BRADLEY/ GROMBACHER LLP
CLASS ACTIONS, MASS TORTS & CATASTROPHIC INJURIES

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March 10, 2023

Labor and Workforce Development Agency
Attn: PAGA Administrator
455 Golden Gate Avenue, 9th Floor
San Francisco, CA 94102
Filed Online and Courtesy Copy Delivered
via Certified Mail

Re: **Written Notice – Private Attorney General Act ("PAGA") – Labor Code section 2698 *et seq.***
Erika Sanchez v. Eisenhower Medical Center

PAGA Administrator:

Notice is hereby provided that, pursuant to Labor Code section 2699.3, Erika Sanchez ("Employee") contends that Eisenhower Medical Center ("Eisenhower") has violated, and continues to violate, provisions of the Labor Code and wage orders promulgated by the Industrial Welfare Commission ("IWC wage order"), including, but not limited to, Labor Code sections 201-203, 204, 226, 226.7, 510, 512, 1182, 1197, 1198, 2802 and the applicable wage order.

In accordance with the required notice under Labor Code section 2699.3 of the Private Attorney General Act ("PAGA"), this letter shall serve as formal written notice to the Labor and Workforce Development Agency ("LWDA").

Employee was hired by Eisenhower in approximately 2012. Employee worked for Eisenhower in Rancho Mirage, California until her date of separation of November 18, 2022. Employee was employed as a patient account representative and earned approximately $18.16 per hour. Employee's job duties included but were not limited to entering patient charges into the computer system and verifying insurance.

Employee is an "aggrieved employee" as defined in Labor Code section 2699(a) and brings this action on behalf of herself and all other aggrieved employees of Eisenhower. Employee, also on behalf of herself and all other aggrieved employees, seek penalties under PAGA for Eisenhower's violations of the Labor Code.

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Eisenhower Medical Center is a California corporation that does business in California.

Eisenhower is a hospital headquartered at 39000 Bob Hope Drive, Rancho Mirage, California. At all relevant times, Eisenhower issued and maintained uniform, standardized scheduling and timekeeping practices and procedures for all aggrieved, hourly paid employees in California, including Employee and others similarly situated, regardless of their location or position.

Employee and other aggrieved employees seek penalties and other compensation from Eisenhower for the relevant time period because Eisenhower:

1. Failed to pay Employee and aggrieved employees for all overtime (Lab. Code, §§ 510, 1198);
2. Failed to pay Employee and aggrieved employees for all hours worked (Lab. Code, §§ 1182, 1194, 1197, 1198);
3. Failed to pay Employee and aggrieved employees sick pay at the regular rate (Lab. Code, § 246);
4. Failed to pay Employee and aggrieved employees Covid-19 supplemental pay at the regular rate (Lab. Code, § 248);
5. Failed to provide Employee and aggrieved employees with compliant meal periods (Lab. Code, §§ 226.7, 512);
6. Failed to provide Employees and aggrieved employees with compliant rest periods (Lab. Code, §§ 226.7, 512);
7. Failed to provide Employees and aggrieved employees with accurate, itemized wage statements and failed to maintain accurate records (Lab. Code, §§ 226(a), 1174);
8. Failed to timely pay Employee and aggrieved employees' wages during employment (Lab. Code, § 204);
9. Failed to timely pay Employees and aggrieved employees all final wages in a timely manner (Lab. Code, §§ 201-203);
10. Failed to reimburse all business expenses (Lab. Code § 2802).

Below please find the relevant facts and legal theories to support the aforementioned violation.

<u>Failure to Pay Overtime</u>

1. During the Relevant Time Period, upon information and belief, Eisenhower had, and continues to have, a company-wide policy of discouraging and impeding Employee and other aggrieved employees from recording hours worked that were outside of their scheduled shifts to

limit the amount of overtime employees could accrue. On information and belief, this policy of limiting overtime, led Employee and other aggrieved employees to work off-the-clock before their scheduled shift times. Employee would use a work badge to open the front door to the facility and then would walk approximately two minutes up the stairs to her workstation. She would then have to start up the computer, wait for the software to load and then was able to clock-in. This process could take anywhere from a couple minutes to several minutes if the computer needed an additional reboot. Employee was required to undergo the same process when clocking out. Specifically, she would clock out, wait for the system and computer to shut down, walk down the stairs to the front doors. Eisenhower did not compensate Employee for this time. Employee and aggrieved employees also had to undergo off-the-clock Covid tests. This occurred during the Covid-19 pandemic and was done off-the-clock prior to when Employee and aggrieved employees were permitted to clock in.

At all times, Employee and other aggrieved employees remained under the control of Eisenhower. Eisenhower could have recorded this off-the-clock work but refused to do so to avoid paying Employee and aggrieved employees overtime wages.

Eisenhower knew or should have known that because of these company-wide practices and/or policies, Employee and other aggrieved employees were performing assigned duties off-the-clock and were suffered or permitted to perform work for which they were not paid. Because Employee and other aggrieved employees worked shifts of eight (8) hours a day or more or forty (40) hours a week or more, some of this off-the-clock work qualified for overtime premium pay.

California Labor Code sections 510 and 1198 and the applicable Industrial Welfare Commission ("IWC") wage order require employers to pay employees working more than eight (8) hours in a day or more than forty (40) hours in a workweek at the rate of one-and-one-half (1½) times the regular rate of pay for all hours worked in excess of eight (8) hours in a day or more than forty (40) hours in a workweek. The applicable IWC wage order further provides that employers are required to pay employees working more than twelve (12) hours in a day overtime compensation at a rate of two (2) times their regular rate of pay. An employee's regular rate of pay includes all remuneration for employment paid to, or on behalf of, the employee, including nondiscretionary bonuses and incentive pay.

In addition to subjecting employees to work off the clock, Eisenhower also failed to factor in "Declined Dental" and "Declined Medical" into Employee's and aggrieved employees' regular rate of pay.

Accordingly, Eisenhower regularly failed to pay overtime wages to Employee and other aggrieved employees for all overtime hours worked in violation of Labor Code sections 510 and 1198. Employee and other aggrieved employees are entitled to recover civil penalties, attorney's fees, costs, and interest thereon, pursuant to Labor Code sections 1197.1 and/or 2699(a), (f)-(g).

<u>Failure to Pay All Wages</u>

As stated above, during the relevant time period, as a result of Eisenhower's policy of limiting the amount of overtime employees could accrue, Employee and other aggrieved employees were forced to work off-the-clock before their scheduled shift times and during their meal periods.

Thus, Eisenhower did not pay at least minimum wages for all hours worked by Employee and other aggrieved employees.

Labor Code section 1194(a) provides in relevant part: "[n]otwithstanding any agreement to work for a lesser wage, any employee receiving less than the legal minimum wage … is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage … including interest thereon, reasonable attorney's fees, and costs of suit."

Labor Code section 1194.2(a) provides in relevant part: "[i]n any action under section 1193.6 or section 1194 to recover wages because of the payment of a wage less than the minimum wage fixed by an order of the commission, an employee shall be entitled to recover liquidated damages in an amount equal to the wages unlawfully unpaid and interest thereon."

Labor Code section 1197 provides: "[t]he minimum wage for employees fixed by the commission is the minimum wage to be paid to employees, and the payment of a less wage than the minimum so fixed is unlawful."

Employee is informed and believes, and therefore alleges, that Eisenhower's compensation schemes do not fairly compensate Employee and aggrieved employees for all hours spent performing their job duties.

The failure to pay at least minimum wages to Employee and aggrieved employees for each and every hour worked violates Labor Code sections 1182.11-1182.12, 1194, 1194.2, and 1197; the applicable IWC wage order.

The failure to pay designated wages to Employee and aggrieved employees for each and every hour worked violates Labor Code sections 221 and 223; and the applicable IWC wage order.

Accordingly, Eisenhower regularly failed to pay at least minimum wages to Employee and other aggrieved employees for all the hours they worked in violation of Labor Code sections 1194, 1197, 1197.1 and 1198. Employee and other aggrieved employees are entitled to recover civil penalties, attorney's fees, costs, and interest thereon, pursuant to Labor Code sections 1197.1 and/or 2699(a), (f)-(g).

<u>Failure to Provide Compliant Meal Breaks</u>

Employee and aggrieved employees' meal breaks were frequently late. As a result, Employee and aggrieved employees were forced to work in excess of five (5) hours before taking a meal period.

Under the foregoing, California employers must provide meal periods and authorize and permit rest periods to all employees during their shifts. In *Augustus v. ABM Security Services, Inc.* (2016) 2 Cal.5th 257, the California Supreme Court reaffirmed that the required meal and rest periods must be "off-duty," which means that employees must be relieved of "all work-related duties," including the duty to remain "on call," and they must be "free from employer control" over how they "spend their time." *Id*. at 264, 269. Employees must have the freedom to use meal and rest periods for their own purposes. *Id*. at 270; *Brinker Rest. Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1038-39.

When employees must either "remain at the ready and capable of being summoned to action," "respond when the employer seeks contact with [them]," "perform other work if the employer so requests," and/or remain "on call" during their meal and rest periods, the employees have not been "relieve[d] … of all work-related duties and employer control." *Augustus*, *supra*, 2 Cal.5th at 270. Such a meal or rest period is not "off duty" and therefore is "impermissible." *Ibid*.

The Supreme Court's decision in *Augustus* is just the latest in a series of meal and rest break cases that have affirmed California's broad, protective standard for employees.

Moreover, as the mere existence of a facially lawful meal and rest break policy is unavailing if there are practical constraints and pressures on employees to perform their duties in ways that omit breaks. *See Brinker*, *supra*, 53 Cal.4th at 1040.

Yet Eisenhower did and does not provide Employee and aggrieved employees with meal periods during which they are completely relieved of duty for at least thirty (30) minutes by the fifth hour of work and again by the tenth hour of work.

Thus, Eisenhower has failed to perform its obligations to provide Employee and aggrieved employees with off-duty meal periods by the end of the fifth hour of work and a second meal period by the end of the tenth hour of work. Eisenhower also has failed to pay Employee and aggrieved employees one (1) hour of pay at the regular rate for each off-duty meal period that they have been denied.

On July 15, 2021, the California Supreme Court issued a decision in *Ferra v. Loews Hollywood Hotel, LLC* (2021) 11 Cal.5th 858 where the court unanimously held that employers must pay premium payments to employees for missed meal, rest, and recovery breaks at the employee's "regular rate of pay" instead of their base hourly rate. The regular rate of pay may be higher than the base hourly rate because the regular rate of pay must include all nondiscretionary incentive payments, including nondiscretionary bonuses. This includes employees' "Declined Dental" and "Declined Medical."

Eisenhower knew or should have known that because of its policies and/or practices, that Employee and aggrieved employees were not actually relieved of all duties to take timely, uninterrupted meal periods. Employee further knew or should have known that it did not pay Employee and aggrieved employees all meal period premiums when meal periods were missed, late, short, and/or interrupted. Furthermore, Employee has engaged in a company-wide practice and/or policy of not paying meal period premiums owed when compliant meal periods are not provided. Because of this practice and/or policy, Employee and aggrieved employees have not received all premium pay for missed, interrupted, or late meal periods. Accordingly, Eisenhower failed to provide all meal periods in violation of Labor Code sections 226.7, 512(a), 516, and 1198.

Employee and other aggrieved employees are entitled to civil penalties, attorney's fees, costs, and interest thereon, pursuant to Labor Code sections 2699(a), (f)-(g).

Failure to Provide Compliant Rest Breaks

Labor Code sections 226.7, 516, and 1198, and the applicable IWC Wage Order require employers to provide rest periods and to pay an employee one (1) additional hour of pay at the employee's regular rate for each work day that a meal or rest period is not provided. Labor Code section 226.7 provides that no employer shall require an employee to work during any rest period mandated by an applicable order of the IWC. The applicable IWC wage order, section 11 provides that "[e]very employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period" and that the "rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof" unless the total daily work time is less than three and one-half (3 ½) hours.

To comply with its obligation to authorize and permit rest periods under Labor Code section 226.7 and the applicable IWC wage order, an employer must "relinquish any control over how employees spend their break time, and relieve their employees of all duties—including the obligation that an employee remain on call. A rest period, in short, must be a period of rest." *Augustus et al. v. ABM Security Services, Inc*. (2016) 2 Cal.5th 257, 269-270.

During the relevant time period, Eisenhower regularly failed to authorize and permit Employee and other aggrieved employees to take a ten (10) minute rest period per each four (4) hour period worked or major fraction thereof. Specifically, as a result of significant pressure from supervisors, Employee and aggrieved employees were unable to take rest breaks.

As a result of Eisenhower's practices and policies, Employee and other aggrieved employees worked shifts in excess of 3.5 hours, in excess of 6 hours, and/or in excess of 10 hours without receiving all uninterrupted 10-minute rest periods to which they were entitled.

Eisenhower also has engaged in a company-wide practice and/or policy of not paying rest period premiums owed when compliant rest periods are not authorized and permitted. Because of this practice and/or policy, Employee and other aggrieved employees have not received premium pay for all non-compliant rest periods.

Accordingly, Eisenhower failed to authorize and permit all rest periods in violation of Labor Code sections 226.7, 516, and 1198. Employee and other aggrieved employees are entitled to civil penalties, attorney's fees, costs, and interest thereon, pursuant to Labor Code sections 2699(a), (f)-(g).

Failure to Pay Sick Pay at the Regular Rate

Employee received compensation, including "Declined Medical" and "Declined Dental" in addition to her hourly wages while employed by Eisenhower. Those additional amounts should have been included when calculating her regular rate of pay and used when paying overtime wages, premium wages, and sick leave wages, but were not.

Employee was improperly paid sick leave wages at her base hourly rate instead of at the regular rate.

Labor Code section 246 provides that employers must calculate paid sick leave for non-exempt employees in one of two ways:

> (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; [or]
>
> (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.

Employee was paid sick leave wages at his base hourly rate of pay, which is less than required under either of the two alternative methods of calculation provided by Labor Code section 246(l).

Failure to Pay Covid-19 Supplemental Pay at the Regular Rate

Labor Code section 248.2 (b)(3) states:

> (A) Each hour of COVID-19 supplemental paid sick leave shall be compensated at a rate equal to the following:
>
> i. For nonexempt covered employees, by the highest of the following:
>
> 1. 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.

2. 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.
3. The state minimum wage.
4. The local minimum wage to which the covered employee is entitled.

ii. COVID-19 supplemental paid sick leave for exempt covered employees shall be calculated in the same manner as the employer calculates wages for other forms of paid leave time.

Eisenhower failed to comply Labor Code section 248 because it paid Covid-19 supplemental pay at the base rate of pay rather than at Employee's and aggrieved employees' regular rate of pay.

Wage Statements

Labor Code section 226(a) requires employers make, keep, and provide true, accurate, and complete wage records. Eisenhower has not provided Employee and other aggrieved employees with properly itemized wage statements. Labor Code section 226(e) provides that if an employer fails to comply with providing an employee with properly itemized wage statements as set forth in 226(a), then the employee is entitled to recover the greater of all actual damages or $50 for the initial pay period in which a violation occurs and $100 per employee for each violation in a subsequent pay period, not to exceed $4,000. Further, Labor Code section 226.3 provides that any employer who violates section 226(a) shall be subject to a civil penalty in the amount of $250 per employee per violation in an initial citation and $1,000 per employee for each violation in a subsequent citation, for which the employer fails to provide the employee a wage statement or fails to keep the required records pursuant to section 226(a).

During the relevant time period, Eisenhower has knowingly and intentionally provided Employee and other aggrieved employees with uniform, incomplete, and inaccurate wage statements. For example, Eisenhower issued uniform wage statements to Employee and other aggrieved employees that fail to correctly list: gross wages earned; total hours worked; net wages earned; and all applicable hourly rates in effect during the pay period, including rates of pay for overtime wages and/or meal and rest period premiums, and the corresponding number of hours worked at each hourly rate.

Specifically, Eisenhower violated sections 226(a)(1), 226(a)(2), 226(a)(5), and 226(a)(9). Because Eisenhower did not record the time Employee and other aggrieved employees spent working off-the-clock, Eisenhower did not list the correct amount of gross wages and net wages earned by Employee and other aggrieved employees in compliance with section 226(a)(1) and section 226(a)(5), respectively. For the same reason, Eisenhower failed to accurately list the total number of hours worked by Employee and other aggrieved employees, in violation of section 226(a)(2), and failed to list the applicable hourly rates of pay in effect during the pay period and the corresponding accurate number of hours worked at each hourly rate, in violation of section 226(a)(9). For the same reason, Eisenhower also failed to list the correct amount of net wages in violation of section 226(a)(5). Eisenhower also failed to correctly list all applicable hourly rates in effect during the pay period, namely, correct rates of pay for overtime wages and/or meal and rest period premiums, in violation of section 226(a)(9).

As a result of not having kept accurate records, Employee and aggrieved employees suffered injuries in the form of confusion over whether they received all wages owed to them, and difficulty and expense in reconstructing pay records in addition to other injuries which may come to light during the discovery process.

Labor Code section 1198 provides that the maximum hours of work and the standard conditions of labor shall be those fixed by the Labor Commissioner and as set forth in the applicable IWC wage order. Section 1198 further provides that "[t]he employment of any employees for longer hours than those fixed by the order or under conditions of labor prohibited by the order is unlawful." Pursuant to the applicable IWC wage order, employers are required to keep accurate time records showing when the employee begins and ends each work period and meal period.

Employee and other aggrieved employees are entitled to recover civil penalties, attorney's fees, costs, and interest thereon pursuant to Labor Code sections 226.3, 1174.5, and/or 2699(a), (f)-(g).

Failure to Timely Pay Wages During Employment

Labor Code section 204 requires that all wages earned by any person in any employment between the 1st and the 15th days, inclusive, of any calendar month, other than those wages due upon termination of an employee, are due and payable between the 16th and the 26th day of the month during which the labor was performed, and that all wages earned by any person in any employment between the 16th and the last day, inclusive, of any calendar month, other than those wages due upon termination of an employee, are due and payable between the 1st and the 10th day of the following month.

Labor Code section 204 also requires that all wages earned for labor in excess of the normal work period shall be paid no later than the payday for the next regular payroll period. Alternatively, Labor Code section 204 provides that the requirements of this section are deemed satisfied by the payment of wages for weekly, biweekly, or semimonthly payroll if the wages are paid not more than seven (7) calendar days following the close of the payroll period.

During the Relevant Time Period, Eisenhower willfully failed to pay Employee and aggrieved employees all wages due including, but not limited to, overtime wages, minimum wages, and/or meal and rest period premiums, within the time periods specified by Labor Code section 204.

Failure to Timely Pay Final Wages Upon Termination

As a pattern and practice, Eisenhower regularly failed to pay Employee and aggrieved employees their final wages pursuant to Labor Code sections 201-203.

Labor Code sections 201 and 202 provide that if an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately, and that if an employee voluntarily leaves his or her employment, his or her wages shall become due and payable not later than seventy-two (72) hours thereafter, unless the employee has given seventy-two (72) hours previous notice of his or her intention to quit, in which case the employee is entitled to his or her wages at the time of quitting.

On information and belief, Eisenhower has a company-wide practice or policy of failing to pay all accrued wages to departing employees and don't adhere to the time requirements set forth in Labor Code sections 201 and 202.

Eisenhower willfully failed to pay Employee and aggrieved employees the earned and unpaid wages set forth above, including but not limited to, overtime wages, minimum wages, and/or meal rest period premiums, either at the time of discharge, or within seventy-two (72) hours of their leaving Eisenhower's employ.

Failure to Reimburse Business Expenses

Labor Code section 2802 requires employers pay for all necessary expenditures and losses incurred by the employee in the performance of his or her job. The purpose of Labor Code section 2802 is to prevent employers from passing off their cost of doing business and operating expenses on to their employees. *Cochran v. Schwan's Home Service, Inc.* (2014) 228 Cal.App.4th 1137, 1144.

The applicable wage order, the applicable IWC Wage Order section 8(b) provides that: "[w]hen the employer requires the use of tools or equipment or they are necessary for the performance of a job, such tools and equipment shall be provided and maintained by the employer, except that an employee whose wages are at least two (2) times the minimum wage may provide and maintain hand tools and equipment customarily required by the particular trade or craft…"

During the Relevant Time Period, Eisenhower had a company-wide policy whereby Eisenhower required Employee and aggrieved employees to purchase their own face masks that they were required to wear while working.

Although Eisenhower required Employee and aggrieved employees to utilize these face masks to carry out their work-related duties, Eisenhower failed to reimburse them for this cost. Eisenhower could have provided Employee and aggrieved employees with face masks. Instead, Eisenhower passed these operating costs off onto Employee and aggrieved employees.

Thus, Eisenhower had, and continues to have, a company-wide policy and/or practice of not reimbursing employees for expenses necessarily incurred in violation of Labor Code section 2802.

Conclusion

Enclosed please find a copy of the class action complaint that is in the process of being filed in the Superior Court for the State of California, Riverside County. Employee respectfully requests that the LWDA notify this office within sixty (60) days if it wishes to investigate this matter further. A copy is being sent via certified mail to Eisenhower. Should you have any questions or concerns or require additional information, please do not hesitate to contact the undersigned.

Thank you for your time and consideration.

Very truly yours,

BRADLEY/GROMBACHER, LLP

Marcus J. Bradley, Esq.

cc: Celine Kaiser
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