UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

LUC A. BIJOUX and JUAN RODRIGUEZ, on behalf of themselves and all others similarly situated,	:	Case No. 14 Civ. 3891
Plaintiffs,	:	**CLASS AND COLLECTIVE ACTION COMPLAINT**
- against -	:	
AMERIGROUP NEW YORK, LLC,	:	
Defendant.	:	

Plaintiffs Luc A. Bijoux and Juan Rodriguez (collectively "Plaintiffs" or "New York Class Representatives"), on behalf of themselves and all others similarly situated, by and through their attorneys Shulman Kessler LLP and Outten & Golden LLP, complaining of the Defendant Amerigroup New York, LLC ("Defendant" or "Amerigroup"), allege as follows:

PRELIMINARY STATEMENT

1. This lawsuit seeks to recover unpaid overtime compensation for Plaintiffs and their similarly situated co-workers who have worked for Defendant in New York as Medicaid Marketing Representatives, also known as Facilitated Enrollers and Certified Application Counselors (collectively referred to as "Marketing Representatives").

2. Defendant is an insurance company, operating throughout the United States, including New York.

3. Defendant offers eligible individuals' government based health insurance programs, such as Medicaid. Amerigroup employs Marketing Representatives, such as Plaintiffs, to enroll eligible New Yorkers for free or low-cost government-subsidized health insurance at locations throughout New York, including at doctors' offices, hospitals, and pharmacies.

4. Defendant requires its Marketing Representatives to meet daunting productivity requirements each workweek, forcing Plaintiffs to work in excess of 40 hours per workweek in order to avoid disciplinary action.

5. While employed by Defendant, Plaintiffs consistently worked over 40 hours per week without receiving premium overtime pay for all the hours they worked. Throughout the relevant period, it was Defendant's policy to deprive Plaintiffs of all of their earned overtime wages in violation of the Fair Labor Standards Act ("FLSA") and the New York Labor Law ("NYLL" or "N.Y. Lab. Law"). In order to avoid paying Plaintiffs overtime premiums for all of the hours Plaintiffs worked in excess of 40 per workweek, Defendant required its Marketing Representatives to work "off-the-clock."

6. Defendant tracked its Marketing Representatives' hours worked by requiring them to use a computer program that logged their hours worked each day. Marketing Representatives were not permitted to log all of their overtime hours worked per workweek.

7. After the end of their scheduled hours, Marketing Representatives typically continued to work "off-the-clock" for Defendant throughout the week by answering telephone calls and emails from supervisors and from Defendant's enrollees, meeting with enrollees at the office and at the enrollees' homes, completing paperwork, and attending events. Marketing Representatives were required to complete these tasks after hours in order to meet their quotas as well as avoid discipline and termination.

8. Defendant was aware of its Marketing Representatives' "off-the-clock" work because Marketing Representatives were required to communicate with their supervisors and advise them of their daily schedules, quotas fulfilled, and hours worked.

9. Plaintiffs bring this action on behalf of themselves and all similarly situated current and former Marketing Representatives of Defendant pursuant to the FLSA.

10. Plaintiffs also seek permission to give notice of this action pursuant to 29 U.S.C. § 216(b) to all persons who are presently, or have at any time during the 3 years immediately preceding the filing of this action, worked for Defendant as Marketing Representatives.

JURISDICTION & VENUE

11. Jurisdiction of the Court over this controversy is based upon 29 U.S.C. § 201, *et seq.*, 28 U.S.C. §§ 1331 and 1337 and the doctrine of supplemental jurisdiction pursuant to 28 U.S.C. § 1367.

12. This Court has jurisdiction over all state law claims brought in this action pursuant to 28 U.S.C. § 1367.

13. Defendant does business in Kings, Queens, Richmond, New York, Nassau and Suffolk Counties and maintains a principal place of business at 241 37th Street, Brooklyn, New York.

14. Accordingly, this action properly lies in the Eastern District of New York, pursuant to 28 U.S.C. § 1391.

THE PARTIES

Plaintiffs

15. Luc A. Bijoux is a resident of the County of Brooklyn, State of New York.

16. At all times relevant to the Complaint, Luc A. Bijoux was an "employee" within the meaning of Section 3(e) of the FLSA, 29 U.S.C. § 203(e), and N.Y. Lab. Law § 190(2).

17. At all times relevant, Luc A. Bijoux was employed by Defendant as a Marketing Representative.

18. Luc A. Bijoux has expressed his consent to make these claims against the Defendant by filing a written consent form, pursuant to 29 U.S.C. § 216(b). (*See* Exhibit A, annexed hereto).

19. Juan Rodriguez is a resident of the County of Nassau, State of New York.

20. At all times relevant to the Complaint, Juan Rodriguez was an "employee" within the meaning of Section 3(e) of the FLSA, 29 U.S.C. § 203(e), and N.Y. Lab. Law § 190(2).

21. At all times relevant, Juan Rodriguez was employed by Defendant as a Marketing Representative.

22. Juan Rodriguez has expressed his consent to make these claims against the Defendant by filing a written consent form, pursuant to 29 U.S.C. § 216(b). (*See* Exhibit A, annexed hereto).

Defendant

23. Upon information and belief, Defendant was and still is a domestic corporation, authorized to do business pursuant to the laws of the State of New York.

24. Upon information and belief, Defendant maintains control, oversight, and direction over its operations and employment practices.

25. At all times hereinafter mentioned, Defendant was and still is an "employer" within the meaning of Section 3(d) of the FLSA, 29 U.S.C. § 203(d), and N.Y. Lab. Law § 190(3).

26. At all times hereinafter mentioned, the activities of the Defendant constituted an "enterprise" within the meaning of Section 3(r) & (s) of the FLSA, 29 U.S.C. § 203(r) & (s).

27. At all times hereinafter mentioned, Defendant employed employees, including Plaintiffs herein, who regularly engaged in commerce or in the production of goods for

commerce or in handling, selling or otherwise working on goods and materials which have moved in or been produced for commerce within the meaning of Section 3(b), (g), (i) and (j) of the FLSA, 29 U.S.C. § 203(b), (g), (i), (j), (r) & (s).

28. At all relevant times, Defendant maintained control, oversight, and direction over Plaintiffs and similarly situated employees, including timekeeping, payroll and other employment practices that applied to them.

29. Defendant applies the same employment policies, practices, and procedures to all Marketing Representatives throughout New York, including policies, practices, and procedures with respect to payment of overtime compensation.

30. Defendant's annual gross volume of business is not less than $500,000 within the meaning of 29 U.S.C. § 203(s)(A)(ii).

FLSA COLLECTIVE ACTION CLAIMS

31. Plaintiffs bring the First Cause of Action, pursuant to the FLSA, 29 U.S.C. § 216(b), on behalf of themselves and all similarly situated persons who work or have worked for Defendant as a Marketing Representative within the last 3 years and who elect to opt-in to this action.

32. Upon information and belief, there are approximately more than 100 current and former Marketing Representatives that are similarly situated to Plaintiffs who were denied overtime compensation.

33. Plaintiffs represent other Marketing Representatives, and are acting on behalf of Defendant's current and former Marketing Representatives' interests as well as their own interests in bringing this action.

34. Defendant unlawfully required Plaintiffs and all individuals employed as Marketing Representatives to work in excess of 40 hours per week without paying them overtime compensation at a rate of at least 1 and ½ times their regular hourly rate.

35. Plaintiffs seek to proceed as a collective action with regard to the First Cause of Action, pursuant to 29 U.S.C. § 216(b) on behalf of themselves and the following class of persons:

> All Marketing Representatives who are currently or have been employed by the Defendant (hereinafter referred to as the "FLSA Collective") at any time during the 3 years prior to the filing of their respective consent forms (hereinafter referred to as the "Collective Period").

36. Defendant was aware or should have been aware that the law required it to pay non-exempt employees, including Plaintiffs and the FLSA Collective, an overtime premium of 1 and ½ times their regular rate of pay for all work-hours Defendant suffered or permitted them to work in excess of 40 per workweek. Upon information and belief, Defendant applied the same unlawful policies and practices to its Marketing Representatives throughout the State of New York.

37. The FLSA Collective is readily identifiable and locatable through the use of the Defendant's records. The FLSA Collective should be notified of and allowed to opt-in to this action, pursuant to 29 U.S.C. § 216(b). Unless the Court promptly issues such a notice, the FLSA Collective, who have been unlawfully deprived of overtime pay in violation of the FLSA, will be unable to secure compensation to which they are entitled, and which has been unlawfully withheld from them by the Defendant.

FEDERAL RULE OF CIVIL PROCEDURE RULE 23
NEW YORK CLASS ALLEGATIONS

38. Plaintiffs bring the Second and Third Causes of Action on their own behalf and as a class action, pursuant to Fed R. Civ. P. 23(a) and (b), on behalf of the following class of persons:

> All Marketing Representatives who are currently, or have been employed by the Defendant, in the State of New York at any time during the 6 years prior to the filing of this Complaint to the entry of the judgment in the case (hereinafter referred to as the "New York Class" and the "New York Class Period," respectively.)

39. The persons in the New York Class are so numerous that joinder of all members is impracticable. Although, the precise number of such persons is unknown, and facts on which the calculation of that number can be based are presently within the sole control of Defendant.

40. Upon information and belief, the size of the New York Class is at least 100 individuals.

41. The Second and Third Causes of Action are properly maintainable as a class action under Fed. R. Civ. Pro. 23(b)(3). There are questions of law and fact common to the New York Class that predominate over any questions solely affecting individual members of the New York Class, including but not limited to:

a. whether the Defendant failed to keep accurate time records for all hours worked by the New York Class Representatives and the New York Class;

b. what proof of hours worked is sufficient where an employer fails in its duty to maintain true and accurate time records;

c. whether the Defendant failed to pay proper compensation to New York Class Representatives and the New York Class for all work-hours in excess of 40 per workweek in violation of and within the meaning of the N.Y. Lab. Law Article 6, §§ 190 *et seq.* and the supporting New York State Department of Labor Regulations, 12 N.Y.C.R.R. Part 142;

d. whether Defendants failed to furnish the New York Class Representatives and New York Class with an accurate statement of, *inter alia*, wages, hours worked, and rates paid as required by N.Y. Lab. Law § 195;

e. whether Defendants failed to furnish the New York Class Representatives and New York Class with the annual notice required by N.Y. Lab. Law § 195;

f. the nature and extent of New York Class-wide injury and the appropriate measure of damages sustained by the New York Class Representatives and the New York Class;

g. whether Defendant acted willfully or with reckless disregarding in its failure to pay the New York Class Representatives and the New York Class; and

h. the nature and extent of class-wide injury and the measure of damages for those injuries.

42. The New York Class Representatives fairly and adequately protect the interests of the New York Class and have no interests antagonistic to the class. The named Plaintiffs are represented by attorneys who are experienced and competent in both class litigation and employment litigation.

43. A class is superior to other available methods for the fair and efficient adjudication of the controversy, particularly in the context of wage-and-hour litigation where an individual plaintiff lacks the financial resources to vigorously prosecute a lawsuit in federal court against the corporate defendant. The damages sustained by individual class members are small, compared to the expense and burden of individual prosecution of this litigation. Class action treatment will obviate unduly duplicative litigation and the possibility of inconsistent judgments.

44. Further, the New York Class Representatives and the New York Class have been equally affected by the Defendant's failure to pay proper wages. Moreover, members of the New York Class still employed by the Defendant may be reluctant to raise individual claims for fear of retaliation.

45. Defendant has acted or refused to act on grounds generally applicable to the New York Class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class was a whole.

46. Plaintiffs' claims are typical of those of the New York Class. Plaintiffs and the other New York Class members were subjected to the Defendant's policies, practices, programs, procedures, protocols and plans alleged herein concerning the failure to pay proper wages and the failure to keep adequate records. Plaintiffs' job duties are typical of those of the class members.

47. A class action is superior to other available methods for the fair and efficient adjudication of this litigation – particularly in the context of wage litigation like the present action, where individual plaintiffs may lack the financial resources to vigorously prosecute a lawsuit in federal court against a corporate defendant. The members of the New York Class have been damaged and are entitled to recovery as a result of Defendant's common and uniform policies, practices, and procedures. Although the relative damages suffered by individual members of the New York Class are not *de minimis*, such damages are small compared to the expense and burden of individual prosecution of this litigation. In addition, class treatment is superior because it will obviate the need for unduly duplicative litigation that might result in inconsistent judgments about Defendant's practices.

CLASS-WIDE FACTUAL ALLEGATIONS

48. Plaintiffs and the members of the FLSA Collective and New York Class (collectively "Class Members") have been victims of Defendant's common policy and plan that has violated their rights under the FLSA by requiring Marketing Representatives to work in excess of 40 hours per week and denying them overtime compensation for all overtime hours

worked. At all times relevant, Defendant's unlawful policy and pattern or practice has been willful.

49. All of the work performed by Class Members was assigned by Defendant and/or Defendant was aware of all the "off-the-clock" work that Plaintiffs and Class Members performed.

50. Upon information and belief, Defendant has a policy and pattern or practice to require Plaintiffs and Class Members to work in excess of 8 hours per workday and requiring Plaintiffs and Class Members to work on weekends.

51. Defendant failed to pay Plaintiffs and Class Members time and one half for all hours worked over 40 in a workweek in violation of the FLSA.

52. Defendant failed to furnish Plaintiffs and Class Members with an accurate statement of, *inter alia*, wages, hours worked, and rates paid as required by NYLL;

53. Defendants failed to furnish Plaintiffs and Class Members with the annual notice required by NYLL;

54. As part of its regular business practice, Defendant intentionally, willfully, and repeatedly engaged in a pattern, practice, and/or policy that violates the FLSA. Defendant's policy and pattern or practice includes but is not limited to:

a. Willfully failing to record all of the time that its employees, including Plaintiffs and Class Members, worked for the benefit of Defendant;

b. Willfully failing to keep payroll records as required by the FLSA and NYLL;

c. Willfully requiring Plaintiffs and Class Members to work "off-the-clock;" and

d. Willfully failing to pay its employees, including Plaintiffs and Class Members, overtime wages for all of the hours that they worked in excess of 40 per workweek.

55. Defendant was or should have been aware that the FLSA required it to pay its Marketing Representatives premium overtime pay for all hours worked in excess of 40 per week.

56. Defendant's failure to pay Plaintiffs and Class Members overtime wages for their work in excess of 40 hours per week was willful, intentional, and in bad faith.

57. Defendant's unlawful conduct has been widespread, repeated, and consistent.

INDIVIDUAL FACTUAL ALLEGATIONS

Luc A. Bijoux

58. Luc A. Bijoux was employed by Defendant from in or about April 2008 until in or about May 2014 as a Marketing Representative.

59. Luc A. Bijoux was an employee of Defendant, working under its direct supervision.

60. At all times hereinafter mentioned, Luc A. Bijoux was required to be paid overtime pay at the statutory rate of 1 and ½ his regular rate of pay after he had worked 40 hours in a workweek.

61. During most workweeks between June 2008 and June 2014, Luc A. Bijoux worked more than 65 hours per week.

62. Defendant failed to compensate Luc A. Bijoux for all of the time worked in excess of 40 hours per week at a rate of at least 1 and ½ times his regular hourly rate, throughout the entire term of his employment with Defendant.

63. Defendant failed to furnish Luc A. Bijoux with an accurate statement of wages listing hours worked, rates paid, gross wages, allowances and deductions taken, and net wages paid.

64. Upon information and belief, Defendant did not keep accurate records of hours worked by Luc A. Bijoux.

Juan Rodriguez

65. Juan Rodriguez was employed by Defendant from in or about December 2005 until in or about March 2013 as a Marketing Representative.

66. Juan Rodriguez was an employee of Defendant, working under its direct supervision.

67. At all times hereinafter mentioned, Juan Rodriguez was required to be paid overtime pay at the statutory rate of 1 and ½ his regular rate of pay after he worked 40 hours in a workweek.

68. During most workweeks between June 2008 and March 2013, Juan Rodriguez worked more than 65 hours per week.

69. Defendant failed to compensate Juan Rodriguez for all of the time worked in excess of 40 hours per week at a rate of at least 1 and ½ times his regular hourly rate, throughout the entire term of his employment with Defendant.

70. Defendant failed to furnish Juan Rodriguez with an accurate statement of wages listing hours worked, rates paid, gross wages, allowances and deductions taken, and net wages paid.

71. Upon information and belief, Defendant did not keep accurate records of hours worked by Juan Rodriguez.

FIRST CAUSE OF ACTION
FLSA – Overtime Wages
(Brought on behalf of Plaintiffs and the FLSA Collective)

72. Plaintiffs reallege and incorporate by reference all allegations in all preceding paragraphs.

73. Plaintiffs and members of the FLSA Collective are non-exempt employees entitled to be paid overtime compensation for all overtime hours worked.

74. Defendant employed Plaintiffs and members of the FLSA Collective for workweeks longer than 40 hours and willfully failed to compensate Plaintiffs for all of the time worked in excess of 40 hours per week, at a rate of at least 1 and ½ times their regular hourly rate, in violation of the requirements of Section 7 of the FLSA, 29 U.S.C. § 207(a)(1).

75. Plaintiffs have expressed their consent to make these claims against the Defendant by filing a written consent form, pursuant to 29 U.S.C. § 216(b).

76. Defendant has failed to make a good faith effort to comply with the FLSA with respect to its compensation to Plaintiffs and the FLSA Collective.

77. Because Defendant's violations of the FLSA were willful, a 3 year statute of limitations applies, pursuant to 29 U.S.C. § 255.

78. As a consequence of the willful underpayment of wages, alleged above, Plaintiffs have incurred damages thereby and the Defendant is indebted to them in the amount of the unpaid overtime compensation, together with interest, liquidated damages, attorneys' fees, and costs in an amount to be determined at trial.

SECOND CAUSE OF ACTION
NYLL – Unpaid Overtime
(Brought on behalf of Plaintiffs and the members of the New York Class)

79. Plaintiffs reallege and incorporate by reference all allegations in all preceding paragraphs.

80. Defendant employed Plaintiffs and members of the New York Class for workweeks longer than 40 hours and willfully failed to compensate Plaintiffs and the New York Class for all of the time worked in excess of 40 hours per week, at a rate of at least 1 and ½ times their regular hourly rate, in violation of the requirements of NYLL.

81. By the course of conduct set forth above, Defendant has violated N.Y. Lab. Law § 650, *et seq.*; 12 N.Y.C.R.R. Part 142-2.2.

82. Defendant failed to keep, make, preserve, maintain and furnish accurate records of time worked by Plaintiffs and Class Members.

83. Defendant has a policy and practice of refusing to pay overtime compensation for all hours worked to Plaintiffs and the New York Class.

84. Defendant's failure to pay overtime compensation to Plaintiffs and the New York Class was willful within the meaning of N.Y. Lab. Law § 663.

85. As a consequence of the willful underpayment of wages, alleged above, Plaintiffs have incurred damages thereby and Defendant is indebted to them in the amount of the unpaid overtime compensation and such other legal and equitable relief due to the Defendant's unlawful and willful conduct, as the Court deems just and proper.

86. Plaintiffs seek recovery of liquidated damages, attorneys' fees, and costs to be paid by the Defendant as provided by the NYLL.

THIRD CAUSE OF ACTION
NYLL – Notice and Record-Keeping Requirement Violation
(Brought on behalf of Plaintiffs and the members of the New York Class)

87. Plaintiffs reallege and incorporate by reference herein all allegations in all preceding paragraphs.

88. Defendant failed to supply Plaintiffs and members of the New York Class notice as required by N.Y. Lab. Law § 195, in English or in the language identified by Plaintiffs as their primary language, containing Plaintiffs' rate or rates of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or other; hourly rate or rates of pay and overtime rate or rates of pay if applicable; the regular pay day designated by the employer in accordance with N.Y. Lab. Law § 191; the name of the employer; any "doing business as" names used by the employer; the physical address of the employer's main office or principal place of business, and a mailing address if different; the telephone number of the employer; plus such other information as the commissioner deems material and necessary.

89. Defendant failed to supply Plaintiffs and members of the New York Class with an accurate statement of wages as required by N.Y. Lab. Law § 195, containing the dates of work covered by that payment of wages; name of employee; name of employer; address and phone number of employer; rate or rates of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or other; gross wages; hourly rate or rates of pay and overtime rate or rates of pay if applicable; the number of hours worked, including overtime hours worked if applicable; deductions; and net wages.

90. Due to Defendant's violations of N.Y. Lab. Law § 195, Plaintiffs and members of the New York Class are each entitled to damages of $50 for each workweek that Defendant failed to provide a wage notice, or a total of $2,500 per class member, and damages of $100 for

each workweek that Defendant failed to provide accurate wage statements, or a total of $2,500 per class member, as provided for by N.Y. Lab. Law § 198, reasonable attorneys' fees, costs, and injunctive and declaratory relief.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, on behalf of themselves and all others similarly situated, seek for the following relief:

A. That, at the earliest possible time, Plaintiffs be allowed to give notice to the FLSA Collective, or that the Court issue such notice, to all persons who are presently, or have at any time during the 3 years immediately preceding the filing of this suit, up through and including the date of this Court's issuance of court-supervised notice, been employed by Defendant as Marketing Representatives, or similarly situated positions. Such notice shall inform them that this civil action has been filed, of the nature of the action, and of their right to join this lawsuit if they believe they were denied proper wages;

B. Unpaid overtime pay and an additional and equal amount as liquidated damages pursuant to the FLSA and the supporting United States Department of Labor regulations;

C. Unpaid overtime pay and liquidated damages permitted by law pursuant to the NYLL;

D. Statutory damages, as provided for by N.Y. Lab. Law § 198, for Defendant's violations of the notice and recordkeeping requirements pursuant to N.Y. Lab. Law § 195;

E. Certification of this case as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure;

F. Designation of Plaintiff as representative of the Rule 23 Class, and counsel of record as Class Counsel;

G. Pre-judgment interest and post-judgment interest as provided by law;

H. Appropriate equitable and injunctive relief to remedy violations, including but not necessarily limited to an order enjoining Defendant from continuing its unlawful practices;

I. Attorneys' fees and costs of the action;

J. Issuance of a declaratory judgment that the practices complained of in this action are unlawful under N.Y. Lab. Law § 190 *et seq*.;

K. An injunction requiring Defendant to cease the unlawful activity described herein pursuant to N.Y. Lab. Law § 190 *et seq*.;

L. Appropriate monetary relief for lost wages, as provided for by FLSA § 216(b) and NYLL § 215(d);

M. Liquidated damages relating to lost wages, as provided for by FLSA § 216(b) and NYLL § 215(d);

N. Reasonable incentive awards for Plaintiffs to compensate them for the time they spent attempting to recover wages for the Class and for the risks they took in doing so; and

O. Such other relief as this Court shall deem just and proper.

Dated: Melville, New York
June 23, 2014

Respectfully submitted,

By: */s/ Troy L. Kessler*
Troy L. Kessler

SHULMAN KESSLER LLP
Troy L. Kessler
Marijana F. Matura
510 Broadhollow Road, Suite 110
Melville, New York 11747
Telephone: (631) 499-9100

OUTTEN & GOLDEN LLP
Rachel Bien
3 Park Avenue, 29th Floor
New York, New York 10016
Telephone: (212) 245-1000

Attorneys for Plaintiffs and the Putative FLSA Collective and New York Class