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County of Sonoma
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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SONOMA

MARWAN GREEN, on behalf of himself and all others similarly situated,

Plaintiff,

v.

LA TORTILLA FACTORY, INC., a Delaware Corporation; and DOES 1-50, inclusive.

Defendants.

CASE NO.: 24CV03994

REPRESENTATIVE ACTION COMPLAINT:

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

UNLIMITED CIVIL CASE

Plaintiff Marwan Green ("Plaintiff"), on behalf of the State of California, hereby brings this PAGA Representative Action Complaint ("Complaint") against Defendant La Tortilla Factory, Inc. ("Defendant") and DOES 1 to 50 (collectively "Defendants") and each of them, as follows:

INTRODUCTION

1. Defendant manufactures and sells traditional flour, low-fat, organic, and flavored tortillas to customers its customers across the United States.

2. Plaintiff brings this PAGA representative action solely on behalf of the State of California against Defendant for alleged violations of the California Labor Code.

3. **Plaintiff does not seek to recover anything other than penalties as permitted by California Labor Code § 2699.**

4. As set forth below, Plaintiff alleges that Defendant incorrectly classifies its non-exempt employees as exempt. Plaintiff further alleges that Defendant failed to pay all overtime compensation and sick pay wages at the proper legal rates by failing to calculate the "regular rate of pay" correctly. Moreover, Plaintiff alleges that Defendant's meal and rest period policies and practices failed to allow and permit aggrieved employees to take all compliant and timely meal and rest periods or pay premium wages at the "regular rate of pay" in lieu thereof. Plaintiff further alleges that Defendant failed to provide aggrieved employees with accurate written itemized wage statements in violation of Labor Code § 226(a) and failed to timely pay all final wages upon separation of employment in violation of Labor Code §§ 201-203.

JURISDICTION

5. Plaintiff, on behalf the State of California brings this representative action pursuant to Labor Code § 2699, *et seq*. seeking penalties for Defendant's violation of California Labor Code §§ 201-204, 210, 226(a), 226(a)(6), 226(e), 226.3, 226.7, 227.3, 246, 510, 512, 516, 1174, 1174.4, 1199, and applicable Industrial Welfare Commission Wage Orders ("Wage Orders").

6. Based upon the foregoing, Plaintiff and all aggrieved employees are aggrieved employees within the meaning of Labor Code §2699, *et seq*.

7. This Court has jurisdiction over Defendant because, upon information and belief, Defendant has sufficient minimum contacts in California or otherwise intentionally avail themselves

to the State of California 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 Sonoma. Defendant owns, maintains offices, transacts business, has an agent or agents within the County of Sonoma, and/or otherwise are found within the County of Sonoma, and Defendant is within the jurisdiction of this Court for purposes of service of process.

PARTIES

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

10. Plaintiff is informed and believes and alleges that Defendants are authorized to do business within the County of Sonoma 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 him by California Labor Code §§ 201-203, 204, 210, 226, 226(a), 226(e), 226.3, 226.7, 227.3, 246, 510, 512, 516, 1174, 1174.4, 1199, and applicable Wage Orders.

11. Plaintiff is informed and believes, and based thereon alleges, that during the four years 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 Sonoma.

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

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

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

PAGA REPRESENTATIVE ACTION ALLEGATIONS

15. Headquartered in Santa Rosa, California, Defendant produces traditional flour, extra virgin olive oil, and organic and flavored tortillas for customers out of its 75,000-square-foot plant.

16. Plaintiff was employed by Defendant as a non-exempt employee with the title of “Route Salesperson” from November 2019.

17. Plaintiff and other aggrieved employees (including Merchandiser, Warehouse Associate, Packer, Warehouse Coordinator, Route Salesperson, Warehouse Worker, Mixer, Accounts Receivable Clerk, and all other aggrieved positions) were responsible for all La Tortilla Factory’s business in the State of California. However, in these roles, Plaintiff and aggrieved employees were often not afforded all protections and rights conferred under the California Labor Code and applicable wage orders.

18. At all relevant times, Plaintiff and other aggrieved employees regularly worked various shifts, many of which were more than 8.0 hours in a workday and 40.0 hours in a workweek. Plaintiff alleges that other aggrieved employees were also subjected to the same policies, procedures, practices, working conditions, and corresponding wage and hour violations to which he was subjected

during his employment.

19. First, at all relevant times, Defendant has and continues to incorrectly classify Plaintiff and other aggrieved employees as exempt employees under the outside salesperson exemption. Labor Code section 1171 provides that the overtime pay requirements of Labor Code section 1194 apply to those ―employed in any occupation, trade, or industry, whether compensation is measured by time, piece, or otherwise, but shall not include any individual employed as an outside salesman . . . . The applicable wage order also states that its provisions shall not apply to outside salespersons.

20. As it pertains to Plaintiff and others in his position, Defendant classified them as Outside Salesperson exempt from overtime, meal and rest periods, and other Labor Code protections. However, Plaintiff and other aggrieved employees in this position do not properly qualify for the outside salesperson exemption, which requires that the employee "customarily and regularly work more than half of his/her working time away from the employer's place of business and sells items or obtains orders for products or services." This exemption applies to employees who spend more than 50 percent of the workday engaged in sales activities outside the office. (*Ramirez v. Yosemite Water Co*. (1999) 20 Cal.4th 785 (*Ramirez*).) Exemptions, in particular, are narrowly construed and are only allowed if the employer is "plainly and unmistakably" entitled to classify the employee as exempt. If an employee disputes the classification, it is the employer's burden to prove that the employee was properly classified as exempt.

21. The main reason for this exemption is that outside salespersons generally control their own hours and are paid on a commission basis. (*Grubb & Ellis Co. v. Spengler* (1983) 143 Cal.App.3d 890, 897.) The Division of Labor Standard Enforcement (DLSE), quoting from the transcript of a 1996 IWC meeting, stated, "Outside salesmen have historically been exempt 'because it's very difficult to control their hours and working conditions. They set their own time, and they're on the road, they call on their customers . . . . [R]arely do you know what they're doing on an hour-to-hour basis." (Dept. of Industrial Relations, DLSE Opn. Letter No.1998.09.08 (Sept. 8, 1998) p. 2.) A classic example that may come to mind is a door-to-door vacuum salesperson who is on the road traveling from residence to residence.

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22. Here, at all relevant times, Plaintiff and other aggrieved employees with the same position were required to load tortillas and other items at Defendant's warehouse and then drive and deliver them to various retail customer locations using vehicles provided by Defendant. Plaintiff and other aggrieved employees with the same job were regularly required to drive to stores to stock tortillas and other bread products as required, ensuring proper in-stock inventories and stocking merchandise at all assigned accounts using proper techniques. Taken together, Plaintiff and other aggrieved employees with the same job title did not spend half of their time working away from the employer's place of business but instead were required to work out of Defendant's warehouse, a home office, and out of the work vehicles provided by La Tortilla Factory. (See *Espinoza v. Warehouse Demo Services, Inc*. (2022) 86 Cal.App.5th 1184, 1193 ["The DLSE concluded that an employer's place of business was not limited to its principal place of business or headquarters and that these employees did not fall within the exemption. (Id. at pp. 1–2.) The DLSE reasoned that "[a]n employer can more easily control and monitor the hours and working conditions of salespersons who perform their sales work on property that is owned or controlled by the employer."].)

23. Defendant has sought to evade Labor Code regulations by imposing unrealistic expectations that aggrieved employees will spend more than half their time selling away from the employer's location when their actual job duties require them to spend most of their time engaged in non-sales activities. Indeed, as listed on its job description online, Defendant even controls the schedule of Plaintiff and others with his same job title requires the following schedule: Schedule is as follows: Monday, Tuesday, Thursday, Friday, and Saturday (OFF Wednesday and Sunday)." (See https://www.salary.com/job/la-tortilla-factory/route-sales-representative-commerce/j202203192132003088825)

24. As a result of Defendant's misclassification of Plaintiff and other aggrieved employees with the same job, they were not provided with overtime pay, meal or rest periods, and other protections under the California Labor Code and applicable wage orders.

25. Furthermore, in addition to Defendant's misclassification of Plaintiff and other aggrieved employees with the same job title, Defendant also failed to properly calculate the "regular rate of pay" for purposes of paying overtime to Plaintiff and all aggrieved employees by failing to

include all forms of remuneration, including but not limited to, commissions, non-discretionary bonuses, shift pay and other forms of pay in calculating the "regular rate of pay."

26. Under the California Labor Code (as well as the FLSA), courts have consistently held that regularly paid non-discretionary bonuses (and other forms of pay) must be included in determining an employee's "regular rate of pay" for purposes of calculating overtime. (See *Haber v. The Americana Corp.* 378 F. 2d 854, 855-856 (9th Cir. 1967) [holding that regularly paid efficiency bonuses must be included in calculating the "regular rate"]; *Wang v. Chinese Daily News*, Inc. 435 F. Supp. 2d 1042, 1055-1057 (C.D. Cal. 2006) [granting summary judgment to Plaintiff under California and federal law on the grounds that Defendant improperly calculated overtime by excluding annual bonuses paid to employees from the "regular rate of compensation"]; see *Walling v. Youngerman-Reynolds Hardwood Co*. (1945) 65 S.Ct. 1242, 1245. ("The regular rate by its very nature must reflect all payments which the parties have agreed shall be received regularly during the workweek, exclusive of overtime payments. It is not an arbitrary label chosen by the parties but an actual fact. Once the parties have decided upon the amount of wages and the mode of payment, the determination of the regular rate becomes a matter of mathematical computation, the result of which is unaffected by any designation of a contrary 'regular rate' in the contracts."); see also 29 CFR §§ 778.110 ("production bonus") and 778.111 ("piece-rate").

27. Labor Code § 510 requires an employer to compensate an employee who works more than eight (8.0) hours in one workday, forty (40.0) hours in a workweek, and for the first eight (8.0) hours worked on the seventh consecutive day, no less than one and one-half times (11/2) the regular rate of pay. In addition, Labor Code § 510 obligates employers to compensate employees at no less than twice the regular rate of pay when an employee works more than twelve (12.0) hours in a workday or more than eight (8.0) hours on the seventh consecutive day of work. Pursuant to Section 3 of the applicable Wage Orders, aggrieved employees shall not be employed more than eight (8.0) hours in any workday or more than 40.0 hours in any workweek unless the employee receives one and one-half (11/2) times such employee's regular rate of pay for all hours worked over 40 hours in the workweek.

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

29. Accordingly, through PAGA and to the extent permitted by law, Plaintiff and other aggrieved employees are entitled to recover penalties for violations of Labor Code §§ 204, 210, 510, 1194, 1197.1, 1199 1197.1 under Labor Code § 1197.1, 1199, or Labor Code § 2699(f)(2) and for attorneys' fees and costs pursuant to Labor Code § 2699(g)(1).

30. Furthermore, at all relevant times, Defendant also failed in its obligation to provide Plaintiff and other aggrieved employees the legally required paid sick days at the legal rate pursuant to Labor Code §§ 246(a),(b), which requires that "[a]n employee who, on or after July 1, 2015, works in California for the same employer for 30 or more days within a year from the commencement of employment is entitled to paid sick days. . . at the rate of not less than one hour per every 30 hours worked, beginning at the commencement of employment." Labor Code § 246(l)(1) provides that paid sick time for aggrieved employees must be "calculated in the same manner as the regular rate of pay for the workweek in which the employee uses paid sick time, whether or not the employee actually works overtime in that workweek."

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

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

"regular rate of pay" as required by Labor Code §§ 246(l) (1-2). Based on the foregoing Labor Code violations, Plaintiff seeks all civil and statutory penalties available and applicable under Labor Code § 2699(f)(2), and for attorneys' fees and costs pursuant to Labor Code § 2699(g)(1).

33. Moreover, at all relevant times, Plaintiff and other aggrieved employees were denied compliant and timely 30-minute off-duty meal periods as mandated by California law. Due to Defendant's uniform meal period policies/practices, operational requirements, and work demands, Plaintiff and other aggrieved employees often could not take timely and uninterrupted net 30-minute first meal periods before the end of the fifth hour of work. Further, when Plaintiff and other aggrieved employees worked more than 10.0 hours in a shift, they were not always allowed and permitted to take a mandated second meal period before the end of the tenth hour of work in violation of the Labor Code and applicable Wage Orders.

34. In addition, for each missed or non-compliant meal period, Defendant failed and continues to fail to maintain a mechanism by which aggrieved employees were paid meal period premiums at the "regular rate of pay" pursuant to *Ferra v. Loews Hollywood Hotel, LLC* (2021) 11 5th 858 and Labor Code § 226.7.

35. Accordingly, due to Defendant's uniform meal period practices, aggrieved employees were also regularly denied legally compliant meal periods in violation of Labor Code §§ 226.7, 510, 516, and applicable Wage Orders, and would be entitled to penalties under Labor Code § 2698 *et seq*.

36. Next, at all relevant times, Plaintiff and other aggrieved employees were not provided with all 10-minute rest periods for every four hours worked, or a major fraction thereof, due to Defendant's uniform rest period policies/practices, operational requirements, and work demands. As a result, Plaintiff and other aggrieved employees were and are often unable to take a net 10-minute duty-free rest period for every major fraction of four hours worked. This includes a second rest period for shifts in excess of six hours and a third rest period for shifts in excess of 10.0 hours in a workday.

37. By not relieving all aggrieved employees of all duties during rest periods, Defendant failed to provide legally compliant rest periods. See *Augustus v. ABM Security Services, Inc*. (2016) 2 Cal. 5th 257, 269 [concluding that "during rest periods employers must relieve employees of all duties and relinquish control over how employees spend their time."] (Emphasis added). In *Augustus*,

the California Supreme Court expressly rejected the employer's assertion that it could provide an on-duty rest period to employees who worked as security guards and further explained: "that employers [must] relinquish any control over how employees spend their break time and relieve their employees of all duties." *Id*. at 273. Each time aggrieved employees could not take a compliant rest period; Defendant failed and continues to fail to adequately pay rest period premium payments at the "regular rate of pay" as required by Labor Code § 226.7.

38. Accordingly, due to Defendant's uniform rest period policies/practices, aggrieved employees were regularly denied legally compliant rest breaks in violation of Labor Code §§ 226.7, 512, and applicable Wage Orders, and would be entitled to penalties under Labor Code § 2698 *et seq*.

39. As a result of Defendant's failure to pay Plaintiff and other aggrieved employees for all overtime wages, sick pay wages, and Defendant's failure to pay all meal and rest period premiums at the "regular rate of pay," Defendant issued wage statements which failed to identify the gross wages earned accurately, the total hours worked, the net wages earned, and the correct corresponding number of hours worked at each hourly rate, in violation of Labor Code § 226(a)(1, 2, 5, and 9).

40. Labor Code § 226.3 provides that "[a]ny 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 violation 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 required in subdivision (a) of Section 226."

41. Thus, for the violations of Labor Code section 226 described above, Plaintiff and other aggrieved employees may also recover Labor Code § 226.3 penalties for Defendant violations of Labor Code § 226(a). Consequently, because Defendant failed to comply with Labor Code § 226(a), Plaintiff and other aggrieved employees would be entitled to recover penalties under Labor Code § 226(e) and/or 2698 *et seq*.

42. Finally, because Defendant failed to pay all overtime, sick pay wages, and meal and rest period premiums at the "regular rate of pay," Defendant also failed and continues to fail to pay Plaintiff and other aggrieved employees all wages owed at their time of separation from employment in violation of Labor Code §§ 201-203. Thus, aggrieved employees would be entitled to recover

waiting time penalties under Labor Code §§ 201-203 and/or 2698 *et seq*.

FIRST CAUSE OF ACTION

PRIVATE ATTORNEYS GENERAL ACT

(Plaintiff and Similarly Aggrieved Employees Against All Defendants)

43. Plaintiff re-alleges and incorporates by reference each and every allegation outlined in the preceding paragraphs.

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

a) Defendant's misclassification of Plaintiff and other aggrieved employees as exempt;

b) Defendant's failure to pay all overtime wages at the "regular rate of pay" because Defendant failed to include all forms of compensation, including, but not limited to, shift differentials, non-discretionary bonuses, incentive pay, and other forms of remuneration;

c) Defendant's failure to pay all sick pay at the "regular rate of pay";

d) Defendant's failure to allow and permit legally compliant meal periods or compensation at the "regular rate of pay" in lieu thereof;

e) Defendant's failure to allow and permit legally compliant rest periods or compensation at the "regular rate of pay" in lieu thereof;

f) Defendant's failure to furnish legally compliant wage statements pursuant to Labor Code § 226(a); and

g) Defendant's failure to timely pay final wages to aggrieved employees at the time of separation from employment was unlawful.

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45. On or about April 29, 2024, Plaintiff notified Defendant La Tortilla Factory, Inc. ("Defendant") via certified mail and the California Labor and Workforce Development Agency ("LWDA") via its website of Defendant's violations of the California Labor Code § 2698 *et. seq*. with respect to violations of the California Labor Code identified in Paragraph 44(a)-(g). Now that sixty-five days (65) have passed from Plaintiff notifying Defendant of these violations, Plaintiff has exhausted his administrative requirements for bringing a claim under the Private Attorneys General Act with respect to these violations.

46. Plaintiff was compelled to retain the services of counsel to file this court action to protect his interests and the interests of other similarly aggrieved employees and to assess and collect the civil penalties owed by Defendant. Plaintiff has, therefore, incurred attorneys' fees and costs, which he is entitled to receive under California Labor Code § 2699.

PRAYER FOR RELIEF

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

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

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

3. For such other relief that the Court may deem just and proper.

Dated: July 5, 2024

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