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15 Attorneys for Plaintiff,
16 DONALD E. DELAHUNT, and all others similarly situated

17 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

18 **FOR THE COUNTY OF NEVADA**

19 **(UNLIMITED JURISDICTION)**

20 DONALD E. DELAHUNT, as an "aggrieved
21 employee" on behalf of himself and other
22 similarly situated "aggrieved employees" under
23 the Labor Code Private Attorneys General Act of
24 2004,

25 *Plaintiff,*

26 vs.

27 RALEY'S, a California corporation; and DOES
28 1-50, inclusive,

Defendants.

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF NEVADA
DEC 23 2021

JASON B. GALKIN
EXECUTIVE OFFICER & CLERK
By: K. JEFFERSON, Deputy Clerk

FILED BY FACSIMILE

Case No. CU21-085869

**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



1 Plaintiff, Donald E. Delahunt (hereafter “Plaintiff” or “Delahunt”), on behalf of himself,
2 the State of California, and the other Aggrieved Employees, complains and alleges as follows:

3 **I. INTRODUCTION**

4 1. Plaintiff brings this representative action based on alleged violations of the
5 California Labor Code and Industrial Welfare Commission Order No. 7-2001 (hereafter “the
6 Wage Order”), against Defendants Raley's, a California corporation, and DOES 1-50, inclusive
(collectively “Defendants”).

7 2. As set forth in more detail below, Plaintiff alleges that Defendants are liable to
8 him, the State of California, and the Aggrieved Employees (defined below), for civil penalties
9 and other related relief. These claims are based on Defendants’ failures to:

- 10 (A) Pay all earned and unused vacation pay;
11 (B) Issue only accurate and complete itemized wage statements;
12 (C) Timely pay wages during employment; and
13 (D) Timely pay wages upon termination of employment.

14 Accordingly, Plaintiff now seeks to recover civil penalties and related relief through this
15 representative action.

16 **II. THE PARTIES**

17 3. Plaintiff Donald E. Delahunt is resident of California.

18 4. Defendant Raley's is a corporation organized and existing under the laws of
19 California and also a citizen of California based on Plaintiff’s information and belief.

20 5. Plaintiff is ignorant of the true names, capacities, relationships, and extents of
21 participation in the conduct alleged herein of the Defendants sued as DOES 1-50, inclusive, but
22 is informed and believes and thereon alleges that said Defendants are legally responsible for the
23 wrongful conduct alleged herein and therefore sues these Defendants by such fictitious names.
24 Plaintiff will amend the Complaint to allege the true names and capacities of the DOE Defendants
25 when ascertained.

26 6. The “Aggrieved Employees” are all individuals the Defendants have employed or
27 otherwise contracted with in California as exempt and nonexempt employees, including clerks,
28 individuals performing work comparable to the aforementioned, and individuals in similar
positions during the period beginning one year before the Plaintiff’s notice of August 4, 2021 to
the California Labor and Workforce Development Agency and ending on the date judgment is



1 entered.

2 7. Plaintiff is informed and believes and thereon alleges that, at all relevant times
3 herein, all Defendants were the agents, employees and/or servants, masters or employers of the
4 remaining defendants, and in doing the things hereinafter alleged, were acting within the course
5 and scope of such agency or employment, and with the approval and ratification of each of the
6 other Defendants.

7 8. At all relevant times, in perpetrating the acts and omissions alleged herein,
8 Defendants, and each of them, acted pursuant to and in furtherance of a policy, practice, or a lack
9 of a practice which resulted in Defendants not paying Plaintiff and the other Aggrieved
10 Employees in accordance with applicable California labor laws as alleged herein.

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

16 **III. FACTUAL ALLEGATIONS**

17 10. IWC Wage Order 7-2001 (“the Wage Order”) applies to “all persons employed in
18 the mercantile industry whether paid on a time, piece rate, commission, or other basis” Wage
19 Order, § 1. The Wage Order defines “Mercantile Industry” to mean “any industry, business, or
20 establishment operated for the purpose of purchasing, selling, or distributing goods are
21 commodities at wholesale or retail; or for the purpose of renting goods or commodities.” Wage
22 Order, § 2(H). At all relevant times during the applicable limitations period, the Raley's
23 “Employers, Delahunt, and all of the Aggrieved Employees were covered by the Wage Order
24 because the Defendants operated, and Delahunt, and all of the Aggrieved Employees worked for,
25 one or more establishments operated as grocery stores. Accordingly, Delahunt and all of the other
26 Aggrieved Employees are entitled to the protections the Wage Order provides.

27 11. On approximately November of 2018, the Defendants began to employ Delahunt
28 in Grass Valley in Nevada County, California in the position of clerk. The Defendants
continuously employed him in that capacity until on or about June 24, 2021 when his employment
ended.

12. At all relevant times, the Defendants issued wages to Delahunt and all of the other



1 Aggrieved Employees on a weekly (52 / year) basis and paid them by the hour, salary,
2 commission, or piece rate. At all relevant times, the Defendants classified Delahunt and all of the
3 other Aggrieved Employees as employees whether or not entitled to the protections of the Labor
4 Code and the Wage Order.

5 13. At all relevant times, the Defendants failed to pay all earned but unused vacation
6 pay to Delahunt and all of the other Aggrieved Employees at their final rates of pay. Under the
7 policies and practices of the Defendants, Delahunt and all of the other Aggrieved Employees
8 earned the following forms of vacation pay during employment: vacation, and paid time off
9 (PTO). Under such policies, these accrued but unused forms of vacation pay were subject to forfeit
10 at the conclusion of the employment relationship. The Defendants willfully failed to pay out at
11 the end of the employment relationship and at the correct final rates of pay the unused vacation
12 pay Delahunt and the Aggrieved Employees earned and accrued. During the employment
13 relationship between the Defendants and Delahunt and the Aggrieved Employees, the Defendants
14 paid out accrued vacation pay at lower rates than the regular rates of pay of Delahunt and the
15 Aggrieved Employees.

16 14. At all relevant times, the Defendants failed to issue to Delahunt and all of the other
17 Aggrieved Employees complete and accurate wage statements that state all hours worked at the
18 correct rates of pay, and all wages earned. The Defendants knowingly and intentionally failed to
19 state on the wage statements they issued to Delahunt and all of the other Aggrieved Employees
20 the unpaid wages discussed above. The wage statements fail to state all earned vacation pay, and
21 related information. The Defendants failed to maintain records of the accrued, but unused
22 vacation pay of Delahunt and the Aggrieved Employees that the Defendants owed to Delahunt
23 and the Aggrieved Employees at their final pay rates at the end of the employment relationship.

24 15. At all relevant times, the Defendants also failed to timely pay Delahunt and all of
25 the other Aggrieved Employees all earned wages as described above during and at the conclusion
26 of employment. The Defendants willfully failed to pay out at the end of the employment
27 relationship and at the correct final rates of pay the unused vacation pay Delahunt and the
28 Aggrieved Employees earned and accrued. Instead, the Defendants willfully paid out less than
the amount of accrued and unused vacation pay and paid it out at lower rates of pay than the final
rates of pay of Delahunt and the Aggrieved Employees.

16. For the reasons stated herein, Plaintiff alleges that as a result of Defendants'



unlawful practice and policies, Plaintiff and the Aggrieved Employees were:

- A. Not paid all wages earned, including, but not limited to, vacation wages and PTO;
- B. Not provided with accurate and complete wage statements; and
- C. Not timely paid all earned and unpaid wages during their employment with Defendants and at the time such employment ended.

IV. FIRST (AND ONLY) CAUSE OF ACTION

CIVIL PENALTIES

(Lab. Code §§ 2698, *et seq.*)

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

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

18. At all relevant times, Plaintiff and the Aggrieved Employees have been all employees whether or not entitled to the protections of both the Labor Code and the Wage Order.

A. FORFEITURE OF VACATION PAY

19. Section 227.3 of the Labor Code states that, unless otherwise stipulated by a collective bargaining agreement, whenever a contract of employment or employer policy provides for paid vacations and an employee is terminated without having fully utilized his vested vacation time, all vested vacation must be paid to the employee at his final rate in accordance with such contract of employment or employer policy respecting vacation eligibility or time served. In addition, the statute prohibits an employment contract or employer policy from providing for forfeiture of such vested vacation time upon an employee's termination of employment, regardless of the reason for termination. (See *Suastez v. Plastic Dress-Up Co.* (1982) 31 Cal.3d 774, [183 Cal.Rptr. 846, 646 P.2d 122 (1982)].)

20. The California Supreme Court has examined the terms under which an employee acquires a vested right to vacation benefits that is protected against forfeiture. The Supreme Court concluded that a "proportionate right to a paid vacation 'vests' as the labor is rendered." Thus, an employee is entitled to a pro rata share of vacation pay upon termination of employment even though he has not completed all of the service requirements specified in the employer's policy or plan.

21. An employer should never, by reason of the employee's termination, attempt to



divest or forfeit any portion of the vacation benefits in which the employee has acquired a vested interest pursuant to the terms of the employer's policy or agreement.

22. A vacation policy that provides for the forfeiture of vacation pay that is not used by a specified date, such as an employee's anniversary date, is impermissible under California law. Courts have held that such "use-it-or-lose-it policies" result in forfeitures of vested vacation pay and thus transgress the requirements of Labor Code Section 227.3. Such policies do not permit employees to carry over vacation time from one year to the next and do not allow employees to receive vacation pay in lieu of taking vacation time off.

23. The DLSE's enforcement policy permits employers to exclude employees from a vacation policy during a specified period of time at the beginning of employment. This could apply to a probationary or introductory period or even the first year of employment. If the policy is properly drafted, employees will not be entitled to prorated vacation benefits if they separate from the employer for any reason during the probationary period or "initial employment." (D.L.S.E. Operations and Procedures Manual § 7(a).) However, such an exclusion will be recognized only if it is not found to be a "subterfuge." The Division will deem a subterfuge to exist if vacation benefits are implicitly earned or accrued during the waiting period. For example, if a policy provides that employees do not earn any vacation during their first year of employment, but earn four weeks' vacation during the second year and are reduced to two weeks' vacation the third year, the Division will contend that the policy involves a subterfuge. This is based on the Division's position that the policy, when viewed as a whole, makes it clear that two of the four weeks' vacation attributed to the second year are actually earned in the first years. In a case where such a subterfuge is found, employees who separate during the so-called "waiting period" (i.e., the first year of employment in the example) will be entitled to prorated vacation pay.

24. The Division takes the position that vacation pay for a terminating employee must be prorated on a daily basis and must be paid at the final rate of pay in effect as of the date of the separation. (See D.L.S.E. Operations and Procedures Manual § 8; D.L.S.E. Enforcement Policies and Interpretations Manual § 13.3 (1998); Letter of Chief Deputy Labor Commissioner Albert J. Reyff (Oct. 28, 1986).)

25. The Defendants maintained vacation pay policies and practices with accrual components that violate Labor Code § 227.3 based on the California Supreme Court's decision in *Suastez v. Plastic Dress-Up Co.*, supra. The Defendants' vacation policy fails to provide for



1 proportionate vacation pay accruals as employees render labor and causes employees to forfeit
2 their vested rights to vacation pay. Under the policies and practices of the Defendants, Delahunt
3 and all of the other Aggrieved Employees earned the following forms of vacation pay during
4 employment: vacation, and paid time off (PTO). Under such policies, these accrued but unused
5 forms of vacation pay were subject to forfeit at the conclusion of the employment relationship.
6 Consequently, the Aggrieved Employees are entitled to recover vacation pay.

7 26. In *Suastez*, the defendant-employer “refused to pay vacation benefits to anyone
8 whose employment was terminated before . . . [his or her employment] anniversary date” and
9 refused to pay the plaintiff-employee a pro rata share of his vacation pay for the time period
10 between his last employment anniversary date and his termination date. (*Id.* at 776–77.) In finding
11 for the plaintiff-employee, the Court held that “a proportionate right to a paid vacation ‘vests’ as
12 the labor is rendered” and that Labor Code § 227.3 protects that right from forfeiture. (*Id.* at 784.)

13 27. It is especially worth noting that, in rejecting the contention that the plaintiff-
14 employee had no vested right to vacation pay until his anniversary date, the Court specifically
15 stated: “The right to some share of vacation pay vests, like pension rights, on acceptance of
16 employment. Nonperformance of a condition subsequent, such as [defendant-employer’s]
17 requirement that employees remain until their anniversary, can, at most, result in a forfeiture of
18 the right to a vacation; *it cannot prevent that right from vesting.*” (*Id.* at 780–81, (italics added).)

19 28. Like the vacation pay policy the Court rejected in *Suastez*, the Defendants’
20 vacation pay policies also fail to provide for proportionate accruals. The Defendants willfully
21 failed to pay out at the end of the employment relationship and at the correct final rates of pay the
22 unused vacation pay Delahunt and the Aggrieved Employees earned and accrued. During the
23 employment relationship between the Defendants and Delahunt and the Aggrieved Employees,
24 the Defendants paid out accrued vacation pay at lower rates than the regular rates of pay of
25 Delahunt and the Aggrieved Employees. Accordingly, Delahunt now seeks an award of civil
26 penalties against the Defendants for these Labor Code violations that the Defendants have
27 committed against him and all of the other Aggrieved Employees as follows: \$100 for each
28 aggrieved employee for each initial violation of Labor Code § 227.3, and \$200 for each aggrieved
employee for each subsequent violation, per pay period (penalties set by Labor Code
§ 2699(f)(2)).

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1 **B. FAILURE TO PROVIDE ACCURATE AND COMPLETE WRITTEN WAGE**
2 **STATEMENTS**

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

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

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

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

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

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

22 E. The number of piece-rate units earned and the piece rate.

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

25 32. As alleged herein, at all relevant times during the applicable limitations period,
26 Defendants violated California Labor Code section 226 because they did not properly and
27 accurately itemize each employee’s gross wages earned, net wages earned, the total hours worked,
28 the corresponding number of hours worked at each rate by the employee and other requirements



1 of California Labor Code section 226. Defendants failed to state in the wage statements they
2 issued to Plaintiff and the other Aggrieved Employees all vacation wages earned (as described
3 above).

4 33. Defendants' failure to provide Plaintiff and the other Aggrieved Employees with
5 accurate wage statements was knowing and intentional. Defendants had the ability to provide
6 Plaintiff and the other Aggrieved Employees with accurate wage statements but intentionally
7 provided wage statements that Defendants knew were not accurate.

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

19 **C. UNTIMELY WAGES DURING EMPLOYMENT**

20 35. Labor Code § 204 states:

- 21 (a) All wages, other than those mentioned in Section 201,
22 201.3, 202, 204.1, or 204.2, earned by any person in any
23 employment are due and payable twice during each
24 calendar month, on days designated in advance by the
25 employer as the regular paydays. Labor performed
26 between the 1st and 15th days, inclusive, of any calendar
27 month shall be paid for between the 16th and the 26th day
28 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.



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

11 (c) However, when employees are covered by a collective
12 bargaining agreement that provides different pay
13 arrangements, those arrangements shall apply to the
14 covered employees.

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

20 36. Defendants failed to compensate Plaintiff and the Aggrieved Employees for all
21 earned vacation pay at the correct rates of pay. As a result, Defendants failed to timely pay all
22 earned vacation wages due during employment within the time periods set by California Labor
23 Code section 204.

24 **D. UNTIMELY FINAL WAGES**

25 37. Labor Code § 201 provides that all earned and unpaid wages of an employee who
26 is discharged are due and payable immediately at the time of discharge.

27 38. Labor Code § 202 provides that all earned and unpaid wages of an employee who
28 quits after providing at least 72-hours notice before quitting are due and payable at the time of
quitting and that all earned and unpaid wages of an employee who quits without providing at least
72-hours notice before quitting are due and payable within 72 hours.

39. By failing to pay earned vacation wages to Plaintiff and the Aggrieved Employees,
Defendants failed to timely pay them all earned and unpaid wages in violation of Labor Code
§ 201 or § 202.

40. Plaintiff is informed and believes that Defendants' failures to timely pay Plaintiff
and the Aggrieved Employees all of their earned and unpaid wages (described above) have been



1 willful in that, at all relevant times, Defendants have deliberately maintained policies and
2 practices that violate the requirements of the Labor Code and the Wage Order, even though at all
3 relevant times, they have had the ability to comply with those legal requirements.

4 **E. CIVIL PENALTIES SOUGHT**

5 41. During the applicable time period, Defendants violated California Labor Code
6 §§ 201, 202, 203, 204, 226, 227.3, and related Labor Code statutes.

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

10 43. Pursuant to California Labor Code §§ 2699(a) and (f), Plaintiff and the Aggrieved
11 Employees are entitled to recover civil penalties for each of the Defendants' violations of
12 California Labor Code §§ 201, 202, 203, 204, 226, and 227.3, and related Labor Code statutes
13 during the applicable limitations period in the following amounts:

14 A. For violations of California Labor Code § 204, one hundred dollars
15 (\$100.00) for each aggrieved employee for each initial violation and two hundred dollars
16 (\$200.00) for each aggrieved employee for each subsequent, willful or intentional violation
17 (penalty amounts established by California Labor Code § 210).

18 B. For violations of California Labor Code § 226, two hundred fifty dollars
19 (\$250.00) per employee for initial violation and one thousand dollars (\$1,000.00) per employee
20 for each subsequent violation (penalty amounts established by California Labor Code § 226.3).

21 C. For violations of California Labor Code §§ 201, 202, 203, 227.3, one
22 hundred dollars (\$100.00) for each aggrieved employee per pay period for each initial violation
23 and two hundred dollars (\$200.00) for each aggrieved employee per pay period for each
24 subsequent violation (penalty amounts established by California Labor Code § 2699(f)(2)).

25 **F. NOTICE TO THE STATE OF CALIFORNIA AND DEFENDANTS**

26 44. Plaintiff has complied with the procedures for bringing suit specified in California
27 Labor Code § 2699.3. By letter dated August 4, 2021, Plaintiff gave written notice by certified
28 mail to the Labor and Workforce Development Agency ("LWDA") and 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 Plaintiff's letter to the LWDA
dated August 4, 2021 is attached hereto as **Exhibit A**. The LWDA has not responded to Plaintiff's



1 letter.

2 45. Pursuant to California Labor Code § 2699(g), Plaintiff and the Aggrieved
3 Employees are entitled to an award of civil penalties, reasonable attorneys' fees, and costs in
4 connection with their claims for civil penalties.

5 **V. PRAYER FOR RELIEF**

6 46. WHEREFORE, Plaintiff, on behalf of himself and the Aggrieved Employees,
7 prays for relief and judgment against Defendants as follows:

- 8 A. Civil penalties;
9 B. Costs of suit;
10 C. Reasonable attorneys' fees; and
11 D. Such other relief as the Court deems just and proper.

12 **VI. DEMAND FOR JURY TRIAL**

13 Plaintiff, on behalf of himself and all other Aggrieved Employees, hereby demands a jury
14 trial on all issues so triable.

15 Respectfully submitted,

16 THE SPIVAK LAW FIRM

17 Dated: December 22, 2021

18 By: 
19 DAVID G. SPIVAK, Attorneys for Plaintiff,
20 DONALD E. DELAHUNT, and all others
21 similarly situated
22
23
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25
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27
28



EXHIBIT A



SPIVAK LAW

SENT BY ELECTRONIC SUBMISSION, CERTIFIED MAIL, AND EMAIL

August 4, 2021

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

Re: Donald E. Delahunt / Raley's

To Whom It May Concern:

Pursuant to the Labor Code Private Attorneys General Act of 2004, Labor Code sections 2698, *et seq.*, Donald E. Delahunt (hereafter "Delahunt" or "Complainant") provides notice that Raley's, a California corporation, and related entities (collectively "the Raley's Employers" or "the Employers") violated his rights and those of all other individuals the Raley's Employers have employed or otherwise contracted with in California as exempt and nonexempt employees, including clerks, individuals performing work comparable to the aforementioned, and individuals in similar positions (hereafter the "Aggrieved Employees") under Labor Code sections 226, 203, 201, 202, 204, 221, 227.3, 1174, and 1198. On behalf of himself and all other Aggrieved Employees, Delahunt hereby provides this notice to the Labor & Workforce Development Agency and the Raley's Employers and their agents and representatives.

At all relevant times, the Raley's Employers have employed persons, conducted business, and engaged in illegal payroll practices and policies, throughout California. Delahunt and all of the other Aggrieved Employees are "employees" within the meaning of Industrial Welfare Commission Order No. 7-2001

(hereafter “the Wage Order”) section 2, subdivision (E) and “Aggrieved Employees” within the meaning of Labor Code section 2699(c).

Statement of Facts

In November of 2018, the Raley's Employers began to employ Delahunt in Grass Valley in Nevada County, California in the position of clerk. The Raley's Employers continuously employed him in that capacity until on or about June 24, 2021 when his employment ended.

At all relevant times, the Raley's Employers issued wages to Delahunt and all of the other Aggrieved Employees on a weekly (52 paychecks/year) basis and paid them by the hour, salary, commission, or piece rate.

The Raley's Employers failed to pay all earned but unused vacation pay to Delahunt and all of the other Aggrieved Employees at their final rates of pay. Under the policies and practices of the Raley's Employers, Delahunt and all of the other Aggrieved Employees earned the following forms of vacation pay during employment: vacation, paid time off (PTO). Under such policies, these accrued but unused forms of vacation pay were subject to forfeit at the conclusion of the employment relationship. The Raley's Employers willfully failed to pay out at the end of the employment relationship and at the correct final rates of pay the unused vacation pay Delahunt and the Aggrieved Employees earned and accrued. During the employment relationship between the Raley's Employers and Delahunt and the Aggrieved Employees, the Raley's Employers paid out accrued vacation pay at lower rates than the regular rates of pay of Delahunt and the Aggrieved Employees.

The Raley's Employers unlawfully deducted wages belonging to Delahunt and all of the other Aggrieved Employees. The Raley's Employers arbitrarily deducted during and at the end of the employment relationship the unused vacation pay Delahunt and the Aggrieved Employees earned and accrued during their employment.

At all relevant times, the Raley's Employers failed to issue to Delahunt and all of the other Aggrieved Employees complete and accurate wage statements that state all hours worked at the correct rates of pay, and all wages earned. The

Raley's Employers knowingly and intentionally failed to state on the wage statements they issued to Delahunt and all of the other Aggrieved Employees the unpaid wages discussed above. The wage statements fail to state all earned vacation pay. The Raley's Employers failed to maintain records of the accrued, but unused vacation pay of Delahunt and the Aggrieved Employees that the Raley's Employers owed to Delahunt and the Aggrieved Employees at their final pay rates at the end of the employment relationship.

The Raley's Employers also failed to timely pay Delahunt and all of the other Aggrieved Employees all earned wages as described above during and at the conclusion of employment. The Raley's Employers willfully failed to pay out at the end of the employment relationship and at the correct final rates of pay the unused vacation pay Delahunt and the Aggrieved Employees earned and accrued. Instead, the Raley's Employers willfully paid out less than the amount of accrued and unused vacation pay and paid it out at lower rates of pay than the final rates of pay of Delahunt and the Aggrieved Employees.

The Raley's Employers failed to maintain accurate employee records of Delahunt and all of the other Aggrieved Employees. The Raley's Employers failed to maintain records of the accrued, but unused vacation pay of Delahunt and the Aggrieved Employees.

For the reasons stated herein, Delahunt alleges the following violations of the Labor Code and the Wage Order on behalf of himself and all of the other Aggrieved Employees:

- (a) The Raley's Employers failed to pay all earned but unused vacation pay to Delahunt and all of the other Aggrieved Employees at their final rates of pay;
- (b) The Raley's Employers unlawfully deducted wages belonging to Delahunt and all of the other Aggrieved Employees;
- (c) The Raley's Employers knowingly and intentionally failed to provide Delahunt and all of the other Aggrieved Employees with accurate wage statements;
- (d) The Raley's Employers willfully failed to timely pay Delahunt and all of the other Aggrieved Employees all earned and unpaid wages

during their employment with the Raley's Employers and when their employment ended; and

- (e) The Raley's Employers failed to maintain accurate employment records pertaining to Delahunt and all of the other Aggrieved Employees.

Accordingly, Delahunt now seeks civil penalties on behalf of himself and all of the other Aggrieved Employees based on the Raley's Employers' alleged violations of the Labor Code and the Wage Order.

The Wage Order

The Wage Order applies to "all persons employed in the mercantile industry whether paid on a time, piece rate, commission, or other basis." Wage Order, § 1. The Wage Order defines "Mercantile Industry" to mean, "any industry, business, or establishment operated for the purpose of purchasing, selling, or distributing goods or commodities at wholesale or retail; or for the purpose of renting goods or commodities." Wage Order, § 2(H). At all relevant times during the applicable limitations period, the Raley's "Employers, Delahunt, and all of the Aggrieved Employees were covered by the Wage Order because the Raley's Employers operated, and Delahunt, and all of the Aggrieved Employees worked for, one or more establishments operated as grocery stores. Accordingly, Delahunt and all of the other Aggrieved Employees are entitled to the protections the Wage Order provides.

Forfeiture of Vacation Pay **(Lab. Code § 227.3)**

Section 227.3 of the Labor Code states that, unless otherwise stipulated by a collective bargaining agreement, whenever a contract of employment or employer policy provides for paid vacations and an employee is terminated without having fully utilized his vested vacation time, all vested vacation must be paid to the employee at his final rate in accordance with such contract of employment or employer policy respecting vacation eligibility or time served. In addition, the statute prohibits an employment contract or employer policy from providing for forfeiture of such vested vacation time upon an employee's

termination of employment, regardless of the reason for termination. (See *Suastez v. Plastic Dress-Up Co.* (1982) 31 Cal.3d 774, [183 Cal.Rptr. 846, 646 P.2d 122 (1982)].)

The California Supreme Court has examined the terms under which an employee acquires a vested right to vacation benefits that is protected against forfeiture. The Supreme Court concluded that a “proportionate right to a paid vacation ‘vests’ as the labor is rendered.” Thus, an employee is entitled to a pro rata share of vacation pay upon termination of employment even though he has not completed all of the service requirements specified in the employer’s policy or plan.

An employer should never, by reason of the employee’s termination, attempt to divest or forfeit any portion of the vacation benefits in which the employee has acquired a vested interest pursuant to the terms of the employer’s policy or agreement.

A vacation policy that provides for the forfeiture of vacation pay that is not used by a specified date, such as an employee’s anniversary date, is impermissible under California law. Courts have held that such “use-it-or-lose-it policies” result in forfeitures of vested vacation pay and thus transgress the requirements of Labor Code Section 227.3. Such policies do not permit employees to carry over vacation time from one year to the next and do not allow employees to receive vacation pay in lieu of taking vacation time off.

The DLSE’s enforcement policy permits employers to exclude employees from a vacation policy during a specified period of time at the beginning of employment. This could apply to a probationary or introductory period or even the first year of employment. If the policy is properly drafted, employees will not be entitled to prorated vacation benefits if they separate from the employer for any reason during the probationary period or “initial employment.” (D.L.S.E. Operations and Procedures Manual § 7(a).) However, such an exclusion will be recognized only if it is not found to be a “subterfuge.” The Division will deem a subterfuge to exist if vacation benefits are implicitly earned or accrued during the waiting period. For example, if a policy provides that employees do not earn any vacation during their first year of employment, but earn four weeks’ vacation during the second year and are reduced to two weeks’ vacation the third year, the

Division will contend that the policy involves a subterfuge. This is based on the Division's position that the policy, when viewed as a whole, makes it clear that two of the four weeks' vacation attributed to the second year are actually earned in the first years. In a case where such a subterfuge is found, employees who separate during the so-called "waiting period" (i.e., the first year of employment in the example) will be entitled to prorated vacation pay.

The Division takes the position that vacation pay for a terminating employee must be prorated on a daily basis and must be paid at the final rate of pay in effect as of the date of the separation. (See D.L.S.E. Operations and Procedures Manual § 8; D.L.S.E. Enforcement Policies and Interpretations Manual § 13.3 (1998); Letter of Chief Deputy Labor Commissioner Albert J. Reyff (Oct. 28, 1986).)

The Raley's Employers maintained vacation pay policies and practices with accrual components that violate Labor Code § 227.3 based on the California Supreme Court's decision in *Suastez v. Plastic Dress-Up Co.*, supra. The Raley's Employers' vacation policy fails to provide for proportionate vacation pay accruals as employees render labor and causes employees to forfeit their vested rights to vacation pay. Under the policies and practices of the Raley's Employers, Delahunt and all of the other Aggrieved Employees earned the following forms of vacation pay during employment: vacation, and paid time off (PTO). Under such policies, these accrued but unused forms of vacation pay were subject to forfeit at the conclusion of the employment relationship. Consequently, the Aggrieved Employees are entitled to recover vacation pay.

In *Suastez*, the defendant-employer "refused to pay vacation benefits to anyone whose employment was terminated before . . . [his or her employment] anniversary date" and refused to pay the plaintiff-employee a pro rata share of his vacation pay for the time period between his last employment anniversary date and his termination date. (*Id.* at 776–77.) In finding for the plaintiff-employee, the Court held that "a proportionate right to a paid vacation 'vests' as the labor is rendered" and that Labor Code § 227.3 protects that right from forfeiture. (*Id.* at 784.)

It is especially worth noting that, in rejecting the contention that the plaintiff-employee had no vested right to vacation pay until his anniversary date, the Court

specifically stated: “The right to some share of vacation pay vests, like pension rights, on acceptance of employment. Nonperformance of a condition subsequent, such as [defendant-employer’s] requirement that employees remain until their anniversary, can, at most, result in a forfeiture of the right to a vacation; *it cannot prevent that right from vesting.*” (*Id.* at 780–81, (italics added).)

Like the vacation pay policy the Court rejected in *Suarez*, the Raley’s Employers’ vacation pay policies also fail to provide for proportionate accruals. The Raley’s Employers willfully failed to pay out at the end of the employment relationship and at the correct final rates of pay the unused vacation pay Delahunt and the Aggrieved Employees earned and accrued. During the employment relationship between the Raley’s Employers and Delahunt and the Aggrieved Employees, the Raley’s Employers paid out accrued vacation pay at lower rates than the regular rates of pay of Delahunt and the Aggrieved Employees. Accordingly, Delahunt now seeks civil penalties for these Labor Code violations that the Raley’s Employers have committed against him and all of the other Aggrieved Employees as follows: \$100 for each aggrieved employee for each initial violation of Labor Code § 227.3, and \$200 for each aggrieved employee for each subsequent violation, per pay period (penalties set by Labor Code § 2699(f)(2)).

Unlawful Deductions **(Lab. Code § 221)**

Under Labor Code § 221, “It shall be unlawful for any employer to collect or receive from an employee any part of wages theretofore paid by said employer to said employee.” The Raley’s Employers deducted wages from the wages earned by Delahunt and all of the other Aggrieved Employees for in violation of Labor Code § 221. Accordingly, Delahunt seeks civil penalties on behalf of himself and all of the other Aggrieved Employees as follows: \$100 for each aggrieved employee for each initial violation of Labor Code § 221, and \$200 for each aggrieved employee for each subsequent violation, or any willful or intentional violation of Labor Code § 221, plus 25% of the amount unlawfully withheld from each aggrieved employee (penalties set by Labor Code § 225.5).

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Failure to Provide Accurate Wage Statements
(Lab. Code § 226)

Labor Code section 226(a) requires an employer to provide an employee, either semi-monthly or at the time of each wage payment, with an accurate and itemized written wage statement that shows:

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 Employer 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, the Raley's Employers violated Labor Code section 226 because they did not 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 Labor Code section 226. The Raley's Employers failed to state in the wage statements they issued to Delahunt and all of the other Aggrieved Employees all their hours worked and wages earned, including, but not limited to, regular and overtime wages for work they performed off-the-clock after clocking-out (as described above). The Raley's Employers knowingly and intentionally failed to state on the wage statements they issued to Delahunt and all of the other Aggrieved Employees the earned but unpaid wages described above. The wage statements do not state all earned vacation pay. The Raley's Employers failed to maintain records of the accrued, but unused vacation pay of Delahunt and the Aggrieved Employees that the Raley's Employers owed to Delahunt and the Aggrieved Employees at their final pay rates at the end of the employment relationship. Accordingly, Delahunt seeks civil penalties for the Labor Code violations that the Raley's Employers have committed against him and all of the other Aggrieved Employees as follows: \$250 for each aggrieved employee for each initial violation of Labor Code section 226(a), and \$1,000 for each aggrieved employee for each subsequent violation (penalties set by Labor Code section 226.3).

Failure to Timely Pay Wages During Employment
(Lab. Code § 204)

Labor Code section 204 states all wages (other than those mentioned in Labor Code sections 201 and 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.

The Raley's Employers failed to compensate Delahunt and all of the other Aggrieved Employees for wages earned, including vacation pay, at the intervals stated above. As a result, the Raley's Employers failed to timely pay all earned

wages due during employment within the time periods set by Labor Code section 204. Accordingly, Delahunt now seeks civil penalties for the Labor Code violations that the Raley's Employers have committed against him and all of the other Aggrieved Employees as follows: \$100 for each aggrieved employee for each initial violation of Labor Code section 204, and \$200 for each aggrieved employee for each subsequent violation, plus 25% of the amount unlawfully withheld from each aggrieved employee (penalties set by Labor Code section 210).

Failure to Timely Pay Wages Upon Termination of Employment
(Lab. Code §§ 201-203)

Under Labor Code § 2019, 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. *Id.* 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. *Id.*

Under Labor Code § 203, if an employer willfully fails to pay without abatement or reduction, in accordance with §§ 201 and 202, the 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.

The Raley's Employers failed to pay Delahunt and all of the other Aggrieved Employees whose employment ended all of the earned but unpaid wages described above by the conclusion of their employment with Delahunt, including vacation pay. Additionally, the Raley's Employers failed to issue to Delahunt and all of the other Aggrieved Employees whose employment ended their final paychecks until the next regular pay day following the termination. By failing to

pay Delahunt and all of the other Aggrieved Employees as set forth above at the end of employment, the Raley's Employers are liable for violations of Labor Code §§ 201, 202, and 203. Accordingly, on behalf of himself and all of the other Aggrieved Employees, Delahunt seeks civil penalties from the Raley's Employers 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 for 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 & 1198)

Labor Code section 1174, which also 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 location 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 section 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 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 section 1198 prohibits employers from employing their employees under conditions prohibited by the Wage Order.

The Raley's Employers failed to compensate Delahunt and all of the other Aggrieved Employees for all hours worked at the correct rates of pay, including all earned vacation pay. As a result, the Raley's Employers have failed to accurately maintain all records required by section 1174 and the Wage Order, including but not limited to Delahunt and all of the other Aggrieved Employees' total hours worked, total wages paid, and applicable hourly rates during each payroll period. Accordingly, Delahunt seeks civil penalties on behalf of himself and all of the other Aggrieved Employees as follows:

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

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Conclusion

As noted above, this letter constitutes the required notice under the Labor Code Private Attorneys General Act of 2004. Please be advised that Donald E. Delahunt will seek both reasonable attorneys' fees and costs under Labor Code section 2699(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.

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cc: Donald E. Delahunt

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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.

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EXECUTED on Wednesday, December 22, 2021, at Los Angeles, California.

____ (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.

BRECK OYAMA