

March 17, 2023

**PAGA NOTICE AND FILING FEE
SUBMITTED ELECTRONICALLY**

Department of Industrial Relations
Attn: Accounting Unit
455 Golden Gate Avenue, 10 Floor
San Francisco, California 94102

Re: California Labor Code §2699 Notice Letter
On Behalf of Aggrieved Employee Nathalie Aldana

Employer: Little Caesar Enterprises, Inc.
2211 Woodward Avenue
Detroit, Michigan 48201

To whom it may concern:

This letter shall constitute Nathalie Aldana's ("Ms. Aldana's") notification under Labor Code §2699.3 (hereinafter, "PAGA Notice"). The \$75 filing fee was submitted electronically through the California Labor and Workforce Development Agency / Department of Industrial Relations' website for PAGA filings, along with a copy of this PAGA Notice.

The PAGA Notice concerns Ms. Aldana's allegations that her former employer, Little Caesar Enterprises, Inc. ("Little Caesars"), has a policy or practice of not compensating employees for all hours worked, including overtime wages. Labor Code §1197 states the California requirement that employees must be paid at least the minimum wage fixed by the Commission or by any applicable state or local law, and any payment of less than the minimum wage is unlawful. Similarly, Labor Code §1194 entitles "any employee receiving less than the legal minimum wage...to recover in a civil action the unpaid balance of the full amount of this minimum wage." The applicable Wage Orders obligate employers to pay each employee minimum wages for all hours worked. These minimum wage standards apply to each hour employees worked for which they were not paid. Therefore, an employer's failure to pay for any particular hour of time worked by an employee is unlawful, even if averaging an employee's total pay over all hours worked, paid or not, results in an average hourly wage above minimum wage. *Armenta v. Osmose, Inc.* (2005)135 Cal. App. 4th 314, 324.

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Additionally, Labor Code §510 provides in relevant part: “(a) Eight hours of labor constitutes a day’s work. Any work in excess of eight hours in one workday and any work in excess of forty hours 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.”

Ms. Aldana, who was employed as a crew member, and other non-exempt employees must be paid for all “hours worked.” Hours worked means “the time during which an employee is subject to the control of an employer, and includes all the time an employee is suffered or permitted to work, whether or not required to do so.” *See* Wage Order 5-2001, Subd. 2(K); *see also Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal. 4th 833. “[I]t is only necessary that the worker be subject to the control of the employer in order to be entitled to compensation.” *Morillion v. Royal Packing Co.* 22 Cal. 4th 575, 584 (2000). An employee is under the employer’s control and entitled to compensation when the employer “‘directs, commands or restrains’ an employee.” *Morillion*, 22 Cal. 4th at 583 (citation omitted).

As held under *Morillion*, determining whether an employee’s activity is under the employer’s control entitling him or her to compensation depends on the level of control employers exert over employees during the activity: “The level of the employer’s control, *rather than the mere fact that the employer requires the employees’ activity is determinative.*” *Morillion*, 22 Cal.4th at 587 (emphasis added). In *Frlekin v. Apple Inc.* (2020) 8 Cal. 5th 1038, the holding in *Morillion* was reaffirmed. Specifically, in *Frlekin*, the California Supreme Court found that time employees spent undergoing bag searches at the end of their shift was compensable. The court in *Frlekin* reasoned its decision by analyzing factors in determining whether an employer has exerted compensable control over employees:

We also emphasize that whether an activity is required remained probative in determining whether an employee is subject to the employer’s control. But, at least with regard to cases involving onsite employer-controlled activities, the mandatory nature of an activity is not the only factor to consider. We conclude that courts may and should consider additional relevant factors—including, but not limited to, the location of the activity, the degree of the employer’s control, whether the activity primarily benefits the employee or employer, and whether the activity is enforced through disciplinary measures—when evaluating such employer-controlled conduct.

To be free of the employer’s control for purposes of “hours worked,” the employee must be free to use his or her time “effectively for his or her own purposes.” *Morillion*, 22 Cal.4th at 583. Here, Ms. Aldana and other employees were required to perform pre and post shift duties prior to clocking in for their work shifts, i.e., arming and disarming the security alarm system and disposing of trash at a nearby dumpster, without being compensated for this time worked. Ms. Aldana and other employees could not use this time for their own purposes. As such, Little Caesars exercised sufficient control over Ms. Aldana and other non-exempt employees during this time but failed to pay compensation accordingly.

Labor Code §1197.1 authorizes employees who are paid less than the minimum wage 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, Little Caesars failed to compensate Ms. Aldana and all aggrieved employees for all hours worked. Accordingly, through PAGA and to the extent permitted by law, Ms. Aldana and other employees are entitled to recover liquidated damages for violations of Labor Code §1197.1. Based upon these same factual allegations, Ms. Aldana and other employees are entitled to penalties under Labor Code §1199.

Similarly, Labor Code §1194.2 authorizes employees to recover wages to recover liquidated damages for violations of Labor Code §1194. When an employee, as Ms. Aldana and the other aggrieved employees are not paid for all hours worked under Labor Code §1194, the employees may recover minimum wages for the time for which they received no compensation, as well as PAGA penalties for not having received pay for such time.

Consequently, Little Caesars has violated California Labor Code §§200, 510, 1194, 1197, and 1197.1 based on its practice of not paying Ms. Aldana and other employees for all the work they performed under the control of Little Caesars. Little Caesars would also be liable for civil penalties pursuant to California Labor Code §§558 and 2698.

Ms. Aldana further alleges that Little Caesars has a policy or practice of not compensating her and other nonexempt employees for overtime hours at a rate of one and one-half times the employee's regular rate of pay. Labor Code §510 provides in relevant part: "(a) Eight hours of labor constitutes a day's work. Any work in excess of eight hours in one workday and any work in excess of forty hours 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." Wages are defined in Labor Code § 200 as "[a]ll amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis or other method of calculation." The DLSE Enforcement Policies and Interpretations Manual §49 ("DLSE Manual") recognizes that hourly earnings, piecework earnings, commissions, shift premiums are to be included in the definition of wages for purposes of calculating the regular rate of pay for purposes of overtime pay. Specifically, Ms. Aldana alleges that Little Caesars paid her bonuses. However, Little Caesars failed to include Ms Aldana's bonus pay earned as wages in the calculation of her regular rate for purposes of determining her overtime rate. As a result of Little Caesars' failure to include all forms of remuneration when calculating their employees' regular rate of pay, it failed to pay Ms. Aldana and other non-exempt employees overtime wages correctly.

Ms. Aldana further alleges that Little Caesar maintains a policy or practice which fails to pay non-exempt employees sick pay, i.e., “Pooled Time Off”, at the employee’s regular rate of pay. Labor Code 233 provides that “any employer who provides sick leave for employees shall permit an employee to use in any calendar year the employee’s accrued and available sick leave entitlement, in an amount not less than the sick leave that would be accrued during six months at the employee’s then current rate of entitlement, for the reasons specified in subdivision (a) of Section 246.5.” Pursuant to the California Supreme Court’s ruling in *Murphy v. Kenneth Cole Productions* (2007) 40 Cal.4th 1094, 1103, sick pay is a form of wages. Labor Code 246(l) requires that employers pay sick time pay to non-exempt employees at the employee’s “regular rate of pay.” Consequently, Little Caesars violated California Labor Code §§233, 246, 246.5 based on its practice of failing to include bonus pay when determining the “regular rate of pay” for Ms. Aldana and other non-exempt employees for purposes of sick time pay. Little Caesars would also be liable for civil penalties pursuant to California Labor Code §§558 and 2698.

Ms. Aldana further alleges that Little Caesars maintains a policy or practice of compelling its employees to work in excess of 5 and 10 hours a day without being afforded uninterrupted 30 minute meal periods. Pursuant to Labor Code §§ 226.7, 512 and applicable Wage Orders, an employer is required to provide meal periods to its non-exempt employees or compensation in lieu thereof, i.e., premium wages. Here, Ms. Aldana and other non-exempt employees would be prevented or discouraged from taking their meal periods due to workplace interruptions and from being short-staffed. Ms. Aldana and other non-exempt employees were also not provided with second meal periods when they worked shifts greater than 10 hours in a day. Ms. Aldana and other employees were not paid premiums at the regular rate of pay for missed meal periods. Premiums for missed meal periods must be paid at the employee’s regular rate of pay. *Ferra v. Loews Hollywood Hotel, LLC* (2021) 11 Cal.5th 858, 878 confirmed that the term “regular rate of compensation” in Labor Code § 226.7 has the same meaning as “regular rate of pay” in Labor Code §510 and encompasses not only hourly wages but all nondiscretionary payments for work performed by the employee. This interpretation of Labor Code §226.7 comports with the remedial purpose of the Labor Code and wage orders and with our general guidance that the state’s labor laws are to be liberally construed in favor of worker protection. *Id.* Additionally, the application of this holding is applied retroactively. *Id.* at 880. Consequently, Little Caesar has violated Labor Code §§226.7 and 512. Little Caesar would also be liable for civil penalties pursuant to Labor Code §§ 558 and 2698.

Ms. Aldana also alleges that Little Caesar maintains a policy or practice of compelling its employees to work over a four-hour period (or a major fraction thereof) without authorizing and permitting them to take a paid ten-minute rest period in which they were completely relieved of all their duties. Pursuant to Labor Code § 226.7 and applicable Wage Orders, an employer is required to provide rest periods to its non-exempt employees or compensation in lieu thereof. Furthermore, Ms. Aldana and other employees were not paid premium wages at the regular rate of pay for missed rest periods. Premiums for missed rest periods must also be paid at the employee’s regular rate of pay, encompassing both hourly wages and all nondiscretionary payments for work performed by the employee. *Ferra*, 11 Cal.5th at 878. Consequently, Little

Caesar has violated Labor Code § 226.7. Little Caesar would also be liable for civil penalties pursuant to Labor Code § 2698.

As a result of Little Caesars' failure to pay wages for all time worked, failure to include all forms of remuneration when calculating the regular rate for purposes of overtime and sick pay, failure to provide meal periods and rest periods or compensation in lieu thereof, as described above, it also intentionally failed and continues to fail to furnish employees with itemized wage statements that accurately reflect wages earned at all applicable hourly rates, net and gross wages earned, and premium wages due for missed meal and rest periods as required by California Labor Code §226(a). Ms. Aldana and other employees also suffered legal "injury" for purposes of Labor Code § 226(e) insofar as they were unable to readily and easily determine the information required to be set forth under Labor Code § 226(a). For example, Ms. Aldana and other employees were unable to determine their wages earned at all applicable hourly rates, gross wages earned, and net wages earned because of her employer's practices as set forth above. Please also see *Lopez v. Friant & Assocs., LLC* (2017) 15 Cal.App.5th 773, 788-[holding "a plaintiff seeking civil penalties under PAGA for a violation of Labor Code section 226(a) does not have to satisfy the 'injury' and 'knowing and intentional' requirements of section 226(e)(1)."]; *Raines v. Coastal Pacific Food Distributors, Inc.* (2018) 23 Cal.App.5th 667, 679 (2018)-[finding that the "requirements for a section 226(e) claim do not apply to a PAGA claim for a violation of section 226(a)"]. Consequently, since Little Caesars failed to comply with Labor Code §226(a), Ms. Aldana and other similarly situated employees would be entitled to recover penalties under Labor Code §§ 226(e) and 2698.

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." Little Caesars failed to provide Ms. Aldana and other employees with accurate itemized wage statements as indicated above. Consequently, since Little Caesars failed to comply with Labor Code §226(a), Ms. Aldana and other employees would be entitled to recover penalties under Labor Code §226.3 and 2698.

Little Caesars also failed and refused and continues to fail and refuse to timely pay compensation to Ms. Aldana and other similarly situated terminated or resigned employees, including but not limited to, all wages owed as a result of Little Caesars' failure to pay for all hours worked and its failure to provide meal periods and rest periods or compensation in lieu thereof. Under Labor Code §§ 201-202, an employer must provide an employee wages at the time of discharge or within up to seventy-two (72) hours of their resignation. Labor Code § 203 provides "if an employer willfully fails to pay... any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty..." for up to 30 days. Labor Code § 203; *Mamika v. Barca* (1998) 68 Cal.App.4th 487, 492. In addition, Labor Code § 256 provides that the Labor Commissioner "shall impose a civil penalty in an amount not exceeding

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30 days' pay as waiting time under the terms of Section 203." Consequently, Little Caesars is liable for waiting time penalties for having violated California Labor Code §§ 201, 202 and 203. Little Caesars would also be liable for civil penalties pursuant to Labor Code § 2698.

Pursuant to Labor Code §2699.3(a)(2)(A), please advise within sixty-five (65) calendar days of the postmark date of this notice whether your office intends to investigate the violations alleged herein. Our office understands that if we do not receive a response from your office within sixty-five (65) calendar days of the postmark date of this notice, that Ms. Aldana may immediately thereafter pursue his interests and the interests of similarly situated aggrieved employees with a civil complaint against Little Caesars for its violations of the Labor Code.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Ivan P. Medina', with a stylized, flowing script.

Ivan P. Medina, Esq.
THE NOURMAND LAW FIRM, APC

cc: Little Caesars Enterprises, Inc.
(by U.S. Certified Mail)