FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TRINA RAY, individually, and on behalf of others similarly situated, *Plaintiff-Appellee,* v. COUNTY OF LOS ANGELES, *Defendant-Appellant.*	No. 17-56581 D.C. No. 2:17-cv-04239-PA-SK,
TRINA RAY; SASHA WALKER, individually, and on behalf of all others similarly situated, *Plaintiffs-Appellants,* v. LOS ANGELES COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES, Erroneously Sued As County of Los Angeles, *Defendant-Appellee.*	No. 18-55276 D.C. No. 2:17-cv-04239-PA-SK, OPINION

Appeal from the United States District Court
for the Central District of California
Percy Anderson, District Judge, Presiding

Argued and Submitted March 7, 2019
Pasadena, California

Filed August 22, 2019.

Before: Kim McLane Wardlaw and Mark J. Bennett, Circuit Judges, and Kathleen Cardone,* District Judge.

Opinion by Judge Bennett

COUNSEL

Jennifer Mira Hashmall (argued) and Jeffrey B. White, Miller Barondess LLP, Los Angeles, California, for Defendant-Appellant/Cross-Appellee.

Matthew C. Helland (argued) and Daniel S. Brome, Nichols Kaster LLP, San Francisco, California; Philip Bohrer, Bohrer Brady LLC, Baton Rouge, Louisiana; for Plaintiff-Appellee/Cross-Appellants.

OPINION

BENNETT, Circuit Judge:

This case concerns whether a county is an arm of the state and thus entitled to Eleventh Amendment immunity when it shares responsibility with the state for implementing a state-wide homecare program. We also consider the effective date of regulations that (1) a district court vacated before their original effective date; (2) an appellate court upheld, reversing the district court; and (3) the agency then decided not to enforce until a date after the original effective date. We agree with the district court that the County of Los

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* The Honorable Kathleen Cardone, United States District Judge for the Western District of Texas, sitting by designation.

Angeles is not entitled to Eleventh Amendment immunity but disagree as to the effective date of the regulations, which we hold is the original effective date of January 1, 2015. We thus affirm in part, reverse in part, and remand.

FACTS

California's In-Home Supportive Services program ("IHSS program" or "the program") provides in-home supportive services to eligible low-income elderly, blind, or disabled persons. Homecare providers help recipients with daily activities like housework, meal preparation, and personal care. The program serves hundreds of thousands of recipients. In the County of Los Angeles alone there are about 170,000 homecare providers and more than 200,000 recipients. California implements the program through regulations promulgated by the California Department of Social Services (CDSS), and the program is administered in part by California counties. Plaintiffs are current or former Los Angeles IHSS homecare providers.

The State and its counties share responsibility for implementing and running the IHSS program. The CDSS ensures that "in-home supportive services [are] provided in a uniform manner in every county," Cal. Welf. & Inst. Code § 12301(a), and it must "adopt regulations establishing a uniform range of services available to all eligible recipients based upon individual needs," *id.* § 12301.1(a). The State also procures and

implements a "Case Management Information and Payroll System." *Id.* § 12317(b).

But counties have some oversight of the IHSS program as well. They, like the State, may terminate homecare providers. *See id.* § 12300.4(b)(5). And counties evaluate recipients and ensure quality compliance. *See id.* § 12301.1. Counties also "ensure that services are provided to all eligible recipients." *Id.* § 12302. Plaintiffs claim that although they receive paychecks from the State, the County is responsible for a "share" of their wages. For example, if a county imposes "any increase in provider wages or benefits [that] is locally negotiated," then "the county shall use county-only funds" to fund that increase. *Id.* § 12306.1(a). Each county also determines whether its providers may exceed the maximum number of hours set by the CDSS. *See id.* § 12300.4(d)(3).

As employers of the homecare providers, the State and County must comply with the Fair Labor Standards Act's (FLSA) overtime wage requirements. *See* 29 U.S.C. § 207(a)(1). But that wasn't always the case.

In 1974, Congress created a "companionship exemption" to the FLSA for employees "employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves." *See id.* § 213(a)(15); Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55. This exemption applied to homecare providers like Plaintiffs.

In October 2013, however, the Department of Labor (DOL) promulgated a new rule that changed the definition of "companionship services" so that homecare providers like Plaintiffs would be entitled to overtime pay under the FLSA. *See* Application of the Fair Labor Standards Act to Domestic Service, 78 Fed. Reg. 60,454, 60,454 (Oct. 1, 2013) (codified at 29 C.F.R. pt. 552). The final rule had an effective date of January 1, 2015. *See id.*

Before the rule's effective date, a group of "trade associations that represent businesses employing workers" subject to the FLSA exemption filed a lawsuit in the District Court for the District of Columbia. *See Home Care Ass'n of Am. v. Weil*, 76 F. Supp. 3d 138, 142 (D.D.C. 2014) (*Weil I*). The plaintiffs claimed that the rule was arbitrary and capricious and thus sought to enjoin its implementation. *Id.* at 139. At step one of its *Chevron* analysis, the district court found that Congress had "clearly spoken" on the issue. *Id.* at 146. The district court then vacated the rule, *id.* at 148, and the DOL appealed.

On August 21, 2015, the D.C. Circuit reversed and ordered the district court to enter summary judgment for the DOL. *Home Care Ass'n of Am. v. Weil*, 799 F.3d 1084, 1087 (D.C. Cir. 2015) (*Weil II*). Although the DOL prevailed, on September 14, 2015 it announced that it would "not bring enforcement actions against any employer for violations of FLSA obligations resulting from the amended domestic service regulations for 30

days after the date the mandate issues."[1] Application of the Fair Labor Standards Act to Domestic Service; Announcement of 30-Day Period of Non-Enforcement, 80 Fed. Reg. 55,029, 55,029 (Sept. 14, 2015) (codified at 29 C.F.R. pt. 552). The *Weil II* mandate issued on October 13, 2015.

On October 27, 2015, the DOL said that it would not begin enforcing the final rule until November 12, 2015. And, echoing its September 14, 2015 statement, the DOL again said that

> from November 12, 2015 through December 31, 2015, [it would] exercise prosecutorial discretion in determining whether to bring enforcement actions, with particular consideration given to the extent to which States and other entities have made good faith efforts to

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[1] The DOL also stated:

> This 30-day non-enforcement policy does not replace or affect the timeline of the Department's existing time-limited non-enforcement policy announced in October 2014. 79 FR 60974. Under that policy, through December 31, 2015, the Department will exercise prosecutorial discretion in determining whether to bring enforcement actions, with particular consideration given to the extent to which States and other entities have made good faith efforts to bring their home care programs into compliance with the FLSA since the promulgation of the Final Rule. The Department will also continue to provide intensive technical assistance to the regulated community, as it has since promulgation of the Final Rule.

Application of the Fair Labor Standards Act to Domestic Service; Announcement of 30-Day Period of Non-Enforcement, 80 Fed. Reg. at 55,029.

> bring their home care programs into compliance with the FLSA since the promulgation of the Final Rule.

Application of the Fair Labor Standards Act to Domestic Service; Dates of Previously Announced 30-Day Period of Non-Enforcement, 80 Fed. Reg. 65,646, 65,646 (Oct. 27, 2015) (codified at 29 C.F.R. pt. 552).

Before the *Weil I* decision, California (through the CDSS) began taking steps to "meet the January 1, 2015, implementation date," including modifying its systems to "process and calculate overtime compensation." But after the *Weil I* decision, the CDSS decided that it would not implement overtime payments "until further notice." After *Weil II*, the CDSS again said that it would comply with the overtime requirements—but not until February 1, 2016.

In June 2017, Ray filed a putative collective action,[2] under Section 216(b) of the FLSA, against the State of California and the County of Los Angeles. Ray's complaint sought relief for herself and the putative collective for unpaid overtime wages between January 1, 2015—the rule's original effective date—and February 1, 2016, the date on which the State began paying overtime wages.

As relevant here, the County moved to dismiss the complaint on Eleventh Amendment immunity

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[2] Collective actions are provided for in the FLSA and are different from class actions, *see Campbell v. City of L.A.*, 903 F.3d 1090, 1101 (9th Cir. 2018), but the differences are not relevant to this appeal.

grounds.[3] In the alternative, the County moved to strike all references in the complaint to overtime wages allegedly earned before October 13, 2015—the date on which the mandate issued in *Weil II*.

The district court first held that the County had no Eleventh Amendment immunity. The district court noted that the Supreme Court has long refused to grant Eleventh Amendment immunity to counties and that the Court has already held that California counties are not arms of the State. The district court then assumed *arguendo* that a county could be an arm of the State under the five-factor test that we set out in *Mitchell v. Los Angeles Community College District*, 861 F.2d 198 (9th Cir. 1988) for determining whether an entity is an arm of the state for purposes of Eleventh Amendment immunity. The district court found that only one of the five factors favored the County, and thus it held that the County enjoyed no Eleventh Amendment immunity.

The district court then "reject[ed] Plaintiffs' efforts to enforce the FLSA companionship exemption regulations retroactively to January 1, 2015." Instead, it held "that the putative collective period extends from November 12, 2015, through January 31, 2016," and not before. The court said that although the *Weil II* decision applied retroactively, that decision was merely that the DOL could amend the FLSA and that those

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[3] Early on, Ray voluntarily dismissed the CDSS as a defendant, and Plaintiffs did not name the State as a defendant in the now-operative complaint.

amendments were not arbitrary and capricious. This, the district court held, differed from "the retroactive application of the amended regulations themselves." The district court reasoned:

> The rule of law announced by the D.C. Circuit is given retroactive effect by allowing DOL to reinstate those regulations without having to begin a new rule-making process. That is not the same thing as reinstating an earlier and judicially vacated effective date and retroactively creating liability for violations of the reinstated regulations as if the District Court's vacation of the regulations had never occurred.

The district court also found it "compelling" that both the D.C. Circuit and the DOL "intended" that the regulation become effective "no earlier than November 12, 2015." As evidence of this intent, the district court pointed to the DOL's decision not to enforce the new regulations before that date.

Finally, the district court found that its holding was consistent "with the general rule that a private right of action should ordinarily not exist when the applicable rule could not be enforced by the relevant enforcement agency."

The County filed an interlocutory appeal as to the denial of Eleventh Amendment immunity. The district court granted Plaintiffs' motion to certify for interlocutory appeal the district court's holding that the putative collective period began on November 12, 2015, and we granted Plaintiffs' request to appeal that holding.

DISCUSSION

We review de novo the denial of Eleventh Amendment immunity. *Cal. ex rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 843 n.12 (9th Cir. 2004). We construe the motion to strike as a motion to dismiss in part, and thus we review the effective date holding de novo because it essentially dismissed Plaintiffs' overtime claims for the period between January 1, 2015 and November 12, 2015. *See Yamaguchi v. U.S. Dep't of the Air Force*, 109 F.3d 1475, 1482 (9th Cir. 1997).

A. The County is not entitled to Eleventh Amendment immunity.

Plaintiffs first argue that Eleventh Amendment immunity is never available to counties. The County argues that it enjoys Eleventh Amendment immunity when acting as an "arm of the State."

Federal courts have long declined to extend Eleventh Amendment immunity to counties.[4] Indeed, the

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[4] *See*, *e.g.*, *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 401 (1979) ("[T]he Court has consistently refused to construe the Amendment to afford protection to political subdivisions such as counties and municipalities, even though such entities exercise a slice of state power." (internal quotation marks omitted)); *Lincoln Cty. v. Luning*, 133 U.S. 529, 530 (1890) (holding that the Eleventh Amendment does not bar a suit against a county, though the principle advanced has changed over time); *Del Campo v. Kennedy*, 517 F.3d 1070, 1075–76 (9th Cir. 2008) ("State sovereign immunity . . . does not extend to counties and similar municipal corporations, even though they share some portion of state power." (internal quotation marks omitted)

Supreme Court once said that Eleventh Amendment immunity does not extend to municipal corporations. *Mt. Healthy*, 429 U.S. at 280. But thirty years later, the Supreme Court suggested that it was at least possible for a county to receive Eleventh Amendment immunity. In *Northern Insurance Company of New York v. Chatham County*, 547 U.S. 189, 190 (2006), which involved a county-operated drawbridge, the Court stated that a county might be entitled to Eleventh Amendment immunity if it were "acting as an arm of the State, as delineated by this Court's precedents, in operating the drawbridge."[5]

The Court cited several cases for this proposition. First, *Alden v. Maine:* "The second important limit to the principle of sovereign immunity is that it bars suits against States but not lesser entities. The immunity does not extend to suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the State." 527 U.S. 706, 756 (1999). This sentence means one of two things: either (1) that Eleventh Amendment immunity does not extend to

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(quoting *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977))).

[5] At least one circuit has relied on this language and held that counties might be entitled to Eleventh Amendment immunity. *See Fuesting v. Lafayette Par. Bayou Vermilion Dist.*, 470 F.3d 576, 579 (5th Cir. 2006) ("[A] municipality can be immune from suit if it was 'acting as an arm of the State, as delineated by [the Supreme] Court's precedent'" (alteration in original) (quoting *Chatham*, 547 U.S. at 194)). But, to our knowledge, no court has ever actually extended Eleventh Amendment immunity to a county.

municipal corporations because they are not arms of the state or (2) that Eleventh Amendment immunity does not extend to a municipal corporation unless it is acting, in a particular circumstance, as an arm of the state. *Alden* in turn cites *Mt. Healthy*, in which the Court considered whether "the Mt. Healthy Board of Education is to be treated as an arm of the State partaking of the State's Eleventh Amendment immunity, or is instead to be treated as a municipal corporation or other political subdivision to which the Eleventh Amendment does not extend." *Mt. Healthy*, 429 U.S. at 280. That citation suggests the former reading.

The *Chatham* Court also cited *Lake Country Estates*, but while that case noted that "some agencies exercising state power have been permitted to invoke the [Eleventh] Amendment in order to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself," it also stated that "the Court has consistently refused to construe the Amendment to afford protection to political subdivisions such as counties and municipalities, even though such entities exercise a 'slice of state power.'" *Lake Country Estates*, 440 U.S. at 400–01. Although these passages seem to support Plaintiffs' argument that counties never enjoy Eleventh Amendment immunity, it is not for us to clarify *Chatham*'s apparently contrary statement.

The *Chatham* Court ultimately found it dispositive that the County there had conceded below that it had no Eleventh Amendment immunity and that the question on which certiorari was granted assumed

that conclusion. Given that the Supreme Court appears to have left open the possibility that a county could be entitled to Eleventh Amendment immunity in some cases, we decline to hold to the contrary. We therefore assume without deciding that, consistent with the Court's language in *Chatham*, a county might be entitled to Eleventh Amendment immunity if acting as an arm of the state.

1. The County is not an arm of the State here.

In *Mitchell*, we set out five factors for determining whether a government entity is an arm of its state for Eleventh Amendment immunity purposes: (1) "whether a money judgment would be satisfied out of state funds"; (2) "whether the entity performs central governmental functions"; (3) "whether the entity may sue or be sued"; (4) "whether the entity has the power to take property in its own name or only the name of the state"; and (5) "the corporate status of the entity." 861 F.2d at 201. "To determine these factors, the court looks to the way state law treats the entity." *Id.*

a. First *Mitchell* factor

"The first *Mitchell* factor—whether a money judgment . . . would be satisfied out of state funds—is the most important." *Sato v. Orange Cty. Dep't of Educ.*, 861 F.3d 923, 929 (9th Cir. 2017); *see also Beentjes v. Placer Cty. Air Pollution Control Dist.*, 397 F.3d 775, 785 (9th Cir. 2005) (noting that the first *Mitchell* factor is "the one given the most weight"). The County conceded,

both below and on appeal, that it cannot show that a money judgment would be paid directly with State funds.[6] Thus, this factor weighs against Eleventh Amendment immunity.

b. Second *Mitchell* factor

As to the second *Mitchell* factor—whether the County performs central governmental functions—we must determine whether the County addresses "a matter of statewide rather than local or municipal concern, and the extent to which the state exercises centralized governmental control over the entity." *Beentjes*, 397 F.3d at 782 (internal quotation marks omitted) (first quoting *Belanger v. Madera Unified Sch. Dist.*, 963 F.2d 248, 253 (9th Cir. 1992); then quoting *Savage v. Glendale Union High Sch., Dist. No. 205, Maricopa Cty.*, 343 F.3d 1036, 1044 (9th Cir. 2003)).

To begin, it is unclear whether the second *Mitchell* factor concerns whether the County performs central government functions in general or whether the County performs central government functions in carrying out the particular function at issue—here implementing the IHSS program.

As the district court correctly noted, the closest analogue in our case law is *Streit v. County of Los Angeles*, 236 F.3d 552 (9th Cir. 2001). There, the Los Angeles

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[6] The parties discuss at length how the County and the State allocate the costs of the program, but that is not relevant—what matters is who would be responsible for satisfying a money judgment against the County, not who pays for the program.

County Sheriff's Department (LASD) would check its systems, before releasing a prisoner, to see if the prisoner was wanted by another law enforcement agency. *Id.* at 556. This extended the period of incarceration one or two days past the prisoners' release dates. *Id.* The plaintiffs alleged that the County delayed their release during these checks, in violation of their civil rights. *Id.* The LASD argued that because it was an arm of the state, it was not a "person" that could be liable for damages under § 1983. *Id.* at 557.

We looked at the LASD's performance of the particular function at issue—implementing the prerelease policy—not the LASD's general function as a sheriff's department. *See id.* at 567. We held that "*conducting the AJIS checks* is not a central government function." *Id.* (emphasis added). Thus, it appears from *Streit* that we look to whether the County, in performing the particular function at issue, performs a central government function. This fits with the Court's statement in *Chatham* that the county there might have been entitled to Eleventh Amendment immunity if it were "acting as an arm of the State, as delineated by this Court's precedents, *in operating [a] drawbridge.*" *Chatham*, 547 U.S. at 194 (emphasis added).

i. A matter of statewide rather than local or municipal concern

The in-home care of the elderly and disabled is a matter of both statewide and local concern. Plaintiffs are residents of California, and the IHSS program is a

statewide program implemented through State legislation that provides care to hundreds of thousands of California residents. But Plaintiffs are also, of course, residents of Los Angeles County, and the County has an interest in the program and the care provided in Los Angeles.

ii. The extent to which the state exercises centralized governmental control over the entity

Here we consider the extent to which the County, in implementing the program, has "discretionary powers" and "substantial autonomy in carrying out [its] duties." *Beentjes*, 397 F.3d at 783.

The County may negotiate, implement, and pay for pay raises. *See* Cal. Welf. & Inst. Code § 12306.1. The County may also allow its providers to exceed the maximum number of hours that the CDSS has set. *See id.* § 12300.4(d)(3). Thus, the County has discretion to make some important choices on its own.

But the County contends—and Plaintiffs do not dispute—that it has no discretion over the action (or inaction) that subjected it to potential liability here: payment of overtime wages under the FLSA. In taking the actions that have subjected it to potential liability, the County had neither "discretionary powers" nor "substantial autonomy" in carrying out its duties.

We think this clearly tips the scales in the County's favor as to this factor. The County had no

choice in the matter of the overtime wages, as the State mandated the payment start date. We therefore hold that the second *Mitchell* factor favors Eleventh Amendment immunity.

c. Third, fourth, and fifth *Mitchell* factors

The County does not dispute that it can sue and be sued (third *Mitchell* factor), that it has the power to take property in its own name (fourth *Mitchell* factor), or that it has an independent corporate status[7] separate from the State (fifth *Mitchell* factor). Thus, these three *Mitchell* factors weigh against Eleventh Amendment immunity.

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In sum, the first *Mitchell* factor is the most important, and it weighs against Eleventh Amendment immunity. So do the third, fourth, and fifth *Mitchell* factors. Only the second factor favors immunity. We therefore hold that, under *Mitchell*, the County is not an arm of the State when it administers the IHSS

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[7] The fifth *Mitchell* factor asks whether the entity has "independent corporate status," *Holz v. Nenana City Pub. Sch. Dist.*, 347 F.3d 1176, 1188 (9th Cir. 2003), or is, instead, merely an agency of the state without an identity that is separate from the state, *Beentjes*, 397 F.3d at 785. Here the County does not dispute its independent corporate status, as the Supreme Court has already held that California counties have independent corporate status and are not agents of the State of California. *See Moor v. Alameda Cty.*, 411 U.S. 693, 719 (1973).

program, and thus it has no Eleventh Amendment immunity barring this action.

2. The Supreme Court has not overruled or undermined *Mitchell*.

The County argues that we should overrule *Mitchell* because a later Supreme Court case, *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30 (1994), undermined it. As a three-judge panel, if we find that intervening Supreme Court authority is clearly irreconcilable with our own precedent, we must consider ourselves bound by the intervening higher authority and consider our precedent effectively overruled. *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003). Because *Hess* is not clearly irreconcilable with *Mitchell*, we reject the County's argument.

In *Hess*, the Court held that a Congressionally approved bistate entity—the Port Authority Trans-Hudson Corporation (PATH), created to improve coordination of the "terminal, transportation and other facilities of commerce in, about and through the port of New York"—did not have Eleventh Amendment immunity. 513 U.S. at 35, 52–53 (citation omitted). The County argues that *Hess* established "indicators of immunity" that undermine the *Mitchell* test. We disagree.

The *Hess* Court noted that "current Eleventh Amendment jurisprudence emphasizes the integrity retained by each State in our federal system." *Id.* at 39. The Court then emphasized the difference between PATH and the States of the Union: "The States, as

separate sovereigns, are the constituent elements of the Union. Bistate entities, in contrast, typically are creations of three discrete sovereigns: two States and the Federal Government." *Id.* at 40.

The Court stated that "[p]ointing away from Eleventh Amendment immunity, the States lack financial responsibility" for the bistate entity. *Id.* at 45. Here, California similarly lacks financial responsibility for the County generally, but Plaintiffs allege that although California writes their checks, the County pays a share of their wages and sets their hours of work.

In *Hess*, "indicators of immunity point[ed] in different directions." *Id.* at 47. Perhaps they do here as well. Los Angeles is not a constituent member of the Union, but it acted at the direction of the State and had no authority over the payments at issue. But when faced with a different dichotomy in *Hess*, the Court emphasized that the most important factor was whether judgments against PATH would be paid by the State: "the vulnerability of the State's purse [is] the most salient factor in Eleventh Amendment determinations." *Id.* at 48; *see also id.* at 48–49 (citing cases for the "prevailing view" that the state-treasury factor is "generally accorded . . . dispositive weight"); *id.* at 51 (stating that "the Eleventh Amendment's core concern is not

implicated" if the State is not "in fact obligated to bear and pay the . . . indebtedness of the enterprise").[8]

After noting that the bistate entity "was financially self-sufficient," generated "its own revenues," and paid "its own debts," the Court held that "[r]equiring the [bistate entity] to answer in federal court to injured railroad workers who assert a federal statutory right, under the FELA, to recover damages does not touch the concerns—the States' solvency and dignity—that underpin the Eleventh Amendment." *Id.* at 52. The same is true here. *Mitchell* and *Hess* both emphasize the state-treasury factor. *Hess* thus fully supports and does not undermine *Mitchell*.[9]

The County argues that *Hess* emphasized the amount of control that a state maintains over an entity, a factor supposedly not mentioned in *Mitchell* and one that, according to the County, favors Eleventh

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[8] The dissent read the holding even more broadly:

> In place of the various factors recognized in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 99 S. Ct. 1171, 59 L.Ed.2d 401 (1979), for determining arm-of-the-state status, we may now substitute a single overriding criterion, vulnerability of the state treasury. If a State does not fund judgments against an entity, that entity is not within the ambit of the Eleventh Amendment, and suits in federal court may proceed unimpeded.

Id. at 55 (O'Connor, J., dissenting).

[9] Los Angeles makes a legitimate point about the unfairness of the result here. But that unfairness springs from the State and its implementing legislation, not the Eleventh Amendment. Los Angeles must air its grievance, if at all, in Sacramento.

Amendment immunity here. First, as we mentioned above, the second *Mitchell* factor *does* include a "control" inquiry—it just doesn't make that factor dispositive. In addition, *Hess* pointed out that "[g]auging actual control . . . can be a 'perilous inquiry,' [and] 'an uncertain and unreliable exercise.'" 513 U.S. at 47 (quoting Note, 92 Colum. L. Rev. 1243, 1284 (1992)). The Court therefore doubted not only the efficacy but also the utility of a "control" analysis, and it did not suggest that control was a favored, much less dispositive, factor in the Eleventh Amendment analysis.[10]

Hess clearly stated that "rendering control dispositive does not home in on the impetus for the Eleventh Amendment: the prevention of federal-court judgments that must be paid out of a State's treasury." *Id.* at 48. And, in specifically discussing the control factor, the Court noted that even though "'political subdivisions exist solely at the whim and behest of their State,' . . . cities and counties do not enjoy Eleventh Amendment immunity." *Id.* at 47 (quoting *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 313 (1990)).

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[10] The control discussed in *Hess* seems to have gone to *overall* control over the entity, not just control within the context of the particular function at issue: "PATH urges that we find good reason to classify the Port Authority as a state agency for Eleventh Amendment purposes based on the control New York and New Jersey wield over the Authority. . . . But ultimate control of every state-created entity resides with the State, for the State may destroy or reshape any unit it creates." *Id.* at 47. Thus, looking at the State's overall control over the County as a county would not help the County's position here.

Finally, the County insists that *Hess* compels us to consider the State's dignity, a factor not mentioned in *Mitchell*. *Hess* noted that the State's "solvency and dignity . . . underpin the Eleventh Amendment." 513 U.S. at 52. That is undoubtedly true. But the State is no longer a party to this action, and it will not be responsible for an adverse judgment against the County. Allowing this action against Los Angeles does not injure California's dignity.[11]

The Supreme Court decided *Hess* about five years after we decided *Mitchell*. And although *Hess* arose in a different context than *Mitchell*–*Hess* addressed a bi-state entity, not a county—nothing in *Hess* so undermines *Mitchell* that we have the power to overrule it. More importantly, even if we used *Hess* rather than *Mitchell* to guide our analysis, we would reach the same result.

When a non-state entity invokes Eleventh Amendment immunity, the most important factor for determining whether the entity is an arm of the state remains the state-treasury factor—that is, whether the state will be liable for a money judgment against the non-state entity. That factor, and all but one of the other *Mitchell* factors, dictates the result here. The

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[11] And, although it would not have altered our analysis, we note that California has not sought to file an amicus brief (below or on appeal) arguing either that the County is entitled to Eleventh Amendment immunity or that this case threatens California's dignity.

Eleventh Amendment does not bar Plaintiffs' suit against Los Angeles.

B. The effective date of the rule is January 1, 2015.

We next consider whether the effective date of the rule is the original effective date of January 1, 2015 or some date after the D.C. Circuit reversed the district court's vacatur. The County argues that the rule cannot have an effective date that is earlier than the date on which the D.C. Circuit reversed the district court's vacatur. Plaintiffs argue that the legal effect of the vacatur is to reinstate the original January 1, 2015 effective date. We agree with Plaintiffs and hold that the effective date of the rule is January 1, 2015.

1. A January 1, 2015 effective date is not impermissibly retroactive.

The County argues that a January 1, 2015 effective date is impermissibly retroactive. Plaintiffs argue that the D.C. Circuit's decision, not the rule, applies retroactively, because the D.C. Circuit was "explaining what the law always was," and thus reinstating the original effective date is merely a return to the status quo ante.

When an appellate court applies "a rule of federal law to the parties before it," that interpretation "must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of

whether such events predate or postdate [the] announcement of the rule." *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993). That is because "when a court delivers a ruling, even if it is unforeseen, the law has not changed. Rather, the court is explaining what the law always was." *Jones Stevedoring Co. v. Dir., Office of Workers' Comp. Programs*, 133 F.3d 683, 688 (9th Cir. 1997).

When the D.C. Circuit held that the DOL had the rulemaking authority to promulgate the new rule and that its new rule was a reasonable exercise of that authority, *see Weil II*, 799 F.3d at 1090, it did not change the law but merely explained what the law always was—the district court's erroneous contrary holding notwithstanding.

Two cases support our holding. In *GTE South, Inc. v. Morrison*, 199 F.3d 733, 738, 740 (4th Cir. 1999), the Fourth Circuit addressed an issue much like the one we face: determining the effective date of certain pricing rules, promulgated by the FCC, that the Eighth Circuit stayed and then vacated before their effective date. The Supreme Court later reversed the Eighth Circuit. *See AT & T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 385 (1999). The *Morrison* panel held that "the Supreme Court's determination that the FCC has jurisdiction to issue pricing rules would appear to compel the conclusion that the FCC always had such jurisdiction and that the rules *apply as of the effective date originally scheduled.*" 199 F.3d at 740 (emphasis added). The Fourth Circuit emphasized that its holding was not unfair to the parties who argued for a later

effective date because they had "ample notice" of the original effective date and "surely knew that the FCC's authority to issue pricing rules might ultimately be upheld by the Supreme Court." *Id.* at 741.

In *US West Communication, Inc. v. Jennings*, 304 F.3d 950, 955 (9th Cir. 2002), we considered a similar question: whether the regulations that the Fourth Circuit considered in *Morrison* applied to conduct that occurred during the period of vacatur. Finding the Fourth Circuit's reasoning in *Morrison* persuasive and applicable, we noted that the Supreme Court's determination that the regulations were valid meant that we should apply them "to all . . . agreements arbitrated under the Act, *including agreements arbitrated before the rules were reinstated.*" *Id.* at 957 (emphasis added). Relying on *Morrison*, we held that applying the reinstated regulations to conduct that occurred during the period of vacatur would not give the regulations an impermissible retroactive effect. *Id.* at 958.

Morrison and *Jennings* are analogous to this case because both involved determining how to apply rules or regulations that were vacated but ultimately reinstated on appeal. Indeed, *Morrison* commented not only on the retroactivity of the Supreme Court's reversal but also on the effective date of the regulations, holding that the intervening vacatur did not alter the original effective date of the pricing rules. 199 F.3d at 740.

Thus, *Morrison* and *Jennings* guide our analysis here. The D.C. Circuit's holding that the DOL had the

authority to promulgate the new rule and that the rule was reasonable applies retroactively. As in *Jennings*, the regulations apply as of the original effective date. To hold otherwise could encourage dilatory appellate litigation. If an erroneously vacated rule or regulation were not effective until sometime after the mandate issued in a later appeal, then a party might drag out the appellate process to avoid compliance for as long as possible. Put differently, an erroneous vacatur cannot postpone a rule's effective date until an appellate court corrects the error sometime in the future. And, as the Fourth Circuit noted in *Morrison*, in a case like this everyone knows that the lower court decision might be reversed on appeal.

The State and its counties knew from October 13, 2013, when the DOL first announced its final rule, that January 1, 2015 was the rule's effective date. *See* Application of the Fair Labor Standards Act to Domestic Service, 78 Fed. Reg. at 60,454. The State and its counties had a full fifteen months to comply with the final rule—indeed the State initially said that it would comply with the original effective date, but it changed course after the *Weil I* court vacated the rule. That decision may have been reasonable, but it created a monetary risk, as the State and its counties were well aware that an appellate court might uphold the regulations on appeal.

The district court held that to apply the *Weil II* decision retroactively would be to "reinstate[ ] an earlier and judicially vacated effective date and retroactively creat[e] liability for violations of the reinstated

regulations as if the District Court's vacation of the regulations had never occurred." That is exactly correct. And although the district court found that to be unfair, it would be equally unfair to hold that a putative collective of homecare providers is not entitled to nearly a year's worth of overtime wages just because a single district court issued an erroneous decision that another court reversed on appeal. The State gambled that *Weil I* would be affirmed. The effect of that gamble might be unfair to the County, but the County must seek any recourse from the State. It is not fair for the homecare providers to bear the financial consequences of the State's calculated risk.

2. The DOL's decision not to enforce a new rule does not obviate private rights of action.

According to the County, the DOL's choice against enforcing the rule until November 12, 2015 eliminated the availability of private rights of action until that date because a private right of action cannot precede an agency's enforcement of a rule or regulation. We disagree.

"An agency's informal assurance that *it* will not pursue enforcement cannot preclude a citizen's suit to do so." *Ohio Valley Envtl. Coal. v. Fola Coal Co., LLC*, 845 F.3d 133, 145 (4th Cir. 2017) (emphasis added). Congress created a private right of action under the FLSA for unpaid overtime: "Any employer who violates the provisions of section 206 or section 207 of this title

shall be liable to the employee or employees affected in the amount of their . . . unpaid overtime compensation. . . .” 29 U.S.C. § 216(b). An agency’s discretionary decision to hold off enforcement does not and cannot strip private parties of their rights to do so. *See Ohio Valley*, 845 F.3d at 145 (“Congress enacted the citizen suit provision of the Clean Water Act to address situations, like the one at hand, in which the traditional enforcement agency declines to act.”).

The district court’s hypothesis that the D.C. Circuit and DOL “intended” that the regulation become effective “no earlier than November 12, 2015” is tenuous and, in any event, irrelevant. First, the D.C. Circuit said nothing at all on the issue. Second, there is nothing in the several statements of the DOL, which the district court relied on, that suggest that it intended its discretionary enforcement choices to preclude private enforcement. Indeed, other than by amending the rule, the DOL could not have precluded private enforcement even if it wanted to.

The rule’s original effective date remains January 1, 2015. If the DOL “intended” for the effective date be something other than January 1, 2015, the DOL could have sought to change that effective date through the procedures set out in the Administrative Procedure Act. Were we to hold to the contrary and impose our view that the DOL’s exercise of discretion amended the effective date sub silentio, we would in fact be usurping the rulemaking authority of the DOL. *See Nat. Res. Def. Council, Inc. v. U.S. E.P.A.*, 683 F.2d 752, 762 (3d Cir. 1982) (holding that a final rule’s effective date is an

"essential part" of that rule and is thus subject to the rulemaking procedures of the APA).

The effective date of the rule is January 1, 2015.[12]

CONCLUSION

We **AFFIRM** the district court's holding that the County is not entitled to Eleventh Amendment immunity and **REVERSE** the district court's holding that the putative collective period began on November 12, 2015, holding instead that the rule's effective date—and thus the beginning of the putative collective period—is January 1, 2015. We **REMAND** for proceedings consistent with this opinion. Costs shall be awarded to Plaintiffs-Appellants.

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[12] Although some district courts have reached a different conclusion—*see*, *e.g.*, *Bangoy v. Total Homecare Solutions, LLC*, No. 1:15-CV-573, 2015 WL 12672727, at *3 (S.D. Ohio Dec. 21, 2015) (holding that the plaintiffs failed to state a claim for a violation of the FLSA between January 1, 2015 and "late August 2015")—nearly all of them have reached the same result we reach here, *see*, *e.g.*, *Kinkead v. Humana, Inc.*, 206 F. Supp. 3d 751, 752 (D. Conn. 2016) (holding that the effective date of the rule is January 1, 2015, "the effective date set forth by the agency"); *Collins v. DKL Ventures, LLC*, 215 F. Supp. 3d 1059 (D. Colo. 2016) (same); *Lewis-Ramsey v. Evangelical Lutheran Good Samaritan Soc'y*, 215 F. Supp. 3d 805 (S.D. Iowa 2016) (same).

UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 17-4239 PA (SKx)	Date	September 28, 2017
Title	Trina Ray, et al. v. California Dep't of Soc. Servs., et al.		

Present: The Honorable	PERCY ANDERSON, UNITED STATES DISTRICT JUDGE

Kamilla Sali-Suleyman	Not Reported
Deputy Clerk	Court Reporter
N/A	
Tape No.	

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
None	None

Proceedings: IN CHAMBERS - COURT ORDER

Before the Court is a Motion to Dismiss filed by defendant County of Los Angeles (the "County") (erroneously sued as the Los Angeles County Department of Public Social Services) (Docket No. 53). Also before the Court is a Motion for Conditional Certification filed by plaintiffs Trina Ray and Sasha Walker ("Plaintiffs") (Docket No. 27). Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court finds that these matters are appropriate for decision without oral argument. The hearings calendared for

July 31, 2017 and September 11, 2017, are vacated, and the matters taken off calendar.

I. Factual and Procedural Background

Plaintiff Trina Ray commenced this action on June 7, 2017. In her original Complaint, Ms. Ray asserted a claim for unpaid overtime under the Fair Labor Standards Act "("FLSA") on behalf of herself and a putative collective of In-Home Supportive Services ("IHSS") providers against the California Department of Social Services ("DSS") and the County. Plaintiffs filed the First Amended Complaint ("FAC") on July 21, 2017. The FAC dropped DSS as a defendant and added Ms. Walker as a named plaintiff. The FAC seeks to represent an FLSA collective of "all persons who have been employed by [the County] as IHSS Homecare Providers in the County of Los Angeles, and who were paid for hours in excess of forty (40) per week at a rate of less than 1.5 times their regular rate at any time from January 1, 2015 to February 1, 2016." (FAC ¶ 2.) There are approximately 169,246 IHSS providers in the County. (Docket No. 31 at 4:22-23.)

A. IHSS Program

" 'IHSS is a state social welfare program designed to avoid institutionalization of incapacitated persons. It provides supportive services to aged, blind, or disabled persons who cannot perform the services themselves and who cannot safely remain in their homes unless the services are provided to them. The program

compensates persons who provide the services to a qualifying incapacitated person.' " Guerrero v. Superior Court, 213 Cal. App. 4th 912, 920, 153 Cal. Rptr. 3d 315, 321 (2013) (quoting Basden v. Wagner, 181 Cal. App. 4th 929, 931, 104 Cal. Rptr. 3d 394, 395 (2010)). The state "intends that necessary in-home supportive services shall be provided in a uniform manner in every county based on individual need. . . ." Cal. Welf. & Inst. Code § 12301(a). The California Court of Appeal has described the IHSS program:

> The Department [the state Department of Social Services or DSS] promulgates regulations that implement the program, and county welfare departments administer the program under the Department's supervision. Counties process applications for IHSS, determine the individual's eligibility and needs, and authorize services. The county either obtains and pays the provider of the services, or it pays the recipient who hires a provider.
>
> . . .
>
> The services that may be authorized through IHSS are specified in the DSS Manual sections 30-757.11 through 30-757.19. (DSS Manual, § 30-757.1.) The Department must adopt regulations establishing a uniform range of services available to all eligible recipients based up individual needs, subject to county plans developed in conformity with state law. ([Cal. Welf. & Inst. Code] §§ 12301.1, 12302.) Counties evaluate the recipients based on those regulations and reassess

periodically, but at least annually. (§ 12301.1) The Department, in consultation with the counties, must also "establish and implement statewide hourly task guidelines" and a standardized tool to assess recipient needs. (§§ 12301.2, 12309.)

Although County may authorize exceptions to the hourly task time guidelines for particular services based on factors set forth in the DSS Manual (see DSS Manual, § 30-757.1), no exception may result in the recipient's total hours exceeding the maximum monthly limits specified. (Id., § 30-757.1(a)(4).)

. . .

Counties are tasked with performing "quality assurance activities," including establishing a dedicated, specialized unit or function to ensure quality assurance and program integrity, including fraud detection and prevention in the provision of services; performing routine reviews of supportive case services to ensure there are accurate assessments of needs and hours; developing, with the state, policies, procedures, timelines, and instructions under which counties will receive, resolve and respond appropriately to claims data match discrepancies or other information that indicates potential overpayments to providers or recipients or third-party liability; monitoring the delivery of supportive services to detect and prevent potential fraud by providers, recipients and others to maximize recovery of overpayments. (§ 12305.71, subds.(a), (b), (c).)

> Such monitoring may include unannounced home visits to a recipient's home to verify the receipt of services. (§ 12305.71, subd. (c)(3)(A), (B).)

Guerrero, 213 Cal. App. 4th at 920-22, 153 Cal. Rptr. 3d at 321-23 (some citations omitted). "'The program was originated, and is largely funded, by the federal government. A state may participate in the program by paying a portion of the funding and complying with federal requirements. California participates in the IHSS program pursuant to . . . section 12300 et seq. The county administers the program locally on behalf of the state in accordance with the statute and state regulations establishing a uniform range of services available to all eligible recipients. County social workers interview applicants for IHSS services and determine their eligibility and need for such services and the number of hours of service to which the applicant is entitled under the regulations.'" Id. at 920 n.3, 153 Cal. Rptr. 3d at 321 n.3 (quoting Service Emps. Int'l Union v. County of Los Angeles, 225 Cal. App. 3d 761, 765, 275 Cal. Rptr. 508, 510 (1990)).

The IHSS program is paid for through a combination of federal, state, and county funds:

> [T]he IHSS program is primarily delivered as a Medi-Cal benefit. Accordingly, around 50 percent of IHSS program costs are paid for by the federal government. The nonfederal costs of the IHSS program are shared by the state and counties. Historically, the state paid for 65 percent of nonfederal program costs and

> counties paid for the remaining 35 percent. There are some IHSS costs that are not shared according to the historical state-county cost-sharing arrangement. For example, pursuant to state law, the state only participates in funding IHSS provider wages and benefits up to $12.10 per hour, placing the responsibility on counties to fund 100 percent of the nonfederal costs of IHSS provider wages and benefits above $12.10 per hour.

(Docket No. 54, Ex. 1 at 13-14.[1]) Based on "Maintenance of Effort" legislation that capped a county's share of nonfederal IHSS expenses, the share of county costs fell from 35% in 2012 to 24% in 2016. (Id. at 20.) As a result of new budget legislation enacted by the State of California (the "State" or "California"), the county share of IHSS costs is expected to increase to 36% during the 2017-18 budget year, with the state share falling to 64%. (Id.; see also Cal. Welf. & Inst. Code § 12306.16.) IHSS providers such as Plaintiffs and the collective they seek to represent receive paychecks issued by the California State Controller. (FAC ¶ 18; Cal. Welf. & Inst. Code § 12300.4.) DSS processes payroll through a statewide computer system it operates. Cal. Welf. & Inst. Code § 12317. Counties may increase IHSS provider wages, but when they do so, "the county shall use county-only funds to fund both the county share and the state share, including employment taxes, of any increase in the cost of the program, unless otherwise provided for in the annual

[1] Plaintiffs have not objected to the County's Request for Judicial Notice.

Budget Act or appropriated by statute." Cal. Welf. & Inst. Code § 12306.1.

B. FLSA Overtime Rules

The FLSA generally requires employers to pay overtime at a rate of at least 150% of regular pay to their employees whenever the employees work more than 40 hours in a week. 29 U.S.C. § 207(a)(1). The FLSA does, however, contain exemptions from the overtime requirements. 29 U.S.C. § 213. In 1974, Congress added a "companionship exemption" for employees employed in "domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves." 29 U.S.C. § 213(a)(15). In October 2013, the federal Department of Labor ("DOL") promulgated new regulations that changed the definition of "companionship services." See 29 C.F.R. §§ 552.6 & 552.109. By changing the definition of "companionship services," the new regulations limited the scope of the exemption provided by 29 U.S.C. § 213(a)(15) and made many IHSS providers, including Plaintiffs and the members of the collective they seek to represent, eligible for overtime pay under the FLSA beginning on January 1, 2015. 78 Fed. Reg. 60454-01.

In Home Care Ass'n of America v. Weil, 76 F. Supp. 3d 138 (D.D.C. 2014), a group of IHSS employers challenged DOL's enactment of the amended regulations. The United States District Court for the District of Columbia concluded that the DOL's revised

"companionship services" regulations were inconsistent with the intent of Congress and the language of the FLSA. On December 31, 2014, the District Court in Weil temporarily stayed the regulations from going into effect. (Docket No. 54, Ex. 14.) The District Court, on January 14, 2015, vacated the regulations. Home Care Ass'n of America v. Weil, 78 F. Supp. 3d 123 (D.D.C. 2015). As a result of the District Court's actions, California's DSS issued an "All-County Letter" ("ACL") on January 5, 2015, advising California's counties that "implementation of the new FLSA regulations . . . will be delayed until further court clarification." (Docket No. 54, Ex. 5.) DSS advised the counties that the payroll system it operates for IHSS providers "will not process payments for overtime or travel time until further clarification is ascertained based on the court decisions." (Id.)

DOL appealed the District Court's order vacating the regulations. The United States Court of Appeals for the District of Columbia reversed the District Court's invalidation of the regulations on August 21, 2015. Home Care Ass'n of America v. Weil, 799 F.3d 1084 (D.C. Cir. 2015). The D.C. Circuit remanded the action to the District Court with instructions to enter summary judgment in favor of DOL. Id. at 1093. The Court of Appeals issued its mandate on October 13, 2015. In granting DOL's request for expedited issuance of the mandate, the D.C. Circuit concluded that the "mandate should be issued expeditiously so that the final rule can be implemented," noted that the DOL "indicated that, through December 31, 2015, it will exercise

prosecutorial discretion in determining whether to bring enforcement actions, with particular consideration given to the extent to which States and other entities have made good faith efforts to bring their home care programs into compliance with the FLSA since promulgation of the final regulations," and that DOL "will not bring enforcement actions against any employer as to violations of FLSA obligations resulting from the amended regulations until 30 days after the mandate issues." (Docket No. 54, Ex. 16.) Consistent with the representations it had made to the D.C. Circuit to obtain expedited issuance of the mandate, DOL issued a policy statement on October 27, 2015, confirming that it would not bring enforcement actions against any employer for FLSA violations of the amendments to the companionship services regulations for 30 days after the D.C. Circuit issued its mandate. 80 Fed. Reg. 65646-01. DOL stated that its non-enforcement period would conclude on November 12, 2015, and that it would, as a matter of prosecutorial discretion, extend its period of nonenforcement through December 31, 2015. Id. California's DSS issued a statement on November 4, 2015, providing that it would start paying overtime wages beginning on February 1, 2016. (Docket No. 54, Ex. 17.) DSS issued an ACL on December 1, 2015, notifying "counties of the responsibility to implement the overtime and travel compensation requirements effective February 1, 2016." (Docket No. 54, Ex. 7.)

II. Analysis

In its Motion to Dismiss, the County asserts that it is entitled to sovereign immunity under the Eleventh Amendment as an arm of the state when it performs its statutory roll in the IHSS program. The County alternatively contends that this action should be dismissed because California is a necessary and indispensable party that cannot be joined as a result of its Eleventh Amendment immunity. The County also challenges the sufficiency of the FAC by arguing that Plaintiffs have not alleged with sufficient detail specific workweeks in which they did not receive overtime pay as required by Landers v. Quality Commc'ns, Inc., 771 F.3d 638 (9th Cir. 2014).[2] In both the County's Motion to Dismiss and Plaintiffs' Motion for Conditional Certification, the parties dispute when the amendments to the companionship services exemption regulations became effective and entitled Plaintiffs and the putative collective to overtime wages. Plaintiffs seek a collective period beginning on January 1, 2015, when the regulations were originally scheduled to take effect. The County contends that the collective period could not begin any earlier than October 13, 2015, when the D.C. Circuit issued its mandate in Weil, and may not have started until November 12, 2015, or later, when DOL could begin to enforce the regulations.[3]

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[2] The Court concludes that the FAC alleges sufficient facts to satisfy Landers. (See FAC ¶ 24.) The Court therefore denies the County's Motion to Dismiss for failure to state a claim.

[3] Because Ms. Ray worked as an IHSS provider from 2010 or 2011 "until approximately October 2015," and then again

A. Eleventh Amendment Immunity

The Eleventh Amendment of the United States Constitution provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. "The ultimate guarantee of the Eleventh Amendment is that nonconsenting States may not be sued by private individuals in federal court." Board of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 363, 121 S.Ct. 955, 962 (2001). The Supreme Court has "'consistently refused to construe the Amendment to afford protection to political subdivisions such as counties and municipalities, even though such entities exercise a slice of state power.'" Beentjes v. Placer County Air Pollution Control Dist., 397 F.3d 775, 777 (9th Cir. 2005) (quoting Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency, 440 U.S. 391, 401, 99 S. Ct. 1171, 1177 (1979)). The Supreme Court has also specifically concluded that California's counties are not entitled to Eleventh Amendment immunity. See Moor v.

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beginning in September or October 2016 (FAC ¶ 5), the County challenges her standing to assert a claim because, if the FLSA regulations were not in effect until October or November 2015, she would have no entitlement to overtime wages. Because Ms. Walker has worked as an IHSS provider from 2006 to the present (FAC ¶ 7), she has standing no matter when the FLSA regulations became effective. Because at least one of the named plaintiffs has standing to pursue the claims alleged in the FAC regardless of the effective date of the FLSA regulations at issue, the Court declines to address the County's standing argument in this order.

Alameda County, 411 U.S. 693, 719, 93 S. Ct. 1785, 1800-01 (1973) ("[A] detailed examination of the relevant provisions of California law . . . convinces us that the County cannot be deemed a mere agent of the State of California.").

Despite this Supreme Court and Ninth Circuit precedent establishing that California's counties may not assert Eleventh Amendment immunity, the County contends that it should be considered an "arm of the state" because the "particular function" performed by the County in administering the IHSS program is pursuant to California statutory authority and the County had no authority to pay overtime to IHSS providers without the State's consent. (See Docket No. 53 at 12:5-20 & Docket No. 60 at 3:3-18.) The County therefore contends that it should be entitled to Eleventh Amendment immunity under the Ninth Circuit's test for determining if an entity is an arm of the state. See Beentjes, 397 F.3d at 778 ("In the Ninth Circuit, we employ a five-factor test to determine whether an entity is an arm of the state: (1) whether a money judgment would be satisfied out of state funds, (2) whether the entity performs central governmental functions, (3) whether the entity may sue or be sued, (4) whether the entity has the power to take property in its own name or only the name of the state, and (5) the corporate status of the entity." (quoting Belanger v. Madera Unified Sch. Dist., 963 F.3d 248, 250-51 (9th Cir. 1992)); see also Mitchell v. Los Angeles Cmty. Coll. Dist., 861 F.2d 198, 201 (9th Cir. 1988).

Other than the extent to which a "particular function" performed by an entity might be assessed as part of the second Mitchell factor in determining if an entity is entitled to Eleventh Amendment immunity, the Ninth Circuit does not appear to have adopted the "particular function" analysis to a county's assertion of immunity. The closest the Ninth Circuit appears to have come to analyzing a particular function is when it assessed if the Los Angeles Sheriff's Department was acting as an arm of the state "when administering the local county jails." Streit v. County of Los Angeles, 236 F.3d 552, 566-67 (9th Cir. 2001). Streit treated the Sheriff's Department as a "separately suable entity" from the County when it determined that the Sheriff's Department was not entitled to Eleventh Amendment immunity when administering the local jails. Id. A focus on the particular function undertaken by the County appears to be inconsistent with both the binding precedent from the Supreme Court and Ninth Circuit holding that California's counties are not entitled to Eleventh Amendment immunity and the Supreme Court's description of its jurisprudence in the area that its "cases have inquired into the relationship between the State and the entity in question" and that in "making this inquiry, we have sometimes examined 'the essential nature and effect of the proceeding' and sometimes focused on the 'nature of the entity created by state law' to determine whether it should 'be treated as an arm of the State.'" Regents of the Univ. of Cal. v. Doe, 519 U.S. 425, 429-30, 117 S. Ct. 900, 904 (1997) (citations omitted). The Supreme Court has already looked at the "nature of the entity created by state law"

and concluded that California's counties are not "arms of the State." Moor, 411 U.S. at 719, 93 S. Ct. at 1800-01.

Even if the Court were not bound by the precedent declaring that California's counties are not entitled to Eleventh Amendment immunity, and could assess the Mitchell factors in light of the facts presented in this action, it would conclude that the County is not an "arm of the state" for purposes of its involvement in the IHSS program. First, although the County presents substantial evidence that a large portion of the nonfederal IHSS funds are contributed by the State rather than the County, the State's contribution of those funds does not establish that a money judgment against the County in this case would be paid with State rather than County funds. In its Reply, the County argues for the first time that California Government Code sections 895.2 and 895.6 would impose upon the State an obligation to contribute a pro rata share of any judgment. But sections 895.2 and 895.6 of the California Government Code only apply to "public entities that are parties to an agreement." Cal. Gov't Code § 895.6. Here, the County has not submitted any evidence that its involvement in the IHSS program is subject to an "agreement" as contemplated by these provisions of the California Government Code. Instead, the relationship between the County and State appears to be dictated by the statutory scheme created by sections 12300 through 12317.2 of the California Welfare and Institutions Code and regulations promulgated pursuant to that statutory authority. The County therefore has not

established that a "money judgment would be satisfied out of state funds." Beentjes, 397 F.3d at 778. Because this factor is "the predominant factor," the County's failure to show that State funds would be used to satisfy a judgment "is given additional weight." Id. The County also does not dispute that it has the power to take property in its own name, to sue or be sued, and that it has a corporate status separate from the State. The third through fifth Mitchell factors therefore weigh against a finding that the County is an arm of the state.

Only the second Mitchell factor weighs at all in favor of extending Eleventh Amendment immunity to the County for its involvement in the IHSS program. "In assessing the second Mitchell factor—whether the entity performs a central governmental function—we evaluate whether the [County] addresses 'a matter of statewide rather than local or municipal concern,' and 'the extent to which the state exercises centralized governmental control over the entity.'" Id. at 782 (quoting Belanger, 963 F.2d 253 and Savage v. Glendale Union High Sch., 343 F.3d 1036, 1044 (9th Cir. 2003)). The California Welfare and Institutions Code states the California Legislature's intent "that necessary in-home supportive services shall be provided in a uniform manner in every county based on individual need consistent with this chapter." Cal. Welf. & Inst. Code § 12301(a). To further this goal, DSS is required to "adopt regulations establishing a uniform range of services available to all eligible recipients based upon individual needs." Cal. Welf. & Inst. Code § 12301.1(a).

But within this framework of State oversight, counties are allowed at least some discretion in how they operate their local IHSS programs. See Cal. Welf. & Inst. Code § 12302 (involving creation of county plans for the provision of IHSS services within the counties).

While the Court is sympathetic to the apparent inequity of making the County liable for overtime payments that the State directed that the counties not provide until February 1, 2016, through a payroll system controlled and administered by the State, that inequity does not overcome the four other Mitchell factors that weigh in favor of denying Eleventh Amendment immunity to the County arising out of its role, with the State, as a joint employer of IHSS providers. See Bonnette v. Cal. Health & Welfare Agency, 704 F.2d 1465, 1470 (9th Cir. 1983) (citations omitted), disapproved on other grounds by Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 105 S. Ct. 1005 (1985) (concluding that the State and counties were "joint employers" of IHSS providers under the FLSA); see also Guerrero, 213 Cal. App. 4th at 929-30, 153 Cal. Rptr. 3d at 328-29. The Court therefore concludes that the County is not entitled to Eleventh Amendment immunity.

B. Joinder of the State of California as a Necessary and Indispensable Party

The County alternatively contends that this action should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(7) because the State is a necessary

party that cannot be joined in this action without violating its Eleventh Amendment immunity. Rule 19 "prescribes a bifurcated analysis to determine whether parties should or must be joined." Takeda v. Northwestern Nat'l Life Ins. Co., 765 F.2d 815, 819 (9th Cir. 1985). "First, a court must determine whether an absent party should be joined as a 'necessary party' under subsection (a). Second, if the court concludes that the nonparty is necessary and cannot be joined for practical or jurisdictional reasons, it must then determine under subsection (b) whether in 'equity and good conscience' the action should be dismissed because the nonparty is 'indispensable.'" Virginia Sur. Co. v. Northrop Grumman Corp., 144 F.3d 1243, 1247 (9th Cir. 1998). A party is "necessary" under Rule 19(a)(1) if:

> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
>
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> (i) as a practical matter impair or impede the person's ability to protect the interest; or
>
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19(a)(1). Under Rule 19(b), "[i]f a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed. R. Civ. P. 19(b). In deciding whether to proceed with the action despite the absence of a required party:

> The factors for the court to consider include:
>
> (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
>
> (2) the extent to which any prejudice could be lessened or avoided by:
>
> (A) protective provisions in the judgment;
>
> (B) shaping the relief; or
>
> (C) other measures;
>
> (3) whether a judgment rendered in the person's absence would be adequate; and
>
> (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

Fed. R. Civ. P. 19(b). Rule 19(b) "emphasizes practical consequences and its application depends on the circumstances of each case." Takeda, 765 F.2d at 819 (citing Provident Tradesmens Bank & Trust v. Patterson, 390 U.S. 102, 118-19, 88 S. Ct. 733, 742-43 (1968)).

As the Court previously stated, the State and County are "joint employers" of IHSS providers under the FLSA. See Bonnette, 704 F.2d at 1470; see also Guerrero, 213 Cal. App. 4th at 929-30, 153 Cal. Rptr. 3d at 328-29. "Two or more employers may jointly employ someone for purposes of the FLSA. All joint employers are individually liable for compliance with the FLSA." Bonnette, 704 F.2d at 1469; see also Maddock v. KB Homes, Inc., 631 F. Supp. 2d 1226, 1232 (C.D. Cal. 2007) ("Two or more employers may jointly employ an employee and be individually liable under the FLSA."). The individual liability of joint employers is "joint and several liability." See Boucher v. Shaw, 572 F.3d 1087, 1094 (9th Cir. 2009) (citing with approval Donovan v. Agnew, 712 F.2d 1509, 1514 (1st Cir. 1983) for the proposition that "a corporate officer with operational control of a corporation's covered enterprise is an employer along with the corporation, jointly and severally liable under the FLSA for unpaid wages."); see also Chao v. A-One Med. Servs., Inc., 346 F.3d 908, 917 (9th Cir. 2003) (citing with approval Moon v. Kwon, 248 F. Supp. 2d 201, 236-38 (S.D.N.Y. 2002) (applying [29 C.F.R. §] 791.2(a) to find joint and several liability for overtime wages from joint employers)). "It has long been the rule that it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit." Temple v. Synthes Corp., 498 U.S. 5, 7, 113 S. Ct. 315, 316 (1990); see also Fed. R. Civ. P. 19 advisory committee's note to 1966 amendment ("It should be noted particularly, however, that the description is not at variance with the settled authorities holding that a tortfeasor with the usual 'joint-and-several' liability is

merely a permissive party to an action against another with like liability.").

Because the County and State are jointly and severally liable for FLSA violations arising out of their status as joint employers of IHSS providers, the State is a permissive rather than necessary party and, "because the threshold requirements of Rule 19(a) have not been satisfied," no "inquiry under Rule 19(b) is necessary." Temple, 498 U.S. at 8, 111 S. Ct. at 316. The Court therefore denies the County's Motion to Dismiss brought pursuant to Federal Rule of Civil Procedure 12(b)(7).

C. Effective Date of the FLSA Regulations

As the Court has already explained, DOL's amendments to the regulations concerning the companionship exemption regulations were originally scheduled to go into effect on January 1, 2015, but the District Court for the District of Columbia vacated those regulations before their effective date. See Weil, 78 F. Supp. 3d 123. The D.C. Circuit reversed the District Court's order and remanded the action "for the entry of summary judgment in favor of" DOL. Weil, 799 F.3d at 1097. In granting DOL's Motion for Expedited Issuance of the Mandate, which the D.C. Circuit granted on October 13, 2015, the D.C. Circuit acknowledged that DOL had notified the Circuit that DOL "will not bring enforcement actions against any employer as to violations of the FLSA obligations resulting from the amended regulations until 30 days after the mandate

issues." (Docket No. 54, Ex. 16.) DOL issued a policy statement on October 27, 2015, confirming that it would not bring enforcement actions against any employer for FLSA violations of the amendments to the companionship services regulations for 30 days after the D.C. Circuit issued its mandate. 80 Fed. Reg. 65646-01.

Relying on Kinkead v. Humana, Inc., 206 F. Supp. 3d 751 (D. Conn. 2016), Plaintiffs contend that the D.C. Circuit's opinion reversing the District Court should apply retroactively to allow enforcement of the applicable regulations beginning on the original effective date of January 1, 2015. In adopting a January 1, 2015 effective date for the regulations, the Kinkead court relied on the Supreme Court's retroactivity analysis in Harper v. Virginia Dept. of Taxation, 509 U.S. 86, 113 S. Ct. 2510 (1993). See Kinkead, 206 F. Supp. 3d at 754 ("In light of the fact that the district court vacated the new rule, it is not surprising that defendants refrained from paying overtime to plaintiff while the district court's decision remained valid. But, of course, the district court ruling was promptly challenged in the D.C. Circuit, and the real question here is whether the D.C. Circuit's subsequent reversal of the district court's vacatur means that defendants became liable to pay plaintiff overtime for the periods that she worked while the district court's decision had been in effect. The answer to this question follows from the well-established rule that judicial decisions are presumptively retroactive in their effect and operation.").

In Harper, the Supreme Court held that a court's "application of a rule of federal law to the parties before the Court requires every court to give retroactive effect to that decision." Harper, 509 U.S. at 90, 113 S. Ct. at 2513. Specifically, the Supreme Court stated: "When this Court applies a rule of law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." Id. at 97, 113 S. Ct. at 2517. This Court declines to adopt the analysis in Kinkead because it conflated the retroactive effect of the rule of law announced by the D.C. Circuit's opinion in Weil—that DOL had the authority to amend the FLSA regulations at issue and that the amendments were reasonable and not arbitrary and capricious—with the retroactive application of the amended regulations themselves. The rule of law announced by the D.C. Circuit is given retroactive effect by allowing DOL to reinstate those regulations without having to begin a new rule-making process. That is not the same thing as reinstating an earlier and judicially vacated effective date and retroactively creating liability for violations of the reinstated regulations as if the District Court's vacation of the regulations had never occurred.

Both the D.C. Circuit and DOL understood that the Circuit's ruling did not have the effect of retroactively establishing an effective date of January 1, 2015. To the contrary, both the D.C. Circuit and DOL understood and intended for the regulation to become

effective and enforceable no earlier than November 12, 2015, 30 days after the Circuit issued its mandate on October 13, 2015. As the D.C. Circuit implied in its order expediting the issuance of its mandate, the delay in enforcement that DOL indicated it would provide following issuance of the mandate would allow employers a period of time to comply with the reinstated regulations. (Docket No. 54, Ex. 16 at 2-3.) Kinkead did not address this compelling evidence of the intent of both the D.C. Circuit and DOL. Indeed, to enforce an effective date retroactively deprives employers, who were acting in accordance with then-binding guidance from the District Court of the District of Columbia, of the ability to plan for the enforcement of the regulations through responsible budgeting and avoiding the payment of overtime wages by adding workers or adjusting work schedules.

The procedural posture of Weil and the D.C. Circuit's actions are similar to an appellate court's reversal of a district court's issuance of an injunction enjoining the enforcement of a regulation. In such instances, the Ninth Circuit, like the D.C. Circuit did, has announced an effective date of the reinstated regulations, but has not retroactively enforced the regulations. See Stormans, Inc. v. Selecky, 586 F.3d 1109, 1141 n.18 (9th Cir. 2009) ("The new rules . . . are effective as of the filing date of this opinion, and, except to the extent that the district court, upon reconsideration in light of this disposition, issues a preliminary injunction as to the named plaintiffs and their employers, may be enforced in accordance with the law of the state

of Washington."). Concluding that the applicable regulations may be enforced by Plaintiffs and the putative collective beginning no earlier than November 12, 2015, is also consistent with the general rule that a private right of action should ordinarily not exist when the applicable rule could not be enforced by the relevant enforcement agency. See Wilshire Westwood Assocs. v. Atlantic Richfield Corp., 881 F.2d 801, 810 (9th Cir. 1989) (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140, 65 S. Ct. 161, 164 (1944) ("Good administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons.")).

Here, based on the District Court's vacation of the regulation, the D.C. Circuit's orders, and DOL's announcement of a new effective date, DOL could not enforce the regulations until November 12, 2015. The Court adopts this date as the appropriate date on which the putative collective period could begin.[4] While DOL also announced that it would exercise its prosecutorial discretion not to enforce the reinstated regulations through December 31, 2015, this discretionary action does not necessarily limit the private

[4] At least one other Court has adopted November 12, 2015, as the effective date of the regulations, although it did so for somewhat different reasons. See Bangoy v. Total Homecare Solutions, LLC, 2015 WL 12672727, Case No. 1:15-CV-573 (S.D. Ohio Dec. 21, 2015). Other courts have adopted the October 13, 2015 date of the issuance of the D.C. Circuit's mandate as the effective date of the regulations. A majority of courts, usually without engaging in an analysis of their own, have followed Kinkead.

enforcement rights of Plaintiffs and the putative collective. Because the putative collective began receiving overtime wages on February 1, 2016, the putative collective period begins on November 12, 2015, and continues through January 31, 2016.

Conclusion

The Court concludes that the County is not an arm of the state for Eleventh Amendment immunity purposes, that the State is not a necessary and indispensable party to this action, and that the FAC otherwise states a viable claim for relief. The Court therefore denies the County's Motion to Dismiss. The Court does, however, reject Plaintiff's efforts to enforce the FLSA companionship exemption regulations retroactively to January 1, 2015. Instead, the Court concludes that the putative collective period extends from November 12, 2015, through January 31, 2016.

The Court recognizes that the County could immediately appeal this Court's denial of its Motion to Dismiss based on Eleventh Amendment immunity. See Savage, 343 F.3d at 1040 ("[E]ntities that claim to be arms of the State may use the collateral order doctrine to appeal a district court order denying a claim of Eleventh Amendment immunity.").[5] To avoid the potential wasted effort, costs, and issues involved in providing

[5] Plaintiffs could have avoided this appellate issue and the delay caused by such an appeal, by commencing this action in state court. Pursuing this action in state court would also allow Plaintiffs to pursue the claims they asserted against DSS in their original Complaint but abandoned when they filed the FAC.

notice to nearly 200,000 members of the collective, if the County elects to appeal the Court's denial of its Motion to Dismiss, the Court will delay conditionally certifying the collective until no earlier than October 18, 2017. Additionally, should the County appeal, the Court would consider certifying, pursuant to 28 U.S.C. § 1292(b), an interlocutory appeal concerning the effective date of the applicable regulations because, as the disagreement among the various district courts shows, there appears to be a substantial ground for difference of opinion concerning the effective date of the regulations, and establishing if the collective period runs for 13 months, two-and-a-half months, or one month, may materially advance the ultimate termination of the litigation.

The Court orders the parties to meet and confer regarding the possibility of the County's collateral appeal and the advisability of an interlocutory appeal of the Court's adoption of a November 12, 2015 effective date for the applicable regulations. The parties shall also discuss an appropriate notice procedure should the action proceed in this Court without an appeal, and what, if any, tolling may apply to the claims of the members of the putative collective based on the filing date of the action and any delay caused by an appeal of this Order. The parties shall file a Joint Report summarizing their views on these issues, and any proposals for providing notice to the putative collective, by no later than October 11, 2017.

IT IS SO ORDERED.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TRINA RAY, individually, and on behalf of others similarly situated, *Plaintiff-Appellee,* v. COUNTY OF LOS ANGELES, *Defendant-Appellant.*	No. 17-56581 D.C. No. 2:17-cv-04239-PA-SK
TRINA RAY; SASHA WALKER, individually, and on behalf of all others similarly situated, *Plaintiffs-Appellants,* v. LOS ANGELES COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES, Erroneously Sued As County of Los Angeles, *Defendant-Appellee.*	No. 18-55276 D.C. No. 2:17-cv-04239-PA-SK ORDER

Filed October 8, 2019.

Before: Kim McLane Wardlaw and Mark J. Bennett, Circuit Judges, and Kathleen Cardone,* District Judge.

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* The Honorable Kathleen Cardone, United States District Judge for the Western District of Texas, sitting by designation.

ORDER

The opinion filed on August 22, 2019 is amended as follows:

On page six of the opinion, in the paragraph beginning "As employers of the homecare providers," replace <As employers of the homecare providers, the State and County> with <Assuming, without deciding, the State and County are employers of the homecare providers, they>.

With this amendment, the panel votes to deny the appellant's petition for panel rehearing. [Dkt. 51] Judges Wardlaw and Bennett vote to deny the appellant's petition for rehearing en banc [DKT No. 51], and Judge Cardone so recommends. The full court has been advised of the petition for rehearing en banc, and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for panel rehearing and rehearing en banc is therefore **DENIED.** No further petitions for panel or en banc rehearing shall be permitted.

IT IS SO ORDERED.

Matthew C. Helland, CA SBN 250451
helland@nka.com
Daniel S. Brome, CA SBN 278915
dbrome@nka.com
NICHOLS KASTER, LLP
235 Montgomery St., Suite 810
San Francisco, CA 94104
Telephone: (415) 277-7235
Facsimile: (415) 277-7238

Attorneys for Plaintiffs and Others Similarly Situated

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Trina Ray and Sasha Walker, individually, and on behalf of others similarly situated, Plaintiffs, v. California Department of Social Services, and Los Angeles County Department of Public Social Services, Defendants.	**Case No. 2:17-cv-04239-PA-SK** **FIRST AMENDED COLLECTIVE ACTION COMPLAINT FOR DAMAGES AND RESTITUTION** (Filed Jul. 21, 2017) **(1) Failure to Pay Overtime Compensation in Violation of the Fair Labor Standards Act (29 U.S.C. § 201, et seq.)**

PRELIMINARY STATEMENT

1. This is a collective action brought by Individual Plaintiffs Trina Ray and Sasha Walker ("Plaintiffs") on their own behalf and on behalf of the proposed

FLSA Collective. Plaintiffs and the putative collective are or were employed by the Los Angeles County Department of Public Social Services ("DPSS" or "Defendant"), as homecare workers, home care providers, or in other similar job titles through the In-Home Supportive Services program (collectively, "IHSS Homecare Providers") and were denied proper compensation as required by federal wage and hour laws. These employees are similarly situated under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216(b).

2. The FLSA Collective is made up of all persons who have been employed by Defendant as IHSS Homecare Providers in the County of Los Angeles, and who were paid for hours in excess of forty (40) per week at a rate of less than 1.5 times their regular rate at any time from January 1, 2015 to February 1, 2016 (the "Collective Period").

3. During the Collective Period, Defendant failed to pay overtime compensation to Plaintiffs and each member of the FLSA Collective as required by federal law. Plaintiffs seek relief for themselves and for the FLSA Collective under the FLSA requiring Defendant to pay appropriate overtime compensation.

THE PARTIES

4. Plaintiff Trina Ray ("Plaintiff Ray") is an individual residing in Los Angeles, California (Los Angeles County).

5. Plaintiff Ray is currently employed by Defendant as an IHSS Homecare Provider. She worked the first of two stints of employment for Defendants from approximately 2010 or 2011 until approximately October 2015. Defendant then re-hired Plaintiff in approximately September or October 2016 and have employed her since. Throughout her employment with Defendant, Plaintiff Ray has reported to the IHSS office located in Rancho Dominguez, California (Los Angeles County).

6. Plaintiff Sasha Walker ("Plaintiff Walker") is an individual residing in Los Angeles, California (Los Angeles County).

7. Plaintiff Walker is currently employed by Defendant as an IHSS Homecare Provider, and has been so employed since 2006. Throughout her employment with Defendant, Plaintiff Walker has provided services in Los Angeles County.

8. The In-Home Supportive Services ("IHSS") program provides in-home assistance to eligible aged, blind, and disabled individuals as an alternative to out-of-home care. IHSS currently serves over 550,000 recipients through over 460,000 homecare workers (providers). Services covered by the IHSS program include domestic services (e.g. housework, meal preparation, laundry, running errands), non-medical care services (such as bathing, dressing, bladder care); transportation services (to medical appointments), and paramedical services (necessary health care activities

that recipients would normally perform for themselves were it not for their functional limitations).

9. According to its website, the Los Angeles Department of Public Social Services (DPSS) is the second largest department in Los Angeles County and is the largest social service agency in the United States. DPSS is responsible for the administration and oversight of the IHSS program at the county level.

10. Defendant's gross annual sales made or business done has been $500,000.00 or greater at all times relevant herein. Defendant operates in interstate commerce by, among other things, receiving federal funding for the programs they administer.

JURISDICTION AND VENUE

11. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 as this case is brought under the FLSA, 29 U.S.C. §§ 201 *et seq*. Plaintiffs Ray and Walker have signed consent forms to join this lawsuit, which have previously been filed with the Court. Other individuals have filed consent forms to join this action, and as this case proceeds, it is likely that still other individuals will file consent forms and join as opt-in plaintiffs.

12. Venue is proper in the United States District Court, Central District of California pursuant to 28 U.S.C. § 1391, because Defendant operates in this district and because a substantial part of the events giving rise to the claims occurred in this district.

FACTUAL ALLEGATIONS

13. Plaintiffs re-allege and incorporate by reference the above paragraphs as if fully set forth herein.

14. Plaintiffs and those similarly situated are individuals who were or are employed by Defendant as homecare providers through the In-Home Supportive Services program in Los Angeles County at any time between January 1, 2015 and February 1, 2016 (the "Collective Period"). As IHSS Homecare Providers, Plaintiffs and the similarly situated individuals were responsible for providing in-home assistance for IHSS recipients.

15. At all relevevant times, Defendant is, or has been, Plaintiffs' and the similarly situated individuals' "employers" within the meaning of the FLSA, 29 U.S.C. § 203(d).

16. For example, Defendant DPSS exercises significant control over IHSS Homecare Providers' work. DPSS is responsible for hiring and orientation for IHSS Homecare Providers in Los Angeles County. DPSS maintains several offices within Los Angeles County, which serve as the employment touchpoints for IHSS Homecare Providers. DPSS is responsible for reviewing requests by IHSS Homecare Providers to work more than the pre-approved maximum weekly hours. IHSS Homecare Providers regularly interact with DPSS employees regarding changes in recipients' health and/or condition. IHSS Homecare Providers also interact with DPSS employees regarding inquiries related to their pay.

17. DPSS is responsible for setting IHSS Homecare Providers' rates of pay. In June 2015, the Los Angeles County board of supervisors voted to raise the wage for county IHSS workers. *See http://www.latimes.com/local/lanow/la-me-lncounty-home-care-worker-raise-20150616-story.html*.

18. Although IHSS Homecare Providers receive paychecks from the State of California, DPSS is responsible for payment of a share of IHSS Homecare Providers' wages. The raises for IHSS Homecare Providers approved in 2015 were expected to cost the County of Los Angeles over $42 million in 2015-16 and 2016-17.

19. DPSS is responsible for setting IHSS Homecare Providers' hours of work, in that DPSS determines the hours for which IHSS Homecare recipients are eligible. DPSS also exercises control over IHSS Homecare Providers' hours of work by reviewing requests to exceed the approved number of services hours, and by communicating with IHSS Homecare Providers regarding unauthorized overtime work.

20. DPSS has the right to discipline and fire IHSS Homecare Providers. For example, DPSS is responsible for monitoring IHSS Homecare Providers' hours, following progressive discipline if IHSS Homecare Providers exceed their approved hours, and terminating/suspending IHSS Homecare Providers for repeated instances of exceeding the approved number of hours.

21. DPSS is responsible for inputting employment records, such as Providers' contact information, into a statewide database that maintains employment records for IHSS Homecare Providers.

22. During the Collective Period, Defendant suffered and permitted Plaintiffs to regularly work more than forty (40) hours in certain workweeks without providing appropriate overtime compensation. Upon information and belief, Defendants also suffered and permitted the members of the FLSA Collective to regularly work more than forty (40) hours in certain workweeks during the Collective Period.

23. For example, Plaintiff Ray worked approximately 271 hours each month from January through June 2015, approximately 280 hours in July 2015, and approximately 283 hours in August and September 2015. As a result, she worked over 40 hours the vast majority (if not all) of the weeks between January 2015 and September 2015. Indeed, 271 monthly hours equates to an average of over 9 hours per day over 30 calendar days in a month, which leads to an average of approximately 63 hours per week. Thus, from January 2015 through September 2015 Plaintiff Ray worked an average of at least 63 hours per week. It is mathematically impossible to work 271 hours in a month without working over 40 hours in at least one week.

24. By way of further example, Plaintiff Walker worked approximately 283 in each month from July through December of 2015, and approximately 263 hours from January through June of 2015. As a result,

she worked over 40 hours the vast majority (if not all) of the weeks in 2015. Indeed, 283 monthly hours equates to an average of over 9.4 hours per day over 30 calendar days in a month, which leads to an average of approximately 66 hours per week. Thus, from July 2015 through December 2015 Plaintiff Walker worked an average of at least 66 hours per week. It is mathematically impossible to work 283 hours in a month without working over 40 hours in at least one week.

25. During the Collective Period, Plaintiffs and those similarly situated were not compensated in accordance with the FLSA because they were not paid proper overtime wages for all hours worked in excess of forty (40) per workweek. Specifically, rather than paying them 1.5 times their regular rate of pay for all hours worked over forty (40) in a workweek, which is required by the FLSA (29 U.S.C. § 207), Defendant paid them "straight time" for all of their overtime hours worked. This was true for all IHSS Homecare Providers throughout the Collective Period and specifically in the example weeks and months outlined in paragraphs 23 and 24 above. Defendant's failure to pay the additional half-time for overtime hours violated the FLSA.

26. Plaintiffs and those similarly situated have been eligible for overtime since at least January 1, 2015, when the Department of Labor implemented new regulations regarding overtime pay for home health care workers. Defendant was aware of the new regulations but did not begin paying overtime to IHSS Homecare Providers until February 1, 2016.

27. Defendant was aware, or should have been aware, that Plaintiffs and the FLSA Collective performed work that required them to work overtime. For example, Defendant informed Plaintiffs of the total number of service hours their clients (the recipient enrolled in the IHSS program) were approved to receive each month. In addition, Defendant required Plaintiff and those similarly situated to report their work hours via weekly timesheets, which routinely reflected overtime hours.

COLLECTIVE ACTION ALLEGATIONS

28. Plaintiffs bring this action on behalf of themselves and other similarly situated employees as authorized under the FLSA, 29 U.S.C. § 216(b). Plaintiff's consent forms have previously been filed with the Court.

29. The proposed FLSA Collective class is defined as follows:

> All people employed by Defendant as homecare workers, home care providers, or in other similar job titles, through the In-Home Supportive Services program and in Los Angeles County, and who were paid for hours in excess of forty (40) per week at a rate of less than 1.5 times their regular rate at any time from January 1, 2015 to February 1, 2016.

30. Pursuant to the FLSA, 29 U.S.C. § 207, employers are generally required to pay overtime compensation at a rate of 1.5 times an employees' regular

rate of pay for hours worked over forty (40) in a workweek.

31. The FLSA contains an exemption from overtime for "domestic service" workers who provide companionship and other services to individuals who are unable to care for themselves and also contains an exemption for live-in domestic service workers. 29 U.S.C. §§ 213(a)(15) and 213(b)(21).

32. In October 2013, the United States Department of Labor determined that these exemptions do not apply to domestic-service workers employed by third-party agencies or employers.

33. Since January 1, 2015, federal regulations have provided that domestic-service workers employed by third-party agencies or employers are not exempt from the FLSA's minimum wage and overtime requirements. 29 C.F.R. § 552.109(a).

34. As of January 1, 2015, all domestic-service workers employed by third-party agencies or employers are entitled to overtime compensation at an hourly rate of 1.5 times the employee's regular rate of pay for hours worked over forty (40) in a work week.

35. During the Collective Period, Plaintiffs and the FLSA Collective routinely worked in excess of forty (40) hours per workweek without receiving proper overtime compensation for their overtime hours worked.

36. Despite the Department of Labor's positon that domestic-service workers employed by third-party

agencies or employers are not exempt from the FLSA's minimum wage and overtime requirements, Defendant maintained its practice of failing to pay the proper overtime compensation to Plaintiffs and the FLSA Collective from January 1, 2015 to February 1, 2016. In so doing, Defendant violated the provisions of the FLSA, 29 U.S.C. §§ 207 and 215(a)(2).

37. Defendant was aware that it was not compensating Plaintiffs and the FLSA Collective for overtime between January 1, 2015 and February 1, 2016, and was aware of the new Department of Labor regulations.

38. Defendant knowingly, willfully, or in reckless disregard of the law, maintained an illegal practice of failing to pay Plaintiff and the FLSA Collective proper overtime compensation for all hours worked over forty (40).

39. Defendant was liable under the FLSA for failing to properly compensate Plaintiffs and the FLSA Collective, and as such, notice should be sent to the Collective. There are numerous similarly situated current and former employees of Defendant who have been denied overtime pay in violation of the FLSA who would benefit from the issuance of Court-supervised notice of this lawsuit and the opportunity to join. Those similarly situated employees are known to Defendant and are readily identifiable through Defendant's records.

CLAIM FOR RELIEF

FAIR LABOR STANDARDS ACT

29 U.S.C. §§ 201 et seq.

(On Behalf of Plaintiff and the FLSA Collective)

40. Plaintiffs and the FLSA Collective allege and incorporate by reference the allegations in the preceding paragraphs.

41. The FLSA requires covered employers, such as Defendant, to compensate all non-exempt employees at a rate of not less than one and one-half times the regular rate of pay for work performed in excess of forty hours per work week.

42. Plaintiffs and the FLSA Collective are entitled to be paid overtime compensation for all hours worked over forty (40) per workweek. By failing to pay Plaintiffs and the FLSA Collective overtime compensation of one and one-half times their hourly rate of pay for the overtime hours they worked, Defendant violated the FLSA, 29 U.S.C. §§ 201 *et seq*.

43. Defendant knew, or showed reckless disregard for the fact, that it failed to pay these individuals overtime compensation in violation of the FLSA.

44. The foregoing conduct, as alleged, constitutes a willful violation of the FLSA, within the meaning of 29 U.S.C. § 255(a).

45. Plaintiffs, on behalf of themselves and the FLSA Collective, seek damages in the amount of all unpaid overtime compensation owed to themselves

and the FLSA Collective, liquidated damages as provided by the FLSA, 29 U.S.C. § 216(b), interest, and such other legal and equitable relief as the Court deems just and proper.

46. Plaintiffs, on behalf of themselves and the FLSA Collective, seek recovery of attorneys' fees and costs to be paid by Defendant, as provided by the FLSA, 29 U.S.C. § 216(b).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, on behalf of themselves and all members of the FLSA Collective, pray for relief as follows:

A. Designation of this action as a collective action on behalf of Plaintiffs and those similarly situated and prompt issuance of notice pursuant to 29 U.S.C. § 216(b) to all those similarly situated apprising them of the pendency of this action, and permitting them to assert timely FLSA claims in this action by filing individual consent forms pursuant to 29 U.S.C. § 216(b);

B. Judgment that Plaintiffs and those similarly situated are non-exempt employees entitled to protection under the FLSA;

C. Judgment against Defendant for violation of the overtime provisions of the FLSA;

D. Judgment that Defendant's violations as described above were willful;

E. An award in an amount equal to Plaintiff's and the FLSA Collective's unpaid back wages at the applicable overtime rate;

F. An award to Plaintiffs and those similarly situated for the amount of unpaid wages owed, liquidated damages and penalties where provided by law, and interest thereon;

G. An award of reasonable attorneys' fees and costs pursuant to 29 U.S.C. § 216 and/or other applicable laws;

H. An award of prejudgment interest to the extent liquidated damages are not awarded;

I. Leave to add additional plaintiffs by motion, the filing of written consent forms, or any other method approved by the Court;

J. Leave to amend to add additional defendants, if necessary; and

K. For such other and further relief, in law or equity, as this Court may deem appropriate and just.

Dated: July 21, 2017 **NICHOLS KASTER, LLP**

By: s/Matthew C. Helland
Matthew C. Helland

Attorneys for Plaintiff
and Others Similarly Situated

Matthew C. Helland, CA SBN 250451
helland@nka.com
Daniel S. Brome, CA SBN 278915
dbrome@nka.com
NICHOLS KASTER, LLP
235 Montgomery St., Suite 810
San Francisco, CA 94104
Telephone: (415) 277-7235
Facsimile: (415) 277-7238

Attorneys for Plaintiff and Others Similarly Situated

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Trina Ray, individually, and on behalf of others similarly situated, Plaintiff, v. California Department of Social Services, and Los Angeles County Department of Public Social Services, Defendants.	**Case No. 2:17-cv-04239-PA-SK** **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR CONDITIONAL CERTIFICATION AND DISTRIBUTION OF JUDICIAL NOTICE** (Filed Jul. 3, 2017) **Date:** July 31, 2017 **Time:** 1:30 p.m. **Room:** 9A **Hon. Percy Anderson**

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[1] **I.INTRODUCTION**

Plaintiff and those she seeks to represent were employed by the Los Angeles Department of Public Social Services ("DPSS") and the California Department of Social Services ("CDSS") as homecare providers through the In-Home Supportive Services program.

Defendants DPSS and CDSS paid these workers straight-time pay (instead of time-and-a-half) for hours worked in excess of 40 in a week until February 1, 2016, despite their knowledge that the workers were eligible for overtime pay prior to that date. Plaintiff seeks conditional certification of this case as a collective action under the Fair Labor Standards Act ("FLSA") on behalf of the following defined Collective:

> All people employed by Defendants as home-care workers, home care providers, or in other similar job titles, through the In-Home Supportive Services program and in the County of Los Angeles, who were paid for hours in excess of forty (40) per week at a rate of less than 1.5 times their regular rate at any time from January 1, 2015 to February 1, 2016 ("LA IHSS Homecare Providers").

The Court should grant this motion because all LA IHSS Homecare Providers are similarly situated with respect to the relevant pay policies and practices.

As is commonplace in FLSA collective actions, the Court should authorize Judicial Notice of this case to members of the Collective. Prompt issuance of Judicial Notice is important because, unlike in a Rule 23 class action, the FLSA statute of limitations on each putative plaintiff's individual claim continues to run until the employee files a consent form with the Court. Since CDSS and DPSS began paying overtime in February 2016, and the statute of limitations for non-willful violations of the FLSA is two years, FLSA claims in this case are quickly disappearing. Plaintiffs therefore

request that the Court grant this motion promptly and authorize distribution of their proposed Judicial Notice.

[2] **II. FACTUAL BACKGROUND**

Plaintiff and LA IHSS Homecare Providers are similarly situated because they had similar job responsibilities, were subject to similar hiring requirements, were subject to the same policies regarding pay, were all paid straight time for overtime until February 1, 2016, and were all therefore subject to Defendants' delayed implementation of new FLSA regulations.

A. IHSS Homecare Providers Have Similar Job Responsibilities

Plaintiff and other LA IHSS Homecare Providers assist seniors and people with disabilities ("consumers") with personal and household tasks. While the particular assistance needed for each consumer will vary according to their medical conditions and functional abilities, LA IHSS Homecare Providers' work is limited to domestic and personal care services. (Helland Decl. Exh. 1, p. 13-14, 17-22.) Tasks can include housework, meal preparation, dressing, bathing, assistance with toileting, feeding, accompaniment to medical appointments, and other similar domestic and personal care services. (*Id.* p. 17-21; Ray Decl. ¶ 2; Nichols Del. Sutherland Decl. ¶ 2.) A county social worker conducts an assessment of each consumer to determine the specific domestic services provided and

the number of monthly hours allotted for services. (Helland Decl. Exh. 1, p. 5, 13-14.)

B. IHSS Homecare Providers Were Subject to Similar Hiring Requirements

All LA IHSS Homecare Providers were required, by DPSS policy and state law, to take the same steps in order to become an LA IHSS Homecare Provider Plaintiff and other LA IHSS Homecare Providers were required to: (1) attend an "on-site, in-person provider orientation to obtain information about IHSS rules and requirements for being a provider" (2) Complete a CDSS IHSS Provider Enrollment Form (also known as form SOC 426) and submit it to Los Angeles County in person, along with a government-issued photo id and social security card (3) complete and sign a Provider Enrollment Agreement, CDSS form SOC 846, [3] indicating that the provider agrees to the rules of the IHSS program, and finally (4) submit fingerprints and pass a Criminal Background Investigation done by the Department of Justice. (Helland Decl. Exhs. 2, 3, 4; *see also* Ray Decl. ¶ 3; Nichols Del. ¶ 3; Sutherland Decl. ¶ 3.) Plaintiff and other LA IHSS Homecare Providers could not be enrolled as providers or receive payment until completing all of the above requirements.

C. IHSS Homecare Providers are Subject to the Same State and County Agency Policies Regarding Pay

The CDSS and the DPSS impose uniform pay policies and requirements or all LA IHSS Homecare Providers. The CDSS pays LA IHSS Homecare Providers and sets rules for the IHSS Program. (Helland Decl. Exh. 1 p. 8.) The county (here, DPSS), determines the consumers' approved hours (to be worked by the IHSS Homecare Provider), collects timesheets, maintains payroll, and inputs timesheets into the CDSS computer. (*Id*.)

DPSS required that Plaintiff and all other LA IHSS Homecare Providers follow the same hours reporting process in order to get paid. LA IHSS Homecare Providers were to complete paper timesheets with the number of hours worked each day for the bimonthly pay period. (Helland Decl. Exh. 5.) Both the provider and the IHSS recipient/recipient's authorized representative were required to sign each timesheet. (*Id.*) Plaintiff and other IHSS providers were required to mail completed timesheets to a "Timesheet Processing Facility" in Chico, CA. (*Id.*)

D. Defendants Paid IHSS Homecare Providers at a Uniform Rate, with Straight Time for Overtime

Defendant paid all LA IHSS Homecare Providers the same hourly rate. which was $9.65 per hour in 2015. (Helland Decl. Exh. 5.) Plaintiff and all other LA

IHSS Homecare Providers were paid "straight time" for all hours worked during the time period covered by this case, and were not paid overtime wages ii they worked more than 40 hours a week. (*See* Helland Decl. Exh. 6, p. 3 ("[all] [4] IHSS providers will continue to be paid straight-time at the locally bargained hourly wage rate in the same manner in which hours were reported and providers were paid in 2014"); Ray Decl. ¶ 5; Nichols Del. ¶ 5; Sutherland Decl. ¶ 5.)

E. Defendants Took Uniform Steps in Their Delayed Implementation of FLSA Regulations

On October 1, 2013, the Department of Labor published its Final Rule on the Application of the FLSA to Domestic Service. This rule made IHSS Homecare Providers employed by third party agencies like DPSS and CDSS eligible for overtime under the FLSA. (Helland Decl. Exh. 6, p. 1.) On October 8, 2014, CDSS issued an All County Letter explaining the changes in federal law and informing county social services agencies that the new overtime requirements would go into effect on January 1, 2015. (Helland Decl. Exh. 7, p. 5.) A CDSS SOC 846 form dated 9/2014 states that "[b]eginning January 1, 2015, IHSS providers will get paid overtime (one and a half times the regular pay rate) when they work more than 40 hours in a workweek." (Helland Decl. Exh. 8, p. 1.)

However, CDSS delayed implementation of these changes due to a legal challenge to the Department of

Labor regulations. (*See* Helland Decl. Exhs. 6, 9.) On January 23, 2015, the CDSS issued an All-County letter informing County Welfare Directors of the implementation halt and stating "[a]ll county IHSS offices and county public authorities should continue to operate under the requirements and regulations for payment of wages that were in effect on December 31, 2014." (Helland Decl. Exh. 6, at 3.) On August 21, 2015 the United States Court of Appeals for the District of Columbia Circuit held that the DOL regulations were valid and enforceable as issued. *See Home Care Ass'n of Am. v. Weil*, 799 F.3d 1084 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 2506 (2016). On November 4, 2015, CDSS announced that it would begin paying IHSS providers overtime compensation effective February 1, 2016. (Helland Decl. Exh. 10.) CDSS issued [5] subsequent guidelines to counties for implementation of overtime pay. (*See e.g.* Helland Decl. Exh. 11.)

F. Plaintiff and Some LA IHSS Homecare Providers Worked Overtime

Plaintiff Ray worked for CDSS and DPSS as an LA IHSS Homecare Provider from approximately 2010 or 2011 until approximately October 2015, and then again from September or October 2016 through the present. (Ray Decl. ¶¶ 2-3.) During the time period relevant to this case, Plaintiff was approved to provide 283 hours of services each month, which is an average of approximately 66 hours per week. (*Id.* ¶ 4; Compl., ECF No. 1 ¶ 21.) As a result, Plaintiff Ray regularly worked in excess of 40 weekly hours. (Ray Decl. ¶ 4;

Compl., ECF No. 1 ¶ 21.) CDSS and DPSS did not pay her for overtime pay at a rate of 1.5 times her regular rate for weekly hours in excess of 40. (Ray Decl. ¶ 5; Helland Decl. Exh. 6, p. 3.) Other LA IHSS Homecare Providers who have joined this case similarly worked over 40 hours in a week in 2015 without payment of overtime. (Nichols Decl. ¶¶ 4-5; Sutherland Decl. ¶¶ 4-5.) Many other LA IHSS Homecare Providers likewise worked overtime during 2015. (Ray Decl. ¶ 7; Nichols Decl. ¶ 7; Sutherland Decl. ¶ 7.) According to CSDD, 21% of IHSS Homecare Providers worked overtime in February 2016. (Helland Decl. Exh. 12, p. 11.)

III. ARGUMENT

A. IHSS Homecare Providers are Similarly Situated, So Conditional Certification Under the FLSA is Warranted

The FLSA specifically provides that an action for unpaid overtime wages may be maintained "by any one or more employees for and in behalf of himself of themselves and other employees *similarly situated*." 29 U.S.C. § 216(b) (emphasis added). The FLSA's collective action procedure allows for efficient adjudication of similar claims, so "similarly situated" employees, whose claims are often small and not likely to be brought on an individual basis, may join together and pool their [6] resources to prosecute their claims. *See Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989).

Three important features define FLSA collective actions. First, in order to participate in a collective action, an employee must "opt in," meaning he or she must consent in writing to join the suit and that consent must be filed with the court. *Misra v. Decision One Mortg. Co.*, 673 F. Supp. 2d 987, 992 (C.D. Cal. 2008). Second, the statute of limitations runs on each employee's claim until his or her consent is filed. *See* 29 U.S.C. § 256(b); *Johnson v. Serenity Transportation, Inc.*, 2016 WL 1569984, at *4 (N.D. Cal. Apr. 19, 2016). Third, to serve the FLSA's "broad remedial purpose," district courts have the discretionary power to order notice to other potentially similarly situated employees to inform them of their right to join the case. *Hoffmann-La Roche*, 493 U.S. at 173.

The collective action mechanism lowers litigation costs for individual plaintiffs, and decreases the burden on the courts through "efficient resolution in one proceeding of common issues of law and fact arising from the same alleged discriminatory activity." *Hoffmann-La Roche*, 493 U.S. at 170. "These benefits . . . depend on employees receiving accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate." *Id.* Thus, the district court "has a managerial responsibility to oversee the joinder of additional parties to assure that the task is accomplished in an efficient and proper way." *Id.* at 170-71.

i. The FLSA's two-stage certification process

Generally, district courts in the Ninth Circuit, including the Central District of California, follow a two-stage process to determine whether a collective action under the FLSA should be certified. *See, e.g.*, *Javine v. San Luis Ambulance Serv., Inc.*, 2015 WL 12672090, at **6-7 (C.D. Cal. Jan. 13, 2015); *Smith v. Bimbo Bakeries USA, Inc.*, 2013 WL 4479294, at *2 (C.D. Cal. Aug. 19, 2013); *Mitchell v. Acosta Sales, LLC*, 841 F. Supp. 2d 1105, 1115 (C.D. Cal. 2011); *Kress v.* [7] *PricewaterhouseCoopers, LLP*, 263 F.R.D. 623, 627 & n.3 (E.D. Cal. 2009); *Misra v. Decision One Mortg. Co.*, 673 F. Supp. 2d 987 (C.D. Cal. 2008); *Leuthold v. Destination Am., Inc.*, 224 F.R.D. 462, 466-67 (N.D. Cal. 2004) (noting that most courts prefer the two-step approach). This District has described the two-stage process as follows:

> Under this two-step approach, a district court first determines, based on the submitted pleadings and affidavits, whether the proposed class should be notified of the action. Since this first determination is generally made before the close of discovery and based on a limited amount of evidence, the court applies a fairly lenient standard and typically grants conditional class certification. The standard applied is less rigorous than the commonality requirement of Rule 23.
>
> To satisfy the initial step, a plaintiff need only make a modest factual showing sufficient to demonstrate that [she] and potential plaintiffs together were victims of a common policy

> or plan that violated the law. If conditional class certification is granted, the district court may authorize the named plaintiff to send written notice to all potential plaintiffs and set a deadline for those plaintiffs to opt-in to the suit.
>
> The second step in this approach occurs after discovery is complete, at which time the defendants may move to decertify the class. In this second-step determination, the court makes a factual determination about whether the plaintiffs are similarly situated by weighing such factors as (1) the disparate factual and employment settings of the individual plaintiffs, (2) the various defenses available to the defendant which appeared to be individual to each plaintiff, and (3) fairness and procedural considerations. If the district court determines that the plaintiffs are not similarly situated, the court may decertify the class and dismiss the opt-in plaintiffs without prejudice.

Misra, 673 F. Supp. 2d at 992-93 (citations and quotations omitted); *see also Boyd v. Bank of Am. Corp.*, 2013 WL 6536751, at **1-2 (C.D. Cal. Dec. 11, 2013) (outlining the two-step process and granting motion under lenient standard).

At the first tier—the "notice" stage—the standard is "fairly lenient," and typically results in conditional certification. *Javine*, 2015 WL 12672090, at *6. For [8] conditional certification, plaintiffs are similarly situated when they show "some identifiable factual or legal

nexus binds together the various claims of the class members." *Id.* at *7. In *Javine*, the nexus was the employer's alleged failure to include bonus payments in the regular rate for purposes of calculating overtime. *Id.* The court granted conditional certification, recognizing that "courts often certify claims based on allegations that a defendant has miscalculated employees' overtime pay." *Id.*; *see also McDonald v. Ricardo's on the Beach, Inc.*, 2013 WL 228334, at *2 (C.D. Cal. Jan. 22, 2013) (conditional certification granted where plaintiffs alleged that the employer paid straight time only unless employees worked over 80 hours in two weeks, as opposed to 40 hours in a week).

Importantly, at this first notice stage, each plaintiff's employment circumstances need not be identical. *Boyd*, 2013 WL 6536751, at *3; *Mitchell*, 841 F. Supp. 2d at 1115 ("Plaintiff need not show that his position is or was identical to the putative class members' positions; a class may be certified under the FLSA if the named plaintiff can show that his position was or is similar to those of the absent class members."); *Sanchez v. Sephora USA, Inc.*, 2012 WL 2945753, at *2 (N.D. Cal. July 18, 2012) (same). Further, at the notice stage, courts do not decide substantive issues going to the merits of the case or make credibility determinations. *E.g.*, *Davis v. Social Serv. Coordinators*, 2012 WL 5361746, *23 (E.D. Cal. Oct. 30, 2012) (rejecting defendant's merits based arguments as being better left for the second stage where merits-based decisions can be made on a complete record); *Sanchez*, 2012 WL 2945753, at *4 (same); *Labrie v. UPS Supply Chain*

Sols., Inc., 2009 WL 723599, at *7 (N.D. Cal. Mar. 18, 2009) (noting that a merits analysis is "beyond the scope" of conditional certification). In fact, "[i]n determining whether plaintiffs have met [the similarly situated] standard, courts need not consider evidence provided by defendants." *Kress*, 263 F.R.D. at 628: *accord Sliger v. Prospect Mortg., LLC*, 2011 WL 3747947, *3 (E.D. Cal. 2011).

[9] The second tier comes after discovery is largely complete, typically on a motion for decertification by the defendant. *Kress*, 263 F.R.D. at 628. There, the court makes a second determination using a stricter "similarly situated" standard. *Id.* Factors considered at the second stage include: (1) factual and employment settings of the individual plaintiffs; (2) the various defenses available to the defendant with respect to the individual plaintiffs; and (3) fairness and procedural considerations. *Id.* (quoting *Leuthold*, 224 F.R.D. at 467). The court then decides whether the plaintiffs are "similarly situated" in order to proceed to trial, or whether the case should be fully or partially decertified. *See O'Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567, 586 (6th Cir. 2009) (discussing the benefits of partial decertification); *Labrie*, 2009 WL 723599, at *7 ("In the event that discovery reveals that this is not a proper case for a FLSA collective action . . . then the court may decertify the class and dismiss the opt-in plaintiffs without prejudice."); *Leuthold*, 224 F.R.D. at 467 (same).

This case is clearly in the first stage, as Plaintiff filed her complaint only 2 days ago. (ECF No. 1.) Under

the first-stage analysis, therefore, the facts described above show that Plaintiff is similarly situated to the opt-in Plaintiffs and the putative opt-in Plaintiffs, and the case is appropriate for conditional certification and judicial notice.

ii. Plaintiff and IHSS Homecare Providers are similarly situated

Plaintiff submits sufficient evidence to meet the minimal standard required for conditional certification. This lawsuit challenges a single policy of Defendants: delaying implementation of federal regulations that require agencies and third-party employers of home health workers to pay such workers overtime wages for overtime hours worked. Defendants' public statements establish that it treated all LA IHSS Homecare Providers the same with respect to overtime eligibility and payment: it paid all members of the putative collective on a straight-time basis for all hours worked until February 1, 2016, when it began properly paying overtime.

[10] Moreover, the record shows that CDSS took steps to ensure that county agencies such as DPSS implemented overtime policies in a uniform manner. (*See* Helland Decl. Exhs. 6-11.) When the regulations were challenged in court, CDSS decided to delay implementation statewide. (Helland Decl. Exhs. 6, 9.) And when the challenge proved unsuccessful in August 2015, CDSS implemented a state-wick program to begin paying overtime—but not until February 2016. (Helland

Decl Exh. 10.) Plaintiff and all LA IHSS Homecare Providers are similarly situated in that they were subject to the same delayed implementation of the law.

In addition to being subject to the same unlawful pay policy, Plaintiff and all other similarly situated employees worked in one county (Los Angeles), and through one county agency. They reported their hours using the same form and through the same procedures, and they were all paid by CDSS. (*See* Helland Decl, Exhs. 1, 3-5.) Accordingly, time sheets and payroll records will serve as common evidence to identify putative plaintiffs and to establish liability.

Notably, this case does not involve a challenge to exempt status. *See Litty v. Merrill Lynch & Co., Inc.*, 2014 WL 5904907 (C.D.Cal. 2014) (Anderson, J. (denying FLSA conditional certification in case involve an exemption defense). LA IHSS Healthcare Workers' job duties therefore have no bearing on the merits of this case. Even so, the structure of the IHSS program ensures that all LA IHSS Homecare Providers perform only domestic and personal care services. (*See, e.g.*, Helland Decl. Exh. p. 13-14, 17-22.) Defendants admit these are non-exempt job duties under the current FLSA regulations. (Helland Decl. Exh. 7, p. 2 ("As a result of the changes in the FLSA rules, IHSS . . . providers will be required to be paid overtime").)

This is a very straightforward case, in which the Defendants admit the workers are eligible for overtime but delayed implementing changes to its practices and procedures. Courts recognize that conditional certification

is appropriate in home healthcare cases like this one. *See Dillow v. Home Care Network, Inc.*, 2017 [11] WL 2418738, at *1 (S.D. Ohio June 5, 2017); *Mayfield-Dillard v. Direct Home Health Care, Inc.*, 2017 WL 945087, at *2 (D. Minn. Mar. 10, 2017). This Court should do the same, and authorize notice to all LA IHSS Homecare Providers who were paid for more than 40 hours in any week between January 1, 2015 and February 1, 2016.

B. The Court Should Authorize Judicial Notice

Court-supervised notice is the preferred method for managing the notification process for several reasons: (1) it avoids a "multiplicity of duplicative suits"; (2) allows the court to set deadlines to advance the disposition of an action; (3) furthers the "wisdom and necessity for early judicial intervention" in multi-party actions; (4) it prevents plaintiffs' claims from expiring under the statute of limitations; and (5) it ensures that the plaintiffs receive accurate and timely notice so they can make an informed decision on whether to join the suit. *See Hoffmann-La Roche*, 493 U.S. at 170-173. Ultimately, the purpose of judicial notice is to give employees accurate and timely notice of a pendency of the collective action so they can make an informed decision about whether to participate. *Id.* at 170; *Gatdula v. CRST Int'l, Inc.*, 2012 WL 12884919, at *6 (C.D. Cal. Aug. 21, 2012)

The United States Supreme Court determined that district courts have the authority to manage the process of joining multiple parties, consider a motion for collective action certification, and issue court-approved notice in the "appropriate case." *See Hoffmann-La Roche*, 493 U.S. at 169; *Brewer v. General Nutrition Corp.*, 2013 WL 100195, *5 (N.D. Cal. Jan. 7, 2013) ("In appropriate circumstances Courts may provide 'accurate and timely' notice to potential plaintiffs so that they "can make informed decisions about whether to participate."). The benefits to the judicial system of FLSA collective actions "depend on employees receiving accurate and timely notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate." *Id.* District courts are encouraged to become involved in the notice [12] process early to ensure "timely, accurate, and informative" notice and to het maintain control of the litigation. *Id.* at 171-72.

i. Judicial Notice is Warranted

Prompt issuance of Judicial Notice is essential because the statute of limitations on putative plaintiffs' claims will continue to run until they receive notice and consent in writing to join the case. *See* 29 U.S.C. § 216(b); 29 U.S.C. § 256(b). Unlike Rule 23 class actions, the statute of limitations for those who have not filed consent forms is not tolled with the commencement of this action. *Villarreal v. Caremark LLC*, 2014 WL 4247730, at *4 (D. Ariz. Aug. 21, 2014) (recognizing the prejudice caused the running FLSA statute of

limitations and rejecting the defendant's request for a 60 day extension to conduct discovery prior to filing an opposition to the plaintiffs' motion for conditional certification); *Kelly v. Bluegreen Corp.*, 2008 WL 4962672, at *2 (W.D. Wis. Nov. 19, 2008) ("The longer the delay in notice to potential class members, the more potential class members will lose their opportunity to opt in to this class before the statute of limitations runs on their claims. Such a risk of delay creates an unnecessary risk that a growing number of potential class members will have only the option of filing their own lawsuits."). The consequence is that claims are lost with each day that passes without proper notice of this lawsuit being provided to all putative class members.

The effect of the running statute of limitations is especially crucial in this case, since Defendants began paying overtime on February 1, 2016. The FLSA statute of limitations is two years (extended to three upon a showing of willfulness),[1] meaning that potential optins have less than 8 months of timely claims for nonwillful violations as of the date of this filing. Any delay in the [13] issuance of notices reduces claims even further. The Court should authorize prompt issuance of Judicial Notice to prevent further erosion of claims.

The Court should also order Defendants to provide Plaintiff's counsel a list of all putative collective members and their contact information. The identification of these individuals is critical for Plaintiffs to provide those individuals with notice of the action as

[1] 29 U.S.C. § 255(a).

contemplated by the FLSA. *See Hoffmann-La Roche*, 493 U.S. at 170 (affirming that the district court correctly permitted discovery of the names and addresses of the putative class). This is precisely the reason why a list of potential plaintiffs is routinely disclosed in FLSA collective actions. *Id.* at 165.

Accordingly, Plaintiff respectfully requests that within ten days of the Court's Order, Defendants be required to provide Plaintiff's counsel with a list (in Excel of similar exportable format) of all people employed by Defendants as homecare workers, home care providers, or in other similar job titles, through the In-Home Supportive Services program and in the County of Los Angeles, who were paid for hours in excess of forty (40) per week at a rate of less than 1.5 times their regular rate at any time from January 1, 2015 to February 1, 2016 ("LA IHSS Homecare Providers"). This list should include the (1) name, (2) job title(s), (3) dates of employment, (4) last known address and cell phone number, (5) location of employment, (6) employee number, (7) social security number (last four digits only), (8) last known email address, and (9) primary language for all LA IHSS Homecare Providers. *See Riendeau*, 2013 WL 2422689, at *3 (granting conditional certification and ordering defendant to produce to plaintiffs a Microsoft Excel spreadsheet containing the list and contact information for the putative collective members).

Plaintiff respectfully requests that the Court rule on the form and manner of notice in conjunction with this motion. Defendants often request a "meet and

confer" to negotiate the content of notice after a conditional certification motion is granted. However, that meet and confer process directly disadvantages the putative [14] collective, because the statute of limitations continues to run while the parties haggle about notice issues. *See Kelly*, 2008 WL 4962672, at *2 ("The longer the delay in notice to potential class members, the more potential class members will lose their opportunity to opt in to this class before the statute of limitations runs on their claims. Such a risk of delay creates an unnecessary risk that a growing number of potential class members will have only the option of filing their own lawsuits."). Defendants can address any concerns with Plaintiff's proposed notice in their opposition to this motion. In order to ensure that notice is distributed in a timely manner, Plaintiff respectfully requests an order resolving any notice issues which Defendants may raise.

ii. Plaintiff's Proposed Notice is Accurate and Informative

Judicially authorized notice of a collective action under § 216(b) must be "timely, accurate, and informative." *Hoffmann-La Roche*, 493 U.S. at 172. Plaintiff's proposed judicial notice will provide employees with an accurate description of this lawsuit, as well as their rights under the FLSA. (*See* Helland Decl. Exh. 13.) As such, the proposed notice achieves the ultimate goal of providing employees accurate and timely notice concerning the pendency of the collective action without taking sides on the merits.

Plaintiff's proposed notice borrows from the sample Rule 23 class action notice drafted by the Federal Judicial Center ("FJC"). (*See* Helland Decl. Exhs. 13. 14.) The Federal Judicial Center drafted its sample class notices "[a]t the request of the Subcommittee on Class Actions of the U.S. judicial branch's Advisory Committee on the Federal Rules of Civil Procedure." (Helland Decl. Exh. 15.) Although the substance of the FJC sample notices is largely irrelevant because the notices address issues specific to class actions, the FJC's goal of clearly communicating a recipient's rights is equally important (if not more important) in FLSA collective actions. (*Compare* Helland Decl. Exh. 16 ("Our focus grout experience tells us that attorneys and judges can significantly improve class [15] members' motivation to read and comprehend class action notices by changing the language, organizational structure, format, and presentation of the notice.") *with Hoffmann-LaRoche*, 493 U.S. at 170 (the benefits of a collective action "depend or employees receiving accurate and timely notice concerning the pendency of the collective action.").) A notice mailing which the recipient discards before reading and understanding it is not effective notice, whether under Rule 23 or *Hoffmann-LaRoche.*

The FJC study disclosed that many notice recipients held a "preconceived notion of a notice [which] was almost totally negative; they expected to find wordy legalese that would be difficult or impossible to understand." (Helland Decl. Exh, 16.) Recipients "were not eager to tackle any type of legal document and said

they are flooded daily with 'junk mail.'" (*Id.*) Accordingly, "[a] threshold challenge is ***to get potential class members to open and read a class action notice***." (*Id.* (emphasis added).) For this reason, Plaintiff has included proposed language on the envelope to be sent to members of the Collective. (*See id.* ("[g]enerally, participants preferred direct declarations of the envelope's contents such as 'Notice of Proposed Class Action Settlement.'")) Plaintiff's proposed envelope language follows the FJC's suggested format. (*Compare* Helland Decl. Exh. 17 *with* Exh. 18.)

The challenge does not end when recipients open the envelope, however. As the FJC recognized, "[a]nother challenge is to convince people to read and act on the class action notice rather than throw it away." (Helland Decl. Exh. 16.) The decision to throw away the notice or keep reading it may be made in a split second; accordingly, "[a] first impression must persuade readers that they may have a stake in the class action and that they will be able to comprehend the notice." (*Id.*) Plaintiff has therefore borrowed the FJC's suggested format for the heading of a notice. (*Compare* Helland Decl. Exh. 13 *with* Exh. 14.) The rest of the notice contains a straightforward explanation of the collective action and the employee's [16] right to join the collective action. The Court should approve Plaintiff's proposed notice.

1. Reminder Postcard

Plaintiff requests that the Court authorize Plaintiff to send a reminder notice to putative members of

the collective 21 days before the 60-day deadline for opting in expires. Defendants suffer no prejudice by ensuring putative members of the collective receive timely notice, giving them a fair opportunity to join the case in a timely manner. There is no cost to Defendants and no delay to the disposition of this matter if putative class members are reminded of the deadline to join. A potential opt-in who reviews the initial notice and decides not to join this case may simply discard the reminder postcard. On the other hand, a potential opt-in who fails to read the initial notice – for whatever reason – would be left unaware of her rights without a reminder postcard. Reminders have been regularly approved by courts. *See, e.g.*, *Boyd*, 2013 WL 6536751, *4 (approving a reminder notice); *Ramirez v. Ghilotti Bros, Inc.*, 941 F. Supp. 2d 1197, 1121 (N.D. Cal. Apr. 25, 2013 (authorizing a second notice, substantially the same as the first, as a reminder 45 days after the first notice); *Sanchez*, 2012 WL 2945753, at *6 (finding a second notice or a reminder appropriate in an FLSA action since the individual is not part of the class unless he or she opts-in); *Helton v. Factor 5, Inc.*, 2012 WL 2428219, at *7 (N.D. Cal. June 26, 2012) (ordering a reminder postcard be sent to potential plaintiffs 30 days before deadline for opting in); *Harris v. Vector Marketing Corp.*, 716 F. Supp. 2d 835, 847 (N.D. Cal. 2010) (finding a reminder postcard appropriate "[p]articularly since the FLSA requires an opt-in procedure"); *Gee v. Suntrust Mortgage, Inc.*, 2011 WL 722111, at *4 (N.D. Cal. Feb. 18, 2011) (permitting a reminder notice 45 days after issuance of the first notice). Reminder letters, moreover, lower the number of late opt-ins, thus

reducing the burden on the Court in deciding whether late opt-ins should be allowed to join. Plaintiffs' proposed reminder postcard is attached as Helland Decl. Exh. 19.

[17] **2. Email Notice**

Plaintiff proposes that notice be distributed by email as well as physical mail Email is an essential means of communication, and provides a cheap and efficient manner of distribution of notice. *Syed v. M-I, L.L.C.*, 2014 WL 6685966, at *8 (E.D. Cal. Nov. 26, 2014) ("email is an increasingly important means of contact"); *Phelps v. MC Commc'ns, Inc.*, 2011 WL 3298414, at *6 (D. Nev. Aug. 1, 2011) ("Email is an efficient, reasonable, and low-cost supplemental form of notice"). Accordingly, Plaintiff requests that the Court authorize distribution of an email with the subject "IHSS Overtime Lawsuit Notice" and the following text:

> A collective action lawsuit has been filed in federal court in the Central District of California. You may be able to join the lawsuit if you worked as an IHSS Homecare Provider for the California Department of Social Services/ the Los Angeles County Department of Public Social Services from January 1, 2015 to February 1, 2016 and worked over forty (40) hours in a week without receiving time-and-a-half overtime premium pay. To learn more about this lawsuit please visit http://www.nka.com/wp-content/uploads/2017/06/IHSS-Notice.pdf.

See Bazzell v. Body Contour Centers, LLC, 2016 WL 3655274, at *8 (W.D. Wash. July 8, 2016) (approving similar email notice).

Distribution of notice by email in addition to US Mail is the best way to ensure that putative collective members receive actual notice. Given the cost of housing in Los Angeles County, it is likely that some of the low wage workers in the putative collective will have moved, rendering notice by mail ineffective. "In contrast, email addresses are retained and usually remain the same regardless of where one is residing. In this case, email addresses could be a very useful method to provide notice and would certainly be a less intrusive and more cost efficient alternative to calling residential and cell phone numbers." *Schemkes v. Presidential Limousine*, 2011 WL 868182, at *4 (D. Nev. Mar. 10, 2011); *accord Margulies v.* [18] *Tri-Cty. Metro. Transp. Dist. of Oregon*, 2013 WL 5593040, at *21 (D. Or. Oct. 10. 2013) (email is "efficient and nonintrusive").

Recognizing that email is ubiquitous, cheap, efficient, and nonintrusive, courts have shown an increasing recognition that electronic communication is an appropriate and efficient means of notifying individuals of their right to opt in. *See Lewis v. Wells Fargo & Co.*, 669 F. Supp. 2d 1124, 1128-29 (N.D. Cal. 2009); *Coates v. Farmers Grp., Inc.*, 2015 WL 8477918, at *13 (N.D. Cal. Dec. 9, 2015); *Nikmanesh v. Wal-Mart Stores, Inc.*, 2015 WL 12683964, at *4 (C.D. Cal. Aug. 18, 2015); *Johnson v. Pink Spot Vapors, Inc.*, 2015 WL 1413614, at *6 (D. Nev. Mar. 27, 2015); *Woods v. Vector Mktg. Corp.*, 2015 WL 1198593, at *4 (N.D. Cal. Mar. 16, 2015)

(notice program included official website where putative members could submit an electronic opt-in form, email notice and reminder email, reminder postcard, and targeted publication through Facebook ads); *Syed*, 2014 WL 6685966, at *8; *Vance v. Cuarto LLC*, 2014 WL 12646033, at *4 (D. Or. Oct. 6, 2014); *Guy v. Casal Inst. of Nevada, LLC*, 2014 WL 1899006, at *7 (D. Nev. May 12, 2014); *Thomas v. Kellogg Co.*, 2014 WL 716152, at *3 (W.D. Wash. Jan. 9, 2014); *Bonner v. SFO Shuttle Bus Co.*, 2013 WL 6139758, at *4 (N.D. Cal. Nov. 21, 2013); *Davis v. Westgate Planet Hollywood Las Vegas, LLC*, 2009 WL 102735, at * 15 (D. Nev. Jan. 12, 2009).

The Court should recognize this trend and approve email notice here. There is no prejudice to Defendants if workers receive notice by mail and email, but there could be great prejudice to employees who do not receive, read, or understand[2] the physical notice. Combining email and U.S. Mail greatly increases the likelihood that individuals will receive actual notice. The Court should approve Plaintiff's request to send notice by email.

[19] **3. Posting Notice**

Plaintiff requests that the Court order Defendants to post notice in the eight county locations.[3] Posting

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[2] As explained below, Plaintiff proposes to send email notice in English and the language that putative collective members identify as their primary language.

[3] See http://dpss.lacounty.gov/wps/portal/dpss/main/home/office-locations?program=ihss&title=IHSS%20Offices.

notice is "an effective means of reaching potential plaintiffs that, for whatever reason, did not receive notice by mail or email." *Margulies*, 2013 WL 5593040, at *21. Posting notice is "a cost-efficient way to notify potential opt-in plaintiffs of the action and places no burden on Defendants." *Coyle v. Flowers Foods Incorporated*, 2016 WL 4529872, at *7 (D. Ariz. Aug. 30, 2016).

Numerous district courts in the Ninth Circuit have approved posting notice, particularly where there are a limited number of facilities. *Id.* at *6 (twelve warehouse locations); *Ramirez*, 941 F. Supp. 2d at 1211-12 (posting notice in English and Spanish at four locations); *Carrillo v. Schneider Logistics, Inc.*, 2012 WL 556309, at **12-13 (C.D. Cal. Jan. 31, 2012), *aff'd*, 501 F. App'x 713 (9th Cir. 2012) (approving request to post notice in five locations at each warehouse, "including at the entry and in the lunchroom of each warehouse, that are accessible to the workers and including where other notices of workplace rights are posted"); *Bados Madrid v. Peak Constr., Inc.*, 2009 WL 2983193, at *3 (D. Ariz. Sept. 17, 2009) ("defendants are ordered to post notice of the collective action on their premises for the 45-day notice period."); *Adams v. Inter-Con Sec. Sys., Inc.*, 242 F.R.D. 530, 542 (N.D. Cal. 2007) (posting of notice at locations with fifteen of more security officers).

Posting notice is appropriate here. First, since there is a limited number of locations (only eight locations provide IHSS services in Los Angeles County), posting notice poses no appreciable burden for Defendants. Second, it is likely that Defendants will have

outdated contact information for some of the low wage workers at issue (all earn $11.00 per hour). Given that such posting has a "potential [20] for efficiently and effectively reaching similarly situated workers," the Court should order posting notice. *See Carillo*, 2012 WL 556309, at *13.

4. Text Message Notice

Traditional means of notice like mail, email, and posting may still be ineffective at providing notice to members of this putative collective. The low-income, low-education, and mostly-immigrant putative collective members in this case are less likely to have reliable internet access and are subject to housing displacement (and thus change of address). Further, IHSS homecare providers are not required to visit LA's IHSS offices after having completed the background check and onboarding process, so many providers may not see a physical office posting. Accordingly, email, U.S. mail, and posting alone may be ineffective means of providing notice. In response to similarly transient and difficult-to-contact collectives, courts nationally have begun to approve text message notice in actions like this one.

IHSS homecare providers in California are "mainly middle-aged women of low-incomes." (Helland Decl. Exh. 20 at 3.) In Los Angeles County, only 20% of homecare providers are white. (Helland Decl. Exh. 21 at 49.) Fifty-eight percent are foreign-born, and 79% are female. *Id.* The majority (85%) are not college graduates.

Id. In 2015, homecare providers made $9.65 an hour. (Helland Decl, Exh. 5.) This is below the 2015 living wage for Los Angeles County, which was $12.44/hour in 2015 with no dependents. (Helland Decl. Exh. 22.)

In sum, the population of IHSS homecare providers, and accordingly the members of the putative collective in this case, are low-income individuals who lack access to education and resources. This poses a challenge to issuing effective notice. Low-income individuals are less likely than the general population to have reliable internet access, which poses challenges to email notice. (Helland Decl. Exh, 23 at 2 ("Nine in ten low- and moderate-income families have an Internel connection" but "[o]f those who do . . . half of those with home access say their [21] connections are too slow for useful work. One in five families with Internet access says their connection has been cut off in the past year").) Low-income people also face housing instability, as they are vulnerable to eviction which would inevitably lead to an address change, thus rendering U.S. mail notice ineffective. (*See* Helland Decl. Exh. 24 at 1 ("Renters need to earn 4 times local minimum wage to afford the median asking rent of $2,400 . . . lowest-income renters spend 70% of income or rent, leaving little left for food, transportation, health expenses").)

While U.S. mail, email, and posting alone may therefore be ineffective, text message notice will help ensure notice reaches more members of the putative collective. Although low income people may have unreliable internet access and inconsistent mailing addresses, they are nonetheless likely to have a cell phone (*See*

Helland Decl. Exh. 25 (92% of adults with an income of less than $30,000 a year and 95% of adults with an income below $50,000 a year own a cell phone).) Text messaging then, can fill in the gap for this collective and ensure that members receive actual notice. Courts around the country have realized the utility of text message notice in similar cases. *Irvine v. Destination Wild Dunes Mgmt.*, Inc., 132 F.Supp.3d 707, 711 (D.S.C. 2015) ("The request that notice be distributed via direct mail, email and text messaging appears eminently reasonable to the Court. This has become a much more mobile society with one's email address and cell phone number serving as the most consistent and reliable method of communication Political candidates now routinely seek out their supporters' cell phone numbers and email addresses because traditional methods of communication via regular mail and land line telephone numbers quickly become obsolete."); *Regan v. City of Hanahan*, 2017 WL 1386334, at *3 (D.S.C. Apr. 17, 2017) ("Mail, email and text message notice is reasonable because, in today's mobile society, individuals are likely to retain their mobile numbers and email addresses even when they move."); *Eley v. Stadium Grp., LLC*, 2015 WL 5611331, at *4 (D.D.C. Sept. 22, 2015) (granting request for text message notice because the request was "in line with what [22] has been approved in other FLSA collective actions") (citing *Bhumithanarn v. 22 Noodle Mkt. Corp.*, 2015 WL 4240985, at *5 (S.D.N.Y. July 13, 2015)).

Courts have also recognized the utility of text message notice in cases where, as here, the workforce at

issue has a high turnover rate. (*See* Helland Decl. Exh. 26 ("Historically, the annual turnover rate within the IHSS workforce has been about one-third.")); *Martin v. Sprint/united Mgmt. Co.*, 2016 WL 30334, at *19 (S.D.N.Y. Jan. 4, 2016) (granting text message notice due to high turnover rate among employees); *Bhumithanarn*, 2015 WL 4240985, at *5 (S.D.N.Y. July 13, 2015) ("[G]iven the high turnover characteristic of the restaurant industry, the Court finds that notice via text message is likely to be a viable and efficient means of communicating with many prospective members of this collective action.").

This Court should order notice in the form of text message as well as U.S. mail, email, and posting, so as to best realize the benefits offered by collective actions (namely, judicial efficiency and lower individual litigation costs) that "depend on employees receiving accurate and timely notice." *Hoffmann-La Roche*, 493 U.S. at 170. At the very least, the Court should utilize some combination of these alternative methods of notice, and should not rely solely on U.S. Mail.

5. Language Access

Finally, to facilitate provision of notice to potential opt-in plaintiffs who are non-English speakers, Plaintiff requests that Defendant identify each putative collective member's primary written language. This information will be readily available, because Defendants request this information during the job application process (Helland Decl. Exh. 3.)

Following the initial distribution of notice, Plaintiff proposes that the Parties select certified translators from the Court's website[4] to translate the approved notice and email notice into any language spoken by more than 5% of the putative [23] collective, and these translated notices would be posted online. For individuals identified as speaking these languages, their email notice would contain the English text, followed by the same text in their primary language, including a link to the translated notice. Additionally, the following sentence would be translated and added to the reminder postcard: "This notice is also available in [language] online at [website link]."

This procedure will dramatically increase the likelihood that workers receive actual notice, with minimal increase in cost, and without burdening anyone with duplicative notices. Given that the putative collective likely includes many non-English speakers, and that Defendants have information about their primary language, it is appropriate to make sure potential optins have access to notice in their primary language. *See Ramirez*, 941 F. Supp. 2d 1197, 1211-12 (notice distributed and posted English and Spanish); *Carrillo*, 2012 WL 556309, at *12 (notice distributed in English and Spanish, and summary of notice provided to local media in English and Spanish).

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[4] See http://court.cacd.uscourts.gov/cacd/IntRoster.nsf/29dd6cbe6c9b013988256fe9007b65d7?OpenView.

IV. CONCLUSION

Defendants uniformly failed to pay overtime to Plaintiff and LA IHSS Homecare Workers prior to February 1, 2016, based on a uniform decision to delay implementation of FLSA regulations. The Court should conditionally certify the FLSA collective and authorize distribution of Judicial Notice.

Dated: July 3, 2017 **NICHOLS KASTER, LLP**

By: s/Matthew C. Helland
Matthew C. Helland

Attorneys for Plaintiff and
Others Similarly Situated

Matthew C. Helland, CA SBN 250451
helland@nka.com
Daniel S. Brome, CA SBN 278915
dbrome@nka.com
NICHOLS KASTER, LLP
235 Montgomery St., Suite 810
San Francisco, CA 94104
Telephone: (415) 277-7235
Facsimile: (415) 277-7238

Attorneys for Plaintiff and Others Similarly Situated

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Trina Ray, individually, and on behalf of others similarly situated, Plaintiff, v. California Department of Social Services, and Los Angeles County Department of Public Social Services Defendants.	**Case No.** **COLLECTIVE ACTION COMPLAINT FOR DAMAGES AND RESTITUTION** (Filed Jun. 7, 2017) **(1) Failure to Pay Overtime Compensation in Violation of the Fair Labor Standards Act (29 U.S.C. § 201, et seq.)**

PRELIMINARY STATEMENT

1. This is a collective action brought by Individual Plaintiff Trina Ray ("Plaintiff") on her own behalf and on behalf of the proposed FLSA Collective. Plaintiff and the putative collective are or were employed by

the California Department of Social Services and/or the Los Angeles County Department of Public Social Services ("Defendants"), as homecare workers, home care providers, or in other similar job titles through the In-Home Supportive Services program (collectively, "IHSS Homecare Providers") and were denied proper compensation as required by federal wage and hour laws. These employees are similarly situated under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216(b).

2. The FLSA Collective is made up of all persons who have been employed by Defendants as IHSS Homecare Providers and who were paid for hours in excess of forty (40) per week at a rate of less than 1.5 times their regular rate at any time from January 1, 2015 to February 1, 2016 (the "Collective Period").

3. During the Collective Period, Defendants failed to pay overtime compensation to Plaintiff and each member of the FLSA Collective as required by federal law. Plaintiff seeks relief for herself and for the FLSA Collective under the FLSA requiring Defendants to pay appropriate overtime compensation.

THE PARTIES

4. Plaintiff Trina Ray ("Plaintiff Ray") is an individual residing in Los Angeles, California (Los Angeles County).

5. Plaintiff Ray is currently employed by Defendants as an IHSS Homecare Provider. She worked the first of two stints of employment for Defendants from

approximately 2010 or 2011 until approximately October 2015. Defendants then re-hired Plaintiff in approximately September or October 2016 and have employed her since. Throughout her employment with Defendants, Plaintiff Ray has reported to the IHSS office located in Rancho Dominguez, California (Los Angeles County).

6. The In-Home Supportive Services ("IHSS") program provides in-home assistance to eligible aged, blind, and disabled individuals as an alternative to out-of-home care. IHSS currently serves over 550,000 recipients through over 460,000 homecare workers (providers). Services covered by the IHSS program include domestic services (e.g. housework, meal preparation, laundry, running errands), non-medical care services (such as bathing, dressing, bladder care); transportation services (to medical appointments), and paramedical services (necessary health care activities that recipients would normally perform for themselves were it not for their functional limitations).

7. According to its website, the mission of the California Department of Social Services (CDSS) is to serve, aid, and protect needy and vulnerable children and adults throughout the State of California. CDSS is responsible for the oversight of programs, including IHSS, which serve more than eight million people across the state.

8. According to its website, the Los Angeles Department of Public Social Services (DPSS) is the second largest department in Los Angeles County and is

the largest social service agency in the United States. DPSS is involved in the administration and oversight of the IHSS program at the county level.

9. Defendants' gross annual sales made or business done has been $500,000.00 or greater at all times relevant herein. Defendants operate in interstate commerce by, among other things, receiving federal funding for the programs they administer.

JURISDICTION AND VENUE

10. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 as this case is brought under the FLSA, 29 U.S.C. §§ 201 *et seq*. Plaintiff Ray has signed a consent form to join this lawsuit, which is attached as Exhibit A. As this case proceeds, it is likely other individuals will file consent forms and join as opt-it plaintiffs.

11. Venue is proper in the United States District Court, Central District of California pursuant to 28 U.S.C. § 1391, because Defendants operate in this district and because a substantial part of the events giving rise to the claims occurred in this district.

FACTUAL ALLEGATIONS

12. Plaintiff re-alleges and incorporates by reference the above paragraphs as if fully set forth herein.

13. Plaintiff and those similarly situated are individuals who were or are employed by Defendants as

homecare providers through the In-Home Supportive Services program at any time between January 1, 2015 and February 1, 2016 (the "Collective Period"). As IHSS Homecare Providers, Plaintiff and the similarly situated individuals were responsible for providing in-home assistance for IHSS recipients.

14. At all relevevant times, Defendants are, or have been, Plaintiff's and the similarly situated individuals' "employers" within the meaning of the FLSA, 29 U.S.C. § 203(d).

15. For example, Defendant CDSS exercises significant control over IHSS Homecare Providers' work. CDSS provides the form IHSS Homecare Providers use to apply for employment. CDSS issues payment to IHSS Homecare Providers, and CDSS has control over the number of hours IHSS Homecare Providers may work. CDSS also played a role in deciding whether to pay overtime to IHSS Homecare Providers.

16. Defendant DPSS also exercises significant control over IHSS Homecare Providers' work. IHSS Homecare Providers apply for work by submitting the CDSS employment form to DPSS. DPSS maintains several offices within Los Angeles County, which serve as the employment touchpoints for IHSS Homecare Providers. DPSS also requires that IHSS Homecare Providers record their hours via weekly timesheets and submit them to its offices throughout Los Angeles County. DPSS is responsible for reviewing requests by IHSS Homecare Providers to work more than the pre-approved maximum weekly hours. IHSS Homecare

Providers regularly interact with DPSS employees regarding changes in recipients' health and/or condition. IHSS Homecare Providers also interact with DPSS employees regarding inquiries related to their pay.

17. During the Collective Period, Defendants suffered and permitted Plaintiff to regularly work more than forty (40) hours in certain workweeks without providing appropriate overtime compensation. Upon information and belief, Defendants also suffered and permitted the members of the FLSA Collective to regularly work more than forty (40) hours in certain workweeks during the Collective Period.

18. During the Collective Period, Plaintiff and those similarly situated were not compensated in accordance with the FLSA because they were not paid proper overtime wages for all hours worked in excess of forty (40) per workweek. Specifically, rather than paying them 1.5 times their regular rate of pay for all hours worked over forty (40) in a workweek, which is required by the FLSA (29 U.S.C. § 207), Defendants paid them "straight time" for all of their overtime hours worked.

19. Plaintiff and those similarly situated have been eligible for overtime since at least January 1, 2015, when the Department of Labor implemented new regulations regarding overtime pay for home health care workers. Defendants were aware of the new regulations but did not begin paying overtime to IHSS Homecare Providers until February 1, 2016.

20. Defendants are aware, or should have been aware, that Plaintiff and the FLSA Collective performed work that required them to work overtime. For example, Defendants informed Plaintiff of the total number of service hours her client (the recipient enrolled in the IHSS program) was approved to receive each month. In addition, Defendants required Plaintiff and those similarly situated to report their work hours via weekly timesheets, which routinely reflected overtime hours.

21. During the Collective Period, Plaintiff's client was approved to receive approximately 283 hours of services each month through the IHSS program, which is an average of approximately 66 hours per week. As a result, Plaintiff regularly worked well in excess of 40 weekly hours. Defendants failed to pay Plaintiff the required rate of one and one-half times her regular hourly rate for any of the overtime hours she worked.

COLLECTIVE ACTION ALLEGATIONS

22. Plaintiff brings this action on behalf of herself and other similarly situated employees as authorized under the FLSA, 29 U.S.C. § 216(b). Plaintiff's consent form is attached to this Complaint as Exhibit A.

23. The proposed FLSA Collective class is defined as follows:

> All people employed by Defendants as home-care workers, home care providers, or in other similar job titles, through the In-Home Supportive Services program, and who were paid for hours in excess of forty (40) per week at a rate of less than 1.5 times their regular rate at any time from January 1, 2015 to February 1, 2016.

24. Pursuant to the FLSA, 29 U.S.C. § 207, employers are generally required to pay overtime compensation at a rate of 1.5 times an employees' regular rate of pay for hours worked over forty (40) in a workweek.

25. The FLSA contains an exemption from overtime for "domestic service" workers who provide companionship and other services to individuals who are unable to care for themselves and also contains an exemption for live-in domestic service workers. 29 U.S.C. §§ 213(a)(15) and 213(b)(21).

26. In October 2013, the United States Department of Labor determined that these exemptions do not apply to domestic-service workers employed by third-party agencies or employers.

27. Since January 1, 2015, federal regulations have provided that domestic-service workers employed by third-party agencies or employers are not exempt from the FLSA's minimum wage and overtime requirements. 29 C.F.R. § 552.109(a).

28. As of January 1, 2015, all domestic-service workers employed by third-party agencies or employers

are entitled to overtime compensation at an hourly rate of 1.5 times the employee's regular rate of pay for hours worked over forty (40) in a work week.

29. During the Collective Period, Plaintiff and the FLSA Collective routinely worked in excess of forty (40) hours per workweek without receiving proper overtime compensation for their overtime hours worked.

30. Despite the Department of Labor's positon that domestic-service workers employed by third-party agencies or employers are not exempt from the FLSA's minimum wage and overtime requirements, Defendants maintained their practice of failing to pay the proper overtime compensation to Plaintiff and the FLSA Collective from January 1, 2015 to February 1, 2016. In so doing, Defendants violated the provisions of the FLSA, 29 U.S.C. §§ 207 and 215(a)(2).

31. Defendants were aware that they were not compensating Plaintiff and the FLSA Collective for overtime between January 1, 2015 and February 1, 2016, and were aware of the new Department of Labor regulations.

32. Defendants knowingly, willfully, or in reckless disregard of the law, maintained an illegal practice of failing to pay Plaintiff and the FLSA Collective proper overtime compensation for all hours worked over forty (40).

33. Defendants are liable under the FLSA for failing to properly compensate Plaintiff and the FLSA Collective, and as such, notice should be sent to the

Collective. There are numerous similarly situated current and former employees of Defendants who have been denied overtime pay in violation of the FLSA who would benefit from the issuance of Court-supervised notice of this lawsuit and the opportunity to join. Those similarly situated employees are known to Defendants and are readily identifiable through Defendants' records.

CLAIM FOR RELIEF

FAIR LABOR STANDARDS ACT

29 U.S.C. §§ 201 et seq.

(On Behalf of Plaintiff and the FLSA Collective)

34. Plaintiff and the FLSA Collective allege and incorporate by reference the allegations in the preceding paragraphs.

35. The FLSA requires covered employers, such as Defendants, to compensate all non-exempt employees at a rate of not less than one and one-half times the regular rate of pay for work performed in excess of forty hours per work week.

36. Plaintiff and the FLSA Collective are entitled to be paid overtime compensation for all hours worked over forty (40) per workweek. By failing to pay Plaintiff and the FLSA Collective overtime compensation of one and one-half times their hourly rate of pay for the overtime hours they worked, Defendants violated the FLSA, 29 U.S.C. §§ 201 *et seq*.

37. Defendants knew, or showed reckless disregard for the fact, that it failed to pay these individuals overtime compensation in violation of the FLSA.

38. The foregoing conduct, as alleged, constitutes a willful violation of the FLSA, within the meaning of 29 U.S.C. § 255(a).

39. Plaintiff, on behalf of herself and the FLSA Collective, seeks damages in the amount of all unpaid overtime compensation owed to herself and the FLSA Collective, liquidated damages as provided by the FLSA, 29 U.S.C. § 216(b), interest, and such other legal and equitable relief as the Court deems just and proper.

40. Plaintiff, on behalf of herself and the FLSA Collective, seeks recovery of attorneys' fees and costs to be paid by Defendants, as provided by the FLSA, 29 U.S.C. § 216(b).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of herself and all members of the FLSA Collective, prays for relief as follows:

A. Designation of this action as a collective action on behalf of Plaintiff and those similarly situated and prompt issuance of notice pursuant to 29 U.S.C. § 216(b) to all those similarly situated apprising them of the pendency of this action, and permitting them to assert

timely FLSA claims in this action by filing individual consent forms pursuant to 29 U.S.C. § 216(b);

B. Judgment that Plaintiff and those similarly situated are non-exempt employees entitled to protection under the FLSA;

C. Judgment against Defendants for violation of the overtime provisions of the FLSA;

D. Judgment that Defendants' violations as described above were willful;

E. An award in an amount equal to Plaintiff's and the FLSA Collective's unpaid back wages at the applicable overtime rate;

F. An award to Plaintiff and those similarly situated for the amount of unpaid wages owed, liquidated damages and penalties where provided by law, and interest thereon;

G. An award of reasonable attorneys' fees and costs pursuant to 29 U.S.C. § 216 and/or other applicable laws;

H. An award of prejudgment interest to the extent liquidated damages are not awarded;

I. Leave to add additional plaintiffs by motion, the filing of written consent forms, or any other method approved by the Court;

J. Leave to amend to add additional county agency defendants, if necessary; and

K. For such other and further relief, in law or equity, as this Court may deem appropriate and just.

Dated: June 7, 2017 **NICHOLS KASTER, LLP**

By: s/Matthew C. Helland
Matthew C. Helland

Attorneys for Plaintiff
and Others Similarly Situated

EXHIBIT A

CALIFORNIA DEPARTMENT OF SOCIAL SERVICES LOS ANGELES COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES (DPSS) PLAINTIFF CONSENT FORM

1. I consent to make a claim under the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq*. against my current/former employer(s), the California Department of Social Services, the Los Angeles County Department of Public Social Services ("Defendants"), and any other related entities or affiliates, to recover overtime pay.

2. During the past three years, there were occasions when I worked over 40 hours per week for defendants as a home health care worker, or similar job title, and did not receive proper compensation for my overtime hours worked.

3. If this case does not proceed collectively, then I also consent to join any subsequent action to assert these claims against Defendants and an ether related entities or affiliates.

Dated: 6/01/2017

Trina Ray
Signature

Trina Ray
Print Name

Information Below Will Be Redacted in Filings with the Court. Please Print or Type.

[redacted]

Return this form by fax, email or mail to:

Nicholas Kaster, PLLP,
Attn: Matthew C. Helland
Fax: (612) 215-6870
Email: forms@nka.com
Address: 4600 IDS Center,
80 S. 8th Street,
Minneapolis, MN 55402
Web: www.nka.com

STATE OF CALIFORNIA—HEALTH AND
HUMAN SERVICES AGENCY
DEPARTMENT OF SOCIAL SERVICES
744 P Street • Sacramento, CA 95814 •
www.cdss.ca.gov

[LOGO]
WILL LIGHTBOURNE
DIRECTOR

[SEAL]
EDMUND G. BROWN JR.
GOVERNOR

November 4, 2015

Statement regarding federal regulations that require the payment of overtime wages for certain home care workers

(Filed Aug. 4, 2017)

Due to recent court action, California is moving ahead to meet federal regulations that require the payment of overtime wages for certain home care workers who work more than forty hours in a workweek. These workers in California include providers of In-Home Supportive Services (IHSS), waiver personal care services, and certain assistive services for developmentally disabled individuals. State law provides mechanisms for payments and establishes caps on the number of hours that a provider may work within a given workweek.

Following consultation with consumer advocates and unions representing providers, the Administration is moving forward on a variety of activities that together will enable the payment of overtime wages in biweekly payrolls beginning on February 1, 2016. These activities include:

- Updating the timesheets used in these programs to enable the capture of hours worked in excess of forty hours per workweek,

- Training the State's nearly 400,000 service providers and 500,000 home care services recipients in how to fill out and approve the new timesheets,

- Implementing workweek agreements for providers serving multiple consumers,

- Preparing county staff to assist with workweek agreements and resolve timesheet errors,

- Finalizing changes to the automated case management and payroll system to enable overtime payments, and

- Adding a new IHSS service category for accompaniment to medical appointments, and enabling payment for travel incurred while serving multiple recipients on the same day.

In addition to the activities above, recipients and providers will be notified of associated program changes in advance of the February 1 date, to allow time for them to identify additional service providers if necessary. As many providers serve and are paid in more than one program under the home care service system, all programs will commence regular payment of overtime and travel on February 1, 2016.

The State is committed to moving forward expeditiously on these activities, in a manner that is safe for consumers, fair to providers, and minimizes disruption

to the paychecks upon which so many Californians depend.

STATE OF CALIFORNIA—HEALTH AND HUMAN SERVICES AGENCY
DEPARTMENT OF SOCIAL SERVICES
744 P Street • Sacramento, CA 95814 •
www.cdss.ca.gov

[LOGO]	[SEAL]
WILL LIGHTBOURNE	EDMUND G. BROWN JR.
DIRECTOR	GOVERNOR

January 5, 2015

ALL-COUNTY INFORMATION NO. I-73-14

REASON FOR THIS TRANSMITTAL

[ ] State Law Change
[ ] Federal Law or Regulation Change
[ ] Court Order
[ ] Clarification Requested by One or More Counties
[x] Initiated by CDSS

(Filed Aug. 4, 2017)

TO: ALL COUNTY WELFARE DIRECTORS
ALL IN-HOME SUPPORTIVE SERVICES (IHSS) PROGRAM MANAGERS

SUBJECT: INFORMATION REGARDING FEDERAL COURT ORDER IMPACTING THE IMPLEMENTATION OF THE FEDERAL DEPARTMENT OF LABOR REGULATIONS PERTAINING TO THE PAYMENT OF OVERTIME COMPENSATION AND OTHER COMPENSABLE ACTIVITIES AND TO RELATED

PROVISIONS OF SENATE BILLS 855 AND 873 (CHAPTERS 29 AND 685, STATUTES OF 2014) FOR THE IHSS AND WAIVER PERSONAL CARE SERVICES PROGRAMS

This All-County Information Notice is to inform counties of the two recent court orders issued by Judge Richard Leon of the United States District Court, District of Columbia, which impact the implementation of regulations adopted by the U.S. Department of Labor (DOL) pertaining to the payment of overtime compensation and other compensable activities for In-Home Supportive Services (IHSS) and Waiver Personal Care Services (WPCS) providers that were to be effective January 1, 2015.

The first court order, dated December 22, 2014, vacated the DOL rule which precluded third-party employers from claiming applicable wage and overtime exemptions for services provided by live-in providers and employees performing companionship services. The second court order, dated December 31, 2014, enjoined the implementation of the revised definition of companionship services until January 15, 2015. However, a court hearing regarding the temporary injunction is calendared for January 9, 2015 wherein further information may be ascertained regarding the federal regulations at issue.

Based on the above-referenced court orders, CDSS Director Will Lightbourne notified County Welfare Directors on December 31, 2014, that the implementation of the new FLSA regulations and the key provisions of

Senate Bills 855 and 873 will be delayed until further court clarification.

All county IHSS offices and county public authorities should continue to operate under the requirements and regulations for payment of wages that were in effect on December 31, 2014. CDSS is continuing to move forward with the new timesheet format, but CMIPS II programming will not process payments for overtime or travel time until further clarification is ascertained based on the court decisions.

In those instances in which counties have conducted assessments that included wait time adjustments for medical accompaniment and those adjustments were entered into CMIPS II, counties will need to ensure that these adjustments are removed from CMIPS II with utmost expediency. However, counties should retain this information within the IHSS recipient's case file for future reference.

An information notice is currently in development to inform all IHSS providers and recipients of this delay. Mailing of the notices will begin this week to all IHSS providers and recipients. Please see attachment.

Depending on future court rulings, CDSS will issue further guidance to the counties via a Program Manager Letter, All-County Information Notice, or All-County Letter.

If you have any questions regarding this information, please call the Adult Programs Policy and Quality Assurance Branch, Policy and Operations

Bureau, Provider Policy and Adult Protective Services Unit, at (916) 651-5350.

Sincerely,

Original Document Signed By Hafida Habek, acting for:

EILEEN CARROLL
Deputy Director
Adult Programs Division

Attachment

C: CWDA
CAPA

IMPORTANT NOTICE TO ALL IN-HOME SUPPORTIVE SERVICES (IHSS) PROGRAM RECIPIENTS AND PROVIDERS

Dear IHSS Recipients and IHSS Providers,

On Wednesday, December 31, 2014 the US District Court in Washington, D.C. temporarily stopped the federal overtime pay requirements for home care workers which was due to go into effect January 1, 2015.

This means that:

- The IHSS program in California will **not** be implementing payments for overtime, travel time, or wait time for providers of services at this time, and
- The "hours cap" of 61 hours per week for each provider will **not** go into effect at this time.

Timecards will be issued in time for the January 15th payroll, but all authorized hours worked will be paid at straight-time (the locally bargained hourly wage) only, and travel and wait time will not be paid. **This means providers will be paid the same way they were in 2014 until further notice.**

The IHSS program will notify you if or when there are any further changes.