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Labor and Workforce Development Agency
Department of Industrial Relations
Accounting Unit
455 Golden Gate Avenue, 10th Floor
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VIA WEB PORTAL AT:
https://dir.tfaforms.net/

John C. Rademacher, CEO
Option Care Enterprises, Inc.
3000 Lakeside Drive, Suite 300N
Bannockburn, IL 60015

VIA CERTIFIED MAIL

Re: *Gilbert, et al. v. Option Care Enterprises, Inc.* – Notice of Labor Code Private Attorneys General Act Claims and Intent to Pursue Civil Action

To Whom It May Concern:

This office represents Cynthia Gilbert ("Plaintiff") in her claims for violations of California wage-and-hour statutes and regulations by Option Care Enterprises, Inc. (herein, "Option Care" or the "Employer"). Ms. Gilbert intends to file a civil lawsuit on behalf of herself and all other similarly-situated individuals against Option Care to recover wages and statutory penalties under California statutes and regulations. This Notice Letter shall also serve to provide notice for any other aggrieved employee subsequently named in the civil action through amendment (*i.e.*, any later-joined co-plaintiffs).

Additionally, our client(s) intend to seek recovery of all available civil penalties under the Private Attorneys General Act ("PAGA"). This correspondence is being sent, pursuant to the provisions of California Labor Code § 2699.3, in order to allow Plaintiff, on behalf of herself and all other similarly-situated individuals, to collect the civil penalties associated with the violations of the following statutes and regulations in her civil lawsuit against Option Care.

BACKGROUND

These are the facts as we presently understand them, as matters pertain to Plaintiff and the putative and/or representative class of workers Plaintiff intends to represent – *i.e.*: ***All current and former employees of Employer who have worked in California as a non-exempt employee the statutory period preceding the date of this letter or the initiation of litigation, whichever date is sooner (herein, the "Putative Class").***

Pursuant to its own website, Option Care is a Delaware company doing business in California in the home health care sector, employing nurses and other professionals to render infusion and other medical services to residents and citizens of the State of California, throughout the State. Defendant advertises on its website that "[w]e specialize in infusion treatments for a broad range of acute and chronic conditions with access to the most innovative therapies and drugs available." (See, e.g., https://optioncarehealth.com/about).

On information and belief, and according to its website, Defendant also maintains 27 physical locations throughout California, which it characterizes as "infusion suites" within the State. Defendant employs registered nurses, such as Plaintiff, throughout the state, and often requires them to work "on-call" at various times during each work period.

Plaintiff has worked for the Company as an infusion nurse, traveling to and providing health care services to the customers of Employer, exclusively in Southern California. During her employment, Plaintiff has not paid for all regular, overtime, and double-time hours worked, was not provided compliant rest breaks, or meal periods. Further, she was required to work "on call" shifts and perform administrative tasks "off the clock" for the Company. Defendant also failed to provide Plaintiff with accurate itemized wage statements as required by law.

Plaintiff and those similarly-situated are expected to travel significant distances in service and obedience to the Employer, and to provide "coverage" for large geographic areas where patients may be located. Employees like Plaintiff maintain a company cell phone, which they must utilize to answer calls and also for app-based work messaging systems. As such, the Employees are effectively "tethered" through technological means to the job.

Plaintiff and those similarly-situated are required to work "on-call" shifts, for both 8-hour and also 24-hour coverage periods. However, despite the employer's requirements that Plaintiff must monitor and respond to work-related communications for the assigned 8-hour and 24-hour "on-call" shifts, during these periods (which are mandatory and scheduled by the Employer) employees like Plaintiff are either not paid at all, or are paid at a rate well below the statutory minimum wage rate.

Moreover, despite requiring Plaintiff to telephonically report ready to work, Plaintiff has not been paid mandatory reporting time pay minimums in accordance with California law and regulations.

THE LAW

The actions of the Employer, described above, violate California law in a number of ways.

A. Failure to Pay Minimum, Regular, and Overtime Wages.

California's Wage Orders provide, in relevant part, that "Every employer shall pay to each employee, on the established payday for the period, not less than the applicable minimum wage for all hours worked in the payroll period, whether the remuneration is measured by time, piece, commission, or otherwise." (*E.g.* Wage Order 14-2001, at § (4)(B)). "Hours worked" is defined in subdivision 2(H) of the wage order 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." (*Id.*, at § (2)(H). Thus, the obligation to pay minimum wages attaches to each and every separate hour worked during the payroll period. California Labor Code section 1194 further codifies the minimum wage obligations of employers.

Under the California Labor Code, Plaintiff will be entitled to recover her reasonable attorneys' fees and costs against the Company. Cal. Labor Code §§ 218.5, 2699(g). Statutory interest also is accruing on all of the unpaid wages at the rate of ten percent (10%) per year. Cal. Labor Code § 218.6.

B. Meal and Rest Break Violations.

Section 226.7 of the Labor Code provides that employers cannot require employees to work during breaks mandated by an order of the Industrial Welfare Commission. The IWC, in turn, has mandated in Section 12(A) of the Wage Orders, that every employer shall authorize and permit all employees to take rest periods at the rate of ten minutes per four hours worked in the middle of each work period. All such rest periods must be separately compensated.

During Plaintiff's employment, Option Care knowingly and intentionally failed to remit payment for rest periods as mandated by the IWC Wage Order(s).

Both Labor Code Section 226.7 and the IWC Wage Orders require that if an employer fails to provide an employee a rest period in accordance with a state law or order of the IWC, the employer shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the rest period is not provided. Section 226. 7's "regular rate" of compensation is not limited to Plaintiffs base rate of compensation, but includes other forms of qualifying compensation, such as their piece-rate pay. *Alvarado v. Dart Container Corp.,* 4 Cal. 5th 542, 554 (2018).

During Plaintiff's employment, Defendants failed to provide Plaintiff the additional hour of pay at her regular rate of pay as required under Labor Code §§ 226.7 and 512. Under the California Labor Code, Plaintiff will be entitled to recover her reasonable attorney's fees and costs against the Company. Cal. Labor Code §§ 218.5, 2699(g). Statutory interest also is accruing on all of the unpaid wages at the rate of ten percent (10%) per year. Cal. Labor Code § 218.6.

Section 512 of the Labor Code similarly requires that an employer may not employ any 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, and for a work period of more than 10 hours without a *second* meal period of not less than 30 minutes.

Section 226.7 of the Labor Code mandates that if an employer fails to provide an employee with a compliant meal period, it shall pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the meal period is not provided.

During Plaintiff's employment, Defendants knowingly and intentionally failed to provide compliant meal periods. Further, Defendants failed to pay Plaintiff one additional hour of pay at her "regular rate" of compensation for each workday a compliant meal break was not provided.

C. Wage Statement Violations.

Labor Code section 226, subdivision (a), requires a California employer to include very specific information on an employee's paycheck stub. The required information includes, among other things, accurate figures for the gross wages earned, total hours worked, and all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee.

Defendants thus have violated Labor Code § 226 by failing to accurately report gross and net wages earned and total hours worked by the Plaintiff. Because of the inaccurate wage statements, Plaintiff has been harmed because her wages owed and hours worked were not properly indicated, and Plaintiff could not promptly and easily determine from the wage statement alone the correct amount of wages owed during each pay period.

D. Failure to Pay Reporting Time.

Relevant to this action, the language of the IWC Wage Order(s), at §5(A), relates that each workday an employee is required to report to work and does report, but is not put to work or is furnished less than half said employee's usual or scheduled day's work, the employee shall be paid for half the usual or scheduled day's work, but in no event less than two (2) hours, nor more than four (4) hours at the employee's regular rate of pay, which shall not be less than the minimum wage. Section 5(B) relates, "If an employee is required to report for work a second time in any one workday and is furnished less than two hours of work on the second reporting, said employee shall be paid for two hours at the employee's regular rate of pay, which shall not be less than the minimum wage."

In *Ward v. Tilly's*, the Court of Appeal held that, for purposes of triggering reporting time pay obligations to a worker, the "an employee need not necessarily physically appear at the workplace to 'report for work.' Instead, 'report[ing] for work' within the meaning of the wage order is best understood as presenting oneself as ordered." *Ward v. Tilly's, Inc.*, 31 Cal. App. 5th 1167, 1185 (2019).

In this matter Plaintiff and the putative classs are owed reporting time wages in the circumstances when she/class members were contacted telephonically (or via text/SMS/app-based messaging) to work, by the Defendants, but were presented with less than two (2) hours of working time or less than one half of their usual shift. During the statutory period, these events did occur but the Plaintiff and the putative class were not paid the proper reporting-time payments.

E. Other Statutory Violations.

Option Care has not those employees who have left its employment all wages due, as required pursuant to Labor Code §§ 201 and 202. Consequently, Option Care owes them statutory penalties pursuant to Labor Code § 203. Plaintiff believes that there have been more than 100 employees in California who were subjected to the same illegal actions.

Plaintiff will seek wages and statutory penalties against Option Care for these violations. Penalties sought arise from any and all claims for (i) alleged violations of California Labor Code §s 201, 202, 203, 204, 226, 226.7, 219, 510, 512, 558, 1194, and 1198, including but not limited to, (i) failure to pay employees all minimum, regular and/or overtime wages due based on all hours worked, including off-the-clock and on-call work; (ii) alleged violations of California Labor Code § 226, including, but not limited to, failure to provide accurate wage statements; (iii) alleged violations of California Labor Code §§ 201-203, including, but not limited to, failure to pay final wages timely, or pay penalties of untimely final wages; (iv) failure to pay all meal and rest period premiums owed, and at the proper rate; (v) alleged violation of California Business and

Professions Code § 17200 *et seq.* based on underlying violations of the California Labor Code as identified herein at (i) through (iv), and (vi) alleged violations of California Labor Code § 2698 *et seq.* based on derivative violations of the Labor Code, including but not limited to Labor Code §§ 201, 202, 203, 204, 219, 226, , 226.7, 510, 512, 558, 1194, 1194.2, 1194.3, 1197.1 and 1198; and the IWC Wage Orders.

PAGA CIVIL PENALTIES

1. Statutory and Regulatory Violations

Labor Code § 1194 provides that, 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."

Labor Code § 510 requires employers to pay nonexempt workers overtime premium wages when they work more than eight hours in one day or over forty hours in one week, and for the first eight hours worked on the seventh straight day of work in a single workweek. This statute also requires employers to pay nonexempt workers double-time premium wages when they work more than 12 hours in one workday and for all hours worked in excess of eight on the seventh straight day of work in one workweek.

In this matter, it is alleged that Option Care intentionally denied the Putative Class wages that should have been paid and violated California *Labor Code* §§ 1194, 510, and the applicable IWC Wage Order(s), all as set forth above. This includes off-the-clock work, as well as on-call shifts. To the extent that reporting time pay is owed, at the regular or overtime rate, that also is sought from Option Care.

Labor Code § 201 requires immediate payment of all wages owed at the termination of employment. It is believed that within the last year, Option Care employees in California have been terminated and have not received their overtime or double-time wages owed at their termination.

Labor Code § 202 requires payment of all wages owed within 72 hours of the resignation of an employee, unless the employee gives more than 72 hours' notice, in which case wages are owed at the employee's resignation. It is believed that within the last year, Option Care employees in California have resigned and have not received their overtime or double-time wages owed in a timely fashion as required by Labor Code § 202.

Labor Code § 204 sets timetables for when wages are due each pay period. In effect, most wages earned during a pay period must be paid at the conclusion of that pay period or the conclusion of the next pay period (in the case of wages earned for labor in excess of the normal work period). Here, wages were owed each pay period in which individuals worked compensable hours, and yet Option Care did not timely pay them the earned wages in the correct amounts.

Labor Code § 219 provides that an employer may not circumvent by way of private agreement the requirements of the wage-and-hour laws of the Labor Code. To the extent that Option Care has promulgated wage-and-hour policies that do not comply with California law, or that Option Care will argue that Plaintiff and Putative Class members agreed to work off-the-clock or on-call for no pay, or at less than the minimum wage, Option Care will have violated Labor Code § 219.

Labor Code § 226, subdivision (a) requires employers to put specific, accurate information on their employees' paycheck stubs. This information includes *inter alia* the actual number of hours worked and the applicable and lawful rates of pay. Option Care failed to include necessary information on Plaintiff's paycheck stubs by failing to pay the correct total amounts of wages or indicate the total hours worked, and it is believed that the violation of Labor Code § 226, subdivision (a) extends to all other Putative Class members.

Labor Code § 226.7, sub§ (a) provides, "No employer shall require any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission." In the case at bar, Plaintiff and the putative class were deprived of compliant meal and rest periods, as discussed above.

Labor Code section 512 provides that no employer shall employ an employee for a work period of more than five (5) hours without a meal break of not less than thirty (30) minutes in which the employee is relieved of all of his or her duties. An employer's duty with respect to meal breaks is an obligation to provide a meal period to its employees. The employer satisfies this obligation if it relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30–minute break, and does not impede or discourage them from doing so. *Brinker Rest. Corp. v. Superior Court*, 53 Cal.4th 1004 (2012). However, Plaintiff and their fellow employees were not actually provided with all duty-free, uninterrupted 30-minute meal periods as the law requires. After all, Plaintiff and the putative class members remained constantly "tethered" by device to their duties. Thus, by not paying Plaintiff and the putative class for their meal periods, and by not providing them, Defendants have violated California law.

Labor Code § 1194(a) provides that 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 receive 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. To the extent that Option Care will argue that the employees agreed to work for some alternative fee, and/or failed to pay minimum wages to Plaintiff, Option Care will have violated Labor Code § 1194(a).

Labor Code § 1198 provides that 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. To the extent the Option Care made Plaintiffs work beyond the maximum hours of work and standard conditions fixed by the Labor Commission, and failed to remit lawful payment for those hours, Option Care will have violated Labor Code § 1198.

California law relates that each workday an employee is required to report to work and does report, but is not put to work or is furnished less than half said employee's usual or scheduled day's work, the employee shall be paid for half the usual or scheduled day's work, but in no event less than two (2) hours, nor more than four (4) hours at the employee's regular rate of pay, which shall not be less than the minimum wage. Section 5(B) of the Wage Order relates, "If an employee is required to report for work a second time in any one workday and is furnished less than two hours of work on the second reporting, said employee shall be paid for two hours at the employee's regular rate of pay, which shall not be less than the minimum wage." In *Ward v. Tilly's*, the Court of Appeal held that, for purposes of triggering reporting time pay obligations to a worker, the "an employee need not necessarily physically appear at the workplace to 'report for work.' Instead, 'report[ing] for work' within the meaning of the wage order is best understood as presenting oneself as ordered." *Ward v. Tilly's, Inc.*, 31 Cal. App. 5th 1167, 1185 (2019). Thus, in this matter Plaintiff and the putative class are owed reporting time wages in the circumstances when she/class members were contacted telephonically (or via text/SMS/app-based messaging) to work, by the Defendants, but were presented with less than two (2) hours of working time or less than one half of their usual shift. During the statutory period, these events did occur but the Plaintiff and the putative class were not paid the proper reporting-time payments.

2. **Civil Penalties Sought**

Labor Code § 201 requires immediate payment of all wages owed at the termination of employment. It is believed that within the last three (3) years, the Company's employees in California have been terminated and have not received all wages owed at their termination. There is no civil penalty associated with violation of § 201, but Plaintiff (and/or any later-joined plaintiffs) intends to pursue civil penalties on behalf of herself and all others similarly-situated under Labor Code § 2699, subd. (f).

Labor Code § 202 requires payment of all wages owed within 72 hours of the resignation of an employee, unless the employee gives more than 72-hours notice, in which case wages are owed at the employee's resignation. It is believed that within the last three (3) years, Company employees in California have resigned and have not received all regular and premium pay owed in a timely fashion after their resignation. There is no civil penalty associated with violation of § 202, but Plaintiff (and/or any later-joined plaintiffs) intends to pursue civil penalties on behalf of themselves and all others similarly-situated under Labor Code § 2699, subd. (f).

Labor Code § 203 establishes a statutory penalty for willful violations of Labor Code §s 201 or 202. There has been a willful violation of Labor Code § 201 and 202 because the Company cannot hide behind its ignorance of the California's wage and hour laws. Further evidence of the Employer's willful disregard for Labor Code §s 201 and 202 is likely to be adduced at trial. Plaintiff (and/or any later-joined plaintiffs) intends to pursue civil penalties on behalf of herself and all others similarly-situated under Labor Code § 256.

Labor Code § 204 makes wages due no less frequently than twice a month for non-exempt employees for work performed each pay period. The Company has violated § 204 with respect to Plaintiffs' and their similarly-situated coworkers by not paying them all wages due for work performed each pay period. Plaintiff intends to pursue civil penalties on behalf of herself and all other similarly-situated under Labor Code § 210.

Labor Code § 210 establishes a civil penalty for violations of Labor Code § 204. Every person who fails to pay the wages of each employee as provided in § 204 shall be subject to a civil penalty as follows:

(1) For any initial violation, one hundred dollars ($100) for each failure to pay each employee; and
(2) For each subsequent violation, or any willful or intentional violation, two hundred dollars ($200) for each failure to pay each employee, plus 25 percent of the amount unlawfully withheld.

As it is alleged that Option Care violated Labor Code § 204, Plaintiff will, on behalf of the Putative Class, seek the civil penalties available under Labor Code § 210.

Labor Code § 219 provides that an employer may not circumvent by way of private agreement the requirements of the wage-and-hour laws of the Labor Code. To the extent that the Company will argue that these employees were subject to any "agreement" to work off the clock, without proper first or second meals, or on call without any pay or for less than minimum wages, the Company will have violated Labor Code § 219. There is no civil penalty associated with violation of § 219, but Plaintiff intends to pursue civil penalties on behalf of herself and all others similarly-situated under Labor Code § 2699, subd. (f).

Labor Code § 226 subdivision (a), requires a California employer to include very specific information on an employee's paycheck stub. The required information includes the proper number of regular and overtime hours worked and the correct rates of pay. Lab. Code § 226(a). Subdivision (e) sets forth statutory penalties for the violation of § 226(a). Plaintiff intends to bring suit to recover said penalties on behalf of herself and all others similarly-situated.

Labor Code § 226.3 sets forth civil penalties for violation of § 226, subdivision (a). Plaintiff intends to seek said penalties against Defendants on behalf of themselves and all other similarly-situated employees for violation of § 226, subdivision (a).

Labor Code § 226.7, subd. (a) provides, "No employer shall require any employee to work during any meal or rest period mandated by an applicable order of the Industrial Welfare Commission." There is no civil penalty associated with violation of § 226.7, but Plaintiff intends to pursue civil penalties on behalf of herself and all others similarly-situated under Labor Code § 2699, subd. (f).

Labor Code § 512 provides that no employer shall employ an employee for a work period of more than five (5) hours without a meal break of not less than thirty (30) minutes in which the employee is relieved of all of his or her duties. Furthermore, no employer shall employ an employee for a work period of more than ten (10) hours per day without providing the employee with a second meal period of not less than thirty (30) minutes in which the employee is relieved of all of his or her duties. It is alleged herein that Plaintiff and other employees were not provided with all requisite meal periods as required under the law. As it is alleged that the Company violated Labor Code § 512, Plaintiff will seek the civil penalties available under Labor Code § 558.

Labor Code § 1197 requires that employers may not pay less than the mandated minimum wage. The Company violated § 1197 by not paying Plaintiffs and their similarly-situated coworkers at least the minimum wage for all hours worked. The civil penalty for violations of § 1197 is enumerated in Labor Code § 1197.1. Plaintiffs intend to seek said penalties against the Company on behalf of herself and all other similarly-situated employees for violations of § 1197.

The IWC Wage Orders require that an employer properly pay employees reporting time pay, in situations where they are required to "report" to work but are not provided with a sufficient length of shift. Here, in addition to the civil penalties for wages owed, while there is no civil penalty directly associated with violation of the Wage Order sections on reporting time, Plaintiff intends to pursue civil penalties on behalf of herself and all others similarly-situated under Labor Code § 2699, subd. (f).

Finally, as noted in the case of *Thurman v. Bayshore Transit Mgmt., Inc.*, 203 Cal. App. 4th 1112 (2012), the PAGA civil penalty under Labor Code § 558 includes, "[f]or each subsequent violation, one hundred dollars ($100) for each underpaid employee for each pay period for which the employee was underpaid in addition to an amount sufficient to recover underpaid wages." *See Thurman v. Bayshore Transit Mgmt., Inc*., *supra*. Pursuant to § 558, Plaintiffs seek civil penalties equal to the amount of underpaid wages to all aggrieved employees in this matter.

Labor Code § 2699 provides for a civil penalty for the violation of Labor Code §s that lack a civil penalty provision of their own. The civil penalty is as follows: "If, at the time of the alleged violation, the person employs one or more employees, the civil penalty is one hundred dollars ($100) for each aggrieved employee per pay period for the initial violation and two hundred dollars ($200) for each aggrieved employee per pay period for each subsequent violation." Plaintiffs allege that Option Care has potentially violated the following civil-penalty-less Labor Code §s: 201, 202, and 203.

The IWC Wage Orders also provide for a civil penalty to be assessed against an employer who violates their provisions. Section 20 thereof states, in relevant part:

> (A) In addition to any other civil penalties provided by law, any employer or any other person acting on behalf of the employer who violates, or causes to be violated, the provisions of this order, shall be subject to the civil penalty of:
> (1) Initial Violation — $50.00 for each underpaid employee for each pay period during which the employee was underpaid in addition to the amount which is sufficient to recover unpaid wages.
> (2) Subsequent Violations — $100.00 for each underpaid employee for each pay period during which the employee was underpaid in addition to an amount which is sufficient to recover unpaid wages.

Plaintiff will seek, on behalf of herself and all other similarly-situated individuals, this additional civil penalty against Option Care for its violation of the IWC Wage Order(s), § 3(A), 4 and 5, as well as any additional violation of said Wage Order(s).

Reservation of right to pursue additional civil penalties or add additional representative plaintiffs: Plaintiffs intend to pursue the aforementioned civil penalties for these specific violations of law. However, should any other civil penalties be available by virtue of the Company's unlawful practices as enumerated herein, or as discovery reveals, Plaintiffs reserve the right to pursue such additional civil penalties. Moreover, should any subsequently-joined co-plaintiffs be added to the litigation, this Notice Letter shall also serve as notice being given by such co-plaintiffs as well.

CONCLUSION

Pursuant to California Labor Code § 2699.5, a violation of the above-cited statutes and regulations may form the basis for a PAGA action against Option Care. However, as required by law, aggrieved employees like Ms. Gilbert (and any other later-joined co-plaintiff) must first give the Labor and Workplace Development Agency the opportunity to pursue the offending employer before bringing their own PAGA action to collect civil penalties associated with the violation of the above-cited statutes and regulations.

In addition, pursuant to this letter and the enclosures, Plaintiff is complying with the updated requirements for PAGA claims; specifically, this claim notice letter will also be filed online, with copies sent by certified mail to the employer. Tendered herewith is a filing fee of $75, as required by the amended statute.

Please let me know if your agency intends to investigate the matter. If not, Ms. Gilbert intends to pursue her PAGA claims in a civil action, pursuant to law.

Very truly yours,

PALAY HEFELFINGER, APC

Daniel J. Palay

DJP:bdh
Enclosure(s):
(1) Filing fee payment