

February 8, 2024

**PAGA NOTICE AND FILING FEE
SUBMITTED ELECTRONICALLY**

Department of Industrial Relations
Attn: Accounting Unit
455 Golden Gate Avenue, 10 Floor
San Francisco, California 94102

Re: California Labor Code §2699 Notice Letter
On Behalf of Aggrieved Employee Rigoberto Elviro

Employer: Guckenheimer Enterprises, Inc.
1017 Central Parkway North, Suite 100
San Antonio, Texas 78232

To whom it may concern:

This letter shall constitute Rigoberto Elviro's ("Mr. Elviro") notification under Labor Code §2699.3 (hereinafter, "PAGA Notice"). The \$75 filing fee was submitted electronically through the California Labor and Workforce Development Agency / Department of Industrial Relations' website for PAGA filings, along with a copy of this PAGA Notice.

The PAGA Notice concerns Mr. Elviro's allegations that his employer Guckenheimer Enterprises, Inc. ("GEI"), had a policy or practice of not compensating employees for all hours worked, including overtime wages. Labor Code § 1197 states the California requirement that employees must be paid at least the minimum wage fixed by the Commission or by any applicable state or local law, and any payment of less than the minimum wage is unlawful. Similarly, Labor Code § 1194 entitles "any employee receiving less than the legal minimum wage...to recover in a civil action the unpaid balance of the full amount of this minimum wage." The applicable Wage Orders obligate employers to pay each employee minimum wages for all hours worked. These minimum wage standards apply to each hour employees worked for which they were not paid. Therefore, an employer's failure to pay for any particular hour of time worked by an employee is unlawful, even if averaging an employee's total pay over all hours worked, paid or not, results in an average hourly wage above minimum wage. *Armenta v. Osmose, Inc.* (2005) 135 Cal. App. 4th 314, 324.

Additionally, Labor Code §510 provides in relevant part: "(a) 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 forty hours 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.”

GEI has a policy and practice of unevenly rounding hours worked by its employees, which results in an aggregate loss of wages to the employees. For instance, Mr. Elviro, who was employed as a sous chef, contends that he and other non-exempt employees were required to use an app to record their work time. Mr. Elviro and other employees would then use the app to clock-in prior to their scheduled work shifts and were required to immediately begin performing their work duties. Similarly, at the end of scheduled work shift, Mr. Elviro and other non-exempt employees would clock-out minutes after the end of the work shift. However, Mr. Elviro and other non-exempt employees would not be compensated for all their time worked since GEI rounds down more than it rounds up, thereby in the aggregate depriving employees of all earned wages. GEI’s uneven rounding would result in the non-payment of overtime wages if the employees worked more than 8 hours a day and/or a minimum wage violation in the event that the employees worked 8 hours or less, since they would not have been compensated at least the prevailing minimum wage for all time worked.

GEI also has a policy or practice of not compensating employees overtime wages as a result of GEI not including all forms of remuneration in determining the regular rate for overtime purposes. Wages are defined in Labor Code § 200 as “[a]ll amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis or other method of calculation.” The DLSE Enforcement Policies and Interpretations Manual §49 (“DLSE Manual”) recognizes that hourly earnings, piecework earnings, commissions, shift premiums are to be included in the definition of wages for purposes of calculating the regular rate of pay for purposes of overtime pay. Here, Mr. Elviro contends that GEI would regularly pay other forms of remuneration during a pay period where he worked overtime, such as bonus pay, GTL, spot award, etc. and would not accurately include this in determining the regular rate of pay for overtime purposes.

Mr. Elviro further contends that GEI would require him and other non-exempt employees to wait in line for COVID-19 temperature checks and screening prior to the start of their shift and employees would not get compensated for this time. The aforementioned practice would result in the non-payment of overtime wages if the employees worked more than 8 hours a day and/or a minimum wage violation in the event that the employees worked 8 hours or less, since they would not have been compensated at least the prevailing minimum wage for all time worked. Mr. Elviro and other employees must be paid for all “hours worked.” Hours worked is “the time during which an employees is subject to the control of an employer, and includes all the time an employee is suffered or permitted to work, whether or not required to do so.” *See Wage Order 9-2001, Subd. 2(K); see also Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal. 4th 833. “[I]t is only necessary that the worker be subject to the control of the employer in order to be entitled to compensation.” *Morillion v. Royal Packing Co.* 22 Cal. 4th 575, 584 (2000). An employee is under the employer’s control and entitled to compensation when the employer “‘directs, commands or restrains’ an employee.” *Morillion*, 22 Cal. 4th at 583 (citation omitted).

As held under *Morillion*, determining whether an employee's activity is under the employer's control entitling him or her to compensation depends on the level of control employers exert over employees during the activity: "The level of the employer's control, *rather than the mere fact that the employer requires the employees' activity is determinative.*" *Morillion*, 22 Cal.4th at 587 (emphasis added). In *Frlekin v. Apple Inc.* (2020) 8 Cal. 5th 1038, the holding in *Morillion* was reaffirmed. Specifically, in *Frlekin*, the California Supreme Court found that time employees spent undergoing bag searches at the end of their shift was compensable. The court in *Frlekin* reasoned its decision by analyzing factors in determining whether an employer has exerted compensable control over employees:

We also emphasize that whether an activity is required remained probative in determining whether an employee is subject to the employer's control. But, at least with regard to cases involving onsite employer-controlled activities, the mandatory nature of an activity is not the only factor to consider. We conclude that courts may and should consider additional relevant factors—including, but not limited to, the location of the activity, the degree of the employer's control, whether the activity primarily benefits the employee or employer, and whether the activity is enforced through disciplinary measures—when evaluating such employer-controlled conduct.

To be free of the employer's control for purposes of "hours worked," the employee must be free to use his or her time "effectively for his or her own purposes." *Morillion*, 22 Cal.4th at 583. Here, Mr. Elviro and other non-exempt employees were required to wait in line and undergo temperature checks for COVID-19 prior to the start of their shift. Mr. Elviro and other similarly aggrieved employees could not use this time for their own purposes. As such, GEI exercised sufficient control over Mr. Elviro and other employees during these required temperature checks and owes them wages for this time.

The California Department of Industrial Relations recently issued guidance that supports Mr. Elviro's claim that GEI failed to pay him and other employees for all time worked, including the time spent for required COVID-19 temperature checks as indicated herein. See Cal. Dept. of Industrial Relations, Safe Reopening FAQs for Workers and Employers (July 8, 2021), available at https://www.dir.ca.gov/covid19/FAQs_COVID-19_Safe_Reopening.htm, which provides the following in regard to FAQ #10 (titled "Medical Checks, Testing, and Vaccinations"):

10. Q: Must my employer pay me for time spent at my employer's worksite completing certain medical checks (including temperature checks) before beginning a shift?

A. Yes. Employers must pay workers for all hours worked, including time that a worker is under the control of the employer. Employers that require their workers to complete a medical check in order to begin a shift, even if it is recommended under public health order, must compensate workers for that time worked.

The term “hours worked” means the time during which a worker is subject to the control of an employer, and includes all the time the worker is suffered or permitted to work, whether or not required to do so. Under this definition, one way to determine whether time a worker spends performing a task is compensable—that is, whether it is time “worked”— is whether the employer exercised control over the worker by requiring the worker to perform that task.

If an employer requires that all workers perform a medical check (such as a temperature check) onsite before beginning a shift, the time completing the medical check, including anytime waiting in line, would constitute time worked. This requirement applies even if such tasks were performed pursuant to a state or local public health guideline, because the check is done at the request and thus under the control of the employer.

The United States Department of Labor has also said that temperature checks are compensable if they are “necessary” to the employee’s job.
<https://www.dol.gov/agencies/whd/flsa/pandemic> The Department provided the following example:

For many employees, undergoing a temperature check before they begin work must be paid because it is necessary for their jobs. If a nurse who performs direct patient care services at a hospital is required to check her temperature upon arrival at the hospital before her shift, the time that she spends checking her temperature upon entry to the worksite is likely compensable because such task is necessary for her to safely and effectively perform her job during the pandemic.

Consequently, GEI has violated California Labor Code §§200, 510, 1194 and 1197 based on its practice of not paying Mr. Elviro and other non-exempt employees for all the work they performed under the control of GEI. GEI would also be liable for civil penalties pursuant to California Labor Code §§558 and 2698.

Furthermore, Labor Code §1197.1 authorizes employees who are paid less than the minimum fixed by an applicable state or local law, or by an order of the commission a civil penalty, restitution of wages, and liquidate damages as follows: (1) for any initial violation that is intentionally committed, one hundred dollars (\$100) for each underpaid employee for each pay period for which the employee is underpaid...[and] (2) [f]or each subsequent violation for the same specific offense, two hundred fifty dollars (\$250) for each underpaid employee for each pay period for which the employee is underpaid regardless of whether the initial violation is intentionally committed. As set forth above, GEI failed to compensate Mr. Elviro and all aggrieved employees for all hours worked. Accordingly, through PAGA and to the extent permitted by law, Mr. Elviro and other employees are entitled to recover liquidated damages for violations of Labor Code § 1197.1. Based upon these same factual allegations, Mr. Elviro and other employees are entitled to penalties under Labor Code § 1199.

Similarly, Labor Code §1194.2 authorizes employees to recover wages to recover liquidated damages for violations of Labor Code § 1194. When an employee, as Mr. Elviro and the other employees are not paid for all hours worked under Labor Code §1194, the employees may recover minimum wages for the time for which they received no compensation, as well as PAGA penalties for not having received pay for such time.

Mr. Elviro further alleges that GEI maintains a policy or practice of compelling its employees to work in excess of 5 and 10 hours a day without being afforded uninterrupted 30 minute meal periods. Pursuant to Labor Code §§ 226.7, 512 and applicable Wage Orders, an employer is required to provide meal periods to its non-exempt employees or compensation in lieu thereof, i.e., premium wages. Here, Mr. Elviro and other non-exempt employees would be prevented and discouraged from taking their meal periods due to workplace interruptions and from being short-staffed. Mr. Elviro and other non-exempt employees were also not provided with second meal periods when they worked shifts greater than 10 hours in a day. Mr. Elviro was not paid premiums at the regular rate of pay for missed meal periods. Premiums for missed meal periods must be paid at the employee's regular rate of pay, encompassing both hourly wages and all nondiscretionary payments for work performed by the employee. *Ferra v. Loews Hollywood Hotel, LLC* (2021) 11 Cal.5th 858, 878 confirmed that the term "regular rate of compensation" in Labor Code § 226.7 has the same meaning as "regular rate of pay" in Labor Code §510 and encompasses not only hourly wages but all nondiscretionary payments for work performed by the employee. This interpretation of Labor Code §226.7 comports with the remedial purpose of the Labor Code and wage orders and with our general guidance that the state's labor laws are to be liberally construed in favor of worker protection. *Id.* Additionally, the application of this holding is applied retroactively. *Id.* at 880. Consequently, GEI has violated Labor Code §§226.7 and 512. GEI would also be liable for civil penalties pursuant to Labor Code §§ 558 and 2698.

Mr. Elviro also alleges that GEI maintains a policy or practice of compelling its employees to work over a four-hour period (or a major fraction thereof) without authorizing and permitting them to take a paid ten-minute rest period in which they were completely relieved of all their duties. Pursuant to Labor Code § 226.7 and applicable Wage Orders, an employer is required to provide rest periods to its non-exempt employees or compensation in lieu thereof. Furthermore, Mr. Elviro was not paid premium wages at the regular rate of pay for missed rest periods. Premiums for missed rest periods must also be paid at the employee's regular rate of pay, encompassing both hourly wages and all nondiscretionary payments for work performed by the employee. *Ferra*, 11 Cal.5th at 878. Consequently, GEI has violated Labor Code § 226.7. GEI would also be liable for civil penalties pursuant to Labor Code § 2698.

As a result of, including but not limited to, GEI's failure to pay wages for all hours worked, its failure to include all forms of remuneration to determine the regular rate for overtime purposes, failure to provide meal and rest periods or compensation in lieu thereof, as described above, it also intentionally failed and continues to fail to furnish employees with itemized wage statements that accurately reflect all hours worked, wages earned at all applicable hourly rates,

net and gross wages earned and premium wages due for missed meal and rest periods as required by California Labor Code §226(a). Mr. Elviro and other employees also suffered legal “injury” for purposes of Labor Code § 226(e) insofar as they were unable to readily and easily determine the information required to be set forth under Labor Code § 226(a). For example, Mr. Elviro and other employees were unable to determine their hours worked, wages earned at all applicable hourly rates, gross wages earned, and net wages earned, because of GEI’ failure to pay wages for all hours worked, its failure to include all forms of remuneration to determine the regular rate for overtime purposes, and its failure to provide meal periods and rest periods or compensation in lieu thereof. Please also see *Lopez v. Friant & Assocs., LLC* (2017) 15 Cal.App.5th 773, 788-[holding “a plaintiff seeking civil penalties under PAGA for a violation of Labor Code section 226(a) does not have to satisfy the ‘injury’ and ‘knowing and intentional’ requirements of section 226(e)(1).”]; *Raines v. Coastal Pacific Food Distributors, Inc.* (2018) 23 Cal.App.5th 667, 679 (2018)-[finding that the “requirements for a section 226(e) claim do not apply to a PAGA claim for a violation of section 226(a)”]. Consequently, since GEI failed to comply with Labor Code §226(a), Mr. Elviro and other similarly situated employees would be entitled to recover penalties under Labor Code §§ 226(e) and 2698.

Labor Code § 226.3 provides that “[a]ny employer who violates subdivision (a) of Section 226 shall be subject to a civil penalty in the amount of two hundred fifty dollars (\$250) per employee per violation in an initial violation and one thousand dollars (\$1,000) per employee for each violation in a subsequent citation, for which the employer fails to provide the employee a wage deduction statement or fails to keep the required in subdivision (a) of Section 226.” GEI failed to provide Mr. Elviro and other employees with accurate itemized wage statements as indicated above. Consequently, since GEI failed to comply with Labor Code §226(a), Mr. Elviro and other employees would be entitled to recover penalties under Labor Code §226.3 and 2698, in lieu of the normal penalties provided for in Section 226.

GEI has also failed and refused and continues to fail and refuse to timely pay compensation to Mr. Elviro and other similarly situated terminated or resigned employees, including but not limited to, all wages owed as a result of GEI’s failure to pay wages for all hours worked, its failure to include all forms of remuneration to determine the regular rate of pay for overtime purposes, and its failure to provide meal periods and rest periods or compensation in lieu thereof. Under Labor Code §§ 201-202, an employer must provide an employee wages at the time of discharge or within up to seventy-two (72) hours of their resignation. Labor Code § 203 provides “if an employer willfully fails to pay... any wages of an employee who is discharged or who quits, the wages of the employee shall continue as a penalty...” for up to 30 days. Labor Code § 203; *Mamika v. Barca* (1998) 68 Cal.App.4th 487, 492. In addition, Labor Code § 256 provides that the Labor Commissioner “shall impose a civil penalty in an amount not exceeding 30 days’ pay” as waiting time under the terms of Section 203. Consequently, GEI is liable for waiting time penalties for having violated California Labor Code §§ 201, 202 and 203. GEI would also be liable for civil penalties pursuant to Labor Code § 2698.

Labor Code § 204 expressly requires that “[a]ll wages. . . 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.” Due to GEI’ failure to pay Mr. Elviro and other non-exempt employees on timely and bi-monthly basis for all applicable wages, including

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overtime and premium wages for missed meal and rest periods (resulting from the faulty compensation practices described above) GEI failed to pay Mr. Elviro and other non-exempt employees all wages owed within 7 days of the close of the payroll period, in accordance with Labor Code §204, on a regular and consistent basis. Labor Code §210 (a) provides that “in addition to, and entirely independent and apart from, any other penalty provided in this article, every person who fails to pay the wages of each employee as provided in Sections...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; (2) for each subsequent violation, or any wilful or intentional violation, two hundred dollars (\$200) for each failure to pay each employee, plus 25 percent of the amount unlawfully withheld.”

Pursuant to Labor Code §2699.3(a)(2)(A), please advise within sixty-five (65) calendar days of the postmark date of this notice whether your office intends to investigate the violations alleged herein. Our office understands that if we do not receive a response from your office within sixty-five (65) calendar days of the postmark date of this notice, that Mr. Elviro may immediately thereafter pursue his interests and the interests of similarly situated aggrieved employees with a civil complaint against GEI for its violations of the Labor Code.

Sincerely,

/s/ Michael Nourmand

Michael Nourmand, Esq.
THE NOURMAND LAW FIRM, APC

cc: Guckenheimer Enterprises, Inc. (by U.S. Certified Mail)