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Superior Court of California,
County of San Diego
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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO**

DESIREE BERRY, individually and on
behalf of other aggrieved employees,

Plaintiffs,

v.

TD AMERITRADE, INC., a corporation;
and DOES 1 through 50,

Defendants.

Case No. 37-2022-00004165-CU-OE-CTL
Hon. Blaine K. Bowman
Dept. C-74

**First Amended Representative Action
Complaint**

1. Minimum Wage Violations
2. Failure to Pay All Overtime Wages
3. Failure to Pay All Paid Sick Leave Wages
4. Unpaid Vacation Wages
5. Meal and Rest Period Premium Violations
6. Untimely Payment of Wages
7. Wage Statement Violations
8. Failure to Reimburse Business Expenses
9. Failure to Pay All Wages Upon Separation
10. Day's Rest Violation
11. Recordkeeping Violations
12. Failure to Provide Records

1 Plaintiff DESIREE BERRY (“Plaintiff”), individually as the State of California’s
2 designated proxy under the Private Attorneys General Act (“PAGA”), and on behalf of other
3 current and former aggrieved employees, brings this First Amended Representative Action
4 Complaint against Defendants TD AMERITRADE, INC., a corporation registered to do business
5 in California, and DOES 1 through 50 (collectively, “Defendants”), alleging as follows:

6 **INTRODUCTION**

7 1. This case is filed by Plaintiff, an aggrieved employee, seeking civil penalties
8 against Defendants for violations of the California Labor Code. Plaintiff’s claims are premised
9 upon Defendants’ failure to include all forms of remuneration in the “regular rate of pay” or
10 “regular rate of compensation” used to lawfully calculate and pay certain wages and premiums
11 to its employees.

12 2. In connection with Plaintiff’s employment and the employment of others within
13 the State of California, Defendants committed numerous systemic Labor Code violations for
14 which Plaintiff now seeks to receiver civil penalties pursuant to Labor Code § 2698 *et seq.*

15 **JURISDICTION & VENUE**

16 3. Jurisdiction of this action is proper in this Court under Article VI, Section 10 of
17 the California Constitution.

18 4. Venue as to each defendant is proper in this judicial district because Defendants
19 employed Plaintiff and aggrieved employees in this county, and committed some of the alleged
20 Labor Code violations in this county.

21 **PARTIES**

22 5. Plaintiff worked for Defendants in San Diego County from December 2015
23 through December 2021 as an hourly, non-exempt employee. During her employment, Plaintiff
24 held various positions with TD Ameritrade, including Regional Account Services
25 Representative, Senior Regional Account Services Representative, and Temp. Team Manager.

26 6. Defendant TD AMERITRADE, INC. does business and employs aggrieved
27 employees throughout California, including in San Diego County.

7. The true names and capacities, whether individual, corporate, or otherwise, of the parties sued as DOES 1 through 50, are presently uncertain to Plaintiff, who sues them by such fictitious names under Code of Civil Procedure section 474. Plaintiff is informed, believes, and alleges that each of the fictitiously-named defendants is responsible in some manner for the acts and omissions alleged herein.

8. Plaintiff is informed, believes, and alleges that all defendants in this action are employers and/or joint employers and part of an integrated employer enterprise, as each defendant exercises control over the wages, hours, and working conditions of Plaintiff and the aggrieved employees, suffers and permits them to work, and engages the workforce creating a common law employment relationship. Additionally, all defendants have common ownership, common management, interrelationship of operations, and centralized control over labor relations and are therefore part of an integrated enterprise and thus jointly and severally responsible for the acts and omissions alleged herein.

9. Plaintiff is informed, believes, and alleges that each defendant acted in all respects pertinent to this action as an alter-ego, agent, servant, joint employer, joint venturer, co-conspirator, partner, in an integrated enterprise, or in some other capacity on behalf of all other co-defendants, such that the acts and omissions of each defendant are legally attributable to all others.

10. Plaintiff is informed, believes, and alleges that the above-mentioned defendants violated and/or caused to be violated Labor Code and IWC Wage Order provisions and/or regulating minimum wages and days of work and other provisions of the Labor Code with respect to the aggrieved employees. As a result, they may be held personally liable under Labor Code sections 558, 558.1, and 1197.1. (*See, e.g., Atempa v. Pedrazzani* (2018) 27 Cal. App. 5th 809.)

PAGA ALLEGATIONS

11. Plaintiff seeks to recover civil penalties as an individual aggrieved employee, on behalf of the State of California and the “aggrieved employees,” defined as follows:

a. All current and former non-exempt hourly employees of TD Ameritrade, Inc. [1] who worked in the State of California at any time

1 from November 4, 2020 through the date of judgment (the “PAGA
2 Period”), and [2] who were paid non-excludable remuneration including,
3 but not limited to, acting manager premiums, bonuses, Basic and Supp
4 Life/ADD payments, shift premiums, non-discretionary incentives, shift
5 differentials, and other such earnings (the “aggrieved employees”).

6 12. The State of California, via the Labor and Workforce Development Agency
7 (“LWDA”), is the real party in interest in this action with respect to the PAGA claims. (*Kim v.*
8 *Reins Int’l California, Inc.* (2020) 9 Cal. 5th 73, 81 [The “government entity on whose behalf
9 the plaintiff files suit is always the real party in interest.”])

10 13. Plaintiff is an “aggrieved employee” because Plaintiff was employed by
11 Defendants and personally experienced one or more of the alleged violations. Therefore,
12 Plaintiff is properly suited to act on behalf of the State of California and collect civil penalties
13 for violations committed against all other current and former aggrieved employees of
14 Defendants. (*See, e.g., Huff v. Securitas Security Services USA, Inc.* (2018) 23 Cal. App. 5th
15 745, 751 [“PAGA allows an “aggrieved employee”—a person affected by one Labor Code
16 violation committed by an employer—to pursue penalties for all the Labor Code violations
17 committed by that employer.”])

18 14. “Notwithstanding any other provision of law, any provision of this code that
19 provides for a civil penalty to be assessed and collected by the Labor and Workforce
20 Development Agency or any of its departments, divisions, commissions, boards, agencies, or
21 employees, for a violation of this code, may, as an alternative, be recovered through a civil action
22 brought by an aggrieved employee on behalf of himself or herself and other current or former
23 employees pursuant to the procedures specified in Section 2699.3.” (Labor Code § 2699(a)).

24 15. On November 4, 2021, Plaintiff gave written notice by online filing with the
25 LWDA and by certified mail to Defendants of the specific provisions of the Labor Code alleged
26 to have been violated, including the facts and theories to support the alleged violations (the
27 “PAGA Notice”). Plaintiff paid the requisite filing fee to the LWDA. A copy of the PAGA
28 Notice is attached hereto as Exhibit 1 and incorporated by reference.

1 16. Within 33 calendar days of the postmark date of the notice sent by Plaintiff,
2 Defendants did not give written notice by certified mail to Plaintiff providing a description of
3 any actions taken to cure the alleged violations.

4 17. Now that at least 65 days have passed from Plaintiff notifying Defendants of these
5 violations, without any notice of cure from Defendants or notice from the LWDA of its intent to
6 investigate the alleged allegations and issue the appropriate citations to Defendant, Plaintiff
7 exhausted all prerequisites and commences this civil action under Labor Code § 2699.

8 18. Any allegations regarding violations of the IWC Wage Orders are enforceable as
9 violations of Labor Code section 1198, which states: “[t]he employment of any employee for
10 longer hours than those fixed by the order or under conditions of labor prohibited by the order is
11 unlawful.”

12 **GENERAL ALLEGATIONS**

13 19. Defendants paid Plaintiff and other aggrieved employee hourly compensation
14 plus other forms of remuneration, including, but not limited to, acting manager premiums,
15 bonuses, shift premiums, non-discretionary incentives, Basic and Supp Life/ADD payments,
16 shift differentials, and other excess earnings incentivizing additional hours or shifts or production
17 or performance.

18 20. In pay periods when Defendants paid employees non-discretionary payments
19 such as Basic and Supp Life/ADD payments, Defendants failed to include these amounts in the
20 regular rate of pay for the purpose of paying overtime. One illustrative example of this regular
21 rate of pay violation is found on the wage statement Defendants issued to Plaintiff, for the pay
22 period dated 12/11/2020. In this pay period, Plaintiff is directly paid a Basic and Supp Life/ADD
23 payment that is attributed to her gross wages, however, Defendants failed to include this amount
24 in the regular rate of pay and paid her overtime at 1.5 times straight hourly rate instead of regular
25 rate of pay.

26 21. In pay periods where Defendants provided Plaintiff and other aggrieved
27 employees with remuneration in addition to their respective base hourly rate for hours worked—
28 excluding any forms of pay subject to any applicable statutory exclusions from the “regular

1 rate”—Defendants failed to properly calculate and pay paid sick leave at the appropriate regular
2 rate of pay, in violation of Labor Code §§ 246, 248.1, and 248.2; and Defendants further failed
3 to properly calculate and pay meal and rest period premiums at the appropriate regular rate of
4 compensation, in violation of Labor Code § 226.7.

5 22. Illustrative examples of these regular rate of pay/compensation violations may be
6 found on the wage statements Defendants issued to Plaintiff, including for the pay periods of
7 10/04/2021 to 10/10/2021 (meal period paid at base hourly rate instead of regular rate of
8 compensation); and 08/16/2021 to 08/22/2021 (sick pay paid at base hourly rate instead of one
9 of the methods allowed by statute).

10 23. During these pay periods, Defendants issued non-compliant wage statements, as
11 the wage statements fail to correctly state the gross and net wages earned and the correct hourly
12 rates in effect for paid sick leave hours or meal/rest period premiums, in violation of Labor Code
13 § 226(a)(1), (5), and (9). This is because Defendants provided paid sick leave and Labor Code
14 § 226.7 premiums at the incorrect hourly rate, resulting in an inaccurate hourly rate on the
15 paystubs, along with inaccurate and depreciated gross and net wages actually earned.

16 24. During pay periods when employees worked overtime and were directly paid
17 Basic and Supp Life/ADD payments and Defendants failed to include those payments in the
18 regular rate of pay, Defendants issued non-compliant wage statements, as the wage statements
19 fail to correctly state the gross and net wages earned and the correct hourly rates in effect, in
20 violation of Labor Code § 226(a)(1), (5), and (9).

21 25. Furthermore, during pay periods when Defendants paid non-discretionary
22 remuneration that was calculated from employees’ hours worked (*i.e.*, differentials, acting
23 manager pay, etc.), Defendants also violated Labor Code section 226(a)(2) because Defendants
24 failed to list employees’ total hours worked. On these wage statements, when the total number
25 of hours listed in each pay category are added together, they do not equal the actual total number
26 of hours Plaintiff or other employees worked, and there is no way to determine the total hours
27 worked from the four corners of the wage statement or through simple math. One illustrative
28 example of this issue occurs on Plaintiff’s wage statement, dated 10/15/2021, where Defendants

1 failed to list Plaintiff's total hours worked. Plaintiff would need to reference other documents to
2 identify her total hours worked because simply adding the hours each pay category together does
3 not yield Plaintiff's total hours worked.

4 26. Defendants' pattern, practice, and uniform administration of corporate company
5 policy regarding payroll, regular rate of pay/compensation calculations, and non-compliant wage
6 statement formats, as described herein, results in Defendants' liability for civil penalties to the
7 State of California and the aggrieved employees, along with interest, attorneys' fees, and costs
8 of suit.

9 27. As a result of the foregoing regular rate violations, Defendants failed to pay all
10 overtime wages, sick leave wages, and premiums in each pay period in which they were earned
11 by Plaintiff and aggrieved employees, in violation of Labor Code § 204 and/or 204b (for any
12 weekly employees), which requires timely payment of all wages each regularly scheduled pay
13 period.

14 28. As a further result of the foregoing regular rate violations, Defendants failed to
15 pay all overtime wages, paid sick leave wages, and Labor Code § 226.7 premiums due to Plaintiff
16 and the aggrieved employees upon separation of employment, or within 72 hours thereof.
17 Defendants have thus violated Labor Code § 201, which requires that if an employer fires an
18 employee all wages must be paid immediately; and, Labor Code § 202, which requires that if an
19 employee quits without providing at least 72 hours' notice, his or her final wages must be paid
20 no later than 72 hours thereafter; or, if at least 72 hours' notice is provided, then the employer
21 must pay the wages immediately upon the employee's final day of employment. Defendants
22 have thus violated Labor Code §§ 201 and 202 because they failed to pay all paid sick leave
23 wages and premium pay during the PAGA Period at the "regular rate" resulting in
24 underpayments. As a result, Defendants are also liable for civil penalties associated with Labor
25 Code §§ 201 through 203.

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1 6. This cause of action is brought pursuant to the IWC Wage Orders and Labor Code
2 §§ 204, 510, 558, 1194, and 1198, which require non-exempt employees be timely paid overtime
3 wages all overtime hours worked, and which further provide a private right of action for an
4 employer's failure to pay all overtime compensation for overtime hours worked.

5 7. Defendants failed in their affirmative obligation to pay Plaintiff and class members
6 no less than one and one-half times their respective "regular rate of pay" for all hours worked in
7 excess of eight hours in one day, 40 hours in one week, or the first eight hours worked on the
8 seventh day of work in any one workweek, and no less than twice their respective "regular rate of
9 pay" for all hours over 12 hours in one day and any work in excess of eight hours on any seventh
10 day of a workweek for such hours worked, in violation of Labor Code sections 204, 510, 558,
11 1194, and 1198 and the IWC Wage Orders (the "Hours and Days of Work" sections of the
12 applicable orders).

13 8. Plaintiff and class members are entitled to recover the full amount of the unpaid
14 overtime, in addition to interest, statutory and civil penalties, and attorneys' fees, and costs to the
15 extent permitted by law.

16 **THIRD CAUSE OF ACTION**

17 **FAILURE TO PAY ALL PAID SICK LEAVE WAGES**

18 **Violation of Labor Code §§ 200, 218, and 245 et seq**

19 9. All outside paragraphs of this Complaint are incorporated into this section.

20 10. Defendants knowingly and intentionally failed in their affirmative obligation to
21 pay sick leave wages to Plaintiff and a paid sick leave subclass in violation of Labor Code section
22 245 et seq. Paid sick leave earnings constitute wages for purposes of California wage and hour
23 law. (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1103 ["Courts have
24 recognized that 'wages' also include those benefits to which an employee is entitled as a part of
25 his or her compensation, including money, room, board, clothing, vacation pay, and sick pay"].)

26 11. Labor Code section 246(l) governs how Defendants were required to calculate paid
27 sick leave:
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1 [A]n employer shall calculate paid sick leave using any of the following
2 calculations:

3 (1) Paid sick time for nonexempt employees shall be calculated in the same
4 manner as the regular rate of pay for the workweek in which the employee
5 uses paid sick time, whether or not the employee actually works overtime
6 in that workweek.

7 (2) Paid sick time for nonexempt employees shall be calculated by dividing
8 the employee's total wages, not including overtime premium pay, by the
9 employee's total hours worked in the full pay periods of the prior 90 days
10 of employment.

11 (3) Paid sick time for exempt employees shall be calculated in the same
12 manner as the employer calculates wages for other forms of paid leave
13 time.

14 12. Defendants failed to pay Plaintiff and class members their paid sick leave wages
15 at one of the lawful rates set forth in the statute because Defendants failed to include in their sick
16 leave calculation the additional remuneration received by Plaintiff and class members.

17 13. Furthermore, to the extent the paid sick leave paid constitutes Covid-related paid
18 sick leave, Defendants knowingly and intentionally failed in their affirmative obligation to pay
19 Covid-19 Supplemental Sick Leave wages to class members at the correct rate in violation of
20 Labor Code sections 246, 248.1, 248.2, and 248 et seq.

21 14. Pursuant to Labor Code section 248.1, Defendants were required to provide up to
22 80 hours of Covid-19 Supplemental Paid Sick Leave to employees for the period of April 20,
23 2020 to December 31, 2020. Labor Code section 248.2 required Defendants to provide up to 80
24 hours of Covid-19 Supplemental Paid Sick Leave for the period of January 1, 2021 through at
25 least September 30, 2021. Labor Code section 248.6 extended Covid sick leave protections and
26 requires employers to provide up to 80 hours of Covid-19 Supplemental Paid Sick Leave for the
27 period of January 1, 2022 to September 30, 2022, and may be extended thereafter.

1 15. Under Labor Code section 248.1, employees must be paid for Covid-19
2 Supplemental Paid Sick Leave at the highest of the following: (1) the regular rate of pay for the
3 last pay period, (2) state minimum wage, (3) local minimum wage.

4 16. Under Labor Code section 248.2, non-exempt employees must be paid
5 supplemental paid sick leave according to the highest of the following four methods:

6 (I) Calculated in the same manner as the regular rate of pay for the workweek in
7 which the covered employee uses COVID-19 supplemental paid sick leave,
8 whether or not the employee actually works overtime in that workweek.

9 (II) Calculated by dividing the covered employee's total wages, not including
10 overtime premium pay, by the employee's total hours worked in the full pay
11 periods of the prior 90 days of employment.

12 (III) The state minimum wage.

13 (IV) The local minimum wage to which the covered employee is entitled.

14 17. Labor Code section 248.6 requires employers to pay supplemental sick leave using
15 either method (I) or (II), as identified above.

16 18. On information and belief, Defendants failed to pay Covid-19 Supplemental Sick
17 Leave in the manner described above because Defendants failed to include in their sick leave
18 calculation the additional remuneration received by class members.

19 19. As a result, Defendants violated the Labor Code and are liable to Plaintiff and class
20 members for underpaid sick leave wages, in addition to interest, attorneys' fees, and costs.

21 **FOURTH CAUSE OF ACTION**

22 **UNPAID VACATION WAGES**

23 **Violation of Labor Code §§ 201, 202, 203, and 227.3 and 1194, and 1198**

24 20. All outside paragraphs of this Complaint are incorporated into this section.

25 21. This cause of action is brought by an unpaid vacation wages subclass pursuant to
26 Labor Code §§ 200, 201, 202, 203, and 227.3 and 1194, and 1198, which require non-exempt
27 employees be timely paid all vested vacation wages at their final rate of pay upon separation of
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1 employment, and which further provide a private right of action for an employer's timely failure
2 to pay all vacation compensation upon termination.

3 22. Defendant offered Plaintiff and class members an employment contract or policy
4 providing for the accrual of vacation and/or paid time off. Plaintiff and class members accrued
5 vacation and/or PTO pursuant to the contract or policy.

6 23. Upon separation of Plaintiff and class members, Defendants willfully failed in
7 their affirmative obligation to timely pay Plaintiff and class members all accrued but unused
8 vacation at their final rate during their employment with Defendants, in violation of Labor Code
9 sections 201(a), 202(a), 203, and 227.3.

10 24. Plaintiff and class members are entitled to recover the full amount of the accrued
11 vacation wages owed, in addition to interest, statutory and civil penalties, and attorneys' fees, and
12 costs to the extent permitted by law.

13 **FIFTH CAUSE OF ACTION**

14 **MEAL AND REST PERIOD PREMIUM VIOLATIONS**

15 **Violation of Labor Code §§ 226.7**

16 25. Plaintiff incorporates all outside paragraphs of this Complaint as if set forth
17 herein.

18 26. Defendants violated Labor Code §§ 226.7, 512, and 516, 1198 and the IWC Wage
19 Orders (the "Meal Periods" and "Rest Periods" sections of the applicable orders) by failing to
20 provide meal and rest periods and/or to pay meal and rest period premiums at the regular rate of
21 compensation to the aggrieved employees during the PAGA Period. On days in which Plaintiff
22 and the aggrieved employees received a meal or rest period premium under Labor Code § 226.7,
23 Defendants failed to pay the corresponding meal or rest period premium at one hour Defendants
24 regular rate of compensation.

25 27. As a result of this common practice, Defendants failed to provide Plaintiff and the
26 aggrieved employees all Labor Code § 226.7 premiums due at the lawful regular rate of
27 compensation in violation of Labor Code §§ 226.7, 512, and 516, and the IWC Wage Orders.

1 28. As a result, Defendants violated the Labor Code and IWC Wage Orders and are
2 liable to Plaintiff, the aggrieved employees and the State of California for civil penalties as
3 required by Labor Code sections 558 and 2699(a) and (f)(2), in addition to interest, attorneys'
4 fees, and costs to the extent permitted by law, including under Labor Code section 2699(g).

5 **SIXTH CAUSE OF ACTION**

6 **UNTIMELY PAYMENT OF WAGES**

7 **Violation of Labor Code §§ 204, 210, 218**

8 29. All outside paragraphs of this Complaint are incorporated into this section.

9 30. This cause of action is brought pursuant to the IWC Wage Orders and Labor Code
10 §§ 204, 204b, and 210 which require non-exempt employees be timely paid all wages owed each
11 pay period, and which further provide a private right of action for an employer's failure to comply
12 with this obligation. Labor Code § 218 authorizes individuals to sue directly for wages and
13 penalties due under these sections, including Labor Code § 210(c)'s statutory late payment
14 penalties.

15 31. Defendants willfully failed in their affirmative obligation to timely pay all wages,
16 including minimum wage, overtime, double time, paid sick leave and COVID supplemental sick
17 leave, and meal and rest premiums, earned by Plaintiff and class members twice during each
18 calendar month on days designated in advance by the employer as regular paydays (for
19 employees paid on a non-weekly basis) and on the regularly-scheduled weekly payday for
20 weekly employees, if any, in violation of Labor Code sections 204 and 204b and the IWC Wage
21 Orders (the "Minimum Wages" sections of the applicable orders).

22 32. Plaintiff and class members are entitled to recover the full amount of the unpaid
23 wages, in addition to a statutory penalty in the amount of \$100 for the initial violation for each
24 failure to pay each employee and \$200 for all subsequent violations and for all willful or
25 intentional violations for each failure to pay each employee, plus 25 percent of the amount
26 unlawfully withheld under provided in Labor Code § 210, in addition to interest, attorneys' fees,
27 and costs to the extent permitted by law.

28 **SEVENTH CAUSE OF ACTION**

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1 31. Defendants' unlawful acts and omissions deprived Plaintiff and class members of
2 lawful reimbursements for business expenses in amounts to be determined at trial. Plaintiff and
3 class members are entitled to recover the amount unreimbursed expenses of Plaintiff and class
4 members in addition to interest, attorneys' fees, and costs to the extent permitted by law, including
5 under Labor Code section 2802.

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7 **NINTH CAUSE OF ACTION**

8 **FAILURE TO TIMELY PAY ALL WAGES UPON SEPARATION OF EMPLOYMENT**

9 **Violation of Labor Code §§ 201 through 203, 218**

10 37. All outside paragraphs of this Complaint are incorporated into this section.

11 38. Defendants willfully failed in their affirmative obligation to pay all wages earned
12 and unpaid to Plaintiff and aggrieved employees immediately upon termination of employment
13 or within 72 hours thereafter for employees who did not provide at least 72 hours prior notice of
14 his or her intention to quit, and further failed to pay those sums for 30 days thereafter in violation
15 of Labor Code sections 201 through 203 and the IWC Wage Orders. The wages remaining unpaid
16 include but are not limited to those due to the regular rate underpayments for meal and rest period
17 premiums and paid sick leave and COVID supplemental sick leave, overtime, double time,
18 minimum wage, and vacation wages. Labor Code § 218 authorizes individuals to sue directly for
19 wages and penalties due under these sections.

20 39. As a result, Defendants violated the Labor Code and IWC Wage Orders and are
21 liable to Plaintiff, the aggrieved employees and the State of California for civil penalties as
22 required by Labor Code sections 558 and 2699(a) and (f)(2), in addition to interest, attorneys'
23 fees, and costs to the extent permitted by law, including under Labor Code section 2699(g).

24 **TENTH CAUSE OF ACTION**

25 **DAY'S REST VIOLATION**

26 **Violation of Labor Code §§ 551 and 552**

27 40. All outside paragraphs of this Complaint are incorporated into this section.
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1 41. This cause of action is brought pursuant to the IWC Wage Orders and Labor Code
2 §§ 551 and 552, which requires non-exempt employees one day's rest therefrom in seven.

3 42. Plaintiff and aggrieved employees worked more than six days in seven.

4 43. Defendants willfully failed to provide Plaintiff and aggrieved employees one
5 day's rest therefrom in seven in violation of the IWC Wage Orders and Labor Code §§ 551 and
6 552.

7 44. As a result of Defendants' violation of the Labor Code and IWC Wage Orders,
8 Defendants are liable to Plaintiff, the aggrieved employees and the State of California for civil
9 penalties as required by Labor Code sections § 558(a) *et seq.*

10 **ELEVENTH CAUSE OF ACTION**

11 **RECORDKEEPING VIOLATIONS**

12 **Violation of Labor Code § 1174**

13 1. All outside paragraphs of this Complaint are incorporated into this section.

14 2. Labor Code section 1174 provides: "Every person employing labor in this state
15 shall: ...(d) Keep, at a central location in the state or at the plants or establishments at which
16 employees are employed, payroll records showing the hours worked daily by and the wages paid
17 to, and the number of piece-rate units earned by and any applicable piece rate paid to, employees
18 employed at the respective plants or establishments. These records shall be kept in accordance
19 with rules established for this purpose by the commission, but in any case shall be kept on file
20 for not less than three years."

21 3. Labor Code section 1174.5 provides: "Any person employing labor who willfully
22 fails to maintain the records required by subdivision (c) of Section 1174 or accurate and complete
23 records required by subdivision (d) of Section 1174 ..., shall be subject to a civil penalty of five
24 hundred dollars (\$500)."

25 4. Defendants willfully failed in their affirmative obligation to maintain accurate
26 records showing the hours worked daily and wages premiums and other above-referenced
27 payments paid to the aggrieved employees, in violation of Labor Code sections 1174, 1198 and
28 the IWC Wage Orders (the "Records" sections of the applicable orders).

1 5. As a result, Defendants violated the Labor Code and are liable to Plaintiff, the
2 aggrieved employees and the State of California for civil penalties as required by Labor Code
3 section 1174.5, in addition to interest, attorneys' fees, and costs to the extent permitted by law,
4 including under Labor Code section 2699(g).

5 **TWELFTH CAUSE OF ACTION**

6 **FAILURE TO PROVIDE RECORDS**

7 **Violation of Labor Code § 1198.5**

8 6. All outside paragraphs of this Complaint are incorporated into this section.

9 7. Labor Code section 1198.5 requires employers to provide an employee's
10 "personnel records" within 30 days of receipt of the request. Section 1198.5(k) authorizes a
11 penalty of \$750 for an employer's failure to provide a copy of or permit inspection of personnel
12 records. Section 1198.5(l) allows an employee to seek injunctive relief to obtain an employer's
13 compliance with this section and authorizes the recovery of attorneys' fees and costs.

14 8. Section 7 (Records) of the IWC Wage Orders, which may be enforced through
15 Labor Code section 1198, requires that employers maintain time records of when an employee
16 begins and ends each work period and when the employee takes meal periods, among other
17 required employment and payroll records. Section 7(C) states that "[a]n employee's records
18 shall be made available for inspection by the employee upon reasonable request."

19 9. Plaintiff requested from Defendants all records due under the IWC Wage Orders
20 (including the Records sections) and Labor Code sections 226, 432, and 1198.5. Defendants
21 failed to provide Plaintiff's time records.

22 10. Defendants' unlawful acts and omissions deprived Plaintiff of the ability review
23 the documents they received during their employment and to inspect and reconcile their actual
24 time worked with the ultimate pay they received on their wage statements. Plaintiff is entitled
25 to recover the penalties and injunctive relief, in addition to interest, attorneys' fees, and costs to
26 the extent permitted by law, including under Code of Civil Procedure section 1021.5, and Labor
27 Code sections 226 and 1198.5.

1 **PRAYER FOR RELIEF**

2 Plaintiff prays for judgment as follows:

- 3 a. For an award of all civil penalties under the Labor Code section 2698 *et seq.*;
- 4 b. For an award of reasonable attorneys' fees and costs of suit, including expert fees,
5 to the extent permitted by law, including under Labor Code sections 218.5, 226,
6 1194 and 2802.;
- 7 c. For any recoverable pre- and post-judgment interest; and
- 8 d. For this action to be maintained as a representative action under the PAGA;
- 9 e. For Plaintiff and counsel of record to be provided with all enforcement capability
10 as if the action were brought by the State of California or the California Division
11 of Labor Enforcement;
- 12 f. For recovery of all civil penalties and other recoverable amounts under the PAGA;
- 13 g. For reasonable attorneys' fees and costs of suit, including expert fees, to the extent
14 permitted by law, including (without limitation) under Labor Code § 2699, and
15 Code of Civil Procedure section 1021.5; and
- 16 h. For such other relief the Court deems just and proper.

17

18 Dated: March 15, 2024

19 ***Ferraro Vega Employment Lawyers, Inc.***

20

21 

22 Nicholas J. Ferraro

23 *Attorneys for Plaintiff Desiree Berry*

EXHIBIT 1

Notice of Labor Code Violations

FERRARO VEGA

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November 4, 2021

NOTICE OF LABOR CODE VIOLATIONS
CALIFORNIA LABOR CODE SECTIONS 2698 *et seq.*

VIA CERTIFIED U.S. MAIL

TD Ameritrade, Inc.
200 S. 108th Avenue
Omaha, NE 68154

TD Ameritrade Holding Corporation
200 S. 108th Avenue
Omaha, NE 68154

TD Ameritrade Services Company
200 S. 108th Avenue
Omaha, NE 68154

TD Ameritrade Clearing, Inc.
200 S. 108th Avenue
Omaha, NE 68154

PAGA Notice & Filing Fee
Submitted electronically to the California
Labor and Workforce Development
Agency on **11/4/2021**

Dear Labor Enforcement Officer and Company Representatives:

This letter serves as written notice on behalf of DESIREE BERRY (“Claimant”) and other aggrieved employees under California Labor Code section 2699.3 against TD AMERITRADE, INC., TD AMERITRADE HOLDING CORPORATION, TD AMERITRADE SERVICES COMPANY, INC., TD AMERITRADE CLEARING, INC., and all related employer entities (“Defendants”).

If the California Labor and Workforce Development Agency (“LWDA”) does not investigate the facts, allegations, and violations set forth in this notice within the statutorily prescribed period under Labor Code section 2699.3, Claimant shall seek and recover civil penalties as a proxy and agent of the State of California on behalf of other aggrieved employees under the California Private Attorneys General Act (“PAGA”).

“PAGA allows an ‘aggrieved employee’—a person affected by at least one Labor Code violation committed by an employer—to pursue penalties for all the Labor Code violations committed by that employer.” *Huff v. Securitas Security Services USA, Inc.* (2018) 23 Cal. App. 5th 745, 751; *see also Kim v. Reins International California, Inc.* (2020) 9 Cal. 73, 79.

FACTUAL STATEMENT

Defendants provide brokerage, banking, and financial advisory services throughout California and the United States, including in San Diego County. Defendants employ individuals throughout the State of California in hourly, non-exempt positions where employees are entitled to overtime, paid sick leave, and meal and rest period premiums, along other wage and hour protections under applicable state and local law.

Defendants engaged, suffered and permitted Claimant and the other “aggrieved employees,” as defined below, to work, exercised control over their respective wages, hours, and working conditions, and at all times were an agent and or ostensible agent of each other and the joint employer of Claimant and other aggrieved employees. Defendants comprise an integrated enterprise known and constitute an “employer” of Claimant and other aggrieved employees for purposes of this civil action.

Claimant has been employed by Defendants since December 7, 2015. Claimant currently works as a Spec., Temp Manager. During her employment, Claimant worked as a Regional Account Services Representative and Senior Regional Account Services Representative. Throughout her employment her employment Claimant was an hourly, non-exempt employee.

Through this notice, Claimant informs the LWDA of the Labor Code violations set forth herein. The aggrieved employees who Claimant seeks to represent include the following individuals:

All current and former non-exempt hourly employees who worked for Defendants in the State of California during one-year period preceding the date of this notice through the current date and the date of final judgment in any pending action (the “aggrieved employees” and the “PAGA Period”).

Claimant seeks all recoverable civil penalties for Defendants’ violations and reserves the right to supplement this notice as further investigation is completed and further facts, witnesses, and violations are uncovered. Claimant reserves the right to narrow the definition of the “aggrieved employees” in the forthcoming civil action.

Underpaid Overtime

Violation of Labor Code §§ 510, 558, 1194, 1197.1, 1198, 1199; IWC Wage Orders

Defendants failed to pay overtime wages at the lawful regular rate of pay to Claimant and other aggrieved employees in violation of Labor Code sections 510, 558, 1194, 1197.1, 1198, 1199, and the related sections of the applicable IWC Wage Orders, including sections 3 (Hours and Days of Work) and the standing Minimum Wage Order.

Labor Code section 510 requires “[a]ny work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek and the first eight hours worked on the

seventh day of work in any one workweek shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee;” and “any work in excess of 12 hours in one day shall be compensated at the rate of no less than twice the regular rate of pay for an employee;” and “any work in excess of eight hours on any seventh day of a workweek shall be compensated at the rate of no less than twice the regular rate of pay of an employee.” These requirements are further set forth in the IWC Wage Orders and enforced via Labor Code section 1198.5.

Along with the penalties sections of the IWC Wage Orders, Labor Code sections 558 and 1197.1 contain civil penalties for violating this provision of those provisions of the IWC Wage Orders, including sections 3 and 4. Labor Code section prohibits payment of a wage less than the legal overtime compensation applicable to the employee. Labor Code section 1198 renders “employment of any employee for longer hours than those fixed by the order or under conditions of labor prohibited by the [IWC Wage Orders]” unlawful and Labor Code section 1199 renders payment of wages contrary to the forging Labor Code and Wage Order provisions unlawful.

Like federal law, under the California Labor Code, the “regular rate” is not simply a straight time multiple of an employee’s base rate, but rather must include “all remuneration for employment paid to ... the employee,” except the eight items specifically enumerated in 29 U.S.C. § 207(e)(1)-(8). Remuneration like bonuses and incentives must be included in the hourly overtime rate. *See, e.g., Howell v. Advantage RN, LLC* (S.D. Cal. 2019) 401 F. Supp. 3d 1078, 1093 (“Such non-discretionary bonuses ... cannot be lawfully excluded from the regular rate”). Additionally, shift differentials must be factored in to the regular rate of pay. *See, e.g., Alvarado v. Dart Container Corp.* (2018) 4 Cal. 5th 542, 554 (“Regular rate of pay, which can change from pay period to pay period, includes adjustments to the straight time rate, reflecting, among other things, shift differentials and the per-hour value of any nonhourly compensation the employee has earned.”). Payments made directly to employees for benefits (*i.e.*, life, accident, health, etc.) are not excludable from the regular rate of pay. *Flores v. City of San Gabriel* (9th Cir. 2016) 824 F.3d 890, 901 (finding benefits payments paid *directly to employees* “cannot be excluded under § 207(e)(4)” of the FLSA).

During her employment, Claimant received multiple different types of compensation that should have been included in the regular rate of pay, including, but not limited to bonuses, incentives, premiums, shift differentials, and benefits. Defendants failed to properly include all forms of compensation in the regular rate of pay when calculating the overtime rate for Claimant and other aggrieved employees.

For example, as illustrated on Claimant's Wage Statement, dated 10/15/2021:

Earnings					
Description	Dates	Hours	Rate	Amount	YTD
Acting Manager Pay - 15%	09/27/2021 - 10/10/2021	93.48333	4.506	421.24	1,195.51
Better Begins With Me - Gross up			0		1,411.68
Bonus - Corporate			0		1,487.79
Double Time for 10% Shift Pay			0		0.20
Doubletime Pay			0		3.83
Floating Holiday Pay			0		218.85
Holiday Pay			0		1,571.06
Holiday Worked - Regular Pay - 1			0		110.56
Incentive - PFP			0		2,224.55
Meal / Break	10/04/2021 - 10/10/2021	2	30.04	60.08	60.08
Overtime - Shift 2 - Premium			0		424.30
Overtime	09/27/2021 - 10/03/2021	3.066666	47.47	145.58	
Overtime	10/04/2021 - 10/10/2021	10.41666	46.74	486.88	17,476.98
Overtime	10/04/2021 - 10/10/2021	17.5	0	-262.85	
Overtime	10/04/2021 - 10/10/2021	17.5	0	292.25	
PTO - Paid Time Off - Taken			0		1,172.92
Regular Pay	09/27/2021 - 10/10/2021	80	30.04	2,403.20	42,042.92
Regular Pay - Shift 2 - Premium			0		111.57
Regular Pay - Shift 3 - Premium			0		5.96
Remote Work Reimbursement	09/27/2021 - 10/10/2021	0	0	160.00	560.00
Shift Differential - 10%	09/27/2021 - 10/10/2021	4.666667	3.004	14.02	14.02
Shift Differential - 15%	09/27/2021 - 10/10/2021	0.100001	4.506	0.46	0.46

Defendants paid Claimant three shift differentials: Shift Differential – 10%, Shift Differential – 15%, and Acting Manager Pay – 15%. Defendant calculated two overtime rates for each separate workweek. However, Defendants' method of calculating the regular rate of pay resulted in an underpayment of overtime to Claimant.

Claimant's Wage Statement, dated 12/24/2020, provides another example of Defendants' failure to properly calculate the regular rate of pay:

HOURS AND EARNINGS							
Description	PP Begin	PP End Date	Hours	Rate	Current	YTD Hours	YTD
Regular Pay - Shift 2 - Premium	12/12/2020	12/18/2020	15.92	2.76	44.00	22.97	62.65
Regular Pay	12/12/2020	12/18/2020	40.00	27.64	1,105.60	1681.78	46,264.40
Overtime - Shift 2 - Premium	12/12/2020	12/18/2020	0.13	4.15	0.56	0.25	1.05
Overtime - FLSA Premium	12/12/2020	12/18/2020	29.37	14.14	415.25	65.00	905.45
Overtime 1x	12/12/2020	12/18/2020	29.37	27.64	811.70	65.00	1,789.21
Basic and Supp Life/ADD - Taxable	12/05/2020	12/18/2020	0.00		1.57		40.58
Regular Pay	12/05/2020	12/11/2020	40.00	27.64	1,105.60		
Overtime - Shift 2 - Premium	12/05/2020	12/11/2020	0.03	4.15	0.14		
Overtime - FLSA Premium	12/05/2020	12/11/2020	11.93	13.82	164.92		
Overtime 1x	12/05/2020	12/11/2020	11.93	27.64	329.84		
PTO - Paid Time Off - Taken						247.25	6,789.72
Holiday						72.00	1,961.37
Incentive - PFP							6,617.84
Work from Home Expense Reimbursement							1,000.00
Total						2,070.18	66,246.54

In this pay period, Claimant received shift differentials. She also received a Basic and Supp Life/ADD payment as part of her gross wages. Defendants did not include this direct benefit payment to Claimant in the regular rate of pay and their method of calculating the regular rate of pay resulted in an underpayment to Claimant. This company-wide practice of not properly calculating the regular rate of pay was applied to other aggrieved employees and is a matter of common payroll administration.

Defendants have thus violated the foregoing sections of the Labor Code in each pay period in which aggrieved employees like Claimant have worked overtime hours in pay periods where they earned forms of non-excludable remuneration but were not properly paid 1.5x or 2.0x their regular rate of pay for those overtime hours under California law.

As a result, Claimant may recover civil penalties on behalf of herself, the State of California and the aggrieved employees as provided under Labor Code §§ 1197.1 (\$100/\$250) and 2699 (\$100/\$200) per violation per pay period per employee, along with all other civil penalties permitted by law.

Underpaid Meal Period Premiums
Violation of Labor Code §§ 226.7, 512, 1198; IWC Wage Orders

Defendants failed to pay meal period premiums at the lawful regular rate of compensation to Claimant and other aggrieved employees in violation of Labor Code sections 226.7, 512 and 1198, and the related sections of the IWC Wage Orders, including section 11.

Labor Code section 512 requires that employers provide a 30-minute, uninterrupted meal period after no more than five hours of work and a second meal period after no more than 10 hours of work. *See Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal. 4th 1004, 1049. Labor Code section 226.7 requires that if a meal period is late, missed, short, or interrupted, the employer must pay for an hour of pay at the employee's "regular rate" of compensation. *Ferra v. Loews Hollywood Hotel, LLC* (2021) 11 Cal. 5th 858, 862 ("We hold that the terms are synonymous: "regular rate of compensation" under section 226.7(c), like "regular rate of pay" under section 510(a), encompasses all nondiscretionary payments, not just hourly wages"). "[T]ime records showing noncompliant meal periods raise a rebuttable presumption of meal period violations, including at the summary judgment stage." *Donohue v. AMN Services, LLC* (2021) 11 Cal. 5th 58, 61. Labor Code section 1198 renders "employment of any employee for longer hours than those fixed by the order or under conditions of labor prohibited by the [IWC Wage Orders]" unlawful.

In pay periods where Defendants paid one or more meal period premiums to Claimant or the aggrieved employees, Defendants did not pay those premiums at the regular rate of compensation. As explained with respect to the "regular rate of pay" allegations of the overtime section, and for the same reasons, Defendants did not include all required forms of remuneration when calculating the regular rate of compensation at which meal premiums must be paid. Specifically, Defendant did not include the shift differentials, bonuses, incentives,

benefits, and other forms of compensation in the regular rate of compensation for purposes of the meal period premiums. As a result, Defendants violated the foregoing sections of the Labor Code and IWC Wage Orders and underpaid Claimant and the aggrieved employee meal period premiums.

This violation is illustrated on Claimant's Wage Statement above, dated 10/15/2021. During this pay period, Claimant received two Meal/Break premiums. Defendants paid the premiums at Claimant's straight time hourly rate of \$30.04 although Claimant's regular rate of compensation was higher than \$30.04 because she was paid shift differentials during the same period. This practice of underpaying premiums by not including all forms of compensation (including but not limited to shift differentials, incentives, bonuses, premiums, and benefits) applied as a matter of common payroll administration with respect to the aggrieved employees.

As a result, Claimant may recover civil penalties on behalf of herself, the State of California and the aggrieved employees as provided under Labor Code section 2699 (\$100/\$200) per violation per pay period per employee, along with all other civil penalties permitted by law.

Underpaid Rest Period Premiums
Violation of Labor Code §§ 226.7, 516, 1198; IWC Wage Orders

Defendants failed to pay rest period premiums at the lawful regular rate of compensation to Claimant and other aggrieved employees in violation of Labor Code sections 226.7, 516 and 1198, and the related sections of the IWC Wage Orders, including section 12.

Labor Code sections 226.7 and 516, along with the IWC Wage Orders, require that employers authorize and permit a 10-minute, uninterrupted rest period for each four-hour period (or major fraction thereof) that an employee works. Labor Code section 226.7 requires that if a meal period is non-compliant, the employer must pay for an hour of pay at the employee's "regular rate" of compensation. *See Ferra v. Loews Hollywood Hotel*, 11 Cal. 5th at 862. Labor Code section 1198 renders "employment of any employee for longer hours than those fixed by the order or under conditions of labor prohibited by the [IWC Wage Orders]" unlawful.

For the same reasons as set forth above in the meal period section, and on information and belief, the aggrieved employees were underpaid rest period premiums, to the extent they received any, as a result of Defendants' policy and practice of not including all forms of remuneration in the regular rate of compensation at which such rest period premiums must be paid.

As a result, Claimant may recover civil penalties on behalf of herself, the State of California and the aggrieved employees as provided under Labor Code section 2699 (\$100/\$200) per violation per pay period per employee, along with all other civil penalties permitted by law.

Underpaid Paid Sick Leave
Violation of Labor Code §§ 246 through 248.5

Defendants violated Labor Code section 246 because they failed to calculate and pay Claimant and the aggrieved employees paid sick leave at an hourly rate using one of the three permissible methods of calculation set forth in Labor Code sections 246(l)(1) to (3).

Under Labor Code section 246 *et seq.*, employers are required to provide paid sick leave to all employees. Employers have the option of providing 24 hours of paid sick leave to employees or to allow employees to accrue paid sick leave each pay period. Cal. Lab. Code § 246. If an employer chooses the accrual method, employees must accrue sick leave at a rate of one (1) hour for every thirty (30) hours worked in a given pay period. Cal. Lab. Code § 246(b)(1). Under the accrual method, employees must begin accruing paid sick leave at the commencement of employment. Cal. Lab. Code § 246(b)(1).

Additionally, employers are required to pay sick leave in accordance with one of the permissible methods provided in Labor Code § 246(l)(1)-(3):

(l) For the purposes of this section, an employer shall calculate paid sick leave using any of the following calculations:

(1) Paid sick time for nonexempt employees shall be calculated in the same manner as the regular rate of pay for the workweek in which the employee uses paid sick time, whether or not the employee actually works overtime in that workweek.

(2) Paid sick time for nonexempt employees shall be calculated by dividing the employee's total wages, not including overtime premium pay, by the employee's total hours worked in the full pay periods of the prior 90 days of employment.

(3) Paid sick time for exempt employees shall be calculated in the same manner as the employer calculates wages for other forms of paid leave time.

The third option is not applicable because this case involves non-exempt employees. Therefore, Defendants were required to pay paid sick time under the method set forth in options one or two. However, Defendants failed to pay sick leave using method one or two described above because when they paid sick leave to aggrieved employees, they failed to factor in bonuses, incentives, shift differentials, benefit payments, and other forms of remuneration.

As illustrated on Claimant's Wage Statement with a check date of 9/3/2021, Defendants paid Claimant, like other aggrieved employees, paid sick leave hours her base rate, rather than methods one or two above:

Description	Dates	Hours	Rate	Amount
Acting Manager Pay - 15%	08/23/2021 - 08/29/2021	27.00000	4.2911	115.86
Better Begins With Me - Gross u			0	
Bonus - Corporate			0	
Double Time for 10% Shift Pay			0	
Doubletime Pay			0	
Floating Holiday Pay			0	
Holiday Pay			0	
Holiday Worked - Regular Pay - I			0	
Incentive - PFP			0	
Overtime - Shift 2 - Premium			0	
Overtime	08/16/2021 - 08/22/2021	6.516667	42.9124	279.65
Overtime	08/23/2021 - 08/29/2021	11.76666	44.0324	518.12
PTO - Paid Time Off - Taken			0	
Regular Pay	08/16/2021 - 08/29/2021	70.85000	28.6074	2,026.84
Regular Pay - Shift 2 - Premium			0	
Regular Pay - Shift 3 - Premium			0	
Remote Work Reimbursement			0	
Sick Pay	08/16/2021 - 08/22/2021	2.75	28.6074	78.67
Tax Season Premium			0	
Vacation Pav			0	

Defendants did not pay paid sick leave “in the same manner as the regular rate of pay for the workweek in which the employee uses paid sick leave, whether or not the employee actually works overtime in that workweek,” because the regular rate should have included the Acting Manager Pay differential. Additionally, Defendants did not use method two by dividing the employee's total wages by total hours worked in the full pay periods of the prior 90 days, as such calculation would have resulted in a paid sick leave rate higher than the base rate of \$28.607 at which Claimant was paid.

The failure to calculate and pay paid sick leave at one of the lawful rates set forth in Labor Code § 246(l)(1)-(3) was applied as a matter of common policy and practice to Claimant and the aggrieved employees in those pay periods where they earned bonuses, incentives, differentials, premiums, benefits, or other forms of non-excludable remuneration and also received paid sick leave.

As a result, Claimant may recover civil penalties on behalf of herself, the State of California and the aggrieved employees as provided under Labor Code § 2699 (\$100/\$200) per violation per pay period per employee, along with all other civil penalties permitted by law. Claimant is also entitled to penalties under Labor Code section 248.5.

Underpaid Covid Supplemental Paid Sick Leave
Violation of Labor Code §§ 246 through 248.5

Defendants violated Labor Code section 248.1 and 248.2 because they failed to calculate and pay Claimant and the aggrieved employees paid sick leave at the lawful hourly rate.

Under Labor Code section § 248.1, employers were required to provide up to 80 hours of Covid-19 Supplemental Paid Sick Leave to employees for the period of April 16, 2020 to December 31, 2021. Under Labor Code § 248.2, employers were required to provide up to 80 hours of Covid-19 Supplemental Paid Sick Leave for the period of January 1, 2021 through September 30, 2021. Employers must comply with the calculation and payment methods of these Covid supplemental sick leave laws.

Under Labor Code section 248.1, non-exempt employees must be paid supplemental paid sick leave according to the highest of the following methods:

(3) (A) Each hour of COVID-19 supplemental paid sick leave shall be compensated at a rate equal to the highest of the following:

- (i) The covered worker's regular rate of pay for the covered worker's last pay period, including pursuant to any collective bargaining agreement that applies.
- (ii) The state minimum wage.
- (iii) The local minimum wage to which the covered worker is entitled.

Under Labor Code section 248.2, non-exempt employees must be paid supplemental paid sick leave according to the highest of the following methods:

(i) For nonexempt covered employees, by the highest of the following:

- (I) Calculated in the same manner as the regular rate of pay for the workweek in which the covered employee uses COVID-19 supplemental paid sick leave, whether or not the employee actually works overtime in that workweek.
- (II) Calculated by dividing the covered employee's total wages, not including overtime premium pay, by the employee's total hours worked in the full pay periods of the prior 90 days of employment.
- (III) The state minimum wage.
- (IV) The local minimum wage to which the covered employee is entitled.

On information and belief, Defendants paid supplemental sick leave to aggrieved employees at the base rate, rather than the highest method set forth in Labor Code sections 248.1 and 248.2. The failure to calculate and pay paid sick leave at one of the lawful rates set forth in Labor Code §§ 248.1 and 248.2 was applied as a matter of common policy and practice to Claimant and the aggrieved employees in those pay periods where they earned benefits

payments, bonuses, incentives, shift differentials, premiums, or other forms of non-excludable remuneration and also received statutory Covid paid sick leave.

As a result, Claimant may recover civil penalties on behalf of herself, the State of California and the aggrieved employees as provided under Labor Code § 2699 (\$100/\$200) per violation per pay period per employee, along with all other civil penalties permitted by law. Claimant is also entitled to penalties under Labor Code section 248.5.

Untimely Payment of Wages During Employment **Violation of Labor Code §§ 204, 204b, 210**

Defendants violated Labor Code sections 204 and 204b requiring payment of all wages on regularly scheduled paydays with respect to Claimant and other aggrieved employees by failing to pay all wages owed on the regular pay days scheduled each pay period. To the extent that Defendants made or makes any retroactive payments to Claimant or other aggrieved employees, such amounts are untimely in violation of these payday statutes.

Because Defendants failed to pay all wages in each pay period in which such wages were earned at the lawful rate for overtime, meal/rest premiums and other forms of remuneration, Defendants violated Labor Code section 204 and/or 204b (for weekly employees), which requires timely payment of wages of wages each regular scheduled pay period. Labor Code section 204 requires payment of “all wages” for non-exempt employees at least twice each calendar month. Labor Code section 204b applies to employees paid on a weekly basis and also requires the payment for all labor within the required pay periods. Labor Code section 210 provides that, “every person who fails to pay the wages of an employee as provided in Section...204...shall be subject to a civil penalty” of \$100 for an initial violation and \$200 plus 25% of the amount unlawfully withheld for a subsequent violation.

As explained above, Defendants underpaid Claimant and other aggrieved employees overtime, premium pay, and sick leave pay on account of the regular rate of pay underpayments. Defendants are separately liable for not paying the full amount owed to Claimant and other aggrieved employees each payday in violation of Labor Code sections 204 and/or 204b.

As a result, Claimant may recover civil penalties on behalf of herself, the State of California and the aggrieved employees as provided under Labor Code section 2699 (\$100/\$200) per violation per pay period per employee, Labor Code section 210 (\$100/\$200) per violation per pay period, along with all other civil penalties permitted by law.

Untimely Payment of Wages Upon Separation of Employment **Violation of Labor Code §§ 201, 202, 203**

Defendants violated Labor Code sections 201, 202 and 203 requiring timely payment of all wages upon separation and waiting time penalties in lieu thereof with respect to aggrieved employees by failing to pay all wages and premiums owed upon termination of employment.

Labor Code section 201 requires that if an employer fires an employee, the wages must be paid immediately. Labor Code section 202 requires that if an employee quits without providing 72 hours' notice, his or her wages must be paid no later than 72 hours thereafter. Labor Code section 202 states that if an employee provides 72 hours' notice, the final wages are payable upon his or her final day of employment. Labor Code section 203 requires an employer who fails to comply with Labor Code sections 201 or 202 to pay a waiting time penalty for each employee, up to a period of 30 days.

Because Defendants failed to pay all wages owed to the aggrieved employees during their employment and failed to properly pay overtime, Defendants failed to timely pay all wages owed upon separation of employment in violation of Labor Code sections 201, 202 and 203.

As a result, Claimant may recover civil penalties on behalf of herself, the State of California and the aggrieved employees as provided under Labor Code § 2699 (\$100/\$200) per violation per pay period per employee, along with all other civil penalties permitted by law.

Non-Compliant Wage Statements **Violation of Labor Code §§ 226, 226.3**

Defendants violated Labor Code section 226 with respect to Claimant and other aggrieved employees by failing to furnish itemized wage statements each pay period that accurately list all information required by Labor Code section 226(a)(1) through (9).

Labor Code section 226(a) requires an employer to furnish wage statements to employees semimonthly or at the time of each payment of wages, “an accurate itemized statement in writing showing:” (1) gross wages earned, (2) total hours worked, (3) the number of piece rate units earned and applicable piece rate in effect, (4) all deductions, (5) net wages earned, (6) the inclusive dates of the pay period, (7) the name of the employee and last four digits of SSN or an EIN, (8) the name and address of the legal name of the employer, and (9) all applicable hourly rates in effect during the pay period and the number of hours worked at each hourly rate by the employee.¹ An employer who violates subdivision (a) of Section 226 shall be subject to a civil penalty in the amount of \$250 per employee per violation for the initial citation and \$1,000 per employee for each violation in a subsequent citation, in addition to other penalties allowed by law.

¹ See generally *Lopez v. Friant & Associates, LLC* (2017) 15 Cal. App. 5th 773, 787-88 (“Consistent with the PAGA statutory framework and the plain language of section 226(e), we hold a plaintiff seeking civil penalties under PAGA for a violation of section 226(a) does not have to satisfy the “injury” and “knowing and intentional” requirements of section 226(e)(1)”); see also *Kastler v. Oh My Green, Inc.* (N.D. Cal., Oct. 25, 2019) Case No. 19-CV-02411-HSG (“Injuries from a failure to provide an accurate pay statement include ‘possibility of not being paid overtime, employee confusion over whether they received all wages owed them, difficulty and expense involved in reconstructing pay records, and forcing employees to make mathematical computations to analyze whether the wages paid in fact compensated them for all hours worked’”) (rejecting *Maldonado* defense for class claims).

Throughout the relevant statutory period, as a result of the foregoing violations identified in this notice—the regular rate of pay underpayments for overtime, premium pay, and paid sick leave—Defendants violated Labor Code section 226(a)(1) by not listing the correct “gross wages earned,” as the employees earned overtime, paid sick leave, and premiums at the “regular rate” or variation thereof, but were instead underpaid, resulting in an inaccurate reflection and recording of “gross wages earned” on those wage statements.

Additionally, Defendants violated Labor Code section 226(a)(5) with respect to “net wages earned” for the same reasons, as the “net wages earned” are depreciated and underpaid resulting in an inaccurate reflection on the pay stub.

Furthermore, in violation of Labor Code section 226(a)(9), the hourly rates in effect for overtime, paid sick leave, and premiums are incorrect for the same reasons, as they are inaccurately stated as the base rate (or other incorrect) for Claimant and other aggrieved employees, whereas the applicable hourly rate in effect was in fact the “regular rate” for those respective earnings.

Additionally, Defendants separately violated section 226(a)(1), (2) and (5), (6), and (9) for Claimant and the aggrieved employees, as illustrated by the below example with the check date of 4/30/2021:

TD Ameritrade, Inc 866/373-3872	Desiree Berry		Advice #: Advice Date:		U 04/30/2021		
HOURS AND EARNINGS							
Description	PP Begin	PP End Date	Hours	Rate	Current	YTD Hours	YTD
Overtime - Shift 2 - Premium	04/19/2021	04/25/2021	0.03	4.29	0.15	81.40	344.03
Overtime - FLSA Premium	04/19/2021	04/25/2021	6.85	14.31	97.99	228.90	3,640.37
Overtime 1x	04/19/2021	04/25/2021	6.85	28.61	195.97	224.85	6,318.85
Regular Pay	04/19/2021	04/25/2021	40.00	28.61	1,144.30	635.33	17,831.29
Basic and Supp Life/ADD - Taxable	04/12/2021	04/25/2021	0.00		1.70		14.78
Remote Work Reimbursement	04/12/2021	04/25/2021	0.00		40.00		240.00
Overtime - Shift 2 - Premium	04/12/2021	04/18/2021	12.77	4.29	54.79		
Overtime - FLSA Premium	04/12/2021	04/18/2021	23.22	14.74	342.10		
Overtime 1x	04/12/2021	04/18/2021	23.22	28.61	664.17		
Regular Pay	04/12/2021	04/18/2021	40.00	28.61	1,144.30		
Premium Bonus	04/05/2021	04/11/2021	0.00		275.00		3,487.50
Premium Bonus	03/29/2021	04/04/2021	0.00		275.00		
Holiday						32.00	884.48
Regular Pay - Shift 2 - Premium						28.80	80.47
Total					4,235.47		37,139.78

For each pay period, section 226(a) requires Defendants to issue a single “accurate itemized wage statement” showing each of the required categories for the *applicable pay period*.

Defendants violated section 226(a)(2) by failing to list the total hours worked by the employee on a pay period basis. In the exemplar pay period, Defendants list hours worked across a 27-day period ranging from 3/29/2021 to 4/25/2021. Additionally, on Defendants’ wage statements, when the total number of hours listed are added together, they do not total the actual number of hours Claimant or other aggrieved employees worked, and there is no way to actually determine that total on the “four corners” of the wage statement or through “simple

math,” as Claimant and other aggrieved employees are effectively required to look beyond the four corners of the wage statement to actually figure out how many hours they worked in that respective pay period. Indeed, this problem is compounded by the fact that Defendants have violated Labor Code section 226(a)(2) in the manner of purportedly including hours worked across a 27-day period on a single wage statement (as opposed to those exclusively for the pay period at issue, as required by statute). Defendants wage statements throughout the PAGA Period for the Claimant and aggrieved employees bear similar defects and violations of this subdivision of 226(a).

Indeed, Defendants violated section 226(a) with respect to Claimant and the aggrieved employees each time they issued wage statements that contained payments from different pay periods and failed to provide accurate wage statements for each applicable period. The 4/30/21 wage statement is also inaccurate because Defendants included a Premium Bonus payment of \$275 for the period of 3/29 to 4/4, which is for the previous pay period. This error renders the 4/30/2021 wage statement and the previous wage statement for 4/16/2021 inaccurate because they each fail to list the correct gross wages and net wages for the applicable pay period, in violation of section 226(a)(1) and (5).

Defendants violated Labor Code section 226(a)(6) by not including the inclusive dates of a single pay period on each wage statement, i.e., “semi-monthly or at the time of each payment of wages” ... a wage statement including “(6) the inclusive dates of the period for which the employee is paid.”

Claimant and other aggrieved employees cannot promptly and easily determine from the wage statement alone the wages paid or earned without reference to other documents or information. Indeed, these wage statement violations are significant because they sowed confusion among Claimant and other aggrieved employees with respect to what amounts were owed and paid, at what rates, and how those amounts were calculated. The wage statements reflect a false statement of earnings and concealed the underlying problems and underpayments throughout the relevant period.

Thus, Claimant may recover civil penalties on behalf of herself, the State of California and the aggrieved employees as provided under Labor Code sections 226.3 (\$250/\$1,000) and/or 2699 (\$100/\$200) per violation per pay period per employee, along with all other civil penalties permitted by law.

Failure to Maintain Accurate Records
Violation of Labor Code §§ 1174, 1174.5, 1198; IWC Wage Orders

Because of the violations set forth in this notice, including Defendants' failure to accurately maintain records of pay for all hours worked at the appropriate lawful rates of pay, Defendants violated Labor Code section 1174 and the IWC Wage Orders by failing to maintain accurate payroll records showing daily hours worked, all hourly rates in effect and hours worked at those rates, and the wages paid to each employee. As a result, Defendants are liable for a civil penalty of \$500 per employee to Claimant and each aggrieved employee pursuant to Labor Code section 1174.5.

Attorneys' Fees and Costs
Labor Code § 2699(g)

Claimant was compelled to retain the services of counsel to file this court action to protect his interests, the interests of other aggrieved employees, and the State of California. Claimant has thereby incurred and will continue to incur attorneys' fees and costs, which are recoverable on all PAGA causes of action under Labor Code section 2699(g).

Notice of Demand for Defendants
to Change Policies and Practices

Claimant intends to pursue legal action against Defendants based on the violations set forth in this notice. Defendants are hereby notified that any attempt to resolve this case must be conducted in coordination with Claimant's counsel to protect the interests of Claimant, the aggrieved employees, and the State of California via the LWDA. Any and all settlements releasing liability require Court approval in connection with Claimant and their counsel to fully release liability and resolve the claims alleged in this notice. Claimant will establish that (1) her lawsuit was a catalyst in motivating Defendants to change their policies and practices and provide the relief sought through this action, (2) that the forthcoming lawsuit has merit and is based on undisputed violations for which Defendants will be liable at trial, and (3) that Claimant has hereby notified Defendants of their violations and considers this notice an attempt to resolve the matter. *See Tipton-Whittingham v. City of Los Angeles* (2004) 34 Cal.4th 604, 608 (citing *Graham v. Daimler-Chrysler Corp.* (2004) 34 Cal. 4th 553) (authorizing an award of catalyst attorneys' fees against Defendants).

As the PAGA representative, Claimant has a duty to file this case at the earliest opportunity. Defendants may contact Claimant's counsel with any questions regarding this letter or the forthcoming lawsuit.

CONCLUSION

If the LWDA does not pursue enforcement, Claimant will bring representative claims on behalf of the State of California and the aggrieved employees seeking all recoverable civil

penalties for violations of the Labor Code and the IWC Wage Orders, along with attorneys' fees, costs, interest, and other appropriate relief.

Thank you for your attention to this matter.

Sincerely,



Nicholas J. Ferraro

Cc Claimant Desiree Berry

Lauren Vega, Esq.
Counsel for Claimant
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