B
BOKHOUR
LAW GROUP

MEHRDAD BOKHOUR
Attorney at Law

1901 Avenue of the Stars | Suite 450
Los Angeles | California 90067

tel 310 975 1493
fax 310 675 0861

October 14, 2022

SUBMITTED VIA LWDA'S PAGA CLAIM NOTICE ONLINE PORTAL

BHC FREMONT HOSPITAL, INC.
39001 SUNDALE DR.
FREMONT, CA 94538

c/o: CSC – LAWYERS INCORPORATING SERVICE
2710 GATEWAY OAKS DR., SUITE 150N
SACRAMENTO, CA 95833

Re: *Manuel Diaz v. BHC Fremont Hospital, Inc.*
Notice of Intent to File Suit for California Labor Code § 2698 et seq. Penalties

To Whom It May Concern:

This office, along with Falakassa Law, P.C., represent Manual Diaz (hereinafter "Mr. Diaz" or the "Plaintiff") and a proposed group of current and former non-exempt employees working for BHC Fremont Hospital, Inc. ("BHC" or the "Company") in the State of California for violations of the Labor Code Sections 201, 202, 203, 204, 210, 226, 226.3, 510, 1182.12, 1194, 1194.2, 1197, 1197.1, 1198, 1199 and 1199.5, and all applicable Industrial Welfare Commission Wage Orders ("Wage Orders").

This letter shall serve as notification under Labor Code § 2699.3 (hereinafter "PAGA Notice"). The $75 filing fee made payable to the California Labor and Workforce Development Agency for the Private Attorneys General Act Notice ("PAGA Notice") and a copy of this PAGA Notice was submitted electronically to the Department of Industrial Relations.

Mr. Diaz wishes to bring a representative action on behalf of himself and the State of California as well as on behalf of the following group of "Aggrieved Employees":

> All non-exempt employees who work or worked for BHC Fremont Hospital, Inc. in California during the one year immediately preceding the filing of this PAGA Notice and continuing into the present and ongoing. ("aggrieved employees")

BHC Fremont Hospital provides inpatient and outpatient treatment to adolescents and teens with a variety of emotional and behavior problems, including chemical dependency, PTSD support, and other mental health services.

Mr. Diaz was employed by BHC as a non-exempt licensed vocational nurse at the BHC's Fremont facility. Mr. Diaz and other aggrieved employees are or were employed as non-exempt employees in BHC's large hospital. Mr. Diaz and other aggrieved employees were responsible for various aspects of patient treatment and care. At all relevant times, Mr. Diaz and the other aggrieved employees were subjected to the same policies, procedures, and practices, working conditions, and corresponding wage and hour violations.

First, at all relevant times, BHC had a consistent policy of rounding Plaintiff and other aggrieved employees' time entries to the nearest quarter hour. As a result of this practice, Plaintiff and other aggrieved employees are not compensated for all the hours that they work and all of the overtime hours they work, in violation of Labor Code §§ 204, 210, 510, 1194, 1197.1, 1199, and applicable Wage Orders.

California courts have held that rounding time policies can be lawful if and when the rounding policy is fair and neutral on its face and 'it is used in such a manner that it will not result, over a period of time, in failure to compensate the employees properly for all the time they have actually worked,' (29 C.F.R. § 785.48; see DLSE Manual, supra, §§ 47.1, 47.2.)."

Here, BHCs rounding time policy/practice is not neutral on its face or in its application as Mr. Diaz and other aggrieved employees are subject to discipline, including termination for being tardy in reporting to work, or returning from a meal period. Moreover, because BHC is easily capable of tracking the time worked by aggrieved employees to the minute, the policy itself exists not for the convenience or benefit of the employees who are trying to report their time on timecards or otherwise, but for BHC's benefit. As a result, the policy is not neutral on its face, and over a period of time, Plaintiff and other aggrieved employees were not properly paid for all hours worked in violation of Labor Code §§ 204, 210, 510, 1194, 1197.1, 1199, and applicable Wage Orders.

Labor Code § 1197.1 authorizes employees who are paid less than the minimum fixed by an applicable state or local law, or by an order of the commission a civil penalty, restitution of wages, and liquidate damages as follows: (1) for any initial violation that is intentionally committed, one hundred dollars ($100) for each underpaid employee for each pay period for which the employee is underpaid....[and] (2) [f]or each subsequent violation for the same specific offense, two hundred fifty dollars ($250) for each underpaid employee for each pay period for which the employee is underpaid regardless of whether the initial violation is intentionally committed. As set forth above, BHC failed to compensate Plaintiff and other aggrieved employees for all hours worked.

Furthermore, at all relevant times, Mr. Diaz and other aggrieved employees were not properly paid at the correct overtime rate for all hours worked in excess of eight (8) hours per workday or forty (40) hours per workweek. When Mr. Diaz and the other aggrieved employees worked overtime hours, BHC failed to include all compensation, including but not limited to, non-discretionary bonuses, shift differentials, and other forms of renumeration, when calculating the "regular rate of pay" used in overtime calculations. For instance, BHC routinely paid Mr. Diaz and other aggrieved employees' bonuses linked to incentives, performances, and shift premiums, but BHC would omit these payments when calculating the regular rate of pay used in overtime calculations and when paying overtime to Mr. Diaz and the other non-exempt employees.

Under the California Labor Code (as well as the FLSA), courts have held that regularly paid non-discretionary incentive pay/bonuses must be included in determining an employee's "regular rate of pay" for purposes of calculating overtime. Indeed, Labor Code § 510 requires an employer to compensate an employee who works more than eight (8) hours in one workday, forty (40) hours in a workweek, and for the first eight (8) hours worked on the seventh consecutive day no less than one and one-half times the regular rate of pay for an employee. In addition, Labor Code § 510 obligates employers to compensate employees at no less than twice the regular rate of pay when an employee works more than twelve (12) hours in a day or more than eight (8) hours on the seventh consecutive day of work.

Pursuant to Section 3 of the applicable Wage Orders, employees shall not be employed more than eight (8) hours in any workday or more than 40 hours in any workweek unless the employee receives one and one-half (11/2) times such employee's regular rate of pay for all hours worked over 40 hours in the workweek. By their policy of requiring Mr. Diaz and the other non-exempt employees to work in excess of eight (8) hours in a workday and/or forty (40) hours in a workweek without compensating them at the rate of one-half (1 1/2) their regular rate of pay, Goodman willfully violated the provisions of Labor Code § 510 and applicable Wage Orders.

As a result of BHC's failure to include all forms of compensation in calculating the "regular rate," as set forth above, BHC failed to compensate Mr. Diaz and other aggrieved employees for all overtime wages at the proper rates. Accordingly, Mr. Diaz and other aggrieved employees are entitled to recover liquidated damages for violations of Labor Code § 1197.1. Mr. Diaz and other aggrieved employees would be entitled to recover penalties under Labor Code § 1197.1 and/or Labor Code § 2698 *et seq*.

Furthermore, at all relevant times, Mr. Diaz and other aggrieved employees were denied 30-minute off-duty meal periods prior to the fifth hour of work as mandated by California law. As a result of BHC's meal period policies/practices and staffing shortages, Mr. Diaz and other aggrieved employees were often unable to take compliant and timely meal periods. Further, for shifts longer than 10 hours, Mr. Diaz and other aggrieved employees were unable to take compliant and timely second meal periods before the tenth hour of work. Moreover, meal breaks were often interrupted by medical emergencies and/or special requirements for treating patients.

Moreover, at all relevant times, Mr. Diaz and other aggrieved employees were not adequately provided with meal period premiums for their missed or non-compliant meal periods as required by Labor Code § 226.7 and *Ferra v. Loews Hollywood Hotel, LLC* (2021) No. S259172. In *Ferra*, the California Supreme Court made clear that payment of meal (and rest) period premiums must include more than just the employee's base hourly rate. The court's holding establishes that the amount to be paid for meal/rest premiums is not the employees' base hourly rate but their "regular rate of compensation," which is used to calculate overtime pay, which includes other forms of compensation, including non-discretionary bonuses and shift pay Throughout Mr. Diaz's employment, BHC failed to adequately pay missed meal and rest period premiums as well as sick and vacation wages at the appropriate "regular rate of pay" to Mr. Diaz and aggrieved employees.

Consequently, BHC has violated Labor Code §§ 226.7, 512 and applicable Wage Orders. BHC would also be liable for civil penalties pursuant to Labor Code § 2698.

Furthermore, at all relevant times, Mr. Diaz and other aggrieved employees were also not provided with 10 minutes of net rest period time for every 4 hours worked, or major fraction thereof as mandated by California law. Specifically, due to BHC's rest period policies/practices and staffing shortages at BHC, Mr. Diaz and other aggrieved employees were often unable to take compliant rest periods of 10 minutes time for every 4 hours worked, or major fraction thereof. On occasions when Mr. Diaz and other aggrieved employees worked more than 10.0 hours in a shift, BHC failed to authorize and/or permit a third mandated rest period. Finally, Mr. Diaz and other aggrieved employees were not provided rest period premiums at the appropriate "regular rate of pay" for missed or non-compliant rest periods.

Accordingly, due to BHC's uniform rest period policies/practices, Mr. Diaz and other aggrieved employees were also regularly denied legally compliant rest periods in violation of Labor Code 226.7, 512, and applicable Wage Orders.

As a result of BHC's unlawful rest period policies and practices, Mr. Diaz seeks to recover on behalf of herself and all aggrieved employees rest period premiums and penalties. Consequently, BHC has violated Labor Code §§ 226.7, 512 and applicable Wage Orders. BHC would also be liable for civil penalties pursuant to Labor Code § 2698 *et seq*.

As a result of BHC's failure to pay Mr. Diaz and other aggrieved employees for all hours they were subject to the control of BHC, and failure to pay for meal and rest period premiums for missed/non-compliant meal and rest periods, BHC issued wage statements which failed to accurately identify the gross wages earned, the total hours worked, the net wages earned, and the correct corresponding number of hours worked at each hourly rate, in violation of Labor Code §226(a) (1, 2, 5, and 9).

Labor Code § 226.3 provides that "[a]ny employer who violates subdivision (a) of Section 226 shall be subject to a civil penalty in the amount of two hundred fifty dollars ($250) per employee per violation in an initial violation and one thousand dollars ($1,000) per employee for each violation in a subsequent citation, for which the employer fails to provide the employee a wage deduction statement or fails to keep the required in subdivision (a) of Section 226."

Thus, for the violations of Labor Code section 226 described above, Mr. Diaz and other aggrieved employees may also recover Labor Code § 226.3 penalties for BHC's violations of

Labor Code § 226(a). As such, the wage statements BHC issued to Mr. Diaz and other aggrieved employees are in violation of Labor Code § 226 (a)(9). Thus, Mr. Diaz is an aggrieved employee within the meaning of PAGA and BHC has violated Labor Code §226(a) with respect to Mr. Diaz and other aggrieved employees. Consequently, because BHC failed to comply with Labor Code § 226(a) and applicable Wage Orders, Mr. Diaz and other aggrieved employees would be entitled to recover penalties under Labor Code §§ 226(e) and/or §2698 *et seq*.

Moreover, at all relevant times, BHC required Mr. Diaz and other aggrieved employees to incur necessary business expenses associated with using their personal cell phones for work related purposes but did not reimburse aggrieved employees adequately for these necessary expenditures in violation of Labor Code §§ 2802-2804. *See Cochran v. Schwan's Home Service, Inc.*, (2014) 228 Cal.App.4th 1137, 1144 ["[i]f an employee is required to make work-related calls on a personal cell phone, then he or she is incurring an expense for the purposes of section 2802. It does not matter whether the phone bill is paid for by a third person, or at all...To show liability under section 2802, an employee need only show that he or she was required to use a personal cell phone to make work-related calls, and he or she was not reimbursed"].

Here, BHC uniformly failed to adequately reimburse aggrieved employees for a reasonable portion of cell phone bill (and other costs incurred) in the discharge of their duties for those aggrieved employees. Accordingly, due to BHC's uniform failure to adequately reimburse for necessary business expenditures in violation of Labor Code §§ 2800-2802 and applicable Wage Orders, Ms. Rios and other aggrieved employees would be entitled to civil penalties under Labor Code § 2698 *et seq*.

Finally, because of, BHC's failure to pay all minimum and overtime wages, and meal and rest period premiums, BHC also failed and continues to fail to pay other aggrieved employees all wages owed at their time of separation from employment in violation of Labor Code §§ 201-203 and applicable Wage Orders. Thus, aggrieved employees would be entitled to recover penalties under Labor Code §§ 201-203 and/or 2698 *et seq*.

Pursuant to Labor Code § 2699.3(a)(2)(A), please advise within sixty-five (65) calendar days of the date of this notice whether your office intends to investigate the violations alleged herein above. We understand that if we do not receive a response from your office within sixty-five (65) calendar days of this PAGA Notice, Mr. Diaz may thereafter pursue her interests and the interests of similarly aggrieved employees with a civil complaint against BHC for its violations of the California Labor Code and applicable Wage Orders.

While it is our intent to pursue a PAGA representative lawsuit against BHC for civil penalties under Labor Code § 2699, it is our firms' policy to attempt to negotiate an early resolution of all matters where possible and beneficial to all aggrieved employees. If BHC is interested in attempting to resolve this matter, please contact me or have your lawyer contact our office so that we can discuss an informal discovery plan and the possibility of early mediation on or before **December 9, 2022**.

Very truly yours,

Mehrdad Bokhour, Esq.
Joshua Falakassa, Esq.