BOYAMIAN LAW

April 5, 2024

SUBMITTED ELECTRONICALLY VIA ONLINE SUBMISSION

Labor and Workforce Development Agency
Attention: PAGA Administrator
455 Golden Gate Avenue, 9th Floor
San Francisco, California 94102

Re: *Cordero adv. Humana Marketpoint, Inc.*
Notice of PAGA Claims Pursuant to Labor Code § 2699.3

To Whom It May Concern:

My office represents Kimberly Cordero (hereinafter "Claimant"), with respect to claims on behalf of herself and other similarly situated current and former Direct Marketing Sales Agents (collectively hereinafter referred to as "Marketing Sales Agents" or "Aggrieved Employees") of Humana Inc., Humana at Home, Inc., Humana at Home1, Inc. and Humana Marketpoint, Inc. (hereinafter collectively referred to as "Humana" or "Company") who worked in California from April 5, 2023 and continuing to the present ("Relevant Time Period"). The purpose of this letter is to satisfy the notice requirements of Labor Code § 2699.3(a). This notice is provided to enable Claimant to proceed in a court of law against Humana as authorized by California Labor Code section 2695, *et seq*.

Below we set forth the facts and theories which we believe support our contention that Humana has violated and continues to violate various provisions of the California Labor Code including, but not limited to, failures by Humana to misclassify Marketing Sales Agents as exempt from overtime, failure to pay for all hours worked, including minimum wages and overtime wages, failure to provide separate rest period compensation, and for related derivative claims of inaccurate wage statements and waiting time penalties.

Facts & Theories About the Case

1. ***Relevant Factual Background***

Humana is a national insurance and healthcare company that provides, among other things, various insurance products and in-home care services. On the sales side, Humana has in place a dedicated team of Marketing Sales Agents who work remotely, from their homes or away from a Humana office, calling prospective customers and offering them a wide variety of insurance options. Kimberly Cordero is a former Marketing Sales Agent. She was a salaried, exempt employee earning a $52,000 base salary plus commissions. Ms. Cordero was hired on February 7, 2022 and was terminated from her position in or around November 20, 2023.

P 818 | 547. 5300 F 818 | 547 . 5678 550 N. BRAND BLVD. | SUITE 1500 | GLENDALE, CA 91203

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Our investigation has revealed that Marketing Sales Agents are generally engaged to sell insurance during the time period between mid-October and early December per Medicare guidelines for Annual Enrollment Period (AEP). Sales activity for non-AEP months is minimal as the remaining months in the calendar year are used to perform maintenance activities on policies Aggrieved Employees sold, responding to customer inquiries about policy terms and features, and general branding/marketing related activities for Humana.

In addition, Marketing Sales Agents are also subject to rigid control over all aspects of their work. Aggrieved Employees, including Ms. Cordero, have in place a set schedule for work, beginning from 10:00 a.m. and concluding to 6:30 p.m. Marketing Sales Agents are required to manually clock in to work, are required to take two 15-minute rest breaks, clock out for a supposed meal break, and a "wellness" thirty-minute break once a week. They were also required to meet sales goals and quota. For inbound calls, Marketing Sales Agents were required to meet 150-200 sales a week and for outbound calls, 78 sales a week.

2. *Failure to Pay Overtime Compensation*

Our investigation has uncovered that during the AEP, Humana compensates Marketing Sales Agent with overtime payment for all hours worked. However, in the non-AEP months, the Company has a policy, practice, or procedure of not paying for daily overtime when Marketing Sales Agents, including Ms. Cordero, routinely work in excess of 8.0 hours of work. Instead, Humana requires Aggrieved Employees to complete a "Long Call Form" which would serve as some form of credit for the following scheduled day of work. Specifically, if Ms. Cordero worked 9 hours during a non-AEP shift, that extra hour of overtime would mean that the following day, her work schedule would commence at 11:00 a.m. instead of 10:00 a.m.

Claimant seeks to recover civil penalties pursuant to the unpaid compensation for all hours worked as defined by the Labor Code and the applicable Industrial Welfare Commission wage order as to the time during which an employee is subject to the control of an employer, and includes all the time the employee is engaged, suffered or permitted to work, whether or not required to do so, or as otherwise set forth in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*, (2018) 4 Cal.5th 903. *See also Morillion v. Royal Packing Co*. (2000) 22 Cal-4th 575; *Troester v. Starbucks Corp*. (2018) 421 P.3d 1114 (California Supreme Court decision affirming that relevant statutes and wage order do not allow employers to require employees to routinely work for minutes off-the-clock without compensation.) In California, the employer is required to keep records of all hours worked. Labor Code § 1174(d). California law also requires that all hours worked over 8 in a day or 40 in a week or worked on the 7th consecutive day of a work week be paid 1.5 times an employee's regular rate of pay. *See, e.g.*, Lab. Code §§ 510, 1194; Cal. Code Regs., tit. 8, § 11090, et seq. In addition, hours worked over 12 in a day or hours over 8 worked on the 7th consecutive day in a week are paid at 2 times an employee's regular rate of pay.

3. *Rest Period Violations Due to Humana's Commission-Based Pay Plans*

In conjunction with Marketing Sales Agents' core duties to sell insurance products and services to Humana's customers and prospective customers, Aggrieved Employees' compensation package included commission-based payments based upon the sales they make on behalf of Humana. Labor Code § 200(a) defines wages as: "all amounts of 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." Notably, the Labor Code's definition of wages includes commissions, as set forth in Labor Code § 200(a).

Ms. Cordero and other Aggrieved Employees were paid based on commission pay plans that are the functional equivalent of the commission pay plan that was found to be unlawful in *Vaquero v. Stoneledge Furniture LLC* ("*Stoneledge*"), 9 Cal. App. 5th 98 (2017). In *Stoneledge*, sales associates who worked for Ashley Furniture stores were paid on a commission pay plan, which guaranteed a minimum hourly rate as an advance against commissions earned in later pay periods. The *Stoneledge* court held the commission pay plan was unlawful because it failed to separately compensate sales associates for rest periods in weeks where the employee was paid on a commission basis. In essence, the reasoning of the *Stoneledge* court was a natural extension of its prior holding in *Bluford v. Safeway, Inc.*, 216 Cal. App. 4th 864, 872 (2013), which held that "under the rule of *Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314, 323 rest periods must be separately compensated in a piece-rate system." *See also Stoneledge*, 9 Cal. App. 5th at 110 ("We agree with *Bluford* that Wage Order No. 7 requires employers to separately compensate employees for rest periods if an employer's compensation plan *does not already include* a minimum hourly wage for such time.") (emphasis added).

In *Ferra*, the Court held that employers are required to pay meal and rest break violation premiums at the same "regular rate of pay" they use for paying overtime -to wit, they must include in the pay rate calculation all wages and other nondiscretionary earnings (such as shift differentials, piece-rate and incentive compensation, and nondiscretionary bonuses). *Id*. at * 11. The High Court also confirmed that its decision applies retroactively to meal and rest break violation premium payments previously made or owed. *Id*. at *12.

4. *Other Claims*

Because Claimant and other similarly situated Aggrieved Employees were not compensated for all hours worked, were deprived of overtime compensation, and were not provided with the separate rest break, Humana also failed to provide accurate wage statements in a violation of Labor Code Section 226, and failed to fully compensate former employees in a timely manner when their employment ended, in violation of Labor Code Section 201 *et seq*.

<u>Scope of Anticipated Action</u>

California Labor Code Section 2699.3(a) requires an aggrieved employee to inform the Agency before filing a civil action under the Private Attorneys General Act of 2004 ("PAGA"). Based on the foregoing facts, Claimant is asserting PAGA claims on behalf of herself and on behalf of all other Marketing Sales Agents employed by Humana from April 5, 2023, to the present. Claimant seeks *civil penalties* under PAGA for the following Labor Code violations:

1. Violations of Labor Code sections 216, 1194, 225.5, 558 for failing to pay minimum and overtime wages due. Specifically, does not pay minimum and overtime wages to Claimant and other non-exempt, hourly employees for all hours worked, as required by Labor Code sections 216, 510, 511, 558, 1182.1-1182.3, 1194-1197.1 and 1198.

5. Violations of Labor Code sections 204 and 210, based on the Company's failure to pay Claimant and similarly situated non-exempt, hourly employees on the regular pay day all owed wages, and the Company's failure to fully compensate former employees in a timely manner when their employment ended, in violation of Labor Code Section 201 *et seq*.

Accordingly, we believe Humana has violated, and continues to violate, numerous provisions of California law, including, without limitation Labor Code Sections §§ 201, 202, 203, 204, 210, 216, 221, 223, 225.5, 226, 226.3, 226.7, 510, 511, 512, 551, 552, 558, 1174, 1174.5, 1194-1197.1, 1198 and 2698, *et seq*., as well as the relevant IWC orders and regulations, and that Claimant and other similarly situated current and former non-exempt, hourly employees are entitled to all damages, restitution and statutory penalties allowed by law. Our investigation is continuing, and there may be more violations uncovered.

We respectfully request that the Labor Workforce Development Agency notify this office within sixty (60) days if it wishes to investigate this matter further or, in the alternative, notify us that you will not pursue an investigation so that we may pursue these penalties under the Private Attorney General Act of 2004. Should you have any questions or concerns or require additional information, please do not hesitate to contact the undersigned. If the Company wishes to resolve these claims without resorting to protracted litigation, please contact the undersigned forthwith to discuss this matter further.

Thank you for your immediate attention to this matter.

Very truly yours,

Michael H. Boyamian

P 818 | 547. 5300 F 818 | 547 . 5678 550 N. BRAND BLVD. | SUITE 1500 | GLENDALE, CA 91203
WWW.BOYAMIANLAW.COM

Cc: Humana Inc. (*Sent via Certified Mail*)
Attention: 1505 Corporation (*Agent of Service of Process*)
C T Corporation
330 N. Brand Blvd.
Glendale, California 91203

Humana Marketpoint, Inc. (*Sent via Certified Mail*)
Attention: 1505 Corporation (*Agent of Service of Process*)
C T Corporation
330 N. Brand Blvd.
Glendale, California 91203

Humana at Home1, Inc. (*Sent via Certified Mail*)
Attention: 1505 Corporation (*Agent of Service of Process*)
C T Corporation
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