

Jeremy F. Bollinger (SBN 240132)
Ari E. Moss (SBN 238579)
Dennis F. Moss (SBN 77512)
Kiara Bramasco (SBN 322600)
MOSS BOLLINGER LLP
15300 Ventura Blvd., Ste. 207
Sherman Oaks, California 91403
Telephone: (310) 982-2984
Facsimile: (818) 963-5954
jeremy@mossbollinger.com
ari@mossbollinger.com
dennis@mossbollinger.com
kiara@mossbollinger.com

Attorneys for Plaintiff JUSTIN CARINO

SUPERIOR COURT OF CALIFORNIA
COUNTY OF KERN

JUSTIN CARINO, individually and on behalf
of other persons similarly situated,

Plaintiff,

vs.

**ADVENTIST HEALTH DELANO DBA
DELANO REGIONAL MEDICAL
CENTER**, a California Corporation; and
DOES 1-50,

Defendants.

Case No.: BCV-20-102879

CLASS ACTION

COMPLAINT FOR DAMAGES:

1. **FAILURE TO PAY OVERTIME
WAGES**
2. **FAILURE TO PAY PREMIUMS
FOR MEAL AND REST PERIOD
VIOLATIONS**
3. **FAILURE TO FURNISH
ACCURATE ITEMIZED WAGE
STATEMENTS**
4. **UNFAIR COMPETITION (Bus. &
Prof Code. §§ 17200 *et seq.*)**
5. **PENALTIES PURSUANT TO
PRIVATE ATTORNEY
GENERAL ACT, Labor Code §§
2698 *et seq.* ("PAGA")**

DEMAND FOR JURY TRIAL

1 Plaintiff JUSTIN CARINO (“Plaintiff”) on behalf of himself, and all others similarly
2 situated, complains and alleges as follows:

3 **INTRODUCTION**

4 1. This is a class and PAGA action lawsuit brought on behalf of Plaintiff and other
5 similarly situated health care workers who work or worked for Defendant Adventist Health
6 Delano as nurses, certified nursing assistants and in other similar capacities who were subject to
7 the Paid Time Off, Alternative Workweek, Overtime and break policies and practices described
8 herein, under Code of Civil Procedure § 382, seeking unpaid overtime wages and interest
9 thereon, remedies for inadequate penalties paid for meal and rest period violations, waiting time
10 penalties in the form of continuation wages for failure to timely pay employees, inaccurate wage
11 statement penalties, equitable relief, reasonable attorneys’ fees and costs. Plaintiff also seeks
12 civil penalties under California’s Private Attorney General Act, Labor Code Section 2698 et seq.
13 (“PAGA”).

14 **JURISDICTION AND VENUE**

15 2. This Court has jurisdiction over this action under Article 6 of the California
16 Constitution and California Code of Civil Procedure § 410.10.

17 3. This Court has jurisdiction over Plaintiff’s and Class Members’ claims for unpaid
18 overtime wages under California Labor Code §§ 510 and 1194.

19 4. This Court has jurisdiction over Plaintiff’s and Class Members’ claims for waiting
20 time penalties and meal and rest period premiums under California Labor Code § 218.

21 5. This Court has jurisdiction over Plaintiff’s and the Class Members’ claims for
22 restitution of unpaid wages and other ill-gotten benefits arising from Defendants’ unlawful
23 and/or unfair business practices under California Business & Professions Code §§17200 et seq.

24 6. Venue is proper in this judicial district, pursuant to California Code of Civil
25 Procedure § 395.5 because the Defendant Adventist Health Delano’s principal place of business
26 is situated in Kern County, California.

PARTIES

7. Plaintiff JUSTIN CARINO is a resident of Kern County, California. Plaintiff has been employed by Defendants as a Licensed Vocational Nurse (“LVN”) on an hourly basis at Delano Regional Medical Center in Delano, California, since 2017. Prior to that he was employed by Defendants as a Certified Nursing Assistant (“CNA”).

8. Plaintiff appears in this action on behalf of himself and on behalf of all others similarly situated.

9. Defendant ADVENTIST HEALTH DELANO DBA DELANO REGIONAL MEDICAL CENTER (“DRMC”) is a California corporation with its principal place of business in Kern County, California. It is an “Employer” in the “Healthcare Industry” as those terms are defined in Industrial Welfare Commission (IWC) Wage Order 5-2001(3)(A)(1). DRMC owns and operates Delano Regional Medical Center.

10. Plaintiff is informed and believes that DOES 1 through 50 are corporations, individuals, limited liability partnerships, limited liability companies, general partnerships, sole proprietorships or are other business entities or organizations of a nature not currently known to Plaintiff.

11. Plaintiff is unaware of the true names of Defendants DOES 1 through 50. Plaintiff sues said defendants by said fictitious name and will amend this complaint when the true names and capacities are ascertained or when such facts pertaining to liability are ascertained, or as permitted by law or by the Court. Plaintiff is informed and believes that each of the fictitiously named Defendants is in some manner responsible for the events and allegations set forth in this complaint.

12. All of the acts and failures to act alleged herein were duly performed by and were attributable to all Defendants, each acting as a joint employer, successor, agent, employee, or under the direction and control of the others, except as specifically alleged otherwise. Said acts and failures to act were within the scope of such agency and/or employment, and each Defendant participated in, approved and/or ratified the unlawful acts and omissions by the other

Defendants complained of herein. Whenever and wherever reference is made in this Complaint to any act by a Defendant or Defendants, such allegations and reference shall also be deemed to mean the acts and failures to act of each Defendant acting individually, jointly and/or severally.

13. Plaintiff makes the allegations in this complaint without any admission that, as to any particular allegation, Plaintiff bears the burden of pleading, proving, or persuading, and Plaintiff reserves all of Plaintiff's rights to plead in the alternative.

14. DRMC and DOES 1-50 are collectively referred to herein as "Defendants".

GENERAL FACTUAL ALLEGATIONS

15. Facts Related to Violations of Defendants' Alternative Workweek Schedule:

According to the California Department of Industrial Relations Alternative Workweek Elections Database, DRMC conducted an election to adopt an alternative workweek schedule ("AWS") in 2000. The AWS was approved in 2000 and then again in 2012. DRMC's AWS provides for employees to work 12-hour shifts seven days out of every two-week period. Full-time 12-hour shift employees are regularly scheduled three 12-hour shifts one week and four 12-hour shifts one week during a regular pay period. Employees working pursuant to the AWS earn double time (2x their base hourly rate) for all hours in excess of twelve hours in a day and overtime (1.5x their base hourly rate) for all hours in excess of forty in a workweek.

16. Defendants also maintain a Paid Time Off ("PTO") Policy for their employees, including Plaintiff, that is supposed to be used "for leisure, celebration of holidays, short-term illness and other personal needs on a paid basis."

17. Plaintiff is supposed to regularly work seven 12-hour shifts every two weeks pursuant to Defendants' AWS. At the beginning of each year, Plaintiff is given his schedule for the entire year. His regular work shift begins at 7:30 pm. Not infrequently on days that Plaintiff is scheduled to work, DRMC phones Plaintiff about two hours before his scheduled shift start time to let him know that he has been "docked," meaning he is not to report to work that day. Defendants do not pay Plaintiff pursuant to the AWS for the day he is docked. Instead, Defendants deduct from the wages Plaintiff has earned and accrued in PTO and pays him for

1 twelve hours out of his accrued PTO.

2 18. All docked hours are paid at Plaintiff's base hourly rate. As a result, during those
3 weeks he would otherwise qualify for overtime pay, had he worked the docked hours, he does
4 not receive the overtime premium pursuant to the AWS that would otherwise have put him over
5 40 hours for a week. More importantly, this practice violates the requirement that AWS
6 schedules are to be "regular." As a consequence of the irregularity of Plaintiff's schedule,
7 Plaintiff should have been paid overtime for all hours over 8 in a day that he worked since the
8 inception of this practice. The regularity of Plaintiff's schedule and the schedules of others is
9 compromised by the practice of frequently removing employees from the work schedule for full
10 (or partial) days at a time.

11 19. On some days on which Plaintiff is scheduled to work, Plaintiff is also placed
12 "on-call." Shortly before his scheduled shift, DRMC notifies Plaintiff that he will be on-call for
13 part of the shift and docked for the remainder. On such days, Defendants pay Plaintiff \$3 for
14 every hour that he is on-call. In or around February 2020, Defendants began allowing employees
15 to be on-call for no more than four hours in a shift. The employee is then docked for the
16 remaining 8 hours of the 12-hour shift (4 hours on call, 8 hours docked). Defendants will then
17 pay Plaintiff from his earned PTO, by auto-deducting 8 hours of his PTO to pay Plaintiff for the
18 eight hours that he was scheduled to work, but which were subsequently docked.

19 20. On some days on which Plaintiff works his regularly scheduled shift, Defendants
20 require Plaintiff to take a one-hour meal period instead of his regularly scheduled half-hour meal
21 period. On such days, Plaintiff is off-the-clock for 30 minutes. Then, Defendants auto-deduct the
22 remaining 30 minutes from Plaintiff's accrued PTO to cover the half hour of docked time in the
23 middle of Plaintiff's workday.

24 21. On other days, Defendants dock an employee for the last hour of a shift. The
25 employee is sent home one hour before the end of his or her scheduled shift and is paid for 11
26 hours of work. The remaining hour of the 12-hour scheduled shift is auto-deducted from the
27 employee's accrued PTO at his base hourly rate.

22. By auto deducting Plaintiff's PTO to pay him for scheduled hours that are not worked, Defendants are violating the AWS and thereby failing to pay Plaintiff the correct minimum and overtime wages for all hours worked.

23. The regular failure of Defendants to comply with the approved AWS invalidates the AWS. As a result, Defendants should have paid Plaintiff overtime according to Industrial Welfare Commission (IWC) Wage Order 5-2001(3)(A)(1) and Labor Code § 510 which require an employer to compensate an employee overtime at not less than:

- One and one-half times the employee's regular rate of pay for all hours worked in excess of eight hours up to and including 12 hours in any workday or in excess of 40 hours in a week, and for the first eight hours worked on the seventh consecutive day of work in a workweek; and
- 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 on the seventh consecutive day of work in a workweek.

24. Defendants did not pay all overtime to Plaintiff and other similarly situated employees due to Defendants' systematic failure to adhere to the AWS in violation of Wage Order 5-2001(3)(A)(1) and Labor Code §§ 510, 1194.

25. **Facts Related to Violations of California's Paid Sick Leave Law:** Pursuant to Labor Code § 245.5(b), all employers in California are required to provide paid sick leave to their employees, unless the employee is exempt from coverage, which Plaintiff and other similarly aggrieved employees are not. Employees who work in California for 30 or more days within a year from the commencement of employment are entitled to paid sick leave on the 90th day of employment. Labor Code § 246. Pursuant to Labor Code § 246.5(a), an employer is to make sick leave pay available for the following purposes:

- a. Diagnosis, care, or treatment of an existing health condition of, or preventative care for, an employee or an employee's family member.
- b. For an employee who is a victim of domestic violence, sexual assault, or stalking ...

1 26. An employer must provide an employee three days or 24 hours of sick leave to be
2 used for the purposes stated above. Cal. Lab. Code § 246. Paid sick leave may be provided as
3 part of a paid leave policy or paid time off policy so long as the “employer makes available an
4 amount of leave applicable to employees that may be used for the same purposes under the same
5 conditions as specified in this section.” Lab. Code § 246(f).

6 27. Because Defendants require the use of PTO to cover an employee’s docked time,
7 employees like Plaintiff do not have the option to choose when to use PTO for sick days.
8 Defendants require PTO to cover docked hours. In April, Plaintiff was docked and requested that
9 Defendants not use his PTO to cover his docked hours, as he wanted to keep his accrued PTO in
10 order to be able to take a proper vacation. Plaintiff was told that his PTO must be used to cover
11 the docked hours. As a result of Defendants’ automatic deduction of PTO, some aggrieved
12 employees are left with less than three days of available PTO hours, meaning less than three days
13 of available sick leave. The involuntary use of PTO means Defendants are forcing employees to
14 use their sick leave for purposes not delineated in Labor Code §246.5. As a result, they may not
15 have sufficient paid sick leave available when they need it for a qualifying condition.
16 Defendants’ auto-deduction of PTO results in a violation of Labor Code § 246 each time it leaves
17 an employee with less than three days of available paid sick leave.

18 28. Moreover, Defendants’ policy requires employees to have at least 84 hours of
19 earned PTO in order to take a paid vacation. Because Defendants pay Plaintiff from his accrued
20 PTO for scheduled hours that are not worked, Plaintiff and other employees that fall below the
21 84-hour threshold cannot use earned PTO for a vacation.

22 29. **Facts Related to Defendants’ Calculation of Meal and Rest Period Premiums:**
23 Wage Order 5-2001(11) provides: “If an employer fails to provide an employee a meal period in
24 accordance with the applicable provisions of this order, the employer shall pay the employee one
25 (1) hour of pay at the employee’s *regular rate of compensation* for each workday that the meal
26 period is not provided.” Wage Order 5-2001(11)(B), (12)(B) (same re rest periods) (emphasis
27 added); *see also* Labor Code § 226.7(c) (“If an employer fails to provide an employee a meal or
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rest or recovery period in accordance with a state law, ..., the employer shall pay the employee one additional hour of pay at the employee's **regular rate of compensation** for each work day that the meal or rest period is not provided." (Emphasis added)).

30. Defendants paid aggrieved employees one hour of pay at the employee's base hourly rate when compensating those employees for violations of the meal and rest period requirements, including in periods when the employee earned a shift differential and other forms of compensation required to be factored into an employee's regular rate of compensation.

31. **Facts Related to Standalone and Derivative Wage Statement Violations:**
Labor Code § 226 provides, in part:

(a) An employer, semimonthly or at the time of each payment of wages, shall furnish to his or her employee, either as a detachable part of the check, draft, or voucher paying the employee's wages, or separately if wages are paid by personal check or cash, an accurate itemized statement in writing showing (1) **gross wages earned**, (2) **total hours worked by the employee**, except as provided in subdivision (j), (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 only the last four digits of his or her social security number or an employee identification number other than a social security number, (8) **the name and address of the legal entity that is the employer** and, if the employer is a farm labor contractor, as defined in subdivision (b) of Section 1682, the name and address of the legal entity that secured the services of 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 and, beginning July 1, 2013, if the employer is a temporary services employer as defined in Section 201.3, the rate of pay and the total hours worked for each temporary services assignment.

32. Plaintiff and similarly employed Californians receive wage statements every two weeks. Beginning December 31, 2019, when the name of the legal entity that employs Plaintiff and all other employees who work at DRMC changed from Central California Foundation for Health to Adventist Health Delano, Plaintiff and all other employees of DRMC received inaccurate wage statements that did not list the correct name of their employer. On July 31, 2020, Plaintiff received his first wage statement that listed Adventist Health Delano as his employer.

1 33. During the one year prior to the filing of this complaint, Plaintiff and other
2 similarly situated employees of DRMC received wage statements that did not correctly list all
3 wages earned, including the correct amount of overtime and double time wages due to DRMC's
4 practice of docking employees and paying a portion of their wages for hours worked out of their
5 PTO bank, and the correct hourly rate for break period premium wages paid, as discussed above,
6 in violation of Labor Code § 226.

7 **CLASS DEFINITIONS AND CLASS ALLEGATIONS**

8 34. Plaintiff brings this action on behalf of himself, on behalf of all others similarly
9 situated, and as a member of Classes defined as follows:

- 10 a. AWS Class: All current and former hourly-paid non-exempt employees of
11 Defendants who work or worked for Defendants in California at any time during
12 the four years preceding the filing of Plaintiff's Complaint through the present
13 who worked under one or more alternative workweek schedules for Defendants.
14 b. Break Premium Class: All current and former hourly-paid non-exempt
15 employees of Defendants who work or worked for Defendants in California at
16 any time during the four years preceding the filing of Plaintiff's Complaint
17 through the present to whom Defendants paid premium pay pursuant to Labor
18 Code section 226.7 or Sections 11 or 12 of the applicable Wage Orders,
19 including Wage Order 5-2001.

20 35. This action has been brought and may be properly maintained as a class action
21 pursuant to the provisions of California Code of Civil Procedure § 382 and other applicable law.

22 36. **Numerosity**: Code of Civil Procedure § 382: members of the Classes are so
23 numerous that their individual joinder is impracticable. Plaintiff estimates that there are no less
24 than 100 persons in each of the classes. The precise number of Class members and their
25 addresses are unknown to Plaintiff. However, Plaintiff is informed and believes that the number
26 can be obtained from Defendants' records. Class members may be notified of the pendency of
27 this action by mail, electronic mail, the Internet, or published notice.

1 37. **Existence of Predominance of Common Questions of Fact and Law:** Code of
2 Civil Procedure § 382: Common questions of law and fact exist as to all members of the Class.
3 These questions predominate over any questions effecting only individual members of the class.
4 These common factual and legal questions include:

- 5 (a) Whether Defendants’ policy and practice of modifying schedules of
6 employees employed pursuant to an authorized AWS is unlawful;
- 7 (b) Whether Defendants’ policy and practice of docking violates its AWS;
- 8 (c) Whether Defendants’ policy and practice of auto-deducting PTO to pay for
9 hours that are not actually worked violates its AWS;
- 10 (d) Whether Defendants’ policy and practice of modifying schedules of
11 employees employed pursuant to an authorized AWS results in non-payment
12 of all overtime and/or double time compensation owed to the AWS Class;
- 13 (e) Whether Defendants’ failure to factor shift differentials, and other forms of
14 compensation paid to class members violated Labor Code § 226.7(c) and the
15 applicable IWC Wage Orders;
- 16 (f) Whether Defendants’ failure to list Adventist Health Delano on class
17 members’ wage statements violated Labor Code § 226;
- 18 (g) Whether Defendants’ failure to list all wages earned, including the correct
19 amount of overtime and double time wages due to Defendants’ practice of
20 docking, on class members’ wage statements violated Labor Code § 226.
- 21 (h) Whether Defendants’ failure to list the correct hourly rate for break period
22 premium wages paid on class members’ wage statements violated Labor Code
23 § 226;
- 24 (i) Whether Defendants failed to provide class members who ceased employment
25 with Defendants all wages owed at the time of the cessation of the employee-
26 employer relationship;

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(j) Whether Defendants committed unlawful business practices or acts within the meaning of Business & Professions Code Sects. 17200 *et seq.*;

(k) Whether, as a consequence of Defendants' unlawful conduct, the Class members are entitled to restitution, and/or equitable relief;

(l) Whether Defendants' affirmative defenses, if any, raise any common issues of law or fact as to Plaintiff and the class members as a whole.

38. **Typicality:** Plaintiff's claims are typical of the claims of the members of each Class because Plaintiff, as an hourly paid employee, was exposed to the same unlawful business practices as the members of the classes. Plaintiff sustained the same types of injuries and losses that the class members sustained. Plaintiff is subject to the same affirmative defenses as the members of the class.

39. **Adequacy:** Plaintiff will adequately and fairly protect the interests of the members of the Classes. Plaintiff has no interest adverse to the interests of absent Class members. Plaintiff is represented by legal counsel who has substantial class action experience in civil litigation and employment law.

40. **Superiority:** A class action is superior to other available means for fair and efficient adjudication of the claims of the Classes and would be beneficial for the parties and the court. Class action treatment will allow a large number of similarly situated persons to prosecute their common claims in a single forum, simultaneously, efficiently, and without the unnecessary duplication of effort and expense that numerous individual actions would require. The monetary amounts due to many individual Class members are likely to be relatively small, and the burden and expense of individual litigation would make it difficult or impossible for individual members of the Class to seek and obtain relief. A class action will serve an important public interest by permitting such individuals to effectively pursue recovery of the sums owed to them. Further, class litigation prevents the potential for inconsistent or contradictory judgments raised by individual litigation.

FIRST CAUSE OF ACTION
FAILURE TO PAY OVERTIME WAGES
(By Plaintiff and the AWS Class Against All Defendants)

41. Plaintiff re-alleges and incorporates by reference the foregoing allegations as though set forth herein.

42. During all times relevant, one or more of the IWC Wage Orders applied to Plaintiff's employment with Defendants and that of the members of the AWS Class.

43. Pursuant to Labor Code §§ 510, 1194, 1194.2, and Section 3 of the applicable Wage Order(s), including Wage Order 5, for each hour (or fraction thereof) an employee works up to forty (40) hours in a week and eight (8) hours in a day, the employer must pay the employee's regular hourly wage. For each hour (or fraction thereof) an employee works over forty (40) hours in a week or more than eight (8) hours in a workday the employer must pay the rate of one and a half times the employee's regular hourly wage.

44. For each hour (or fraction thereof) an employee works more than twelve (12) hours in one day or more than eight (8) hours a day on the seventh consecutive day of work, the employer must compensate the employee at the rate of no less than twice the regular rate of pay for that employee.

45. From at least four years before the filing of this action and continuing to the present, and pursuant to company policy and/or practice and/or direction, Defendants required Plaintiff and members of the Overtime Classes to work more than 40 hours per week and/or eight hours in a workday and Defendants did not pay Plaintiff and members of the AWS Class all overtime compensation they should have received. Defendants violated California overtime laws by failing throughout the four-year period preceding this action to adhere to the requirement that AWS schedules be regular per Sections 2(A) and 3(B) of applicable Wage Orders, including Wage Order 5-2001 of the IWC.

46. Under California law, a "regularly scheduled alternative workweek" schedule is allowed when adopted by vote of the employees. Cal. Labor Code § 511. Under the relevant Wage Order, in the health care industry an acceptable alternative workweek schedule ("AWS")

1 includes “work days exceeding ten (10) hours but not more than 12 hours within a 40-hour
2 workweek.” Cal. Code Regs. tit. 8, § 11050(3)(B)(8). “If an employer ... requires an [AWS]
3 employee to work fewer hours than those that are regularly scheduled by the agreement, the
4 employer shall pay the employee overtime compensation at a rate of one and one-half (1 1/2)
5 times the employee's regular rate of pay for all hours worked in excess of (8) hours ... for the day
6 the employee is required to work the reduced hours.” Cal. Code Regs. tit. 8, § 11050(3)(B)(2).
7 “In essence, the employer must pay a ‘short-shift penalty’ if AWS employees are required to
8 work fewer hours than scheduled.” *Huntington Memorial Hosp. v. Superior Court*, 131 Cal. App.
9 4th 893, 909 (2005). The short-shift penalty is intended to give employers the benefit of an AWS
10 while protecting employees by requiring regular shifts.

11 47. Defendants adopted an AWS for Plaintiff and members of the AWS Class at
12 Delano Regional Medical Center where Plaintiff worked. Plaintiff worked at the medical center
13 subject to an AWS, also known as the 12-Hour Shift Agreement. From at least four years before
14 the filing of this action and continuing to the present, and pursuant to company policy and/or
15 practice and/or direction, not infrequently, on certain 12-hour shifts, Defendants required
16 Plaintiff and members of the AWS Class to work fewer than twelve hours, or no hours, in
17 defiance of the requirement that AWS shifts be regular, but did not pay them at their overtime
18 rate for the hours they worked in excess of eight hours in a day on any of their scheduled days.

19 48. Defendants’ policy and practice of requiring overtime work but not paying at the
20 proper overtime rate for said work violates Labor Code Section 510 and the applicable California
21 Wage Order, including Wage Order 5.

22 49. In committing the violations of state law as herein alleged, Defendants have
23 knowingly and willfully refused to perform their obligations to compensate class members for all
24 wages earned and all hours worked.

25 50. As a direct result, Plaintiff and members of the AWS Class have suffered and
26 continue to suffer, substantial losses related to the use and enjoyment of such compensation,
27 wages, lost interest on such monies and expenses and attorney’s fees in seeking to compel
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Defendants to fully perform its obligation under state law, all to their respective damage in amounts according to proof at trial and within the jurisdictional limitations of this Court.

51. AWS Class Members whose employment by Defendants ended on or after December 8, 2017 have an additional claim for waiting time penalties pursuant to Labor Code §201 et seq. for up to 30 days of waiting time penalties on account of Defendants' ongoing, willful failure to pay them the overtime wages that are due and owing, together with interest thereon, attorneys' fees and costs.

52. Plaintiff on behalf of himself and the members of the AWS Class requests the unpaid wages, all penalties to which they may recover interest, attorneys' fees, costs, and any other remedies allowed by law in an amount to be proven at trial.

SECOND CAUSE OF ACTION
FAILURE TO PAY PREMIUMS FOR MEAL AND REST PERIOD VIOLATIONS
(By Plaintiff and the Break Premium Class against Defendants)

53. Plaintiff re-alleges and incorporates by reference the foregoing allegations as though set forth herein.

54. At all relevant times, Plaintiff and the other members of the Break Premium Class were employees of Defendants covered by Labor Code Section 226.7 and the applicable Wage Orders, including Wage Order 5-2001.

55. Pursuant to Labor Code Section 226.7 and Wage Order 5-2001, Plaintiff and the other members of the Break Premium Class were entitled to rest periods of at least 10 minutes for each four-hour period of work, or major fraction thereof, and one hour of additional pay (i.e., premium) for every day a required rest period was not provided.

56. Pursuant to Labor Code Sections 226.7 and 512, and Wage Order 5-2001, Plaintiff and the other members of the Break Premium Class were entitled to a meal period of at least 30 minutes for each workday they worked more than 5 hours in any workday, and one additional hour of pay (i.e., premium) for every day that a timely meal period was not provided.

57. When Defendants failed to allow Plaintiff and other members of the Break Premium Class to take their meal and/or rest periods in accordance with Labor Code Section

226.7 and Wage Order 5-2001, Defendants maintained a policy or practice of paying break premiums at amounts that only included “base hourly wages” and did not factor in other non-discretionary wages earned for an hour’s work owed to members of the Break Premium Class as required by Labor Code Section 226.7 and Wage Order 5-2001.

58. During the period in which Defendants did not provide Plaintiff and members of the Break Premium Class all compliant rest and/or meal periods, Defendants failed to provide Plaintiff and other members of the Break Premium Class the additional hour of pay required by Labor Code Section 226.7 and Wage Order 5-2001.

59. As a result of Defendants’ unlawful conduct, Plaintiff and other members of the Break Premium Class have suffered damages in an amount, subject to proof, to the extent they were not paid all premiums owed for meal and rest period violations.

60. Pursuant to Labor Code Section 218, Plaintiff and other members of the Break Premium Class are entitled to recover the full amount of their unpaid additional pay for meal and rest period violations. Pursuant to Labor Code Section 218.5, Plaintiff and other members of the Break Premium Class are entitled to recover their reasonable attorney’s fees and costs of suit. Pursuant to Labor Code Section 218.6 or Civil Code Section 3287(a), Plaintiff and other members of the Break Premium Class are entitled to recover prejudgment interest on the additional pay owed for meal and rest period violations.

61. Break Premium Class Members whose employment by Defendants ended on or after December 8, 2017 have an additional claim for waiting time penalties pursuant to Labor Code §201 et seq. for up to 30 days of waiting time penalties on account of Defendants’ ongoing, willful failure to pay them the overtime wages that are due and owing, together with interest thereon, attorneys’ fees and costs.

THIRD CAUSE OF ACTION
FAILURE TO FURNISH ACCURATE ITEMIZED WAGE STATEMENTS
(By Plaintiffs and All Classes against Defendants)

62. Plaintiff re-alleges and incorporates by reference the foregoing allegations as though set forth herein.

63. The California Labor Code requires that a wage statement include, among other things, “the name and address of the legal entity that is the employer.” Cal. Lab. Code § 226(a)(8). CCFH issued wage statements to members of all Classes employed by CCFH in the year preceding the filing of this complaint that listed the employer as Delano Regional Medical Center, rather than the name of the legal entity that is the employer, Central California Foundation for Health.

64. Section 226(a) of the California Labor Code also requires Defendants to accurately report total hours worked by Plaintiff and the members of the putative Classes, the applicable hourly rate for each hour worked, and to accurately set forth wages earned. Defendants have knowingly and intentionally failed to comply with Labor Code section 226(a) on each and every wage statement provided to Plaintiff and members of the proposed Classes by failing to accurately list all hours worked at the correct applicable hourly rate, and all wages earned, as alleged above.

65. As a consequence of Defendants’ knowing and intentional failure to comply with Labor Code section 226(a), Plaintiff and each putative Class member she seeks to represent are each entitled to actual damages or penalties not to exceed \$4000 pursuant to Labor Code section 226(b), together with interest thereon and attorneys’ fees and costs.

FOURTH CAUSE OF ACTION
UNFAIR COMPETITION
(By Plaintiff and All Classes against Defendants)

66. Plaintiff re-alleges and incorporates by reference the foregoing allegations as though set forth herein.

67. The unlawful conduct of Defendants alleged herein constitutes unfair competition within the meaning of Business and Professions Code Section 17200. Due to its unlawful and unfair business practices in violation of the Labor Code, Defendants have gained a competitive advantage over other comparable companies doing business in the State of California that comply with their obligations to compensate employees for all earned wages as required by law.

1 68. As a result of Defendants’ unfair competition as alleged herein, Plaintiff and other
2 members of the Classes have suffered injury in fact and lost money or property. Plaintiff and
3 members of the Classes have been deprived of their rights to overtime and double time wages for
4 all hours worked; additional pay for missed or late meal periods, additional pay for missed rest
5 periods; accurate wage statements; and/or timely payment of all earned wages due upon
6 termination of employment.

7 69. Pursuant to Business and Professions Code Section 17203, Plaintiff and other
8 class members are entitled to restitution of all wages and other monies owed and belonging to
9 them, including interest thereon, that Defendants wrongfully withheld from them and retained for
10 itself by means of its unlawful and unfair business practices.

11 70. Plaintiff and class members are entitled to recover reasonable attorney’s fees in
12 connection with their unfair competition claims pursuant to Code of Civil Procedure Section
13 1021.5, the substantial benefit doctrine and/or the common fund doctrine.

14 **FIFTH CAUSE OF ACTION**
15 **VIOLATION OF CALIFORNIA’S PRIVATE ATTORNEY GENERAL ACT (LABOR**
16 **CODE § 21699 et seq.)**
17 **(By Plaintiff, the State of California and All Aggrieved Employees against All Defendants)**

18 71. Plaintiff re-alleges and incorporates by reference the foregoing allegations as
19 though set forth herein.

20 72. Under the Private Attorney General Act, Labor Code §§ 2698-99 (“PAGA”),
21 private parties may recover civil penalties for violations of the California Labor Code. PAGA
22 penalties are in addition to any other relief available under the Labor Code.

23 73. As set forth above, Defendants violated the California Labor Code by consistently
24 failing to employ Plaintiff and other similarly situated employees in compliance with California
25 law, including failing to pay all overtime due to its practice of docking resulting in violations of
26 Defendants’ AWS, failing to comply with California’s Paid Sick Leave Law by diminishing
27 aggrieved employees’ PTO below that which they were entitled under labor Code § 246, failing
28 to pay complete premiums for meal and rest period violations, failing to include the correct name
of the legal entity that employed the aggrieved employees on their wage statements, failing to

1 include all wages earned, including the correct amount of overtime and double time wages due to
2 Defendants' practice of docking, and the correct hourly rate for break period premium wages
3 paid, in violation of Labor Code § 226; and failing to pay all final wages upon termination of
4 employment in violation of Labor Code § 201-203.

5 74. Plaintiff provided written notice by certified mail to the Labor & Workforce
6 Development Agency ("LWDA") and to Defendants of the legal claims and theories of this case
7 on September 30, 2020, and in an amended notice submitted on October 5, 2020. (Attached
8 hereto as **Exhibit A** is a true and correct copy of the September 30, 2020 letter and attached
9 hereto as **Exhibit B** is a true and correct copy of the October 30, 2020 amended letter. To date,
10 and after 65 days from the date of mailing of the written notices, the LWDA has not notified
11 Plaintiff that the LWDA intends to exercise jurisdiction over the claim for civil penalties under
12 the PAGA. Accordingly, Plaintiff exhausted administrative remedies as required by Labor Code
13 § 2699.3.

14 75. Under the PAGA, Plaintiff and all other aggrieved employees are entitled to
15 recover the maximum civil penalties permitted by law from Defendants for the violations of
16 Labor Code alleged in this Complaint.

17 76. Plaintiff and all other aggrieved employees are also entitled to recover their
18 attorneys' fees and costs under Labor Code § 2699.
19

20 **PRAYER FOR RELIEF**

21 WHEREFORE, Plaintiff on behalf of himself and all others similarly situated, prays for
22 relief and judgment against Defendants as follows:

23 **CLASS CERTIFICATION:**

- 24 1. An order that the action be certified as a class action;
- 25 2. An order that Plaintiff be certified as the representative of the Classes;
- 26 3. An order that counsel for Plaintiff be confirmed as Class counsel;

27 ///

ON THE FIRST CAUSE OF ACTION:

1. Damages for unpaid wages;
2. Damages for unpaid continuation wages owed for failing to pay all earned wages timely upon termination of employment
3. Prejudgment interest;

ON THE SECOND CAUSE OF ACTION:

1. Damages for unpaid premiums for meal and rest period violations;
2. Damages for unpaid continuation wages owed for failing to pay all earned wages timely upon termination of employment
3. Prejudgment interest;

ON THE THIRD CAUSE OF ACTION:

1. Damages for inaccurate wage statements for each pay period;
2. Prejudgment interest;

ON THE FOURTH CAUSE OF ACTION:

1. Restitution of all unpaid wages and other monies owed and belonging to Class members that Defendants unlawfully withheld from them and retained for itself;
2. Prejudgment interest;

ON THE FIFTH CAUSE OF ACTION:

1. Civil penalties under Labor Code Section 2699 (75% payable to the LWDA and 25% payable to aggrieved employees);
2. Costs;
3. Reasonable attorney's fees; and
4. Such other and further relief as this Court may deem just and proper.

///

1 **ON ALL CAUSES OF ACTION:**

- 2 1. Judgment in favor of Plaintiff and the putative Classes and against Defendants;
- 3 2. Reasonable attorney's fees;
- 4 3. Costs of suit; and
- 5 4. Such other relief as the Court deems just and proper.

6 Dated: December 8, 2020

MOSS BOLLINGER LLP

7 

9 By: _____

Jeremy F. Bollinger

Attorneys for Plaintiff Justin Carino

11 **DEMAND FOR JURY TRIAL**

12 Plaintiff demands a trial by jury for himself and the Class on all claims so triable.

13 Dated: December 8, 2020

MOSS BOLLINGER LLP

14 

16 By: _____

Jeremy F. Bollinger

Attorneys for Plaintiff Justin Carino

EXHIBIT A

to Complaint

Carino et al. v. Adventist Health Delano et al.



Moss Bollinger
LLP

JEREMY F. BOLLINGER
310.982.2984/fax: 818.963.5954
jeremy@mossbollinger.com

September 30, 2020

VIA PAGA ONLINE FILING

Secretary Julie A. Su
Labor & Workforce Development Agency
PAGA ADMINISTRATOR
1515 Clay Street, Ste. 801
Oakland, California 94612

**VIA U.S. CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

Adventist Health Delano
dba Delano Regional Medical Center
c/o CSC – Lawyers Incorporating Service
2710 Gateway Oaks Drive, Suite 150N
Sacramento, CA 95833

Re: Notice pursuant to Labor Code Section 2699.3(a)(1)
Labor Code Private Attorney General Act ("PAGA")

Employers: Adventist Health Delano dba Delano Regional Medical Center (formerly Central California Foundation for Health)

Employee: Justin Carino, on behalf of himself and on behalf of all current and former hourly individuals employed by Adventist Health Delano dba Delano Regional Medical Center

Dear Secretary Su:

Pursuant to the Private Attorney General Act of 2004, California Labor Code § 2698 *et seq.* ("PAGA"), representative employee, Justin Carino ("Carino"), on behalf of himself and all other similarly situated current and former California employees who work(ed) for Adventist Health Delano dba Delano Regional Medical Center (formerly Central California Foundation for

Health) (“DRMC”) on a non-exempt, hourly basis, gives notice that his employer violated the California Labor Code within the one year prior to the mailing of this letter.

**Unpaid Overtime and Double Time Wages Due to DRMC’s Failure to Adhere to Its
Alternative Workweek Schedule**

Carino is employed by DRMC at Delano Regional Medical Center in Delano, California. Plaintiff was hired by DRMC in or about 2013 or 2014 as a Certified Nursing Assistant (“CNA”). On or about 2017, Plaintiff became a Licensed Vocational Nurse (“LVN”) for DRMC.

According to the California Department of Industrial Relations Alternative Workweek Elections Database, DRMC conducted an election to adopt an alternative workweek schedule (“AWS”) in 2000. The AWS was approved in 2000 and then again in 2012. DRMC’s AWS provides for employees to work 12-hour shifts seven days out of every two-week period. Full-time 12-hour shift employees are regularly scheduled three 12-hour shifts one week and four 12-hour shifts one week during a regular pay period. Employees working pursuant to the AWS earn double time (2x their base hourly rate) for all hours in excess of twelve hours in a day and overtime (1.5x their base hourly rate) for all hours in excess of forty in a workweek.

DRMC also maintains a Paid Time Off (“PTO”) Policy for its employees, including Carino, that is supposed to be used “for leisure, celebration of holidays, short-term illness and other personal needs on a paid basis.”

Carino is supposed to regularly work seven 12-hour shifts every two weeks pursuant to DRMC’s AWS. At the beginning of each year, Carino is given his schedule for the entire year. His regular work shift begins at 7:30 pm. Not infrequently, on some days that Carino is scheduled to work, including during the one year preceding the date Carino submitted this letter, DRMC phones Carino about two hours before his scheduled shift start time to let him know that he has been “docked,” meaning he will not need to report to work that day. DRMC does not pay Carino pursuant to the AWS for the day he is docked. Instead, DRMC deducts from the wages Carino has earned and accrued in PTO and pays him for twelve hours out of his accrued PTO.

For example, on July 15, 2020, Carino was scheduled to work a 12-hour shift. DRMC notified him shortly before his shift was to begin that he would be “docked” for the day, meaning that he would not be needed for the day and that his PTO would be used to pay him for his scheduled hours. Using PTO to cover docked hours is mandatory. Accordingly, Carino did not work that day; however, his wage statement for the pay period ending July 25, 2020, shows that DRMC deducted 12 hours from Carino’s accrued PTO and used the PTO to make up for the 12-hour shift he did not work. Carino was paid for those twelve hours at his base hourly rate of \$20.47/hour. Similarly, on June 8, 2020, Carino was scheduled for a 12-hour shift. Shortly before

his shift was scheduled to begin, DRMC notified him that he was docked for the day. His accrued PTO was used to cover 10.5 of the twelve hours that he was docked.

All docked hours are paid at Carino's base hourly rate. As a result, he does not receive the overtime premium pursuant to the AWS for the docked hours that would otherwise have put him over 40 hours for a week. More importantly, given this practice, he should have been paid overtime for all hours over 8 in a day that he worked since the inception of this practice because AWS are legal only to the extent that they represent a regular schedule. The regularity of Carino's schedule and the schedules of others is compromised by the practice of frequently removing employees from the work schedule for full (or partial) day at a time.

On some days on which Carino is scheduled to work, Carino is also placed "on-call." Shortly before his scheduled shift, DRMC notifies Carino that he will be on-call for part of the shift and docked for the remainder. On such days, DRMC pays Carino \$3 for every hour that he is on-call. In or around February 2020, DRMC began allowing employees to be on-call for no more than four hours in a shift. The employee is then docked for the remaining 8 hours of the 12-hour shift (4 hours on call, 8 hours docked). DRMC will then pay Carino from his earned PTO, by auto-deducting 8 hours of his PTO to pay Carino for the eight hours that he was scheduled to work, but which were subsequently docked.

On some days on which Carino works his regularly scheduled shift, DRMC requires Carino to take a one-hour meal period instead of his regularly scheduled half-hour meal period. On such days, Carino is off-the-clock for 30 minutes. Then, DRMC auto-deducts the remaining 30 minutes from Carino's accrued PTO to cover the half hour of docked time in the middle of Carino's workday.

On other days, DRMC docks an employee for the last hour of a shift. The employee is sent home one hour before the end of his or her scheduled shift and is paid for 11 hours of work. The remaining hour of the 12-hour scheduled shift is auto-deducted from the employee's accrued PTO at his base hourly rate.

By auto deducting Carino's PTO to pay him for scheduled hours that are not worked, DRMC is violating the AWS and thereby failing to pay Plaintiff the correct minimum and overtime wages for all hours worked.

The regular failure of DRMC to comply with the approved AWS invalidates the AWS. As a result, DRMC should have paid Carino overtime according to Industrial Welfare Commission (IWC) Wage Order 5-2001(3)(A)(1) and Labor Code § 510 which require an employer to compensate an employee overtime at not less than:

- One and one-half times the employee's regular rate of pay for all hours worked in excess of eight hours up to and including 12 hours in any workday or in excess of 40 hours in a week, and for the first eight hours worked on the seventh consecutive day of work in a workweek; and
- 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 on the seventh consecutive day of work in a workweek.

DRMC did not pay all overtime to Carino and other similarly situated employees due to DRMC's systematic failure to adhere to the AWS in violation of Wage Order 5-2001(3)(A)(1) and Labor Code §§ 510, 1194.

Because DRMC failed to pay all overtime wages properly since it implemented its docking system, DRMC is liable for penalties per aggrieved employees of \$100 per pay period for the first violation within the statutory period, and \$200 per pay period for each additional violation.

Mandatory PTO (Violation of Sick Leave Law and DRMC Vacation Policy)

Pursuant to Labor Code § 245.5(b), all employers in California are required to provide paid sick leave to their employees, unless the employee is exempt from coverage, which Carino and other similarly aggrieved employees are not. Employees who work in California for 30 or more days within a year from the commencement of employment are entitled to paid sick leave on the 90th day of employment. Labor Code § 246. Pursuant to Labor Code § 246.5(a), an employer is to make sick leave pay available for the following purposes:

- (1) Diagnosis, care, or treatment of an existing health condition of, or preventative care for, an employee or an employee's family member.
- (2) For an employee who is a victim of domestic violence, sexual assault, or stalking ...

An employer must provide an employee three days or 24 hours of sick leave to be used for the purposes stated above. Cal. Lab. Code § 246. Paid sick leave may be provided as part of a paid leave policy or paid time off policy so long as the "employer makes available an amount of leave applicable to employees that may be used for the same purposes under the same conditions as specified in this section." Lab. Code § 246(f).

Because DRMC requires the use of PTO to cover an employee's docked time, employees like Carino do not have the option to choose when to use PTO for sick days. DRMC requires PTO to cover docked hours. In April, Carino was docked and requested that DRMC not use his PTO to cover his docked hours, as he wanted to keep his accrued PTO in order to be able to take a proper vacation. Carino was told that his PTO must be used to cover the docked hours. As a result of DRMC's automatic deduction of PTO, some aggrieved employees are left with less than

three days of available PTO hours, meaning less than three days of available sick leave. The involuntary use of PTO means DRMC is forcing employees to use their sick leave for purposes not delineated in Labor Code §246.5. As a result, they may not have sufficient paid sick leave available when they need it for a qualifying condition. DRMC's auto-deduction of PTO results in a violation of Labor Code § 246 each time it leaves an employee with less than three days of available paid sick leave.

Moreover, DRMC's policy requires employees to have at least 84 hours of earned PTO in order to take a paid vacation. Because DRMC pays Carino from his accrued PTO for scheduled hours that are not worked, Carino and other employees that fall below the 84-hour threshold cannot use earned PTO for a vacation.

Because DRMC failed to comply with California's Paid Sick Leave Law by diminishing aggrieved employees' PTO below that which they were entitled under Labor Code § 246, DRMC is liable for penalties per aggrieved employees of \$100 per pay period for the first violation within the statutory period, and \$200 per pay period for each additional violation.

Meal and Rest Period Premiums Rate Calculation

Wage Order 5-2001(11) provides: "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." Wage Order 5-2001(11)(B), (12)(B) (same re rest periods) (emphasis added); *see also* Labor Code § 226.7(c) ("If an employer fails to provide an employee a meal or rest or recovery period in accordance with a state law, ..., the employer shall pay the employee one additional hour of pay at the employee's **regular rate of compensation** for each work day that the meal or rest period is not provided." (Emphasis added)).

DRMC paid aggrieved employees one hour of pay at the employee's base hourly rate when compensating those employees for violations of the meal and rest period requirements, including in periods when the employee earned a shift differential, on call pay and other forms of compensation required to be factored into an employee's regular rate of compensation.¹

¹ To the extent that Carino was not paid a meal or rest period premium (or to the extent his PTO did not dip below 72 hours) during the relevant one-year period, he may seek the PAGA penalties on behalf of the aggrieved employees who suffered these violations during that period because he suffered other PAGA violations. *Huff v. Securitas Sec. Servs. USA, Inc.*, 23 Cal. App. 5th 745, 761 (Ct. App. 2018), *reh'g denied* (June 13, 2018), *review denied* (Aug. 8, 2018) ("[S]o long as [plaintiff] was affected by at least one of the Labor Code violations alleged in the complaint, he can recover penalties for all the violations he proves.").

As DRMC failed to pay meal and rest period premiums as required by California law when such violations occurred, DRMC is liable for penalties of \$100 per pay period for the first violation within the statutory period, and \$200 per pay period for each additional violation.

DERIVATIVE LABOR CODE VIOLATIONS

Inaccurate Wage Statements

Labor Code § 226(a) provides: “An employer, semimonthly or at the time of each payment of wages, shall furnish to his or her employee, either as a detachable part of the check, draft, or voucher paying the employee’s wages, or separately if wages are paid by personal check or cash, an accurate itemized statement in writing showing (1) gross wages earned, (2) total hours worked by the employee, except as provided in subdivision (j), ... (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, ... 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”

Carino and similarly aggrieved employees received wage statements that did not correctly list all wages earned, including the correct amount of overtime and double time wages due to DRMC’s practice of docking Carino and paying a portion of his wages for hours worked out of his PTO bank, and the correct hourly rate for break period premium wages paid, as discussed above, in violation of Labor Code § 226.

Unpaid Final Wages

Aggrieved employees who worked pursuant to DRMC’s AWS and were docked by DRMC, as well as aggrieved employees who were paid meal and rest period premiums at their base hourly rates and did not incorporate other forms of pay such as shift differentials and on-call pay into their regular rate of pay, have ceased their employment by DRMC. Upon the cessation of that employment relationship (and as prescribed by statute), these aggrieved employees did not receive all wages owed. Namely, said former employees did not receive all wages due to DRMC’s failure to account for all overtime and double time incurred and failure to pay the correct regular rate of pay for premium wages for missed rest and meal periods. Those former employees, upon termination, did not receive all owed wages on the date of termination, or within 72 hours if they resigned. Therefore, DRMC has violated and continue to violate Labor Code Sections 201 and 202, because they have not paid the aforementioned wages and owes PAGA penalties for each pay period in which it failed to pay all final pay upon termination.

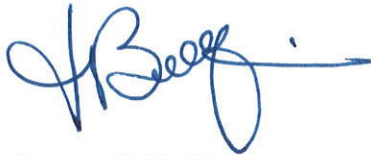
Civil Penalties

As a result of the foregoing, DRMC is liable for civil penalties as provided for by California law. Consequently, Carino and all other aggrieved employees of DRMC are entitled to recover all penalties permitted by the Labor Code and penalties provided for under California law, including but not limited to Labor Code § 2698 *et seq.*

Conclusion

DRMC violated and continues to violate the California law as described above. Carino requests the agency to investigate the above allegations and provide notice of the investigation and findings pursuant to PAGA's provisions. Alternatively, Carino requests that the agency inform him if it does not intend to investigate these violations so that he may file a lawsuit with respect to the allegations discussed in this letter. Thank you for your immediate attention to this matter. If you have any questions, please do not hesitate to contact me at (310) 982-2984.

Sincerely,
MOSS BOLLINGER, LLP



Jeremy F. Bollinger

EXHIBIT B

to Complaint

Carino et al. v. Adventist Health Delano et al.



Moss Bollinger
LLP

JEREMY F. BOLLINGER
310.982.2984/fax: 818.963.5954
jeremy@mossbollinger.com

October 5, 2020

VIA PAGA ONLINE FILING

Secretary Julie A. Su
Labor & Workforce Development Agency
PAGA ADMINISTRATOR
1515 Clay Street, Ste. 801
Oakland, California 94612

**VIA U.S. CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

Adventist Health Delano
dba Delano Regional Medical Center
c/o CSC – Lawyers Incorporating Service
2710 Gateway Oaks Drive, Suite 150N
Sacramento, CA 95833

Re: **AMENDED** Notice pursuant to Labor Code Section 2699.3(a)(1)
Labor Code Private Attorney General Act ("PAGA")

Employers: Adventist Health Delano dba Delano Regional Medical Center (formerly Central California Foundation for Health)

Employee: Justin Carino, on behalf of himself and on behalf of all current and former hourly individuals employed by Adventist Health Delano dba Delano Regional Medical Center

Dear Secretary Su:

Pursuant to the Private Attorney General Act of 2004, California Labor Code § 2698 *et seq.* ("PAGA"), representative employee, Justin Carino ("Carino"), on behalf of himself and all other similarly situated current and former California employees who work(ed) for Adventist Health Delano dba Delano Regional Medical Center (formerly Central California Foundation for Health) ("DRMC") on a non-exempt, hourly basis, gives notice that his employer violated the

California Labor Code within the one year prior to the mailing of this letter. Carino amends his PAGA letter to add a claim for penalties based on a standalone violation of Labor Code section 226 for failure to include the name of the legal entity that employed Carino and other persons employed by DRMC during the year preceding the date of this letter.

**Unpaid Overtime and Double Time Wages Due to DRMC's Failure to Adhere to Its
Alternative Workweek Schedule**

Carino is employed by DRMC at Delano Regional Medical Center in Delano, California. Plaintiff was hired by DRMC in or about 2013 or 2014 as a Certified Nursing Assistant ("CNA"). On or about 2017, Plaintiff became a Licensed Vocational Nurse ("LVN") for DRMC.

According to the California Department of Industrial Relations Alternative Workweek Elections Database, DRMC conducted an election to adopt an alternative workweek schedule ("AWS") in 2000. The AWS was approved in 2000 and then again in 2012. DRMC's AWS provides for employees to work 12-hour shifts seven days out of every two-week period. Full-time 12-hour shift employees are regularly scheduled three 12-hour shifts one week and four 12-hour shifts one week during a regular pay period. Employees working pursuant to the AWS earn double time (2x their base hourly rate) for all hours in excess of twelve hours in a day and overtime (1.5x their base hourly rate) for all hours in excess of forty in a workweek.

DRMC also maintains a Paid Time Off ("PTO") Policy for its employees, including Carino, that is supposed to be used "for leisure, celebration of holidays, short-term illness and other personal needs on a paid basis."

Carino is supposed to regularly work seven 12-hour shifts every two weeks pursuant to DRMC's AWS. At the beginning of each year, Carino is given his schedule for the entire year. His regular work shift begins at 7:30 pm. Not infrequently, on some days that Carino is scheduled to work, including during the one year preceding the date Carino submitted this letter, DRMC phones Carino about two hours before his scheduled shift start time to let him know that he has been "docked," meaning he will not need to report to work that day. DRMC does not pay Carino pursuant to the AWS for the day he is docked. Instead, DRMC deducts from the wages Carino has earned and accrued in PTO and pays him for twelve hours out of his accrued PTO.

For example, on July 15, 2020, Carino was scheduled to work a 12-hour shift. DRMC notified him shortly before his shift was to begin that he would be "docked" for the day, meaning that he would not be needed for the day and that his PTO would be used to pay him for his scheduled hours. Using PTO to cover docked hours is mandatory. Accordingly, Carino did not work that day; however, his wage statement for the pay period ending July 25, 2020, shows that DRMC deducted 12 hours from Carino's accrued PTO and used the PTO to make up for the 12-hour

shift he did not work. Carino was paid for those twelve hours at his base hourly rate of \$20.47/hour. Similarly, on June 8, 2020, Carino was scheduled for a 12-hour shift. Shortly before his shift was scheduled to begin, DRMC notified him that he was docked for the day. His accrued PTO was used to cover 10.5 of the twelve hours that he was docked.

All docked hours are paid at Carino's base hourly rate. As a result, he does not receive the overtime premium pursuant to the AWS for the docked hours that would otherwise have put him over 40 hours for a week. More importantly, given this practice, he should have been paid overtime for all hours over 8 in a day that he worked since the inception of this practice because AWS are legal only to the extent that they represent a regular schedule. The regularity of Carino's schedule and the schedules of others is compromised by the practice of frequently removing employees from the work schedule for full (or partial) day at a time.

On some days on which Carino is scheduled to work, Carino is also placed "on-call." Shortly before his scheduled shift, DRMC notifies Carino that he will be on-call for part of the shift and docked for the remainder. On such days, DRMC pays Carino \$3 for every hour that he is on-call. In or around February 2020, DRMC began allowing employees to be on-call for no more than four hours in a shift. The employee is then docked for the remaining 8 hours of the 12-hour shift (4 hours on call, 8 hours docked). DRMC will then pay Carino from his earned PTO, by auto-deducting 8 hours of his PTO to pay Carino for the eight hours that he was scheduled to work, but which were subsequently docked.

On some days on which Carino works his regularly scheduled shift, DRMC requires Carino to take a one-hour meal period instead of his regularly scheduled half-hour meal period. On such days, Carino is off-the-clock for 30 minutes. Then, DRMC auto-deducts the remaining 30 minutes from Carino's accrued PTO to cover the half hour of docked time in the middle of Carino's workday.

On other days, DRMC docks an employee for the last hour of a shift. The employee is sent home one hour before the end of his or her scheduled shift and is paid for 11 hours of work. The remaining hour of the 12-hour scheduled shift is auto-deducted from the employee's accrued PTO at his base hourly rate.

By auto deducting Carino's PTO to pay him for scheduled hours that are not worked, DRMC is violating the AWS and thereby failing to pay Plaintiff the correct minimum and overtime wages for all hours worked.

The regular failure of DRMC to comply with the approved AWS invalidates the AWS. As a result, DRMC should have paid Carino overtime according to Industrial Welfare Commission

(IWC) Wage Order 5-2001(3)(A)(1) and Labor Code § 510 which require an employer to compensate an employee overtime at not less than:

- One and one-half times the employee's regular rate of pay for all hours worked in excess of eight hours up to and including 12 hours in any workday or in excess of 40 hours in a week, and for the first eight hours worked on the seventh consecutive day of work in a workweek; and
- 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 on the seventh consecutive day of work in a workweek.

DRMC did not pay all overtime to Carino and other similarly situated employees due to DRMC's systematic failure to adhere to the AWS in violation of Wage Order 5-2001(3)(A)(1) and Labor Code §§ 510, 1194.

Because DRMC failed to pay all overtime wages properly since it implemented its docking system, DRMC is liable for penalties per aggrieved employees of \$100 per pay period for the first violation within the statutory period, and \$200 per pay period for each additional violation.

Mandatory PTO (Violation of Sick Leave Law and DRMC Vacation Policy)

Pursuant to Labor Code § 245.5(b), all employers in California are required to provide paid sick leave to their employees, unless the employee is exempt from coverage, which Carino and other similarly aggrieved employees are not. Employees who work in California for 30 or more days within a year from the commencement of employment are entitled to paid sick leave on the 90th day of employment. Labor Code § 246. Pursuant to Labor Code § 246.5(a), an employer is to make sick leave pay available for the following purposes:

- (1) Diagnosis, care, or treatment of an existing health condition of, or preventative care for, an employee or an employee's family member.
- (2) For an employee who is a victim of domestic violence, sexual assault, or stalking ...

An employer must provide an employee three days or 24 hours of sick leave to be used for the purposes stated above. Cal. Lab. Code § 246. Paid sick leave may be provided as part of a paid leave policy or paid time off policy so long as the "employer makes available an amount of leave applicable to employees that may be used for the same purposes under the same conditions as specified in this section." Lab. Code § 246(f).

Because DRMC requires the use of PTO to cover an employee's docked time, employees like Carino do not have the option to choose when to use PTO for sick days. DRMC requires PTO to cover docked hours. In April, Carino was docked and requested that DRMC not use his PTO to

cover his docked hours, as he wanted to keep his accrued PTO in order to be able to take a proper vacation. Carino was told that his PTO must be used to cover the docked hours. As a result of DRMC's automatic deduction of PTO, some aggrieved employees are left with less than three days of available PTO hours, meaning less than three days of available sick leave. The involuntary use of PTO means DRMC is forcing employees to use their sick leave for purposes not delineated in Labor Code §246.5. As a result, they may not have sufficient paid sick leave available when they need it for a qualifying condition. DRMC's auto-deduction of PTO results in a violation of Labor Code § 246 each time it leaves an employee with less than three days of available paid sick leave.

Moreover, DRMC's policy requires employees to have at least 84 hours of earned PTO in order to take a paid vacation. Because DRMC pays Carino from his accrued PTO for scheduled hours that are not worked, Carino and other employees that fall below the 84-hour threshold cannot use earned PTO for a vacation.

Because DRMC failed to comply with California's Paid Sick Leave Law by diminishing aggrieved employees' PTO below that which they were entitled under Labor Code § 246, DRMC is liable for penalties per aggrieved employees of \$100 per pay period for the first violation within the statutory period, and \$200 per pay period for each additional violation.

Meal and Rest Period Premiums Rate Calculation

Wage Order 5-2001(11) provides: "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." Wage Order 5-2001(11)(B), (12)(B) (same re rest periods) (emphasis added); *see also* Labor Code § 226.7(c) ("If an employer fails to provide an employee a meal or rest or recovery period in accordance with a state law, ..., the employer shall pay the employee one additional hour of pay at the employee's **regular rate of compensation** for each work day that the meal or rest period is not provided." (Emphasis added)).

DRMC paid aggrieved employees one hour of pay at the employee's base hourly rate when compensating those employees for violations of the meal and rest period requirements, including in periods when the employee earned a shift differential, on call pay and other forms of compensation required to be factored into an employee's regular rate of compensation.¹

¹ To the extent that Carino was not paid a meal or rest period premium (or to the extent his PTO did not dip below 72 hours) during the relevant one-year period, he may seek the PAGA penalties on behalf of the aggrieved employees who suffered these violations during that period because he suffered other PAGA violations. *Huff v. Securitas Sec. Servs. USA, Inc.*, 23 Cal. App. 5th 745, 761 (Ct. App. 2018), *reh'g denied* (June 13, 2018), *review denied* (Aug. 8, 2018) ("[S]o

As DRMC failed to pay meal and rest period premiums as required by California law when such violations occurred, DRMC is liable for penalties of \$100 per pay period for the first violation within the statutory period, and \$200 per pay period for each additional violation.

Inaccurate Wage Statements

Carino asserts both standalone claims for violations of Labor Code § 226, as well as claims for wage statement penalties that are derivative of his unpaid wages and meal and rest period claims. Labor Code § 226 provides, in part:

(a) An employer, semimonthly or at the time of each payment of wages, shall furnish to his or her employee, either as a detachable part of the check, draft, or voucher paying the employee's wages, or separately if wages are paid by personal check or cash, an accurate itemized statement in writing showing (1) **gross wages earned**, (2) **total hours worked by the employee**, except as provided in subdivision (j), (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 only the last four digits of his or her social security number or an employee identification number other than a social security number, (8) **the name and address of the legal entity that is the employer** and, if the employer is a farm labor contractor, as defined in subdivision (b) of Section 1682, the name and address of the legal entity that secured the services of 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 and, beginning July 1, 2013, if the employer is a temporary services employer as defined in Section 201.3, the rate of pay and the total hours worked for each temporary services assignment.

...

(e) (1) An employee suffering injury as a result of a knowing and intentional failure by an employer to comply with subdivision (a) is entitled to recover the greater of all actual damages or fifty dollars (\$50) for the initial pay period in which a violation occurs and one hundred dollars (\$100) per employee for each violation in a subsequent pay period, not to exceed an aggregate penalty of four thousand dollars

long as [plaintiff] was affected by at least one of the Labor Code violations alleged in the complaint, he can recover penalties for all the violations he proves.”).

(\$4,000), and is entitled to an award of costs and reasonable attorney's fees.

...

(2)(B) An employee is deemed to suffer injury for purposes of this subdivision if the employer fails to provide accurate and complete information as required by any one or more of items (1) to (9), inclusive, of subdivision (a) and the employee cannot promptly and easily determine from the wage statement alone one or more of the following:

(i) The amount of the gross wages or net wages paid to the employee during the pay period or any of the other information required to be provided on the itemized wage statement pursuant to items (2) to (4), inclusive, (6), and (9) of subdivision (a).

(ii) Which deductions the employer made from gross wages to determine the net wages paid to the employee during the pay period. Nothing in this subdivision alters the ability of the employer to aggregate deductions consistent with the requirements of item (4) of subdivision (a).

(iii) The name and address of the employer and, if the employer is a farm labor contractor, as defined in subdivision (b) of Section 1682, the name and address of the legal entity that secured the services of the employer during the pay period. ...

Labor Code § 226 (emphasis added). Carino and similarly employed Californians receive wage statements every two weeks. Beginning December 31, 2019, when the name of the legal entity that employs Carino and all other employees who work at DRMC changed from Central California Foundation for Health to Adventist Health Delano, Carino and all other employees of DRMC received inaccurate wage statements that did not list the correct name of their employer. On July 31, 2020, Carino received his first wage statement that listed Adventist Health Delano as his employer.

In addition, during the one year prior to date of Carino's original PAGA letter, Carino and similarly aggrieved employees received wage statements that did not correctly list all wages earned, including the correct amount of overtime and double time wages due to DRMC's practice of docking Carino and paying a portion of his wages for hours worked out of his PTO bank, and the correct hourly rate for break period premium wages paid, as discussed above, in violation of Labor Code § 226.

Accordingly, DRMC is liable for penalties per aggrieved employees of \$100 per pay period for the first wage statement violation within the statutory period, and \$200 per pay period for each additional violation.

OTHER DERIVATIVE LABOR CODE VIOLATIONS

Unpaid Final Wages

Aggrieved employees who worked pursuant to DRMC's AWS and were docked by DRMC, as well as aggrieved employees who were paid meal and rest period premiums at their base hourly rates and did not incorporate other forms of pay such as shift differentials and on-call pay into their regular rate of pay, have ceased their employment by DRMC. Upon the cessation of that employment relationship (and as prescribed by statute), these aggrieved employees did not receive all wages owed. Namely, said former employees did not receive all wages due to DRMC's failure to account for all overtime and double time incurred and failure to pay the correct regular rate of pay for premium wages for missed rest and meal periods. Those former employees, upon termination, did not receive all owed wages on the date of termination, or within 72 hours if they resigned. Therefore, DRMC has violated and continue to violate Labor Code Sections 201 and 202, because they have not paid the aforementioned wages and owes PAGA penalties for each pay period in which it failed to pay all final pay upon termination.

Civil Penalties

As a result of the foregoing, DRMC is liable for civil penalties as provided for by California law. Consequently, Carino and all other aggrieved employees of DRMC are entitled to recover all penalties permitted by the Labor Code and penalties provided for under California law, including but not limited to Labor Code § 2698 *et seq.*

Conclusion

DRMC violated and continues to violate the California law as described above. Carino requests the agency to investigate the above allegations and provide notice of the investigation and findings pursuant to PAGA's provisions. Alternatively, Carino requests that the agency inform him if it does not intend to investigate these violations so that he may file a lawsuit with respect to the allegations discussed in this letter. Thank you for your immediate attention to this matter. If you have any questions, please do not hesitate to contact me at (310) 982-2984.

Sincerely,
MOSS BOLLINGER, LLP



Jeremy F. Bollinger