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Labor and Workforce Development Agency
800 Capitol Mall, MIC-55
Sacramento, CA 95814
PAGAfilings@dir.ca.gov
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Re: Gerardo Tovar v. Optima Family Services, Inc., et al.

Dear Representative:

This office represents Gerardo Tovar ("Mr. Tovar") with respect to his claims under the California Labor Code against Optima Family Services, Inc. ("Employer" or "Optima"). This letter is being sent simultaneously to Optima's counsel of record, Shareef Farag and Nicholas Poper of the firm Baker Hostetler, by certified mail.

Mr. Tovar was employed as an hourly, non-exempt employee by Optima Family Services, Inc. from approximately September 24, 2019 to approximately June 21, 2023 as a Direct Behavior Interventionist.

Mr. Tovar alleges that Optima employed him and other aggrieved employees as non-exempt Direct Behavior Interventionists and similar positions providing in-home ABA and behavioral services to children and families throughout Southern California. Aggrieved employees routinely traveled between multiple client homes during the workday, used their personal vehicles, phones, and internet services for work purposes, and were required to record their own time through Optima's timekeeping system. During Mr. Tovar's employment, Optima maintained and enforced policies and practices that resulted in widespread wage-and-hour violations. Specifically, Optima maintained a practice of requiring or encouraging employees to round their recorded worktime to 15-minute increments, resulting in underpayment of compensable time worked, including drive time and other off-the-clock work. Employees were simultaneously subject to attendance and tardiness policies threatening discipline for late arrivals, which created pressure to round time in Optima's favor. Optima also failed to provide compliant meal and rest periods to employees who routinely worked shifts exceeding three-and-one-half hours without compliant rest periods and shifts exceeding five hours without compliant meal periods, particularly where employees were scheduled to travel



directly between client appointments with insufficient time to take uninterrupted breaks. Optima further maintained facially noncompliant break policies, including a rest period policy stating employees were entitled to a rest period only “for every 4 hours worked,” rather than for every four hours or major fraction thereof.

Optima additionally failed to pay required split-shift premiums to employees who regularly worked morning and evening client sessions separated by lengthy unpaid gaps exceeding two hours. Mr. Tovar and other aggrieved employees regularly experienced these split schedules while traveling between client locations throughout Los Angeles, Riverside, and San Bernardino Counties, yet Optima did not pay split-shift compensation. Optima also failed to reimburse employees for necessary business expenses, including mileage, personal vehicle usage, cellular phone usage, and home internet/data usage required to perform telehealth and Zoom sessions with clients during the COVID-19 period and at other times when services were rendered remotely. As a result of these policies and practices, Optima failed to pay all minimum and overtime wages, failed to provide compliant meal and rest periods, failed to pay meal and rest premiums and split-shift premiums, failed to reimburse business expenses, failed to furnish accurate itemized wage statements, and failed to timely pay all wages due during employment and upon separation, in violation of the California Labor Code and applicable Industrial Welfare Commission Wage Orders

Mr. Tovar intends to seek penalties for violations of the California Labor Code which are recoverable under California Labor Code section 2698, *et seq.*, the Private Attorneys General Act of 2004 (“**PAGA**”). Mr. Tovar is seeking penalties on behalf of himself and in a representative capacity on behalf of the State of California and all current and former non-exempt employees of Optima Family Services, Inc. (“**Aggrieved Employees**”). This letter is being sent in compliance with California Labor Code sections 2699.3 and 2810.3.

As detailed below, Optima violated several of California’s wage and hour laws during Mr. Tovar’s employment, including but not limited to violations of California Labor Code sections 201, 202, 203, 204, 226(a), 226.7, 510, 512(a), 1174(d), 1194, 1197, 1197.1, 1198, 2800, 2802, and the Industrial Welfare Commission Wage Orders (“**IWC Wage Order**”) including *inter alia*, IWC Wage Order No. 4. The claims made on behalf of Mr. Tovar and Aggrieved Employees are based upon the following facts and theories:

1. FAILURE TO PAY FOR ALL TIME WORKED AT CORRECT RATES OF PAY, INCLUDING MINIMUM WAGES, STRAIGHT TIME WAGES, AND OVERTIME COMPENSATION



Optima has engaged in numerous unlawful practices which resulted in the failure to pay Mr. Tovar and Aggrieved Employees for all time worked at the correct rates of pay, including minimum wages, straight time wages, and overtime compensation.

First, Optima regularly required Mr. Tovar and Aggrieved Employees to work more than eight (8) hours in a day or forty (40) hours in a workweek, but failed to pay them overtime compensation for such work. Optima also failed to provide Mr. Tovar and Aggrieved Employees with adequate training as to the payment of overtime compensation, all in an effort to keep their workers uninformed as to their legal right to overtime compensation. In addition, Optima regularly required Mr. Tovar and Aggrieved Employees to work off-the-clock in order to complete their duties and responsibilities. This off-the-clock work included, amongst other things, requiring Mr. Tovar and Aggrieved Employees to: (1) respond to Optima and work-related requests and perform work while clocked out for purported meal breaks; (2) perform work before clocking in for the start of their shift; (3) perform work after clocking out for the end of their shift; and (4) donning and doffing uniforms and other protective equipment while off-the-clock. Mr. Tovar and Aggrieved Employees were not compensated for this off-the-clock work, resulting in a failure to pay minimum wages and straight time wages. Moreover, this off-the-clock work typically caused Mr. Tovar and Aggrieved Employees to work more than eight (8) hours in a day and forty (40) hours in week, resulting in a failure to pay overtime compensation.

In addition to requiring Mr. Tovar and Aggrieved Employees to perform work off-the-clock without compensation, Optima also failed to accurately record the actual time worked by Mr. Tovar and Aggrieved Employees, which resulted in a failure to pay Mr. Tovar and Aggrieved Employees for all hours actually worked, including minimum wages, straight time wages and overtime wages. Finally, and as a matter of policy and/or practice, Optima failed to pay overtime to Mr. Tovar and Aggrieved Employees for all overtime hours worked based on regular rates of pay correctly calculated to include all applicable remuneration. Optima maintained a rounding policy that was not neutral in practice and/or policy.

As a result of the foregoing practices, Optima has failed to pay Mr. Tovar and Aggrieved Employees for all wages earned at the correct rates of pay, including minimum wages, straight time wages, and overtime compensation. Accordingly, Optima violated IWC Wage Order No. 4 and California Labor Code sections 204, 510, 1194, 1197, 1197.1 and 1198.

Mr. Tovar and Aggrieved Employees will therefore seek unpaid wages; PAGA default penalties; penalties pursuant to paragraph (20)(A) of IWC Wage Order No. 4;



penalties pursuant to California Labor Code sections 558, 1197.1, and 1199; compensation pursuant to Labor Code Section 1194; and attorneys' fees and costs.

2. FAILURE TO PROVIDE MEAL PERIODS AND PAY MEAL PERIOD PREMIUMS

Optima failed to provide Mr. Tovar and Aggrieved Employees with legally-compliant 30-minute meal periods. Mr. Tovar and Aggrieved Employees were required by Optima to work more than five (5) hours per day, but were not provided with uninterrupted 30-minute meal periods. Further, Mr. Tovar and Aggrieved Employees were not provided with a second uninterrupted 30-minute meal period when they worked over ten (10) hours per day. Optima regularly required Mr. Tovar and Aggrieved Employees to work through their first meal period, to take their first meal period after their fifth (5th) hour of work, and/or not accurately record their meal periods. On the occasions that Mr. Tovar and Aggrieved Employees did take a meal period, their meal periods were frequently interrupted or cut short.

Optima's policies, practices, and procedures were responsible for the violations alleged above and prevented Mr. Tovar and other Aggrieved Employees from taking timely, complete and duty-free meal periods because, amongst other reasons: (1) Optima did not have legally-compliant policies regarding the provision and timing of meal periods or systematically disregarded their own purported meal period policies; (2) Optima's management at various levels, affecting all hourly-non-exempt employees, failed and refused to implement and enforce legally compliant meal period policies and practices; (3) Optima failed to adequately inform and train Mr. Tovar and other Aggrieved Employees regarding their right to take timely, uninterrupted, and duty-free meal periods; (4) Optima failed to adequately inform and train Mr. Tovar and other Aggrieved Employees about their right to premium wages for non-compliant meal periods; (5) Optima failed to ensure that there was adequate staffing to allow Mr. Tovar and other Aggrieved Employees to take timely, uninterrupted, and duty-free meal periods; (6) Optima required Mr. Tovar and other Aggrieved Employees to remain on-call and respond to work-related requests at all times, including during meal periods, which included responding to in-person verbal interruptions; (7) Optima required Mr. Tovar and other Aggrieved Employees to perform work-related duties during purported meal periods, including but not limited to donning and doffing required protective gear; and (8) Optima's policy and culture prevented Mr. Tovar and other Aggrieved Employees from taking timely, uninterrupted, and duty-free meal periods because of the priority placed on completing job requirements over employees right to receive timely, uninterrupted, and duty-free meal periods.

Mr. Tovar and Aggrieved Employees did not receive an extra hour of wages at



their regular rate of pay for the meal periods which were not provided to them in compliance with California law. Accordingly, Optima violated IWC Wage Order No. 4 and California Labor Code sections 226.7, 512(a) and 1198.

Mr. Tovar and Aggrieved Employees will therefore seek PAGA default penalties pursuant to Labor Code section 2699; penalties pursuant to paragraph (20)(A) of IWC Wage Order No. 4; penalties pursuant to California Labor Code sections 558 and 1199; and attorneys' fees and costs.

3. FAILURE TO AUTHORIZE AND PERMIT REST PERIODS AND PAY REST PERIOD PREMIUMS

Optima failed to authorize and permit Mr. Tovar and Aggrieved Employees take legally-compliant 10-minute rest periods. Optima required Mr. Tovar and Aggrieved Employees to work through rest periods. Mr. Tovar and Aggrieved Employees were not provided with uninterrupted, duty-free rest periods when they worked more than four (4) hours or a major fraction thereof. Further, Mr. Tovar and Aggrieved Employees were not provided with a second uninterrupted, duty-free rest period when they worked more than six (6) hours in a day, or a third uninterrupted, duty-free rest period after working more than ten (10) hours in day. In the rare event that a rest period was taken, it was frequently interrupted or cut short. Moreover, Mr. Tovar and Aggrieved Employees were not completely relieved of duty as required by *Augustus v. ABM Security Services, Inc.*, 2 Cal.5th 257 (2016).

Optima's policies, practices, and procedures were responsible for the violations alleged above and prevented Mr. Tovar and other Aggrieved Employees from taking timely and complete rest periods because, amongst other reasons: (1) Optima did not have legally-compliant policies regarding the provision and timing of rest periods or systematically disregarded their own purported rest period policies; (2) Optima's management at various levels, affecting all hourly-non-exempt employees, failed and refused to implement and enforce legally compliant rest period policies and practices; (3) Optima failed to adequately inform and train Mr. Tovar and other Aggrieved Employees regarding their right to take timely, uninterrupted, and duty-free rest periods; (4) Optima failed to adequately inform and train Mr. Tovar and other Aggrieved Employees about their right to premium wages for non-compliant rest periods; (5) Optima failed to ensure that there was adequate staffing to allow Mr. Tovar and other Aggrieved Employees to take timely, uninterrupted, and duty-free rest periods; (6) Optima required Mr. Tovar and other Aggrieved Employees to remain on-call and respond to work-related requests at all times, including during rest periods, which included responding to in-person verbal interruptions; and (7) Optima's policy and culture prevented Mr. Tovar and other Aggrieved Employees from taking timely, uninterrupted, and duty-free rest periods



because of the priority placed on completing job requirements over employees right to receive rest periods.

Mr. Tovar and Aggrieved Employees did not receive an extra hour of wages at their regular rate of pay for the rest periods which were not provided to them in compliance with California law. Accordingly, Optima violated IWC Wage Order No. 4 and California Labor Code sections 226.7, and 1198.

Mr. Tovar and Aggrieved Employees will therefore seek PAGA default penalties pursuant to Labor Code section 2699; penalties pursuant to paragraph (20)(A) of IWC Wage Order No. 4; California Labor Code sections 558 and 1199 penalties; and attorneys' fees and costs.

4. FAILURE TO TIMELY PAY WAGES DURING EMPLOYMENT

As to each pay period, Optima has failed to timely pay all wages earned because Mr. Tovar and Aggrieved Employees were not paid all the wages they were owed including, *inter alia*, overtime compensation, straight time wages, minimum wages, and meal and rest period premiums. Accordingly, Optima violated California Labor Code section 204(a).

Mr. Tovar and Aggrieved Employees will therefore seek PAGA default penalties pursuant to Labor Code section 2699; penalties pursuant to California Labor Code sections 210 and 1199; and attorneys' fees and costs.

5. FAILURE TO PROVIDE ACCURATE ITEMIZED WAGE STATEMENTS

As a result of the practices described above, the wage statements provided to Mr. Tovar and Aggrieved Employees failed to include the actual hours worked, the actual gross wages earned, and the correct rates of pay. Accordingly, Optima violated California Labor Code section 226(a).

Mr. Tovar and Aggrieved Employees will therefore seek PAGA default penalties; penalties pursuant to California Labor Code section 226.3; and attorneys' fees and costs.

6. FAILURE TO MAINTAIN ACCURATE RECORDS

Optima has failed to maintain accurate records relating to Mr. Tovar and Aggrieved Employees' work periods, meal periods, total daily hours worked, and total hours worked per payroll period. Accordingly, Optima violated IWC Wage Order No. 4 and California Labor Code sections 1198.5 and 1174(d).



Mr. Tovar and Aggrieved Employees will therefore seek PAGA default penalties pursuant to Labor Code section 2699; penalties pursuant to paragraph (20)(A) of IWC Wage Order No. 4; California Labor Code section 1174.5 penalties; and attorneys' fees and costs.

7. FAILURE TO REIMBURSE NECESSARY EXPENDITURES

California Labor Code sections 2800 and 2802 require an employer to reimburse its employees for all necessary expenditures incurred by the employee in direct consequence of the discharge of his or her job duties or in direct consequence of his or her obedience to the directions of the employer. IWC Wage Order No. 4 requires Employer to provide employees with the tools or equipment necessary for the performance of their job. During the relevant time period, Mr. Tovar and Aggrieved Employees incurred necessary business-related expenses and costs that were not fully reimbursed by Employer. These costs include, but are not limited to, the use of their personal cell phone and internet data usage for work related purposes. Accordingly, Optima violated IWC Order No. 4 and California Labor Code sections 2800 and 2802.

Mr. Tovar and Aggrieved Employees will therefore seek PAGA default penalties pursuant to Labor Code section 2699; penalties pursuant to paragraph (20)(A) of IWC Wage Order No. 4; and attorneys' fees and costs.

8. FAILURE TO TIMELY PAY ALL WAGES UPON TERMINATION OF EMPLOYMENT

Upon the termination of employment, Mr. Tovar and Aggrieved Employees were not paid all wages due to them within twenty-four (24) hours or even within seventy-two (72) hours for those who resigned. Specifically, as a result of Optima's practices of requiring Mr. Tovar and Aggrieved Employees to work off-the-clock without compensation, failing to pay proper overtime compensation, failure to properly calculate regular rates, and failure to accurately record all hours actually worked, Optima failed to pay Mr. Tovar and Aggrieved Employees for all straight time wage, minimum wages and overtime compensation owed to them upon termination of their employment. Optima also failed to pay Mr. Tovar and Aggrieved Employees for meal period premiums and rest period premiums they were owed, amongst other wages. Accordingly, Optima violated California Labor Code sections 201 and 202.

Mr. Tovar and Aggrieved Employees will therefore seek PAGA default penalties pursuant to Labor Code section 2699; penalties pursuant to California



Labor Code sections 203, 1199, and 2699(f)(2); and attorneys' fees and costs.

Therefore, on behalf of himself, the State of California and all Aggrieved Employees, Mr. Tovar may seek all applicable penalties related to these violations of the California Labor Code pursuant to PAGA. If you have any questions or require additional information, please do not hesitate to contact us. Thank you for your attention to this matter.

Sincerely,

DEVIN E. RAUCHWERGER
PARTNER
For DOMB & RAUCHWERGER LLP

Notice provided to Optima via Certified Mail

Optima Family Services, Inc.
c/o BAKER & HOSTETLER LLP
ATTN: Shareef Farag, Esq.; Nicholas Poper, Esq.
1900 Avenue of the Stars, Ste 2700
Los Angeles, CA 90067-4301