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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN JOAQUIN

TERRY NELSON, an individual, on behalf of himself and all other aggrieved employees,

Plaintiff,

v.

PENSKE LOGISTICS LLC, a Delaware company; and DOES 1 through 10, Inclusive,

Defendants.

Case No.: STK-CV-UOE-2024-0001484

REPRESENTATIVE ACTION COMPLAINT UNDER THE PRIVATE ATTORNEYS GENERAL ACT ("PAGA") FOR:

1. Failure to Pay Sick Leave at the Correct Legal Rate;
2. Failure to Pay Overtime Premium Wages at the Correct Legal Rate;
3. Failure to pay Vacation Pay at the Correct Legal Rate;
4. Failure to pay Meal Break Premiums at the Correct Legal Rate;
5. Failure to Provide Meal Breaks or Compensation in Lieu Thereof;
6. Failure to Authorize and Permit Rest Beaks or Compensation in Lieu Thereof;
7. Failure to pay all Regular and Overtime Wages;
8. Failure to Reimburse Business Expenses;
9. Failure to Provide Accurate Wage Statements and Keep Adequate Records;
10. Failure to Pay all Wages due upon Termination of Employment; and
11. Maintenance of an Illegal Quota at a Distribution Center

Plaintiff TERRY NELSON ("Plaintiff"), by and through his attorneys, brings this representative action on behalf of himself, and all other aggrieved employees who are or were employed in California by PENSKE LOGISTICS LLC ("Penske" or "Defendant") and DOES 1 through 10, inclusive between one year and sixty-five days prior to the date of the filing of this action through the date of final disposition of this action[1]. Plaintiff hereby alleges, on information and belief, except for information based on personal knowledge, which allegations are likely to have evidentiary support after further investigation and discovery, as follows:

INTRODUCTION

1. On behalf of himself and other aggrieved employees, Plaintiff brings this representative action under the California Private Attorneys General Act of 2004, as codified in Labor Code §§ 2698, *et seq*. ("PAGA") against Defendant and Does 1 through 10 inclusive for civil penalties, interest, costs of suit and attorneys' fees, and all other appropriate relief, resulting from Defendant's wage-and-hour violations and other unlawful conduct.

2. Defendant operates warehouse distribution facilities throughout the state of California and employs numerous employees at those distribution facilities.

3. Employees were required to work off-the-clock and were also not reimbursed for required business expenses.

4. Additionally, Defendant failed to accurately calculate regular rates of pay. Defendant regularly paid several types of bonuses, but failed to factor those bonuses into the regular rate of pay for the purpose of calculating: overtime premium wages; missed meal and rest premium wages; sick leave wages; and vacation pay wages.

5. Further, Defendant regularly failed to provide employees with proper meal breaks, failed to authorize and permit legally compliant rest breaks, and failed to provide meal and rest break premiums in lieu of such breaks.

[1] For those PAGA claims released in *Estrada v. Penske*, Case No. STK-CV-UOE-2022-0004749, the PAGA period starts on July 11, 2023.

6. Defendant also failed to provide accurate wage statements and maintain adequate records and failed to pay all wages owed upon termination of employment.

7. Finally, Defendant did not comply with California quota laws applicable to distributions centers operated in California.

8. Upon information and belief, the above practices are uniform at all distribution facilities in the State of California and are still ongoing.

9. In order to redress the harms suffered, Plaintiff, on behalf of himself and other aggrieved employees, brings this representative claim under the California Private Attorneys General Act (PAGA).

JURISDICTION AND VENUE

10. This Court has jurisdiction over all causes of action asserted herein pursuant to the California Constitution, Article VI, §10, because this case is a cause not given by statute to other trial courts. The penalties sought by Plaintiff total more than this Court's jurisdictional minimum.

11. Plaintiff is a citizen of California because his domicile is in California.

12. This Court has jurisdiction over Defendant because they conduct substantial business in California, employ numerous individuals in California, and have intentionally availed themselves of the laws and markets of California through the operation of their business in California.

13. Venue is proper in this Court because Defendant transacts business in San Joaquin County, and Defendant is otherwise within this Court's jurisdiction for purposes of service of process. On information and belief, Defendant employs numerous individuals in San Joaquin County. Furthermore, Plaintiff was employed by Defendant in San Joaquin County.

14. Venue is also proper because in a PAGA matter venue is proper in any county in which alleged violations took place. In this matter one of the distribution centers Defendant operated (the one in which Plaintiff was employed) is sited in San Joaquin County (in the City of Manteca).

15. There is no federal question at issue here for removal under 28 U.S.C. §1331, as the issues herein are based solely on California statutes and law, including the Labor Code, IWC Wage Orders, and Code of Civil Procedure. Further, as a representative action under PAGA, the matter is not subject for removal under 28 U.S.C. §1332(a)-(d). Plaintiff does not seek individual damages, but rather civil penalties, and as such, does not seek damages on his own behalf in an amount greater than $75,000, or damages for a class in an amount greater than $5 million.

PARTIES

A. PLAINTIFF

16. Plaintiff is an individual over the age of eighteen years, and at all times relevant herein was and is, a resident of the County of San Joaquin in the State of California.

17. During the PAGA Period, Plaintiff worked at one of Defendant's distribution facilities in Manteca, California. Plaintiff was employed by Defendant from in or around November 2018 through on or around May 11, 2023.

B. DEFENDANT

18. Defendant is a Delaware company with its principal place of business in the State of Pennsylvania.

19. On information and belief, Defendant operates distribution facilities throughout the State of California and employs numerous employees in those distribution facilities.

20. On information and belief, at the distribution facility in which Plaintiff worked for Defendant, Defendant employed or exercised control over the wages, hours, or working conditions of 100 or more employees at any given point in time, during the PAGA period.

21. Based on information and belief, Defendant had the authority to, directly or indirectly, or through an agent or other person, employ or exercise control over Plaintiff's and other aggrieved employees' wages, hours, and working conditions.

22. Based on information and belief, Defendant had knowledge of the wage-and-hour violations alleged herein and had the power to prevent the violations from occurring. Having knowledge of the wage-and-hour violations set forth in this Complaint, Defendant could have but failed to prevent the violations from occurring.

23. Plaintiff does not know the true names and capacities of defendants sued herein as DOES 1 through 10, and therefore sues these defendants by such fictitious names. Plaintiff will amend this Complaint to allege the true names and capacities when they are ascertained.

24. Plaintiff believes and thereon alleges that each "Doe" defendant is responsible in some manner for the occurrences herein alleged, and Plaintiff's injuries and damages as herein alleged are directly, proximately and/or legally caused by such defendant and its acts.

25. Plaintiff is informed and believes and thereon alleges that the aforementioned DOES are somehow responsible for the acts alleged herein as the agents, employers, representatives or employees of the named Defendant, and in doing the acts herein alleged were acting within the scope of their agency, employment or representative capacity of said named Defendant.

26. The tortious acts and omissions alleged herein were performed by Defendant's management level employees. Defendant allowed and/or condoned a continuing pattern of unlawful practices in violation of the California Labor Code, and has caused, and will continue to cause, Plaintiff's economic damage in an amount to be proven at trial.

FACTUAL ALLEGATIONS COMMON TO ALL CLAIMS

27. Defendant operates distribution warehouses throughout the State of California. Workers at those warehouses are provided with lifts and are given assignments to complete. The assignments consist of driving their lift up and down aisles in enormous warehouses, taking items off the shelves to be ultimately shipped to customers and/or retail stores.

28. Defendant utilizes a system in which the employee’s workday is controlled by a computerized system on the lifts. The computerized system provides the assignments and tracks the employee’s performance rate on the assignments.

29. Employees are given a limited amount of time to complete each assignment. If they do not complete their assignments within the time allotted, they receive lower scores, are reprimanded and can be terminated.

<u>Off-the-clock Work</u>

30. Employees are required to work time off-the-clock before their shifts.

31. Before starting their work assignments, Plaintiff and other aggrieved employees were required to conduct safety checks on their lifts. However, this time is counted against their performance time which could result in being disciplined and terminated. As a result, employees need to complete their safety checks before the start time of their shifts.

32. Therefore, employees are required to arrive at least ten minutes prior to their shifts in order to prepare their lift and conduct safety checks so they can start their assignments on time. However, employees are not allowed to clock in until the start time of their shifts. This results in unpaid off-the-clock work.

<u>Failure to Accurately Calculate the Regular Rate of Pay and Therefore Failure to Pay all Wages at Legally Required Rates</u>

33. Defendant regularly paid various types of bonuses.

34. However, Defendant failed to incorporate those bonuses into the appropriate calculations of the regular rate of pay for: overtime premium wages; missed meal and rest period wages; sick leave wages; and vacation wages.

<u>Meal Breaks</u>

35. The computerized system prevents employees from being able to take their meal and rest breaks.

36. The system provides for a 35-minute meal period that does not count

against performance time.

37. However, in order to clock out for the break, the employee must still clock out on a time clock at the breakroom. The employee must first park their lift. This requires waiting in line for other employees to park their lift. This takes approximately five minutes. After clocking back in on the time clock, the employees must complete the reverse process which also takes approximately five minutes. Because an employee is required to take at least a 30-minute meal break on the time clock, this results in the computerized system recording 40 minutes for a meal break and the employee is penalized on his or her performance, due to the discrepancy.

38. Because employees are counseled, written up and terminated for even small performance rate issues, this results in employees not taking their breaks.

39. Upon information and belief, Defendant modifies the time records to reflect that a break was taken when it was not.

40. Further, even when employees are able to take breaks, they are often interrupted and/or taken after the fifth hour of work.

41. Plaintiff and other aggrieved employees are owed premiums for all of these missed meal periods.

<u>Rest Breaks</u>

42. For rest breaks, employees are allegedly provided with 15 minutes for each rest break.

43. However, upon information and belief, the computerized system counts the rest breaks against performance time.

44. Because employees are counseled, written up and terminated for even small performance rate issues, this results in employees not taking their breaks.

45. Further, an employee is only allowed to use the restroom on his breaks. However, it takes the employee several minutes each way to go to and from the restroom.

46. As a result, Plaintiff and other aggrieved employees who do take their

breaks are provided with rest breaks less than 10 minutes.

47. Plaintiff and other aggrieved employees are owed premiums for those missed rest periods.

Unreimbursed Expenses

48. Defendant also requires employees to purchase steel-toed boots which they must use when working in the warehouses. Defendant provides a voucher but that is insufficient to cover the cost of the boots.

Wage Statements

49. Because of Defendant's failure to record all hours worked and failure to pay all wages and premiums owed, the wage statements it issues to employees are incorrect.

50. The wage statements also do not accurately state the name and address of the employer.

51. In failing to provide paid sick leave and COVID-19 supplemental paid sick leave at the correct rate (as described above), Defendant also violated the requirement under Labor Code § 246(i) to provide with the employee wage statements the number of hours earned and used at the appropriate and accurate rates.

Termination of Employment

52. When Plaintiff's employment with Defendant ended, Defendant failed to pay him all money that he was owed, as a result of not paying him for off-the-clock work, not paying wages at legally required rates and not paying meal and rest break premiums as alleged above.

Failure to Comply with Quota Laws

53. On information and belief, at the distribution facility in which Plaintiff worked for Defendant, Defendant employed or exercised control over the wages, hours, or working conditions of 100 or more employees at any given point in time, during the PAGA period, and therefore, Defendant falls under California's law regulating the use of quotas at distribution facilities.

54. Defendant did not provide a written description of each quota to which Plaintiff and other aggrieved employees were subject, including the quantified number of tasks to be performed or materials to be produced or handled, within the defined time period, and any potential adverse employment action that could result from failure to meet the quota.

55. Defendant also required Plaintiff and other aggrieved employees to meet a quota that prevents compliance with meal or rest periods and use of bathroom facilities, including reasonable travel time to and from bathroom facilities.

56. Defendant also took adverse employment action against aggrieved employees for failure to meet such quotas.

57. Plaintiff is informed and believes that all of the above practices he experienced were not unique to him but rather were companywide policies and practices at all distribution facilities in the State of California and were suffered by all non-exempt employees.

58. Plaintiff is informed and believes that the unlawful wage and hour policies described in this action are set centrally and are applicable through-out California.

59. Plaintiff is informed and believes that the unlawful wage and hour policies described in this action are still ongoing.

FIRST CAUSE OF ACTION

Private Attorneys General Act

(Against All Defendants)

[Cal. Labor Code §§ 2698-2699.5]

60. Plaintiff re-alleges and incorporates by reference each and every allegation contained in the preceding and subsequent paragraphs as though fully set forth herein.

61. Plaintiff is an “aggrieved employee" within the meaning of California Labor Code § 2699(c), and a proper representative to bring a civil action on behalf of himself and other current and former employees of Defendant pursuant to the

procedures specified in California Labor Code §2699.3, because Plaintiff was employed by Defendant and the alleged violations of the California Labor Code were committed against Plaintiff.

62. Pursuant to the PAGA, Labor Code §§ 2698-2699.5, Plaintiff seeks to recover civil penalties, including but not limited to penalties under California Labor Code §§ 2699, 203, 210, 248.5, 558, 1197.1 and the applicable IWC Wage Order, from Defendant for the violations set forth above, including but not limited to violations of California Labor Code §§ 200, 201, 202, 203, 204, 210, 226, 226.3, 226.7, 227.3, 246, 510, 512, 558, 1174, 1174.5, 1175, 1194, 1194.2, 1197, 1197.1, 1198, 2100-2104 and 2802.

63. Plaintiff seeks civil penalties pursuant to the PAGA for violations of the Labor Code, including:

a. Failure to pay regular and overtime wages for all hours worked (Labor Code §§ 200, 204, 210, 510, 558, 1194, 1194.2, 1197, 1197.1 and 1198, and the applicable IWC Wage Order);
b. Failure to calculate a legally sufficient regular rate, and therefore:
    i. Failure to pay overtime premium wages at legally sufficient rates (Labor Code § 510; *Alvarado v Dart Container*, (2018), 4 Cal.5th 542);
    ii. Failure to pay vacation pay at legally sufficient rates (Labor Code § 227.3);
    iii. Failure to pay sick leave and COVID-19 supplemental sick leave at legally sufficient rates (Labor Code §§ 246(l)(1)-(2) and 248.5); and
    iv. Failure to pay rest and meal break premium wages at legally sufficient rates (Labor Code §§ 226.7, 512(a), 558, 1198; *Ferra v. Loews Hollywood Hotel, LLC*, (2021) 11 Cal. 5th 858).
c. Failure to provide meal breaks (Labor Code §§ 226.7, 512, 558 and the applicable IWC Wage Order);

d. Failure to authorize and permit rest breaks (Labor Code §§ 226.7, 558 and the applicable IWC Wage Order);

e. Failure to reimburse business expenses (Labor Code § 2802);

f. Failure to pay wages in a timely fashion (Labor Code §§ 204, and 210);

g. Failure to provide accurate wage statements (Labor Code §§ 226(a), 226(e)(1), 226.3, 1174, 1174.5, and the applicable IWC Wage Order);

h. Failure to provide accurate statements of sick leave used and accrued (Labor Code §§ 246(l)(1)-(2)); and

i. Failure to pay all wages due upon termination of the employment relationship (Labor Code §§ 201, 202, 203, 204, 1198, 2699 et seq., and the "Minimum Wages" Section , and the applicable IWC Wage Order).

j. Failure to comply with California quota laws (Labor Code § 2100, et seq.).

64. Plaintiff is also entitled to an award of reasonable attorneys' fees and costs pursuant to California Labor Code § 2699(g)(1).

65. Plaintiff has satisfied the requirements of Labor Code § 2699.3. On November 28, 2023, Plaintiff sent notice to the California Labor and Workforce Development Agency (LWDA) notifying them of the specific violations and the facts and theories supporting those violations. Plaintiff also provided Defendant notice of this "PAGA Letter" by certified mail. Sixty-five days have elapsed since Plaintiff notified the LWDA, and the LWDA has not provided notice that it intends to investigate the claims.

66. Further, for certain violations, Labor Code § 2699.3 provides that "the employer may cure the alleged violation within 33 calendar days of the postmark date of the notice sent by the aggrieved employee or representative. The employer shall give written notice within that period of time by certified mail to the aggrieved employee or representative and by online filing with the agency if the alleged violation is cured, including a description of actions taken, and no civil action

pursuant to Section 2699 may commence. If the alleged violation is not cured within the 33-day period, the employee may commence a civil action pursuant to Section 2699." Lab. Code, § 2699.3(c)(2)(A). Labor Code § 2699(d) states that "[f]or purposes of this part, 'cure' means that the employer abates each violation alleged by any aggrieved employee, the employer is in compliance with the underlying statutes as specified in the notice required by this part, and any aggrieved employee is made whole. A violation of paragraph (6) or (8) of subdivision (a) of Section 226 shall only be considered cured upon a showing that the employer has provided a fully compliant, itemized wage statement to each aggrieved employee for each pay period for the three-year period prior to the date of the written notice sent pursuant to paragraph (1) of subdivision (c) of Section 2699.3." Lab. Code, § 2699(d). Plaintiff has not received notice from Defendant that any of the alleged violations were cured within the statutory period. Plaintiff has, therefore, exhausted his administrative remedies as required by Labor Code §2699.3.

67. Attached as Exhibit 1 to this Complaint is Plaintiff's PAGA Letter.

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PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment as follows:

1. For civil penalties pursuant to the PAGA (Labor Code 2698 et seq.);
2. For costs of suit and attorneys' fees as permitted by law, including those available pursuant to Labor Code section 2699(g);
3. For an award of interest, including prejudgment interest, at the legal rate as permitted by law;
4. For such other and further relief as the Court deems proper and just under all the circumstances.

DATED: February 6, 2024

BEN TRAVIS LAW, APC
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EXHIBIT 1

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November 29, 2023

Via LWDA Website:
Labor & Workforce Development Agency
Attn: PAGA Administrator
1515 Clay Street, Suite 801
Oakland, CA 94612

Re: ***Terry Nelson v. Penske Logistics LLC***
Written Notice Under Labor Code § 2699.3

Dear PAGA Administrator:

We represent Terry Nelson ("Claimant"), who is a former non-exempt employee of Penske Logistics LLC ("Penske" or "Defendant").

This letter shall serve as our client's written notice to the Labor and Workforce Development Agency of the Labor Code violations he claims Defendant committed against him and all other current and former non-exempt employees of Defendant who worked at warehouse distribution facilities in California. Our client provides this written notice in accordance with the Labor Code Private Attorneys General Act of 2004 ("PAGA"), Labor Code §§ 2698, et seq. Our client desires to file a civil action to enforce his rights under the Labor Code and seek compensation accordingly. Pursuant to Labor Code § 2699, and by way of this letter, our client also intends to represent all other current and former non-exempt employees of Defendant in California who have suffered at least one of the violations described herein during the relevant period.

A copy of this letter, along with the $75.00 filing fee is being uploaded on the LWDA's website for this purpose contemporaneously with the certified mailing of this letter to Defendant.

FACTUAL BACKGROUND

Defendant operates distribution facilities throughout the state of California and employs numerous employees at those distribution facilities. Upon information and belief, the operations of each distribution facility in California are subject to the same employment policies, practices, and procedures.

Claimant worked as a non-exempt employee for Defendant at its Manteca, California distribution facility from in or around November 2018 through on or around May 11, 2023. Defendant compensated Claimant at an hourly rate of pay. Defendant also compensated Claimant on a regular basis with bonuses. Claimant worked five days a week during most weeks. Claimant regularly worked more than eight hours a day and more than 40 hours a week.

Defendant denied Claimant and other non-exempt employees in California specific rights afforded to them under the California Labor Code, and the applicable Industrial Welfare Commission Wage Order ("IWC Wage Order").

Defendant also failed to provide full uninterrupted meal breaks, and failed to provide a second meal break when Claimant and similarly situated employees worked shifts of 10 or more hours. They did this by penalizing employees if they took their full meal breaks forcing the employees to not take breaks at all. Additionally, meal breaks were regularly interrupted to unload trucks which arrived during Claimant or similarly situated employees meal breaks.

Defendant failed to authorize and permit Claimant and other aggrieved employees legally adequate rest breaks. They did this by failing to provide sufficient break time to allow Claimant and other aggrieved employees to travel from their work station to a break area (and return) and still have a full ten minute uninterrupted break relieved of all duty. Similarly, Defendant failed to provide time or sufficient time for breaks on the electronic quota system Claimant and other aggrieved were subject to. This had the result of discouraging taking breaks to earn bonuses and to avoid write ups.

Furthermore, despite Claimant and other aggrieved employees regularly earning bonuses, Defendant did not properly include all those bonuses in the calculation of their regular rates of pay. Therefore, Defendant did not pay Claimant and other aggrieved employees overtime pay, sick and vacation pay and meal and rest break premiums at the correct hourly rates.

Additionally, Defendant required Claimant and other aggrieved employees to work off-the-clock, including but not limited to, working through meal breaks or meal breaks being interrupted, working before their shifts including the time spent before shifts conducting safety checks on their lifts to be ready on time. Defendant did not pay Claimant and other aggrieved employees for these hours worked.

Defendant also required Claimant and other aggrieved employees to purchase steel-toed boots for work purposes and did not reimburse them for those business expenses.

Derivatively, Defendant failed to pay Claimant and similarly situated employees all wages owed timely during employment and upon termination of employment and failed to and continues to fail to provide accurate wage statements and maintain accurate records as required by California law.

Defendant also violated the California quota laws by failing to provide employees with written descriptions of each quota and any potential adverse employment action that could result from failure to meet the quota. Defendant also violated the quota laws by requiring employees to meet quotas that prevented compliance with meal and rest periods and use of bathroom facilities, including reasonable travel time to and from bathroom facilities, and by taking adverse employment actions against employees, including termination, for failure to meet a quota that did not allow them to take meal and rest periods and use the bathroom facilities, including reasonable travel time to and from bathroom facilities, and for failure to meet a quota that had never been disclosed to them.

FACTUAL BASES & LEGAL THEORIES SUPPORTING ALLEGED VIOLATIONS OF THE LABOR CODE

Claimant alleges that Defendant's policies, procedures and workplace culture caused various and wide-ranging labor code provision violations, including but not limited to Labor Code §§ 200, 201, 202, 203, 204, 210, 226, 226.3, 226.7, 227.3, 245-249, 510, 512, 558, 1174, 1174.5, 1175, 1194, 1194.2, 1197, 1197.1, 1198, 2101-2103 and 2802.

1. **Defendant failed to pay Claimant and similarly situated employees paid sick leave and COVID-19 supplemental paid sick leave at the correct legal rate; and failed to properly notice Claimant and similarly situated employees of the sick leave they had and have accrued. (Violation of Labor Code §§ 246 through 248.6).**

a. Defendant failed and fails to pay Sick Leave at a legally sufficient rate.

California Healthy Workplaces Healthy Families Act, ARTICLE 1.5. 'Paid Sick Days' [sections §§ 245-249] requires employers to provide paid sick leave and COVID-19 supplemental paid sick leave to employees. Labor Code § 246(l)(1)-(2) mandates that sick leave be calculated in the same fashion that overtime base rates are calculated for the pay period sick leave is used, or in a 90-day period in which the sick leave is used. In either case, the rate should be calculated by dividing the sum of all wages by total hours. Labor Code § 248.6 mandates the same calculations for COVID-19 supplemental paid sick leave.

When Defendant provided paid sick leave, Defendant refused to include all wages earned (including bonuses) in the calculations, and instead paid sick leave at the employees' simple hourly rates. Claimant and similarly situated employees are therefore owed compensation for these improperly paid sick time hours.

In failing to pay the proper sick leave rate, Defendant also violated the requirement under Labor Code § 246(i) to provide with the employee wage statements the number of hours earned and used at the appropriate and accurate rates.

Claimant will seek all available remedies, including PAGA penalties as provided for by California law.

2. **Defendant failed to pay Claimant and similarly situated employees overtime premium wages at the correct legal rate (Violation of Labor Code §§ 200, 204, 210, 510, 1194, 1194.2, 1197, 1197.1 and 1198).**

The fundamental right of an employee in the state of California to be paid wages in a timely manner for their work is established by Labor Code § 204, while Labor Code § 1197 requires employers to pay their employees the fixed minimum wage as set by the commission. Pursuant to Labor Code § 1198, it is unlawful to employ persons for more than eight hours per day or forty hours per workweek without compensating them at the rate of pay either time and one half or two times that person's regular rate of pay depending on the number of hours worked. Pursuant to Labor Code § 200(a), wages includes all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation. An employee is permitted to recover any unpaid balance of the minimum wage or overtime compensation not paid for all hours worked under Labor Code § 1194. As required by Labor Code § 1197.1, an employer must pay a civil penalty if it causes an employee to be paid a wage lower than that of the fixed minimum. *See also* the applicable IWC Wage Order, item 20. Labor Code § 210 provides for an additional civil penalty, independent and apart from any other penalty.

An employee's "regular rate of pay" for purposes of Labor Code § 510 and the IWC wage orders is not the same as the employee's straight time rate (i.e., his or her normal hourly wage rate). Regular rate of pay, which can change from pay period to pay period, includes adjustments to the straight time rate, reflecting, among other things, shift differentials and the per-hour value of any non-hourly compensation the employee has earned. *Alvarado v Dart* (2019) 4 Cal 5th 542. Defendant, however, does not comply with the law by including bonuses in the calculation of the regular rate of pay. Rather, Defendant paid Claimant and other aggrieved employees overtime pay based on their basic hourly rates. Claimant and similarly situated employees are owed unpaid overtime premiums.

Labor Code § 558 states: "(a) Any employer or other person acting on behalf of an employer who violates, or causes to be violated, a section of this chapter or any provision regulating hours and days of work in any order of the Industrial Welfare Commission shall be subject to a civil penalty as follows:

> (1) For any initial violation, fifty dollars ($50) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages.
>
> (2) For each subsequent violation, one hundred dollars ($100) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages."

Claimant will seek all available remedies, including PAGA penalties as provided for by California law.

3. **Defendant failed to pay Claimant and similarly situated employees vacation pay at the correct and legal "regular rate of pay." (Violation of Labor Code § 227.3).**

Labor Code § 227.3 provides that "Unless otherwise provided by a collective-bargaining agreement, whenever a contract of employment or employer policy provides for paid vacations, and an employee is terminated without having taken off his vested vacation time, all vested vacation shall be paid to him as wages at his final rate in accordance with such contract of employment or employer policy respecting eligibility or time served; provided, however, that an employment contract or employer policy shall not provide for forfeiture of vested vacation time upon termination. The Labor Commissioner or a designated representative, in the resolution of any dispute with regard to vested vacation time, shall apply the principles of equity and fairness."

Claimant and certain other Aggrieved Employees have either resigned from Defendant's employ or had their employment terminated by Defendant. At all relevant times, Defendant has had an established written policy, practice, or agreement to provide paid vacation to its employees employed in the State of California wherein employees receive additional compensation in the form of vacation time, which they can use to take time off from work with compensation. Upon resignation or termination, Defendant paid Claimant and the other Aggrieved Employees vested vacation time at an hourly rate of pay that was lower than their final regular hourly rates of pay, because Defendant failed to include earned bonuses when calculating the regular rate of pay, in violation of Labor Code § 227.3.

Claimant and other aggrieved employees are entitled to civil penalties pursuant to Labor Code § 2699(f)(2) for Defendant's failure to pay such vested, but unused vacation time compensation at the correct rate upon resignation or termination, as set forth above, in violation of Labor Code § 227.3.

Claimant will seek all available remedies, including PAGA penalties as provided for by California law.

4. Defendant failed to pay Claimant and similarly situated employees missed meal and rest break premiums at the correct legal "regular rate of pay."

Labor Code § 512(a) states, "An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee. An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived."

Section (A) of the "Meal Period" provision of the applicable IWC Wage Order states, "No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and the employee. An employer may not employ an employee for a work period of more than ten (10) hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived. Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered and 'on duty' meal period and counted as time worked.'" Section (D) states "If an employer fails to provide an employee a meal period in accordance with the applicable provisions of this Order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each work day that the meal period is not provided."

Labor Code §1198 states "The maximum hours of work and the standard conditions of labor fixed by the commission shall be the maximum hours of work and the standard conditions of labor for employees. The employment of any employee for longer hours than those fixed by the order or under conditions of labor prohibited by the order is unlawful."

Labor Code § 226.7 states: "(b) An employer shall not require an employee to work during a meal or rest or recovery period mandated pursuant to an applicable statute, or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health."

On July 15, 2021, the California Supreme Court held in *Ferra v. Loews Hollywood Hotel, LLC*, (2021) 11 Cal. 5th 858, that the term "regular rate of compensation" under § 226.7(c) is equivalent to the term "regular rate of pay" under Labor code § 510(a). Accordingly, the meal and rest break premiums owed must be paid at the same rate as would be required under Labor Code § 510(a). On the rare occasions that Defendant actually paid meal or rest break premiums, those premiums were only paid at the basic hourly rate and did not account for any bonuses paid. Accordingly, Defendant violated Labor Code § 226.7(c).

Labor Code § 558 states: "(a) Any employer or other person acting on behalf of an employer who violates, or causes to be violated, a section of this chapter or any provision regulating hours and days of work in any order of the Industrial Welfare Commission shall be subject to a civil penalty as follows:

> (1) For any initial violation, fifty dollars ($50) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages.
> (2) For each subsequent violation, one hundred dollars ($100) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages."

Claimant will seek all available remedies, including PAGA penalties as provided for by California law.

5. **Defendant failed to pay all Regular and Overtime Wages (Off-the-Clock Work)**. (**Labor Code §§ 200, 204, 510, 1194 & 1198)**

Labor Code section 1194(a) states "Notwithstanding any agreement to work for a lesser wage, any employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney's fees and costs of suit." Liquidated damages in an amount equal to the wages unlawfully unpaid and interest thereon are provided for under Labor Code section 1194.2.

Labor Code section 1197 states "The minimum wage for employees fixed by the commission or by any applicable state or local law, 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 1197.1 (a) states "Any employer or other person acting either individually or as an officer, agent, or employee of another person, who pays or causes to be paid to any employee a wage less than the minimum fixed by an applicable state or local law, or by an order of the commission shall be subject to a civil penalty, restitution of wages, liquidated damages payable to the employee, and any applicable penalties imposed pursuant to Labor Code §203..."

As provided for in Section 1197.1(a)(1), for any initial violation that is intentionally committed, one hundred dollars ($100) for each underpaid employee for each pay period for which the employee is underpaid. For each subsequent violation for the same specific offense, two hundred fifty dollars ($250) for each underpaid employee for each pay period for which the employee is underpaid regardless of whether the initial violation is intentionally committed.

Labor Code section 1198 states "The maximum hours of work and the standard conditions of labor fixed by the commission shall be the maximum hours of work and the standard conditions of labor for employees. The employment of any employee for longer hours than those fixed by the order or under conditions of labor prohibited by the order is unlawful."

Section (B) of the "Minimum Wages" provision of the applicable IWC Wage Order states "Every 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."

As set forth above, Defendant required Claimant and other aggrieved employees to work off-the-clock before their shifts. Claimant and other aggrieved employees regularly worked more than eight hours a day and more than 40 hours a week, however, Defendant did not compensate Claimant and other aggrieved employees for the time spent working for Defendant before they clocked in.

As such, Claimant and other aggrieved employees are owed unpaid hours. Claimant will seek all available remedies, including PAGA penalties as provided for by California law.

6. Defendant refused and failed to provide legally compliant meal periods or compensation in lieu thereof (Violation of Labor Code §§ 226.7 and 512 and the applicable IWC Wage Order).

Pursuant to Labor Code § 512, no employer shall employ any person for a work period in excess of five (5) hours without providing a meal period of at least thirty (30) minutes. *See also* the applicable IWC Wage Order, item 11. During this meal period of no less than thirty (30) minutes, the employer must completely relinquish any and all control over the employee and the employee must not engage in any work-related activity for the employer. *Brinker Restaurant* Corp. v. *Superior Court* (2012) 53 Cal.4th 1004, 1040. If the employee performs any work for the employer during the thirty (30) minute meal period, the employee has not been provided a meal period in accordance with the law. *Id.* Additionally, California law does not permit an employer to employ an individual for a work period in excess of ten (10) hours without providing a second meal period of at least thirty (30) minutes. Labor Code § 512; the applicable IWC Wage Order, item 11. If the employer fails to provide an employee with a legally compliant meal period, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the meal period was not provided. Labor Code § 226.7; the applicable IWC Wage Order, item 11.

Claimant contends that as a policy, practice, guideline and/or procedure, Defendant failed to provide meal breaks to its employees. Specifically, Defendant made it impossible for employees to take meal breaks by penalizing them for taking their full breaks. Furthermore, when meal periods were provided, they were often after the end of the fifth hour of work. As such, Claimant and similarly situated employees were not relieved of duty and not provided legally adequate meal breaks. Consequently, Claimant is entitled to receive one additional hour of pay at his regular rate of compensation for each day a compliant rest or meal period was not provided.

Labor Code § 558 states: "(a) Any employer or other person acting on behalf of an employer who violates, or causes to be violated, a section of this chapter or any provision regulating hours and days of work in any order of the Industrial Welfare Commission shall be subject to a civil penalty as follows:

> (1) For any initial violation, fifty dollars ($50) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages.
> (2) For each subsequent violation, one hundred dollars ($100) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages."

Claimant will seek all available remedies, including PAGA penalties as provided for by California law.

7. Defendant refused and failed to authorize and permit legally compliant rest periods or compensation in lieu thereof (Violation of Labor Code § 226.7 and the applicable IWC Wage Order).

The applicable IWC Wage Order, item 12 requires employers to authorize and permit off-duty rest periods during which an employee must be relieved of any and all work-related duties. *Augustus v. ABM Security Services, Inc.* (2016) 2 Cal.5th 257, 269. Additionally, a lawful off-duty rest period is not provided where an employer fails to relinquish control over how employees spend their time. *Id*. Under Labor Code § 226.7, an employer is required to pay an employee one (1) additional hour of pay at the employee's regular rate of pay for each workday in which a lawful rest period was not provided. *See also* the applicable IWC Wage Order.

Defendant consistently provided employees with rest periods that were less than

10 minutes. Claimant and similarly situated employees of Defendant have and are being denied legally sufficient rest breaks.

Labor Code section 558 states: "(a) Any employer or other person acting on behalf of an employer who violates, or causes to be violated, a section of this chapter or any provision regulating hours and days of work in any order of the Industrial Welfare Commission shall be subject to a civil penalty as follows:

> (1) For any initial violation, fifty dollars ($50) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages.
>
> (2) For each subsequent violation, one hundred dollars ($100) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages."

Claimant will seek all available remedies, including PAGA penalties as provided for by California law.

8. Defendant failed to reimburse business expenses. (Labor Code § 2802)

Labor Code section 2802(a) provides in pertinent part, "[a]n employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer."

Labor Code section 2802(b) states, "[a]ll awards made by a court or by the Division of Labor Standards Enforcement for reimbursement of necessary expenditures under this section shall carry interest at the same rate as judgments in civil actions. Interest shall accrue from the date on which the employee incurred the necessary expenditure or loss."

Furthermore, Labor Code section 2802(c) states "[f]or purposes of this section, the term 'necessary expenditures or losses' shall include all reasonable costs, including, but not limited to, attorney's fees incurred by the employee enforcing the rights granted by this section."

Defendant required Claimant and other aggrieved employees to purchase steel-toed boots for use in the workplace. Claimant and other aggrieved employees were not reimbursed for this necessary expense which was required for the benefit of their employer.

Defendant did and does not compensate Claimant and other aggrieved employees for these costs incurred in the discharge of their duties and they are entitled to recover these expenses. Claimant will seek all available remedies, including PAGA penalties as provided for by California law.

9. Defendant failed to timely pay wages. (**Labor Code §§ 204 and 210 and the "Minimum Wages" section of the applicable IWC Wage Order)**

Labor Code § 204 subsection (a) states in relevant part "All wages, other than those mentioned in Section 201, 201.3, 202, 204.1, or 204.2, earned by any person in any employment are due and payable twice during each calendar month, on days designated in advance by the employer as the regular paydays. Labor performed between the 1st and 15th days, inclusive, of any calendar month shall be paid for between the 16th and the 26th day of the month during which the labor was performed, and labor performed between the 16th and the last day, inclusive, of any calendar month, shall be paid for between the 1st and 10th day of the following month."

Labor Code § 204 subsection (b)(1) states: "Notwithstanding any other provision of this section, all wages earned for labor in excess of the normal work period shall be paid no later than the payday for the next regular payroll period."

The "Minimum Wages" section of the applicable IWC Wage Order provides every 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.

Labor Code § 210(a) imposes a civil penalty for violation of Labor Code § 204 of one hundred dollars ($100) for the initial violation for each failure to pay each employee and two hundred dollars ($200) for each subsequent violation, or willful and intentional violation, plus 25 percent of the amount unlawfully withheld.

Due to Defendant not paying correct legal rates as alleged above, Defendant does not pay all wages. In addition, Defendant fails to pay meal and rest break premiums, Defendant failed to pay Claimant all minimum, regular, overtime, and meal and rest period wages due and owing either on the regular paydays or the payday for the next payroll period. Defendant willfully failed to pay all wages when required by § 204 of the Labor Code. Therefore, Defendant owes penalties to all affected employees including Claimant. Claimant will pursue all remedies for Defendant's failure to pay timely wages on behalf of himself and other current and former aggrieved employees, including recovery of wages, attorney's fees, costs, and penalties to the extent allowed by law.

10. Defendant failed to provide accurate wage statements and maintain accurate records. (Labor Code §§ 226(a), 226(e)(l), 226.3, 1174, 1174.5, and the "Records" Section of the applicable IWC Wage Order)

Labor Code § 226(a) states in pertinent part that every employer shall provide an accurate itemized statement in writing with respect to each one of its employees showing: 1) gross wages earned; 2) total hours worked by an employee, except for any employee whose compensation is solely based on a salary and who is exempt from payment of overtime under subdivision (a) of Section 515 or any applicable order of the Industrial Welfare Commission; (3) the number of piece rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis; (4) all deductions, provided that all deductions made on written orders of the employee may be aggregated and shown as one item; (5) net wages earned; (6) the inclusive dates of the period for which the employee is paid; (7) the name of the employee and the last four digits of his or her social security number or an employee identification number other than a social security number; (8) the name and address of the legal entity that is the employer...; and (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee.

Labor Code § 226.3 provides that "Any employer who violates subdivision (a) of Section 226 shall be subject to a civil penalty in the amount of two hundred fifty dollars ($250) per employee per violation in an initial citation and one thousand dollars·($1,000) per employee for each violation in a subsequent citation for which the employer fails to provide the employee a wage deduction statement or fails to keep the records required in subdivision (a) of Section 226."

In addition, Labor Code § 226(e) imposes a penalty of the greater of all actual damages or $50 for the initial pay period in which a violation occurs and $100 per employee for each violation in a subsequent pay period, not exceeding an aggregate penalty of $4,000, and Claimant is entitled to an award of costs and reasonable attorney's fees.

Section (B) of the “Records” provision of the applicable IWC Wage Order states that “Every employer shall semimonthly or at the time of each payment of wages furnish each employee, either as a detachable part of the check, draft, or voucher paying the employee’s wages, or separately, an itemized statement in writing showing: (1) all deductions; (2) the inclusive dates of the period for which the employee is paid; (3) the name of the employee or the employee’s social security number; and (4) the name of the employer, provided all deductions made on written orders of the employee may be aggregated and shown as one item.”

Labor Code § 1174(d) provides that an employer must keep, at a central location in the state or at the plants or establishments at which employees are employed, payroll records showing the hours worked daily by and the wages paid to, employees employed at the respective establishments. These records shall be kept on file for not less than three years. Labor Code § 1174.5 provides for a civil penalty of five hundred dollars ($500) for an employer who willfully fails to maintain the records pursuant to Labor Code section l 174(d).

Sections (7)(A)(4) and (5) of the “Records" provision of the applicable IWC Wage Order provides that employers shall keep accurate information with respect to each employee, including total wages paid each payroll period, total hours worked during the payroll period, and applicable rates of pay, as well as time records showing when each employee begins and ends each work period. The time records must also show meal periods, split shift intervals, and total daily hours worked.

Defendant failed to maintain records as set forth in § 1174 of the Labor Code and the “Records” section of the applicable IWC Wage Order including but not limited to, accurately recording applicable rates of pay.

Defendant also failed to provide accurate itemized wage statements as required by

Labor Code §226.

Due to Defendant not paying for all hours worked, not paying at legally required rates and not paying meal and rest period premiums, Defendant does not record proper hours and wages, and does not provide legally compliant wage statements accurately accounting for hours, wages, deductions, etc.. Nor do the wage statements properly state the name and address of the legal entity that is the employer.

Claimant will seek all available remedies, including PAGA penalties as provided for by California law.

11. **Defendant failed to pay all wages due on termination**. (**Labor Code §§ 201, 202, 203, 204, 1198, 2699 et seq., and the "Minimum Wages" Section of the applicable IWC Wage Order)**

Labor Code § 201 states "If an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately."

Labor Code § 202 states "If an employee not having a written contract for a definite period quits his or her employment, his or her wages shall become due and payable not later than 72 hours thereafter, unless the employee has given 72 hours previous notice of his or her intention to quit, in which case the employee is entitled to his or her wages at the time of quitting."

Labor Code § 203(a) states, in relevant part; "If an employer willfully fails to pay, without abatement or reduction, in accordance with Sections 201, 201.3, 201.5, 202, and 205.5, any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefore is commenced; but the wages shall not continue for more than 30 days."

Labor Code § 204(a) states in pertinent part "All wages... earned by any person in any employment are due and payable twice during each calendar month, on days designated in advance by the employer as the regular paydays."

Labor Code § 210(a) imposes a civil penalty for violation of Labor Code § 204 of one hundred dollars ($100) for the initial violation for each failure to pay each employee and two hundred dollars ($200) for each subsequent violation, plus 25 percent of the amount unlawfully withheld.

The “Minimum Wages” section of the applicable IWC Wage Order provides every 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.

Due to Defendant not paying correct legal rates as alleged above, Defendant does not pay all wages. In addition, Defendant fails to pay meal and rest break premiums. In addition, Defendant failed to pay Claimant all minimum, regular, overtime, and meal and rest period wages due and owing during and upon termination of employment. Defendant willfully failed to pay all wages when required by §§ 201 and 202 of the Labor Code. Therefore, Defendant owes waiting time penalties to all affected employees including Claimant. Claimant will pursue all remedies for Defendant’s failure to pay timely wages on behalf of himself and other current and former aggrieved employees, including recovery of wages, attorney's fees, costs, and penalties to the extent allowed by law.

12. Defendant violated warehouse quota laws (Labor Code § 2100 et seq.)

Labor Code § 2101 provides that each employer that employs 100 or more employees at a single warehouse distribution center in California, or 1,000 employees at one or more warehouse distribution centers in California, shall provide upon hire or within 30 days of the effective date of this part, a written description of each quota to which the employee is subject, including the quantified number of tasks to be performed or materials to be produced or handled, within the defined time period, and any potential adverse employment action that could result from failure to meet the quota.

Labor Code § 2102 provides that an employee shall not be required to meet a quota that prevents compliance with meal or rest periods, use of bathroom facilities, including reasonable travel time to and from bathroom facilities, or occupational health and safety laws in the Labor Code or division standards. An employer shall not take adverse employment action against an employee for failure to meet a quota that does not allow a worker to comply with meal and rest periods, or occupational health and safety laws in the Labor Code or division standards, or for failure to meet a quota that has not been disclosed to the employee pursuant to Section 2101.

Labor Code § 2103 provides:

(a) Any actions taken by an employee to comply with occupational health and safety laws in the Labor Code or division standards shall be considered time on task and productive time for purposes of any quota or monitoring system.

(b) Notwithstanding subdivision (a), consistent with existing law, meal and rest breaks are not considered productive time unless the employee is required to remain on call.

Defendant failed to provide employees with a written description of applicable quotas and any potential adverse employment action that could result from failure to meet the quota. Defendant also required Claimant and other aggrieved employees to meet quotas that prevented compliance with meal and rest periods and use of bathroom facilities, including reasonable travel time to and from bathroom facilities. Similarly, the quota system prevented Claimant and similarly situated employees from taking breaks because it failed to account for or treat time traveling to and from break areas as productive in the quota such that Claimant and similarly situated employee were penalized under the quota for taking breaks.

Defendant took adverse employment actions against Claimant and other aggrieved employees, including termination, for failure to meet a quota that did not allow them to take meal and rest periods and use the bathroom facilities, including reasonable travel time to and from bathroom facilities, and for failure to meet a quota that had never been disclosed to them as required by § 2101.

Claimant will seek all available remedies, including PAGA penalties as provided for by California law.

CONCLUSION

The facts and claims contained herein are based on the information available at the time of this writing. If Claimant becomes aware of additional claims, additional compensation owed or other violations to him or any other current and former employee of Defendant, he reserves the right to revise these facts and/or add any new claims by amending this written notice.

If you have any questions or concerns regarding the above, do not hesitate to contact us.

Sincerely,

Ben Travis
Ben Travis Law, APC

Justin Hewgill
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