IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case No. 20-56245

TRINA RAY and SASHA WALKER, individually and on behalf of others similarly situation,

Plaintiffs-Appellants

v.

COUNTY OF LOS ANGELES, sued as the Los Angeles County Department of Social Services,

Defendant-Appellee.

On Appeal from the United States District Court
For the Central District of California

No. 2:17-CV-04239-PA-SKPercy Anderson)
Honorable Percy Anderson, United States District Judge

AMICUS CURIAE BRIEF BY CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF DEFENDANT-APPELLEE COUNTY OF LOS ANGELES

JENNIFER BACON HENNING, SBN 193915
Litigation Counsel
California State Association of Counties
1100 K Street, Suite 101
Sacramento, CA 95814
jhenning@counties.org

Attorney for Amicus Curiae
California State Association of Counties

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

California Session Laws

Government Publications

Law Review Articles

Administrative Authority

Other Authorities

I. CORPORATE DISCLOSURE STATEMENT [F.R.A.P., Rule 20(a)(4)(A), 26.1]

Amicus Curiae California State Association of Counties ("CSAC") is a non-profit corporation. CSAC does not have a parent corporation, and no publicly held corporation owns 10% or more of its stock.

II. AMICUS IDENTITY STATEMENT AND INTEREST IN THE CASE [F.R.A.P. Rule 29(a)(4)(D)]

CSAC is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of County Counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

The question before this Court is an important one for CSAC's member counties: Whether counties are employers of IHSS providers for purposes of the Fair Labor Standards Act's (FLSA) wage and hour provisions. The IHSS program is an entitlement program in which the level of benefit is determined by the State, and care providers are selected and supervised directly by the recipient of services. While counties play an important administrative role in the delivery of IHSS services and provide

social worker services to recipients, treating counties as the employer for purposes of wage and hour laws would be a significant expansion of their burdens under the IHSS program.

More than that, treating counties as employers for purposes of wage and hour laws would undermine an essential premise of the IHSS program. The County of Los Angeles aptly explains how the factors developed under case law for determining "employer" status for wage and hour laws fully supports the district court's decision. Those arguments will not be repeated here. But as this Court has previously found, context matters in FLSA employer determinations. *Moreau v. Air France,* 356 F.3d 942, 951 (9th Cir. 2003). This brief will provide that context by explaining why the Legislature has intentionally limited the role of counties in IHSS, leaving recipients in charge of hiring, firing and supervising providers.

III. STATEMENT OF AUTHORSHIP AND FINANCIAL SUPPORT [F.R.A.P. Rule 29 (a)(4)(E)]

No party's counsel authored this amicus brief in whole or in part. No party or party's counsel contributed money intended to fund preparation or submission of this amicus brief. No one other than amicus and its counsel contributed money intended to fund preparation or submission of this amicus brief.

IV. STATEMENT CONCERNING CONSENT TO FILE [F.R.A.P. Rule 29(a)(2), Circuit Rule 29-3]

All parties have consented to the filing of this brief.

V. STATEMENT OF FACTS

Amicus Curiae joins Appellee's Statement of Facts found in Appellee's Answering Brief. ("Appellee's Brief" at 16-28.)

VI. INTRODUCTION

The Welfare and Institutions Code establishes that counties and/or public authorities established by counties are deemed to be the employer of In-Home Supportive Services (IHSS) providers for the limited purpose of wage and hour negotiations under the Meyers-Millas Brown Act (Cal. Gov. Code § 3500 et seq.), but that "recipients shall retain the right to hire, fire, and supervise the work of any in-home supportive services personnel providing services to them." Cal. Welf. & Instit. Code § 12301.6, subd. (c)(1). This limited employer designation, coupled with administrative tasks performed at the local level to assist the State implement IHSS, does not make counties liable for FLSA wage and hour violations. To the contrary, the development of the IHSS program in this State reflects a conscious policy decision to ensure recipients retain control over hiring, firing and training providers, as well as their hours and working conditions. The State establishes the program parameters, and manages the payroll. The limited

role played by counties in IHSS is by design, and this context weighs against finding the County an employer for purposes of FLSA overtime liability.

VII. ARGUMENT

A. The History of the IHSS Program Shows an Intent to Provide a Limited Role to Counties, While Leaving Recipients Ultimately in Charge of Their Care.

The IHSS program was adopted in 1973 to "maintain a state system of a broad range of social services, including rehabilitation services, to assist aged, blind, or disabled persons . . . attain or retain the capabilities of maintaining or achieving self-care, economic independence, personal well-being, rehabilitation or a sound family life." Cal. Welf. & Instit. Code § 12250.

IHSS was created out of a mosaic of state programs for long-term care originating from different social groups. "This mosaic has been shaped by the California-born Independent Living Movement of the 1970s, fueled by the civil rights movement, which led to changes in the law and benefits that allowed people with serious disabilities and chronic illnesses to live outside of institutions and participate in education and the workplace." Little Hoover Commission, *Unsafe in Their Own Homes: State Programs Fail to*

Protect Elderly From Indignity, Abuse and Neglect (Nov. 6, 1991), p. 6.[1] Home-based care services in California date back more than 50 years, when blind, disabled and elderly Californians were initially just given cash support to hire caregivers. A "homemaker program" later directly employed and assigned caregivers to program participants. "IHSS was formed by the merger of these programs in 1973 and was funded by a combination of state and county money." *Ibid.*

In the IHSS program, recipients of services are given the ability to hire and fire their own caregivers rather than accept whatever caregiver an agency might select for them. Cal. Welf. & Instit. Code § 12301.6. This "consumer" or "social" model for delivering services fosters a sense of independence and control in recipients, which should not be underestimated. In fact, a key feature of IHSS as compared to other elderly or disabled assistance programs, such as Home Health (Cal. Health & Safety Code § 1725 et seq.), or Adult Day Care (Cal. Health & Safety Code § 1570 et seq.), is the use of the social model, where care providers are non-medical

[1] The Little Hoover Commission on California State Government Organization and Economy is an independent state oversight agency created in 1962 to investigate state operations and issue reports recommending reforms. Cal. Gov. Code §§ 8521-8525. This 1991 report on IHSS services is available on the Commission's website at: https://lhc.ca.gov/sites/lhc.ca.gov/files/Reports/113/Report113.pdf.

personnel and recipients control the functions and activities provided. The fact that recipients have direct control of their providers and the providers' work environment is not happenstance or some kind of legal fiction. It is very much an intentional feature of the IHSS program.

1. Problems Identified in the Early 1990's Were Related to Providers' Low Wages.

By the late 1980's and early 1990's, problems with the IHSS program were apparent. In 1991, California's Little Hoover Commission issued a report detailing concerns with the program, which was then serving more than 170,000 elderly and disabled persons.[2] Little Hoover Commission, *Unsafe in Their Own Homes: State Programs Fail to Protect Elderly From Indignity, Abuse and Neglect* (Nov. 6, 1991). Among the problems identified in the Little Hoover report was the failure to provide adequate wages and benefits, leading to inadequate care. The report noted that IHSS providers

[2] The IHSS program was serving more than 430,000 lower-income elderly or disabled Californians by 2009. Little Hoover Commission, *A Long Term Strategy for Long Term Care* (Apr. 28, 2011). [This report is available on the Commission's website at https://lhc.ca.gov/sites/lhc.ca.gov/files/Reports/205/Report205.pdf.] That number has now increased to more than 591,000 recipients, helping them to live independently in their homes. Cal. State Auditor, *In-Home Supportive Services Program Report* 2020-109 (Feb. 2021) p. 1. [This report is available on the Auditor's website at https://www.auditor.ca.gov/reports/2020-109/index.html.]

were earning $4.25 per hour with no benefits, which was less than the average fast food employee or housekeeper. *Id.* at 10. These low wages and a lack of benefits were discouraging a qualified pool of providers. The report also noted that recipients needed assistance locating and hiring qualified care givers, particularly since the turnover rate was quite high. *Id.* at 12. The report also found the lack of criminal screenings and inadequate training as short falls in the program. *Id.* at 8.

Despite the problems with the IHSS program, the report noted that having individual providers was a vital element of the program because it "provided recipients with the maximum freedom of choice in who will take care of the personal needs." *Id.* at 12-13. This included the ability to pay close friends or family members to provide needed services, which allowed for a personal connection between the provider and recipient that would not be possible without that control.

Around the same time that the Little Hoover Commission report was issued, it was becoming clear that there was no entity with which IHSS providers could negotiate to obtain higher wages and benefits. Litigation to attempt to force either the State or counties to negotiate wages and benefits was not successful. *See, e.g., Service Employees Int'l Union Local 434 v. County of Los Angeles*, 225 Cal.App.3d 761 (1990) [IHSS providers are not

employees of the State, nor of the county to which they submit their records, for purposes of collective bargaining]. In sum, though the fundamental objective of the program seemed to be working (recipient control over providers), there were identified problems with wages and benefits, and no method available to address those problems without legislative changes.

Compounding this situation was a statewide budget crisis in the early 1990's. Part of the solution for addressing the budget gap was a cut in recipient hours by approximately 12 percent beginning October 1, 1992. Stats. 1992, ch. 722, § 51, p. 3409; *see* CDSS All-County Letter No. 92-81 (Sept. 17, 1992).[3] The fear that the budget difficulties would lead to program changes that would restrict a recipient's right to self-direction over the services he or she received lead the California Senior Legislature (a senior advocacy group) to make creation of an IHSS public authority for wage and hour bargaining one of its top legislative priorities in 1992. Janet Heinritz-Canterbury, *Collaborating to Improve In-Home Supportive*

[3] The California Department of Social Services maintains all of its All County Letters on its website at: https://www.cdss.ca.gov/inforesources/letters-regulations/letters-and-notices/all-county-letters.

Services: Stakeholder Perspectives on Implementing California's Public Authorities (2002) p. 11.[4]

2. New Program Options and New Revenues Drive Changes in Provider Wages and Other Quality Control, But Not in Recipient Self-Determination.

The stage was then set in the early 1990's for a coalition of seniors, disability advocates, and unions to work together for legislative reforms. In a nod to the idea of fixing the wage and benefit problems identified by the Little Hoover Commission, while at the same time preserving recipient self-determination, the coalition lobbied for reform using the slogan: "Keep what works, fix what's wrong, and fund it!" Janet Heinritz-Canterbury, *Collaborating to Improve In-Home Supportive Services: Stakeholder Perspectives on Implementing California's Public Authorities* (2002) p. 11. The effort led to Senate Bill 485 (Stats. 1992, ch. 722, §§ 1-154, pp. 3342-3505), signed by Governor Pete Wilson in September, 1992.

Senate Bill 485 added Section 12301.6 to the Welfare and Institutions Code. Stats. 1992, ch. 722, § 54, pp. 3411-3413. The bill authorized (though did not mandate) a number of things, including: creating an IHSS public

[4] This report is the result of a joint research project sponsored by the Paraprofessional Healthcare Institute and the California Wellness Foundation. Both are nonprofit organizations focused on various aspects of long-term care. The report is available at: https://phinational.org/wp-content/uploads/2017/07/CA-PA-Report.pdf.

authority; developing a board to advise the public authority; creating an employer of record for MMBA negotiations (recognizing a union and negotiating wages); developing a county-wide registry to help recipients find providers; and providing access to training for providers. These changes all addressed the short-comings in the IHSS program identified in the Little Hoover Commission report.

Also signed into law during that legislative session was Assembly Bill 1773. Stats. 1992, ch. 939, §§ 1-10, pp. 4473-4479. Assembly Bill 1773 amended Welfare and Institutions Code section 14132.95 to make changes to personal care services in IHSS that would allow the State to take advantage of significant federal funding from the Personal Care Services Program (PCSP) beginning in April, 1993. Stats. 1992, ch. 939, §§5-7, pp. 4476-4478; *see* CDSS All-County Letter No. 93-03 (Jan. 12, 1993) [explaining new rules for personal care services imposed by AB 1773].

With new legislation authoring the creation of an "employer" for wage negotiation purposes and an infusion of federal money from the PCSP into the IHSS program, seven counties exercised the option to create a public authority between 1994 and 1999: Alameda, Contra Costa, Los Angeles, Monterey, San Francisco, San Mateo, and Santa Clara. Janet Heinritz-Canterbury, *Collaborating to Improve In-Home Supportive Services:*

Stakeholder Perspectives on Implementing California's Public Authorities (2002) p. 13.

Under this model, providers continued to receive their paychecks from the State, and continued to be hired, supervised, and discharged by the individual recipient-client. Those fundamental aspects of the program remained. The change related only to collective bargaining. "[F]or years thousands of low-wage workers in California were paid by the same state agency and performed the same work, but they had no employer for NLRA purposes - no one with whom they might bargain collectively over wages and working conditions. The California legislature responded by authorizing counties to establish a public authority or another entity to constitute an employer. Under California law, home care workers were authorized to organize, to elect a collective representative, and then to bargain collectively over wages and benefits with the public authority of the county in which they work." Benjamin Sachs, *David E. Feller Memorial Labor Law Lecture: Revitalizing Labor Law*, 31 Berkeley J. Emp. & Lab. L. 333, 341 (2010).

There were, however, continued problems in the IHSS program. In counties without public authorities, providers were still struggling with the inability to negotiate wages or benefits because there was no statutory

authority to do so. Thus, turnover in non-public authority counties remained a problem, especially given the draw of higher wages and benefits in public authority counties. (*Ibid.*) Further, there was nothing in the IHSS statute to allow for a State share of increased wages or benefits, which put significant pressure on county budgets in those counties that did negotiate for higher wages and benefits. (*Ibid.*)

3. IHSS Shifts to a Mandate to Address the Wage and Benefit Issue Statewide, and Funding Models Adapt to Changes.

The IHSS framework changed once against after the attempt to create an optional public authority did not resolve the issue of quality provider retention. Two bills were adopted in 1999 to deal with the issue: Assembly Bill 1682 (Stats. 1999, ch. 90, §§ 1-14, pp. 1650-1667), and Senate Bill 710 (Stats. 1999, ch. 91, §§ 1-5, pp. 1667-1672). Taken together, those bills made two significant changes. First, they imposed a mandate on all counties to either act themselves, or create a public authority to act, as the provider's employer for MMBA purposes no later than January 1, 2003. Stats. 1999, ch. 90, §6, pp. 1658-1659 [adding the former version of Cal. Welf. & Instit. Code § 12302.25]. This was an important change because it created the ability to collectively bargain for wages and benefits in all parts of the State, and not just in the seven counties that had adopted public authorities.

The second important change was that the State agreed to assume a share of county/public authority wage and benefit increases for providers. Prior to Senate Bill 710, the nonfederal share of administrative costs were shared, with 70% paid by the State and 30% by the counties. CDSS All-County Letter No. 00-68 (Sept. 20, 2000), p. 2. There were, however, no provisions for sharing wage increases above the minimum wage or provider benefits.[5] After enactment of Senate Bill 710, the sharing ratio for all provider wage and benefit costs became 80% State and 20% county for up to $0.50 above the minimum wage, with the county responsible for 100% of the nonfederal costs above that. Stats. 1999, ch. 91, § 4, p. 1672. The sharing ratios were changed again the very next year. Starting with fiscal year 2000-2001, the sharing ratio for all provider wage and benefit costs became 65% State and 35% county of the nonfederal share of wage and benefit increases. Stats. 2000, ch. 108, § 44.6, p. 1677. The 2000-2001 fiscal year budget, therefore, included for the first time $109.7 million from the State's general fund for the State's share of negotiated wage increases for providers in

[5] Senate Bill 1780 (Stats 1996, ch. 206, §§ 1-41, pp. 1649-1695) restricted state funds and required that counties must bear the non-federal cost of wages and benefits for individual providers above the state minimum wage. This measure also clarified that no wage or benefit increase for individual providers may take effect until the State Department of Social Services receives approval of the State Department of Health Services (Stats 1996, ch. 206, § 22, pp. 1664-1678).

public authority counties, and $3.7 million in non-public authority counties. CDSS All-County Letter No. 00-68 (Sept. 20, 2000), p. 2. The FY 2000-2001 budget also included for the first time $34.2 million from the General Fund for the State's share of cost for up to $0.60 per hour for health benefits for providers in public authority counties. *Ibid.*

Changes in provider wages funding continued through the years. In 2012, the Coordinated Care Initiative ("CCI") created a "maintenance of effort" for counties, providing a set amount to the county obligation toward IHSS costs, with the state assuming responsibility for any additional costs that would have historically been paid by counties under the previous county share of cost model. Cal. Welf. & Instit. Code § 12306.15 (repealed). The CCI also created a pilot project for a statewide authority for collective bargaining. *Ibid.* The State pivoted again in 2017 when it adopted Senate Bill 90 (Stats. 2017, ch. 25, §§ 11-28), which repealed the provisions that would have eventually transitioned collective bargaining responsibilities to a statewide IHSS Authority, created the ability to negotiate a new wage supplement (subject to State approval), and reset counties' maintenance of effort. Cal. Welf. & Instit. Code §§ 12301.61 [repealed by its own terms], 12306.

This history reflects the State's continued efforts to implement mandatory collective bargaining, which began in 1999. The policy goal underlying all of these efforts rests on correcting wage inadequacies and the county-to-county discrepancies that cause instability in the provider workforce. But two important aspects of the IHSS program have remained unchanged throughout this period of evolution. First, even after counties assumed the role of negotiating wages and benefits, the State maintained control of the wages and benefits paid. The law specifies that "[n]o increase in wages or benefits locally negotiated, mediated, imposed, or adopted by ordinance pursuant to this section, and no increase in the public authority administrative rate, shall take effect unless and until, prior to its implementation, the increase is reviewed and determined to be in compliance with state law and the department has obtained the approval of the State Department of Health Care Services for the increase. . . ." Cal. Welf. & Instit. Code § 12306.1, subd. (a).

Second, notwithstanding these myriad of legislative amendments related to wage negotiations and how IHSS services are funded, the Legislature has steadfastly stood by the fundamental principle of IHSS that has been in place since its inception: recipient self-determination over providers. Indeed, dating back to Assembly Bill 1682 and Senate Bill 710,

the Legislature has made clear that "[r]ecipients of in-home supportive services shall retain the right to choose the individuals that provide their care and to recruit, select, train, and supervise any provider under any other mode of service." Stats. 1999, ch. 90, § 6, pp. 1658-1659 [adding Section 12302.25, subd. (a) to the Welfare and Institutions Code]; *see also* CDSS All-County Letter No. 00-36 (May 19, 2000)["Notwithstanding the provisions of AB 1682 every recipient will continue to have the right to direct their provider of services. We do not believe it was the intent of the Legislature to change the current relationship between a recipient and his or her provider."].

Further, while counties and public authorities were given authority to negotiate provider wages and benefits, they are specifically forbidden from reducing recipient hours in order to pay the increased wages. Hour reductions can only be made based on uniform standards developed by the State. Cal. Welf. & Instit. Code § 12302.25, subd. (f) ["In implementing and administering this section, no county, public authority, nonprofit consortium, contractor, or a combination thereof, that delivers in-home supportive services shall reduce the hours of service for any recipient below the amount determined to be necessary under the uniform assessment guidelines established by the department."]; CDSS All-County Letter No. 00-68 (Sept.

20, 2000), p. 5 ["Notwithstanding any cost increases, AB 1682 does not permit necessary service hours to be reduced for any recipient."].

B. Counties Should Not Be Held Responsible for an Aspect of the IHSS Program in Which They Have No Role By Design.

As the County of Los Angeles makes clear in its brief, case law establishes the criteria for determining when a party is an employer for purposes of FLSA wage and hour requirements. The criteria focus on whether the party is in control of a variety of factors – hiring, firing, schedule, conditions of employment, and the like. *Bonnette v. California Health and Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983).

What is apparent from the legislative history of the responsibilities assigned to counties in the IHSS program is that counties were intentionally given no role in controlling the providers' working situation. If there is one aspect of the IHSS program that the Little Hoover Commission, the advocates, and the Legislature have agreed upon throughout the myriad of changes to the IHSS program over several decades is a desire to maintain the recipient's control and self-direction over their care. The recipient has the sole authority to select the provider, determine the tasks he or she will perform, set the hours and days the work will occur, and fire the provider. It is precisely this flexibility and focus on recipient self-determination that makes the IHSS program unique among the various aid programs available

to the elderly and disabled. Since counties are statutorily prohibited from exercising control over employment conditions governed by the FLSA, they should not be considered employers for purposes of FLSA liability.

VIII. CONCLUSION

Appellants are asking this Court to find the County responsible for aspects of wages it does not control. The County does not hire, fire, or control the providers' work schedules or conditions of employment in the work environment. The State, not the County, controls payroll and had sole decision-making authority about the overtime implementation date at issue in this case. This is more than a matter of a County electing not to exercise control over providers. Rather, the inability of a County to act is by legislative design and is a critical aspect of the IHSS program. It is a distinct policy decision that supports the goal of recipient self-determination and statewide uniformity.

For these reasons, Amicus Curiae respectfully requests that the Court affirm the district court ruling below.

Dated: May 5, 2021

Respectfully submitted,

By: /s/ Jennifer Bacon Henning

Jennifer Bacon Henning, SBN 193915

Counsel for Amicus Curiae
California State Association of Counties

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPESTYLE REQUIREMENTS

I certify as follows:

1. The foregoing amicus brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 3,946 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f); and

2. The foregoing amicus brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010, in font size 14, and font style Times New Roman.

Dated: May 5, 2021

Respectfully submitted,

By: /s/ Jennifer Bacon Henning

Jennifer Bacon Henning, SBN 193915

Counsel for Amicus Curiae
California State Association of Counties

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 5, 2021.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: May 5, 2021

By: /s/ Jennifer Bacon Henning

Jennifer Bacon Henning, SBN 193915

Counsel for Amicus Curiae
California State Association of Counties