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ELECTRONICALLY FILED
Superior Court of California,
County of San Diego
05/03/2023 at 05:40:00 PM
Clerk of the Superior Court
By Cheyenne Preston,Deputy Clerk

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

EMANUEL ZAMUDIO, individually and on behalf of all others similarly situated,

Plaintiff,

vs.

ORKIN, LLC, a limited liability company; ORKIN SERVICES OF CALIFORNIA, INC., a corporation; ROLLINS, INC., a corporation; and DOES 1 through 50, inclusive,

Defendants.

Case No. 37-2023-00010020-CU-OE-CTL

Assigned to the Hon. Keri G. Katz
Department C-74

CLASS ACTION

FIRST AMENDED CLASS AND REPRESENTATIVE ACTION COMPLAINT

1. Minimum Wage Violations
2. Failure to Pay All Overtime Wages
3. Meal Period Violations
4. Rest Period Violations
5. Paid Sick Leave Violations
6. Untimely Payment of Wages
7. Wage Statement Violations
8. Waiting Time Penalties
9. Unfair Competition
10. Civil Penalties Under the Private Attorneys General Act (Labor Code §§ 2698 *et seq.*)

Plaintiff EMANUEL ZAMUDIO, individually and on behalf of all others similarly situated and the State of California under the Private Attorneys General Act ("Plaintiff") brings this CLASS AND REPRESENTATIVE ACTION COMPLAINT against Defendants ORKIN, LLC; ORKIN SERVICES OF CALIFORNIA, INC.; ROLLINS, INC.; and DOES 1 through 50, inclusive (collectively "Defendants"), alleging as follows:

INTRODUCTION

1. This is a class and representative action brought under California Code of Civil Procedure § 382 for Defendants' violations of the California Labor Code and Business and Professions Code.

2. Defendants underpaid the Class Members' wages by failing to include all forms of remuneration, including a nondiscretionary referral bonus, in their hourly overtime, sick pay, and premium rates, resulting in underpayments of wages.

3. Defendants also failed to properly compensate the Class Members for all hours worked at the lawful minimum rate due to Defendants' routine practice of deducting time from the Class Members' reported hours worked and Defendants' employment of a rounding policy that was not facially neutral.

4. Additionally, the Class Members were not always authorized or permitted to take complaint meal and rest breaks. To the extent that Defendants paid the Class Members meal and rest premiums, these were not paid at the regular rate of pay.

5. Defendants are further liable for derivative claims for wage statement, untimely payment, and other associated violations.

6. Defendants' employment policies and practices, as well as their payroll administration systems, enabled and facilitated these violations on a company-wide basis with respect to Class Members.

JURISDICTION & VENUE

7. Jurisdiction of this action is proper in this Court under Article VI, Section 10 of the California Constitution as the causes of action are premised upon violations of California law.

8. The monetary damages and restitution sought exceed the minimal jurisdiction limits of the Superior Court.

9. This Court has jurisdiction over Defendants because, upon information and belief, Defendants have sufficient minimum contacts in California, or otherwise intentionally avail themselves to the California economy so as to render the exercise of jurisdiction over them by the California courts consistent with traditional notions of fair play and substantial justice.

10. Venue is proper in this Court under Code of Civil Procedure sections 393(a), 395, and/or 395.5 because, upon information and belief, Defendants conduct business and committed some of the alleged violations in this county.

PARTIES

A. Plaintiff Emanuel Zamudio

11. Plaintiff Zamudio is an individual over 18 years of age who worked for Defendants in California as a non-exempt employee from about April 2022 to December 2022. Plaintiff worked as a Pest Control Technician.

12. The State of California, via the Labor and Workforce Development Agency ("LWDA"), is the real party in interest in this action. (*Kim v. Reins Int'l California, Inc.* (2020) 9 Cal. 5th 73, 81 [The "government entity on whose behalf the plaintiff files suit is always the real party in interest."])

B. Defendants

13. Defendant ORKIN, LLC is a Delaware limited liability company that maintains operations and conducts business throughout the State of California, including in this county.

14. Defendant ORKIN SERVICES OF CALIFORNIA, INC. is a Delaware corporation that maintains operations and conducts business throughout the State of California, including in this county.

15. Defendant ROLLINS, INC. is a Delaware corporation that maintains operations and conducts business throughout the State of California, including in this county.

16. The true names and capacities, whether individual, corporate, or otherwise, of the parties sued as DOES 1 through 50, are presently unknown, unascertainable, or uncertain, and are sued

by such fictitious names under Code of Civil Procedure section 474. Upon information and belief, each of DOES 1 through 50 constitutes a legal employer or is otherwise legally responsible in some manner for the acts and omissions alleged herein. This Complaint may be amended to reflect their true names and capacities once ascertained.

17. Upon information and belief, Defendants in this action are employers, co-employers, joint employers, and/or part of an integrated employer enterprise, as each of the Defendants exercised control over the wages, hours, and working conditions of the employees, suffered and permitted them to work, and otherwise engaged them as employees under California law.

18. Upon information and belief, at least some of the Defendants have common ownership, common management, interrelationship of operations, and centralized control over labor relations and are therefore part of an integrated enterprise and thus jointly and severally responsible for the acts and omissions alleged herein, including pursuant to Labor Code sections 558, 558.1, and 1197.1.

19. Upon information and belief, Defendants acted in all respects pertinent to this action as an alter-ego, agent, servant, joint employer, joint venturer, co-conspirator, partner, in an integrated enterprise, or in some other capacity on behalf of all other co-defendants, such that the acts and omissions of each defendant may be legally attributable to all others.

CLASS ALLEGATIONS

20. This action is brought individually and on behalf of the following class pursuant to Code of Civil Procedure section 382:

a. All current and former non-exempt employees who worked for Defendants in California at any time from four years prior to the filing of this action through date of class certification.

21. Plaintiff reserves the right to establish various subclass definitions as appropriate at the class certification stage, according to proof.

22. The class is ascertainable and shares a well-defined community of interest in this litigation:

a. Numerosity: The class is estimated to exceed 50 individuals, although the precise membership of the entire class is unknown at this time. The class is so numerous that joinder of all class members is impracticable. The identities of class members are ascertainable by inspection of Defendants' employment and payroll records.

b. Typicality: Plaintiff's claims are typical of the claims of the other class members. They were subject to the same policies and practices of Defendants, which resulted in losses to the class. Proof of common unlawful business practices, which Plaintiff experienced, will establish the right of the class to recover on the causes of action alleged herein.

c. Adequacy: Plaintiff is an adequate class representative; will take all necessary steps to protect the class members' interests adequately and fairly; has no interest antagonistic to other class members; and is represented by attorneys who have substantial experience prosecuting, defending, resolving, and litigating wage and hour class, collective, and representative actions in California state and federal courts.

d. Superiority: A class action is superior to other means for adjudicating this dispute. Individual joinder is impractical. Class treatment will allow for common issues to be resolved in a single forum, simultaneously, and without duplication of effort and expense.

e. Public Policy Considerations: Certification of this lawsuit as a class action advances the State of California's strong public interest in ensuring its approximately millions of employed residents are properly paid the wages they earned for the hours they worked. Class actions provide a mechanism for enforcement of labor laws and allow for vindication of employee rights by unnamed class members.

23. Common questions of law and fact as to the class members predominate over questions affecting only individual members. The common questions of law and fact exist as to whether the employment policies and practices formulated by Defendants and applied to the class members constitute violate California law.

GENERAL ALLEGATIONS

24. Plaintiff and the Class Members in this action worked for Defendants as non-exempt employees and were compensated on an hourly basis.

25. Defendants failed to pay Plaintiff and the Class Members at the lawful minimum rate for all hours worked due to a deduction policy in effect, resulting in unpaid minimum wages.

26. Upon information and belief, Defendants unilaterally and as a matter of practice deducted time from the work hours reported by Plaintiff and the Class Members on their timekeeping records when the time was deemed excessive or "unauthorized."

27. For example, on August 31, 2022 Plaintiff reported working 11 hours and 18 minutes. Defendants later reduced this time to 10 hours and 18 minutes. Defendants' policy and practice of falsifying time records to avoid compensating employees for all their work resulted in unpaid regular wages for Plaintiff and the Class Members.

28. Furthermore, Defendants subjected Plaintiff and other Class Members to a non-neutral and unlawful rounding policy. Defendants required employees to record the exact start and stop times for their shifts, then rounded the overall hours worked for each day to reflect increments of one-tenth of an hour, often rounding downward and resulting in Plaintiff and the Class Members being routinely undercompensated for all their hours worked.

29. For example, the punch times on Plaintiff's timekeeping records for the period of October 17, 2022 through October 31, 2022 indicate that Plaintiff worked exactly 108.7 hours. Defendants' records for this same period identify "productive hours," which are Plaintiff's actual time worked rounded (usually downward) to the nearest tenth of an hour. These rounded and reduced "productive hours" were the only hours for which Plaintiff and, upon information and belief, the Class Members, were paid. Plaintiff is informed, believes, and alleges that Defendants routinely employed this facially non-neutral rounding policy to all Class Members – despite the fact that Defendants could and did track the exact time in minutes that employees worked – resulting in the same or similar under compensation for time worked for other employees.

30. Defendants' policy and practice of deducting one hour of reported time worked from employees' timekeeping records, as well as utilizing an unlawful rounding policy that resulted in

regular underpayment of employees' reported hours worked, also caused underpayment of the overtime wages due to Plaintiff and the Class Members.

31. Defendants paid Plaintiff and the Class Members additional compensation, including, but not limited to, nondiscretionary referral bonuses when they successfully referred an individual for employment with Defendants. Payment of the entire referral bonus was contingent upon the referring employees' continued employment with Defendants, effectively making it a non-discretionary longevity bonus that was improperly excluded from the regular rate of pay calculation for purposes of overtime, meal and rest period premiums, and sick pay.

32. Due to staffing issues, employees' job responsibilities, and the steady flow of business, Plaintiff and the Class Members were not always authorized or permitted to take complaint meal and rest breaks. Defendants maintained a strict policy and practice of overscheduling employees, depriving them of the opportunity to take compliant meal and rest breaks.

33. Furthermore, Defendants' unlawful practice of rounding employees' reported hours worked resulted in inaccurate records for the purposes of employees' entitlement to compliant first and second meal periods, or meal period premiums.

34. To the extent that Defendants paid meal or rest premiums, these premiums were not paid at the "regular rate of compensation" because the premiums did not factor in additional forms of nondiscretionary remuneration, such as the referral bonus, in violation of California law.

35. Because of these violations, Defendants failed provide accurate itemized wage statements to the Class Members that included the accurate total hours and gross or net wages earned, as the employees earned sick leave wages, overtime, premium, and minimum wages that were not paid or otherwise not paid at the lawful rate in light of the regular rate violations. Likewise, these sick pay, overtime, and premium wages were paid at inaccurate hourly wage rates (*i.e.*, the base rate or a multiple of the base rate for overtime instead of the regular rate) which violates the wage statement requirement to include the correct hourly rate in effect each pay period along with the correct number of hours. As a result of the foregoing issues, and because of the compulsory off-the-clock work, Defendants failed to include the total hours worked and the hourly rate in effect along with the

corresponding number of hours worked at each rate. Therefore, Defendants have provided inaccurate and non-compliant wage statements to the Class Members.

36. These violations create derivative liability for failure to pay all wages owed each payday or upon separation of employment.

37. As a result of the foregoing violations, Defendants also failed to timely pay all wages as they were due to Plaintiff and the Class Members while they were employed and also failed to timely pay all wages due to Plaintiff and the Class Members at their separation of employment.

FIRST CAUSE OF ACTION

MINIMUM WAGE VIOLATIONS

Violation of Labor Code §§ 1194, 1194.2 and 1197

(All Claims Alleged by Plaintiff and Class Members Against All Defendants)

38. All outside paragraphs of this Complaint are incorporated into this section.

39. This cause of action is brought pursuant to the IWC Wage Orders and Labor Code §§ 1182.12, 1194, 1194.2, 1197, 1197.1 and 1198 and the IWC Wage Orders (the "Hours and Days of Work" and "Minimum Wages" sections of the applicable orders), which require non-exempt employees be timely paid at least the state or local minimum wage (if higher) for each hour of work, and further provide a private right of action for an employer's failure to pay all minimum wages (plus liquidated damages).

40. Defendants willfully failed in their affirmative obligation to pay Plaintiff and class members at least the lawful minimum wage for each hour worked in violation of Labor Code sections 1182.12, 1194, 1194.2, 1197, 1197.1 and 1198 and the IWC Wage Orders (the "Hours and Days of Work" and "Minimum Wages" sections of the applicable orders), including payment at the lawful local and county minimum wage ordinances in effect. As a result, Defendants are liable for all associated damages, including liquidated damages for the minimum wage violations pursuant to Labor Code § 1194.2.

41. Defendants' unlawful acts and omissions deprived Plaintiff and class members of minimum, regular and overtime wages in amounts to be determined at trial. Plaintiff and class members are entitled to recover to the full amount of the unpaid wages, plus liquidated damages in an

amount equal to the wages unlawfully unpaid (and interest thereon), in addition to interest, attorneys' fees, and costs to the extent permitted by law, including under Labor Code sections 1194 and 1194.2.

<u>SECOND CAUSE OF ACTION</u>

FAILURE TO PAY ALL OVERTIME WAGES

Violation of Labor Code §§ 510 and 1194

42. All outside paragraphs of this Complaint are incorporated into this section.

43. This cause of action is brought pursuant to the IWC Wage Orders and Labor Code §§ 204, 510, 558, 1194, and 1198, which require non-exempt employees be timely paid overtime wages all overtime hours worked, and which further provide a private right of action for an employer's failure to pay all overtime compensation for overtime hours worked.

44. Defendants failed in their affirmative obligation to pay Plaintiff and class members no less than one and one-half times their respective "regular rate of pay" for all hours worked in excess of eight hours in one day, 40 hours in one week, or the first eight hours worked on the seventh day of work in any one workweek, and no less than twice their respective "regular rate of pay" for all hours over 12 hours in one day and any work in excess of eight hours on any seventh day of a workweek for such hours worked, in violation of Labor Code sections 204, 510, 558, 1194, and 1198 and the IWC Wage Orders (the "Hours and Days of Work" sections of the applicable orders).

45. Plaintiff and class members are entitled to recover to the full amount of the unpaid overtime, in addition to interest, statutory and civil penalties, and attorneys' fees, and costs to the extent permitted by law.

<u>THIRD CAUSE OF ACTION</u>

MEAL PERIOD VIOLATIONS

Violation of Labor Code §§ 226.7 and 512

46. All outside paragraphs of this Complaint are incorporated into this section.

47. This cause of action is brought pursuant to the IWC Wage Orders and Labor Code §§ 226.7, 558 and 512, which require non-exempt employees be provided complaint meal periods (or meal period premiums in lieu thereof), and which further provide a private right of action for an

employer's failure to lawfully provide all meal periods and/or pay meal period premiums at the lawful regular rate of compensation.

48. Defendants willfully failed in their affirmative obligation to consistently provide Plaintiff and class members compliant, duty-free meal periods of not less than 30 minutes beginning before the fifth hour of hour for each work period of more than five hours per day and a second duty-free meal period of not less than 30 minutes beginning before the tenth hour of hour of work in violation of Labor Code sections 226.7, 512, 558, 1198 and the IWC Wage Orders (the "Meal Periods" sections of the applicable orders).

49. Further, Defendants willfully failed in their affirmative obligation to consistently pay Plaintiff and class members one additional hour of pay at the respective regular rate of compensation for each workday that a fully compliant meal period was not provided, in violation of Labor Code sections 226.7, 512, 558, and 1198 and the IWC Wage Orders (the "Meal Periods" sections of the applicable orders).

50. Plaintiff and class members are entitled to recover to the full amount of the meal period premiums owed, in addition to interest, statutory and civil penalties, and attorneys' fees, and costs to the extent permitted by law.

FOURTH CAUSE OF ACTION

REST PERIOD VIOLATIONS

Violation of Labor Code §§ 226.7

51. All outside paragraphs of this Complaint are incorporated into this section.

52. This cause of action is brought pursuant to the IWC Wage Orders and Labor Code §§ 226.7 and 516, which require non-exempt employees be authorized to take complaint rest periods (or rest period premiums in lieu thereof), and which further provide a private right of action for an employer's failure to lawfully provide all rest periods and/or pay rest period premiums at the lawful regular rate of compensation.

53. Defendants willfully failed in their affirmative obligation to consistently authorize and permit Plaintiff and class members to receive compliant, duty-free rest periods of not less than ten (10) minutes for every four hours worked (or major fraction thereof) in violation of Labor Code

sections 226.7, 516, 558, and 1198 and the IWC Wage Orders (the "Rest Periods" sections of the applicable orders).

54. Further, Defendants willfully failed in their affirmative obligation to consistently pay Plaintiff and class members one additional hour of pay at the respective regular rate of compensation for each workday that a fully compliant rest period was not provided, in violation of Labor Code sections 226.7, 516, 558, and 1198 and the IWC Wage Orders.

FIFTH CAUSE OF ACTION

FAILURE TO PAY ALL PAID SICK LEAVE WAGES

Violation of Labor Code §§ 200, 218, 246 *et seq.*

55. All outside paragraphs of this Complaint are incorporated into this section.

56. Defendants knowingly and intentionally failed in their affirmative obligation to pay sick leave wages to Plaintiff and the Paid Sick Leave Class in violation of Labor Code section 246 *et seq*. Paid sick leave earnings constitute wages for purposes of California wage and hour law. (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1103 ["Courts have recognized that 'wages' also include those benefits to which an employee is entitled as a part of his or her compensation, including money, room, board, clothing, vacation pay, and sick pay"].)

57. Labor Code § 246(l) governs how Defendants must calculate paid sick leave:

> [A]n 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.

58. Defendants failed to pay Plaintiff and the Paid Sick Leave Class their paid sick leave wages at one of the lawful rates set forth in the statute because Defendants failed to include in their sick leave calculation the additional remuneration received by Plaintiff and the Paid Sick Leave Class.

59. Furthermore, to the extent the paid sick leave paid constitutes Covid-related paid sick leave, Defendants knowingly and intentionally failed in their affirmative obligation to pay Covid-19 Supplemental Sick Leave wages to the Paid Sick Leave Class at the correct rate in violation of Labor Code sections 246, 248.1, 248.2, and 248 *et seq.*

60. Pursuant to Labor Code section 248.1, Defendants were required to provide up to 80 hours of Covid-19 Supplemental Paid Sick Leave to employees for the period of April 20, 2020 to December 31, 2020. Labor Code section 248.2 required Defendants to provide up to 80 hours of Covid-19 Supplemental Paid Sick Leave for the period of January 1, 2021 through at least 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.

61. Under Labor Code section 248.1, employees must be paid for Covid-19 Supplemental Paid Sick Leave at the highest of the following: (1) the regular rate of pay for the last pay period, (2) state minimum wage, (3) local minimum wage.

62. Under Labor Code section 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.

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

64. On information and belief, Defendants failed to pay Covid-19 Supplemental Sick Leave in the manner described above because Defendants failed to include in their sick leave calculation the additional remuneration received by the Paid Sick Leave Class.

65. As a result, Defendants violated the Labor Code and are liable to Plaintiff and the Paid Sick Leave Class for underpaid sick leave wages, in addition to interest, attorneys' fees, and costs.

SIXTH CAUSE OF ACTION

UNTIMELY PAYMENT OF WAGES

Violation of Labor Code §§ 204, 210, 218

66. All outside paragraphs of this Complaint are incorporated into this section.

67. This cause of action is brought pursuant to the IWC Wage Orders and Labor Code §§ 204, 204b, and 210 which require non-exempt employees be timely paid all wages owed each pay period, and which further provide a private right of action for an employer's failure to comply with this obligation. Labor Code § 218 authorizes individuals to sue directly for wages and penalties due under these sections, including Labor Code § 210(c)'s statutory late payment penalties.

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

69. Plaintiff and class members are entitled to recover the full amount of the unpaid wages, in addition to a statutory penalty in the amount of $100 for the initial violation for each failure to pay each employee and $200 for all subsequent violations and for all willful or intentional violations for each failure to pay each employee, plus 25 percent of the amount unlawfully withheld under provided in Labor Code § 210, in addition to interest, attorneys' fees, and costs to the extent permitted by law.

SEVENTH CAUSE OF ACTION

WAGE STATEMENT VIOLATIONS

Violation of Labor Code § 226

70. All outside paragraphs of this Complaint are incorporated into this section.

71. This cause of action is brought by the Wage Statement Subclass pursuant to Labor Code § 226(a) which requires non-exempt employees be provided accurate itemized wage statements each pay period, and which further provide a private right of action for an employer's failure to comply with this obligation.

72. Defendants knowingly and intentionally failed in their affirmative obligation provide accurate itemized wage statements to Plaintiff and class members resulting in injury to Plaintiff and class members. Specifically, the wage statements issued to Plaintiff and class members did not accurately state each pay period all of the information required by Labor Code § 226(a)(1)-(9).

73. Defendants' unlawful acts and omissions deprived Plaintiff and class members of accurate itemized wage statements, causing confusion and concealing wage and premium underpayments.

74. As a result, Plaintiff and class members are entitled to recover the statutory penalty of $50 per employee for the initial pay period in which a violation occurred and $100 per employee for each violation in a subsequent pay period, up to an aggregate penalty of $4,000 per employee, in addition to interest, attorneys' fees, and costs to the extent permitted by law, including under Labor Code section 226(e).

EIGHTH CAUSE OF ACTION

WAITING TIME PENALTIES

Violation of Labor Code §§ 201 *et seq*.

75. All outside paragraphs of this Complaint are incorporated into this section.

76. This cause of action is brought by the Class pursuant to Labor Code §§ 201 through 203, which require an employer to timely pay all wages earned upon termination of employment, and which further provide a private right of action to recover statutory waiting time penalties each day an employer fails to comply with this obligation, up to a maximum of 30 days of wages.

77. Defendants willfully failed and continue to fail in their affirmative obligation to pay all wages earned and unpaid to Plaintiff and members of the Waiting Time Class immediately upon termination of employment or within 72 hours thereafter for employees who did not provide at least 72 hours prior notice of his or her intention to quit, and further failed to pay those sums for 30 days thereafter in violation of Labor Code sections 201 through 203 and the IWC Wage Orders.

78. Plaintiff and the Class are entitled to recover to a waiting time penalty for a period of up to 30 days, in addition to interest, attorneys' fees, and costs to the extent permitted by law.

NINTH CAUSE OF ACTION

UNFAIR COMPETITION

Violation of Business and Professions Code §§ 17200 *et seq.*

79. All outside paragraphs of this Complaint are incorporated into this section.

80. Defendants have engaged and continue to engage in unfair and/or unlawful business practices in the State of California in violation of California Business and Professions Code § 17200 by committing the foregoing wage and hour violations alleged throughout this Complaint.

81. Defendants' dependance on these unfair and/or unlawful business practices deprived Plaintiff and continue to deprive other class members of compensation to which they are legally entitled, constitutes unfair and/or unlawful competition, and provides an unfair advantage to Defendants over competitors who have been and/or are currently employing workers in compliance with California's wage and hour laws. These failures constitute unlawful, deceptive, and unfair business acts and practices in violation of Business and Professions Code section 17200 *et seq.*

82. Plaintiff is a victim of Defendants' unfair and/or unlawful conduct alleged in this Complaint, and Plaintiff, as an individual and on behalf of others similarly situated, seeks full restitution of the moneys as necessary and according to proof to restore all monies withheld, acquired, and/or converted by Defendants pursuant to Business and Professions Code §§ 17203 and 17208.

83. Plaintiff does not have an adequate remedy at law for past or future violations, to the extent the statute of limitations on each of the alleged causes of action do not extend to the four year limitation provided under the UCL or to the extent the underlying Labor Code and IWC Wage Order violations do not provide a private right of action.

84. Plaintiff and class members are entitled to injunctive relief against Defendants, restitution, and other equitable relief to return all funds over which Plaintiff and class members have an ownership interest and to prevent future damage and the public interest under Business and Professions Code § 17200 *et seq.* Plaintiff and class members are further entitled to recover interest, attorneys' fees, and costs to the extent permitted by law, including under Code of Civil Procedure § 1021.5.

TENTH CAUSE OF ACTION

CIVIL PENALTIES UNDER THE PRIVATE ATTORNEYS GENERAL ACT

Violation of Labor Code §§ 2698 *et seq.*

(By Plaintiff on Behalf of the State and the Aggrieved Employees Against All Defendants)

85. All outside paragraphs of this Complaint are incorporated into this section.

86. Plaintiff brings this cause of action as a proxy for the State of California on behalf of the following "aggrieved employees" pursuant to the Private Attorneys General Act ("PAGA"), codified as Labor Code section 2698 *et seq.*:

a. All current and former non-exempt employees who worked for Defendants in California at any time from one year prior to the postmark date of the initial PAGA notice through date of trial.

87. Plaintiff reserves the right to amend, supplement, or add to this description of the aggrieved employees, according to proof.

88. The State of California, via the Labor and Workforce Development Agency ("LWDA"), is the real party in interest in this action with respect to this cause of action. (*Kim v. Reins Int'l California, Inc.* (2020) 9 Cal. 5th 73, 81 [The "government entity on whose behalf the plaintiff files suit is always the real party in interest."])

89. Labor Code section 2699(a) provides: "Notwithstanding any other provision of law,, any provision of this code that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency or any of its departments, divisions, commissions, boards, agencies, or employees, for a violation of this code, may, as an alternative, be recovered through a civil

action brought by an aggrieved employee on behalf of himself or herself and other current or former employees pursuant to the procedures specified in Section 2699.3. "

90. Labor Code section 2699(f) provides: "For all provisions of this code except those for which a civil penalty is specifically provided, there is established a civil penalty for a violation of these provisions, as follows: … (2) If, at the time of the alleged violation, the person employs one or more employees, the civil penalty is one hundred dollars ($100) for each aggrieved employee per pay period for the initial violation and two hundred dollars ($200) for each aggrieved employee per pay period for each subsequent violation."

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

92. Labor Code section 2699.3 sets forth the procedure for commencing an action for civil penalties under the PAGA.

93. On or about Feb. 24, 2023, Plaintiff paid the requisite PAGA filing fee and provided written notice (by online electronic filing with the LWDA and by certified mail to Defendants) of Defendants' alleged Labor Code violations, including the facts and theories to support the alleged violations.

94. A true and correct copy of Plaintiff's written PAGA notice, entitled "Notice of Labor Code Violations" is attached hereto as <u>Exhibit 1</u> and incorporated by reference as though fully set forth herein (the "<u>PAGA notice</u>").

95. To date, neither Plaintiff nor Plaintiff's counsel has received a response to Plaintiff's written PAGA notice from the LWDA.

96. Within 33 calendar days of the postmark date of the notice sent by Plaintiff, neither Plaintiff nor Plaintiff's counsel has received written notice by certified mail from any defendant providing a description of any actions taken to cure the alleged violations.

97. Now that at least 65 days have passed from Plaintiff notifying Defendants of these violations, without notice of cure from Defendants or notice from the LWDA of its intent to investigate

the alleged allegations and issue the appropriate citations to Defendants, Plaintiff exhausted all prerequisites and commenced this civil action under Labor Code section 2699 *et seq*.

98. As set forth in the PAGA notice attached as Exhibit 1 and incorporated into this Complaint, Defendants committed the following violations and are liable for all corresponding civil penalties:

a. ***Unpaid Hours Worked/Minimum Wage.*** Violation of Labor Code §§ 1194, 1197, 1198; IWC Wage Orders.

b. ***Unpaid Overtime***. Violation of Labor Code §§ 510, 1194, 1198; IWC Wage Orders.

c. ***Unpaid Paid Sick Leave.*** Violation of Labor Code §§ 246 through 248.7.

d. ***Unpaid Meal Period Premium Wages.*** Violation of Labor Code §§ 226.7, 512, 1198; IWC Wage Orders.

e. ***Unpaid Rest Period Premium Wages.*** Violation of Labor Code §§ 226.7, 516, 1198; IWC Wage Orders.

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

g. ***Untimely Payment of Wages Upon Separation of Employment.*** Violation of Labor Code §§ 201, 202, 203, 256.

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

i. ***Unlawful Employment Conditions.*** Violation of Labor Code § 432.5

j. ***Failure to Maintain Accurate Records.*** Violation of Labor Code § 1174; IWC Wage Orders.

99. Plaintiff seeks to collect all recoverable civil penalties for the Labor Code violations alleged in this Complaint and the PAGA notice (including amendments thereto) against Defendants pursuant to Labor Code section 2699(a) and (f), in addition to attorneys' fees, costs, and interest to the extent permitted by law, including under Labor Code section 2699(g)

PRAYER

Plaintiff prays for judgment as follows:

a. For certification of this action as a class action;

b. For appointment of Plaintiff as the class representative;

c. For appointment of above-captioned counsel for Plaintiff as Class Counsel;

d. For division of class members into appropriate classes and/or subclasses according to proof;

e. For recovery of damages in amount according to proof;

f. For all recoverable pre- and post-judgment interest;

g. For recovery of all civil and statutory penalties and liquidated damages;

h. For disgorgement of all amounts wrongfully obtained;

i. For this action to be maintained as a representative action under the PAGA;

j. For Plaintiff and counsel of record to be provided with all enforcement capability as if the action were brought by the State of California or the California Division of Labor Enforcement;

k. For recovery of all civil penalties and other recoverable amounts under the PAGA;

l. For restitution and injunctive relief;

m. For reasonable attorneys' fees and costs of suit, including expert fees, to the extent permitted by law, including (without limitation) under Labor Code §§ 218.5, 226, 1194, and 2699, and Code of Civil Procedure section 1021.5; and

n. For such other relief the Court deems just and proper.

Dated: May 3, 2023

Ferraro Vega Employment Lawyers, Inc.

Nicholas J. Ferraro

Nicholas J. Ferraro
Attorneys for Plaintiff Emanuel Zamudio

<u>Exhibit 1</u>
Notice of Labor Code Violations

FERRARO VEGA
SAN DIEGO EMPLOYMENT LAWYERS

Nicholas J. Ferraro
nick@ferrarovega.com
Lauren N. Vega
lauren@ferrarovega.com

ATTORNEYS AT LAW
3160 Camino del Rio South, Suite 308
San Diego, California 92108

619-693-7727
619-350-6855 fax
ferrarovega.com

February 24, 2023

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

VIA CERTIFIED U.S. MAIL
- Electronic Return Receipt -

Orkin, LLC
2170 Piedmont Road NE
Atlanta, Georgia 30324

Orkin Services of California, Inc.
12710 Magnolia Avenue
Riverside, California 92503

Rollins, Inc.
2170 Piedmont Road NE
Atlanta, Georgia 30324

- PAGA Notice & Filing Fee -
Submitted electronically to the Labor and Workforce Development Agency

Dear LWDA Officer and Company Representatives:

This letter serves as written notice under Labor Code section 2699.3 on behalf of **EMANUEL ZAMUDIO** ("Plaintiff") and all other "aggrieved employees" of the following "Defendant(s)":

ROLLINS, INC.;
ORKIN, LLC;
ORKIN SERVICES OF CALIFORNIA, INC.;
DBA ORKIN PEST CONTROL

Defendant(s) shall mean and include the foregoing in addition to any other related employer entities, individuals under Labor Code sections 558 and 558.1, and all others who may be later added upon further investigation and discovery as liable employers.

This office serves as legal counsel for Plaintiff. 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 65-day period under Labor Code section 2699.3, Plaintiff intends to commence a civil action against Defendants as a proxy and agent of the State of California under the 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; *Kim v. Reins International California, Inc.* (2020) 9 Cal. 73, 79.

Through this notice, Plaintiff requests that Defendants complete an internal investigation and audit of the wage and hour and employment practices at issue and make a good faith effort to correct any violations. Plaintiff attempts to identify the non-compliant policies and practices affecting the aggrieved employees so that the parties may resolve the underlying damages and penalties in a settlement approved by the Superior Court of California under Labor Code section 2699(k). Defendants are notified that any attempt to resolve this case should be conducted in coordination with Plaintiff's counsel to protect the interests of Plaintiff, the aggrieved employees, and the State of California via the LWDA. This settlement attempt is in compliance with relevant California law. *Graham v. Daimler Chrysler Corp.* (2004) 24 Cal. 4th 553, 561.

- BACKGROUND -

Defendants employed Plaintiff during the PAGA Period in the position of Pest Control Technician from about April 2022 to December 2022. During their employment Plaintiff and the other aggrieved employees were subject to the wage and hour and employment protections set forth in the California Labor Code and IWC Wage Orders.

Through this notice, Plaintiff informs the LWDA of the Labor Code violations set forth herein. The "aggrieved employees" include Plaintiff and the following individuals:

> All current and former non-exempt 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 trial in any pending action (the "aggrieved employees" and the "PAGA Period").

Plaintiff reserves the right to expand or narrow the definition of the "aggrieved employees" in the forthcoming civil action. Furthermore, Plaintiff 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.

- PAGA CLAIMS –

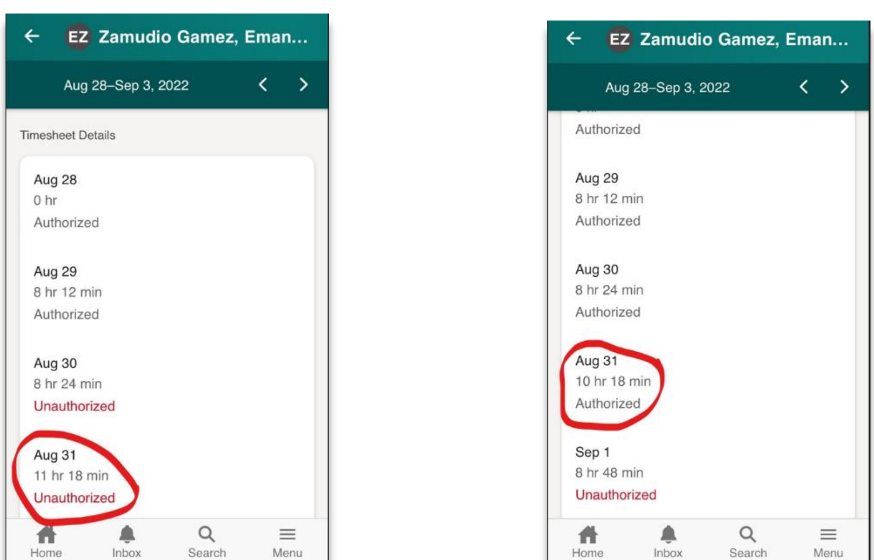
Unpaid Hours Worked/Minimum Wage
Violation of Labor Code §§ 1194, 1197, 1198; IWC Wage Orders

Defendants violated Labor Code sections 1194, 1197, and 1198, along with the California Minimum Wage Order, the applicable local minimum wage ordinances, and the "Hours and

Days of Work" and "Minimum Wages" sections of the applicable IWC Wage Orders with respect to the aggrieved employees.

Labor Code section 1194 renders it unlawful for an employee to receive less than the legal minimum wage for hours worked in California. Labor Code section 1197 further mandates that "[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." 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. The California Minimum Wage Order and the applicable sections of the IWC Wage Orders further require payment of minimum wages for all hours worked. The "Minimum Wages" sections of the applicable IWC Wage Order provide 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." The foregoing California wage laws require payment of "not less than the applicable minimum wage *for all hours worked* in the payroll period" and California law does not allow averaging of pay over the hours worked in the pay period, even if the total pay results in an average above the minimum wage. *Armenta v. Osmose, Inc.* (2005) 135 Cal. App. 3d 314, 324.

Defendants failed to pay Plaintiff and the aggrieved employees at the lawful minimum wage rate for all hours worked, resulting in unpaid minimum wages, due to an deduction policy and practice in effect. Upon information and belief, Defendants unilaterally and as a matter of practice deducted time from the work hours reported by Plaintiff and the aggrieved employees on their timekeeping records when the time was deemed excessive or "unauthorized."



Excerpt of Plaintiff's Time Records Demonstrating an Unlawful Deduction to His Reported Hours

For example, Plaintiff reported working 11 hours and 18 minutes on August 31, 2022, which Defendants later reduced to 10 hours and 18 minutes. Defendants' policy and practice of falsifying time records to avoid compensating employees for all their work resulted in unpaid regular wages for Plaintiff and the aggrieved employees.

Furthermore, Defendants subjected Plaintiff and other aggrieved employees to a non-neutral and unlawful rounding policy. California courts have indicated that rounding policies are unlawful "where the employer can capture and has captured all the minutes an employee has worked." *Camp v. Home Depot USA, Inc.* (2022) 84 Cal.App.5th 638, 661. "The California Supreme Court has stated that the Labor Code and California wage orders 'contemplate[] that employees will be paid for all work performed," that this regulatory scheme in California 'is indeed concerned with "small things,"' and that 'a few extra minutes of work each day can add up.'" *Id.* at 660, quoting *Troester v. Starbucks Corp.* (2018) 5 Cal.5th 829 (internal citations omitted).

Defendants required Plaintiff and other employees to record the exact start and stop times for their shifts, and then rounded the overall hours worked for each day to reflect increments of one-tenth of an hour. Plaintiff's timekeeping records demonstrate on their face that this policy was not applied neutrally, as Plaintiff was repeatedly undercompensated for all his hours worked.

Work Date	Hours	Productive Hours	Overtime Hours	Absent Hours	Punch Time	Punch Type
10/17/2022	11.40	9.90	1.90	.		
					07:17	ON
					12:50	OFF
					13:21	ON
					17:43	OFF
10/18/2022	8.90	8.40	0.40	.		
					07:05	ON
					12:06	OFF
					12:36	ON
					16:01	OFF
10/19/2022	9.40	8.90	0.90	.		
					08:01	ON
					13:01	OFF
					13:30	ON
					17:24	OFF
10/20/2022	9.90	9.40	1.40	.		
					07:00	ON
					11:59	OFF
					12:29	ON
					16:52	OFF
10/21/2022	9.10	8.60	0.60	.		
					07:30	ON
					12:15	OFF
					12:44	ON
					16:35	OFF
10/24/2022	11.10	10.60	2.60	.		
					07:15	ON
					12:12	OFF
					12:42	ON
					18:21	OFF

Work Date	Hours	Productive Hours	Overtime Hours	Absent Hours	Punch Time	Punch Type
10/25/2022	9.30	8.80	0.80	.		
					07:00	ON
					12:01	OFF
					12:30	ON
					16:20	OFF
10/26/2022	10.70	10.20	2.20	.		
					07:00	ON
					12:00	OFF
					12:30	ON
					17:45	OFF
10/27/2022	10.80	10.30	2.30	.		
					07:00	ON
					12:00	OFF
					12:30	ON
					17:50	OFF
10/28/2022	9.70	9.20	1.20	.		
					07:00	ON
					12:00	OFF
					12:30	ON
					16:45	OFF
10/29/2022	5.70	5.70	5.70	.		
					07:30	ON
					13:11	OFF
10/31/2022	8.80	8.30	0.30	.		
					07:10	ON
					12:00	OFF
					12:30	ON
					16:01	OFF

Excerpt of Plaintiff's Time Records Demonstrating Defendant's Illegal Rounding Policy During the Period of 10/17/22 Through 10/31/22

For example, Plaintiff's punch times (highlighted in yellow) indicate that Plaintiff worked exactly 108.7 hours during the period of October 17, 2022 through October 31, 2022. This time was routinely rounded down to the nearest tenth of an hour, which Defendants identified as "productive hours" (highlighted in red).

ROLLINS.COM

Orkin LLC
2170 Piedmont Road NE
Atlanta , GA 30324

Pay Statement	
Period Start Date	10/16/2022
Period End Date	10/31/2022
Pay Date	11/10/2022
Document	1298806
Net Pay	$1,955.00

Pay Details

Emanuel Angel Zamudio Gamez
[redacted]
USA

Employee Number	[redacted]	Pay Group	SM Ork Crane Hydrex Banks
SSN	[redacted]	Tax Location	ORK South San Diego
Job	Route Mgr CA Commercial	Division	PAC - Pacific Division
Pay Rate	$17.0000	Region	759 - South California Region
Pay Frequency	Semi-Monthly	BusUnit/Dept	8030 - South San Diego
		Service Line	2 - Residential PC

Earnings

Pay Type	Hours	Pay Rate	Current	YTD
Regular-Hourly	40.0000	$17.0000	$680.00	
Regular-Hourly	40.0000	$17.0000	$680.00	
Regular-Hourly	8.0000	$17.0000	$136.00	$21,582.00
OT Reg 1.0	5.2000	$17.0000	$88.40	
OT Reg 1.0	14.8000	$17.0000	$251.60	
OT Reg 1.0	0.3000	$17.0000	$5.10	$4,255.90
Overtime Premiu	14.8000	$11.1530	$165.06	
Overtime Premiu	5.2000	$11.1530	$58.00	
Overtime Premiu	0.3000	$11.1530	$3.35	$2,236.48
Sick pay A	0.0000	$0.0000	$0.00	$485.28
Floating Holida	0.0000	$0.0000	$0.00	$272.00
Holiday Pay	0.0000	$0.0000	$0.00	$480.00
PC Sales			($57.50)	$204.80
PC Serv Rein			$611.34	$1,011.47
Referral Bonus	0.0000	$0.0000	$0.00	$1,000.00
Starts			$20.80	$46.30
Incentive-Conte	0.0000	$0.0000	$0.00	$100.00
Meal Prd Prem	1.0000	$22.3060	$22.31	$211.98

Total Hours Worked 108.3000 Total Hours 109.3000

These rounded and reduced "productive hours" were the only hours for which Plaintiff was paid. During the period of October 17, 2022 through October 31, 2022, the "productive hours" amounted to only 108.3 hours. Plaintiff's paystub for this period demonstrate that Plaintiff was only compensated for 108.3 hours, not the 108.7 hours he actually worked.

Plaintiff is informed, believes, and alleges Defendants routinely employed this unlawful rounding policy to all aggrieved employees – despite the fact that Defendants could and did track the exact time in minutes that employees worked – resulting in the same or similar under-compensation for time worked for other employees. Defendants' liability for underpaid wages and hours due to rounding can be fully assessed by comparison of the employees' actual time entries with the time records maintained by Defendants showing rounded time.

As a result, Plaintiff may recover civil penalties as an individual and on behalf of the State of California and the aggrieved employees, as provided under Labor Code sections 558 ($50/$100), 1197.1 ($100/$250), 1199 / "Penalties" section of the IWC Wage Orders ($50/$100), and 2699 ($100/$200) per violation per pay period per employee, along with all other civil penalties permitted by law.

Unpaid Overtime
Violation of Labor Code §§ 510, 1194, 1198; IWC Wage Orders

Defendants violated Labor Code sections 510, 1194, and 1198, along with the "Hours and Days of Work" sections of the applicable IWC Wage Orders with respect to the aggrieved employees.

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 section 1194 renders it unlawful for an employee to receive less than the legal overtime rate for overtime hours worked in California. 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. The IWC Wage Orders further require payment of overtime wages for all overtime hours worked, including the "Hours and Days of Work" sections.

Defendants failed to pay Plaintiff and the aggrieved employees overtime wages and the lawful rate of pay for overtime hours worked, resulting in unpaid overtime wages. For the same reasons as set forth above in the unpaid hours worked section—time deductions and time rounding—Plaintiff alleges the aggrieved employees were underpaid overtime wages due to Defendants' policy and practice of deducting one hour of reported time worked from employees' timekeeping record, as well as employing an unlawful rounding policy that resulted in regular underpayment of employees' reported hours worked.

Furthermore, when Plaintiff and the aggrieved employees worked overtime, Defendants failed to pay the overtime at the "regular rate of pay." Defendants paid Plaintiff and the aggrieved employees a non-discretionary referral bonus when they successfully referred an individual for employment with Defendants. Defendants improperly excluded this additional form of remuneration from Plaintiff and the aggrieved employees' regular rate of pay.

Referral Bonus Guidelines

- An eligible employee will earn $3,000 award for all Full-time referrals ($1,500 at hire $1,500 at 6 months). Part-times referrals will receive half ($1, 500).
- IN ADDITION eligible employees will immediately earn $100 gift card for a referral that reaches the background initiation stage.
- To be eligible for award, the employee making the referral must be a current, full-time employee (excluding Management).
- The applicant referred must provide the name of the employee who referred him/her on the Rollins application and be hired.
- 2nd Bonus payment is not paid if the new employee or the referring employee terminates before payment is earned
- The referral bonus program also applies to applicants who were former employees (full/part-time, or seasonal) and are considered eligible for rehire.
- ***Note:*** Submit the form to your payroll specialist and RAA after your referral is hired. Please allow 2-weeks for processing. All referral bonus paymentsare subject to payroll tax deductions.

Defendants' referral bonus guidelines are clear that payment of the second bonus is contingent upon the referring employee's continued employment with Defendants. The Department of Labor has made clear that such referral bonuses are longevity bonuses that reward continued employment and must be included in the regular rate calculation. WHD Opinion Letter FLSA (Mar. 26, 2020); *Featsent v. City of Youngstown,* (6th Cir. 1995) 70 F.3d 900, 905.

An illustrative example of the regular rate of pay violation is found on Plaintiff's wage statement below:

Pay Type	Hours	Pay Rate	Current	YTD
Regular-Hourly	40.0000	$17.0000	$680.00	
Regular-Hourly	16.0000	$17.0000	$272.00	
Regular-Hourly	32.0000	$17.0000	$544.00	$23,078.00
OT Reg 1.0	12.9000	$17.0000	$219.30	
OT Reg 1.0	10.1000	$17.0000	$171.70	
OT Reg 1.0	1.6000	$17.0000	$27.20	$4,674.10
Overtime Premiu	12.9000	$12.2954	$158.61	
Overtime Premiu	10.1000	$12.2954	$124.18	
Overtime Premiu	1.6000	$12.2954	$19.67	$2,538.94
Sick pay A	0.0000	$0.0000	$0.00	$485.28
Floating Holida	0.0000	$0.0000	$0.00	$272.00
Holiday Pay	0.0000	$0.0000	$0.00	$480.00
PC Sales			$36.99	$241.79
PC Serv Rein			$803.13	$1,814.60
Referral Bonus			$1,000.00	$2,000.00
Starts			$14.60	$60.90
Incentive-Conte	0.0000	$0.0000	$0.00	$100.00
Meal Prd Prem	1.0000	$24.5908	$24.59	$236.57

Excerpt of Plaintiff's Wage Statement from the Period of 11/01/22 to 11/15/22

Because Plaintiff earned the second referral bonus of $1,000 during the same period that Plaintiff earned overtime and double time wages, Defendant should have (but failed to) factor that bonus into the regular rate of pay for all overtime and double time hours. Defendants instead unlawfully paid Plaintiff at a lower regular rate that only included Plaintiff's other forms of additional nondiscretionary remuneration, resulting in an underpayment of wages in those affected pay periods. On information and belief, Defendants committed the same "regular rate of pay" violation against Plaintiff and other aggrieved employees.

As a result, Plaintiff may recover civil penalties as an individual and on behalf of the State of California and the aggrieved employees, as provided under Labor Code sections 558 ($50/$100), 1199 / "Penalties" section of the IWC Wage Orders) ($50/$100), and 2699 ($100/$200) per violation per pay period per employee, along with all other civil penalties permitted by law.

Unpaid Paid Sick Leave
Violation of Labor Code §§ 246 through 248.7

Defendants violated Labor Code sections 246 through 248.7 with respect to the aggrieved employees.

Labor Code section 246 requires employers to provide paid sick leave to its workforce on the terms set forth in the statute. Employers must comply with the accrual, use, and notice provisions of Labor Code sections 246, 246.5, 247, and must further ensure that they maintain the paid sick leave records required by Labor Code section 247.5. 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. If an employer chooses the accrual method, employees must accrue sick leave at a rate of one hour for every thirty hours worked in a given pay period as set forth in Labor Code section 246(b)(1). Under the accrual method, employees must begin accruing paid sick leave at the commencement of employment.

Employers must pay sick leave in accordance with one of the three permissible methods provided in Labor Code section 246(l): (1) "the same manner as the regular rate of pay for the workweek;" (2) "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;" or (3) "for exempt employee … in the same manner as the employer calculates wages for other forms of paid leave time." Labor Code sections 248.6 and 248.7 similarly require paid sick leave to be paid at a regular rate-based calculation in excess of the base hourly rate and at the lawful accrual rate.

Under Labor Code section 246(i), employers must provide employees "with written notice of the amount of paid sick leave available … for use on either the employee's itemized wage statement … or in a separate writing provided on the designated pay date with the employee's payment of wages."

On information and belief, Defendants failed to comply with California's paid sick leave laws with respect to the aggrieved employees. To the extent employees earned paid sick leave in the same pay period in which they earned non-discretionary forms of remuneration, such as the referral bonus, Plaintiff alleges the aggrieved employees were not paid at the correct statutory rate for such sick leave, in violation of California's paid sick leave laws.

As a result, Plaintiff may recover civil penalties as an individual and on behalf of 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.

<u>Unpaid Meal Period Premium Wages</u>
Violation of Labor Code §§ 226.7, 512, 1198; IWC Wage Orders

Defendants violated Labor Code sections 226.7, 512, and 1198, along with the related sections of the IWC Wage Orders with respect to the aggrieved employees.

<u>Labor Code section 512</u> and the IWC Wage Orders require that employers provide an uninterrupted 30-minute 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. <u>Labor Code section 226.7</u> requires that if a meal period is late, missed, short, or interrupted, the employer must pay one additional 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. <u>Labor Code section 1198</u> 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. The IWC Wage Orders, including <u>Section 11</u> (<u>Meal Periods</u>), further require one uninterrupted 30-minute meal period after no more than five hours of work and a second meal period after no more than 10 hours of work and an additional hour of pay at the employee's regular rate of compensation for each workday that a compliant meal period is not provided. Pursuant to <u>Section 11(A)</u> of the IWC Wage Orders, the California Supreme Court has held that the on-duty meal period exception is "exceedingly narrow" and applies only when (1) "the nature of the work prevents the employee from being relieved of all duty" and (2) *both* "the employer and employee have agreed, in writing, to the on-duty meal period." *Augustus v. AMB Security Services, Inc*. (2016) 2 Cal. 5th 257, 266-276 (emphasis added). If these two requirements are not met, then the employer owes the employee one hour of premium pay for each non-compliant meal period taken under the purported on-duty meal arrangement. *Naranjo v. Spectrum Security Services, Inc.* (2019) 40 Cal. 5th 444, 459.

The California Supreme Court has explicitly mandated that "employers cannot engage in the practice of rounding time punches – that is, adjusting the hours that an employee has actually worked to the nearest preset time increment." *Donahue v. AMN Services, LLC* (Cal., Feb. 25, 2021, No. S253677) 2021 WL 728871, 1.

When Defendants did not provide compliant meal periods, Defendants failed to pay Plaintiff and the other aggrieved employees all owed meal period premiums.

When Defendants paid meal period premiums, they were not paid at the "regular rate of compensation" because the premiums did not factor in additional forms of nondiscretionary remuneration, such as the referral bonus, in violation of California law.

An illustrative example of the regular rate of pay violation is found on Plaintiff's wage statement below:

Pay Type	Hours	Pay Rate	Current	YTD
Regular-Hourly	40.0000	$17.0000	$680.00	
Regular-Hourly	16.0000	$17.0000	$272.00	
Regular-Hourly	32.0000	$17.0000	$544.00	$23,078.00
OT Reg 1.0	12.9000	$17.0000	$219.30	
OT Reg 1.0	10.1000	$17.0000	$171.70	
OT Reg 1.0	1.6000	$17.0000	$27.20	$4,674.10
Overtime Premiu	12.9000	$12.2954	$158.61	
Overtime Premiu	10.1000	$12.2954	$124.18	
Overtime Premiu	1.6000	$12.2954	$19.67	$2,538.94
Sick pay A	0.0000	$0.0000	$0.00	$485.28
Floating Holida	0.0000	$0.0000	$0.00	$272.00
Holiday Pay	0.0000	$0.0000	$0.00	$480.00
PC Sales			$36.99	$241.79
PC Serv Rein			$803.13	$1,814.60
Referral Bonus			$1,000.00	$2,000.00
Starts			$14.60	$60.90
Incentive-Conte	0.0000	$0.0000	$0.00	$100.00
Meal Prd Prem	1.0000	$24.5908	$24.59	$236.57

Excerpt of Plaintiff's Wage Statement from the Period of 11/01/22 to 11/15/22

Because Plaintiff earned the second referral bonus of $1,000 during the same period that Plaintiff earned a meal period premium, Defendants should have (but failed to) factor that bonus into the regular rate of pay for all meal period premiums. Defendants instead unlawfully paid Plaintiff at a lower regular rate that only included Plaintiff's other forms of additional nondiscretionary remuneration, resulting in an underpayment of wages in those affected pay period. On information and belief, Defendants committed the same "regular rate of pay" violation against Plaintiff and other aggrieved employees.

Furthermore, as discussed above in the unpaid hours worked section, Defendants maintained an unlawful practice of rounding employees' reported hours worked, resulting in inaccurate records for the purposes of employees' entitlement to complaint first and second meal periods.

As a result, Plaintiff may recover civil penalties as an individual and on behalf of 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.

<u>Unpaid Rest Period Premium Wages</u>
Violation of Labor Code §§ 226.7, 516, 1198; IWC Wage Orders

Defendants violated Labor Code sections 226.7, 516, and 1198, and the related sections of the IWC Wage Orders with respect to Plaintiff and the aggrieved employees.

<u>Labor Code sections 226.7</u> and <u>516</u> and the <u>IWC Wage Orders</u> require that employers authorize and permit an uninterrupted 10-minute rest period for each four-hour period (or major fraction thereof) that an employee works. <u>Labor Code section 226.7</u> requires that if a rest period is non-compliant, the employer must pay one additional 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"). <u>Labor Code section 1198</u> 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. The <u>IWC Wage Orders</u>, including <u>Section 12</u> (<u>Rest Periods</u>), further require one uninterrupted 10-minute rest period for each four-hour period (or major faction thereof) worked and an additional hour of pay at the employee's regular rate of compensation for each workday that a compliant rest period is not authorized or permitted.

Due to staffing issues, employees' job responsibilities, and the steady flow of business, Plaintiff and the aggrieved employees were not always authorized and permitted to take all their rest breaks. Specifically, as mentioned in the various sections above, Defendants maintained a strict policy and practice of overscheduling employees, depriving them of the opportunity to take complaint rest breaks.

When Defendants did not provide compliant rest periods, Defendants failed to pay Plaintiff and the other aggrieved employees all owed rest period premiums. To the extent that Defendants pay any rest period premiums, they were not paid at the "regular rate of compensation" because the premiums did not factor in additional forms of nondiscretionary remuneration, such as the referral bonus, in violation of California law.

As a result, Plaintiff may recover civil penalties as an individual and on behalf of 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.

<u>Untimely Payment of Wages During Employment</u>
Violation of Labor Code §§ 204, 204b, 210

Defendants violated Labor Code sections 204 and/or 204b and 210, as applicable, with respect to Plaintiff and the aggrieved employees.

Labor Code section 204(a) requires payment of "all wages" for non-exempt employees at least twice each calendar month. Labor Code section 204(d) states all wages due must be paid "not more than seven calendar days following the close of the payroll period." 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 "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.

Because Defendants failed to pay all wages and premiums in each pay period in which such wages were earned at the lawful rate, Defendants violated Labor Code section 204 and/or 204b (for weekly employees, as applicable). Defendants violated Labor Code sections 204 and 204b by failing to pay all wages and premiums owed on the regular pay days scheduled each pay period within seven calendar days of the close of the payroll period, as a result of the policies and practices set forth in this notice.

As explained above, Defendants underpaid Plaintiff and the aggrieved employees' minimum, regular, overtime, double time, sick leave, and meal and rest period premium pay, including at the lawful rate of compensation. Defendants are separately liable for not paying the full amount owed to Plaintiff and the aggrieved employees each pay period in violation of Labor Code §§ 204 and/or 204(b).

As a result, Plaintiff may recover civil penalties as an individual and on behalf of the State of California and the aggrieved employees as provided under Labor Code § 2699 ($100/$200) per violation per pay period per employee, and Labor Code § 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, 256

Defendants violated Labor Code sections 201, 202, and 203 with respect to the 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 §§ 201 or 202 to pay a waiting time penalty for each employee, up to a period of 30 days additional compensation.

Defendants failed to pay all wages and premiums owed to aggrieved employees during their employment as set forth in this notice, and also failed to timely pay those amounts to departing employees upon separation of employment. Defendants did not pay waiting time penalties for the late payments. As a result, Defendants violated Labor Code §§ 201, 202, and 203.

As a result, Plaintiff may recover civil penalties on behalf of aggrieved employees and the State of California 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 §§ 226(a) and 226.3 with respect to the aggrieved employees by failing to furnish itemized wage statements each pay period that accurately list all information required by Labor Code § 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.

Defendants failed to provide accurate itemized wage statements to the aggrieved employees each pay period as a result of the policies and practices set forth in this notice. Defendants violated Labor Code § 226(a)(1) and (5) by not listing the correct "gross wages earned" or "net wages earned," as the employees earned wages and premiums that were not paid, resulting in an inaccurate reflection, and recording of "gross wages earned" on those wage statements.

Likewise, in violation of Labor Code § 226(a)(9), Defendants failed to state on employee wage statements each pay period the applicable hourly rates in effect and the number of hours worked at that rate, as Defendants failed to pay all wages and premiums owed to employees at the lawful "regular rate" (or multiple thereof) due for overtime, sick pay, and Labor Code § 226.7 premiums. The amounts stated are instead depreciated and underpaid, resulting in an inaccurate reflection on the pay stub. Additionally, the hours were incorrect due to illegal time rounding, in violation of Labor Code §§ 226(a)(2) and 226(a)(9).

Defendants also violated Labor Code § 226(a)(2) by not accurately listing the total hours worked on the wage statement. Defendants had a policy and practice of falsifying time records to avoid compensating employees for all their work by unilaterally and routinely deducting one hour per day from the work time reported by Plaintiff and, on information and belief, other aggrieved employees on their timekeeping records. Defendants also maintained an unlawful rounding policy that resulted in routine reductions to employees' reported hours worked.

Plaintiff 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 sow confusion among Plaintiff 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 or should be calculated. The wage statements reflect a false statement of earnings and concealed the underlying problems and underpayments of employee wages.

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

Failure to Maintain Accurate Records
Violation of Labor Code § 1174; IWC Wage Orders

Defendants violated Labor Code sections 1174 and the IWC Wage Orders by failing to maintain accurate employee payroll records with respect to Plaintiff and other aggrieved employees.

Labor Code section 1174 requires that employers maintain accurate "payroll records showing the hours worked daily by and the wages paid to, and the number of piece-rate units earned by and any applicable piece rate paid to, employees employed at the respective plants or establishments." Section 7(A) of the IWC Wage Orders, which may be enforced through Labor Code section 1198, mandates similar recordkeeping obligations.

Because of the policies and practices set forth in this notice, including the failure to accurately account for wages earned or hours worked, Defendants failed to accurately maintain records in accordance with Labor Code section 1174 and the IWC Wage Orders.

As a result, Plaintiff may recover civil penalties as an individual and on behalf of the State of California and the aggrieved employees, as provided under Labor Code section 1174.5 ($500) and 2699 ($100/$200), along with all other civil penalties permitted by law.

Unlawful Employment Condition
Violation of Labor Code § 432.5

Defendants violated Labor Code section 432.5 with respect to Plaintiff and other aggrieved employees by requiring that they agree to an unlawful term or condition in writing during their employment.

Labor Code section 432.5 states that "[n]o employer, or agent, manager, superintendent, or officer thereof, shall require any employee or applicant for employment to agree, in writing, to any term or condition which is known by such employer, or agent, manager, superintendent, or officer thereof to be prohibited by law."

Non-solicitation agreements are illegal under California law. Business and Professions Code 16600 provides that "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." Defendants required that Plaintiff and the aggrieved employees sign non-solicitation agreements restricting their ability to receive business from Defendants' customers. As such, Defendants violated California Labor Code section 432.5 by requiring that Plaintiff and the aggrieved employees sign non-solicitation agreements prohibited by California law. Specifically, Plaintiff's Employment Agreement explicitly requires Plaintiff execute an 18-month non-solicitation agreement as a condition of employment.

As a result, Plaintiff may recover civil penalties as an individual and on behalf of 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.

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

Plaintiff has been compelled to retain the services of counsel to protect the interests of other aggrieved employees and the State of California. Plaintiff continues to incur attorneys' fees and costs, which are recoverable under California law, including Labor Code section 2699(g).

- LITIGATION HOLD NOTICE –

This letter imposes a duty upon all defendants and their respective employees, officers, directors, executives, attorneys, human resource and payroll personnel, accountants, and other agents to preserve all physical and electronic evidence, including electronically stored information and emails, which relate to the employment of Plaintiff and the aggrieved employees specified in this notice. Evidence includes, but is not limited to, Defendants' written employment and payroll policies and handbooks; the aggrieved employees' personnel files and payroll records, such as paystubs, time records, wage statements, compensation reports, as well as the underlying electronically data in Excel or similar format. Memoranda and internal and external correspondence relating to the subject matter of this notice shall also be maintained. Failure to preserve and retain relevant evidence may constitute spoliation of evidence and result in an adverse inference or sanctions.

If you have any questions regarding the scope your obligations to preserve evidence, please consult your legal counsel and always err on the side of caution. Periodic or regularly scheduled purges or deletions of information covered by this hold <u>must be suspended immediately</u>.

- CONCLUSION -

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

Please advise if the LWDA intends to investigate any of the factual or legal allegations set forth in this notice. Defendants may contact Plaintiff's counsel with any questions regarding this letter or the forthcoming lawsuit.

Sincerely,

Nicholas J. Ferraro

Nicholas J. Ferraro

Cc Plaintiff Emanuel Zamudio

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