

Filed
Superior Court of California,
Sacramento
10/27/2023
caddicb
By _____, Deputy
23CVR010748

1 **FALAKASSA LAW, P.C.**
2 Joshua S. Falakassa, CA Bar No. 295045
3 *josh@falakassalaw.com*
4 1901 Avenue of the Stars, Suite 450
5 Los Angeles, California 90067
6 Tel: (818) 456-6168; Fax: (888) 505-0868

7 **BOKHOUR LAW GROUP, P.C.**
8 Mehrdad Bokhour, Esq., CA Bar No. 285256
9 *mehrdad@bokhourlaw.com*
10 1901 Avenue of the Stars, Suite 450
11 Los Angeles, California 90067
12 Tel: (310) 975-1493; Fax: (310) 675-0861

13 Attorneys for Plaintiff, on behalf of the State of California

14 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
15 **FOR THE COUNTY OF SACRAMENTO**

16 TOU HER, on behalf of herself and all others
17 similarly situated,

18 Plaintiff,

19 v.

20 TONY'S FINE FOODS, a California
21 Corporation; and DOES 1-50, inclusive.

22 Defendants.
23
24
25
26
27
28

CASE NO.:

**PAGA REPRESENTATIVE ACTION
COMPLAINT:**

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

1 Plaintiff Tou Her (“Plaintiff”) on behalf of the State of California hereby brings this PAGA
2 Representative Action Complaint (“Complaint”) against Defendant Tony’s Fine Foods and DOES 1
3 to 50 (collectively “Defendants”) and each of them, as follows:

4 **INTRODUCTION**

5 1. Defendants provide marketing and logistic solutions for the food and beverage industry
6 by helping stores keep their foods fresh and organized.

7 2. Plaintiff brings this PAGA representative action on behalf of the State of California
8 against Defendants for alleged violations of the California Labor Code and applicable Wage Orders
9 of the IWC.

10 3. As set forth below, Plaintiff alleges that Defendants deprived Plaintiff and other
11 aggrieved employees of all hours worked, and also failed to pay for all overtime and sick pay wages
12 by failing to properly calculate the “regular rate of pay.” Moreover, Plaintiff alleges that Defendants’
13 meal and rest period policies and practices failed to provide her and all other aggrieved employees
14 with compliant meal and rest periods or pay premium pay at the “regular rate of pay” in lieu thereof.
15 Finally, Plaintiff alleges that Defendants failed to provide aggrieved employees with accurate written
16 itemized wage statements and failed to timely pay all final wages upon separation of employment.

17 **JURISDICTION**

18 4. This is a representative action brought pursuant to Labor Code § 2698 *et seq.* on
19 behalf of the State of California and the group of aggrieved employees defined as follows: “All
20 individuals who are or were employed as hourly, non-exempt employees by Defendants, or their
21 predecessors or merged entities, in the State of California from August 24, 2022, and continuing to
22 the present (“aggrieved employees).”

23 5. Plaintiff, of behalf of the State of California brings this representative action pursuant
24 to Labor Code § 2698, *et seq.* seeking penalties for Defendants’ violation of California Labor Code
25 §§ 200-204, 210, 226(a), 226(e), 226.3, 226.7, 246, 510, 512, 1174, 1174.4, 1194, 1197.1, 1199, and
26 all applicable IWC Wage Orders.

27 6. Based upon the foregoing, Plaintiff and all aggrieved employees are aggrieved
28 employees within the meaning of Labor Code §2698, *et seq.*

7. 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 State of California so as to render the exercise of jurisdiction over them by California courts consistent with the traditional notions of fair play and substantial justice.

VENUE

8. Venue is proper in this judicial district pursuant to California Code of Civil Procedure §§ 395(a) and 395.5, as most of the acts and omissions complained of herein occurred in the County of Sacramento. Defendants own, maintain offices, transact business, have an agent or agents within the County of Sacramento, and/or otherwise are found within the County of Sacramento, and Defendants are within the jurisdiction of this Court for purposes of service of process.

9. In determining proper venue for a PAGA Action, a Plaintiff is not limited to the county/counties in which he or she suffered Labor Code violations, but instead may file suit in any county in which an allegedly aggrieved employee suffered a Labor Code violation. (See *Crestwood Behavioral Health v. Superior Court* (2021) 60 Cal.App.5th 1069.)

PARTIES

10. At all relevant times herein, Plaintiff, who is over the age of 18, was and currently is a California resident residing in the State of California.

11. Plaintiff is informed and believes and thereon alleges that Defendant Tony's Fine Foods is a California corporation authorized to and doing business in California and is and/or was the legal employer of Plaintiff and the aggrieved employees during the applicable statutory periods. Plaintiff was, and is, a victim of Defendants' policies and/or practices complained of herein and has been deprived of the rights guaranteed to her by California Labor Code §§ 200-204, 210, 226(a), 226(e), 226.3, 226.7, 246, 510, 512, 1174, 1174.4, 1194, 1197.1, 1199, and applicable Wage Orders.

12. Plaintiff is informed and believes, and based thereon alleges, that at all relevant times preceding the filing of the Complaint and continuing to the present, Defendants did (and continue to do) business in the State of California, County of Sacramento.

13. Plaintiff does not know the true names or capacities, whether individual, partner, or corporate, of the defendants sued herein as DOES 1 to 50, inclusive, and for that reason, said

1 Defendants are sued under such fictitious names, and Plaintiff will seek leave from this Court to
2 amend this Complaint when such true names and capacities are discovered. Plaintiff is informed, and
3 believes, and thereon alleges, that each of said fictitious defendants, whether individual, partners, or
4 corporate, were responsible in some manner for the acts and omissions alleged herein, and
5 proximately caused Plaintiff and the aggrieved employees to be subject to the unlawful employment
6 practices alleged herein.

7 14. Plaintiff is informed, and believes, and thereon alleges, that at all times mentioned
8 herein, Defendants were and are the employers of Plaintiff and the aggrieved employees. At all times
9 herein mentioned, each of said Defendants participated in the doing of the acts hereinafter alleged to
10 have been done by the named Defendants; and furthermore, the Defendants, and each of them, were
11 the agents, servants, and employees of each and every one of the other Defendants, as well as the
12 agents of all Defendants, and at all times herein mentioned were acting within the course and scope
13 of said agency and employment. Defendants, and each of them, approved of, condoned, and/or
14 otherwise ratified each and every one of the acts or omissions complained of herein.

15 15. At all times mentioned herein, Defendants, and each of them, were members of and
16 engaged in a joint venture, partnership, and common enterprise, and acting within the course and
17 scope of and in pursuance of said joint venture, partnership, and common enterprise.

18 16. Further, Plaintiff alleges that all Defendants were joint employers for all purposes of
19 Plaintiff and the aggrieved employees.

20 **PAGA REPRESENTATIVE ACTION ALLEGATIONS**

21 17. Founded in 1934, Defendants provide marketing and logistic solutions for the food
22 and beverage industry by helping stores keep their foods fresh and organized.

23 18. Plaintiff was employed by Defendants as a non-exempt employee with the title of
24 “Loader” beginning on August 21, 2019, until her separation from employment on April 28, 2023.
25 Plaintiff and other aggrieved employees (including, loaders, drivers, staff, drivers, technicians, order
26 selector, and all other aggrieved positions) were responsible for all aspects of Defendants’ business
27 in the State of California.

28 19. At all relevant times, Plaintiff and other aggrieved employees regularly worked

1 various shifts, many of which were in excess of 8.0 hours in a workday and 40.0 hours in a workweek.
2 Plaintiff alleges that other aggrieved employees were also subjected to the same policies, procedures,
3 and practices, working conditions, and corresponding wage and hour violations to which she was
4 subjected during her employment.

5 20. First, at all relevant times, Defendants have had a consistent practice of failing to
6 accurately record all time worked and time under which aggrieved employees were under the control
7 of the employer. Defendants have had a consistent practice of failing to accurately record all time
8 worked and time under which aggrieved employees were under the control of the employer. This
9 included a policy and practice of failing to properly record aggrieved employees time worked,
10 including, but not limited to, including, but not limited to, time spent on other pre-shift and post shift
11 work duties.

12 21. As a result of this company-wide practice, Plaintiff and other aggrieved employees are
13 not compensated for all the hours that they actually work and all of the overtime hours they actually
14 work, in violation of Labor Code §§ 204, 210, 510, 1194, 1197.1, 1199, and applicable Wage Orders

15 22. Furthermore, at all relevant times, Plaintiff and other aggrieved employees were not
16 properly paid at the correct overtime rate for all hours worked in excess of eight (8) hours per workday
17 and/or forty (40) hours per workweek. Although Plaintiff and other aggrieved employees regularly
18 worked overtime hours, they were not compensated at one and one-half times their “regular rate of
19 pay” because Defendants failed to include all forms of compensation, including, but not limited to,
20 non-discretionary bonuses, shift differentials, non-discretionary bonuses, incentive pay, and other
21 forms of remuneration when calculating the “regular rate of pay” used for payment of overtime
22 wages.

23 23. Under the California Labor Code (as well as the FLSA), courts have consistently held
24 that regularly paid non-discretionary bonuses (and other forms of pay) must be included in
25 determining an employee’s “regular rate of pay” for purposes of calculating overtime. (See *Haber v.*
26 *The Americana Corp.* 378 F. 2d 854, 855-856 (9th Cir. 1967) [holding that regularly paid efficiency
27 bonuses must be included in calculating the “regular rate”]; *Wang v. Chinese Daily News, Inc.* 435 F.
28 Supp. 2d 1042, 1055-1057 (C.D. Cal. 2006) [granting summary judgement to Plaintiff under

1 California and federal law on the grounds, that Defendant improperly calculated overtime by
2 excluding annual bonuses paid to employees from the “regular rate of compensation”].)

3 24. By their policy of requiring Plaintiff and other aggrieved employees to work in excess
4 of eight (8) hours in a workday and/or forty (40) hours in a workweek without compensating them at
5 the lawful rate of one-half (1 1/2) their “regular rate of pay,” Defendants willfully violated the
6 provisions of Labor Code § 510 and the applicable Wage Orders.

7 25. Accordingly, to the extent permitted by law, Plaintiff and other aggrieved employees
8 are entitled to recover unpaid wages and penalties for violations of Labor Code §§ 204, 210, 510,
9 1197.1.

10 26. Similarly, at all relevant times, Defendants also failed in its obligation to provide
11 Plaintiff and other aggrieved employees the legally required paid sick days at the legal rate pursuant
12 to Labor Code §§ 246(a),(b), which requires that “[a]n employee who, on or after July 1, 2015, works
13 in California for the same employer for 30 or more days within a year from the commencement of
14 employment is entitled to paid sick days. . . at the rate of not less than one hour per every 30 hours
15 worked, beginning at the commencement of employment.”

16 27. Labor Code § 246(l)(1) provides that paid sick time for aggrieved employees must be
17 “calculated in the same manner as the regular rate of pay for the workweek in which the employee
18 uses paid sick time, whether or not the employee actually works overtime in that workweek.”

19 28. Additionally, Labor Code § 246(l)(2) states that the paid sick time must be “calculated
20 by dividing the employee’s total wages, not including overtime premium pay, by the employee’s total
21 hours worked in the full pay periods of the prior 90 days of employment.” Finally, Labor Code §246(i)
22 requires employers to “provide an employee with written notice that sets forth the amount of paid
23 sick leave available, or paid time off leave an employer provides in lieu of sick leave, for use on either
24 the employee’s itemized wage statement described in Section 226 or in a separate writing provided
25 on the designated pay date with the employee’s payment of wages.”

26 29. Here, at all relevant times, Defendants failed in its obligation to provide Plaintiff and
27 other aggrieved employees the legally required paid sick days at the legal rate, including all forms of
28 compensation, pursuant to Labor Code §§ 246(a),(b). As such, Defendants paid sick time below the

1 base rate of pay, rather than the “regular rate of pay” as required by Labor Code §§ 246(l)(1-2).

2 30. Next, at all relevant times, Plaintiff and other aggrieved employees were denied
3 compliant and timely 30-minute off-duty meal periods as mandated by California law. Due to
4 Defendants’ uniform meal period policies/practices, operational requirements, and work demands,
5 Plaintiff and other aggrieved employees were often unable to take timely and uninterrupted 30-minute
6 first meal periods before the end of the fifth hour of work. Further, when Plaintiff and other aggrieved
7 employees worked more than 10.0 hours in a shift, they were not always allowed and permitted to
8 take a mandated second meal period before the end of the tenth hour of work in violation of the Labor
9 Code and applicable Wage Orders.

10 31. Additionally, for each missed or non-compliant meal period, Defendants failed to
11 maintain a mechanism by which aggrieved employees were paid meal period premiums at the
12 “regular rate of pay” pursuant to *Ferra v. Loews Hollywood Hotel, LLC* (2021) 11 5th 858 and Labor
13 Code § 226.7.

14 32. Accordingly, due to Defendants’ uniform meal period practices, Plaintiff and other
15 aggrieved employees were also regularly denied legally compliant meal periods in violation of Labor
16 Code 226.7, 510, 516, and applicable IWC Wage Orders.

17 33. Moreover, at all relevant times, Plaintiff and other aggrieved employees were not
18 provided with all 10-minute rest periods for every four hours worked, or major fraction thereof due
19 to Defendants’ uniform rest period policies/practices, operational requirements and work demands.
20 As a result, Plaintiff and other aggrieved employees were and are often unable to take a net 10-minute
21 duty free rest periods for every major fraction of four hours worked. This includes a second rest period
22 for shifts in excess of six hours, and a third rest period for shifts in excess of 10.0 hours in a workday.
23 To the extent aggrieved were permitted allowed and permitted to take rest periods, the rest periods
24 were often cut short or interrupted for work reasons.

25 34. Making matters worse, Defendants’ have a policy/practice that required aggrieved
26 employees to remain on premises and not leave the jobsite during rest periods.

27 35. By not relieving all aggrieved employees of all duties during rest periods, Defendants
28 failed to provide legally compliant rest periods. See *Augustus v. ABM Security Services, Inc.* (2016)

1 2 Cal. 5th 257, 269 [concluding that “during rest periods employers must relieve employees of all
2 duties and relinquish control over how employees spend their time.”]. In *Augustus*, the California
3 Supreme Court expressly rejected the employers’ assertion that it could provide an on-duty rest period
4 to employees who worked as security guards and further explained “that employers [must] relinquish
5 any control over how employees spend their break time and relieve their employees of all duties.” *Id.*
6 at 273.

7 36. Each time Plaintiff and other aggrieved employees were unable to take a compliant
8 rest period, Defendants failed and continue to fail to adequately pay rest period premium payments
9 at the “regular rate of pay” as required by Labor Code § 226.7.

10 37. Accordingly, due to Defendants’ uniform rest period policies/practices and work
11 demands, Plaintiff and other aggrieved employees were also regularly denied legally compliant rest
12 breaks in violation of Labor Code §§ 226.7, 512, and applicable Wage Orders.

13 38. As a result of Defendants’ failure to pay Plaintiff and other aggrieved employees for
14 all minimum wages, overtime wages, sick pay wages at the appropriate legal rate, and Defendants’
15 failure to pay for meal and rest period premiums at the “regular rate of pay,” Defendants issued wage
16 statements which failed to accurately identify the gross wages earned, the total hours worked, the net
17 wages earned, and the correct corresponding number of hours worked at each hourly rate, in violation
18 of Labor Code § 226(a)(1, 2, 5, and 9).

19 39. Labor Code § 226.3 provides that “[a]ny employer who violates subdivision (a) of
20 Section 226 shall be subject to a civil penalty in the amount of two hundred fifty dollars (\$250) per
21 employee per violation in an initial violation and one thousand dollars (\$1,000) per employee for
22 each violation in a subsequent citation, for which the employer fails to provide the employee a wage
23 deduction statement or fails to keep the required in subdivision (a) of Section 226.”

24 40. Thus, for the violations of Labor Code § 226 described above, Plaintiff and other
25 aggrieved employees may also recover Labor Code § 226.3 penalties for Defendants’ violations of
26 Labor Code § 226(a).

27 41. As a further result of Defendants’ failure to pay for all hours worked, including all
28 minimum, sick pay and overtime wages, and meal and rest period premiums at the “regular rate of

1 pay,” Defendants also failed and continues to fail to pay the aggrieved employees all wages owed at
2 their time of separation from employment in violation of Labor Code §§ 201-203.

3 **FIRST CAUSE OF ACTION**

4 **PRIVATE ATTORNEYS GENERAL ACT**

5 *(Plaintiff and Similarly Aggrieved Employees Against All Defendants)*

6 42. Plaintiff re-alleges and incorporates by reference each and every allegation set forth
7 in the preceding paragraphs.

8 43. Defendants have committed several Labor Code violations against Plaintiff and other
9 similarly aggrieved employees. Plaintiff, an “aggrieved employee” within the meaning of Labor Code
10 § 2698 *et seq.*, acting on behalf of the State of California, brings this representative action against
11 Defendants to recover the civil penalties due to Plaintiff, other similarly aggrieved employees, and
12 the State of California according to proof pursuant to Labor Code § 2699 (a) and (f) including, but
13 not limited to (1) \$100 for each initial violation and \$200 for each subsequent violation per employee
14 per pay period for those violations of the Labor Code for which no civil penalty is specifically
15 provided based on the following Labor Code violations:

16 (a) Defendants’ failure to pay all minimum wages to the aggrieved employees;

17 (b) Defendants’ failure to pay all overtime wages at the “regular rate of pay” because
18 Defendants failed to include all forms of compensation, including, but not limited to, shift
19 differentials, non-discretionary bonuses, incentive pay, and other forms of remuneration.

20 (c) Defendants’ failure to pay all wages in a timely fashion in violation of Labor Code §§
21 204 and 210;

22 (d) Defendants’ failure to pay all sick pay at the “regular rate of pay”;

23 (e) Defendants’ failure to allow and permit legally compliant meal periods or compensation
24 at the “regular rate of pay” in lieu thereof;

25 (f) Defendants’ failure to allow and permit legally compliant rest periods or compensation
26 at the “regular rate of pay” in lieu thereof;

27 (g) Defendants’ failure to furnish legally compliant wage statements pursuant to Labor
28 Code § 226(a); and

1 (h) Defendants' failure to timely pay final wages to aggrieved employees at the time of
2 separation from employment were unlawful.

3 44. On or about August 24, 2023, Plaintiff notified Defendants via certified mail, and the
4 California Labor and Workforce Development Agency ("LWDA") via its website of Defendant's
5 violations of the California Labor Code § 2698 *et. seq.* with respect to violations of the California
6 Labor Code identified in Paragraph 45 (a)-(g).

7 45. Now that sixty-five days (65) have passed since Plaintiff notifying Defendant of these
8 violations, Plaintiff has exhausted her administrative requirements for bringing a claim under the
9 Private Attorneys General Act with respect to these violations.

10 46. Plaintiff was compelled to retain the services of counsel to file this court action to protect
11 her interests and the interests of other similarly aggrieved employees, and to assess and collect the
12 civil penalties owed by Defendants. Plaintiff has therefore incurred attorneys' fees and costs, which
13 he is entitled to receive under California Labor Code § 2698 *et seq.*

14 **PRAYER FOR RELIEF**

15 **WHEREFORE**, Plaintiff prays for judgment on behalf of the State of California against
16 Defendants, as follows:

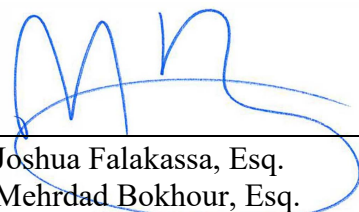
17 1. Upon the First Cause of Action, for civil penalties due to Plaintiff, other similarly
18 aggrieved employees, and the State of California according to proof pursuant to Labor Code § 2699
19 (a) and (f) including, but not limited to: (1) \$100 for each initial violation and \$200 for each
20 subsequent violation per employee per pay period for those violations of the Labor Code for which
21 no civil penalty is specifically provided under the Labor Code;

22 2. For attorneys' fees and costs as provided by Labor Code § 2698 *et seq.*, and Code
23 of Civil Procedure §1021.5; and

24 3. For such other and further relief, the Court may deem just and proper.

1 Dated: October 27, 2023

FALAKSSA LAW, P.C.
BOKHOUR LAW GROUP, P.C.

2
3
4 By: 

Joshua Falakassa, Esq.

Mehrdad Bokhour, Esq.

Attorneys for Plaintiff and the Aggrieved Employees

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28