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ERIN NAYMARK

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

ERIN NAYMARK, an individual,	)	Case No.: 23SMCV04750
Plaintiff,	)	Assigned to: Hon. Michael E. Whitaker (Dept.
vs.	)	207)
TUTORED BY TEACHERS, INC., a Delaware	)	DECLARATION OF ERIN
Corporation; and DOES 1 through 100,	)	NAYMARK IN SUPPORT OF
inclusive,	)	PLAINTIFF’S MOTION FOR
Defendants.	)	APPROVAL OF PAGA
	)	SETTLEMENT AND JUDGMENT
	)	THEREON
	)	Date: July 17, 2024
	)	Time: 8:30 a.m.
	)	Location: Beverly Hills Courthouse –
	)	Dept. 207
	)	Reservation ID: 973134396193

DECLARATION OF ERIN NAYMARK

I, Erin Naymark, declare and state as follows:

1. I am over eighteen years old and unless context indicates otherwise, I have personal knowledge of the following facts and if called as a witness, I could and would testify competently to them. I am the named plaintiff and proposed class representative in the above-captioned action. I make this declaration in support of the proposed PAGA Settlement in the matter of *Erin Naymark v. Tutored By Teachers, Inc., et al.* (Case No. 23SMCV04750) and all motions for approval of the proposed settlement.

2. I was engaged as an Independent Contractor by Defendant Tutored by Teachers (“Defendant”) as a “Teacher Tutor” (“TT”) and “Instructional Support” (“IS”) (collectively referred to herein as “Tutors”) between March of 2022 and September of 2023. I brought this action to redress certain alleged employment claims that my co-workers and I have against Defendant.

3. I allege in this case that I and all of Defendant’s California individuals who performed work as a TT and/or an IS and were treated as independent contractors were, in fact, misclassified and should have been treated as employees. Specifically, I have alleged that Defendant cannot satisfy two prongs of the “ABC Test” for Independent Contractor status as adopted by the California Supreme Court in *Dynamex Operations W. Inc. v. Superior Court*, 4 Cal.5th 903 (2018) and codified in Labor Code section 2775. First, Defendant cannot establish that its Tutors “perform work that is outside the usual course of the hiring entity’s business” as the remote instruction provided by these employees is the essence of the service provided by Defendant to its clients. Second, Defendant also exercised “control and direction” over the Tutors’ work in ways that weigh against independent contractor treatment. Defendant limited which platforms teachers could use for electronic teaching materials as well as dictated the curriculum and learning targets that had to be taught.

4. The theories of liability that I have alleged on behalf of myself in an individual capacity and also in a representative capacity under the California Private Attorneys General Act are as follows:

1 **Labor Code section 226.8 Misclassification Claim:** I am seeking penalties pursuant to
2 226.8 for willful failure to misclassify Plaintiff and the aggrieved Tutors. *See Kim v. Reins*
3 *International California, Inc.*, 9 Cal.5th 73, 89 (2020) (Legislative purpose of PAGA is to create
4 venue for obtaining redress for labor code penalties that do not provide a private right of action,
5 such as Labor Code section 226.8).

6 **Failure to Pay Minimum Wages Claim:** Due to our misclassification as independent
7 contractors, myself and the other aggrieved individuals did not receive payment for all time
8 worked, leading to minimum wage violations. Tutors were paid an hourly rate for the time when
9 they were actively in session teaching students but did not receive any pay for non-productive
10 time. I estimate that Tutors spent approximately 3 hours per week on non-productive tasks such
11 as preparing lesson plans, reading and responding to messages on the company's Slack platform,
12 preparing mandatory reports summarizing sessions, and working during the mandatory 10-15
13 minute pre-lesson period where tutors were expected to handle all technical and logistical issues
14 before their lesson started.

15 **Reimbursement Claim:** Additionally, Defendant did not pay for mandatory business
16 expenses incurred by Tutors in the course and scope of their employment. These expenses
17 included: internet and mobile device usage, instructional and office supplies, and educational
18 software platform fees. I am informed and believe, that Tutors easily expended an average of
19 \$100.00 per month on reimbursable expenses (roughly broken out as \$50 per month for internet,
20 \$25 per month for mobile device, and \$25 on instructional/office supplies and software charges).

21 **Rest Break Claim:** I allege in this case that the Tutors and I suffered rest break violations.
22 Defendant only paid for productive time. It did not separately compensate us for paid ten minute
23 rest breaks. Further Defendant did not make any premium payments for rest breaks that were
24 not authorized and permitted.

25 **Meal Period Claim:** As was the situation with rest breaks, I allege that Defendant did
26 not have a policy of allowing Tutors to take meal periods, often booked Tutors for back-to-back
27 shifts that did not afford time to take a meal, and did not pay meal premiums.
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1 **Wage Statement and Record Keeping Claims:** While Defendant maintained internal
2 payroll records of hours reported, these records did not capture the amount of non-productive
3 working time expended by the Tutors. The wage statements issued by Defendant did not contain
4 this information either and were therefore deficient in reporting the hours worked and wages
5 earned by the Tutors in the particular pay period.

6 **Waiting Time Penalties:** I am alleging waiting time penalties based on failure to pay all
7 minimum wages, regular wages, overtime wages, meal period premiums, and rest break
8 premiums owed at the time of separation.

9 5. The violations I have alleged in this Action and detailed in paragraph 4 of this
10 Declaration occurred during the PAGA Period and, as such, I allege that I am an “Aggrieved
11 Individual” for purposes of the alleged PAGA claim and proposed PAGA settlement.

12 6. I provided my attorneys with a comprehensive history of my employment with
13 Defendant, as well as numerous documents relating to my employment with Defendant.

14 7. By filing my case, I agreed to pursue not only my potential wage and hour claims, but
15 the claims of all other Aggrieved Individuals on a representative basis. I also agreed to participate
16 actively in my case and to assume the risks of serving as a named Plaintiff. These risks include
17 potential retaliation by future employers and potential damage to my professional reputation and
18 employment prospects.

19 8. Throughout this litigation, I regularly conferred with my attorneys to discuss the
20 status of the case, to offer my input, and to assist my attorneys in gathering the evidence necessary
21 to prosecute the class claims. (Although the preservation of my attorney-client privilege requires that
22 I refrain from revealing the specifics of my communications with my attorneys, I understand that the
23 privilege is not waived by stating generally matters that I have discussed with my attorneys.) During
24 our many conversations, and partly in response to my numerous questions, my attorneys kept me
25 well informed about the phases of PAGA litigation, the strategies for prosecuting each phase, and
26 the risks associated with those strategies.
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1 9. Prior to commencing my case, my attorneys thoroughly discussed the claims and legal
2 theories that would be asserted in the complaint and in the PAGA notice and complaint.

3 10. Following the filing of the complaint and the first amended complaint adding PAGA
4 claims, I worked closely with my attorneys and actively participated in the prosecution of my claims
5 by, among other things, reviewing documents and pleadings, and providing information that assisted
6 my attorneys. In particular, I participated in multiple discussions with my attorneys regarding the job
7 duties and daily activities of Tutors. I gave detailed information about Defendant's timekeeping,
8 schedule, and payroll practices, and I educated my attorneys on the intricacies and details of
9 Defendant's business. I spent a significant amount of time discussing the nature, frequency and
10 duration of uncompensated work performed by Tutors as well as discussing the types of materials
11 that Tutors were required to pay out of pocket. We discussed the nature of mediation and what range
12 of potential resolution would be reasonable.

13 11. I participated remotely in mediation (via telephone) and received information and
14 guidance from my counsel regarding the arguments advanced by both sides and their various
15 settlement positions and moves. Since the mediation I remained on-call to assist my attorneys in
16 finalizing the settlement agreement and the present motion. I have actively reviewed the terms of
17 the proposed settlement. My attorneys explained the specifics of how the settlement would work,
18 and I accepted the settlement only after I had spent enough time evaluating the proposed outcome to
19 assure that it was fair. Based on my attorneys' evaluation and recommendation, and my own review,
20 I believe the settlement is fair and reasonable and adequately compensates the Aggrieved Individuals
21 and the State of California, and my support for the settlement is not contingent upon my receipt of
22 an incentive award.

23 12. In summary, over the course of this litigation I have spent a significant amount of
24 time conferring and working with my attorneys on the prosecution of my claims and evaluating the
25 settlement and related documents. I estimate, conservatively, that I have spent approximately
26 twenty-five (25) hours of my time assisting and providing information to my attorneys in the
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1 prosecution of this lawsuit, participating in the mediation, and in evaluating the settlement and related
2 documents.

3 13. By agreeing to bring my case, I formally accepted the responsibilities of representing
4 the Aggrieved Individuals and the State of California on a representative basis. I also agreed to dis
5 my individual claims, which were filed prior to the PAGA claims were added to this case, and provide
6 Defendant with a general release of claims arising out of my employment.

7 Executed on June 24, 2024 in Culver City, California.
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9 By: 
10 Erin Naymark
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