraphs of this Complaint as if set forth herein.

20 80. Labor Code section 1174 provides: "Every person employing labor in this state
21 shall: ...(d) Keep, at a central location in the state or at the plants or establishments at which
22 employees are employed, payroll records showing the hours worked daily by and the wages paid
23 to, and the number of piece-rate units earned by and any applicable piece rate paid to, employees
24 employed at the respective plants or establishments. These records shall be kept in accordance
25 with rules established for this purpose by the commission, but in any case shall be kept on file for
26 not less than three years."

27 81. Labor Code section 1174.5 provides: "Any person employing labor who willfully
28 fails to maintain the records required by subdivision (c) of Section 1174 or accurate and complete

1 records required by subdivision (d) of Section 1174 ..., shall be subject to a civil penalty of five
2 hundred dollars (\$500).”

3 82. Defendants willfully failed in their affirmative obligation to maintain accurate
4 records showing the hours worked daily and wages paid to the aggrieved employees, in violation
5 of Labor Code sections 1174, 1198 and the IWC Wage Orders (the “Records” sections of the
6 applicable orders).

7 83. As a result, Defendants violated the Labor Code and is liable to Plaintiff, the
8 aggrieved employees, and the State of California for civil penalties as required by Labor Code
9 section 1174.5, in addition to attorneys’ fees, costs, and interest to the extent permitted by law,
10 including under Labor Code section 2699(g).

11 **PRAYER FOR RELIEF**

12 Plaintiff prays for judgment as follows:

- 13 a. For an award of all civil penalties under the Labor Code section 2698 *et seq.*;
- 14 b. For an award of reasonable attorneys’ fees and costs of suit, including expert fees,
15 to the extent permitted by law, including under Labor Code section 2699(g);
- 16 c. For any recoverable pre- and post-judgment interest; and
- 17 d. For such other relief the Court deems just and proper.

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19 Dated: May 10, 2022

Ferraro Vega Employment Lawyers, Inc.

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23 Nicholas J. Ferraro
24 Attorney for Plaintiff Whitney Begle
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Exhibit 1

FERRARO VEGA

SAN DIEGO EMPLOYMENT LAWYERS

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www.ferrarovega.com

March 3, 2022

NOTICE OF LABOR CODE VIOLATIONS CALIFORNIA LABOR CODE SECTIONS 2698 *et seq.*

VIA EMAIL & CERTIFIED U.S. MAIL

- *Electronic Return Receipt* -

R. W. Selby & Co., Inc.
11661 San Vicente Boulevard, Suite #510
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- **PAGA Notice & Filing Fee** -
Submitted electronically to the California
Labor and Workforce Development
Agency on **03/03/2022**

Dear Labor Enforcement Officer and Company Representatives:

This letter serves as written notice on behalf of WHITNEY ANN BEGLE (“Claimant”), and all other “aggrieved employees” under California Labor Code section 2699.3 against R.W. Selby & Company, Inc., (“Selby”) along with any other related employer entities, including those who may be later added upon further investigation (collectively, “Defendants”).

If the California Labor and Workforce Development Agency (“LWDA”) does not investigate the facts, allegations, and violations set forth in this notice within the statutorily prescribed period under Labor Code section 2699.3, Claimant shall seek and recover civil penalties as a proxy and agent of the State of California on behalf of other aggrieved employees under the California Private Attorneys General Act (“PAGA”).

“PAGA allows an ‘aggrieved employee’—a person affected by at least one Labor Code violation committed by an employer—to pursue penalties for all the Labor Code violations committed by that employer.” *Huff v. Securitas Security Services USA, Inc.* (2018) 23 Cal. App. 5th 745, 751; *see also Kim v. Reins International California, Inc.* (2020) 9 Cal. 73, 79.

FACTUAL STATEMENT

Defendants comprise the real estate, investment, development and management company R.W. Selby & Company, Inc., employing aggrieved employees like Claimant in the State of California (including San Diego County) in hourly, non-exempt positions where employees

are entitled to wage and hour protections under the California Labor Code and IWC Wage Orders.

Defendants engaged, suffered and permitted Claimant and the other “aggrieved employees,” as defined below, to work, exercised control over their respective wages, hours, and working conditions, and at all times were an agent and/or ostensible agent of any other employers, and the joint employer of Claimant and the aggrieved employees. Defendants legally employed Claimant and the other aggrieved employees under California law.

Additionally, Defendants and their agents remain liable under Labor Code sections 558, 558.1, 1197.1 and 2699 *et seq.* based on the acts and omissions set forth herein.

Claimant WHITNEY ANN BEGLE worked for Defendants from October 24, 2018 to January 14, 2022. Claimant worked in the position of Assistant Property Manager at the Avalon Fashion Valley (now known as Apex Mission Valley) location. Throughout her employment, Claimant worked as an hourly, non-exempt employee in San Diego County. Defendants operate in Nevada and California.

Through this notice, Claimant informs the LWDA of the Labor Code violations set forth herein. The aggrieved employees who Claimant seek to represent include the following individuals:

All current and former non-exempt hourly employees who worked for Defendants in the State of California during one-year period preceding the date of this notice through the current date and the date of final judgment in any pending action (the “aggrieved employees” and the “PAGA Period”).

Claimant seeks all recoverable civil penalties for Defendants’ violations and reserves the right to supplement this notice as further investigation is completed and further facts, witnesses, and violations are uncovered. Claimant reserves the right to expand or narrow the definition of the “aggrieved employees” in the forthcoming civil action.

Overtime and Minimum Wage Violations

Violation of Labor Code §§ 200, 201-204, 210, 510, 558, 1182.12, 1194, 1194.2, 1197, 1197.1, 1198, 1199; IWC Wage Orders

Defendants failed to pay for all hours worked and failed to pay overtime based on the lawful regular rate of pay, in violation of Labor Code sections 201-204, 210, 510, 558, 1182.12, 1194, 1194.2, 1197, 1197.1, 1198, 1199, applicable local minimum wage ordinances, and the related sections of the applicable IWC Wage Orders, including sections 3 and 4 and the standing Minimum Wage Order. Claimant and the aggrieved employees were not paid at least minimum wage *for all hours* worked. Claimant and the aggrieved employees were not paid at their lawful overtime rate (*i.e.*, time and a half or double time based on their regular rate of pay) for all overtime hours worked in excess of 8 hours in a workday, 40 hours in a workweek, or for any hours on any seventh consecutive day of work, to the extent Claimant or other aggrieved

worked on a seventh consecutive workday or other such hours as further investigation may reveal.

Labor Code section 204(a) states that all wages earned are due and payable twice during each calendar month on days designated in advance by the employer as regular pay days. Overtime wages are to be paid no later than the payday for the next regular payroll period. (Labor Code § 204(b)(1).) Labor Code § 210 states that, “every person who fails to pay the wages of an employee as provided in Section...204...shall be subject to a civil penalty” of \$100 for an initial violation and \$200 plus 25% of the amount unlawfully withheld for a subsequent violation.

Labor Code section 1197 states, “[t]he minimum wage for employees fixed by the commission is the minimum wage to be paid to employees, and the payment of a lower wage than the minimum so fixed is unlawful.” The “Minimum Wages” section of the applicable IWC Wage Order further provides that “[e]very employer shall pay to each employee, on the established payday for the period involved, not less than the applicable minimum wage for all hours worked in the payroll period, whether the remuneration is measured by time, piece, commission, or otherwise.”

Labor Code section 510 requires “[a]ny work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek and the first eight hours worked on the seventh day of work in any one workweek shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee;” and “any work in excess of 12 hours in one day shall be compensated at the rate of no less than twice the regular rate of pay for an employee;” and “any work in excess of eight hours on any seventh day of a workweek shall be compensated at the rate of no less than twice the regular rate of pay of an employee.”

Labor Code sections 558 and 1197.1 contain civil penalties for violating this provision of those provisions of the IWC Wage Orders, including sections 3 and 4 and the standing Minimum Wage Order. Labor Code section prohibits payment of a wage less than the legal overtime compensation applicable to the employee. Labor Code section 1198 renders “employment of any employee for longer hours than those fixed by the order or under conditions of labor prohibited by the [IWC Wage Orders]” unlawful and Labor Code section 1199 renders payment of wages contrary to the forging Labor Code and Wage Order provisions unlawful.

When Claimant and the aggrieved employees worked overtime, Defendants failed to pay the overtime at the “regular rate of pay.” Defendants paid Claimant and the aggrieved employees sales commissions that Defendants failed to include in the “regular rate of pay” when employees earned overtime. Defendants paid overtime to Claimant and the aggrieved employees at 1.5x their straight hourly rate. For each overtime hour worked during the period in which Claimant and the aggrieved employees earned sales commissions, Defendants should have (but failed to) pay overtime “at the rate of no less than ***one and one-half times the***

regular rate of pay for an employee” as required by the plain language of Labor Code section 510(a) and the IWC Wage Orders.

As an Assistant Property Manager employee of Selby, Claimant’s remuneration consisted of a regular hourly rate plus commission based on the number of new or renewed leases completed by Claimant. Per Defendant’s offer letter to Claimant, dated October 13, 2018, Claimant was to receive commissions consisting of \$50 for each renewed lease and \$100 for each new lease.

An illustrative example of the regular rate of pay violation is found on Claimant’s paystub for the pay period from November 25, 2021 through December 9, 2021, which shows that Claimant was compensated \$350.00 in commissions and worked 71.98 regular hours. As such, Claimant earned \$4.86 in commissions each hour she worked during the pay period. Adding Claimant’s commission compensation per hour to her regular hourly rate of \$22.28 results in a regular hourly rate of \$27.14 for the pay period. As such, Claimant should have been paid an overtime rate of 1.5x her regular rate of \$27.14 or \$40.71 for each overtime hour suffered or permitted to work during this specific pay period. Nonetheless, Defendants paid Claimant an overtime rate of \$33.42, which is 1.5x her base rate. Thus, during this specific pay period, Defendants compensated Claimant at an overtime rate that was approximately \$7.00 less than what she was entitled to receive.

Earnings						
Description	Start Date	End Date	Hrs/Units	Rate	Current	YTD
Current Pay Period						
Rate 1 - Reg	11/25/2021	12/09/2021	71.98	22.28	1,603.71	40203.65
Rate 1 - OT	11/25/2021	12/09/2021	0.03	33.42	1.00	66.32
Commission \$ - Reg	11/25/2021	12/09/2021			350.00	4250.00
Holiday	11/25/2021	12/09/2021	16.00	22.28	356.48	1280.54
Previous Insperity wages paid / Other wages paid						
Retro Pay \$- Reg						420.69
Vacation - Reg						1069.44
Sick						1398.21
Sick Pay Out # - Sup						260.43
Gross			88.01		2311.19	48949.28

Claimant’s Pay Stub from 11/25/2021 to 12/09/2021

Defendants also committed this same “regular rate of pay” violation against the other aggrieved employees. When an employee of Defendants earned forms of pay like commissions or bonuses or other forms of non-excludable remuneration, as a matter of payroll administration and company policy, these were not included in the regular rate of pay, which resulted in significant underpayments of wages to employees.

Furthermore, Claimant and the aggrieved employees were not paid for all wages owed because Defendants failed to pay all earned commissions. Under Labor Code section 200, commissions are considered wages. On information and belief, Claimant and the aggrieved employees were not paid for all commissions they earned during their employment. Furthermore, Defendants maintained an unlawful commission forfeiture practice because they unlawfully withheld earned commissions from Claimant and the aggrieved employees on the

basis that they were not employed at the time the commission was due to be paid. Claimant and the aggrieved employees satisfied all conditions precedent to earn the commissions, but were deprived of wages under the unlawful forfeiture provision. *Ellis v. McKinnon Broadcasting Co.*, 18 Cal.App.4th 1796 (1993).

As a result, Claimant may recover civil penalties on behalf of herself, the State of California and the aggrieved employees as provided under Labor Code §§ 225.5 (\$100/\$200), 558 (\$50/\$100), 1197.1 (\$100/\$250) and 2699 (\$100/\$200) per violation per pay period per employee, along with all other civil penalties permitted by law.

Underpaid Meal Period Premiums
Violation of Labor Code §§ 226.7, 512, 1198; IWC Wage Orders

Defendants failed to pay meal period premiums at the lawful regular rate of compensation to Claimant and other aggrieved employees in violation of Labor Code sections 226.7, 512 and 1198, and the related sections of the IWC Wage Orders, including section 11.

Labor Code section 512 requires that employers provide a 30-minute, uninterrupted meal period after no more than five hours of work and a second meal period after no more than 10 hours of work. *See Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal. 4th 1004, 1049. Labor Code section 226.7 requires that if a meal period is late, missed, short, or interrupted, the employer must pay for an hour of pay at the employee's "regular rate" of compensation. *Ferra v. Loews Hollywood Hotel, LLC* (2021) 11 Cal. 5th 858, 862 ("We hold that the terms are synonymous: "regular rate of compensation" under section 226.7(c), like "regular rate of pay" under section 510(a), encompasses all nondiscretionary payments, not just hourly wages"). "[T]ime records showing noncompliant meal periods raise a rebuttable presumption of meal period violations, including at the summary judgment stage." *Donohue v. AMN Services, LLC* (2021) 11 Cal. 5th 58, 61. Labor Code section 1198 renders "employment of any employee for longer hours than those fixed by the order or under conditions of labor prohibited by the [IWC Wage Orders]" unlawful.

Defendants failed to provide compliant meal periods to Claimant and the aggrieved employees. The aggrieved employees' time records establish meal period liability on their face. Claimant's time records show that she often experienced late meal periods. When Defendants did not provide compliant meal periods, Defendants failed to pay Claimant and other aggrieved employees a meal period premium in violation of Labor Code section 226.7. To the extent Defendants paid any meal period premiums, the premiums were not paid at the "regular rate of compensation" because the premium did not factor in commissions or other forms of non-excludable remuneration. Instead, Defendants elected to pay aggrieved employees meal period premiums at their base hourly rate, in violation of California law.

For instance, Claimant's pay stub for the pay period from January 10, 2020 through January 24, 2020 shows that she was paid a meal period premium at her regular hourly rate of \$21.63. However, if we factor in the \$100 in commissions earned by Claimant during a pay period, Claimant's "regular rate of compensation" results in \$23.03 per hour. Thus, Defendants

underpaid Claimant and other aggrieved employees for meal period premiums by paying meal period premiums at the employee's "regular hourly rate" instead of at the employee's "regular rate of compensation."

Earnings						
Description	Start Date	End Date	Hrs/Units	Rate	Current	YTD
Current Pay Period						
Rate 1 - Reg	01/10/2020	01/24/2020	71.58	21.63	1,548.28	3098.50
Rate 1 - OT	01/10/2020	01/24/2020	1.30	32.45	42.19	112.61
Commission \$ - Reg	01/10/2020	01/24/2020			100.00	100.00
Vacation - Reg	01/10/2020	01/24/2020	16.00	21.63	346.08	346.08
Missed Meal Occurrences	01/10/2020	01/24/2020	1.00	21.63	21.63	21.63
Previous Insperity wages paid / Other wages paid						
Retro Pay \$- Reg						692.16
Holiday						346.08
Gross			89.88		2058.18	4717.06

Claimant's Pay Stub from 01/10/2020 to 01/24/2020

As a result, Claimant may recover civil penalties on behalf of herself, the State of California and the aggrieved employees as provided under Labor Code § 2699 (\$100/\$200) per violation per pay period per employee, along with all other civil penalties permitted by law.

Underpaid Rest Period Premiums **Violation of Labor Code §§ 226.7, 516, 1198; IWC Wage Orders**

Defendants failed to pay rest period premiums at the lawful regular rate of compensation to Claimant and other aggrieved employees in violation of Labor Code sections 226.7, 516 and 1198, and the related sections of the IWC Wage Orders, including section 12.

Labor Code sections 226.7 and 516, along with the IWC Wage Orders, require that employers authorize and permit a 10-minute, uninterrupted rest period for each four-hour period (or major fraction thereof) that an employee works. Labor Code section 226.7 requires that if a meal period is non-compliant, the employer must pay for an hour of pay at the employee's "regular rate" of compensation. *See Ferra v. Loews Hollywood Hotel*, 11 Cal. 5th at 862. Labor Code section 1198 renders "employment of any employee for longer hours than those fixed by the order or under conditions of labor prohibited by the [IWC Wage Orders]" unlawful. Defendants required Claimant and other aggrieved employees to effectively waive or otherwise forego their rest periods contrary to the law.

Due to staffing issues, employees' job responsibilities, telephone calls, and the steady flow of business, Claimant and the aggrieved employees were not always authorized and permitted to take all of their rest periods. Furthermore, Defendants engaged in the practice of depriving Claimant and aggrieved employees of rest period premiums. To the extent Defendants ever paid a rest period premium, Defendants violated Labor Code section 226.7 because such premiums were not paid at the regular rate of compensation to aggrieved employees, which would have factored in commissions and other compensation.

As a result, Claimant may recover civil penalties on behalf of herself, the State of California and the aggrieved employees as provided under Labor Code section 2699 (\$100/\$200) per violation per pay period per employee, along with all other civil penalties permitted by law.

Failure to Reimburse Necessary Expenses
Violation of Labor Code §§ 2800, 2802

Defendants failed in their affirmative legal obligation to reimburse Claimant and other aggrieved employees for all necessary work-related costs and expenses as a matter of policy and practice in violation of Labor Code section 2802, which states:

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, or of his or her obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful.

Defendants required Claimant and the aggrieved employees to incur costs for work-related purposes, including expenses associated with their cell phones, data, and/or cell phone apps. Defendants required Claimant and the other aggrieved employees to use their personal cell phones for work-related purposes. While Defendants did provide some aggrieved employees with cell phones, residents, the company, vendors, and supervisors would continue to contact aggrieved employees like Claimant on their personal cell phones. Additionally, Claimant and other aggrieved employees were not reimbursed for internet attributed to work-from-home costs. As such and in direct consequence of their job duties, Claimant and the aggrieved employees unavoidably and necessarily incurred losses, expenditures, costs and expenses that were unreimbursed in violation of Labor Code sections 2800 and 2802.

To the extent Defendants argue that the expenses were reimbursable only upon request and preapproval, Labor Code section 2802's mandate is absolute: the element of constructive knowledge "does not appear in the statute" and written policies or handbooks do not "affect the significance of a failure to comply with that statutory duty ... the rights afforded by section[] 2802 may not be subject to negotiation or waiver." *Espinoza v. West Coast Tomato Growers, LLC* (S.D. Cal. 2016) Case No. 14-CF-2984 at n.2; *Park v. Joong-Ang Daily News Cal., Inc.* (2nd App. Dist., Div. 7, 2017) No. B268678 n.7 (unpublished, citing published authority). Labor Code section 2804 further affirms that "[a]ny contract or agreement, express or implied, made by any employee to waive the benefits of this article or any part thereof, is null and void, and this article shall not deprive any employee or his personal representative of any right or remedy to which he is entitled under the laws of this State." In other words, if—as here—employees incur "necessary expenses" or "losses" for the benefit of their employer, then the employees are unconditionally entitled to receive reimbursement for those expenses. Labor Code § 2804 prohibits waiver of these rights.

Such a pattern, practice and uniform administration of corporate policy as described herein is unlawful and creates an entitlement to recover by Claimant, the aggrieved employees and the State of California in a civil action for all civil penalties recoverable for violations of Labor Code section 2802, including those set forth in Labor Code section 2699 (\$100/\$200) per violation per pay period per employee, along with the recovery of attorney's fees and costs of suit.

Untimely Payment of Wages During Employment
Violation of Labor Code §§ 204, 204b, 210

Defendants violated Labor Code sections 204 and 204b requiring payment of all wages on regularly scheduled paydays with respect to Claimant and other aggrieved employees by failing to pay all wages owed on the regular pay days scheduled each pay period. To the extent that Defendants made or make any retroactive payments to Claimant or other aggrieved employees, such amounts are untimely in violation of these payday statutes.

Because Defendants failed to pay all wages in each pay period in which such wages were earned at the lawful rate for overtime, meal/rest premiums and other forms of remuneration, Defendants violated Labor Code section 204 and/or 204b (for weekly employees), which requires timely payment of wages of wages each regular scheduled pay period. Labor Code section 204 requires payment of "all wages" for non-exempt employees at least twice each calendar month. Labor Code section 204b applies to employees paid on a weekly basis and also requires the payment for all labor within the required pay periods. Labor Code section 210 provides that, "every person who fails to pay the wages of an employee as provided in Section...204...shall be subject to a civil penalty" of \$100 for an initial violation and \$200 plus 25% of the amount unlawfully withheld for a subsequent violation.

As explained above, Defendants underpaid Claimant and other aggrieved employees' regular, overtime, sick, and premium pay, including at the lawful regular rate of compensation/pay. Defendants are separately liable for not paying the full amount owed to Claimant and other aggrieved employees each payday in violation of Labor Code sections 204 and/or 204b.

As a result, Claimant may recover civil penalties on behalf of herself, the State of California and the aggrieved employees as provided under Labor Code section 2699 (\$100/\$200) per violation per pay period per employee, Labor Code section 210 (\$100/\$200) per violation per pay period, along with all other civil penalties permitted by law.

Untimely Payment of Wages Upon Separation of Employment
Violation of Labor Code §§ 201, 202, 203

Defendants violated Labor Code sections 201, 202 and 203 requiring timely payment of all wages upon separation and waiting time penalties in lieu thereof with respect to aggrieved employees by failing to pay all wages and premiums owed upon termination of employment.

Labor Code section 201 requires that if an employer fires an employee, the wages must be paid immediately. Labor Code section 202 requires that if an employee quits without providing 72 hours' notice, his or her wages must be paid no later than 72 hours thereafter. Labor Code section 202 states that if an employee provides 72 hours' notice, the final wages are payable upon his or her final day of employment. Labor Code section 203 requires an employer who fails to comply with Labor Code sections 201 or 202 to pay a waiting time penalty for each employee, up to a period of 30 days.

Because Defendants failed to pay all wages and premiums owed to the aggrieved employees during their employment and failed to properly pay regular and overtime wages at the lawful respective rates, Defendants failed to timely pay all wages owed upon separation of employment in violation of Labor Code sections 201, 202 and 203.

As a result, Claimant may recover civil penalties on behalf of herself, the State of California and the aggrieved employees as provided under Labor Code § 2699 (\$100/\$200) per violation per pay period per employee, along with all other civil penalties permitted by law.

Non-Compliant Wage Statements **Violation of Labor Code §§ 226, 226.3**

Defendants violated Labor Code section 226 with respect to Claimant and other aggrieved employees by failing to furnish itemized wage statements each pay period that accurately list all information required by Labor Code section 226(a)(1) through (9).

Labor Code section 226(a) requires an employer to furnish wage statements to employees semimonthly or at the time of each payment of wages, “an accurate itemized statement in writing showing:” (1) gross wages earned, (2) total hours worked, (3) the number of piece rate units earned and applicable piece rate in effect, (4) all deductions, (5) net wages earned, (6) the inclusive dates of the pay period, (7) the name of the employee and last four digits of SSN or an EIN, (8) the name and address of the legal name of the employer, and (9) all applicable hourly rates in effect during the pay period and the number of hours worked at each hourly rate by the employee.¹ An employer who violates subdivision (a) of Section 226 shall be subject to a civil penalty in the amount of \$250 per employee per violation for the initial citation and \$1,000 per employee for each violation in a subsequent citation, in addition to other penalties allowed by law.

¹ See generally *Lopez v. Friant & Associates, LLC* (2017) 15 Cal. App. 5th 773, 787-88 (“Consistent with the PAGA statutory framework and the plain language of section 226(e), we hold a plaintiff seeking civil penalties under PAGA for a violation of section 226(a) does not have to satisfy the “injury” and “knowing and intentional” requirements of section 226(e)(1)”); see also *See Kastler v. Oh My Green, Inc.* (N.D. Cal., Oct. 25, 2019) Case No. 19-CV-02411-HSG (“Injuries from a failure to provide an accurate pay statement include ‘possibility of not being paid overtime, employee confusion over whether they received all wages owed them, difficulty and expense involved in reconstructing pay records, and forcing employees to make mathematical computations to analyze whether the wages paid in fact compensated them for all hours worked’”) (rejecting *Maldonado* defense for class claims).

Throughout the relevant statutory period, as a result of the foregoing violations identified in this notice—unpaid regular and overtime wages and premiums—Defendants violated Labor Code section 226(a)(1) by not listing the correct “gross wages earned,” as the employees earned regular wages, overtime, and premiums, but were instead underpaid, resulting in an inaccurate reflection and recording of “gross wages earned” on those wage statements. Defendants also violated Labor Code section 226(a)(5) with respect to “net wages earned” for the same reasons, as the “net wages earned” are depreciated and underpaid resulting in an inaccurate reflection on the pay stub.

Lastly, in violation of Labor Code section 226(a)(9), the hourly rates and corresponding hours worked at those rates are incorrectly listed on Claimant’s and the aggrieved employees’ wage statements. The hourly rates on the wage statement are inaccurate with respect to hours that were not paid at the “regular rate of pay” with respect to overtime, meal period premium, and paid sick leave hours, if any, as those hours were paid at the improper hourly rate and reflected as such on the wage statements of the aggrieved employees.

Claimant and other aggrieved employees cannot promptly and easily determine from the wage statement alone the wages paid or earned without reference to other documents or information. Indeed, these wage statement violations are significant because they sowed confusion among Claimant and other aggrieved employees with respect to what amounts were owed and paid, at what rates, the number of hours worked, and how those amounts were calculated. The wage statements reflect a false statement of earnings and concealed the underlying problems and underpayments throughout the relevant period.

Thus, Claimant may recover civil penalties on behalf of herself, the State of California and the aggrieved employees as provided under Labor Code sections 226.3 (\$250/\$1,000) and/or 2699 (\$100/\$200) per violation per pay period per employee, along with all other civil penalties permitted by law.

Underpaid Paid Sick Leave **Violation of Labor Code §§ 246 through 248.5**

Defendants violated Labor Code section 246 because they failed to calculate and pay Claimant and the aggrieved employees paid sick leave at an hourly rate using one of the three permissible methods of calculation set forth in Labor Code sections 246(l)(1) to (3). Under Labor Code section 246 *et seq.*, employers are required to provide paid sick leave to all employees. Employers have the option of providing 24 hours of paid sick leave to employees or to allow employees to accrue paid sick leave each pay period. Cal. Lab. Code § 246. If an employer chooses the accrual method, employees must accrue sick leave at a rate of one (1) hour for every thirty (30) hours worked in a given pay period. Cal. Lab. Code § 246(b)(1). Under the accrual method, employees must begin accruing paid sick leave at the commencement of employment. Cal. Lab. Code § 246(b)(1).

Additionally, employers are required to pay sick leave in accordance with one of the permissible methods provided in Labor Code § 246(l)(1)-(3):

(l) For the purposes of this section, an employer shall calculate paid sick leave using any of the following calculations:

(1) Paid sick time for nonexempt employees shall be calculated in the same manner as the regular rate of pay for the workweek in which the employee uses paid sick time, whether or not the employee actually works overtime in that workweek.

(2) Paid sick time for nonexempt employees shall be calculated by dividing the employee's total wages, not including overtime premium pay, by the employee's total hours worked in the full pay periods of the prior 90 days of employment.

(3) Paid sick time for exempt employees shall be calculated in the same manner as the employer calculates wages for other forms of paid leave time.

The third option is not applicable because this case involves non-exempt employees. Defendants were required to pay paid sick time under the method set forth in options one or two.

As an initial matter, Claimant is informed, believes, and alleges that Defendants failed to provide paid sick leave in accordance with California law, rendering Defendants liable for an associated civil penalty with respect to every employee and every pay period during the PAGA period. Moreover, Defendants failed to maintain the records required by Labor Code § 246 *et seq.* with respect to the paid sick leave.

However, to the extent paid, Claimant is informed, believes and alleges Defendants instead paid sick leave at employees' straight time rate of pay and failed to factor in commissions. Specifically, (1) Defendants did not pay paid sick leave "in the same manner as the regular rate of pay for the workweek in which the employee uses paid sick leave, whether or not the employee actually works overtime in that workweek," as the regular rate should have included commission wages for the reasons aforementioned. Additionally, Defendants did not use method two by dividing the employee's total wages by total hours worked in the full pay periods of the prior 90 days, as such calculation would have resulted in a paid sick leave rate higher than the base rate at which Claimant was paid.

For instance, Claimant's pay stub for the pay period from October 25, 2021 through November 9, 2021 shows that she was paid sick leave at her regular hourly rate of \$22.28. However, if we factor in the \$250 in commissions earned by Claimant during a pay period, Claimant's "regular rate of compensation" results in \$25.40 per hour. Thus, Defendants underpaid Claimant and other aggrieved employees for sick leave by compensating them at their "regular hourly rate" instead of at the employee's "regular rate of compensation."

Earnings

Description	Start Date	End Date	Hrs/Units	Rate	Current	YTD
Current Pay Period						
Rate 1 - Reg	10/25/2021	11/09/2021	79.93	22.28	1,780.84	36639.30
Rate 1 - OT	10/25/2021	11/09/2021	0.03	33.42	1.00	65.32
Commission \$ - Reg	10/25/2021	11/09/2021			250.00	3900.00
Vacation - Reg	10/25/2021	11/09/2021	8.00	22.28	178.24	1069.44
Sick	10/25/2021	11/09/2021	8.00	22.28	178.24	1398.21
Previous Insperity wages paid / Other wages paid						

Claimant's Pay Stub from 10/25/2021 to 11/09/2021

Moreover, Defendants incorrectly calculated Claimant's and the other aggrieved employees accrued paid sick leave. Pay stubs show that Defendants elected to use the accrual method. However, Defendant's calculations do not lead to one hour of accrued sick leave for every 30 hours worked, but to less than that. For example, by the pay date of 01/31/2019, Claimant had worked 576.90 hours and should have accrued 19.23 hours of paid sick leave, but the pay stub for the pay period shows that Claimant had only accrued 14.19 hours.

Paid Time Off/Vacation and/or Sick Information

Plan - Level	Available	Used	Balance
Vacation - Vac 0-5 yrs	23.310	8.000	15.310 Hours
CA Sick Leave Plan - ALL CA EE's - Sick 0+ yrs	14.190	0.000	14.190 Hours

Your worksite employer provides the Paid Time Off/Vacation and/or Sick Information shown. "Balance" reflects hours available for use under the PTO, vacation, and/or sick time provided to Insperity by your worksite employer. See your supervisor with questions about your Balance. If your Paid Time Off/Vacation and/or Sick Information does not appear, this information will be provided by your worksite employer, as applicable.

From Claimant's Pay Stub from 01/31/2019

The failure to calculate and pay paid sick leave at one of the lawful rates set forth in Labor Code § 246(l)(1)-(3) was applied as a matter of common policy and practice to Claimant and the aggrieved employees in those pay periods where they earned commissions and also received paid sick leave.

As a result, Claimant may recover civil penalties on behalf of herself, the State of California and the aggrieved employees as provided under Labor Code § 2699 (\$100/\$200) per violation per pay period per employee, along with all other civil penalties permitted by law. Claimant is also entitled to penalties under Labor Code section 248.5.

Underpaid Covid Supplemental Paid Sick Leave
Violation of Labor Code §§ 246 through 248.6

Defendants violated Labor Code section 248.2 and 248.6 because they failed to calculate and pay Claimant and the aggrieved employees paid sick leave at the lawful hourly rate. Labor Code 248.2 required employers to provide up to 80 hours of Covid-19 Supplemental Paid Sick Leave for the period of January 1, 2021 through September 30, 2021. Labor Code section 248.6 extended Covid sick leave protections and requires employers to provide up to 80 hours of Covid-19 Supplemental Paid Sick Leave for the period of January 1, 2022 to September 30,

2022, and may be extended thereafter. Employers must comply with the calculation and payment methods of these Covid supplemental sick leave laws.

Under Labor Code sections 248.2, non-exempt employees must be paid supplemental paid sick leave according to the highest of the following four methods:

(I) Calculated in the same manner as the regular rate of pay for the workweek in which the covered employee uses COVID-19 supplemental paid sick leave, whether or not the employee actually works overtime in that workweek.

(II) Calculated by dividing the covered employee's total wages, not including overtime premium pay, by the employee's total hours worked in the full pay periods of the prior 90 days of employment.

(III) The state minimum wage.

(IV) The local minimum wage to which the covered employee is entitled.

Labor Code section 248.6 requires employers to pay supplemental sick leave using either method I or II identified above.

On information and belief, Defendants violated California law by failing to pay Covid Supplemental Paid Sick Leave at the correct rate. For the same reasons discussed in the Paid Sick Leave section above, Defendants failed to pay Covid-19 Supplemental Sick Leave at a rate authorized by statute. When paying such leave, Defendants failed to factor in employees' commissions, bonuses, incentives, and other compensation when paying sick leave. On information and belief, Defendants instead paid Supplemental Sick Leave at employees' straight time hourly rate rather than by one of the methods authorized by Labor Code sections 248.2 and 248.6.

The failure to calculate and pay paid sick leave at one of the lawful rates set forth in Labor Code §§ 248.2 and 248.6 was applied as a matter of common policy and practice to Claimant and the aggrieved employees in those pay periods where they earned bonuses, commissions, or other forms of non-excludable remuneration and also received statutory paid sick leave. Defendants further failed to maintain the proper records required by the paid sick leave statutes.

As a result, Claimant may recover civil penalties on behalf of herself, the State of California and the aggrieved employees as provided under Labor Code § 2699 (\$100/\$200) per violation per pay period per employee, along with all other civil penalties permitted by law. Claimant is also entitled to penalties under Labor Code section 248.5.

Failure to Maintain Accurate Records

Violation of Labor Code §§ 1174, 1174.5, 1198; IWC Wage Orders

Because of the violations set forth in this notice, including Defendants' failure to accurately maintain records of pay for all hours worked at the appropriate lawful rates of pay, Defendants violated Labor Code section 1174 and the IWC Wage Orders by failing to maintain accurate

payroll records showing all hourly rates in effect and hours worked at those rates, and the wages paid to each employee. As a result, Defendants are liable for a civil penalty of \$500 per employee to Claimant and each aggrieved employee pursuant to Labor Code section 1174.5.

Attorneys' Fees and Costs
Labor Code § 2699(g)

Claimant was compelled to retain the services of counsel to file this court action to protect her interests, the interests of other aggrieved employees, and the State of California. Claimant has thereby incurred and will continue to incur attorneys' fees and costs, which are recoverable on all PAGA causes of action under Labor Code section 2699(g).

**Notice of Demand for Defendants
to Change Policies and Practices**

Claimant intends to pursue legal action against Defendants based on the violations set forth in this notice. Defendants are hereby notified that any attempt to resolve this case must be conducted in coordination with Claimant's counsel to protect the interests of Claimant, the aggrieved employees, and the State of California via the LWDA. Any and all settlements releasing liability require Court approval in connection with Claimant and their counsel to fully release liability and resolve the claims alleged in this notice. Claimant will establish that (1) their lawsuit was a catalyst in motivating Defendants to change their policies and practices and provide the relief sought through this action, (2) that the forthcoming lawsuit has merit and is based on undisputed violations for which Defendants will be liable at trial, and (3) that Claimant have hereby notified Defendants of their violations and considers this notice an attempt to resolve the matter. *See Tipton-Whittingham v. City of Los Angeles* (2004) 34 Cal.4th 604, 608 (citing *Graham v. Daimler-Chrysler Corp.* (2004) 34 Cal. 4th 553 (authorizing an award of catalyst attorneys' fees)).

As the PAGA representative, Claimant has a duty to file this case at the earliest opportunity. Defendants may contact Claimant's counsel with any questions regarding this letter or the forthcoming lawsuit.

CONCLUSION

If the LWDA does not pursue enforcement, Claimant will bring representative claims on behalf of the State of California and the aggrieved employees seeking all recoverable civil penalties for violations of the Labor Code and the IWC Wage Orders, along with attorneys' fees, costs, interest, and other appropriate relief.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in blue ink that reads "Nicholas J. Ferraro". The signature is written in a cursive, flowing style.

Nicholas J. Ferraro

Cc Claimant
 Lauren N. Vega, Esq.
 Elida M. Espinoza, Esa.