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Superior Court of CA,
County of Santa Clara
22CV409265
Reviewed By: R. Walker

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA CLARA

DONTAY CASTON, on behalf of himself, the State of California, and all Aggrieved Employees,

Plaintiff,

vs.

EXEL, INC. dba DHL SUPPLY CHAIN; and DOES 1 through 100, inclusive,

Defendants.

Case No.: 22CV409265

REPRESENTATIVE ACTION COMPLAINT:

(1) CIVIL PENALTIES UNDER THE PRIVATE ATTORNEYS GENERAL ACT (LABOR CODE § 2698, *et seq.)*

UNLIMITED CIVIL CASE

Plaintiff Dontay Caston (hereinafter "Plaintiff"), on behalf of himself, the State of California, and other aggrieved employees, hereby brings this Representative Action Complaint ("Complaint") against Exel, Inc. dba DHL Supply Chain; and DOES 1 to 100, inclusive (collectively "Defendants"), and on information and belief allege as follows:

JURISDICTION

1. Plaintiff, on behalf of himself, all other aggrieved employees, and the State of California, hereby brings this Complaint for recovery of civil penalties under the Private Attorneys General Act, Labor Code § 2698, *et seq.* ("PAGA"), and Industrial Welfare Commission Wage Order 9 ("Wage Order 9"). The monetary damages that Plaintiff seeks exceed this Court's jurisdictional minimum.

VENUE

2. Venue is proper in this judicial district pursuant to Cal. Code of Civ. Proc. §§ 395(a) and 395.5, as at least some of the acts and omissions complained of herein occurred in Santa Clara County . Defendants own, maintain offices, transact business, have agent(s) within Santa Clara County , and/or otherwise are found within Santa Clara County, and Defendants are within the jurisdiction of this Court for purposes of service of process.

PARTIES

3. Plaintiff is an individual over the age of eighteen (18). At all relevant times herein, Plaintiff was, and currently is, a California resident. Plaintiff was employed by Defendants within the statute of limitations periods applicable to each cause of action pled herein.

4. Plaintiff is informed and believes, and based thereon alleges, that during the statute of limitations periods applicable to this action through the present, Defendants did (and continue to do) business and employed aggrieved employees within, among other counties, Santa Clara County and the state of California and, therefore, were (and are) doing business in Santa Clara County and the State of California.

5. Plaintiff does not know the true names or capacities, whether individual, partner, or corporate, of the defendants sued herein as DOES 1 to 100, inclusive, and for that reason, said defendants are sued under such fictitious names, and Plaintiff will seek leave from this Court to

amend this Complaint when such true names and capacities are discovered. Plaintiff is informed and believes, and based thereon alleges, that each of said fictitious defendants, whether individual, partners, or corporate, were responsible in some manner for the acts and omissions alleged herein, and proximately caused Plaintiff and the other aggrieved employees to be subject to the unlawful employment practices, wrongs, injuries and damages complained of herein.

6. Plaintiff is informed and believes, and thereon alleges, that at all times mentioned herein, Defendants were and are the employers of Plaintiff and the other aggrieved employees.

7. At all times herein mentioned, each of said Defendants participated in the doing of the acts hereinafter alleged to have been done by the named Defendants; and furthermore, the Defendants, and each of them, were the agents, servants, and employees of each and every one of the other Defendants, as well as the agents of all Defendants, and at all times herein mentioned were acting within the course and scope of said agency and employment. Defendants, and each of them, approved of, condoned, and/or otherwise ratified each and every one of the acts or omissions complained of herein.

8. At all times mentioned herein, Defendants, and each of them, were members of and engaged in a joint venture, partnership, and common enterprise, and acting within the course and scope of and in pursuance of said joint venture, partnership, and common enterprise. Further, Plaintiff alleges that all Defendants were joint employers for all purposes of Plaintiff and the other aggrieved employees.

FACTUAL ALLEGATIONS

9. Plaintiff was employed by Defendants as a non-exempt Material Handler from approximately November 2021 until approximately July 19, 2022.

10. During Plaintiff's employment with Defendants, Plaintiff and other aggrieved employees earned shift differentials, shift premiums, non-discretionary bonuses, and/or other forms of compensation not excludable from the "regular rate" of pay (these forms of pay are hereinafter referred to collectively as "Incentive Pay"). However, Defendants have failed to incorporate Incentive Pay into Plaintiff's and other aggrieved employees' "regular rate" when paying meal period premiums under Labor Code § 226.7. For example, Plaintiff regularly worked

shifts with Defendants which entitled him to differential pay valued at approximately $6.00 per hour in shift premiums, and also earned non-discretionary bonuses worth hundreds of dollars. But Defendants failed to include these amounts in his regular rate when calculating and paying him meal period premiums. For example, in the pay period of May 30 to June 5, 2022, Plaintiff earned a base rate of pay of $18.00 per hour but also earned an additional $6.00 per hour in shift premiums and shift differentials. However, in calculating and paying Plaintiff meal period premiums (denoted as "MEAL ADJ" on his wage statements), Defendants paid the meal period premiums at $18.00 per premium, i.e., at Plaintiff's *base* rate of pay.

11. Defendants' failure to incorporate Incentive Pay into the "regular rate" has resulted in a failure to pay meal period premiums at Plaintiff's and other aggrieved employees' "regular rate of compensation" as required under Labor Code § 226.7. The California Supreme Court has held that the terms "regular rate of pay" used in Labor Code § 510 and "regular rate of compensation" used in Labor Code § 226.7 are synonymous and, therefore, just as bonuses, shift differentials, and other remuneration must be incorporated into the "regular rate of pay" when calculating overtime pay, they must also be incorporated into the "regular rate of compensation" when calculating meal and rest period premiums under Labor Code § 226.7. *See Ferra v. Loews Hollywood Hotel, LLC*, 11 Cal.5th 858, 862 (2021) (holding "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.") When paying meal period premiums, Defendants have failed to incorporate Incentive Pay and thereby underpaid Plaintiff and other aggrieved employs their meal period premium wages. As a result of Defendants' failure to incorporate Incentive Pay into the regular rate, Plaintiff and other aggrieved employees have been underpaid their meal period premiums under Labor Code § 226.7.

12. In addition to under-paying meal period premiums, Defendants' failure to incorporate Incentive Pay into the "regular rate" has also resulted in a failure to compensate Plaintiff and other aggrieved employees for paid sick time at Plaintiff's and other aggrieved employees' "regular rate of pay" as required under California law. For example, during the same pay period mentioned above (May 30 to June 5, 2022), Plaintiff was paid 4.0 hours of sick pay

(denoted as "SICK PAY" on his wage statement), which were paid to Plaintiff at his *base* rate of pay of $18.00 per hour, rather than Plaintiff's "regular rate of pay" as required under Labor Code § 246(l)(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…"). As alleged herein, Defendants have failed to incorporate Plaintiff's and other aggrieved employees' earned "Incentive Pay" into their "regular rate" and in doing so, Plaintiff and other aggrieved employee have been underpaid for their sick time.

13. Defendants have also failed to pay overtime at one and one-half times Plaintiff's and other aggrieved employees' "regular rate" of pay as a result of its failure to include Incentive Pay in the regular rate. For example, in the pay period of April 18-24, 2022, Plaintiff earned $512.10 in non-discretionary bonuses (denoted as "Non-Disc Bon" on his wage statement), but Defendants failed to properly incorporate that bonus into Plaintiff's regular rate when paying him overtime.

14. Defendants have also failed to pay all earned but unused vacation pay at Plaintiff's and other aggrieved employees' regular rate of pay, in violation of Labor Code § 227.3. Specifically, Defendants paid Plaintiff for 13.33 hours of earned but unused vacation pay as part of his final wages, and paid it to him at his *base* rate of pay of $18.00 per hour, even though Plaintiff earned shift differentials and/or other Incentive Pay in his final pay period with Defendants, as well as at the time the vacation pay was earned. Thus, by paying Plaintiff's vacation pay at Plaintiff's *base* rate of pay, Defendants failed to pay him his vacation pay at his regular rate. On information and belief, Defendants have likewise failed to pay out earned but unused vacation pay at other aggrieved former employees' regular rate of pay, in violation of Labor Code § 227.3.

15. In addition, Defendants failed to issue Plaintiff a wage statement when it paid him his final wages upon his termination of employment. Instead, Defendants simply sent Plaintiff a letter which advised him of his net final pay, and provided him with a paycard. Defendants did not, however, provide Plaintiff with a wage statement, nor did the letter from Defendants contain any of the information required to be included under Labor Code § 226(a). Plaintiff was also

unable to access his wage statement online, as his online access to his wage statements was terminated by Defendants upon his termination. Therefore, Defendants failed to issue Plaintiff his final wage statement at the time it paid him his wages, in violation of Labor Code § 226(a) (requiring employer to provide wage statements "semimonthly or at the time of each payment of wages").

16. Plaintiff requested his final wage statement from Defendants multiple times, but he was not provided with it. Indeed, Plaintiff was not provided with a copy of his final wage statement until Defendants' counsel provided it to Plaintiff's counsel on or about August 30, 2022 (more than a month after his termination), in response to a letter from Plaintiff's counsel requesting Plaintiff's payroll file. On information and belief, Defendants have likewise failed to issue wage statements to other aggrieved employees with their final wages upon termination of employment.

17. As a result of Defendants' failure to pay meal period premium wages, sick pay, and accrued but unused final vacation wages at the regular rate of pay, as well as its failure to pay overtime and/or double-time compensation at one-and-one-half (or two times) the regular rate of pay, Defendants have failed to pay all wages to Plaintiff and other formerly employed aggrieved employees at their separation of their employment.

18. As a further result of Defendants' failure to pay meal period premium wages, sick pay, and accrued but unused final vacation wages at the regular rate of pay, as well as its failure to pay overtime and/or double-time compensation at one-and-one-half (or two times) the regular rate of pay, Defendants have maintained inaccurate payroll records, and issued inaccurate wage statements, to Plaintiff and other aggrieved employees. These failures have resulted in employees' wage statements including inaccurate information regarding, inter alia, gross wages earned, net wages earned, and the rates of pay in effect in each pay period.

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FIRST CAUSE OF ACTION

PRIVATE ATTORNEY GENERAL ACT

(AGAINST ALL DEFENDANTS)

19. Plaintiff re-alleges and incorporates by reference all previous paragraphs.

20. Defendants have committed several Labor Code violations against Plaintiff and other aggrieved employees. Plaintiff is an "aggrieved employee" within the meaning of Labor Code § 2698 *et seq*., and acting on behalf of himself and other aggrieved employees, brings this representative action against Defendants to recover the civil penalties due to Plaintiff, other aggrieved employees, and the State of California according to proof pursuant to Labor Code §§ 558 and 2699 (a) and (f) including, but not limited to: (1) $100.00 for each initial violation for each failure to pay each employee and $200.00 for each subsequent violation or willful or intentional violation pursuant to Labor Code § 210 for each failure to pay each employee, plus 25% of the amount unlawfully withheld; (2) $50.00 for each initial violation and $100.00 for each subsequent violation pursuant to Labor Code § 558 per employee per pay period; (3) $100.00 for each initial violation and $250.00 for each subsequent violation pursuant to Labor Code § 1197.1 per employee per pay period; (4) $250.00 for each initial violation of Labor Code § 226 and $1,000.00 for each subsequent violation, pursuant to Labor Code § 226.3, per employee per pay period; and/or (5) $100.00 for each initial violation and $200.00 for each subsequent violation per employee per pay period for those violations of the Labor Code for which no civil penalty is specifically provided, based on the following Labor Code violations:

a. Failing to pay meal period premiums to Plaintiff and other aggrieved employees at the employees' "regular rate of compensation" in violation of Labor Code §§ 226.7, 558, and 1198;

b. Failing to pay sick pay to Plaintiff and other aggrieved employees at their "regular rate of pay" in violation of Labor Code § 246;

c. Failing to pay overtime and double-time compensation to Mr. Caston and other aggrieved employees at one-and-one-half (or two times) their "regular rate of pay" in violation of Labor Code §§ 204, 510, 558, 1194, and 1198;

d. Failing to pay accrued but unused vacation wages at Plaintiff's and other aggrieved employees' regular rate of pay, in violation of Labor Code § 227.3;

e. Failing to issue accurate, itemized wage statements to Plaintiff and other aggrieved employees in violation of Labor Code §§ 226 and 1198; and

f. Failing to pay Plaintiff and other aggrieved former employees all final wages due at the end of their employment in violation of Labor Code §§ 201-203.

21. On or about October 24, 2022 Plaintiff notified Defendants via certified mail, and notified the California Labor and Workforce Development Agency ("LWDA") via its website, of Defendants' violations of the California Labor Code and Plaintiff's intent to bring a claim for civil penalties under California Labor Code § 2698 *et seq*. with respect to the violations of the California Labor Code identified in Paragraph 20 (a)-(f). Now that sixty-five days have passed from Plaintiff notifying Defendants and the LWDA of these violations, and the LWDA has not provided notice that it intends to investigate the violations, Plaintiff has exhausted his administrative requirements for bringing a claim under the Private Attorneys General Act with respect to these violations.

22. Based on the foregoing, Plaintiff seeks to represent himself, the State of California, and all aggrieved employees, as defined by Labor Code § 2699(c), which includes all current and former employees who worked for Defendants in California between the one year prior to the submission of Plaintiff's PAGA notice to the present.[1]

23. Plaintiff was compelled to retain the services of counsel to file this court action to protect his own interests and the interests of other aggrieved employees, and to assess and collect the civil penalties owed by Defendants. Plaintiff has thereby incurred attorneys' fees and costs, which he is entitled to recover under California Labor Code § 2699(g).

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[1] A prior PAGA settlement in *Foy, et al v. Exel, Inc. dba DHL Supply Chain*, Kern County Superior Court Case No. BCV-20-102463, resolved certain PAGA claims through March 31, 2022. To the extent any of the claims described in this Complaint were included in the *Foy* settlement, the applicable liability period for such claims begins on April 1, 2022.

PRAYER

WHEREFORE, Plaintiff prays for judgment for himself and for all others on whose behalf this suit is brought against Defendants, jointly and severally, as follows:

24. Upon the First Cause of Action, for civil penalties due to Plaintiff, other aggrieved employees, and the State of California according to proof pursuant to Labor Code § 2699, including, but not limited to: (1) $100.00 for each initial violation for each failure to pay each employee and $200.00 for each subsequent violation or willful or intentional violation pursuant to Labor Code § 210 for each failure to pay each employee, plus 25% of the amount unlawfully withheld; (2) $50.00 for each initial violation and $100 for each subsequent violation pursuant to Labor Code § 558 per employee per pay period; (3) $100.00 for each initial violation and $250.00 for each subsequent violation pursuant to Labor Code § 1197.1 per employee per pay period; (4) $250.00 for each initial violation of Labor Code § 226 and $1,000.00 for each subsequent violation, pursuant to Labor Code § 226.3 per employee per pay period; and/or (5) $100.00 for each initial violation and $200.00 for each subsequent violation per employee per pay period for those violations of the Labor Code for which no civil penalty is specifically provided, pursuant to Labor Code § 2699(f);

25. On all causes of action, for attorney's fees and costs as provided by Labor Code § 2699(g) and Code of Civil Procedure § 1021.5; and

26. For such other and further relief the Court may deem just and proper.

Respectfully submitted,

Dated: December 29, 2022

ABRAMSON LABOR GROUP

By: ______________________

Tuvia Korobkin
Attorneys for Plaintiff