

# HAMMONDLAW

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October 20, 2020

## VIA LWDA WEBSITE

Labor & Workforce Development Agency  
455 Golden Gate Avenue, 9th Floor  
San Francisco, CA 94102

## VIA CERTIFIED MAIL

Joy A. Fehr  
CEO and President  
4500 Riverwalk Parkway  
Riverside, California 92505

### **Re: Private Attorneys General Act Notice of Claims Pursuant to California Labor Code § 2699**

Dear Dr. Fehr,

This letter is to provide notice of claims for penalties under the California Labor Code's Private Attorneys General Act, as amended, Cal. Labor Code § 2699 ("PAGA").

We represent Dean Parsons ("Plaintiff") in connection with his representative claims against La Sierra University ("La Sierra") on behalf of himself and all other adjunct instructors employed by La Sierra in California ("Adjunct Aggrieved Employees") from one year prior to the post mark date of this Notice to the trial of this matter ("PAGA Period") for the following Labor Code violations:

- (a) failure to pay wages for all hours worked including hours worked prior to the first day of classes in violation of Labor Code §§ 226.2, 1194;
- (b) failure to pay separately and hourly for rest breaks and/or failure to permit and authorize off-duty rest breaks, and pay missed rest break premium in violation of Labor Code §§ 226.2, 226.7, and IWC Wage Order No. 4, § 12;
- (c) failure to provide meal breaks or pay missed meal break premium pay in violation of Labor Code §§ 512, 226.7 and IWC Wage Order No. 4, § 11;
- (d) failure to issue accurate itemized wage statements for all pay period and failure to issue accurate itemized wage statements that included all hours worked, all applicable hourly rates, accurate entries for net wages, and accurate entries for gross wages earned, in

- violation of Labor Code § 226(a)(1), (a)(2), (a)(5), and (a)(9), and piece-rate information in violation of Labor Code § 226.2(a); and
- (e) failure to reimburse business related expenses in violation of Labor Code § 2802.

Plaintiff also alleges representative claims against La Sierra on behalf of himself and all other individuals employed by La Sierra in California (“Aggrieved Employees”) during the PAGA Period for the following Labor Code violation:

- (a) failure to reimburse business related expenses in violation of Labor Code § 2802.

Plaintiff provides the following factual basis supporting his claims:

**I. Adjunct Aggrieved Employees Were Non-Exempt**

Plaintiff has been employed to teach courses at La Sierra on a contractual basis from approximately 2019 until the spring of 2020. From the beginning of the PAGA Period and until the fall of 2020, La Sierra misclassified Plaintiff and other Adjunct Aggrieved Employees as exempt and paid them a set amount per course. Adjunct Aggrieved Employees were non-exempt because they did not meet the requirements for the professional exemption, the only potentially applicable exemption set out in IWC Wage Order No. 4, § 1(A)(3). In order to be professionally exempt, an employee must “perform specified duties in a particular manner and be paid ‘a monthly *salary* equivalent to *no less than two times the state minimum wage for full-time employment.*’ (Lab. Code, § 515, subd. (a).)” *Negri v. Koning & Associates*, 216 Cal. App. 4th 392, 394 (2013) (emphasis added). Fulltime employment is defined at 40 hours per week. Lab. Code § 515(c). Adjunct Aggrieved Employees were non-exempt because they did not meet the minimum earnings requirement and also because they were not paid a salary but on a piece rate, as discussed in further detail below.

The minimum earnings requirement, on a monthly basis, is calculated as following: 40 (hours per week) multiplied by (the applicable minimum wage) multiplied by 2 (two times the minimum wage) multiplied by 52 (weeks per year) divided by 12 (month per year). See e.g. *Kao v. Holiday*, 12 Cal. App. 5th 947, 958 (2017). The minimum wage in 2019 in California was \$12.00. Accordingly, in 2019 the minimum earnings requirement under Wage Order No. 4-2001, § 1(A) was approximately \$4,160 per month, or \$2,080 per semi-monthly pay period.

Plaintiff and Adjunct Aggrieved Employees earned less than the minimum earnings requirement during most, if not all, of the pay periods during the PAGA Period and were therefore entitled to certain protections under the Labor Code, including being paid for all hours worked, being permitted and authorized to take off-duty rest and meal breaks, and being provided with accurate itemized wage statements pursuant to Labor Code §§ 1194, 1194.2, 226.7, 512, 226(a), 226.2(a).

Beginning in the fall of 2020, La Sierra switched its compensation system for Adjunct Aggrieved Employees to hourly and reclassified them as non-exempt.

## II. Adjunct Aggrieved Employees Were Piece-Rate Workers

From the beginning of the PAGA Period and until the fall of 2020, Plaintiff and Adjunct Aggrieved Employees were piece rate workers because La Sierra compensated them a set amount per course taught. The more courses they taught the more they were paid. The course rate pay was standardized and only varied based on objective criteria such as the experience and education level of an instructor. This type of compensation is a form of piece-rate compensation. The DLSE defines “piece-rate” broadly, as “[w]ork paid for according to the number of units turned out. Consequently, a piece rate must be based upon an ascertainable figure paid for completing a particular task or making a particular piece of goods . . .”<sup>1</sup> True to the piece-rate definition in the DLSE Manual, a 2014 report from the U.S. House of Representatives Committee on Education and the Workforce Democratic Staff, discussing poor working conditions of adjunct instructors, characterizes adjunct instructors’ pay based on the number of courses taught as a piece-rate. The report states: “Generally, adjunct work is a piece work. These contingent faculty usually are paid a piece rate, a fixed amount of compensation for each unit produced, regardless of how much time it takes to produce. In this case, the unit of production is a college course.”<sup>2</sup> This is *exactly* how La Sierra paid Adjunct Aggrieved Employees until fall of 2020 – an ascertainable/fixed amount per course.

The per course pay system was a piece rate and not a salary because a “salary” is defined as a “*predetermined amount that is not subject to reduction* based upon the quantity or quality of work.” *Negri*, 216 Cal. App. 4th at 399 (citing *Kettenring v. Los Angeles Unified School Dist.*, 167 Cal. App. 4th 507, 513-514 (2008); see also *Coates v. Dassault Falcon Jet Corp.*, 961 F.3d 1039, 1042 (8th Cir. 2020) (same). Adjunct Aggrieved Employees’ compensation, however, *could be and was* reduced by being prorated based on the number of students enrolled in the course, which is inconsistent with the compensation being a salary. See *Lucero v. Regents of Univ. of Cal.*, 1993 U.S. Dist. LEXIS 12208, \*17 (N.D. Cal. 1993) (stating that “an exempt employee’s must ‘not [be] subject to reduction’ and finding that “the University’s policies permitting, suspension without pay for disciplinary reasons other than safety violations, standing alone, preclude a salaried basis status.”).

Accordingly, Plaintiff and Adjunct Aggrieved Employees were paid on a piece rate until the fall of 2020, and thus were non-exempt piece-rate workers subject to the requirements of Labor Code § 226.2 that governs piece-rate worker pay in California.

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<sup>1</sup> DLSE Enforcement and Interpretation Manual, § 2.5.1. Noting the diversity of the nature of piece rate plans, the DLSE provides a non-exclusive list of examples, including automobile mechanics paid on a “book rate,” nurses paid on the basis of the number of procedures performed, carpet layer paid based on the number of yards of carpet laid; a technician paid by the number of telephones installed, and a factory worker paid by the widget completed, and carpenter paid by the linear foot of on framing job. DLSE Manual § 2.5.2

<sup>2</sup> “The Just-In-Time Professor” is available here: <https://edlabor.house.gov/download/the-just-in-time-professor>

**III. Plaintiff's Unpaid Wages Claim – Violation of Lab. Code §§ 226.2, 1194 and IWC Wage Order No. 4, § 4**

Defendant is a private non-profit university that employs Plaintiff and other Adjunct Aggrieved Employees as part-time faculty members to teach courses on a term-by-term basis (“Contract Periods”). Prior to the start of each term, Defendant issues its uniform Contract Teaching Agreement that set out the terms of Adjunct Aggrieved Employees’ employment. The Contract Teaching Agreements include the course the instructors is assigned to teach; the start date and end date of the course; and, prior to the fall of 2020, the flat per course compensation for teaching the assigned course. However, Adjunct Aggrieved Employees perform work prior to the start of classes and before the Contract Periods in order to prepare to teach courses including preparing syllabi and other course materials. From the beginning of the PAGA Period and until the fall of 2020, La Sierra did not pay Adjunct Aggrieved Employees for the work performed before the first day of classes. Beginning in the fall of 2020, La Sierra began allowing Adjunct Aggrieved Employees to track and submit their time worked during the week before the first day of classes.

Pursuant to Labor Code § 2699(f)(2), Plaintiff and Adjunct Aggrieved Employees are entitled to one hundred dollars (\$100) for each initial violation and two hundred dollars (\$200) for each subsequent violation of Labor Code §§ 226.2, 1194.

**IV. Plaintiff's Rest Break Claim - Violation of Labor Code §§ 226.2, 226.7 and IWC Wage Order No. 4, § 12**

Adjunct Aggrieved Employees routinely worked at least 3.5 hours or more on any given day and La Sierra knew or should have known that they did so. La Sierra was therefore required to permit and authorize paid rest breaks and during the time Adjunct Aggrieved Employees were paid on a piece rate to pay Adjunct Aggrieved Employees at their average hourly rate for their time spent on rest breaks separately and apart from the piece under Labor Code § 226.2. La Sierra failed pay separately and hourly for rest breaks, however, thereby triggering an obligation to make premium payments to Adjunct Aggrieved Employees under Labor Code § 226.7 and Wage Order No. 4-2001.

Additionally, during the entire PAGA Period, including after the fall of 2020, La Sierra also maintained policies and/or practices that impeded Adjunct Aggrieved Employees’ ability to take off-duty 10-minute rest periods. These policies and/or practices included, but were not limited to, requiring Adjunct Aggrieved Employees to arrive early to prepare for class, and to be available to students before, during, and after class. Thus, La Sierra failed to authorize and permit compliant rest breaks in accordance with Wage Order No. 4-2001, § 12(A) thereby triggering an obligation to make premium payments to Plaintiff and Aggrieved Employees under Labor Code § 226.7 and Wage Order No. 4-2001, § 12(B).

Pursuant to Labor Code § 2699(f)(2), Plaintiff and Adjunct Aggrieved Employees are entitled to one hundred dollars (\$100) for each initial violation and two hundred dollars (\$200) for each subsequent violation of Labor Code §§ 226.2, 226.7.

**V. Plaintiff's Meal Break Claim - Violation of Labor Code §§ 512, 226.7 and IWC Wage Order No. 4, 11**

Under Labor Code § 512 and IWC Wage Order No. 4-2001, § 11, non-exempt employees, such as Adjunct Aggrieved Employees, must be provided with an unpaid, off-duty 30-minute meal period for any shift of 5 or more hours before the beginning of the fifth hour of work. Under Labor Code § 226.7 and IWC Wage Order No. 4-2001, § 11, Adjunct Aggrieved Employees are entitled to receive premium pay for missed meal breaks. Until the fall of 2020, La Sierra did not maintain a lawful meal break policy applicable to Adjunct Aggrieved Employees and as a matter of practice did not provide them with off-duty meal periods because it expected and/or required them to arrive early to arrive early to prepare for class, and to be available to students before, during, and after class.

Pursuant to Labor Code § 2699(f)(2), Plaintiff and Adjunct Aggrieved Employees are entitled to one hundred dollars (\$100) for each initial violation and two hundred dollars (\$200) for each subsequent violation of Labor Code §§ 512, 226.7.

**VI. Plaintiff's Wage Statement Claim – Violation of Labor Code §§ 226(a)(2), (a)(3), (a)(9), 226.2(a)**

As Adjunct Aggrieved Employees were non-exempt employees, La Sierra was required to issue to them accurate itemized wage statements that included the total number of hours worked each pay period, and the applicable hourly rates and the corresponding number of hours worked at each rate, under Labor Code § 226(a)(2) and (a)(9).

However, from the beginning of the PAGA Period and until the fall of 2020, La Sierra did not list any hourly rate on the wage statements and instead only listed the lump sum paid during the pay period. In addition, until the fall of 2020, La Sierra did not track Adjunct Aggrieved Employees' hours worked and as a result did not include on their wage statements entries for the actual hours worked each pay period.

As Adjunct Aggrieved Employees were paid on a piece-rate until the fall of 2020, La Sierra was also required, but failed, to include on their wage statements piece rate information including the number of piece-rate units earned and any applicable piece rate, total hours of compensable rest and recovery periods, rate of compensation for rest and recovery periods, gross wages paid for compensable rest and recovery periods pursuant to Labor Code § 226(a)(3), (a)(1) and (a)(5) and § 226.2(a)(2). However, La Sierra failed to list the above required information, including because it failed to pay Adjunct Aggrieved Employees separately and hourly for rest break time.

Pursuant to Labor Code § 226.3, Plaintiff and Adjunct Aggrieved Employees are entitled to \$250 for each initial pay period with a violation and \$1,000 for each subsequent pay period with a violation. See *Raines v. Coastal Pacific Food Distributors, Inc.*, 23 Cal. App. 5th 667, 674-675 (2018) (finding that Labor Code § 226.3 applies to all violations of Labor Code §

226(a)); see also *Magadia v. Wal-Mart Assocs.*, 384 F. Supp. 3d. 1058, 1109 (N.D. Cal. 2019) (“the Court finds that Cal. Lab. Code § 226.3 penalties are applicable as the appropriate measure of civil penalties under PAGA” for the violation of Labor Code § 226(a).). Alternatively, pursuant to Labor Code § 2699(f)(2), Plaintiff and Adjunct Aggrieved Employees are entitled to hundred dollars (\$100) for each initial violation and two hundred dollars (\$200) for each subsequent violation of Labor Code § 226(a) and § 226.2.

**VII. Plaintiff’s Unreimbursed Expenses Claim on Behalf of Adjunct Aggrieved Employees – Violation of Labor Code 2802**

Pursuant to Labor Code § 2802 an employer is required to reimburse its employees “for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer,…”

Throughout the PAGA Period, La Sierra did not maintain a policy of reimbursing Aggrieved Employees for their business expenses. Adjunct Aggrieved Employees incurred unreimbursed expenses in carrying out their job duties for La Sierra when they taught online courses from home. These expenses include but are not limited to home office expenses including internet cost, home or mobile telephone expenses, ink toner/cartridges and paper and other expenses associated with working from home. La Sierra knew or should have known that Adjunct Aggrieved Employees incurred these expenses in carrying out their job duties for La Sierra because La Sierra required and/or expected Adjunct Aggrieved Employees to teach online courses from home.

Pursuant to Labor Code § 2699(f)(2), Plaintiff and Adjunct Aggrieved Employees are entitled to hundred dollars (\$100) for each initial violation and two hundred dollars (\$200) for each subsequent violation of Labor Code § 2802.

**VIII. Plaintiff’s Unreimbursed Expense Claim on Behalf of Aggrieved Employees – Violation of Labor Code § 2802**


As a result of the COVID-19 pandemic and the state of emergency declared in California on March 4, 2020 due to the pandemic, all non-essential workers were required to work from home. As a result, Aggrieved Employees incurred home office expenses including but not limited home internet cost, home or mobile telephone expenses, ink toner/cartridges and paper, and other expenses associated with working from home, in order to carry out their job duties for La Sierra. However, La Sierra. did not reimburse them for these expenses fully or at all in violation of § 2802 of the California Labor Code. La Sierra knew or should have known that Aggrieved Employees incurred these expenses in carrying out their job duties for La Sierra because they were required to work from home.

Pursuant to Labor Code § 2699(f)(2), Plaintiff and Aggrieved Employees are entitled to one hundred dollars (\$100) for each initial violation of Labor Code § 2802 and two hundred dollars (\$200) for each subsequent violation of § 2802.

**IX. Conclusion**

Therefore, pursuant to Labor Code § 2699.3, we write to inform you and the Labor and Workforce Development Agency of our intent to pursue a lawsuit against La Sierra that will include a claim for civil penalties under the PAGA to be brought by the Plaintiff, individually and on behalf of all other Adjunct Aggrieved Employees and Aggrieved Employees, based on the labor code violations alleged above.

Yours truly,

  
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Julian Hammond