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Superior Court of California
County of Stanislaus
Clerk of the Court
By: Sonia Krohn, Deputy

9
10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **FOR THE COUNTY OF STANISLAUS COUNTY**
12 **(UNLIMITED JURISDICTION)**

13 TINA CALDERON, on behalf of herself, and
14 as an “aggrieved employee” on behalf of other
“aggrieved employees” under the Labor Code
15 Private Attorneys General Act of 2004,

16 *Plaintiff(s),*

17 vs.

18 DAVIS GUEST HOME, INC., a California
19 corporation; LONNY GENE DAVIS, an
20 individual; and DOES 1-50, inclusive,

21 *Defendant(s).*
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Case No.: CV-20-001500

**FIRST AMENDED COMPLAINT FOR
VIOLATIONS OF THE LABOR CODE
AND CIVIL PENALTIES UNDER THE
LABOR CODE PRIVATE ATTORNEYS
GENERAL ACT OF 2004, LABOR CODE
§§ 2698, ET SEQ.**

JURY TRIAL DEMANDED



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1 Plaintiff TINA CALDERON (hereafter “Plaintiff”), on behalf of herself and all others
2 Aggrieved Employees, complains and alleges as follows:

3 **INTRODUCTION**

4 1. Plaintiff brings this representative action based on alleged violations of the
5 California Labor Code and Industrial Welfare Commission Order No. 5-2001 (hereafter “the
6 Wage Order”) against defendants DAVIS GUEST HOME, INC., a California corporation;
7 LONNY GENE DAVIS (“Davis”), an individual; and DOES 1 through 50, inclusive (collectively
8 “Defendants”).

9 2. As set forth in more detail below, Plaintiff alleges that Defendants are liable to her
10 and other aggrieved current and former employees in California for civil penalties and other
11 related relief. These claims are based on Defendants’ alleged failures to (1) provide all rest and
12 meal periods, (2) pay all wages for all hours worked, (3), fairly compete, (4) timely pay final
13 wages upon termination of employment, and (5) provide accurate written wage statements.
14 Accordingly, Plaintiff now seeks to recover civil penalties and related relief through this
15 representative action.

16 **JURISDICTION AND VENUE**

17 3. This Court has subject matter jurisdiction because the aggregate claims of Plaintiff
18 and Aggrieved Employees, inclusive of all relief, place more than \$25,000 in controversy.

19 4. There is no basis for federal question subject matter jurisdiction in this case.
20 Specifically, Plaintiff asserts claims on behalf of herself and the Aggrieved Employees (as defined
21 below) that solely arise under California law, rather than federal law.

22 5. There is also no basis for federal diversity jurisdiction in this case.

23 6. Venue is proper in Stanislaus County pursuant to California Code of Civil
24 Procedure § 395(a) and § 395.5 in that liability arose in Stanislaus County because at least some
25 of the transactions that are the subject matter of this Complaint occurred therein and/or because
26 each defendant is found, maintains offices, transacts business, and/or has an agent therein.

27 **PARTIES**

28 7. Plaintiff is an individual and a resident of Stanislaus County, State of California.
29 Plaintiff was an “employee” within the meaning of Title 8 California Code of Regulations Section
30 11050 and an “aggrieved employee” within the meaning of Labor Code Section 2699(c).

8. The “Aggrieved Employees” are all individuals Defendants employed in



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1 California as non-exempt, hourly employees, including but not limited to direct care providers
2 and persons in other similar positions, at any time during the period beginning February 27, 2019
3 and ending on the date that final judgment is entered in this action

4 9. Defendant DAVIS GUEST HOME, INC. is a corporation organized under the
5 laws of California and also a citizen of California based on Plaintiff's information and belief.

6 10. Defendant LONNY GENE DAVIS is an individual and a resident of Stanislaus
7 County, State of California based on Plaintiff's information and belief.

8 11. Plaintiff is ignorant of the true names, capacities, relationships, and extents of
9 participation in the conduct alleged herein, of the defendants sued as DOES 1-50, inclusive, but
10 is informed and believes and thereon alleges that said defendants are legally responsible for the
11 wrongful conduct alleged herein and therefore sues these defendants by such fictitious names.
12 Plaintiff will amend the complaint to allege the true names and capacities of the DOE defendants
13 when ascertained.

14 12. Plaintiff is informed and believes and thereon alleges that, at all relevant times
15 herein, all Defendants were the agents, employees and/or servants, masters or employers of the
16 remaining defendants, and in doing the things hereinafter alleged, were acting within the course
17 and scope of such agency or employment, and with the approval and ratification of each of the
18 other Defendants.

19 13. At all relevant times, in perpetrating the acts and omissions alleged herein,
20 defendants, and each of them, acted pursuant to and in furtherance of a policy, practice, or a lack
21 of a practice which resulted in Defendants not paying Plaintiff and the Aggrieved Employees in
22 accordance with applicable California labor laws as alleged herein.

23 14. Plaintiff is informed and believes and thereon alleges that each and every one of
24 the acts and omissions alleged herein were performed by, and/or attributable to, all defendants,
25 each acting as agents and/or employees, and/or under the direction and control of each of the other
26 defendants, and that said acts and failures to act were within the course and scope of said agency,
27 employment and/or direction and control.

28 **STATEMENT OF FACTS**

15. Defendants operate residential care facilities for people who face mental health
challenges in Stanislaus County, California.

16. On or about August 16, 2018, Defendants first employed Plaintiff to work in



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1 California as a direct care provider at their residential care facility on Hatch Street in Modesto,
2 California. Throughout her employment, Plaintiff worked for Defendants at all of their residential
3 care facilities. Defendants continuously employed Plaintiff from her hire date until December 19,
4 2019.

5 17. At all relevant times, Plaintiff and the Aggrieved Employees earned their wages at
6 an hourly rate and Defendants provided Plaintiff and the Aggrieved Employees with their
7 paychecks on a semi-monthly basis.

8 18. At all relevant time, Defendants failed to pay Plaintiff and the Aggrieved
9 Employees premium wages for time they worked during their meal periods and rest breaks.
10 Defendants required Plaintiff and the Aggrieved Employees to perform work during their off-the-
11 clock meal and on-the-clock rest periods, including helping the residents, cleaning the facilities,
12 and preparing meals for the day. Defendants prohibited Plaintiff and the Aggrieved Employees
13 from taking duty-free meal periods and rest breaks unless another employee could cover their
14 responsibilities during the meal period or rest break. However, Defendants did not have sufficient
15 staffing to allow Plaintiff and the Aggrieved Employees to obtain cover and take meal or rest
16 periods free of duty.

17 19. Defendants employ only one staff member to care for their 38 residents at their
18 Ohio Ave (Modesto, California) residential care facility at night. During the day, Defendants
19 employ only three staff members and a supervisor for such residents. At all relevant times,
20 Defendants employ only one staff member for eight to nine residents at their smaller residential
21 care facilities, such as those on Central Ave., Mauna Loa, and Nadine in the cities of Modesto
22 and Ceres.

23 20. Although Plaintiff and the Aggrieved Employees did not receive 30-minute duty-
24 free meal periods, Defendants required Plaintiff and the Aggrieved Employees to clock-out for
25 30-minute periods during their work shifts. Defendants sent an email bulletin to Plaintiff and the
26 Aggrieved Employees directing them to clock-out for meal periods. Additionally, Misty (last
27 name unknown), an administrator for Defendants, Cassandra Profeta, a supervisor for Defendants,
28 and Rachel Brown, a supervisor for Defendants, told Plaintiff that she needed to clock-out for
meal periods regardless of whether she took duty-free 30 minute meal periods.

21 21. At all relevant time, Defendants did not pay Plaintiff and the Aggrieved
22 Employees 1.5 times their regular rate of pay for all hours over eight in a day or forty in a week.



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Defendants did not pay employees overtime premium wages for all hours over eight in a day and forty in a week because they did not pay them for those daily 30-minute time periods that they directed Plaintiff and the Aggrieved Employees to arbitrarily clock out for. Had Defendants counted such unpaid 30-minute periods as hours worked, they would have credited Plaintiff and the Aggrieved Employees with some or all of the 30-minute periods as overtime hours.

22. At all relevant times, Defendants knowingly and intentionally failed to maintain accurate employee records pertaining to Plaintiff and the Aggrieved Employees, including accurate wage statements itemizing each Aggrieved Employees' gross wages earned, net wages earned, total hours worked, corresponding number of hours worked at each rate by the Aggrieved Employee and other requirements of California Labor Code Section 226. Due to their failure to state on the itemized wage statements of Plaintiff and the Aggrieved Employees the overtime and minimum wages they earned for unpaid work during clocked-out periods, Defendants failed to provide Plaintiff and the Aggrieved Employees with accurate wage statements.

23. At all relevant times, upon resignation or termination, Defendants failed to pay final wages in a timely manner because they did not pay employees for all off-the-clock work as described above. Defendants willfully failed and refused to pay timely compensation and wages, for among other things, regular time and overtime.

24. At all relevant times herein, Defendants owned and operated Davis Guest Home, Inc. Lonny Gene Davis owned or otherwise controlled the employer-Defendant entities, pursuant to Lab. Code §558.1 (b). As such, he employed Plaintiff and the Aggrieved Employees, and at all relevant times functioned as "owner," "managing agent," and "officer" of Davis Guest Home, Inc. Lonny Gene Davis directly or indirectly, employed and exercised control over the wages, hours, or working conditions of Plaintiff and the Aggrieved Employees and caused the Labor Code and Wage Order violations described above.

FIRST (AND ONLY) CAUSE OF ACTION

CIVIL PENALTIES

(Lab. Code §§ 2698, et seq.)

**(By Plaintiff, on behalf of herself and the other Aggrieved Employees,
against all Defendants)**

25. Plaintiff incorporates all paragraphs of this Complaint as if fully alleged herein.

26. At all relevant times during the applicable limitations period, Plaintiff and the



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Aggrieved Employees have been employees of Defendants and entitled to the benefits and protections of California Labor Code and the Wage Order.

A. FAILURE TO PROVIDE MEAL AND REST PERIODS

27. Labor Code § 1198 states,

“The maximum hours of work and the standard conditions of labor fixed by the commission shall be the maximum hours of work and the standard conditions of labor for employees. The employment of any employee for longer hours than those fixed by the order or under conditions of labor prohibited by the order is unlawful.”

28. In relevant part, Labor Code Section 512 states:

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

29. In relevant part, Section 11 of the Wage Order states:

Meal Periods:

(A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day’s work the meal period may be waived by mutual consent of the employer and the employee. Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an “on duty” meal period and counted as time worked. An “on duty” meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the job paid meal period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time.

(B) If an employer fails to provide an employee a meal period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the



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employee's regular rate of compensation for each workday that the meal period is not provided.

...

(D) Notwithstanding any other provision of this order, employees in the health care industry who work shifts in excess of eight (8) total hours in a workday may voluntarily waive their right to one of their two meal periods. In order to be valid, any such waiver must be documented in a written agreement that is voluntarily signed by both the employee and the employer. The employee may revoke the waiver at any time by providing the employer at least one day's written notice. The employee shall be fully compensated for all working time, including any on-the-job meal period, while such a waiver is in effect.

30. 9 C.F.R. § 785.7 states:

Rest periods of short duration, running from 5 minutes to about 20 minutes, are common in industry. They promote the efficiency of the employee and are customarily paid for as working time. They must be counted as hours worked. Compensable time of rest periods may not be offset against other working time such as compensable waiting time or on-call time. (*Mitchell v. Greinetz*, 235 F. 2d 621, 13 W.H. Cases 3 (C.A. 10, 1956); *Ballard v. Consolidated Steel Corp., Ltd.*, 61 F. Supp. 996 (S.D. Cal. 1945))

31. 29 C.F.R. § 785.18 states:

Bona fide meal periods are not worktime. Bona fide meal periods do not include coffee breaks or time for snacks. These are rest periods. The employee must be completely relieved from duty for the purposes of eating regular meals. Ordinarily 30 minutes or more is long enough for a bona fide meal period. A shorter period may be long enough under special conditions. The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating. For example, an office employee who is required to eat at his desk or a factory worker who is required to be at his machine is working while eating. *Culkin v. Glenn L. Martin, Nebraska Co.*, 97 F. Supp. 661 (D. Neb. 1951), aff'd 197 F. 2d 981 (C.A. 8, 1952), cert. denied 344 U.S. 888 (1952); *Thompson v. Stock & Sons, Inc.*, 93 F. Supp. 213 (E.D. Mich 1950), aff'd 194 F. 2d 493 (C.A. 6, 1952); *Biggs v. Joshua Hendy Corp.*, 183 F. 2d 515 (C.A. 9, 1950), 187 F. 2d 447 (C.A. 9, 1951); *Walling v. Dunbar Transfer & Storage Co.*, 3 W.H. Cases 284; 7 Labor Cases para. 61,565 (W.D. Tenn. 1943); *Lofton v. Seneca Coal and Coke Co.*, 2 W.H. Cases 669; 6 Labor Cases para. 61,271 (N.D. Okla. 1942); aff'd 136 F. 2d 359 (C.A. 10, 1943); cert. denied 320 U.S. 772 (1943); *Mitchell v. Tampa Cigar Co.*, 36 Labor Cases para. 65, 198, 14 W.H. Cases 38 (S.D. Fla. 1959); *Douglass v. Hurwitz Co.*, 145 F. Supp. 29, 13 W.H. Cases (E.D. Pa. 1956))



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1 32. 29 C.F.R. § 785.19 states:

2
3 Healthcare employees who were required to wear pagers and respond to
4 patient emergencies during meal breaks were held entitled to payment from
5 their employer for meal breaks because their employer had not fully
6 relieved them of their responsibilities during those times. *Hoffman v. St.*
7 *Joseph's Hosp.*, 1998 U.S. Dist. LEXIS 7911 (N.D. Ga. Apr. 14, 1998);
8 see also *Havrilla v. United States*, 125 Fed. Cl. 454, 2016 U.S. Claims
9 LEXIS 192 (Mar. 14, 2016) (employees required to work during half hour
10 meal break given that they had to stay at the facility and be available to
11 respond to requests to return or check out weapons and equipment); *Wahl*
12 *v. Wichita*, 701 F. Supp. 1530, 1988 U.S. Dist. LEXIS 15015 (D. Kan. Dec.
13 21, 1988) (Police officers stated a claim under the Fair Labor Standards
14 Act where they alleged that they were not paid for meal periods but were
15 required to remain within a certain area, respond to emergencies and
16 citizen requests, and remain accessible).

17 33. Wage Order 5, § 11(D) states:

18 Notwithstanding any other provision of this order, employees in the health
19 care industry who work shifts in excess of eight (8) total hours in a workday
20 may voluntarily waive their right to one of their two meal periods. In order
21 to be valid, any such waiver must be documented in a written agreement
22 that is voluntarily signed by both the employee and the employer. The
23 employee may revoke the waiver at any time by providing the employer at
24 least one day's written notice. The employee shall be fully compensated
25 for all working time, including any on-the-job meal period, while such a
26 waiver is in effect.

27 34. In relevant part, Section 12 of the Wage Order states:

28 Rest Periods:

(A) Every employer shall authorize and permit all employees to
take rest periods, which insofar as practicable shall be in the middle
of each work period. The authorized rest period time shall be based
on the total hours worked daily at the rate often (10) minutes net
rest time per four (4) hours or major fraction thereof. However, a
rest period need not be authorized for employees whose total daily
work time is less than three and one-half (3 1/2) hours. Authorized
rest period time shall be counted as hours worked for which there
shall be no deduction from wages.

(B) If an employer fails to provide an employee a rest period in
accordance with the applicable provisions of this Order, the
employer shall pay the employee one (1) hour of pay at the
employee's regular rate of compensation for each work day that the



rest period is not provided.

35. “[I]n the context of an eight-hour shift, ‘[a]s a general matter,’ one rest break should fall on either side of the meal break. (*Ibid.*)” *Brinker Rest. Corp. v. Superior Court* (2012) 53 Cal. 4th 1004, 1032, 273 P.3d 513, 531.

36. In addition, Labor Code Section 226.7 states

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

(c) If an employer fails to provide an employee a meal or rest or recovery period in accordance with a state law, including, but not limited to, an applicable statute or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest or recovery period is not provided.

37. Pursuant to California Labor Code § 512 and the Wage Order, Plaintiff and the Aggrieved Employees were entitled to be provided with uninterrupted meal periods of at least 30 minutes for each day they worked five or more hours

38. Pursuant to the Wage Order, Plaintiff and the Aggrieved Employees were entitled to be provided with net rest breaks of at least ten minutes for each four-hour period of work, or major fraction thereof.

39. Defendants failed to provide Plaintiff with all required rest breaks in accordance with the Wage Order. Plaintiff is informed and believes and thereon alleges that, at relevant times within the applicable limitations period, Defendants had a policy, practice, or a lack of a policy which resulted in Defendants not providing the Aggrieved Employees with all rest breaks required by California law.

40. Due to their workload, Defendants often did not provide Plaintiff and Aggrieved Employees with all their duty-free rest breaks. Defendants required Plaintiff and the Aggrieved Employees to perform work during their off-the-clock meal and on-the-clock rest periods, including helping the residents, cleaning the facilities, and preparing meals for the day. Defendants prohibited Plaintiff and the Aggrieved Employees from taking duty-free meal periods



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1 and rest breaks unless another employee could cover their responsibilities during the meal period
2 or rest break. However, Defendants did not have sufficient staffing to allow Plaintiff and the
3 Aggrieved Employees to obtain cover and take meal or rest periods free of duty.

4 41. Defendants failed to pay Plaintiff the additional wages required by California
5 Labor Code § 226.7 for all rest breaks not provided to her. Plaintiff is informed and believes and
6 thereon alleges that, at relevant times within the applicable limitations period, Defendants have
7 maintained a policy, practice, or a lack of a policy which resulted in Defendants not providing the
8 Aggrieved Employees with additional wages for all rest breaks not provided to them as required
9 by California Labor Code § 226.7.

10 42. In relevant part, California Labor Code § 558.1 states:

11 (a) Any employer or other person acting on behalf of an employer, who violates,
12 or causes to be violated, any provision regulating minimum wages or hours and
13 days of work in any order of the Industrial Welfare Commission, or violates, or
14 causes to be violated, §§ 203, 226, 226.7, 1193.6, 1194, or 2802, may be held liable
15 as the employer for such violation.

16 (b) For purposes of this section, the term “other person acting on behalf of an
17 employer” is limited to a natural person who is an owner, director, officer, or
18 managing agent of the employer, and the term “managing agent” has the same
19 meaning as in subdivision (b) of § 3294 of the Civil Code.

20 43. At all relevant times herein, Davis owned and operated Davis Guest Home, Inc.
21 and employed Plaintiff and the Aggrieved Employees. Davis was the “owner,” “managing agent,”
22 and “officer” of Davis Guest Home, Inc. Davis directly or indirectly, or through an agent or other
23 person, employed and exercised control over the wages, hours, or working conditions of Plaintiff
24 and the Aggrieved Employees and caused the violations to the Labor Code and Wage Order
25 described above.

26 44. Defendant Davis intentionally failed to provide all rest breaks and/or meal periods
27 free from any work duties to Plaintiff and the Aggrieved Employees as required by law.
28 Additionally, Davis required Plaintiff and the Aggrieved Employees to work through their off-the-
clock meal periods. As a result, Davis violated California Labor Code §§ 226.7, 512 and 1198.

45. As stated above, Defendants failed to pay Plaintiff the additional wages required
by California Labor Code § 226.7 for all rest breaks and meal periods not provided to her. Plaintiff
is informed and believes and thereon alleges that, at relevant times within the applicable



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1 limitations period, Defendants have maintained a policy, practice, or a lack of a policy which
2 resulted in Defendants not providing the Aggrieved Employees with additional wages for all rest
3 breaks and meal periods not provided to them as required by California Labor Code § 226.7.

4 **B. FAILURE TO PAY EMPLOYEES ALL WAGES FOR ALL HOURS WORKED**

5 46. Section 3 of the applicable Wage Order states:

6 (A) Daily Overtime - General Provisions

7 (1) The following overtime provisions are applicable to employees 18
8 years of age or over and to employees 16 or 17 years of age who are not
9 required by law to attend school and are not otherwise prohibited by law
10 from engaging in the subject work. Such employees shall not be employed
11 more than eight (8) hours in any workday or more than 40 hours in any
12 workweek unless the employee receives one and one-half (1 1/2) times
13 such employee's regular rate of pay for all hours worked over 40 hours in
14 the workweek. Eight (8) hours of labor constitutes a day's work.
15 Employment beyond eight (8) hours in any workday or more than six (6)
16 days in any workweek is permissible provided the employee is
17 compensated for such overtime at not less than:

18 (a) One and one-half (1 1/2) times the employee's regular rate of pay
19 for all hours worked in excess of eight (8) hours up to and including 12
20 hours in any workday, and for the first eight (8) hours worked on the
21 seventh (7th) consecutive day of work in a workweek; and

22 (b) Double the employee's regular rate of pay for all hours worked in
23 excess of 12 hours in any workday and for all hours worked in excess of
24 eight (8) hours on the seventh (7th) consecutive day of work in a
25 workweek.

26 47. Labor Code section 510 states:

27 Eight hours of labor constitutes a day's work. Any work in excess of eight
28 hours in one workday and any work in excess of 40 hours in any one
workweek and the first eight hours worked on the seventh day of work in
any one workweek shall be compensated at the rate of no less than one and
one-half times the regular rate of pay for an employee. Any work in excess
of 12 hours in one day shall be compensated at the rate of no less than twice
the regular rate of pay for an employee. In addition, any work in excess of
eight hours on any seventh day of a workweek shall be compensated at the
rate of no less than twice the regular rate of pay of an employee. Nothing
in this section requires an employer to combine more than one rate of
overtime compensation in order to calculate the amount to be paid to an
employee for any hour of overtime work.

48. Within the health care industry, the term "hours worked" means the time during



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1 which an employee is suffered or permitted to work for the employer, whether or not required to
2 do so, as interpreted in accordance with the provisions of the Fair Labor Standards Act (“FLSA”).
3 Wage Order 5, § 2(K). The FLSA does not define the phrase “hours worked.” However, it is
4 defined by federal regulations:

5 ...As a general rule the term “hours worked” will include: (a) All time
6 during which an employee is required to be on duty or to be on the
7 employer’s premises or at a prescribed workplace and (b) all time during
8 which an employee is suffered or permitted to work whether or not he is
9 required to do so. Thus, working time is not limited to the hours spent in
10 active productive labor, but includes time given by the employee to the
11 employer even though part of the time may be spent in idleness. Some of
12 the hours spent by employees, under certain circumstances... in meal
13 periods and rest periods are regarded as working time and some are not.
14 The governing principles are discussed in part 785 of this chapter
15 (interpretative bulletin on “hours worked”) and part 790 of this chapter
16 (statement of effect of Portal-to-Portal Act of 1947). ...

17 49. 29 C.F.R. § 778.223 states:

18 The United States Supreme Court originally stated that employees subject
19 to the act must be paid for all time spent in “physical or mental exertion
20 (whether burdensome or not) controlled or required by the employer and
21 pursued necessarily and primarily for the benefit of the employer and his
22 business.” (*Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No.*
23 *123* (1944) 321 U. S. 590). Subsequently, the Court ruled that there need
24 be no exertion at all and that all hours are hours worked which the
25 employee is required to give his employer, that “an employer, if he
26 chooses, may hire a man to do nothing, or to do nothing but wait for
27 something to happen. Refraining from other activity often is a factor of
28 instant readiness to serve, and idleness plays a part in all employments in
a stand-by capacity. Readiness to serve may be hired, quite as much as
service itself, and time spent lying in wait for threats to the safety of the
employer’s property may be treated by the parties as a benefit to the
employer.” *Armour & Co. v. Wantock* (1944) 323 U.S. 126; *Skidmore v.*
Swift (1944) 323 U.S. 134. The workweek ordinarily includes “all the time
during which an employee is necessarily required to be on the employer’s
premises, on duty or at a prescribed work place.” *Anderson v. Mt. Clemens*
Pottery Co. (1946) 328 U.S. 680. The Portal-to-Portal Act did not change
the rule except to provide an exception for preliminary and postliminary
activities. See Section 785.34.

50. Labor Code section 1197 makes it unlawful for an employer to pay an employee



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less than the minimum wage required under the applicable Wage Order for all hours worked during a payroll period.

51. California Labor Code § 1194 invalidates any agreement between an employer and an employee to work for less than the minimum or overtime wage required under the applicable Wage Order.

52. Labor Code section 1198 makes it unlawful for an employer to employ an employee under conditions that violate the Wage Order.

53. Employers must compensate non-exempt employees for “off-the-clock” work (before punching in or after punching out on a time clock) if the employers knew or should have known that the employees were working those hours. *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 585.

54. With respect to overtime wages, the regular rate of pay under California law must include “all remuneration for employment paid to, on behalf of, the employee.” O.L. 2002.06.14 (quoting 29 U.S.C. § 207(e)). This requirement includes, but is not limited, to, non-discretionary bonuses. *See, e.g., Huntington Memorial Hosp. v. Superior Court* (2005) 131 Cal. App. 4th 893, 904–05. Commissions and bonuses must be included in the regular rate whether they are the sole source of the employee’s compensation or are in addition to a guaranteed salary or hourly rate. 29 C.F.R. §§778.117, 778.208. *See Oliver v. Mercy Med. Ctr., Inc.* (9th Cir 1982) 695 F.2d 379.

55. Plaintiff is informed and believes that, at all relevant times, Defendants have applied centrally devised policies and practices to her and the Aggrieved Employees with respect to working conditions and compensation arrangements.

56. Defendants compensated Plaintiff and the Aggrieved Employees with an hourly rate of pay on a semi-monthly basis.

57. Defendants further deducted at least 30 minutes from Plaintiff and the Aggrieved Employees’ hours worked in a workday even if they could not take their duty-free meal periods. Defendants also failed to compensate Plaintiff and the Aggrieved Employees for all hours worked at the correct rates of pay. Defendants failed to pay Plaintiff and the Aggrieved Employees for all hours worked. Defendants supervisors knowingly and intentionally required Plaintiff and the Aggrieved Employees to work during their clocked-out meal periods. Defendants and their managers thus acted in violation of the Labor Code. As a result, Defendants often required Plaintiff and the Aggrieved Employees to work in excess of 8 hours per day and 40 hours per



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1 week without being paid for the time over 8 hours and 40 hours, respectively. Plaintiff is informed
2 and believes and thereon alleges that, at all relevant times, Defendants have maintained a policy,
3 practice, or a lack of a policy which resulted in Defendants' failure to compensate the Aggrieved
4 Employees for all hours worked as required by California law, including, but not limited to
overtime wages for all overtime hours they worked.

5 58. In relevant part, California Labor Code § 558.1 states:

6
7 (a) Any employer or other person acting on behalf of an employer, who violates,
8 or causes to be violated, any provision regulating minimum wages or hours and
9 days of work in any order of the Industrial Welfare Commission, or violates, or
causes to be violated, §§ 203, 226, 226.7, 1193.6, 1194, or 2802, may be held liable
as the employer for such violation.

10 (b) For purposes of this section, the term "other person acting on behalf of an
11 employer" is limited to a natural person who is an owner, director, officer, or
12 managing agent of the employer, and the term "managing agent" has the same
meaning as in subdivision (b) of § 3294 of the Civil Code.

13
14 59. At all relevant times herein, Davis owned and operated Davis Guest Home, Inc.
15 and employed Plaintiff and the Aggrieved Employees. Davis was the "owner," "managing agent,"
16 and "officer" of Davis Guest Home, Inc. Davis directly or indirectly, or through an agent or other
17 person, employed and exercised control over the wages, hours, or working conditions of Plaintiff
18 and the Aggrieved Employees and caused the violations to the Labor Code and Wage Order
described above.

19 60. Defendant Davis intentionally failed to pay Plaintiff and the Aggrieved Employees
20 for all hours work at the correct rates of pay as required by law. Additionally, Davis required
21 Plaintiff and the Aggrieved Employees to work though their off-the-clock meal periods without
22 pay. As a result, Davis violated California Labor Code §§ 510, 1194, 1197, 1197.1, and 1198 .

23 **C. FAILURE TO PROVIDE ACCURATE, WRITTEN WAGE STATEMENTS**

24 61. Pursuant to California Labor Code § 226(a), Plaintiff and the Aggrieved
25 Employees were entitled to receive, semimonthly or at the time of each payment of wages, an
26 accurate itemized statement showing: a) gross wages earned; b) net wages earned; c) all applicable
27 hourly rates in effect during the pay period; and d) the corresponding number of hours worked at
each hourly rate by the employee.

28 62. Pursuant to California Labor Code § 226(e), an employee suffering injury as a



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1 result of a knowing and intentional failure by an employer to comply with subdivision (a) is
2 entitled to recover the greater of all actual damages or fifty dollars (\$50) for the initial pay period
3 in which a violation occurs and one hundred dollars (\$100) per employee for each violation in a
4 subsequent pay period, not to exceed an aggregate penalty of four thousand dollars (\$4,000), and
5 is entitled to an award of costs and reasonable attorney's fees.

6 63. Pursuant to California Labor Code § 226(e), an employee is deemed to suffer
7 injury if the employer fails to provide a wage statement. Also, an employee is deemed to suffer
8 injury if the employer fails to provide accurate and complete information as required by California
9 Labor Code § 226(a) and the employee cannot "promptly and easily determine" from the wage
10 statement alone one or more of the following:

11 A. The amount of the gross wages or net wages paid to the employee during
12 the pay period or any of the other information required to be provided on the itemized wage
13 statement pursuant to California Labor Code § 226(a);

14 B. Which deductions the employer made from gross wages to determine the
15 net wages paid to the employee during the pay period;

16 C. The name and address of the employer and, if the employer is a farm labor
17 contractor, as defined in subdivision (b) of Section 1682 of the California Labor Code, the name
18 and address of the legal entity that secured the services of the employer during the pay period;
19 and

20 D. The name of the employee and only the last four digits of his or her social
21 security number or an employee identification number other than a social security number.

22 64. "Promptly and easily determine," as stated in California Labor Code § 226(e),
23 means a reasonable person would be able to readily ascertain the information without reference
24 to other documents or information.

25 65. As alleged herein, Defendants failed to provide Plaintiff and the Aggrieved
26 Employees all wages owed, including but not limited to, minimum and overtime. As a result,
27 Defendants have failed to properly and accurately itemize each employee's gross wages earned,
28 net wages earned, the total hours worked, the corresponding number of hours worked by
employees and other requirements of California Labor Code § 226. As a result, Defendants have
violated California Labor Code § 226.

66. Defendants' failure to provide Plaintiff and the Aggrieved Employees with



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1 accurate wage statements was knowing and intentional. Defendants had the ability to provide
2 Plaintiff and the Aggrieved Employees with accurate wage statements but intentionally provided
3 wage statements that Defendants knew were not accurate.

4 67. As a result of being provided with inaccurate wage statements by Defendants,
5 Plaintiff and the Aggrieved Employees have suffered injury. Their legal rights to receive accurate
6 wage statements were violated and they were misled about the amount of wages they had actually
7 earned and were owed. In addition, the absence of accurate information on their wage statements
8 prevented immediate challenges to Defendants' unlawful pay practices, has required discovery
9 and mathematical computations to determine the amounts of wages owed, has caused difficulty
10 and expense in attempting to reconstruct time and pay records and/or has led to the submission of
11 inaccurate information about wages to state and federal government agencies. Further, Plaintiff
12 and the Aggrieved Employees were not able to ascertain from the wage statements whether
13 Defendants complied with their obligations under California Labor Code § 226(a).

14 68. In relevant part, California Labor Code § 558.1 states:

15 (a) Any employer or other person acting on behalf of an employer, who violates,
16 or causes to be violated, any provision regulating minimum wages or hours and
17 days of work in any order of the Industrial Welfare Commission, or violates, or
18 causes to be violated, §§ 203, 226, 226.7, 1193.6, 1194, or 2802, may be held liable
19 as the employer for such violation.

20 (b) For purposes of this section, the term "other person acting on behalf of an
21 employer" is limited to a natural person who is an owner, director, officer, or
22 managing agent of the employer, and the term "managing agent" has the same
23 meaning as in subdivision (b) of § 3294 of the Civil Code.

24 69. At all relevant times herein, Defendant Davis owned and operated Davis Guest
25 home, Inc. and employed Plaintiff and the Aggrieved Employees. Davis was the "owner,"
26 "managing agent," and "officer" of Davis Guest home, Inc. Davis directly or indirectly, or through
27 an agent or other person, employed and exercised control over the wages, hours, or working
28 conditions of Plaintiff and the Aggrieved Employees and caused the violations to the Labor Code
and Wage Order described above.

70. Davis intentionally failed to provide accurate wage statements to Plaintiff and the
Aggrieved Employees as required by law. Davis failed to provide accurate wage statements to
Plaintiff and the Aggrieved Employees because the wage statements failed to properly and



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1 accurately itemize each employee's gross wages earned, net wages earned, the corresponding
2 number of hours worked at each rate by the employee, and other requirements of California Labor
3 Code § 226. Due to the violations above, Davis failed to provide Plaintiff and the Aggrieved
4 Employees with accurate wage statements because Davis did not state on the wage statements all
5 hours Plaintiff and the Aggrieved Employees worked and all wages they earned, including, but
6 not limited to minimum, regular, and overtime wages. As a result, Davis violated California Labor
Code § 226.

7 **D. UNTIMELY FINAL WAGES**

8 71. Labor Code section 201 provides that all earned and unpaid wages of an
9 employee who is discharged are due and payable immediately at the time of discharge.

10 72. Labor Code section 202 provides that all earned and unpaid wages of an
11 employee who quits after providing at least 72-hours notice before quitting are due and payable
12 at the time of quitting and that all earned and unpaid wages of an employee who quits without
13 providing at least 72-hours notice before quitting are due and payable within 72 hours.

14 73. By failing to pay all earned regular, overtime, and premium wages to Plaintiff
15 and the Aggrieved Employees as described above, Defendants failed to timely pay them all
16 earned and unpaid wages in violation of Labor Code section 201 or 202.

17 74. Labor Code section 203 provides that the wages of an employee continue on a
18 daily basis as a penalty for up to 30 days where an employer willfully fails to timely pay earned
and unpaid wages to the employee in accordance with Labor Code section 201 or 202.

19 75. Plaintiff is informed and believes that Defendants' failures to timely pay Plaintiff
20 and the Aggrieved Employees all of their earned and unpaid wages have been willful in that, at
21 all relevant times, Defendants have deliberately maintained policies and practices that violate
22 the requirements of the Labor Code and the Wage Order even though, at all relevant times, they
23 have had the ability to comply with those legal requirements.

24 76. In relevant part, California Labor Code § 558.1 states:

25 (a) Any employer or other person acting on behalf of an employer, who violates,
26 or causes to be violated, any provision regulating minimum wages or hours and
27 days of work in any order of the Industrial Welfare Commission, or violates, or
28 causes to be violated, §§ 203, 226, 226.7, 1193.6, 1194, or 2802, may be held liable
as the employer for such violation.



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(b) For purposes of this section, the term “other person acting on behalf of an employer” is limited to a natural person who is an owner, director, officer, or managing agent of the employer, and the term “managing agent” has the same meaning as in subdivision (b) of § 3294 of the Civil Code.

77. At all relevant times herein, Defendant Davis owned and operated Davis Guest Home, Inc. and employed Plaintiff and the Aggrieved Employees. Davis was the “owner,” “managing agent,” and “officer” of Davis Guest Home, Inc. Davis directly or indirectly, or through an agent or other person, employed and exercised control over the wages, hours, or working conditions of Plaintiff and the Aggrieved Employees and caused the violations to the Labor Code and Wage Order described above.

78. Davis intentionally failed to pay Plaintiff and the Aggrieved Employees timely wages upon termination of employment as required by law. By willfully failing to pay wages to Plaintiff and the Aggrieved Employees as set forth above, at the time of termination of employment, Davis violated California Labor Code § 203.

E. UNTIMELY WAGES DURING EMPLOYMENT

79. Labor Code § 204 states

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

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

(2) An employer is in compliance with the requirements of subdivision (a) of Section 226 relating to total hours worked by the employee, if hours worked in excess of the normal work period during the current pay period are itemized as corrections on the paystub for the next regular pay period. Any corrections set out in a subsequently issued paystub shall state the inclusive dates of the pay period for which the employer is correcting its initial report of hours worked.

(c) However, when employees are covered by a collective bargaining agreement that provides different pay arrangements, those arrangements shall



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1 apply to the covered employees.

2 (d) The requirements of this section shall be deemed satisfied by the payment
3 of wages for weekly, biweekly, or semimonthly payroll if the wages are paid not
4 more than seven calendar days following the close of the payroll period.

5 80. Defendants paid wages to employees on regular intervals. However, Defendants
6 failed to pay Plaintiff on such intervals for all wages earned and all hours worked. On information
7 and belief, Plaintiff alleges that Defendants also failed to pay the Aggrieved Employees on such
8 intervals for all wages earned and all hours worked.

9 **F. CIVIL PENALTIES SOUGHT**

10 81. During the applicable time period, Defendants violated California Labor Code §§
11 201, 202, 203, 204, 226, 226.7, 510, 512, 1174, 1194, 1197, and 1198.

12 82. California Labor Code §§ 2699(a) and (g) authorize an aggrieved employee, on
13 behalf of themselves and other current or former employees, to bring a civil action to recover civil
14 penalties pursuant to the procedures specified in California Labor Code § 2699.3.

15 83. Pursuant to California Labor Code §§ 2699(a) and (f), Plaintiff and the Aggrieved
16 Employees are entitled to recover civil penalties for each of the Defendants' violations of
17 California Labor Code §§ 201, 202, 203, 204, 226, 226.7, 510, 512, 1174, 1194, 1197, and 1198.
18 during the applicable limitations period in the following amounts:

19 **A.** For violations of California Labor Code § 204, one hundred dollars
20 (\$100.00) for each Aggrieved Employee for each initial violation and two hundred dollars
21 (\$200.00) for each Aggrieved Employee for each subsequent, willful or intentional violation
22 (penalty amounts established by California Labor Code § 210).

23 **B.** For violations of California Labor Code § 1174, five hundred dollars
24 (\$500.00) for each Aggrieved Employee for each violation (penalty amounts established by
25 California Labor Code § 1174.5).

26 **C.** For violations of California Labor Code § 226(a), two hundred fifty dollars
27 (\$250.00) for each Aggrieved Employee for initial violation and one thousand dollars (\$1,000.00)
28 for each Aggrieved Employee for each subsequent violation (penalty amounts established by
California Labor Code § 226.3).

D. For violations of California Labor Code § 510 and 512 fifty dollars
(\$50.00) for each Aggrieved Employee for initial violation and one hundred dollars (\$100.00) for



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each Aggrieved Employee for each subsequent violation per pay period (penalty amounts established by California Labor Code § 558).

E. For violations of California Labor Code § 1197, one hundred dollars (\$100.00) for each Aggrieved Employee for each initial and intentional violation and two hundred fifty dollars (\$250.00) for each Aggrieved Employee for each subsequent violation per pay period (regardless of whether the initial violations were intentionally committed) (penalty amounts established by California Labor Code § 1197.1).

F. For violations of California Labor Code §§ 201, 202, 203, 226.7, 1194, and 1198, one hundred dollars (\$100.00) for each Aggrieved Employee per pay period for each initial violation and two hundred dollars (\$200.00) for each Aggrieved Employee per pay period for each subsequent violation (penalty amounts established by California Labor Code § 2699(f)(2)).

G. NOTICE TO THE STATE OF CALIFORNIA AND DEFENDANTS

84. Plaintiff has complied with the procedures for bringing suit specified in California Labor Code § 2699.3. By letter dated February 27, 2020, Plaintiff filed written notice online with the Labor and Workforce Development Agency (“LWDA”) and gave written notice by certified mail to Defendants of the specific provisions of the California Labor Code alleged to have been violated, including the facts and theories to support the alleged violations. A true and correct copy of the notice to the LWDA dated February 27, 2020 is attached as Exhibit A. Plaintiff accompanied her LWDA notice with a fee in the amount of \$75.00. The LWDA has failed to take action in response within 65 calendar days of the date of Plaintiff’s notice, but Plaintiff anticipates that the LWDA will provide written notice to Plaintiff informing her that it does not intend to investigate these allegations.

85. Pursuant to California Labor Code § 2699(g), Plaintiff and the Aggrieved Employees are entitled to an award of civil penalties, reasonable attorney’s fees and costs in connection with their claims for civil penalties.

PRAYER FOR RELIEF

86. WHEREFORE, Plaintiff, on behalf of herself, the State of California, and the Aggrieved Employees, prays for relief and judgment against Defendants as follows:

- A. Civil penalties;
- B. Costs of suit;
- C. Reasonable attorneys’ fees; and



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D. Such other relief as the Court deems just and proper.

87. For clarity, any reference above to liabilities other than PAGA civil penalties is made only to establish liability for PAGA civil penalties.

DEMAND FOR JURY TRIAL

Plaintiff, on behalf of herself and the Aggrieved Employees, hereby demands a jury trial on all issues so triable.

Respectfully submitted,

THE SPIVAK LAW FIRM

Dated: May 13, 2020

By 
DAVID SPIVAK
CAROLINE TAHMASSIAN
Attorneys for Plaintiff, TINA CALDERON

EXHIBIT A



SPIVAK LAW

SENT BY ELECTRONIC SUBMISSION AND CERTIFIED MAIL

February 27, 2020

Attn: PAGA Administrator
Labor and Workforce Development Agency
Attn: PAGA Administrator
<http://dir.tflaforms.net>
Via Electronic Submission

RE: *Tina Calderon/Davis Guest Home, Inc.*

To Whom It May Concern:

Pursuant to the California Labor Code Private Attorneys General Act of 2004 (Lab. Code §§ 2698, *et seq.*), Tina Calderon (hereafter “Calderon”) provides notice on behalf of herself and of all individuals currently and formerly employed in California as non-exempt, hourly employees, including but not limited to direct care providers and persons in similar positions (hereafter referred to as “Aggrieved Employees”), by Davis Guest Home, Inc., a California corporation, and Lonny Gene Davis, CEO, CFO, secretary and sole owner of Davis Guest Home, Inc. (together referred to below as “Davis Guest Home”), for violations of California Labor Code §§ 201, 202, 203, 204, 226, 226.7, 510, 512, 558.1, 1174, 1174.5, 1194, 1197, 1197.1 and 1198.

At all relevant times, Davis Guest Home has employed persons, conducted business in and engaged in illegal payroll practices and policies throughout California. Calderon and the Aggrieved Employees are “employees” within the meaning of Industrial Welfare Commission Order No. 5-2001 (hereafter “the Wage Order” or “Wage Order 5”), paragraph 2.F, and “aggrieved employees” within the meaning of California Labor Code § 2699(c). At all relevant times, Lonny Davis participated in interviewing potential employees, setting the expectations of the duties the Aggrieved Employees would perform, hiring

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employees, determining employees' hourly rates, raises, and bonuses, and notifying employees of their termination at the end of their employment.

Statement of Facts

Davis Guest Home operates residential care facilities for people who face mental health challenges in Stanislaus County, California. On or about August 16, 2018, Davis Guest Home first employed Calderon to work in California as a direct care provider at its residential care facility on Hatch Street, Modesto, California. Throughout her employment, Calderon worked for Davis Guest Home at all of its residential care facilities. Davis Guest Home continuously employed Calderon from her hire date until December 19, 2019.

At all relevant times, Calderon and the other Aggrieved Employees earned their wages at an hourly rate and Davis Guest Home provided Calderon and the Aggrieved Employees with their paychecks on a semi-monthly basis.

At all relevant time, Davis Guest Home failed to pay Calderon and the other Aggrieved Employees premium wages for time they worked during their meal periods and rest breaks. Davis Guest Home required Calderon and the Aggrieved Employees to perform work during their off-the-clock meal and on-the-clock rest periods, including helping the residents, cleaning the facilities, and preparing meals for the day. Davis Guest Home prohibited Calderon and the Aggrieved Employees from taking duty-free meal periods and rest breaks unless another employee could cover their responsibilities during the meal period or rest break. However, Davis Guest Home did not have sufficient staffing to allow Calderon and the Aggrieved Employees to obtain cover and take meal or rest periods free of duty. For example, Davis Guest Home employs only one staff member to care for its 38 residents at its Ohio Ave (Modesto, California) residential care facility at night. During the day, Davis Guest Home employs only three staff members and a supervisor for such residents. At all relevant times, Davis Guest Home employs only one staff member for eight to nine residents at its smaller residential care facilities, such as those on Central Ave., Mauna Loa, and Nadine in the cities of Modesto and Ceres. Although Calderon and the Aggrieved Employees did not receive 30-minute duty-free meal periods, Davis Guest Home

required Calderon and the Aggrieved Employees to clock-out for 30-minute periods during their work shifts. Davis Guest Home sent an email bulletin to Calderon and the Aggrieved Employees directing them to clock-out for meal periods. Additionally, Misty (last name unknown), an administrator at Davis Guest Home, Cassandra Profeta, a supervisor at Davis Guest Home, and Rachel Brown, a supervisor at Davis Guest Home, told Calderon that she needed to clock-out for meal periods regardless of whether she took duty-free 30 minute meal periods.

At all relevant time, Davis Guest Home did not pay Calderon and the Aggrieved Employees 1.5 times their regular rate of pay for all hours over eight in a day or forty in a week. Davis Guest Home did not pay employees overtime premium wages for all hours over eight in a day and forty in a week because it did not pay them for those daily 30-minute time periods that it directed Calderon and the Aggrieved Employees to arbitrarily clock out for. Had Davis Guest Home counted such unpaid 30-minute periods as hours worked, it would have credited Calderon and the Aggrieved Employees with some or all of the 30-minute periods as overtime hours.

At all relevant times, Davis Guest Home knowingly and intentionally failed to maintain accurate employee records pertaining to Calderon and the Aggrieved Employees, including accurate wage statements itemizing each Aggrieved Employee's gross wages earned, net wages earned, total hours worked, corresponding number of hours worked at each rate by the Aggrieved Employee and other requirements of California Labor Code Section 226. Due to its failure to state on the itemized wage statements of Calderon and the Aggrieved Employees the overtime and minimum wages they earned for unpaid work during clocked-out periods, Davis Guest Home failed to provide Calderon and the Aggrieved Employees with accurate wage statements.

At all relevant times, upon resignation or termination, Davis Guest Home failed to pay final wages in a timely manner because it did not pay employees for all off-the-clock work as described above. Davis Guest Home willfully failed and refused to pay timely compensation and wages, for among other things, regular time and overtime.

For the reasons stated herein, Calderon alleges the following violations of the California Labor Code and the Wage Order 5 on behalf of herself and the Aggrieved Employees:

- a) Davis Guest Home failed to provide Calderon and the Aggrieved Employees with all rest breaks and meal periods;
- b) Davis Guest Home failed to pay Calderon and the Aggrieved Employees one hour's pay for each workday in which it failed to provide them with one or more rest breaks;
- c) Davis Guest Home failed to pay Calderon and the Aggrieved Employees one hour's pay for each workday in which it failed to provide them with one or more meal periods;
- d) Davis Guest Home failed to pay Calderon and the Aggrieved Employees minimum wages for all hours worked;
- e) Davis Guest Home failed to pay Calderon and the Aggrieved Employees overtime wages for all overtime hours worked;
- f) Davis Guest Home failed to provide Calderon and the Aggrieved Employees with accurate wage statements;
- g) Davis Guest Home failed to timely pay Calderon and the Aggrieved Employees all earned and unpaid wages during their employment with Davis Guest Home;
- h) Davis Guest Home failed to timely pay Calderon and the Aggrieved Employees all earned and unpaid wages at the termination of their employment with Davis Guest Home; and

- i) Davis Guest Home willfully failed to maintain accurate employment records regarding Calderon and the Aggrieved Employees.

Accordingly, Calderon now seeks civil penalties on behalf of herself and the Aggrieved Employees based on Davis Guest Home's alleged violations of the California Labor Code and Wage Order 5.

Wage Order 5

Wage Order 5 applies to "all persons employed in the public housekeeping industry whether paid on a time, piece rate, commission, or other basis[.]" § 1. "Public Housekeeping Industry" means any industry, business, or establishment which provides meals, housing, or maintenance services whether operated as a primary business or when incidental to other operations in an establishment not covered by an industry order of the Commission, and includes, but is not limited to the following:

- (2) Hospitals, sanitariums, rest homes, child nurseries, childcare institutions, homes for the aged, and similar establishments offering board or lodging in addition to medical, surgical, nursing, convalescent, aged, or child care.

§ 2(P)(4). Also see §2(J) which defines "Healthcare Industry" to include: "....home health agencies..."

At all relevant times during the applicable limitations period, Davis Guest Home employed Calderon and the Aggrieved Employees as direct patient providers who performed all of their duties in a home-health agency setting. Accordingly, Calderon and the Aggrieved Employees are entitled to the protections provided under Wage Order 5.

///
///

Failure to Provide Rest Breaks and Meal Periods
(Lab. Code §§ 226.7, 512, 558.1, and 1198)

In relevant part, California Labor Code § 1198 states:

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

In relevant part, California Labor Code § 512 states:

An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee.

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

In relevant part, Section 11 of Wage Order 5 states:

Meal Periods:

- (A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the

meal period may be waived by mutual consent of the employer and the employee. Unless the employee is relieved of all duty during a 30-minute meal period, the meal period shall be considered an “on duty” meal period and counted as time worked. An “on duty” meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time.

- (B) If an employer fails to provide an employee a meal period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee’s regular rate of compensation for each workday that the meal period is not provided.

...

- (D) Notwithstanding any other provision of this order, employees in the health care industry who work shifts in excess of eight (8) total hours in a workday may voluntarily waive their right to one of their two meal periods. In order to be valid, any such waiver must be documented in a written agreement that is voluntarily signed by both the employee and the employer. The employee may revoke the waiver at any time by providing the employer at least one day’s written notice. The employee shall be fully compensated for all working time, including any on-the-job meal period, while such a waiver is in effect.

Within the health care industry, the term “hours worked” means the time during which an employee is suffered or permitted to work for the employer, whether or not required to do so, as interpreted in accordance with the provisions of the Fair Labor Standards Act (“FLSA”). Wage Order 5, § 2(K). The FLSA does not define the phrase “hours worked.” However, it is defined by federal regulations:

...As a general rule the term "hours worked" will include: (a) All time during which an employee is required to be on duty or to be on the employer's premises or at a prescribed workplace and (b) all time during which an employee is suffered or permitted to work whether or not he is required to do so. Thus, working time is not limited to the hours spent in active productive labor, but includes time given by the employee to the employer even though part of the time may be spent in idleness. Some of the hours spent by employees, under certain circumstances... in meal periods and rest periods are regarded as working time and some are not. The governing principles are discussed in part 785 of this chapter (interpretative bulletin on "hours worked") and part 790 of this chapter (statement of effect of Portal-to-Portal Act of 1947). ...

29 C.F.R. § 778.223

The United States Supreme Court originally stated that employees subject to the act must be paid for all time spent in "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." (*Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123* (1944) 321 U. S. 590). Subsequently, the Court ruled that there need be no exertion at all and that all hours are hours worked which the employee is required to give his employer, that "an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen. Refraining from other activity often is a factor of instant readiness to serve, and idleness plays a part in all employments in a stand-by capacity. Readiness to serve may be hired, quite as much as service itself, and time spent lying in wait for threats to the safety of the employer's property may be treated by the parties as a benefit to the employer." *Armour & Co. v. Wantock* (1944) 323 U.S. 126; *Skidmore v. Swift* (1944) 323 U.S. 134. The workweek ordinarily includes "all the time during which an employee is necessarily

required to be on the employer's premises, on duty or at a prescribed work place." *Anderson v. Mt. Clemens Pottery Co.* (1946) 328 U.S. 680. The Portal-to-Portal Act did not change the rule except to provide an exception for preliminary and postliminary activities. See Section 785.34.

29 C.F.R. § 785.7.

Rest periods of short duration, running from 5 minutes to about 20 minutes, are common in industry. They promote the efficiency of the employee and are customarily paid for as working time. They must be counted as hours worked. Compensable time of rest periods may not be offset against other working time such as compensable waiting time or on-call time. (*Mitchell v. Greinetz*, 235 F. 2d 621, 13 W.H. Cases 3 (C.A. 10, 1956); *Ballard v. Consolidated Steel Corp., Ltd.*, 61 F. Supp. 996 (S.D. Cal. 1945))

29 C.F.R. § 785.18.

Bona fide meal periods are not worktime. Bona fide meal periods do not include coffee breaks or time for snacks. These are rest periods. The employee must be completely relieved from duty for the purposes of eating regular meals. Ordinarily 30 minutes or more is long enough for a bona fide meal period. A shorter period may be long enough under special conditions. The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating. For example, an office employee who is required to eat at his desk or a factory worker who is required to be at his machine is working while eating. *Culkin v. Glenn L. Martin, Nebraska Co.*, 97 F. Supp. 661 (D. Neb. 1951), aff'd 197 F. 2d 981 (C.A. 8, 1952), cert. denied 344 U.S. 888 (1952); *Thompson v. Stock & Sons, Inc.*, 93 F. Supp. 213 (E.D. Mich 1950), aff'd 194 F. 2d 493 (C.A. 6, 1952); *Biggs v. Joshua Hendy Corp.*, 183 F. 2d 515 (C.A. 9, 1950), 187 F. 2d 447 (C.A. 9, 1951); *Walling v. Dunbar Transfer & Storage Co.*, 3 W.H. Cases 284; 7 Labor Cases para. 61.565 (W.D.

Tenn. 1943); *Lofton v. Seneca Coal and Coke Co.*, 2 W.H. Cases 669; 6 Labor Cases para. 61,271 (N.D. Okla. 1942); aff'd 136 F. 2d 359 (C.A. 10, 1943); cert. denied 320 U.S. 772 (1943); *Mitchell v. Tampa Cigar Co.*, 36 Labor Cases para. 65, 198, 14 W.H. Cases 38 (S.D. Fla. 1959); *Douglass v. Hurwitz Co.*, 145 F. Supp. 29, 13 W.H. Cases (E.D. Pa. 1956))

29 C.F.R. § 785.19

Healthcare employees who were required to wear pagers and respond to patient emergencies during meal breaks were held entitled to payment from their employer for meal breaks because their employer had not fully relieved them of their responsibilities during those times. *Hoffman v. St. Joseph's Hosp.*, 1998 U.S. Dist. LEXIS 7911 (N.D. Ga. Apr. 14, 1998); see also *Havrilla v. United States*, 125 Fed. Cl. 454, 2016 U.S. Claims LEXIS 192 (Mar. 14, 2016) (employees required to work during half hour meal break given that they had to stay at the facility and be available to respond to requests to return or check out weapons and equipment); *Wahl v. Wichita*, 701 F. Supp. 1530, 1988 U.S. Dist. LEXIS 15015 (D. Kan. Dec. 21, 1988) (Police officers stated a claim under the Fair Labor Standards Act where they alleged that they were not paid for meal periods but were required to remain within a certain area, respond to emergencies and citizen requests, and remain accessible).

Notwithstanding any other provision of this order, employees in the health care industry who work shifts in excess of eight (8) total hours in a workday may voluntarily waive their right to one of their two meal periods. In order to be valid, any such waiver must be documented in a written agreement that is voluntarily signed by both the employee and the employer. The employee may revoke the waiver at any time by providing the employer at least one day's written notice. The employee shall be fully compensated for all working time, including any on-the-job meal period, while such a waiver is in effect.

Wage Order 5, § 11(D).

In relevant part, Section 12 of Wage Order 5 states:

Rest Periods:

- (A) Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate often (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 1/2) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.
- (B) If an employer fails to provide an employee a rest period in accordance with the applicable provisions of this Order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each work day that the rest period is not provided.

California Labor Code § 226.7 states in relevant part:

- (b) An employer shall not require an employee to work during a meal or rest or recovery period mandated pursuant to an applicable statute, or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health.
- (c) If an employer fails to provide an employee a meal or rest or recovery period in accordance with a state law, including, but not limited to, an applicable statute or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of

Occupational Safety and Health, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest or recovery period is not provided.

By requiring Calderon and the Aggrieved Employees to work during what should have been duty-free rest breaks and meal periods, Davis Guest Home has intentionally and improperly failed to provide Calderon and the Aggrieved Employees all rest breaks and/or meal periods free from any duties as required by law. In failing to provide such breaks, Davis Guest Home has violated the provisions of California Labor Code §§ 226.7, 512 and 1198.

Davis Guest Home failed to provide timely meal and rest periods to Calderon and the Aggrieved Employees, including by requiring them to work in excess of five hours with no duty-free, 30-minute meal breaks. Davis Guest Home did not pay premium wages to Calderon and the Aggrieved Employees on days it did not provide them with one or more timely meal and rest periods as required by law.

In relevant part, California Labor Code § 558.1 states:

- (a) Any employer or other person acting on behalf of an employer, who violates, or causes to be violated, any provision regulating minimum wages or hours and days of work in any order of the Industrial Welfare Commission, or violates, or causes to be violated, §§ 203, 226, 226.7, 1193.6, 1194, or 2802, may be held liable as the employer for such violation.
- (b) For purposes of this section, the term "other person acting on behalf of an employer" is limited to a natural person who is an owner, director, officer, or managing agent of the employer, and the term "managing agent" has the same meaning as in subdivision (b) of § 3294 of the Civil Code.

At all relevant times herein, Davis owned and operated Davis Guest Home and employed Calderon and the Aggrieved Employees. Davis was the “owner,” “managing agent,” and “officer” of Davis Guest Home. Davis directly or indirectly, or through an agent or other person, employed and exercised control over the wages, hours, or working conditions of Calderon and the Aggrieved Employees and caused the violations to the Labor Code and Wage Order described above.

Davis intentionally failed to provide all rest breaks and/or meal periods free from any work duties to Calderon and the Aggrieved Employees as required by law. Additionally, Davis required Calderon and the Aggrieved Employees to work through their off-the-clock meal periods. As a result, Davis violated California Labor Code §§ 226.7, 512 and 1198.

Accordingly, Calderon seeks civil penalties on behalf of herself and Aggrieved Employees as follows:

1. \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 226.7, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2));
2. \$50 for each Aggrieved Employee for each initial violation of California Labor Code § 512, and \$100 for each Aggrieved Employee for each subsequent violation, per pay (penalties set by Labor Code §558); and
3. \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 1198, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f)(2)).

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Failure to Pay Minimum, Regular, Overtime, and Doubletime Wages
(Lab. Code §§ 510, 1194, 1197, 1197.1 and 1198)

In relevant part, California Labor Code § 1194 states,

(a) Notwithstanding any agreement to work for a lesser wage, any employee receiving less than the [...] legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of [...] overtime compensation, including interest thereon, reasonable attorney's fees, and costs of suit.

In relevant part, § 3 of Wage Order 5 ("Hours and Days of Work") states:

(A) Daily Overtime - General Provisions

(1) The following overtime provisions are applicable to employees 18 years of age or over and to employees 16 or 17 years of age who are not required by law to attend school and are not otherwise prohibited by law from engaging in the subject work. Such employees shall not be employed more than eight (8) hours in any workday or more than 40 hours in any workweek unless the employee receives one and one-half (1 ½) times such employee's regular rate of pay for all hours worked over 40 hours in the workweek. Eight (8) hours of labor constitutes a day's work. Employment beyond eight (8) hours in any workday or more than six (6) days in any workweek is permissible provided the employee is compensated for such overtime at not less than:

(a) One and one-half (1 ½) times the employee's regular rate of pay for all hours worked in excess of eight (8) hours up to and including 12 hours in any workday, and for the first eight (8) hours worked on the seventh (7th) consecutive day of work in a workweek.

(b) Double the employee's regular rate of pay for all hours worked in excess of 12 hours in any workday and for all hours worked in excess of eight (8) hours on the seventh (7th) consecutive day of work in a workweek.

In relevant part, California Labor Code § 510 states,

...Any work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek and the first eight hours worked on the seventh day of work in any one workweek shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee. Any work in excess of 12 hours in one day shall be compensated at the rate of no less than twice the regular rate of pay for an employee. In addition, any work in excess of eight hours on any seventh day of a workweek shall be compensated at the rate of no less than twice the regular rate of pay of an employee.

Labor Code § 1198 prohibits employers from employing their employees under conditions prohibited by the Wage Order.

Under Labor Code § 1197, "The minimum wage for employees fixed by the commission is the minimum wage to be paid to employees, and the payment of a less wage than the minimum so fixed is unlawful."

Davis Guest Home did not pay Calderon and the other Aggrieved Employees for off-the-clock work, including, but not limited to, all worked performed during off-the-clock meal periods. In so doing, Davis Guest Home violated Labor Code §§ 1197 and 1198.

Section 4 of Wage Order 5, pertaining to "Minimum Wages" states in pertinent part:

(A) Every employer shall pay to each employee wages not less than the following:

- (1) Any employer who employs 26 or more employees shall pay to each employee wages not less than the following:
 - a. Ten dollars and fifty cents (\$10.50) per hour for all hours worked, effective January 1, 2017; and
 - b. Eleven dollars (\$11.00) per hour for all hours worked, effective January 1, 2018.
 - (2) Any employer who employs 25 or fewer employees shall pay to each employee wages not less than the following:
 - a. Ten dollars (\$10.00) per hour for all hours worked, effective January 1, 2016 through December 31, 2017; and
 - b. Ten dollars and fifty cents (\$10.50) per hour for all hours worked, effective January 1, 2018.
- ...
- (B) Every employer shall pay to each employee, on the established payday for the period involved, not less than the applicable minimum wage for all hours worked in the payroll period, whether the remuneration is measured by time, piece, commission, or otherwise.

Employers must compensate nonexempt employees for all work whether or not it is scheduled or recorded if the employers knew or should have known that the employees were working those hours. *Morillion v. Royal Packing Co.*, 22 Cal.4th 575, 585 (2000). Davis Guest Home failed to pay Calderon and the other Aggrieved Employees for all hours worked. Davis Guest Home supervisors knowingly and intentionally required Calderon and the other Aggrieved Employees to work during their clocked-out meal periods. Davis Guest Home and its managers thus acted in violation of the Labor Code. As a result, Davis Guest Home often required Calderon and the other Aggrieved Employees to work in excess of 8

hours per day and 40 hours per week without being paid for the time over 8 hours and 40 hours, respectively.

Because Davis Guest Home failed to pay Calderon and the other Aggrieved Employees all wages earned for all hours worked at the correct rates of pay, Calderon seeks civil penalties on behalf of herself and the other Aggrieved Employees as follows:

1. \$50 for each Aggrieved Employee for each initial violation of Labor Code §510, and \$100 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by Labor Code §558);
2. \$100 for each Aggrieved Employee for each initial violation of Labor Code §1194, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by Labor Code § 2699, subdivision (f)(2));
3. \$100 for each underpaid employee for each initial violation of California Labor Code § 1197, and \$250 for each underpaid employee for each subsequent violation per pay period (regardless of whether the initial violations were intentionally committed) (penalties set by Labor Code § 1197.1); and
4. \$100 for each Aggrieved Employee for each initial violation of Labor Code §1198, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by Labor Code § 2699(f)(2)).

Failure To Provide Accurate Wage Statements
(Lab. Code § 226 and 558.1)

California Labor Code § 226 require employers to furnish employees with accurate itemized written wage statements showing:

- 1) gross wages earned,
- 2) total hours worked by the employee, except for any employee whose compensation is solely based on a salary and who is exempt from payment of overtime under subdivision (a) of Section 515 or any applicable order of the Industrial Welfare Commission,
- 3) the number of piece rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis,
- 4) all deductions, provided that all deductions made on written orders of the employee may be aggregated and shown as one item,
- 5) net wages earned,
- 6) the inclusive dates of the period for which the employee is paid,
- 7) the name of the employee and his or her social security number, except that by January 1, 2008, only the last four digits of his or her social security number or an employee identification number other than a social security number may be shown on the itemized statement,
- 8) the name and address of the legal entity that is the employer, and
- 9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee.

At all relevant times during the applicable limitations period, Davis Guest Home violated California Labor Code § 226 in that it failed to properly and accurately itemize each Aggrieved Employee's gross wages earned, net wages earned, the total hours worked, the corresponding number of hours worked at each rate by the Aggrieved Employee and other requirements of California Labor Code § 226. Davis Guest Home failed to state in the wage statements it issued to Calderon and other Aggrieved Employees all the hours worked and wages earned, including minimum and overtime wages, as described above.

In relevant part, California Labor Code § 558.1 states:

- (a) Any employer or other person acting on behalf of an employer, who violates, or causes to be violated, any provision regulating

minimum wages or hours and days of work in any order of the Industrial Welfare Commission, or violates, or causes to be violated, §§ 203, 226, 226.7, 1193.6, 1194, or 2802, may be held liable as the employer for such violation.

- (b) For purposes of this section, the term “other person acting on behalf of an employer” is limited to a natural person who is an owner, director, officer, or managing agent of the employer, and the term “managing agent” has the same meaning as in subdivision (b) of § 3294 of the Civil Code.

At all relevant times herein, Davis owned and operated Davis Guest Home and employed Calderon and the Aggrieved Employees. Davis was the “owner,” “managing agent,” and “officer” of Davis Guest Home. Davis directly or indirectly, or through an agent or other person, employed and exercised control over the wages, hours, or working conditions of Calderon and the Aggrieved Employees and caused the violations to the Labor Code and Wage Order described above.

Davis intentionally failed to provide accurate wage statements to Calderon and the Aggrieved Employees as required by law. Davis failed to provide accurate wage statements to Calderon and the Aggrieved Employees because the wage statements failed to properly and accurately itemize each employee’s gross wages earned, net wages earned, the corresponding number of hours worked at each rate by the employee, and other requirements of California Labor Code § 226. Due to the violations above, Davis failed to provide Calderon and the Aggrieved Employees with accurate wage statements because Davis did not state on the wage statements all hours Calderon and the Aggrieved Employees worked and all wages they earned, including, but not limited to minimum, regular, and overtime wages. As a result, Davis violated California Labor Code §§ 226.

Accordingly, Calderon seeks civil penalties on behalf of herself and Aggrieved Employees as follows: \$250 for each Aggrieved Employee for each initial violation of California Labor Code § 226(a), and \$1,000 for each Aggrieved

Employee for each subsequent violation (penalties set by California Labor Code § 226.3).

Failures to Timely Pay Wages
(Lab. Code § 204)

California Labor Code § 204 states all wages (other than those mentioned in Labor Code sections 201–202) earned by any person in any employment are due and payable twice during each calendar month, on days designated in advance by the employer as the regular paydays. Labor performed between the 1st and 15th days, inclusive, of any calendar month shall be paid for between the 16th and the 26th day of the month during which the labor was performed, and labor performed between the 16th and the last day, inclusive, of any calendar month, shall be paid for between the 1st and 10th day of the following month. In addition, all wages for work performed in excess of the normal work period must be paid by no later than the following regular payday.

Because of Davis Guest Home's failure to pay Calderon and the Aggrieved Employees wages for off-the-clock work, including, but not limited to, off-the-clock meal periods and premium wages for unprovided rest and meal periods within the time periods set by California Labor Code § 204, Davis Guest Home failed to timely pay all wages due during employment. Accordingly, Calderon seeks civil penalties on behalf of herself and Aggrieved Employees as follows: \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 204, and \$200 for each Aggrieved Employee for each subsequent violation (penalties set by Labor Code § 210).

Failure to Timely Pay Wages Upon Termination
(Lab. Code §§ 201-203, and 558.1)

Under Labor Code § 201, if an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately. Under § 202, if an employee not having a written contract for a definite period quits his or her employment, his or her wages shall become due and payable not later than 72 hours thereafter, unless the employee has given 72 hours previous

notice of his or her intention to quit, in which case the employee is entitled to his or her wages at the time of quitting. Notwithstanding any other provision of law, an employee who quits without providing a 72-hour notice shall be entitled to receive payment by mail if he or she so requests and designates a mailing address. The date of the mailing shall constitute the date of payment for purposes of the requirement to provide payment within 72 hours of the notice of quitting.

Under Labor Code § 203, if an employer willfully fails to pay, without abatement or reduction, in accordance §§ 201 and 202, any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but the wages shall not continue for more than 30 days. Davis Guest Home failed to pay final wages in a timely manner to Calderon and the Aggrieved Employees because it did not pay employees for all off-the-clock work as described above. Davis Guest Home willfully failed and refused to pay timely compensation and wages, for among other things, minimum, regular time, and overtime.

In relevant part, California Labor Code § 558.1 states:

- (a) Any employer or other person acting on behalf of an employer, who violates, or causes to be violated, any provision regulating minimum wages or hours and days of work in any order of the Industrial Welfare Commission, or violates, or causes to be violated, §§ 203, 226, 226.7, 1193.6, 1194, or 2802, may be held liable as the employer for such violation.
- (b) For purposes of this section, the term “other person acting on behalf of an employer” is limited to a natural person who is an owner, director, officer, or managing agent of the employer, and the term “managing agent” has the same meaning as in subdivision (b) of § 3294 of the Civil Code.

At all relevant times herein, Davis owned and operated Davis Guest Home and employed Calderon and the Aggrieved Employees. Davis was the “owner,” “managing agent,” and “officer” of Davis Guest Home. Davis directly or indirectly, or through an agent or other person, employed and exercised control over the wages, hours, or working conditions of Calderon and the Aggrieved Employees and caused the violations to the Labor Code and Wage Order described above.

Davis intentionally failed to pay Calderon and the Aggrieved Employees timely wages upon termination of employment as required by law. By willfully failing to pay wages to Calderon and other Aggrieved Employees as set forth above, at the time of termination of employment, Davis violated California Labor Code § 203.

By willfully failing to pay wages to Calderon and other Aggrieved Employees as set forth above, at the time of termination of employment, Davis Guest Home is liable for violations of Labor Code §§ 201, 202, and 203. Accordingly, on behalf of herself and other Aggrieved Employees, Calderon seeks civil penalties from Davis Guest Home as follows:

1. For violations of Labor Code § 201, \$100 per Aggrieved Employee for each of the pay periods in which initial violations of § 201 occurred, and \$200 per Aggrieved Employee per pay period in which subsequent violations of § 201 occurred (penalties set by Labor Code § 2699(f)(2));
2. For violations of Labor Code § 202, \$100 per Aggrieved Employee for each of the pay periods in which initial violations of § 202 occurred, and \$200 per Aggrieved Employee per pay period in which subsequent violations of § 202 occurred (penalties set by Labor Code § 2699(f)(2)); and
3. For violations of Labor Code § 203, \$100 per Aggrieved Employee for each of the pay periods in which initial violations of § 203 occurred, and \$200 per Aggrieved Employee per pay period in

which subsequent violations of § 203 occurred (penalties set by Labor Code § 2699(f) (2)).

Failure to Maintain Accurate Employment Records
(Lab. Code §§ 1174, 1174.5, 1198)

Labor Code § 1174, which pertains to recordkeeping, states:

Every person employing labor in this state shall:

...

(c) Keep a record showing the names and addresses of all employees employed and the ages of all minors.

(d) Keep, at a central residential care facility in the state or at the plants or establishments at which employees are employed, payroll records showing the hours worked daily by and the wages paid to, and the number of piece-rate units earned by and any applicable piece rate paid to, employees employed at the respective plants or establishments. These records shall be kept in accordance with rules established for this purpose by the commission, but in any case, shall be kept on file for not less than three years. An employer shall not prohibit an employee from maintaining a personal record of hours worked, or, if paid on a piece-rate basis, piece-rate units earned.

Labor Code § 1174.5 states:

Any person employing labor who willfully fails to maintain the records required by subdivision (c) of Section 1174 or accurate and complete records required by subdivision (d) of Section 1174, or to allow any member of the commission or employees of the division to inspect records pursuant to subdivision (b) of Section 1174, shall be subject to a civil penalty of five hundred dollars (\$500).

Section 7 of Wage Order 5 states:

(A) Every employer shall keep accurate information with respect to each employee including the following:

- (1) Full name, home address, occupation and social security number.
- (2) Birth date, if under 18 years, and designation as a minor.
- (3) Time records showing when the employee begins and ends each work period. Meal periods, split shift intervals and total daily hours worked shall also be recorded. Meal periods during which operations cease and authorized rest periods need not be recorded.
- (4) Total wages paid each payroll period, including value of board, lodging, or other compensation actually furnished to the employee.
- (5) Total hours worked in the payroll period and applicable rates of pay. This information shall be made readily available to the employee upon reasonable request.
- (6) When a piece rate or incentive plan is in operation, piece rates or an explanation of the incentive plan formula shall be provided to employees. An accurate production record shall be maintained by the employer.

Labor Code § 1198 prohibits employers from employing their employees under conditions prohibited by the Wage Order.

Davis Guest Home has willfully failed to maintain the records required by § 1174 and the Wage Order, including but not limited to, the total premium wages earned for missed meal and rest periods, overtime records, records pertaining to unpaid hours worked and hours of shifts that should not have been off the clock.

2/27/2020

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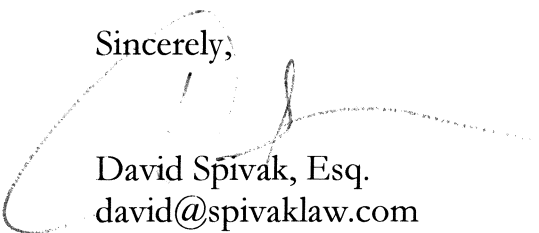
Accordingly, Calderon seeks civil penalties from Davis Guest Home on behalf of herself and other Aggrieved Employees as follows:

1. \$500 for each Aggrieved Employee for each violation of California Labor Code § 1174 (penalties set by Labor Code § 1174.5); and
2. \$100 for each Aggrieved Employee for each initial violation of California Labor Code § 1198, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by California Labor Code § 2699(f) (2)).

Conclusion

As noted above, this letter constitutes the required notice under the California Labor Code Private Attorneys General Act of 2004. Please be advised that I will seek both reasonable attorneys' fees and costs under Labor Code section 2699, subdivision (g)(1) in a civil action should the LWDA decline to pursue this matter. This letter also serves as a formal notice under the catalyst theory and Code of Civil Procedure section 1021.5 to resolve this matter before litigation.

Sincerely,



David Spivak, Esq.
david@spivaklaw.com

cc: Tina Calderon
Walter Haines, Esq.

Davis Guest Home, Inc.
c/o Lonny Gene Davis,
Agent for Service of Process
1008 Chardonnay Ave
Modesto, CA 95351

///

Lonny Gene Davis
1878 E. Hatch Road
Modesto, CA 95351

Lonny Gene Davis
1008 Chardonnay Ave
Modesto, CA 95351

PROOF OF SERVICE

State of California,
County of Los Angeles

1. I am a citizen of the United States and am employed in the County of Los Angeles, State of California. I am over the age of 18 years, and not a party to the within action. My business address is 16530 Ventura Blvd., Suite 203, Encino, California 91436.

2. I am familiar with the practice of The Spivak Law Firm, for collection and processing of correspondence for mailing with the United States Postal Service. It is the practice that correspondence is deposited with the United States Postal Service the same day it is submitted for mailing.

On Wednesday, May 13, 2020, I served the foregoing document described as **PLAINTIFF'S FIRST AMENDED COMPLAINT** on interested parties by placing a true and correct copy thereof enclosed in a sealed envelope, with postage fully prepaid, addressed as follows:

**Mollie Burks
Chad Saunders
Gordon & Rees
275 Battery Street, Suite 2000
San Francisco, CA 94111
mburks@grsm.com
csaunders@grsm.com**

____ (BY MAIL) I caused such an envelope to be mailed by placing it for collection and mailing, in the course of ordinary business practice, with other correspondence of The Spivak Law Firm, 16530 Ventura Blvd., Suite 203, Encino, California 91436.

xxx (BY EMAIL) Based on a court order or an agreement of the parties to accept electronic service, I caused the documents to be sent to the persons at the electronic service addresses listed above from my electronic service address nora@spivaklaw.com.

EXECUTED on Wednesday, May 13, 2020, at Encino, California.

XXXX (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

____ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.



NORA GREER