

1 J. KIRK DONNELLY (SBN 179401)
2 LAW OFFICES OF J. KIRK DONNELLY, APC
2173 Salk Ave., Suite 250
3 Carlsbad, CA 92008
Tel. (760) 209-5894
4 kdonnelly@jkd-law.com

5 Counsel for Plaintiff Gerardo Gutierrez

ELECTRONICALLY
FILED
*Superior Court of California,
County of San Francisco*

04/11/2023
Clerk of the Court
BY: KAREN VALDES
Deputy Clerk

6
7
8 **SUPERIOR COURT OF CALIFORNIA**
9 **IN AND FOR THE COUNTY OF SAN FRANCISCO**

10
11 GERARDO GUTIERREZ, individually, and
12 on behalf of all others similarly situated,

13 Plaintiff,

14 vs. FRAICHE CATERING, INC., a
California corporation, and DOES 1 through
15 50, inclusive,

16 Defendants.

CASE NO. CGC-23-605255

FIRST AMENDED CLASS AND PAGA
REPRESENTATIVE ACTION COMPLAINT

JURY TRIAL DEMANDED

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 0
- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8

$$\begin{matrix} 2 \\ 3 \end{matrix}$$
4
5

6
7
8
9
0
1
2
3

4
5
6

7

23
22
21
20
19
18

24
25

26
27

28

1 because common questions of law and fact predominate over individual issues. Common
2 questions include, but are not limited to, the following: (1) whether Defendant misclassified class
3 members as exempt employees, including whether Defendant paid class members on a salary
4 basis; (2) whether Defendant properly calculated and paid all amounts due to the class members
5 for wages earned, including minimum and overtime wages, under California law, (3) whether
6 Defendant violated the California Labor Code and/or IWC Wage Orders by withholding wages,
7 including minimum and overtime wages, from the class members, (4) whether Defendant
8 provided the class members with all required meal periods on a fully-compliant basis, or
9 compensation in lieu thereof; (5) whether Defendant provided the class members with all required
10 rest periods on a fully-compliant basis, or compensation in lieu thereof; (6) whether Defendant
11 provided reimbursement for reasonable and necessary business expenses; (7) whether Defendant
12 provided the class members with accurate itemized wage statements containing all information
13 required by Labor Code section 226(a); (8) whether Defendant timely paid the class members all
14 wages due upon separation of employment, (9) whether Defendant's failure to timely pay all
15 wages due upon termination of employment was willful; and (10) whether Defendant violated
16 California Business and Professions Code sections 17200, et seq.

17 9. Numerosity. The plaintiff class is so numerous that the individual joinder of all
18 members is impractical under the circumstances of this case. While the exact number of class
19 members is unknown to Plaintiff, Plaintiff is informed and believes the class consists of at least
20 100 individuals.

21 10. Typicality. Plaintiff's claims are typical of the claims of the class members.
22 Plaintiff suffered a similar injury as the other class members as a result of Defendant's common
23 practices regarding the misclassification of employees as exempt and failure to pay them on a
24 salary basis, calculation and payment of wages, including minimum and overtime wages, failure
25 to provide all required meal and rest periods on a fully compliant basis; provision of non-
26 compliant wage statements, non-payment of wages due upon termination, and failure to
27 reimburse for reasonable and necessary business expenses. In addition, Plaintiff will fairly and
28 adequately protect the interests of the class members. Plaintiff has no interests adverse to the

1 interests of the other class members.

2 11. Superiority. A class action is superior to other available means for the fair and
3 efficient adjudication of this controversy since individual joinder of all members of the class is
4 impractical. Class action treatment will permit a large number of similarly situated persons to
5 prosecute their common claims in a single forum simultaneously, efficiently, and without the
6 unnecessary duplication of effort and expense that numerous individual actions would engender.
7 Furthermore, as the damages suffered by each individual member of the class may be relatively
8 small, the expenses and burden of individual litigation would make it difficult or impossible for
9 individual members of the class to redress the wrongs done to them, while an important public
10 interest will be served by addressing the matter as a class action. The cost to the court system of
11 adjudication of such individualized litigation would be substantial. Individualized litigation
12 would also present the potential for inconsistent or contradictory judgments. Finally, the
13 alternative of filing a claim with the California Labor Commissioner is not superior, given the
14 lack of discovery in such proceedings, the fact that there are fewer available remedies, and the
15 losing party has the right to a trial de novo in the Superior Court.

16 FIRST CAUSE OF ACTION

17 (Recovery of Unpaid Minimum Wages and Liquidated Damages – Labor Code §§ 1194
18 and 1194.2)

19 12. Plaintiff incorporates by reference the allegations contained in paragraphs 1
20 through 11.

21 13. California law provides non-exempt employees in California must be paid for all
22 hours worked, up to 40 per week or 8 per day, at a regular time rate no less than the mandated
23 minimum wage. Plaintiff and similarly situated individuals regularly worked hours for which
24 they were not compensated by Defendant as required by California law, including hours worked
25 “off the clock” including without limitation performing cleaning/closing duties before or after
26 having timed out. Accordingly, Plaintiff and the similarly situated employees were not paid for all
27 hours worked, up to 40 per week or 8 per day, at a rate no less than the mandated minimum wage.

28 14. Pursuant to Labor Code Sections 1194 and 1194.2, Plaintiff and the similarly

1 situated individuals are entitled to recover all unpaid minimum wages and liquidated damages,
2 plus attorneys' fees and costs, in an amount to be proved at trial.

3 SECOND CAUSE OF ACTION

4 (Recovery of Unpaid Overtime – Labor Code § 1194)

5 15. Plaintiff incorporates by reference the allegations contained in paragraphs 1
6 through 14.

7 16. California law provides employees in California must be paid overtime, equal to
8 1.5 times the employee's regular rate of pay, for all hours worked in excess of 40 per week or 8
9 per day, unless they are exempt. Plaintiff and similarly situated individuals, all of whom were
10 non-exempt, regularly worked more than 40 hours per week and/or 8 per day, but were not paid
11 all overtime wages due and owing under California law. In particular, Plaintiff and other similarly
12 situated employees were classified as exempt and paid a salary every two weeks, even though
13 they (a) were not paid on a salary basis and did not receive at least two times the applicable
14 minimum wage each month, and (b) did not satisfy the requirements of any overtime exemption,
15 including without limitation the administrative or executive exemptions under Wage Order 5.

16 17. Pursuant to Labor Code Section 1194, Plaintiff and the class members are entitled
17 to recover all unpaid overtime wages, plus attorneys' fees and costs, in an amount to be proved at
18 trial.

19 THIRD CAUSE OF ACTION

20 (Failure to Provide Meal Periods or Compensation in Lieu thereof – Labor Code § 226.7)

21 18. Plaintiff incorporates by reference the allegations contained in paragraphs 1
22 through 17.

23 19. Under the Labor Code and IWC Wage Orders, Defendant was required to provide
24 Plaintiff and similarly situated employees with one 30-minute meal period free from all duties for
25 all shifts longer than 5 hours, and a second 30-minute meal period free from all duties for all
26 shifts longer than 10 hours. Meal periods can be waived, but only under the following
27 circumstances: (1) if an employee's total work period in a day is over five (5) hours but no more
28 than six (6) hours, the required meal period may be waived by mutual consent of the employer

1 and employee, and (2) if an employee's total work period in a day is over ten (10) hours but no
2 more than twelve (12) hours, the required second meal period may be waived by mutual consent
3 of the employer and employee, but only if the first meal period was not waived. Employers
4 covered by the Wage Orders have an obligation to both (1) relieve their employees for at least one
5 meal period for shifts over five hours (see above), and (2) to record having done so. If the
6 employer fails to properly record a valid meal period, it is presumed no meal period was
7 provided.

8 20. Plaintiff and similarly situated employees regularly worked periods of more than
9 five and ten hours in a workday without being provided with all mandatory thirty-minute, duty-
10 free meal periods. Upon information and belief, Defendant did not advise Plaintiff and other
11 similarly situated employees of their right to, timing, or number of meal periods. For example,
12 Plaintiff and similarly situated employees did not receive all required first meal periods, or
13 received them on a non-compliant basis as meal periods regularly were less than 30 minutes.
14 Defendant further did not provide second meal periods to Plaintiff and other similarly situated
15 employees on shifts longer than 10 hours. Per Defendant's illegal meal period policy/practice,
16 Defendant further failed to pay Plaintiff and similarly situated employees an additional hour of
17 wages at their regular rates of pay for each workday a meal period was not provided or was not
18 compliant with all requirements of the Labor Code and/or Wage Orders.

19 21. Defendant failed to provide Plaintiff and similarly situated employees with all
20 required meal periods on a fully compliant basis, or with compensation in lieu thereof. As a
21 result, under Labor Code section 226.7, Plaintiff and the similarly situated employees are entitled
22 to one additional hour's pay at the regular rate of compensation for each day a meal period was
23 missed, late or interrupted, all in an amount to be proved at trial.

24 FOURTH CAUSE OF ACTION

25 (Failure to Provide Rest Periods or Compensation in Lieu thereof – Labor Code § 226.7)

26 22. Plaintiff incorporates by reference the allegations contained in paragraphs 1
27 through 21.

28 23. California law requires an employer to authorize or permit an employee to take a

1 rest period of ten net minutes for every four hours worked, or major fraction thereof, and such rest
2 periods must be in the middle of the four-hour period insofar as practicable. If the employer fails
3 to provide any required rest periods, or fails to provide a fully compliant rest break for a net 10
4 minutes wherein the employee is fully relieved of all duties and all employer control, the
5 employer must pay the employee one hour of pay at the employee's regular rate of compensation
6 for each workday the employer did not provide a legally required and/or fully compliant rest
7 period.

8 24. Defendant failed to provide Plaintiff and similarly situated employees all required
9 and/or fully compliant rest periods, or compensation in lieu thereof. Defendant employed policies
10 and procedures that ensured Plaintiff and other similarly situated employees would not receive all
11 legally required rest periods, maintained a non-compliant written rest period policy, and
12 Defendant did not authorize and permit all required rest periods in strict accordance to, and in
13 compliance with, the timing requirements of all applicable Wage Orders. Defendant never
14 properly advised Plaintiff and other similarly situated employees of their right to, timing, or
15 amount of rest breaks. Defendant further employed policies and procedures ensuring that Plaintiff
16 and similarly situated employees did not receive premium wages to compensate them for
17 workdays they did not receive all legally required and fully compliant rest periods.

18 25. Defendant failed to provide Plaintiff and similarly situated employees with all
19 required rest periods, or with compensation in lieu thereof. As a result, under Labor Code section
20 226.7, Plaintiff and similarly situated employees are entitled to one additional hour's pay at the
21 regular rate of compensation for each day a rest break was missed, late or interrupted, all in an
22 amount to be proved at trial

23 FIFTH CAUSE OF ACTION

24 (Failure to Provide Accurate Itemized Wage Statements – Labor Code § 226)

25 26. Plaintiff incorporates by reference the allegations contained in paragraphs 1
26 through 25.

27 27. The California Labor Code provides that, at the time of each payment of wages,
28 the employer must provide each employee, as a detachable part of the check, draft, or voucher

1 paying the employee's wages, with an itemized statement showing, inter alia, gross wages earned,
2 total hours worked, all deductions taken, net wages earned, the inclusive dates for which the
3 employee is being paid, the employee's name and last four digits of their social security number
4 or employee ID number, the name and address of the legal entity that it is the employer, and all
5 applicable hourly rates in effect during the pay period and all hours worked at each rate.

6 28. For the reasons set forth above, Defendant knowingly and intentionally failed to
7 provide Plaintiff and similarly situated employees with proper, itemized wage statements.
8 Further, the wage statements issued by Defendant violate Section 226 on their face as they do not
9 include the total hours worked or the applicable hourly rates and the number of hours worked at
10 each rate.

11 29. Accordingly, under Labor Code Section 226, Plaintiff and the similarly situated
12 employees each are entitled to penalties in the amount of \$50.00 for the initial pay period in
13 which a violation occurred, and \$100.00 for each subsequent pay period in which a violation
14 occurred, up to an aggregate penalty of \$4,000.00 per employee, plus attorney's fees and costs, all
15 in an amount to be proved at trial.

16 SIXTH CAUSE OF ACTION

17 (Waiting Time Penalties – Labor Code §§ 201, et seq.)

18 30. Plaintiff incorporates by reference the allegations contained in paragraphs 1
19 through 29.

20 31. The California Labor Code provides that, at the time of termination of
21 employment, the employer must pay an employee all wages due and owing within the time
22 frames set forth in Labor Code Sections 201, et seq. For the reasons set forth above, Defendant
23 willfully failed to pay Plaintiff and similarly situated employees who no longer are employed
24 with Defendant all wages due and owing within the deadlines set forth in Labor Code Sections
25 201, et seq.

26 32. Under Labor Code Section 203, Plaintiff and similarly situated employees who no
27 longer are employed with Defendant are entitled to recover waiting time penalties of up to 30
28 days' pay, plus attorney's fees and costs, in an amount to be proved at trial.

1 SEVENTH CAUSE OF ACTION

2 (Failure to Reimburse Expenses – Labor Code § 2802)

3 33. Plaintiff incorporates by reference the allegations contained in paragraphs 1
4 through 32.

5 34. California Labor Code section 2802 provides an employer shall fully reimburse an
6 employee for all reasonable and necessary expenses incurred in the performance of the
7 employee's job duties. Plaintiffs and similarly situated employees regularly were required to use
8 their personal cell phones in the performance of their job duties and incurred related expenses,
9 which expenses were not fully reimbursed by Defendant.

10 35. Pursuant to Labor Code section 2802, Plaintiff and similarly situated employees
11 are entitled to recover their unreimbursed business expenses, plus attorneys' fees and costs, in an
12 amount to be proved at trial.

13 EIGHTH CAUSE OF ACTION

14 (Violation of Unfair Competition Law – Bus. & Prof. Code §§ 17200, et seq.)

15 36. Plaintiff incorporates by reference the allegations contained in paragraphs 1
16 through 35.

17 37. Defendant's failure, inter alia, to pay all wages earned and failure to pay all
18 overtime wages earned, failure to pay premium wages for missed/non-compliant meal and rest
19 periods, and failure to reimburse business expenses, all in violation of the Labor Code and Wage
20 Orders, constitutes an unlawful, unfair or fraudulent business act or practice, in violation of
21 Business & Professions Code Sections 17200, et seq.

22 38. Pursuant to Business & Professions Code Section 17203, Plaintiff and similarly
23 situated employees are entitled to restitution of all unpaid wages, unreimbursed expenses, and
24 other sums owed, plus attorney's fees and costs, in an amount to be proved at trial.

25 NINTH CAUSE OF ACTION

26 (Violation of Private Attorneys General Act – Labor Code §§ 2698, et seq.)

27 39. Plaintiff incorporates by reference the allegations contained in paragraphs 1
28 through 38.

40. During the period beginning one-year period preceding the submission of Plaintiff's notice letter, Defendant violated Labor Code Sections 201-203, 204, 216, 221-224, 226, 226.7, 510, 512, 1174, 1194, 1197, 1198, 1199, 2802, 2810.5, and all applicable Wage Orders. These violations subject Defendant to civil penalties as set forth in the foregoing statutes as well as Labor Code Section 2699.

41. Plaintiff complied with the procedures for bringing suit specified in Labor Code Sections 2699.3 and 2699.5. By letter dated and postmarked February 1, 2023, Plaintiff gave written notice to the California Labor & Workforce Development Agency (“LWDA”) via electronic submission, and via certified mail to Defendant, of the specific provisions of the Labor Code and Wage Orders allegedly violated, including the facts and theories to support the alleged violations.

42. Under Labor Code Section 2699.3, the LWDA must give written notice by certified mail to the parties it intends to investigate the alleged violations within 65 days of the date of the complainant's written notice. As of the filing of this amended complaint, the LWDA had not provided the parties any notice of its intention to investigate Plaintiff's claims on behalf of himself and other aggrieved employees. As of the filing of this amended complaint, Defendant has not responded to Plaintiff's PAGA notice in an attempt to cure.

43. The violations alleged herein subject Defendant to civil penalties as set forth in the foregoing statutes, which Plaintiff seeks on his behalf and on behalf of other aggrieved employees. Plaintiff seeks civil penalties in the amounts set forth in each statute allegedly violated or, for all statutes that lack a specified penalty, Plaintiff seeks default penalties as provided by Labor Code Section 2699.

44. Under Labor Code Section 2699(g), Plaintiff is entitled to an award of reasonable attorney's fees and costs in connection with his claims for civil penalties.

PRAYER

WHEREFORE, Plaintiff prays for judgment against each Defendant, jointly and severally, as follows:

1. For compensatory damages, liquidated damages, and statutory penalties according

1 to proof;

2 2. For an order requiring Defendant to make restitution of all amounts wrongfully
3 withheld from Plaintiff and the class;

4 3. For civil penalties according to proof;

5 4. For pre-judgment interest as permitted by law;

6 5. For reasonable attorney's fees and costs of suit; and

7 6. For such other and further relief as the Court deems just and proper.

8
9 Dated: April 11, 2023

LAW OFFICES OF J. KIRK DONNELLY, APC

10
11 
12 J. Kirk Donnelly
13 Attorneys for Plaintiff GERARDO GUTIERREZ

14 DEMAND FOR JURY TRIAL

15 Plaintiff hereby demands a trial by jury on all claims so triable.

16
17 Dated: April 11, 2023

LAW OFFICES OF J. KIRK DONNELLY, APC

18
19 
20 J. Kirk Donnelly
21 Attorneys for Plaintiff GERARDO GUTIERREZ