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By _____, Deputy
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20 JOSEPH GILLESPIE, and all others similarly situated

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SACRAMENTO
(UNLIMITED JURISDICTION)

18 JOSEPH GILLESPIE, as an "aggrieved
19 employee" on behalf of himself and other
20 similarly situated "aggrieved employees" under
21 the Labor Code Private Attorneys General Act of
22 2004,

23 *Plaintiff,*

24 vs.

25 DG SMITH ENTERPRISE, INC., a California
26 corporation; and DOES 1-50, inclusive,

27 *Defendants.*

Case No.

**COMPLAINT FOR VIOLATIONS OF
THE LABOR CODE AND CIVIL
PENALTIES UNDER THE LABOR
CODE PRIVATE ATTORNEYS
GENERAL ACT OF 2004, LABOR
CODE §§ 2698, ET SEQ.**

JURY TRIAL DEMANDED



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

3 **I. INTRODUCTION**

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

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

11 (A) Pay all wages, including minimum, regular, overtime and doubletime
12 wages, earned for all hours worked at the correct rates of pay;

13 (B) Provide all meal periods;

14 (C) Authorize and permit all rest breaks;

15 (D) Pay premium wages for unprovided meal periods;

16 (E) Pay premium wages for unprovided rest breaks;

17 (F) Indemnify for necessary work-related expenditures;

18 (G) Issue only accurate and complete itemized wage statements;

19 (H) Timely pay wages during employment;

20 (I) Timely pay wages upon termination of employment;

21 (J) Maintain accurate employment records.

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

24 **II. THE PARTIES**

25 3. Plaintiff Joseph Gillespie is a resident of California. At all relevant times, Plaintiff
26 was an “employee” within the meaning of Title 8 California Code of Regulations § 11050 and an
27 “aggrieved employee” within the meaning of Labor Code § 2699 (c).

28 4. Defendant DG Smith Enterprise, Inc. is a corporation organized and existing under
the laws of California and also a citizen of California based on Plaintiff’s information and belief.

5. Plaintiff is ignorant of the true names, capacities, relationships, and extents of



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1 participation in the conduct alleged herein of the Defendants sued as DOES 1-50, inclusive, but
2 is informed and believes and thereon alleges that said Defendants are legally responsible for the
3 wrongful conduct alleged herein and therefore sues these Defendants by such fictitious names.
4 Plaintiff will amend the Complaint to allege the true names and capacities of the DOE Defendants
when ascertained.

5 6. The “Aggrieved Employees” are all individuals the Defendants have employed or
6 otherwise contracted with in California as hourly, non-exempt employees, including crew
7 members, individuals performing work comparable to the aforementioned, and individuals in
8 similar positions during the period beginning one year before the Plaintiff’s notice of June 06,
9 2023, to the California Labor and Workforce Development Agency and ending on the date
10 judgment is entered.

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

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

19 **III. FACTUAL ALLEGATIONS**

20 9. IWC Wage Order 5-2001 (“the Wage Order”) applies to “all persons employed in
21 the public housekeeping industry whether paid on a time, piece rate, commission, or other basis.”
22 Wage Order, § 1. The Wage Order defines "Public Housekeeping Industry" to mean

23 any industry, business, or establishment which provides meals, housing, or
24 maintenance services whether operated as a primary business or when incidental
25 to other operations in an establishment not covered by an industry order of the
Commission, and includes, but is not limited to the following:

- 26 (1) Restaurants, night clubs, taverns, bars, cocktail lounges, lunch counters,
27 cafeterias, boarding houses, clubs, and all similar establishments where
28 food in either sold or liquid form is prepared and served to be consumed
on the premises;



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- (2) Catering, banquet, box lunch service, and similar establishments which prepare food for consumption on or off the premises;
- (3) Hotels, motels, apartment houses, rooming houses, camps, clubs, trailer parks, office or loft buildings, and similar establishments offering rental of living, business, or commercial quarters;
- (4) Hospitals, sanitariums, rest homes, child nurseries, child care institutions, homes for the aged, and similar establishments offering board or lodging in addition to medical, surgical, nursing, convalescent, aged, or child care;
- (5) Private schools, colleges, or universities, and similar establishments which provide board or lodging in addition to educational facilities;
- (6) Establishments contracting for development, maintenance or cleaning of grounds; maintenance or cleaning of facilities and/or quarters of commercial units and living units; and
- (7) Establishments providing veterinary or other animal care services.

Wage Order, § 2(P). At all relevant times during the applicable limitations period, the Defendants, Gillespie, and all of the Aggrieved Employees were covered by the Wage Order because the Defendants operated, and Gillespie, and all of the Aggrieved Employees, worked for one or more restaurants. Accordingly, Gillespie and all of the other Aggrieved Employees are entitled to the protections the Wage Order provides.

10. On approximately January 14, 2021, the Defendants began to employ Gillespie in Sacramento in the position of hourly, non-exempt crew member. The Defendants continuously employed him in that capacity until on or about June 22, 2022 when his employment ended.

11. At all relevant times, the Defendants issued wages to Gillespie and all of the other Aggrieved Employees on a biweekly (26 paychecks/year) basis and paid them by the hour. At all relevant times, the Defendants classified Gillespie and all of the other Aggrieved Employees as non-exempt employees entitled to the protections of the Labor Code and the Wage Order.

12. Defendants failed to compensate Gillespie and all of the other Aggrieved Employees for all hours worked at the applicable minimum or regular rates of pay. Gillespie and the Aggrieved Employees often worked five (5) to six (6) days in a workweek, and between eight (8) to ten (10) hours per workday. At all relevant times, Gillespie and the Aggrieved Employees worked over eight (8) hours in one workday and over forty (40) hours in one workweek. The



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1 Defendants, however, failed to pay Gillespie and the Aggrieved Employees overtime wages of at
2 least one and a half (1½) times their hourly rates of pay for all hours in excess of forty (40) in a
3 week, and all hours in excess of eight (8) in a day.

4 13. At all relevant times, Defendants required Gillespie and the Aggrieved Employees
5 to perform work while clocked-out and failed to compensate them for this time. Due to the
6 workload and failure to hire sufficient staff members, Defendants often requested that Gillespie
7 and the Aggrieved Employees continue to work after they had clocked-out. The Defendants failed
8 to compensate Gillespie and the Aggrieved Employees for this work performed off-the-clock.

9 14. At all relevant times, the Defendants failed to provide Gillespie and all of the other
10 Aggrieved Employees with all timely 30-minute, off-duty meal periods. Defendants also failed
11 to pay premium wages for days on which they failed to provide Gillespie and all of the other
12 Aggrieved Employees with meal periods as required by law. Due to the workload and failure to
13 hire sufficient staff members, Defendants denied Gillespie and the Aggrieved Employees their
14 30-minute off-duty meal period within the first five hours of work. Defendants also denied 30-
15 minute off-duty meal periods to Gillespie and the Aggrieved Employees because they were often
16 interrupted by the Defendants who required them to complete work tasks during meal breaks or
17 to cut their meal-breaks short and return to work. Due to the workload and insufficient staff
18 members, the Defendants also required Gillespie and the Aggrieved Employees to clock-out
19 within the first five hours of work for meal breaks and continue working while clocked-out.
20 Defendants also failed to pay premium wages for days on which they failed to provide Gillespie
21 and the Aggrieved Employees with meal periods as required by law.

22 15. At all relevant times, due to high workload and low staffing levels, the Defendants
23 failed to authorize and permit Gillespie and all of the other Aggrieved Employees to take ten-
24 minute, off-duty, paid rest breaks every four hours worked or major portion thereof. Defendants
25 also failed to pay premium wages for days on which they failed to authorize and permit Gillespie
26 and all of the other Aggrieved Employees to take rest breaks as required by law.

27 16. At all relevant times, Defendants required Gillespie and all of the other Aggrieved
28 Employees to incur certain business expenses in the course of performing their duties. Defendants
required Gillespie and all of the other Aggrieved Employees to supply mobile phones to perform
their job duties. However, Defendants did not provide these items and did not reimburse Gillespie
and the other Aggrieved Employees for these items.



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1 17. At all relevant times, Defendants failed to issue to Gillespie and all of the other
2 Aggrieved Employees complete and accurate wage statements that state all hours worked at the
3 correct rates of pay, and all wages earned. Defendants knowingly and intentionally failed to state
4 on the wage statements they issued to Gillespie and all of the other Aggrieved Employees the
5 unpaid wages discussed above. The wage statements fail to state all minimum wages earned, all
6 regular wages earned, all overtime wages earned, all doubletime wages earned, all meal period
premium wages earned, all rest break premium wages earned, and other required information.

7 18. Defendants also failed to timely pay Gillespie and all of the other Aggrieved
8 Employees all earned wages as described above during and at the conclusion of employment.

9 19. Defendants failed to maintain accurate employee records of Gillespie and all of
10 the other Aggrieved Employees.

11 20. For the reasons stated herein, Plaintiff alleges that as a result of Defendants'
12 unlawful practice and policies, Plaintiff and the Aggrieved Employees were:

13 A. Not paid all wages earned, including, but not limited to, minimum, regular,
14 overtime, and doubletime wages for work performed while clocked out;

15 B. Not provided with all off duty meal periods;

16 C. Not authorized and permitted to take all rest break periods;

17 D. Not paid one hour's pay for each workday in which Defendants failed to
18 authorize and permit them to take one or more timely rest periods;

19 E. Not paid one hour's pay for each workday in which Defendants failed to
20 provide them with one or more timely meal periods;

21 F. Not indemnified for all necessary business expenditures incurred during
22 the discharge of their duties;

23 G. Not provided with accurate and complete wage statements; and

24 H. Not timely paid all earned and unpaid wages during their employment with
25 Defendants and at the time such employment ended.

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(Lab. Code §§ 2698, *et seq.*)

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

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

22. At all relevant times, Plaintiff and the Aggrieved Employees have been non-exempt employees entitled to the protections of both the Labor Code and the Wage Order.

A. FAILURE TO PAY ALL WAGES EARNED FOR ALL HOURS WORKED AT THE CORRECT RATES OF PAY

23. Section 2 of the Wage Order defines “hours worked” as “the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so.”

24. Section 3 of the Wage Order states:

(A) Daily Overtime - General Provisions

(1) The following overtime provisions are applicable to employees 18 years of age or over and to employees 16 or 17 years of age who are not required by law to attend school and are not otherwise prohibited by law from engaging in the subject work. Such 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 (1 ½) times such employee's regular rate of pay for all hours worked over 40 hours in the workweek. Eight (8) hours of labor constitutes a day's work. Employment beyond eight (8) hours in any workday or more than six (6) days in any workweek is permissible provided the employee is compensated for such overtime at not less than:

(a) One and one-half (1 ½) times the employee's regular rate of pay for all hours worked in excess of eight (8) hours up to and including 12 hours in any workday, and for the first eight (8) hours worked on the seventh (7th) consecutive day of work in a workweek.



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(b) Double the employee's regular rate of pay for all hours worked in excess of 12 hours in any workday and for all hours worked in excess of eight (8) hours on the seventh (7th) consecutive day of work in a workweek.

(c) The overtime rate of compensation required to be paid to a nonexempt full-time salaried employee shall be computed by using the employee's regular hourly salary as one-fortieth (1/40) of the employee's weekly salary.

25. Section 4 of the Wage Order requires an employer to pay non-exempt employees at least the minimum wage set forth therein for all hours worked, which consists of all hours that an employer has actual or constructive knowledge that employees are working.

26. Labor Code section 510 states:

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 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. 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. In addition, 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. Nothing in this section requires an employer to combine more than one rate of overtime compensation in order to calculate the amount to be paid to an employee for any hour of overtime work.

27. Labor Code section 1194 invalidates any agreement between an employer and an employee to work for less than the minimum wage required under the applicable Wage Order.

28. Labor Code section 1197 makes it unlawful for an employer to pay an employee less than the minimum wage required under the applicable Wage Order for all hours worked during a payroll period.

29. Labor Code section 1198 makes it unlawful for an employer to employ an employee under conditions that violate the Wage Order.

30. In conjunction, these provisions of the Labor Code require employers to pay non-exempt employees no less than their agreed-upon or statutorily mandated wage rates for all hours worked, including unrecorded hours when the employer knew or reasonably should have known



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1 that employees were working during those hours. (See *Morillion v. Royal Packing Co.* (2000) 22
2 Cal.4th 575, 585.)

3 31. At all relevant times during the applicable limitations period, Defendants failed to
4 compensate Plaintiff and the Aggrieved Employees for all hours worked, including, but not
5 limited to minimum, regular, overtime, and doubletime wages for all hours they worked at the
6 correct rates of pay.

7 32. Plaintiff is informed and believes and thereon alleges that, at all relevant times,
8 Defendants maintained a policy and/or practice, or lack thereof, which resulted in Defendants'
9 failure to compensate Plaintiff and the other Aggrieved Employees for all hours worked as
10 required by California law.

11 **B. FAILURE TO PROVIDE MEAL PERIODS**

12 33. In relevant part, California Labor Code § 1198 states:

13 The maximum hours of work and the standard conditions of labor fixed by the
14 commission shall be the maximum hours of work and the standard conditions of
15 labor for employees. The employment of any employee for longer hours than those
16 fixed by the order or under conditions of labor prohibited by the order is unlawful.

17 34. In relevant part, In relevant part, California Labor Code § 512 states:

18 An employer shall not employ an employee for a work period of
19 more than five hours per day without providing the employee with
20 a meal period of not less than 30 minutes, except that if the total
21 work period per day of the employee is no more than six hours, the
22 meal period may be waived by mutual consent of both the
23 employer and employee.

24 An employer shall not employ an employee for a work period of
25 more than 10 hours per day without providing the employee with
26 a second meal period of not less than 30 minutes, except that if the
27 total hours worked is no more than 12 hours, the second meal
28 period may be waived by mutual consent of the employer and the
29 employee only if the first meal period was not waived.

30 35. In relevant part, Section 11 of the Wage Order states:

31 **Meal Periods**

32 (A) No employer shall employ any person for a work period of



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1 more than five (5) hours without a meal period of not less
2 than 30 minutes, except that when a work period of not
3 more than six (6) hours will complete the day's work the
4 meal period may be waived by mutual consent of the
5 employee and the employer. Unless the employee is
6 relieved of all duty during a 30 minute meal period, the
7 meal period shall be considered an 'on duty' meal period
8 and counted as time worked. An 'on duty' meal period shall
9 be permitted only when the nature of the work prevents an
10 employee from being relieved of all duty and when by
11 written agreement between the parties an on-the-job paid
12 meal period is agreed to. The written agreement shall state
13 that the employee may, in writing, revoke the agreement at
14 any time.

- 15 (B) If an employer fails to provide an employee a meal period
16 in accordance with the applicable provisions of this Order,
17 the employer shall pay the employee one (1) hour of pay at
18 the employee's regular rate of compensation for each work
19 day that the meal period is not provided.

20 36. In relevant part, California Labor Code § 226.7 states:

- 21 (b) An employer shall not require an employee to work during
22 a meal or rest period mandated pursuant to an applicable
23 statute, or applicable regulation, standard, or order of the
24 Industrial Welfare Commission, the Occupational Safety
25 and Health Standards Board, or the Division of
26 Occupational Safety and Health.
- 27 (c) If an employer fails to provide an employee a meal period
28 or rest period in accordance with a state law, including, but
not limited to, an applicable statute or applicable
regulation, standard, or order of the Industrial Welfare
Commission, the Occupational Safety and Health
Standards Board, or the Division of Occupational Safety
and Health, the employer shall pay the employee one
additional hour of pay at the employee's regular rate of
compensation for each work day that the meal or rest
period is not provided.

37. Pursuant to California Labor Code § 512 and the Wage Order, Plaintiff and the
Aggrieved Employees were entitled to uninterrupted meal periods of at least 30 minutes for each
day they worked five or more hours. Pursuant to California Labor Code § 512, they were also



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entitled to a second 30-minute meal period when they worked more than 10 hours in a workday.

38. Pursuant to the Wage Order, Plaintiff and the Aggrieved Employees were entitled to be provided with net rest breaks of at least ten minutes for each four-hour period of work, or major fraction thereof.

39. Defendants intentionally failed to provide Plaintiff and the Aggrieved Employees with all required 30-minute duty free meal periods and 10-minute rest periods free from any work duties in accordance with the Wage Order.

40. At all relevant times, Defendants failed to provide Plaintiff and the Aggrieved Employees with all timely rest and meal periods. Furthermore, Defendants failed to pay premium wages for days on which they failed to provide Plaintiff and the other Aggrieved Employees with timely meal periods.

41. Plaintiff is informed and believes and thereon alleges that, at all relevant times within the applicable limitations period, Defendants had a policy, practice, or a lack of a policy which resulted in Defendants not providing the and the Aggrieved Employees with all off-duty meal periods and rest breaks required by California law.

C. FAILURE TO AUTHORIZE AND PERMIT REST BREAKS

42. In relevant part, California Labor Code § 1198 states:

The maximum hours of work and the standard conditions of labor fixed by the commission shall be the maximum hours of work and the standard conditions of labor for employees. The employment of any employee for longer hours than those fixed by the order or under conditions of labor prohibited by the order is unlawful.

43. In relevant part, Section 12 of the Wage Order states:

Rest Periods

(A) Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized 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. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 1/2) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.



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(B) If an employer fails to provide an employee a rest period in accordance with the applicable provisions of this Order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each work day that the rest period is not provided.

44. In relevant part, California Labor Code § 226.7 states:

(b) An employer shall not require an employee to work during a meal or rest period mandated pursuant to an applicable statute, or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health.

(c) If an employer fails to provide an employee a meal period or rest period in accordance with a state law, including, but not limited to, an applicable statute or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each work day that the meal or rest period is not provided.

45. Pursuant to the Wage Order, Plaintiff and the Aggrieved Employees were entitled to be authorized and permitted to take net rest breaks of at least ten minutes for each four-hour period of work, or major fraction thereof.

46. Defendants intentionally failed to authorize and permit Plaintiff and the Aggrieved Employees to take all 10-minute rest periods free from any work duties in accordance with the Wage Order.

47. At all relevant times, Defendants failed to authorize and permit Plaintiff and the Aggrieved Employees to take all timely rest periods. Furthermore, Defendants failed to pay premium wages to Plaintiff and the Aggrieved Employees for days on which they failed to authorize and permit Plaintiff and the other Aggrieved Employees to take timely rest periods.

48. At all relevant times, due to high workload and low staffing levels, Defendants failed to authorize and permit Plaintiff and the Aggrieved Employees to take ten-minute, paid, duty-free rest breaks every four hours worked or major fraction thereof. Defendants did not seek



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1 an exemption from the rest period protections of the Wage Order from the California Division of
2 Labor Standards Enforcement. Moreover, Defendants failed to pay Plaintiff and the Aggrieved
3 Employees premium wages on workdays they failed to authorize and permit them to take 10-
4 minute rest periods every four hours worked or major fraction thereof.

5 49. Plaintiff is informed and believes and thereon alleges that, at all relevant times
6 within the applicable limitations period, Defendants had a policy, practice, or a lack of a policy
7 which resulted in Defendants not authorizing and permitting Plaintiff and the Aggrieved
8 Employees to take all rest breaks required by California law.

9 **D. FAILURE TO INDEMNIFY**

10 50. In pertinent part, California Labor Code § 2802(a) states: “An employer shall
11 indemnify his or her employee[s] for all necessary expenditures incurred by the employee in direct
12 consequence of the discharge of his or her duties.”

13 51. California Labor Code § 1198 prohibits employers from employing their
14 employees under conditions prohibited by the Wage Order.

15 52. At all relevant times, as described above, Defendants required Gillespie and all of
16 the other Aggrieved Employees to incur certain business expenses in the course of performing
17 their duties. Defendants required Gillespie and all of the other Aggrieved Employees to supply
18 mobile phones to perform their job duties. However, Defendants did not offer mobile phones to
19 Plaintiff and the other Aggrieved Employees for this purpose, nor did they reimburse them for
20 use of their personal mobile phones.

21 53. Plaintiff is informed and believes and thereon alleges that, at all relevant times,
22 Defendants maintained a policy and/or practice, or lack thereof, which resulted in Defendants’
23 failure to indemnify Plaintiff and the Aggrieved Employees for the reasonable expenses they
24 incurred during the course of performing their duties.

25 **E. FAILURE TO PROVIDE ACCURATE AND COMPLETE WRITTEN WAGE**
26 **STATEMENTS**

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



1 55. Pursuant to California Labor Code § 226, an employee is deemed to suffer injury
2 if the employer fails to provide a wage statement. Also, an employee is deemed to suffer injury if
3 the employer fails to provide accurate and complete information as required by California Labor
4 Code § 226(a) and the employee cannot “promptly and easily determine” from the wage statement
5 alone one or more of the following:

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

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

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

14 D. The name of the employee and only the last four digits of his or his
15 social security number or an employee identification number other than a social security number;
16 and

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

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

21 57. As alleged herein, at all relevant times during the applicable limitations period,
22 Defendants violated California Labor Code section 226 because they did not properly and
23 accurately itemize each employee’s gross wages earned, net wages earned, the total hours worked,
24 the corresponding number of hours worked at each rate by the employee and other requirements
25 of California Labor Code section 226. Defendants failed to state in the wage statements they
26 issued to Plaintiff and the other Aggrieved Employees all their hours worked and wages earned,
27 including, but not limited to, regular and overtime wages for work they performed off-the-clock
28 (as described above).

 58. Defendants’ failure to provide Plaintiff and the other Aggrieved Employees with
accurate wage statements was knowing and intentional. Defendants had the ability to provide
Plaintiff and the other Aggrieved Employees with accurate wage statements but intentionally



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provided wage statements that Defendants knew were not accurate.

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

F. UNTIMELY WAGES DURING EMPLOYMENT

60. Labor Code § 204 states:

- (a) All wages, other than those mentioned in Section 201, 201.3, 202, 204.1, or 204.2, earned by any person in any employment are due and payable twice during each calendar month, on days designated in advance by the employer as the regular paydays. Labor performed between the 1st and 15th days, inclusive, of any calendar month shall be paid for between the 16th and the 26th day of the month during which the labor was performed, and labor performed between the 16th and the last day, inclusive, of any calendar month, shall be paid for between the 1st and 10th day of the following month. ...
- (b) (1) Notwithstanding any other provision of this section, all wages earned for labor in excess of the normal work period shall be paid no later than the payday for the next regular payroll period.
- (2) An employer is in compliance with the requirements of subdivision (a) of Section 226 relating to total hours worked by the employee, if hours worked in excess of the normal work period during the current pay period are itemized as corrections on the paystub for the next regular pay period. Any corrections set out in a subsequently



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issued paystub shall state the inclusive dates of the pay period for which the employer is correcting its initial report of hours worked.

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

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

61. Defendants failed to compensate Plaintiff and the Aggrieved Employees for all hours worked at the correct rates of pay, including overtime. Defendants failed to provide Plaintiff and the Aggrieved Employees with all meal and rest periods in compliance with California laws. Defendants also failed to provide Plaintiff and the Aggrieved Employees with all premium wages on workdays they failed to provide them with one or more meal or rest periods in compliance with California laws. As a result, Defendants failed to timely pay all earned minimum, overtime, and premium wages due during employment within the time periods set by California Labor Code section 204.

G. UNTIMELY FINAL WAGES

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

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

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

65. Plaintiff is informed and believes that Defendants' failures to timely pay Plaintiff and the Aggrieved Employees all of their earned and unpaid wages (described above) have been willful in that, at all relevant times, Defendants have deliberately maintained policies and



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practices that violate the requirements of the Labor Code and the Wage Order, even though at all relevant times, they have had the ability to comply with those legal requirements.

H. FAILURE TO MAINTAIN ACCURATE EMPLOYMENT RECORDS

66. Labor Code § 1174 states:

Every person employing labor in this state shall:

...

(c) Keep a record showing the names and addresses of all employees employed and the ages of all minors.

(d) Keep, at a central location in the state or at the plants or establishments at which employees are employed, payroll records showing the hours worked daily by and the wages paid to, and the number of piece-rate units earned by and any applicable piece rate paid to, employees employed at the respective plants or establishments. These records shall be kept in accordance with rules established for this purpose by the commission, but in any case shall be kept on file for not less than three years. An employer shall not prohibit an employee from maintaining a personal record of hours worked, or, if paid on a piece-rate basis, piece-rate units earned.

67. Labor Code § 1174.5 states:

Any person employing labor who willfully fails to maintain the records required by subdivision (c) of Section 1174, or to allow any member of the commission or employees of the division to inspect records pursuant to subdivision (b) of Section 1174, shall be subject to a civil penalty of five hundred dollars (\$500).

68. Section 7 of the Wage Order states:

(a) Every employer shall keep accurate information with respect to each employee including the following:

(1) Full name, home address, occupation, and social security number.

(2) Birth date, if under 18 years, and designation as a minor.

(3) Time records showing when the employee begins and ends each work period. Meal periods, split shift intervals and total daily hours worked shall also be recorded. Meal periods during which



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operations cease and authorized rest periods need not be recorded.

(4) Total wages paid each payroll period, including value of board, lodging, or other compensation actually furnished to the employee.

(5) Total hours worked in the payroll period and applicable rates of pay. This information shall be made readily available to the employee upon reasonable request.

(6) When a piece rate or incentive plan is in operation, piece rates or an explanation of the incentive plan formula shall be provided to employees. An accurate production record shall be maintained by the employer.

69. Labor Code § 1198 prohibits employers from employing their employees under conditions prohibited by the Wage Order.

70. On information and belief, Defendants have willfully failed to maintain the records required by § 1174 and Wage Order, including, but not limited to, the total premium wages earned for missed meal and rest periods, and records pertaining to all unpaid hours worked by Plaintiff and the Aggrieved Employees.

71. Accordingly, Gillespie seeks an award of civil penalties against the Defendants on behalf of himself and all of the other Aggrieved Employees as follows: (1) \$500 for each aggrieved employee for each violation of Labor Code section 1174 (penalties set by Labor Code section 1174.5); and (2) \$100 for each aggrieved employee for each initial violation of Labor Code section 1198, and \$200 for each Aggrieved Employee for each subsequent violation, per pay period (penalties set by Labor Code section 2699(f)(2)).

I. CIVIL PENALTIES SOUGHT

72. Defendants paid wages to employees on regular intervals. Defendants failed to pay Plaintiff on such intervals for all wages earned and all hours worked. On information and belief, Plaintiff alleges that Defendants also failed to pay the Aggrieved Employees on such intervals for all wages earned and all hours worked.

73. During the applicable time period, Defendants violated California Labor Code §§ 201, 202, 203, 204, 226, 226.7, 510, 512, 1174, 1194, 1197, 1198, 2802, and related Labor Code statutes.



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

4 75. Pursuant to California Labor Code §§ 2699(a) and (f), Plaintiff and the Aggrieved
5 Employees are entitled to recover civil penalties for each of the Defendants' violations of
6 California Labor Code §§ 201, 202, 203, 204, 226, 226.7, 510, 512, 1174, 1194, 1197, 1198,
7 2802, and related Labor Code statutes during the applicable limitations period in the following
8 amounts:

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

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

16 C. For violations of California Labor Code §§ 510 and 512, fifty dollars (\$50.00) for
17 each aggrieved employee for each initial violation for pay period for which the employee was
18 underpaid and one hundred dollars (\$100.00) for each underpaid employee for each pay period
19 for which the employee was underpaid (penalty amounts established by California Labor Code
20 § 558).

21 D. For violations of California Labor Code § 1174, five hundred dollars (\$500.00)
22 for each Aggrieved Employee for each initial violation (penalty amounts established by Labor
23 Code § 1174.5).

24 E. For violations of California Labor Code § 1197, one hundred dollars (\$100.00) for
25 each Aggrieved Employee for each initial and intentional violation and two hundred fifty dollars
26 (\$250.00) for each Aggrieved Employee for each subsequent violation, per pay period (regardless
27 of whether the initial violations were intentionally committed) (penalty amounts established by
28 California Labor Code § 1197.1).

 F. For violations of California Labor Code §§ 201, 202, 203, 226.7, 1194, 1198, and
2802, one hundred dollars (\$100.00) for each aggrieved employee per pay period for each initial
violation and two hundred dollars (\$200.00) for each aggrieved employee per pay period for each



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subsequent violation (penalty amounts established by California Labor Code § 2699(f)(2)).

J. NOTICE TO THE STATE OF CALIFORNIA AND DEFENDANTS

76. Plaintiff has complied with the procedures for bringing suit specified in California Labor Code § 2699.3. By letter dated June 06, 2023, Plaintiff gave written notice by certified mail to the Labor and Workforce Development Agency (“LWDA”) and Defendants of the specific provisions of the California Labor Code alleged to have been violated, including the facts and theories to support the alleged violations. A true and correct copy of Plaintiff’s letter to the LWDA dated June 06, 2023 is attached hereto as Exhibit A. The LWDA has not responded to Plaintiff’s letter.

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

V. PRAYER FOR RELIEF

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

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

VI. DEMAND FOR JURY TRIAL

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

Respectfully submitted,

THE SPIVAK LAW FIRM

Dated: August 3, 2023

By:



DAVID G. SPIVAK, Attorneys for
Plaintiff, JOSEPH GILLESPIE, and all
others similarly situated



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EXHIBIT “A”



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SENT BY ELECTRONIC SUBMISSION, CERTIFIED MAIL, AND EMAIL

June 6, 2023

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

Re: Joseph Gillespie / D.G. Smith

To Whom It May Concern:

Pursuant to the Labor Code Private Attorneys General Act of 2004, Labor Code sections 2698, *et seq.*, Joseph Gillespie (hereafter “Gillespie” or “Complainant”) provides notice that DG Smith Enterprise, Inc. and related entities (collectively “the D.G. Smith Employers” or “the Employers”) violated his rights and those of all other individuals the D.G. Smith Employers have employed or otherwise contracted with in California as hourly, non-exempt employees, including crew members, individuals performing work comparable to the aforementioned, and individuals in similar positions (hereafter the “Aggrieved Employees”) under Labor Code sections 201, 202, 203, 204, 226, 226.7, 510, 512, 1174, 1194, 1197, 1198, 2802, and other Labor Code statutes. On behalf of himself and all other Aggrieved Employees, Gillespie hereby provides this notice to the Labor & Workforce Development Agency and the D.G. Smith Employers and their agents and representatives.

At all relevant times, the D.G. Smith Employers have employed persons, conducted business, and engaged in illegal payroll practices and policies, throughout California. Gillespie and all of the other Aggrieved Employees are “employees” within the meaning of Industrial Welfare Commission Order No. 5-2001 (hereafter “the Wage Order”) section 2, subdivision (F) and “Aggrieved Employees” within the meaning of Labor Code section 2699(c).

Statement of Facts

On approximately January 14, 2021, the D.G. Smith Employers began to employ Gillespie in Sacramento in the position of hourly, non-exempt crew member. The D.G. Smith Employers continuously employed him in that capacity until on or about June 22, 2022 when his employment ended.

At all relevant times, the D.G. Smith Employers issued wages to Gillespie and all of the other Aggrieved Employees on a biweekly (26 paychecks/year) basis and paid them by the hour. At all relevant times, the D.G. Smith Employers classified Gillespie and all of the other Aggrieved Employees as non-exempt employees entitled to the protections of the Labor Code and the Wage Order.

The D.G. Smith Employers failed to compensate Gillespie and all of the other Aggrieved Employees for all hours worked at the applicable minimum or regular rates of pay. Gillespie and the Aggrieved Employees often worked five (5) to six (6) days in a workweek, and between eight (8) to ten (10) hours per workday. At all relevant times, Gillespie and the Aggrieved Employees worked over eight (8) hours in one workday and over forty (40) hours in one workweek. The D.G. Smith Employers, however, failed to pay Gillespie and the Aggrieved Employees overtime wages of at least one and a half (1½) times their hourly rates of pay for all hours in excess of forty (40) in a week, and all hours in excess of eight (8) in a day.

At all relevant times, the Employers required Gillespie and the Aggrieved Employees to perform work while clocked-out and failed to compensate them for this time. Due to the workload and failure to hire sufficient staff members, the Employers often requested that Gillespie and the Aggrieved Employees continue to work after they had clocked-out. The D.G. Smith Employers failed to compensate Gillespie and the Aggrieved Employees for this work performed off-the-clock.

At all relevant times, the D.G. Smith Employers failed to provide Gillespie and all of the other Aggrieved Employees with all timely 30-minute, off-duty meal periods. The D.G. Smith Employers also failed to pay premium wages for days on which they failed to provide Gillespie and all of the other Aggrieved Employees with meal periods as required by law. Due to the workload and failure to hire sufficient staff members, the Employers denied Gillespie and the Aggrieved Employees their 30-minute off-duty meal period within the first five hours of work. The Employers also denied 30-minute

off-duty meal periods to Gillespie and the Aggrieved Employees because they were often interrupted by the Employers who required them to complete work tasks during meal breaks or to cut their meal-breaks short and return to work. Due to the workload and insufficient staff members, the Employers also required Gillespie and the Aggrieved Employees to clock-out within the first five hours of work for meal breaks and continue working while clocked-out. The Employers also failed to pay premium wages for days on which it failed to provide Gillespie and the Aggrieved Employees with meal periods as required by law.

At all relevant times, due to high workload and low staffing levels, the D.G. Smith Employers failed to authorize and permit Gillespie and all of the other Aggrieved Employees to take ten-minute, off-duty, paid rest breaks every four hours worked or major portion thereof. The D.G. Smith Employers also failed to pay premium wages for days on which they failed to authorize and permit Gillespie and all of the other Aggrieved Employees to take rest breaks as required by law.

At all relevant times, the D.G. Smith Employers required Gillespie and all of the other Aggrieved Employees to incur certain business expenses in the course of performing their duties. The D.G. Smith Employers required Gillespie and all of the other Aggrieved Employees to supply mobile phones to perform their job duties. However, the D.G. Smith Employers did not provide these items and did not reimburse Gillespie and the other Aggrieved Employees for these items.

At all relevant times, the D.G. Smith Employers failed to issue to Gillespie and all of the other Aggrieved Employees complete and accurate wage statements that state all hours worked at the correct rates of pay, and all wages earned. The D.G. Smith Employers knowingly and intentionally failed to state on the wage statements they issued to Gillespie and all of the other Aggrieved Employees the unpaid wages discussed above. The wage statements fail to state all minimum wages earned, all regular wages earned, all overtime wages earned, all doubletime wages earned, all meal period premium wages earned, all rest break premium wages earned, and other required information.

The D.G. Smith Employers also failed to timely pay Gillespie and all of the other Aggrieved Employees all earned wages as described above during and at the conclusion of employment.

The D.G. Smith Employers failed to maintain accurate employee records of Gillespie and all of the other Aggrieved Employees.

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

- (a) The D.G. Smith Employers failed to pay Gillespie and all of the other Aggrieved Employees all wages earned for all hours worked at the correct rates of pay, including minimum, regular, overtime, and doubletime wages;
- (b) The D.G. Smith Employers failed to provide Gillespie and all of the other Aggrieved Employees all meal periods in compliance with California law;
- (c) The D.G. Smith Employers failed to authorize and permit Gillespie and all of the other Aggrieved Employees to take rest breaks in compliance with California law;
- (d) The D.G. Smith Employers failed to compensate Gillespie and all of the other Aggrieved Employees at one hour's pay for each day in which the D.G. Smith Employers failed to provide them with one or more meal periods as required by law;
- (e) The D.G. Smith Employers failed to compensate Gillespie and all of the other Aggrieved Employees at one hour's pay for each day in which the D.G. Smith Employers failed to authorize and permit them to take one or more rest breaks as required by law;
- (f) The D.G. Smith Employers failed to indemnify Gillespie and all of the other Aggrieved Employees for all necessary business expenditures incurred during the discharge of their duties;
- (g) The D.G. Smith Employers knowingly and intentionally failed to provide Gillespie and all of the other Aggrieved Employees with accurate wage statements;

- (h) The D.G. Smith Employers willfully failed to timely pay Gillespie and all of the other Aggrieved Employees all earned and unpaid wages during their employment with the D.G. Smith Employers and when their employment ended; and
- (i) The D.G. Smith Employers failed to maintain accurate employment records pertaining to Gillespie and all of the other Aggrieved Employees.

Accordingly, Gillespie now seeks civil penalties on behalf of himself and all of the other Aggrieved Employees based on the D.G. Smith Employers' alleged violations of the Labor Code and the Wage Order.

The Wage Order

The Wage Order applies to "all persons employed in the public housekeeping industry whether paid on a time, piece rate, commission, or other basis." Wage Order, § 1. The Wage Order defines "Public Housekeeping Industry" to mean

any industry, business, or establishment which provides meals, housing, or maintenance services whether operated as a primary business or when incidental to other operations in an establishment not covered by an industry order of the Commission, and includes, but is not limited to the following:

- (1) Restaurants, night clubs, taverns, bars, cocktail lounges, lunch counters, cafeterias, boarding houses, clubs, and all similar establishments where food in either sold or liquid form is prepared and served to be consumed on the premises;
- (2) Catering, banquet, box lunch service, and similar establishments which prepare food for consumption on or off the premises;
- (3) Hotels, motels, apartment houses, rooming houses, camps, clubs, trailer parks, office or loft buildings, and similar establishments offering rental of living, business, or commercial quarters;

- (4) Hospitals, sanitariums, rest homes, child nurseries, child care institutions, homes for the aged, and similar establishments offering board or lodging in addition to medical, surgical, nursing, convalescent, aged, or child care;
- (5) Private schools, colleges, or universities, and similar establishments which provide board or lodging in addition to educational facilities;
- (6) Establishments contracting for development, maintenance or cleaning of grounds; maintenance or cleaning of facilities and/or quarters of commercial units and living units; and
- (7) Establishments providing veterinary or other animal care services.

Wage Order, § 2(P). At all relevant times during the applicable limitations period, the D.G. Smith Employers, Gillespie, and all of the Aggrieved Employees were covered by the Wage Order because the D.G. Smith Employers operated, and Gillespie, and all of the Aggrieved Employees, worked for one or more restaurants. Accordingly, Gillespie and all of the other Aggrieved Employees are entitled to the protections the Wage Order provides.

Failure To Pay Wages For All Hours Worked At The Correct
Rates of Pay
(Lab. Code §§ 510, 1194, 1197, and 1198)

Under Labor Code section 1197, “The 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.”

In relevant part, section 2(K) of the Wage Order states,

“Hours worked” means the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so[.]

In relevant part, Labor Code section 1194 states:

- (a) Notwithstanding any agreement to work for a lesser wage, any employee receiving less than the legal minimum wage or the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime compensation, including interest thereon, reasonable attorney's fees, and costs of suit.

In relevant part, Labor Code section 510 states:

Any 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. 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. In addition, 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.

In relevant part, Section 3 of the Wage Order states:

The following overtime provisions are applicable to employees 18 years of age or over and to employees 16 or 17 years of age who are not required by law to attend school and are not otherwise prohibited by law from engaging in the subject work. Such employees shall not be employed more than eight (8) hours in any workday or more than 40 in a workweek unless the employee receives one and one half (1½) times such employee's regular rate of pay for all hours worked over 40 hours in the workweek. Eight (8) hours of labor constitutes a day's work. Employment beyond eight (8) hours in any workday or more than six (6) days in any workweek is permissible provided the employee is compensated for such overtime at not less than:

- (a) One and one-half (1½) times the employee's regular rate of pay for all hours worked in excess of eight (8) hours up to and including twelve (12) hours in any workday, and for the first eight (8) hours worked on the seventh (7th) consecutive day of work in a workweek;

- (b) Double the employee's regular rate of pay for all hours worked in excess of 12 hours in any workday and for all hours worked in excess of eight (8) hours on the seventh (7th) consecutive day of work in a workweek; and
- (c) The overtime rate of compensation required to be paid to a nonexempt full-time salaried employee shall be computed by using the employee's regular hourly salary as one fortieth (1/40) of the employee's weekly salary.

Labor Code § 1198 prohibits employers from employing their employees under conditions prohibited by the Wage Order.

In conjunction, these provisions of the Labor Code require employers to pay employees no less than their agreed-upon or statutorily mandated wage rates for all hours worked, including hours spent working "off-the-clock" (before punching in or after punching out on a time clock) when the employer knew or reasonably should have known that employees were working during those hours. *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 585.

At all relevant times during the applicable limitations period, the D.G. Smith Employers failed to compensate Gillespie and all of the other Aggrieved Employees for all hours worked, including, but not limited to minimum, regular, overtime, and doubletime wages for all hours they worked at the correct rates of pay. Accordingly, Gillespie now seeks civil penalties on behalf of himself and all of the other Aggrieved Employees as follows:

1. \$50 for each aggrieved employee for each initial violation of Labor Code § 510, and \$100 for each aggrieved employee for each subsequent violation, per pay period in addition to an amount sufficient to recover underpaid wages (penalties set by Labor Code § 558);
2. \$100 for each aggrieved employee for each initial violation of Labor Code § 1194, and \$200 for each aggrieved employee for each subsequent violation, per pay period (penalties set by Labor Code § 2699(f)(2));
3. \$100 for each underpaid aggrieved employee for each initial violation of Labor Code § 1197, and \$250 for each underpaid aggrieved employee for each subsequent violation per pay period (regardless of whether the initial

violations were intentionally committed), in addition to an amount sufficient to recover underpaid wages, liquidated damages pursuant to Section 1194.2, and any applicable penalties imposed pursuant to Section 203 (penalties set by Labor Code § 1197.1) and

4. \$100 for each aggrieved employee for each initial violation of Labor Code § 1198, and \$200 for each aggrieved employee for each subsequent violation, per pay period (penalties set by Labor Code § 2699(f)(2)).

Failure to Provide Meal Periods
(Lab. Code §§ 226.7, 512, and 1198)

In relevant part, section 2(K) of the Wage Order states,

“Hours worked” means the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so.

In relevant part, Labor Code section 1198 states, “The employment of any employee ... under conditions of labor prohibited by the [Wage Order] is unlawful.”

In relevant part, Labor Code section 512 states:

An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee. An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived.

In relevant part, section 11 of the Wage Order states:

Meal Periods:

- (A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day's work the meal period may be waived by mutual consent of the employer and the employee. Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an "on duty" meal period and counted as time worked. . . .
- (B) If an employer fails to provide an employee a meal period in accordance with the applicable provisions of this Order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that the meal period is not provided.

In addition, Labor Code section 226.7 states:

- (b) An employer shall not require an employee to work during a meal or rest or recovery period mandated pursuant to an applicable statute, or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health.
- (c) If an employer fails to provide an employee a meal or rest or recovery period in accordance with a state law, including, but not limited to, an applicable statute or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest or recovery period is not provided.

At all relevant times, the D.G. Smith Employers failed to provide Gillespie and all of the other Aggrieved Employees with all timely meal periods. The D.G. Smith Employers denied Gillespie and all of the other Aggrieved Employees their 30-minute off-duty meal period within the first five hours of work. Furthermore, the D.G. Smith Employers failed to pay premium wages for days on which they failed to provide Gillespie and all of the other Aggrieved Employees with timely meal periods. Accordingly, Gillespie now seeks civil penalties for these Labor Code violations that the D.G. Smith Employers have committed against him and all of the other Aggrieved Employees as follows:

1. \$100 for each aggrieved employee for each initial violation of Labor Code section 226.7, and \$200 for each aggrieved employee for each subsequent violation, per pay period (penalties set by Labor Code section 2699(f)(2));
2. \$50 for each aggrieved employee for each initial violation of Labor Code section 512, and \$100 for each aggrieved employee for each subsequent violation, per pay period in addition to an amount sufficient to recover underpaid wages (penalties set by Labor Code section 558); and
3. \$100 for each aggrieved employee for each initial violation of Labor Code section 1198, and \$200 for each aggrieved employee for each subsequent violation, per pay period (penalties set by Labor Code section 2699(f)(2)).

Failure to Authorize and Permit Rest Periods
(Lab. Code §§ 226.7 & 1198)

Section 2(K) of the Wage Order states,

“Hours worked” means the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so.

In relevant part, Labor Code section 1198 states,

The employment of any employee . . . under conditions of labor prohibited by the [Wage Order] is unlawful.

Section 12 of the Wage Order provides, in relevant part:

Rest Periods:

- (A) Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized 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. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 ½) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages.
- (B) If an employer fails to provide an employee a rest period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee's regular rate of compensation for each workday that the rest period is not provided.

In addition, Labor Code section 226.7 states:

- (b) An employer shall not require an employee to work during a meal or rest or recovery period mandated pursuant to an applicable statute, or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health.
- (c) If an employer fails to provide an employee a meal or rest or recovery period in accordance with a state law, including, but not limited to, an applicable statute or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health, the employer shall pay the employee one additional hour of pay at the employee's regular rate

of compensation for each workday that the meal or rest or recovery period is not provided.

The D.G. Smith Employers failed to authorize and permit Gillespie and all of the other Aggrieved Employees to take ten-minute, paid, duty-free rest breaks every four hours worked or major fraction thereof. The D.G. Smith Employers did not seek an exemption from the rest period protections of the Wage Order from the California Division of Labor Standards Enforcement. Moreover, the D.G. Smith Employers failed to pay Gillespie and all of the other Aggrieved Employees premium wages on workdays the D.G. Smith Employers failed to provide Gillespie and all of the other Aggrieved Employees with 10-minute rest periods every four hours worked or major fraction thereof. Accordingly, Gillespie now seeks civil penalties for these Labor Code violations that the D.G. Smith Employers have committed against him and all of the other Aggrieved Employees as follows:

1. \$100 for each aggrieved employee for each initial violation of Labor Code section 226.7, and \$200 for each aggrieved employee for each subsequent violation, per pay period (penalties set by Labor Code section 2699(f)(2)); and
2. \$100 for each aggrieved employee for each initial violation of Labor Code section 1198, and \$200 for each aggrieved employee for each subsequent violation, per pay period (penalties set by Labor Code section 2699(f)(2)).

Failure to Reimburse for Expenses
(Lab. Code §§ 1198 and 2802)

In pertinent part, Labor Code § 2802(a) states, “An employer shall indemnify his or her employee[s] for all necessary expenditures incurred by the employee in direct consequence of the discharge of his or her duties.”

Additionally, the Wage Order states,

- (A) When uniforms are required by the employer to be worn by the employee as a condition of employment, such uniforms shall be provided and maintained by the employer.

...

- (B) When tools or equipment are required by the employer or are necessary to 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 provided herein may be required to provide and maintain hand tools and equipment customarily required by the trade or craft.

Wage Order, § 9(B).

Labor Code Section 1198 prohibits an employer from employing any person under conditions that violate the Wage Order.

As described above, the D.G. Smith Employers required Gillespie and all of the other Aggrieved Employees to incur certain business expenses in the course of performing their duties. The D.G. Smith Employers required Gillespie and all of the other Aggrieved Employees to supply mobile phones to perform their job duties. However, the D.G. Smith Employers did not provide these items and did not reimburse Gillespie and the other Aggrieved Employees for these items. Accordingly, Gillespie seeks civil penalties for these Labor Code violations that the D.G. Smith Employers have committed against him and all of the other Aggrieved Employees as follows:

1. \$100 for each aggrieved employee for each initial violation of Labor Code section 2802, and \$200 for each aggrieved employee for each subsequent violation, per pay period (penalties set by Labor Code section 2699(f)(2)); and
2. \$100 for each aggrieved employee for each initial violation of Labor Code section 1198, and \$200 for each aggrieved employee for each subsequent violation, per pay period (penalties set by Labor Code section 2699(f)(2)).

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

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

1. Gross wages earned;
2. Total hours worked by the employee, except for any employee whose compensation is solely based on a salary and who is exempt from payment of overtime under subdivision (a) of Section 515 or any applicable order of the Industrial Welfare Commission;
3. The number of piece rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis;
4. All deductions, provided that all deductions made on written orders of the Employee may be aggregated and shown as one item;
5. Net wages earned;
6. The inclusive dates of the period for which the employee is paid;
7. The name of the employee and his or her social security number, except that by January 1, 2008, only the last four digits of his or her social security number or an employee identification number other than a social security number may be shown on the itemized statement;
8. The name and address of the legal entity that is the employer; and
9. All applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee.

At all relevant times during the applicable limitations period, the D.G. Smith Employers violated Labor Code section 226 because they did not properly and accurately itemize each Aggrieved Employee's gross wages earned, net wages earned, the total hours worked, the corresponding number of hours worked at each rate by the Aggrieved Employee and other requirements of Labor Code section 226. The D.G. Smith Employers failed to state in the wage statements they issued to Gillespie and all of the other Aggrieved Employees all their hours worked and wages earned, including, but not limited to, regular and overtime wages for work they performed off-the-clock after clocking-out (as described above). The D.G. Smith Employers knowingly and intentionally failed to state on the wage statements they issued to Gillespie and all of the other Aggrieved Employees the earned but unpaid wages described above. The wage statements do not state all minimum wages earned, all regular wages earned, all overtime wages earned, all doubletime wages earned, all meal period premium wages earned, all rest break premium wages earned, and other required information.

Accordingly, Gillespie seeks civil penalties for the Labor Code violations that the D.G. Smith Employers have committed against him and all of the other Aggrieved Employees as follows: \$250 for each aggrieved employee for each initial violation of Labor Code section 226(a), and \$1,000 for each aggrieved employee for each subsequent violation (penalties set by Labor Code section 226.3).

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

Labor Code section 204 states all wages (other than those mentioned in Labor Code sections 201 and 202) earned by any person in any employment are due and payable twice during each calendar month, on days designated in advance by the employer as the regular paydays. Labor performed between the 1st and 15th days, inclusive, of any calendar month shall be paid for between the 16th and the 26th day of the month during which the labor was performed, and labor performed between the 16th and the last day, inclusive, of any calendar month, shall be paid for between the 1st and 10th day of the following month. In addition, all wages for work performed in excess of the normal work period must be paid by no later than the following regular payday.

The D.G. Smith Employers failed to compensate Gillespie and all of the other Aggrieved Employees for wages earned, including minimum wages, regular wages,

overtime wages, doubletime wages, unprovided meal period premium wages, unprovided rest break premium wages, and other compensation, at the intervals stated above. As a result, the D.G. Smith Employers failed to timely pay all earned wages due during employment within the time periods set by Labor Code section 204. Accordingly, Gillespie now seeks civil penalties for the Labor Code violations that the D.G. Smith Employers have committed against him and all of the other Aggrieved Employees as follows: \$100 for each aggrieved employee for each initial violation of Labor Code section 204, and \$200 for each aggrieved employee for each subsequent violation, plus 25% of the amount unlawfully withheld from each aggrieved employee (penalties set by Labor Code section 210).

Failure to Timely Pay Wages Upon Termination of Employment
(Lab. Code §§ 201, 202, and 203)

Under Labor Code § 201, if an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately. Under § 202, if an employee not having a written contract for a definite period quits his or her employment, his or her wages shall become due and payable not later than 72 hours thereafter, unless the employee has given 72 hours previous notice of his or her intention to quit, in which case the employee is entitled to his or her wages at the time of quitting. Notwithstanding any other provision of law, an employee who quits without providing a 72-hour notice shall be entitled to receive payment by mail if he or she so requests and designates a mailing address. *Id.* The date of the mailing shall constitute the date of payment for purposes of the requirement to provide payment within 72 hours of the notice of quitting. *Id.*

Under Labor Code § 203, if an employer willfully fails to pay without abatement or reduction, in accordance with §§ 201 and 202, the wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but the wages shall not continue for more than 30 days.

The D.G. Smith Employers failed to pay Gillespie and all of the other Aggrieved Employees whose employment ended all of the earned but unpaid wages described above by the conclusion of their employment with Gillespie, including minimum wages, regular wages, overtime wages, doubletime wages, unprovided meal period premium wages, unprovided rest break premium wages, and other compensation. By failing to

pay Gillespie and all of the other Aggrieved Employees as set forth above at the end of employment, the D.G. Smith Employers are liable for violations of Labor Code §§ 201, 202, and 203. Accordingly, on behalf of himself and all of the other Aggrieved Employees, Gillespie seeks civil penalties from the D.G. Smith Employers as follows:

1. For violations of Labor Code § 201, \$100 per aggrieved employee for each of the pay periods in which initial violations of § 201 occurred, and \$200 per aggrieved employee per pay period in which subsequent violations of § 201 occurred (penalties set by Labor Code § 2699(f)(2));
2. For violations of Labor Code § 202, \$100 per aggrieved employee for each of the pay periods in which initial violations of § 202 occurred, and \$200 per aggrieved employee per pay period in which subsequent violations of § 202 occurred (penalties set by Labor Code § 2699(f)(2)); and
3. For violations of Labor Code § 203, \$100 per aggrieved employee for each of the pay periods in which initial violations of § 203 occurred, and \$200 for per aggrieved employee per pay period in which subsequent violations of § 203 occurred (penalties set by Labor Code § 2699(f)(2)).

Failure to Maintain Accurate Employment Records
(Lab. Code §§ 1174 & 1198)

Labor Code section 1174, which also pertains to recordkeeping, states:

Every person employing labor in this state shall:

...

- (c) Keep a record showing the names and addresses of all employees employed and the ages of all minors.
- (d) Keep, at a central location in the state or at the plants or establishments at which employees are employed, payroll records showing the hours worked daily by and the wages paid to, and the number of piece-rate units earned by and any applicable piece rate

paid to, employees employed at the respective plants or establishments. These records shall be kept in accordance with rules established for this purpose by the commission, but in any case shall be kept on file for not less than three years. An employer shall not prohibit an employee from maintaining a personal record of hours worked, or, if paid on a piece-rate basis, piece-rate units earned.

Labor Code section 1174.5 states:

Any person employing labor who willfully fails to maintain the records required by subdivision (c) of Section 1174 or accurate and complete records required by subdivision (d) of Section 1174, or to allow any member of the commission or employees of the division to inspect records pursuant to subdivision (b) of Section 1174, shall be subject to a civil penalty of five hundred dollars (\$500).

Section 7 of Wage Order states,

(A) Every employer shall keep accurate information with respect to each employee including the following:

- (1) Full name, home address, occupation and social security number.
- (2) Birth date, if under 18 years, and designation as a minor.
- (3) Time records showing when the employee begins and ends each work period. Meal periods, split shift intervals and total daily hours worked shall also be recorded. Meal periods during which operations cease and authorized rest periods need not be recorded.
- (4) Total wages paid each payroll period, including value of board, lodging, or other compensation actually furnished to the Employee.

- (5) Total hours worked in the payroll period and applicable rates of pay. This information shall be made readily available to the employee upon reasonable request.
- (6) When a piece rate or incentive plan is in operation, piece rates or an explanation of the incentive plan formula shall be provided to employees. An accurate production record shall be maintained by the employer.

Labor Code section 1198 prohibits employers from employing their employees under conditions prohibited by the Wage Order.

The D.G. Smith Employers failed to compensate Gillespie and all of the other Aggrieved Employees for all hours worked at the correct rates of pay, including all minimum wages earned, all regular wages earned, all overtime wages earned, all doubletime wages earned, all meal period premium wages earned, all rest break premium wages earned, and related compensation. As a result, the D.G. Smith Employers have failed to accurately maintain all records required by section 1174 and the Wage Order, including but not limited to Gillespie and all of the other Aggrieved Employees' total hours worked, total wages paid, and applicable hourly rates during each payroll period. Accordingly, Gillespie seeks civil penalties on behalf of himself and all of the other Aggrieved Employees as follows:

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

Conclusion

As noted above, this letter constitutes the required notice under the Labor Code Private Attorneys General Act of 2004. Please be advised that Joseph Gillespie will seek both reasonable attorneys' fees and costs under Labor Code section 2699(g)(1) in a civil action should the LWDA decline to pursue this matter. This letter also serves as a

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Re: Joseph Gillespie
June 6, 2023
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formal notice under the catalyst theory and Code of Civil Procedure section 1021.5 to resolve this matter before litigation.

Sincerely,



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