

FILED BY FAX
ALAMEDA COUNTY

August 17, 2020

CLERK OF
THE SUPERIOR COURT
By Cheryl Clark, Deputy

CASE NUMBER:
RG20065123

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18 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

19 **COUNTY OF ALAMEDA – UNLIMITED JURISDICTION**

21 MICHAEL CUENCA, individually and on
22 behalf of all others similarly situated,

23 Plaintiffs,

24 vs.

25
26 KAISER FOUNDATION HOSPITALS;
27 KAISER FOUNDATION HEALTH PLAN
(HP), INC.; THE PERMANENTE MEDICAL
28 GROUP, INC.; and DOES 1 THROUGH 50,

Case No.: RG20065123

CLASS ACTION

FIRST AMENDED COMPLAINT FOR DAMAGES

1. **Violation of California Equal Pay Act (“EPA”), as amended (Labor Code §§1197.5, 1194.5)**
2. **Violation of Fair Employment and Housing Act (“FEHA,” Cal. Gov’t Code §12940 et seq.) – Race- and National Origin-Based**

INCLUSIVE,

Defendants.

Discrimination

- 3. **Violation of FEHA (Cal. Gov't Code §12940 *et seq.*) – Failure to Prevent Race- and National Origin-Based Discrimination**
- 4. **Violation of FEHA (Cal. Gov't Code §12940 *et seq.*) – Retaliation (as to Plaintiff Cuenca)**
- 5. **Violation of EPA (Labor Code §§1197.5, 1194.5) – Retaliation (as to Plaintiff Cuenca)**
- 6. **Unlawful and/or Unfair Business Practices (Cal. Business & Professions Code §17200 *et seq.*)**
- 7. **Declaratory Judgment (C.C.P. §1060 *et seq.*)**

JURY TRIAL DEMANDED

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1 Plaintiff Michael Cuenca, individually and on behalf of all others similarly situated, is informed
2 and believes, and therefore alleges, as follows:

3 I. NATURE OF THIS ACTION

4 1. Plaintiff Michael Cuenca brings this class action on behalf of himself and on behalf of a
5 class defined as all Hispanic/Latino,¹ non-physician workers employed by Defendants Kaiser
6 Foundation Hospitals; Kaiser Foundation Health Plan, Inc.; and The Permanente Medical Group, Inc.;
7 (collectively, “Kaiser” or “Defendant”) in California at any time during the time period beginning four
8 years prior to the filing of this complaint through the date of trial in this action (“Class Period”). These
9 employees share a community of interest and are similarly situated under California Code of Civil
10 Procedure § 382.

11 2. Throughout the Class Period and throughout California, Kaiser has discriminated against
12 its Hispanic/Latino employees by paying them less than Kaiser pays employees of other races and
13 national origins,² performing substantially similar work under similar working conditions, when viewed
14 as a composite of skill, effort, and responsibility, in violation of the California Equal Pay Act, Cal.
15 Labor Code § 1197.5, as amended. The disparity is especially severe as compared to white employees.
16 Kaiser’s failure to pay employees of varying races and national origins equal wages for performing
17 substantially similar work is not justified by any lawful reason.

18 3. Throughout the Class Period and throughout California, Kaiser has also discriminated
19 against its Hispanic/Latino employees through its hiring and promotions policies. As a result,
20 Hispanic/Latino employees are disproportionately hired for the lowest-paying jobs. Hispanic/Latino
21 employees are also drastically under-represented in positions of management and leadership. These
22 disparities are particularly pronounced comparing the percentages of white employees versus the
23 percentages of Hispanic/Latino employees in executive management. Furthermore, Hispanic/Latino
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25 ¹ Allegations are based on Kaiser’s “Ethnic Group” designation system within the “My Profile” section
26 of the employee portal. The term “Hispanic/Latino” is the terminology Kaiser uses to classify
employees of Hispanic (including Spanish)/Latin American descent.

27 ² In this Complaint, the term “national origin” is used, consistent with California’s FEHA regulation, 2
28 C.C.R. §11027.1, which also encompasses “ethnicities,” a term used in the Equal Pay Act. Plaintiff
intends these terms to be interchangeable for purposes of this Complaint.

III. EXHAUSTION OF ADMINISTRATIVE REMEDIES

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2 9. On August 14, 2020, Plaintiff timely filed a charge of discrimination and retaliation with
3 the California Department of Fair Employment and Housing (“DFEH”) against the above-referenced
4 Defendants. Plaintiff requested, and the DFEH issued, an immediate Right-to-Sue Notice. Accordingly,
5 Plaintiff has timely exhausted his administrative remedies. A true-and-correct copy of Plaintiff’s Right-
6 to-Sue Notice is attached to this complaint as **Exhibit A**.³

7 10. On June 16, 2020, Plaintiff also filed a charge of discrimination with the Office of
8 Federal Contract Compliance Programs (“OFCCP”).

III. PARTIES

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10 11. Plaintiff has been employed as a Business Analyst/Specialist for Kaiser’s Human
11 Resources People Analytics group since April 2015 at Kaiser’s headquarters in Oakland, CA, receiving
12 his paychecks from Kaiser Foundation HP, Inc. Prior to that, from approximately May 2011 to April
13 2015, Plaintiff worked as a Project Manager Consultant/Specialist for Kaiser’s National Diversity
14 Department at Kaiser’s headquarters in Oakland, CA. Plaintiff is, and at all relevant times herein was,
15 an adult Hispanic male residing in California. From at least the beginning of the class period to the
16 present, Plaintiff and employees of other races and/or national origins performed substantially similar
17 work, when viewed as a composite of skill, effort, and responsibility, and performed under similar
18 working conditions. However, Kaiser has paid Plaintiff less than employees of other races and/or
19 national origins for substantially similar work.

20 12. Defendant Kaiser Foundation Hospitals is a healthcare business. Kaiser Foundation
21 Hospitals’ headquarters are located at One Kaiser Plaza, Oakland, CA 94612.

22 13. Defendant Kaiser Foundation HP, Inc. is a healthcare business. Kaiser Foundation HP,
23 Inc. is headquartered at One Kaiser Plaza, Oakland, CA 94612.

24 14. Defendant The Permanente Medical Group, Inc. is a healthcare business. The
25 Permanente Medical Group, Inc. is headquartered at 1950 Franklin Street, Oakland, CA 94612.

26 15. Collectively, Defendants (“Kaiser”) employ over 100,000 employees in Oakland and
27

28 ³ On June 16, 2020 and July 2, 2020, Plaintiff timely filed charges with the DFEH identifying Kaiser Permanente as the Defendant.

1 throughout California. Kaiser is Plaintiff's FEHA employer.

2 16. In addition to the above-referenced Defendants, Plaintiff sues fictitious defendants Does
3 1-50, inclusive, because their names, capacities, status, or facts showing them to be liable are not
4 presently known. Plaintiff is informed and believes, and thereon alleges, that each of the fictitiously
5 named Defendants is responsible in some manner for the occurrences herein alleged, and such
6 Defendants caused Plaintiff's damages as herein alleged. Plaintiff will amend this complaint to show
7 their true names and capacities, together with appropriate charging language, when such information
8 has been ascertained.

9 17. Plaintiff is informed, believes, and thereon alleges that each of the Defendants herein
10 was at all times relevant to this action the agent, employee, representative partner, and/or joint venture
11 of the remaining Defendants and was acting within the course and scope of the relationship. Plaintiff is
12 further informed, believes, and thereon alleges that each of the Defendants herein gave consent to,
13 ratified, and authorized the acts alleged herein to the remaining Defendants.

14 **V. FACTUAL ALLEGATIONS - CLASS**

15 **Kaiser has ignored Plaintiff Cuenca's reports of discrimination against Hispanic/Latino 16 employees in both pay and promotions**

17 18. On October 23, 2019, Plaintiff sent an email to then-CEO Bernard Tyson alerting him
18 to the lack of advancement opportunities for and pay discrimination against Hispanic/Latino employees.
19 Plaintiff attached a report to the email with data showing the extensive pay and promotion
20 discrimination against Hispanic/Latino employees. Plaintiff sent a follow up email to Tyson on October
21 25, 2019. Plaintiff received no response from Tyson to either email.

22 19. On October 25, 2019, Plaintiff received an email from Tod Trotter, Head of Human
23 Resources Compliance, stating that he would investigate the complaints to Tyson. Plaintiff was never
24 contacted about any such investigation.

25 20. On February 10, 2020, Plaintiff sent an email to Gregory Adams, the new CEO, alerting
26 him to the lack of advancement opportunities for and pay discrimination against Hispanic/Latino
27 employees. Plaintiff received no response.

28 21. On June 17, 2020, Plaintiff sent another email to Adams and Trotter, as well as Tom

1 Hanenburg, Interim Regional President of Kaiser Northern California; Richard Isaacs, CEO and
2 Executive Director of (Kaiser) Permanente Medical Group; Ron Copeland, Chief Equity, Inclusion, and
3 Diversity Officer; Christian Meisner, Chief Human Resources Officer; and Richele Thornburg,
4 Executive Vice President of People and Leadership Strategy for The Permanente Federation, attaching
5 an updated version of the report he had previously shared.

6 22. In his various communications with Kaiser's CEOs that reached HR, as outlined above,
7 Plaintiff emphasized that Hispanic/Latino employees are paid thousands or up to tens of thousands of
8 dollars a year less than non-Hispanic/Latino colleagues with similar tenure throughout the state.
9 Plaintiff also emphasized the concentration of Hispanic/Latino employees in Kaiser's lowest paying
10 jobs and the dearth of Hispanic employees in positions of management and leadership.

11 **Kaiser's uniform policies and practices of discrimination in pay and promotions**

12 23. Throughout the Class Period, Kaiser has maintained a general policy of discrimination
13 in hiring and promotions, based on common policies and/or practices. The result is that Hispanic/Latino
14 employees are the only non-white racial/ethnic group whose percentage of Kaiser's workforce is less
15 than the corresponding percentage of California's population as a whole. All other non-white
16 racial/ethnic groups (with the exception of Native Americans) are a higher percentage of Kaiser's
17 workforce than they are of California's population. Hispanic/Latino employees are only about 19% of
18 the Kaiser workforce, but about 40% of the state's population. While Kaiser has a centralized and
19 company-wide Affirmative Action Plan that it is required to submit to the Office of Federal Contract
20 Compliance Programs on an annual basis, its actual hiring and promotion policies and/or practices, and
21 resulting workforce numbers, demonstrate glaring disparities in hiring and promotions.

22 24. In addition, for those Hispanic/Latino employees who *are* hired and/or promoted,
23 Hispanic/Latino employees are disproportionately relegated to Kaiser's lowest-pay jobs and
24 disproportionately excluded from the highest-paying executive management jobs. Even within the same
25 jobs, Hispanic/Latino employees are disproportionately hired at lower grades with lower pay. These
26 hiring policies and/or practices further exacerbate the pay gap between Hispanic/Latino employees and
27 employees of other races and/or national origins.

28 25. Kaiser has maintained such policies and/or practices of systemic discrimination against

1 Hispanic/Latino employees across the organization, resulting in drastic disparities with respect to hiring,
2 pay, and promotions.

3 26. Throughout the Class Period, Kaiser's corporate headquarters has maintained
4 responsibility for hiring, setting wages, and assigning the location of employment across all of its
5 California offices. Likewise, Kaiser's central administrative officers, based in its Oakland headquarters,
6 have maintained centralized control over employees' terms and conditions of employment, including,
7 without limitation, job and location assignment, performance management and evaluation, career
8 progression, promotion, and compensation policies, practices, and procedures.

9 27. Throughout the Class Period, Kaiser's compensation policies and practices have been
10 and continue to be centrally determined and uniformly applied to all Kaiser's employees. Throughout
11 the Class Period, Kaiser has maintained and continues to maintain a centrally determined and uniformly
12 applied set of policies and/or practices for determining employees' wage rates throughout California,
13 including centralized policies and/or practices for setting employees' initial pay and other centralized
14 policies and/or practices concerning employee compensation, including but not necessarily limited to
15 policies/practices as to bonuses. These policies include, but are not limited to, uniform performance
16 evaluation systems that affect both pay and promotions. Upon information and belief, these systems
17 have resulted in lower ratings for Hispanic/Latino employees, and therefore, ultimately, less pay.
18 Defendant's performance evaluations systems are thus one of the policies contributing to systematic
19 discrimination against Hispanic/Latino employees.

20 28. Every job code at Kaiser has a specific pay range that is uniform throughout the state of
21 California and which determines initial pay. Bonuses are also determined through a centralized and
22 uniform process, using a standard formula for groups of employees, designed and controlled by Kaiser's
23 central administrative officers based in its Oakland headquarters.

24 29. From the beginning of the Class Period through the present, Kaiser has paid Hispanic
25 and/or Latino employees less than employees of other races and/or national origins for substantially
26 similar work, when viewed as a composite of skill, effort, and responsibility, and performed under
27 similar working conditions.

28 30. Throughout the Class Period, Kaiser has maintained and continues to maintain a

1 centrally determined and uniformly applied policy and/or practice throughout California of not
2 adjusting employees' wage rates to ensure that it does not pay its Hispanic and/or Latino employees
3 less than its employees of other races and/or national origins for substantially similar work.

4 31. Kaiser is required to maintain records of the wages and wage rates, job classifications,
5 and other terms and conditions of employment of all of its employees throughout California.
6 Furthermore, Kaiser tracks how much each employee makes in comparison to others of the same job
7 code, known as the "compa-ratio." Based upon this information, and Plaintiff's repeated complaints,
8 Kaiser therefore knew or should have known that it paid Hispanic/Latino employees in the Covered
9 Positions less than it paid its counterparts of other races and/or national origins for performing
10 substantially similar work. Yet Kaiser took no steps to eliminate its unlawful and discriminatory pay
11 practices at any time during the Class Period.

12 VI. FACTUAL ALLEGATIONS – PLAINTIFF CUENCA

13 32. Plaintiff is the only Hispanic/Latino member of his four-person demographic data
14 analysis team. He is the lowest-paid member of his team, despite having the same job code as two of
15 the three other members of his team, and despite his being more experienced than all three other
16 members of his team.

17 33. In 2015, in a mid-year performance review, Plaintiff received a negative rating in the
18 communications behavior criteria, which was based on what he alleged to be racial/national origin bias
19 on the part of his manager, Dan Lapporte. Mr. Lapporte accused Plaintiff of being "mean" and
20 "aggressive" towards a co-worker, playing into racist stereotypes about Hispanic men. After Plaintiff
21 reported his allegations to Human Resources, the accusation was removed from the performance review
22 and Plaintiff's rating in that criteria increased.

23 34. Since that time, Plaintiff has applied to dozens of positions for which he is qualified and
24 which would constitute a promotion for Plaintiff, including numerous positions in Kaiser's corporate
25 communications department. He has been turned down for every position, even as some positions
26 remain unfilled or are cancelled.

27 35. For example, Plaintiff applied for an open position as Communications Manager in the
28 office of the Chief of Staff of Information Technology. Plaintiff also reached out directly to the hiring

1 manager who stated that an interview was forthcoming. Plaintiff was also contacted by the recruiter,
2 who stated that there were actually eight open positions in the same category and in the same
3 department. The recruiter assured Plaintiff that, due to his background and experience in technology
4 communications, Plaintiff would surely be selected for one of the eight open positions.

5 36. Plaintiff interviewed for the position on December 17, 2018. However, Plaintiff never
6 heard back from the hiring manager or the recruiter, even despite his outreach efforts, which included
7 an email to the hiring manager on February 13, 2019.

8 37. Upon information and belief, others were hired for the open positions in 2019 to which
9 Plaintiff had applied and some positions remained open.

10 38. After a member of Plaintiff's team resigned in November 2018, Plaintiff's manager Mr.
11 Lapporte received approval to hire a replacement in spring 2019. Mr. Lapporte then worked with his
12 own manager to create a new analyst position that was more senior (with higher compensation) than the
13 position being vacated. This position would have been a promotion for Plaintiff. Plaintiff was informed
14 that this position was more technology-oriented than the position that was vacated. Plaintiff has
15 extensive experience in information technology and demographic data analysis.

16 39. Plaintiff applied for the position on April 22, 2019.

17 40. Mr. Lapporte never acknowledged Plaintiff's candidacy for the position. Plaintiff's
18 manager provided updates on the search for a candidate in meetings where Plaintiff was in attendance
19 but did not acknowledge Plaintiff's application. Plaintiff's manager later announced that the position
20 criteria had changed and a more technology-oriented candidate would no longer be sought out.

21 41. On September 26, 2019, Plaintiff was informed that the position had been filled. The
22 candidate who was selected was an internal program manager with less data analytics and HR analytics
23 experience. Plaintiff was and is more qualified for the position as it was advertised.

24 42. On July 15, 2019, Plaintiff filed an internal EEO complaint alleging pay discrimination,
25 retaliation, and discrimination in hiring/promotions including race/national origin discrimination. On
26 December 5, 2019, Plaintiff received an update on the status of his complaint, rejecting the pay
27 discrimination issue. On March 2, 2020, Plaintiff was informed that the investigation had concluded
28 and that Kaiser rejected his complaint. Plaintiff filed an internal administrative appeal on March 20,

1 2020. On May 5, 2020, Plaintiff received acknowledgment of his internal appeal. On June 9, 2020,
2 Plaintiff was informed that his appeal was rejected.

3 43. On June 17, 2020, Plaintiff sent an email to CEO Gregory Adams; Head of HR
4 Compliance Tod Trotter; Interim Regional President Tom Hanenburg; Executive Director of KP
5 Medical Group Richard Isaacs; Chief Equity, Inclusion, and Diversity Officer Ron Copeland; Chief HR
6 Officer Christian Meisner; and Executive Vice President Richele Thornburg alleging unequal pay and
7 discrimination based on national origin and race against Hispanic/Latino employees at Kaiser, including
8 himself.

9 44. On the morning of July 1, 2020, when Plaintiff had just returned to work following
10 bereavement leave, Plaintiff received a phone call from HR Representative Casandra Szalkiewicz
11 informing him that he was being placed on administrative leave, after being asked several questions
12 about the allegations he had made regarding national origin and race-based discrimination at Kaiser.
13 That same morning, a Kaiser representative came to Plaintiff's house to collect his work laptop and ID
14 badge. Plaintiff's job duties and access to Kaiser's systems were suspended and remain suspended.

15 VII. CLASS ALLEGATIONS

16 A. Class Definition

17 45. Plaintiff brings this action pursuant to California Code of Civil Procedure § 382 on
18 behalf of himself and on behalf of the following proposed class ("Class"):

19 all non-physician workers who self-identify as Hispanic/Latino in Defendant
20 Kaiser Foundation Hospitals'; Kaiser Foundation Health Plan, Inc.'s; and The
21 Permanente Medical Group, Inc.'s; (collectively, "Kaiser" or "Defendant") internal
22 classification system in California at any time during the time period beginning four
23 years prior to the filing of this complaint through the date of trial in this action
24 ("Class Period")

25 46. This action is brought, and may properly be maintained, as a class action under § 382
26 because there is a well-defined community of interest in the litigation, and the proposed class is easily
27 ascertainable based upon Kaiser's employee profile system which tracks employees' race/ethnic group.

28 B. Numerosity and Impracticability of Joinder

47. The proposed Class is numerous and ascertainable. Plaintiff is informed and believes,

1 and on that basis alleges, that the proposed class consists of tens of thousands of Hispanic/Latino
2 employees located across California, and therefore joinder of all individual Class Members would be
3 impractical.

4 **C. Community of Interest**

5 48. There is a well-defined community of interest because common questions of law and
6 fact exist as to all members of the Class and predominate over any questions solely affecting individual
7 members of the Class. Those common questions of law and fact include, but are not limited to:

8 a. Whether Kaiser has had a systemic policy and/or practice of paying its
9 Hispanic/Latino employees less than what is paid to its employees of other races and/or national origins
10 performing substantially similar work, when viewed as a composite of skill, effort, and responsibility,
11 and performed under similar conditions;

12 b. Whether Kaiser's systemic policy and/or practice of paying its Hispanic/Latino
13 employees less than that paid to their counterparts of other races and/or national origins violates the
14 California Equal Pay Act, as amended, Cal. Labor Code § 1197.5;

15 c. Whether Kaiser's systemic policy and/or practice of paying its Hispanic/Latino
16 employees less than that paid to their counterparts of other races and/or national origins violates the
17 Fair Employment and Housing Act (FEHA), Cal. Gov't. Code § 12940(a);

18 d. Whether Kaiser's systemic policy and/or practice of paying its Hispanic/Latino
19 employees less than that paid to employees of other races and/or national origins was willful;

20 e. Whether Kaiser's performance evaluation systems lead to lower overall
21 compensation and fewer promotions for Hispanic/Latino employees as compared to employees of other
22 races and/or national origins;

23 f. Whether Kaiser has a systemic policy and/or practice of disproportionately hiring
24 Hispanic/Latino employees for lower-level and lower-grade positions as compared to employees of
25 other races and/or national origins, leading to overall lower compensation;

26 g. Whether Kaiser has had a systemic policy and/or practice of disproportionately
27 excluding Hispanic/Latino employees from management and leadership positions as compared to
28 employees of other races and/or national origins, leading to lower overall compensation;

1 h. Whether Kaiser's systemic policy and/or practice of disproportionately hiring
2 Hispanic/Latino employees for lower-level and lower-grade positions as compared to employees of
3 other races and/or national origins violates the Fair Employment and Housing Act (FEHA), Cal. Gov't.
4 Code § 12940(a); and

5 i. Whether Kaiser's systemic policy and/or practice of excluding Hispanic/Latino
6 employees from management and leadership positions as compared to employees of other races and/or
7 national origins violates the Fair Employment and Housing Act (FEHA), Cal. Gov't. Code § 12940(a).

8 **D. Typicality of Claims and Relief Sought**

9 49. The claims of Plaintiff are typical of the claims of the proposed class. Plaintiff, like the
10 members of the proposed class, is a Hispanic/Latino non-physician and worked for Kaiser in California
11 during the Class Period. On information and belief, Plaintiff, like the members of the proposed class,
12 has been paid less than employees of other races and/or national origins for substantially similar work,
13 and has been denied opportunities for advancement in a manner that is disproportionate as compared to
14 employees of other race and/or national origins. The relief sought by the Plaintiff herein is also typical
15 of the relief sought on behalf of the proposed class.

16 **E. Adequacy of Representation**

17 50. Plaintiff is able to fairly and adequately protect the interests of all members of the class
18 because it is in Plaintiff's best interest to prosecute the claims alleged herein to obtain full compensation
19 due to the members of the class, and to obtain injunctive relief to protect the Class from further
20 discrimination going forward. Plaintiff's interests align with those of Class Members.

21 51. Plaintiffs have selected counsel who have the requisite resources and ability to prosecute
22 this case as a class action and are experienced labor and employment attorneys who have successfully
23 litigated class actions and other cases involving similar issues.

24 52. This suit is properly maintained as a class action under C.C.P. § 382 because Kaiser has
25 implemented an unlawful scheme that is generally applicable to the Class, making it appropriate to issue
26 final injunctive relief and corresponding declaratory relief with respect to the Class as a whole. This
27 suit is also properly maintained as a class action because the common questions of law and fact
28 predominate over any questions affecting only individual members of the class. For all these and other

1 reasons, a class action is superior to other available methods for the fair and efficient adjudication of
2 the controversy set forth herein.

3 **VIII. CAUSES OF ACTION**

4 **FIRST CAUSE OF ACTION**

5 **Violation of the California Equal Pay Act, as amended Cal. Labor Code §§1197.5, 1194.5** 6 **(Brought by Plaintiff Cuenca on Behalf of Himself and the Class)**

7 53. Plaintiff hereby alleges and incorporates by reference all allegations in each and every
8 preceding paragraph as if fully set forth herein.

9 54. Kaiser willfully violated California Labor Code § 1197.5 by intentionally, knowingly,
10 and deliberately paying Hispanic and/or Latino employees less than employees of other races and/or
11 national origins for substantially similar work throughout the Class Period.

12 55. As a result of Kaiser's conduct, violation of California Labor Code § 1197.5, and/or
13 willful, knowing, and intentional discrimination, Plaintiff and Class Members have suffered and will
14 continue to suffer harm, including but not limited to lost earnings, lost benefits, and other financial loss,
15 as well as non-economic damages.

16 56. Plaintiff and Class Members are therefore entitled to all legal and equitable remedies
17 available, including an injunction under Labor Code § 1194.5, attorney's fees under Labor Code §
18 1197.5 and Cal. CCP §1021.5, and lost wages, interest, and liquidated damages.

19 **SECOND CAUSE OF ACTION**

20 **Race- and National Origin-Based Discrimination in Violation of FEHA** 21 **(California Government Code § 12940, *et seq.*)** 22 **(Brought by Plaintiff Cuenca on Behalf of Himself and the Class)**

23 57. Plaintiff hereby re-alleges and incorporates by reference all allegations in each and every
24 preceding paragraph as if fully set forth herein.

25 58. In relevant part, California Government Code §12940(a) provides that it shall be
26 unlawful for an employer to discriminate against an employee in the terms and conditions of his
27 employment because of his race and/or national origin.

28 59. California's regulations (2 C.C.R. Section 11027.1) define the term national origin

1 broadly to include “the individual’s or an ancestor’s actual or perceived characteristics” including:

- 2 • Physical, cultural, or linguistic characteristics associated with a national origin group;
- 3 • Marriage to or association with persons of a national origin group;
- 4 • Tribal affiliation;
- 5 • Membership in or association with an organization identified with or seeking to promote
- 6 the interests of a national origin group;
- 7 • Attendance or participation in schools, churches, temples, mosques, or other religious
- 8 institutions generally used by persons of a national origin group;
- 9 • A name that is associated with a national origin group; and
- 10 • “National origin groups” including ethnic groups, geographic places of origin, and
- 11 countries that are not presently in existence (*i.e.*, a geographic location or country, a
- 12 formerly existing country, or a region that is not a country but that is associated with an
- 13 ethnic group).

14 67. Plaintiff Cuenca and the putative Class Members are Hispanic/Latino and are thus

15 members of a protected class.

16 68. Kaiser is an employer as defined by FEHA. Plaintiff and the putative Class Members

17 were and are employees of Defendant, under the terms of the FEHA.

18 69. As set forth above, Defendant discriminated against Plaintiff Cuenca and the Class

19 Members because of their race and national origin in pay and promotions. Plaintiff complained to

20 Defendant regarding the discrimination, but Defendant allowed the discrimination to continue.

21 70. As a direct, legal, and proximate result of the discrimination, Plaintiff and the putative

22 Class Members have suffered damages, including lost wages and other economic damages, emotional

23 distress, and punitive damages, in an amount to be proven at trial.

24 71. By reason of the conduct of Defendant, Plaintiff has necessarily retained attorneys to

25 prosecute the action on behalf of himself and the class. Pursuant to California Government Code §

26 12965(b), as a result of Defendant’s discrimination, Plaintiff and the class are entitled to recover

27 damages for economic harm, attorneys’ fees, costs, and expert witness fees. Plaintiff and the class are

28 also entitled to attorneys’ fees pursuant to California Code of Civil Procedure § 1021.5.

72. Defendant’s actions were ratified by managing agents, and were willful, malicious,

1 fraudulent, and oppressive, and were committed with wrongful intent to harm Plaintiff and the Class
2 Members in conscious disregard of their rights. Plaintiff and the Class Members are therefore entitled
3 to recover punitive damages from Defendant in an amount according to proof at trial.

4 73. Plaintiff timely exhausted administrative remedies and obtained a right to sue.

5 **THIRD CAUSE OF ACTION**

6 **Failure to Prevent Race- and National Origin-Based Discrimination in Violation of FEHA
(California Government Code § 12940(k))**

7 **(Brought by Plaintiff Cuenca on Behalf of Himself and the Class)**

8 74. Plaintiff hereby re-alleges and incorporates by reference all allegations in each and every
9 preceding paragraph as if fully set forth herein.

10 75. California Government Code § 12940(k) provides that it shall be an unlawful
11 employment practice for an employer to fail to take all reasonable steps necessary to prevent
12 discrimination, harassment, and retaliation from occurring in the workplace.

13 76. Plaintiff and the putative Class Members are Hispanic/Latino and are thus members of
14 a protected class.

15 77. Kaiser is an employer as defined by FEHA.

16 78. Plaintiff and the putative Class Members were and are employees of Defendant, under
17 the terms of the FEHA.

18 79. Defendant failed to provide Plaintiff and the Class Members with protections required
19 under California Government Code § 12940(k) by not taking immediate and sufficient action to correct
20 the discriminatory conduct directed at Hispanic/Latino employees, even after being alerted repeatedly
21 to the discrimination by Plaintiff.

22 80. As a direct, legal, and proximate result of the discrimination, Plaintiff and the putative
23 Class Members have suffered damages, including lost wages and other economic damages, emotional
24 distress, and punitive damages in an amount to be proven at trial.

25 81. By reason of the conduct of Defendant, Plaintiff has necessarily retained attorneys to
26 prosecute the action on behalf of himself and the class. Pursuant to California Government Code §
27 12965(b), as a result of Defendant's discrimination, Plaintiff and the class are entitled to recover
28 damages for economic harm, attorneys' fees, costs, and expert witness fees. Plaintiff and the class are
also entitled to attorneys' fees pursuant to California Code of Civil Procedure § 1021.5.

1 disregard of his rights. Plaintiff and the Class Members are therefore entitled to recover punitive
2 damages from Defendant in an amount according to proof at trial.

3 94. Plaintiff timely exhausted administrative remedies and obtained a right to sue.

4 **FIFTH CAUSE OF ACTION**
5 **Retaliation in Violation of EPA**
6 **(as amended Cal. Labor Code §§1197.5, 1194.5)**
7 **(Brought by Plaintiff on Behalf of Himself)**

8 95. Plaintiff hereby re-alleges and incorporates by reference all allegations in each and every
9 preceding paragraph as if fully set forth herein.

10 96. California Labor Code § 1197.5(k) provides that it shall be an unlawful employment
11 practice for an employer to retaliate against or otherwise discriminate against an employee because of
12 any action taken by an employee to invoke or assist in any manner the enforcement of the Equal Pay
13 Act.

14 97. Kaiser is an employer as defined by the EPA. Labor Code § 1197.5(l).

15 98. Plaintiff is an employee of Defendant.

16 99. Defendant retaliated against Plaintiff when he was removed from consideration for an
17 open position after filing an internal EEO complaint raising equal pay and other discrimination claims.

18 100. As a direct, legal, and proximate result of the discrimination, Plaintiff has suffered
19 damages, including lost wages and other economic damages, emotional distress, and punitive damages
20 in an amount to be proven at trial.

21 101. Plaintiff is therefore entitled to all legal and equitable remedies available, including an
22 injunction under Labor Code § 1194.5, attorney's fees under Labor Code § 1197.5 and Cal. CCP
23 §1021.5, and lost wages, interest, and liquidated damages.

24 **SIXTH CAUSE OF ACTION**
25 **Unlawful and / or Unfair Business Practices,**
26 **Cal. Business & Professions Code § 17200 et seq.**
27 **(Brought by Plaintiff Cuenca on Behalf of Himself and the Class)**

28 102. Plaintiff hereby re-alleges and incorporates by reference all allegations in each and every
preceding paragraph as if fully set forth herein.

103. Kaiser's policies and/or practices of paying Hispanic/Latino employees less than
employees of other races and/or national origins for substantially similar work performed constitutes a

1 business practice because Kaiser's acts and omissions, as alleged herein, violate the California Equal
2 Pay Act, as amended, Labor Code § 1197.5, and therefore constitute an unlawful business practice
3 prohibited by Business & Professions Code § 17200 *et seq.* Kaiser's business practice of paying
4 Hispanic/Latino employees less than employees of other races and/or national origins for substantially
5 similar work causes harm to Plaintiff and Class Members that outweighs any reason Kaiser may have
6 for doing so. Kaiser's business practice as alleged herein is also racist, immoral, unethical, oppressive,
7 unscrupulous, and offensive to the established public policies of ensuring employees of all races and/or
8 national origins are paid equally for performing equal and substantially similar work, as reflected in the
9 California Equal Pay Act, Cal. Labor Code § 1197.5, and ensuring Hispanic/Latino employees are not
10 discriminated against in the workplace, as reflected in the California Fair Employment and Housing
11 Act, Cal. Gov't Code §12940.

12 104. Kaiser's policies and/or practices of disproportionately excluding Hispanic/Latino
13 employees from management and leadership positions as compared to employees of other races and/or
14 national origins constitutes a business practice because Kaiser's acts and omissions, as alleged herein,
15 violate the California Fair Employment and Housing Act, Cal. Gov't Code §12940, and therefore
16 constitute an unlawful business practice prohibited by Business & Professions Code § 17200 *et seq.*
17 Kaiser's discriminatory business practice regarding promotions causes harm to Plaintiff and Class
18 Members that outweighs any reason Kaiser may have for doing so. Kaiser's business practice as alleged
19 herein is also racist, immoral, unethical, oppressive, unscrupulous, and offensive to the established
20 public policies of ensuring Hispanic/Latino employees are not discriminated against in the workplace,
21 as reflected in the California Fair Employment and Housing Act, Cal. Gov't Code §12940.

22 105. As a result of its unlawful and/or unfair business practices, Kaiser has reaped and
23 continues to reap unfair and illegal profits at the expense of Plaintiffs and Class Members. Accordingly,
24 Kaiser should be disgorged of its illegal profits, and Plaintiffs and Class Members are entitled to
25 restitution with interest of such ill-gotten profits in an amount according to proof at the time of trial.

26 106. Kaiser's unlawful and/or unfair business practices entitle Plaintiffs and Class Members
27 to preliminary and permanent injunctive relief and other equitable relief available under law, including
28 attorneys' fees pursuant to California Code of Civil Procedure § 1021.5.

1 F. For restitution of all monies due to Plaintiff and Class Members, as well as
2 disgorgement of Kaiser’s profits from its unlawful and/or unfair business practices;

3 G. For back pay, front pay, injunctive relief, and emotional distress damages arising from
4 the discrimination against the class of Hispanic/Latino employees described above;

5 H. For an award of exemplary and punitive damages in an amount commensurate with
6 Defendant’s ability to pay and to deter future conduct;

7 I. For preliminary and permanent injunctive relief under, *inter alia*, California Labor Code
8 § 1194.5, enjoining Kaiser from violating California Labor Code § 1197.5 by paying its
9 Hispanic/Latino employees less than that paid to their counterparts of other races and/or national
10 origins for substantially similar work and by disproportionately relegating Hispanic/Latino employees
11 to the lowest-paying and lowest grade jobs while disproportionately excluding Hispanic/Latino
12 employees from leadership and management positions, and from engaging in the unfair and unlawful
13 business practices complained of herein;

14 J. For reasonable attorneys’ fees and costs pursuant to California Labor Code §§
15 1197.5(h), California C.C.P. § 1021.5, California Government Code § 12965(b), and/or any other
16 applicable provision providing for attorneys’ fees and costs; and

17 K. For such further relief that the Court may deem just and proper.

18 **X. DEMAND FOR JURY TRIAL**

19 Pursuant to Code of Civil Procedure section 631, Plaintiff, individually, and on behalf of others
20 similarly situated, demands a trial by jury.

21
22 DATED: August 14, 2020

**BRYAN SCHWARTZ LAW
NICHOLS KASTER, PLLP**

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By:
/s/ Bryan J. Schwartz
Bryan J. Schwartz (SBN 209903)
Natasha T. Baker (SBN 319381)

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Matthew C. Helland (SBN 250451)
Robert L. Schug (SBN 249640)
Neil D. Pederson (MN Bar No. 0397628)*
**pro hac vice application forthcoming*

Attorneys for Plaintiff and the Putative Class

EXHIBIT A

**DEPARTMENT OF FAIR EMPLOYMENT & HOUSING**

KEVIN KISH, DIRECTOR

2218 Kausen Drive, Suite 100 | Elk Grove | CA | 95758
(800) 884-1684 (Voice) | (800) 700-2320 (TTY) | California's Relay Service at 711
<http://www.dfeh.ca.gov> | Email: contact.center@dfeh.ca.gov

August 14, 2020

RE: Notice of Filing of Discrimination Complaint

DFEH Matter Number: 202008-10976114

Right to Sue: Cuenca and a Class of Hispanic/Latino Employees / The
Permanente Medical Group, Inc. et al.

To All Respondent(s):

Enclosed is a copy of a complaint of discrimination that has been filed with the Department of Fair Employment and Housing (DFEH) in accordance with Government Code section 12960. This constitutes service of the complaint pursuant to Government Code section 12962. The complainant has requested an authorization to file a lawsuit. This case is not being investigated by DFEH and is being closed immediately. A copy of the Notice of Case Closure and Right to Sue is enclosed for your records.

Please refer to the attached complaint for a list of all respondent(s) and their contact information.

No response to DFEH is requested or required.

Sincerely,

Department of Fair Employment and Housing

**DEPARTMENT OF FAIR EMPLOYMENT & HOUSING**

KEVIN KISH, DIRECTOR

2218 Kausen Drive, Suite 100 | Elk Grove | CA | 95758
(800) 884-1684 (Voice) | (800) 700-2320 (TTY) | California's Relay Service at 711
<http://www.dfeh.ca.gov> | Email: contact.center@dfeh.ca.gov

August 14, 2020

Michael Cuenca and a Class of Hispanic/Latino Employees
Bryan Schwartz Law, 180 Grand Ave, Suite 1380
Oakland, California 94612

RE: Notice of Case Closure and Right to Sue
DFEH Matter Number: 202008-10976114
Right to Sue: Cuenca and a Class of Hispanic/Latino Employees / The
Permanente Medical Group, Inc. et al.

Dear Michael Cuenca and a Class of Hispanic/Latino Employees,

This letter informs you that the above-referenced complaint was filed with the Department of Fair Employment and Housing (DFEH) has been closed effective August 14, 2020 because an immediate Right to Sue notice was requested. DFEH will take no further action on the complaint.

This letter is also your Right to Sue notice. According to Government Code section 12965, subdivision (b), a civil action may be brought under the provisions of the Fair Employment and Housing Act against the person, employer, labor organization or employment agency named in the above-referenced complaint. The civil action must be filed within one year from the date of this letter.

To obtain a federal Right to Sue notice, you must contact the U.S. Equal Employment Opportunity Commission (EEOC) to file a complaint within 30 days of receipt of this DFEH Notice of Case Closure or within 300 days of the alleged discriminatory act, whichever is earlier.

Sincerely,

Department of Fair Employment and Housing

**COMPLAINT OF EMPLOYMENT DISCRIMINATION
BEFORE THE STATE OF CALIFORNIA
DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING
Under the California Fair Employment and Housing Act
(Gov. Code, § 12900 et seq.)**

In the Matter of the Complaint of

Michael Cuenca and a Class of Hispanic/Latino
Employees

DFEH No. 202008-10976114

Complainant,

vs.

The Permanente Medical Group, Inc.
1950 Franklin St.
Oakland, California 94612

Kaiser Foundation Hospitals
One Kaiser Plaza
Oakland, California 94612

Kaiser Foundation Health Plan, Inc.
One Kaiser Plaza
Oakland, California 94612

Respondents

1. Respondent **The Permanente Medical Group, Inc.** is an **employer** subject to suit under the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.).

2. Complainant is naming **Kaiser Foundation Hospitals** as individual Co-Respondent(s).

Complainant is naming **Kaiser Foundation Health Plan, Inc.** as individual Co-Respondent(s).

3. Complainant **Michael Cuenca and a Class of Hispanic/Latino Employees**, resides in the City of **Oakland** State of **California**.

4. Complainant alleges that on or about **August 14, 2020**, respondent took the following adverse actions:

1 **Complainant was discriminated against** because of complainant's race, national
2 origin (includes language restrictions) and as a result of the discrimination was
3 denied hire or promotion, denied equal pay, other.

4 **Complainant experienced retaliation** because complainant reported or resisted
5 any form of discrimination or harassment and as a result was denied hire or
6 promotion, denied equal pay, other.

7 **Additional Complaint Details:** This is a class equal pay and hiring/promotions case
8 on behalf of all non-physician Hispanic/Latino workers at Kaiser. As a result of
9 Kaiser's policies and/or practices, Hispanic/Latino workers at Kaiser have been
10 discriminated against on the basis of their race and/or national origin in terms of pay,
11 hiring, and promotions. This case also includes Mr. Cuenca's individual case alleging
12 retaliation, discriminatory evaluations, denied hire, denied promotions, and denied
13 equal pay.

14 Upon information and belief, Mike Cuenca and similarly-situated Hispanic/Latino
15 Kaiser employees in California were and are paid less than employees of other
16 races and/or national origins for substantially similar work under similar working
17 conditions, when viewed as a composite of skill, effort, and responsibility under
18 California's Equal Pay Act. Hispanic/Latino employees are also discriminated against
19 in terms of hiring and promotions. Hispanic/Latino employees are the non-white only
20 racial and/or national origin group whose percentage of Kaiser's workforce is less
21 than the corresponding percentage of California's population as a whole. All other
22 non-white racial/ethnic groups (with the exception of Native Americans) are a higher
23 percentage of Kaiser's workforce than they are of California's population as a whole.
24 Hispanic/Latino employees are further relegated into the lowest-paying jobs and
25 disproportionately excluded from positions of management and leadership.

26 As a result of these disparities in pay, hiring, and promotions, Kaiser has
27 discriminated against Hispanic/Latino workers because of their race and/or national
28 origin.

29 Mike Cuenca is the only Hispanic and lowest-paid member of his team. After a
30 negative performance rating in 2015 based on what Mr. Cuenca alleged to be racist
31 stereotyping, which he successfully challenged, Mr. Cuenca was denied
32 advancement opportunities. Despite applying for dozens of internal positions for
33 which he was qualified, Mr. Cuenca was never extended a job offer.

34 Mr. Cuenca also made complaints to Kaiser officials alleging race and national
35 origin-based discrimination and unequal pay at Kaiser. Most recently, on June 17,
36

1 2020, he emailed several Kaiser officials, including the CEO Gregory Adams and the
2 Head of HR Compliance Tod Trotter alleging unequal pay and discrimination based
3 on national origin and race against Hispanic/Latino
4 employees at Kaiser, including himself. Days later, on the morning of July 1, 2020,
5 when Mr. Cuenca had just returned to work from bereavement leave following the
6 death of a close family member, Mr. Cuenca was placed on administrative leave. His
7 work computer and ID badge were seized. He has been stripped of all job duties
8 while Kaiser investigates him.

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Placing an employee on administrative leave is an adverse action for the purposes
of a retaliation claim under both state and federal law. See *Whitehall v. County of*
San Bernardino (2017) 17 Cal.App.5th 352, 366-67; *Taswell v. Regents of University*
of California (2018), 23 Cal.App.5th 343, 365; *Dahlia v. Rodriguez* (9th Cir. 2013)
735 F.3d 1060, 1078-79.

1 VERIFICATION

2 I, **Natasha Baker**, am the **Attorney** in the above-entitled complaint. I have read the
3 foregoing complaint and know the contents thereof. The matters alleged are based
4 on information and belief, which I believe to be true.

5 On August 14, 2020, I declare under penalty of perjury under the laws of the State of
6 California that the foregoing is true and correct.

7 **Oakland, CA**

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