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FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TRINA RAY; SASHA WALKER, individually, and on behalf of all others similarly situated, Plaintiffs-Appellants, v. LOS ANGELES COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES, Defendant-Appellee, and CALIFORNIA DEPARTMENT OF SOCIAL SERVICES, Defendant.	No. 20-56245 D.C. No. 2:17-cv-04239-PA-SK OPINION (Filed Nov. 4, 2022)

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

Argued and Submitted November 18, 2021
Pasadena, California

Before: Marsha S. Berzon and Johnnie B. Rawlinson, Circuit Judges, and Matthew F. Kennelly,* District Judge.

Per Curiam Opinion;
Partial Concurrence and
Partial Dissent by Judge Berzon

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Per Curiam

The State of California and the County of Los Angeles administer an In-Home Supportive Services

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* The Honorable Matthew F. Kennelly, United States District Judge for the Northern District of Illinois, sitting by designation.

program ("IHSS program"), which allows low-income elderly, blind, or disabled residents of the County to hire a provider to help them with daily living activities. In 2013, the U.S. Department of Labor ("DOL") issued a new rule entitling IHSS providers and other home-care workers to overtime pay under the Fair Labor Standards Act ("FLSA"). 78 Fed. Reg. 60,454 (Oct. 1, 2013) (codified at 29 C.F.R. pt. 552). A district court vacated the rule before January 1, 2015, the rule's scheduled effective date. *Home Care Ass'n of Am. v. Weil* ("*Weil*"), 76 F. Supp. 3d 138, 148 (D.D.C. 2014). The D.C. Circuit reversed, upholding the rule in a decision that mandated on October 13, 2015. *Home Care Ass'n of Am. v. Weil* ("*Weil II*"), 799 F.3d 1084, 1087 (D.C. Cir. 2015). The State began paying overtime wages to IHSS providers on February 1, 2016.

In June 2017, Trina Ray, an IHSS provider in Los Angeles County, filed a putative collective action against the County seeking relief for unpaid overtime wages for the period between January 1, 2015, and February 1, 2016.[1] This is our second published opinion in this case. Our previous opinion, *Ray v. County of Los Angeles* ("*Ray I*"), 935 F.3d 703 (9th Cir. 2019), held, first, that the County was not an "arm of the state" with respect to the implementation of the IHSS program and therefore was not entitled to Eleventh Amendment immunity from suit, and, second, that the

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[1] Ray initially named California as a defendant but later voluntarily dismissed the State. Ray filed an amended complaint adding a second named plaintiff, Sasha Walker. We refer to the plaintiffs collectively as "Ray."

effect of *Weil II* was to reinstate the overtime rule's original effective date of January 1, 2015. *Id.* at 705, 713–14.

Three summary judgment rulings by the district court are at issue in this appeal: The court granted summary judgment to the County on the ground that the County does not employ IHSS providers for purposes of the FLSA, granted partial summary judgment to the County on the issue of willfulness, and denied partial summary judgment to Ray on the issue of liquidated damages. We unanimously hold that the County is a joint employer of IHSS providers under the FLSA, and we reverse the district court's ruling to the contrary. In this per curiam opinion, Judges Rawlinson and Kennelly also affirm the district court's rulings on willfullness and liquidated damages. Judge Berzon dissents with regard to those rulings.

I.

A.

California's IHSS program "serves hundreds of thousands of recipients." *Ray I*, 935 F.3d at 705. Providers help qualified individuals in their homes with "daily activities like housework, meal preparation, and personal care." *Id.* "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." *Id.* The federal government, the State, and the counties all contribute funding to the program.

"In the County of Los Angeles alone there are about 170,000 homecare providers and more than 200,000 recipients." *Id.* County residents seeking IHSS services apply through the County. County social workers review applications and conduct in-home visits to assess recipients' needs. Social workers determine the services recipients are entitled to receive, the time allotted for each service, and the total number of hours a provider may work for the recipient each month.

"Recipients . . . retain the right to hire, fire, and supervise the work of any in-home supportive services personnel providing services for them." Cal. Welf. & Inst. Code § 12301.6(c)(2)(B). Prospective providers must attend an in-person orientation in a County field office, where they view state-provided training materials and sign state-issued forms. Cal. Welf. & Inst. Code § 12301.24.

The County has established a public authority, the Personal Assistance Services Council, that serves as providers' employer of record for collective bargaining purposes. The Personal Assistance Services Council maintains a registry of providers, coordinates provider background checks, and provides training for providers and recipients.

Recipients are responsible for setting their provider's work schedule. *See id.* § 12300.4(d)(1)(A). Recipients also review and approve their provider's timesheets.

Providers submit their timesheets directly to the State, which issues their paychecks.[2]

B.

As mentioned, DOL issued a new rule in 2013 entitling IHSS providers to overtime pay under the FLSA. 78 Fed. Reg. 60,454. "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." *Ray I*, 935 F.3d at 707 (internal quotation marks omitted). The County participated in state-organized meetings and trainings on the new overtime rule beginning in 2014.

After *Weil I* vacated the new rule, "the CDSS decided that it would not implement overtime payments 'until further notice.'" *Id.* Once *Weil II* upheld the rule, DOL 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 [in *Weil II*] issues," 80 Fed. Reg. 55,029, 55,029 (Sept. 14, 2015), which occurred on October 13, 2015. DOL later confirmed that it would not begin enforcing the rule until November 12, 2015, and also stated that through December 31, 2015, it would "exercise prosecutorial discretion in determining whether to bring enforcement actions, with particular consideration given

[2] We provide more specifics about the roles of the County and State as pertinent to our substantive analysis, below.

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." 80 Fed. Reg. 65,646, 65,646 (Oct. 27, 2015).

On December 1, 2015, the State notified all counties that it would begin implementing the rule on February 1, 2016. The County supported the State's implementation plan by training County staff on the new overtime requirements, conducting information sessions for providers and recipients, and developing informational materials. California began paying overtime wages to providers on February 1, 2016.

Ray filed suit in June 2017, seeking relief for unpaid overtime wages between January 1, 2015, and February 1, 2016. After we decided *Ray I*, the district court conditionally certified a putative collective consisting of IHSS providers in Los Angeles County who worked overtime between January 1, 2015, and January 31, 2016. More than 10,000 providers opted in as plaintiffs.

The parties filed several motions for partial summary judgment. First, Ray sought partial summary judgment on the issue of whether the County was liable for liquidated damages for the time period after October 13, 2015—the date that *Weil II* mandated. The district court denied the motion, ruling that there was a "factual dispute as to whether the County [was] Plaintiffs' employer," and that the County had "presented evidence of its efforts to comply with the FLSA,

sufficient to avoid summary judgment as to its good faith defense to liquidated damages at this stage."

Second, the County asked the district court to find that the statute of limitations for Ray's FLSA claims was two years, rather than three years for "willful" violations. The district court granted partial summary judgment to the County on this issue, ruling that "the County's inability to implement overtime payment to IHSS providers demonstrates as a matter of law that the County's alleged violation of the FLSA was not 'willful,'" and that "the undisputed facts in the record show that the County did not act with knowing or reckless disregard of whether its conduct was prohibited by the FLSA."

Finally, both sides moved for partial summary judgment on the issue of whether the County was an employer of IHSS providers. Only an employer covered by the statute can be liable under the FLSA for failing to pay overtime compensation. After weighing several factors, the district court held that "as a matter of law . . . the 'economic reality' is that the County is not an employer of IHSS providers." The court therefore granted summary judgment in favor of the County.

Ray timely appealed all three orders. Because the district court's determination that the County does not employ IHSS providers could be dispositive of the entire action, we address the last order first.

II.

The district court erred in granting summary judgment to the County on the ground that the County does not employ IHSS providers.

"The FLSA broadly defines the 'employer-employee relationship[s]' subject to its reach." *Torres-Lopez v. May*, 111 F.3d 633, 638 (9th Cir. 1997) (alteration in original) (citation omitted). "'Employ' includes to suffer or permit to work." 29 U.S.C. § 203(g). "'Employer' includes any person acting directly or indirectly in the interest of an employer. . . ." *Id.* § 203(d).

"[A]n employee may have more than one employer under the FLSA." *Torres-Lopez*, 111 F.3d at 638. DOL so recognized in a regulation providing guidance on joint employment. 29 C.F.R. § 791.2 (2019).[3] "All joint employers are individually responsible for compliance with the FLSA." *Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465, 1469 (9th Cir. 1983) (citing 29 C.F.R. § 791.2(a)), *disapproved of on other grounds by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). Like the employer-employee relationship itself, "the concept of joint employment should be defined expansively under the FLSA." *Torres-Lopez*, 111 F.3d at 639. The parties agree that, to decide whether the County is a joint employer of IHSS providers, we must consider the "economic reality," applying the four factors enumerated in *Bonnette:* "whether the alleged

[3] Section 791.2 is not currently in effect but was in effect during the time period at issue in this case. *See* 86 Fed. Reg. 40,939 (July 30, 2021).

employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records." 704 F.2d at 1469–70.

Ray maintains that *Bonnette* directly controls this case. *Bonnette* held that the State and three counties (not including Los Angeles County) were joint employers of IHSS providers, then called "chore workers," "under the FLSA's liberal definition of 'employer.' " 704 F.2d at 1470. The County disagrees that *Bonnette* is dispositive, and points to differences between the IHSS program operating in Los Angeles County today and the programs analyzed in *Bonnette*. We conclude that *Bonnette*'s analysis and result do apply here, notwithstanding the differences identified by the County.

Bonnette addressed whether recipients of services were the sole employers of IHSS providers for FLSA purposes or whether the State and counties were joint employers as well. We reasoned that the State and counties had "complete economic control" over the employment relationship, because they paid the providers' wages and "controlled the rate and method of payment." *Id.* The State and counties also "maintained employment records." *Id.* Additionally, the State and counties "exercised considerable control over the nature and structure of the employment relationship." *Id.* They made the "final determination, after consultation with the recipient, of the number of hours each chore worker would work and exactly what tasks would be performed." *Id.* Although *Bonnette* did not

take a position on whether the State and counties should be "viewed as having had the power to hire and fire" providers, we observed that "their power over the employment relationship by virtue of their control over the purse strings was substantial." *Id.* In light of the economic and structural control the State and counties exercised, *Bonnette* concluded that the State and the counties were joint employers of IHSS providers. *Id.*

The most significant change between the IHSS program when *Bonnette* was decided and now concerns the payment of providers. At the time of *Bonnette*, the counties were responsible for making payments either to recipients of services, who then paid their providers, or directly to providers. *Bonnette*, 704 F.2d at 1468. The counties did not fund those payments, however. The federal government provided 75% of the funding for the program and the State, 25%. *Id.* at 1467; *Bonnette v. Cal. Health & Welfare Agency*, 525 F. Supp. 128, 130 (N.D. Cal. 1981). The "counties were relieved of any financial responsibility." 525 F. Supp. at 130.[4]

Today, payroll is consolidated statewide, and the State issues paychecks to IHSS providers. We are not persuaded that the State's assumption of payroll responsibility changes *Bonnette*'s analysis. The County continues to exercise considerable economic and structural

[4] The County maintains that it has "always contributed funds that make up a small fraction of the total IHSS program costs," citing a document from the Legislative Analyst's Office showing that before 1991, counties were responsible for 3% of program costs.

control over the employment relationship in a variety of ways.

As to economic control, the record shows that the County contributes a substantial amount of funding to the IHSS program. As the result of a 1991 "realignment" of State and county responsibilities for social services, counties are now responsible for 35% of the nonfederal costs of the program.[5] *See* Cal. Welf. & Inst. Code § 12306(c) (1992). The County maintains that its 35% share of program costs is only nominal, because the State offsets the increase by directing revenue from sales taxes and vehicle license fees to the counties. *See* Cal. Welf. & Inst. Code §§ 17602, 17604. The record indicates, however, that counties have some flexibility in deciding how to spend the realignment funds they receive from the State. For one thing, the funds are deposited in a social services account, which the County uses to fund a variety of social services programs, not just the IHSS program. *See* Cal. Welf. & Inst. Code § 17602(a). Counties are authorized to transfer a certain percentage of funds among their social services, health, and mental health accounts.

Moreover, during the time period under consideration in this case, the County contributed significant additional funding to the IHSS program, apart from the realignment revenue it received from the State. A representative of the County testified that in fiscal

[5] In 2012, the State passed "Maintenance of Effort" legislation, which capped the counties' ongoing contributions to the IHSS program to no more than a 3.5 percent annual increase. Cal. Welf. & Inst. Code § 12306.15(c)(1), *repealed* (2017).

year 2014-2015, the County paid its share of IHSS program costs using $118 million from its general fund and $237 million in realignment revenue. The representative also testified that the County's share of program costs goes toward provider wages.

Given that the County makes a significant financial contribution to provider wages, *Bonnette*'s finding that providers "were paid by the [counties and State]" remains accurate, even though the State is now responsible for cutting the checks.[6] 704 F.2d at 1470. If anything, the County's share of funding for provider wages is greater than it was at the time of *Bonnette*.

Additionally, the County now has the authority, either by itself or through a separate entity, to negotiate for wages covering the providers. Cal. Welf. & Inst. Code § 12302.25. So the County sets or could set wages. As mentioned, the County has established a public authority for collective bargaining purposes, the Personal Assistance Services Council. The County can negotiate to pay providers a rate above the state minimum wage, although the State must review and approve all changes. Cal. Welf. & Inst. Code § 12306.1(a). California pays "65 percent and the County 35 percent of the

[6] The California Court of Appeal reached the same conclusion in rejecting a demurrer by Sonoma County to an IHSS provider's suit for unpaid wages and overtime under the FLSA. *See Guerrero v. Superior Court*, 213 Cal. App. 4th 912, 933 (2013), *as modified on denial of rehearing* (Mar. 11, 2013). The court held that, "[a]s was the case in *Bonnette*, . . . the chore workers' wages were determined and paid by the state and its agents, [Sonoma] County and [the county's] Public Authority," although the "providers were paid directly by the state." *Id.* (emphasis omitted).

nonfederal share of wage and benefit increases negotiated by the Public Authority, with the state contribution capped at a maximum amount set by statute." *Guerrero*, 213 Cal. App. 4th at 933 (citing Cal. Welf. & Inst. Code § 12306.1(c), (d)). Between 2012 and 2016, the County requested pay increases for providers and the State approved those increases. The County therefore "exercised some power in determining the pay rates" for providers. *Torres-Lopez*, 111 F.3d at 643. Such authority is a significant indication of joint employer status even though the employer "was not involved in preparing [employees'] payroll or directly paying their wages." *Id.*[7]

The County also chooses the method of payment, as it did at the time of *Bonnette.* At that time, as today, California state law "specified three methods by which the counties could deliver chore worker services: the counties could hire chore workers directly, contract with agencies or individuals for such services, or make direct payment to the recipients for the 'purchase' of chore worker services." 704 F.2d at 1467 (citing Cal. Welf. & Inst. Code § 12302). In *Bonnette*, all three counties had chosen "the third method of delivery."[8] *Id.*

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[7] *Torres-Lopez* held a grower a joint employer of farmworkers although a labor contractor prepared the payroll and directly paid the wages.

[8] The district court in this case misconstrued the facts in *Bonnette* with respect to the counties' choice of service delivery. The court stated incorrectly that "[a]ll three counties at issue in *Bonnette* chose the first option for assisting the state with the IHSS program. In other words, the counties opted to hire providers

Here, too, the County chose to use the third option, the "direct payment" method.[9] The County therefore exercises at least some control over the method of payment, as in *Bonnette.*

Besides exercising substantial economic control, the County also continues to "exercise considerable control over the nature and structure of the employment relationship," as in *Bonnette.* 704 F.2d at 1470. In *Bonnette*, a county social worker would "consult[ ] with the recipient and others, using a standard county form," and "would determine the tasks to be performed for the recipient by the chore worker and the hours per week required to perform the tasks." 704 F.2d at 1468. Similarly, today a County social worker performs an initial in-home assessment of the recipient's needs and applies state guidelines to determine how many service hours the recipient is eligible to receive. The social worker reviews a list of twenty-five types of services

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directly with money provided by the counties." The court erroneously distinguished *Bonnette* on that basis.

[9] The statutory language describing the "direct payment" option refers to payments to recipients, but in *Bonnette*, payments were sometimes conveyed directly to providers: "At different times the counties used various methods of payment, including two-party checks payable to the recipient and chore worker, checks payable directly to the recipient with the understanding that the recipient would pay the chore worker, and checks payable directly to the chore worker." 704 F.2d at 1468. Likewise, today, although payments are conveyed directly to providers, the parties agree that the County uses the third, direct payment option, presumably because it is evident that the County is not hiring the providers or contracting with agencies or individuals for such services.

that IHSS providers can give and assigns a "functional rate index" number of 1 to 5 for each of the services for which the recipient qualifies. The social worker then authorizes the number of hours allocated to each task, based on state guidelines prescribing a range of hours for each task at each functional ranking. The social worker may deviate from the prescribed range if the worker justifies the deviation.

Once the County has authorized the tasks and service hours the recipient is entitled to receive, it is up to the recipient to set the IHSS provider's schedule, Cal. Welf. & Inst. Code § 12300.4(d)(1)(A), just as in *Bonnette* the "recipient was responsible for the day-to-day supervision of the chore worker," 704 F.2d at 1468. "These aspects of the relationship between recipient and provider are no different than when *Bonnette* was decided." *Guerrero*, 213 Cal. App. 4th at 936–37.

Today, however, if a recipient needs a provider to work overtime hours beyond the authorized amount, the recipient must request County approval, except in narrow circumstances. And today, County social workers inspect the home to make sure recipients are receiving the care they need.

Finally, the County is the public face of the employer as far as the providers are concerned. Prospective providers attend an orientation session conducted by County employees at a County field office, where they view state-provided training materials and sign state-issued forms. Cal. Welf. & Inst. Code § 12301.24. The County also assigned dozens of employees to

answer providers' questions regarding the overtime requirements at issue here. And the County maintains some employment records, including the forms a provider signs when applying for employment, a copy of the provider's ID, and a copy of the provider's Social Security card.

In light of the economic and structural control the County exercises over the employment relationship, we conclude that *Bonnette*'s holding that counties are joint employers of IHSS providers applies to the County. We reverse the district court's grant of summary judgment to the county and direct the court to grant partial summary judgment to Ray on this issue.

III.

The district court did not err in granting partial summary judgment to the County on the issue of willfulness and denying partial summary judgment to Ray on the issue of liquidated damages. A review of the cases addressing willfulness and the assessment of liquidated damages under the FLSA reflect that a determination of willfulness and the assessment of liquidated damages are reserved for the most recalcitrant violators. *See Alvarez v. IBP, Inc.*, 339 F.3d 894, 909 (9th Cir. 2003) ("[W]e will not presume that conduct was willful in the absence of evidence.") (citation omitted); ("[C]ourts need not award liquidated damages in every instance . . . "); *see also Bratt v. Cnty. of Los Angeles*, 912 F.2d 1066, 1072 (9th Cir. 1990) (noting that the case was not one "like many of those cited by the

Employees, where the employer is using 'ticky-tack' reasons to attempt to evade the wage and hour laws") (alterations omitted). The County does not belong in that group of recalcitrant employers.

It is undisputed that the County had no ability to pay overtime wages in the absence of the State making funds available to satisfy the overtime obligations. *See Ray v. Cnty. of Los Angeles*, 935 F.3d 703, 711 (9th Cir. 2019) (*Ray I*) ("[T]he 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 *Ray I*, we noted that "[t]he County had no choice in the matter of the overtime wages, as the State mandated the payment start date." *Id.* That conclusion has not changed. Specifically relying on our opinion in *Ray I*, the district court found that "the facts of this case demonstrate as a matter of law that the County had no authority or ability to implement overtime pay for [In-Home Supportive Services] (IHSS) providers." *District Court Order*, p. 6.

We agree with the district court's reliance on our reasoning in *Ray I*, and its application of that binding precedent to the facts of this case. Notably, as the district court determined, the payroll systems for IHSS providers "are all centralized on a state-wide database

controlled by [the California Department of Social Services]," rather than by the County. *Id.*[10]

The facts of this case are more akin to those declining to impose a willfulness penalty on the employer in the absence of an affirmative refusal to comply with the requirements of the FLSA. For example, in *Bratt*, we reasoned that there was no evidence in the record "that the County attempted to evade its responsibilities under the Act." 912 F.2d at 1072. We explained that "a decision made above board and justified in public," as was done by the County in this case, "is more likely" made in good faith. *Id.* (alteration omitted).

We added that liquidated damages "are designed in part to compensate for concealed violations, which may [otherwise] escape scrutiny." *Id.*

It is undisputed that resolution of the overtime wages for IHSS providers in California played out in public, including numerous training sessions on implementing the new FLSA requirements. Under this circumstance, we agree with the district court and with our precedent in *Bratt* that the County acted in good faith. *See id.*

The facts in this case are in stark contrast to those in *Alvarez*, in which we upheld the district court's determination of "willful conduct." 339 F.3d at 909. The employer in *Alvarez* "took no affirmative action to

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[10] Our colleague in dissent characterizes the State's fiscal control as "a practical matter." This description is not consistent with the holding in *Ray I*.

assure compliance with [the FLSA requirements]." *Id.* Rather, the employer "attempt[ed] to evade compliance, or to minimize the actions necessary to achieve compliance." *Id.* (footnote reference omitted). We emphasized that the employer "could easily have inquired into . . . the type of steps necessary to comply" with the provisions of the FLSA, but failed to do so. *Id.* (citation and internal quotation marks omitted).

There is absolutely no evidence in the record that the County "attempt[ed] to evade compliance, or to minimize the actions necessary to achieve compliance" with the overtime provisions of the FLSA. *Id.* Instead, the record reflects that the only reason that the County failed to pay the required overtime wages sooner is because the State controlled the purse strings.

IV.

We REVERSE the district court's grant of summary judgment to the County on the ground that the County does not employ IHSS providers. On remand, the district court is directed to grant partial summary judgment to Ray on the issue of whether the County is a joint employer of IHSS providers. The majority AFFIRMS the district court's decisions granting partial summary judgment to the County on the issue of willfulness and denying partial summary judgment to Ray on the issue of liquidated damages; Judge Berzon dissents from those holdings for the reasons stated in her dissent.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Ray v. Los Angeles County Department of Public Social Services, No. 20-56245

BERZON, Circuit Judge, concurring in part and dissenting in part:

I fully concur in the per curiam opinion to the extent it holds that the district court erred in granting summary judgment to the County of Los Angeles on the ground that the County does not employ In-Home Supportive Services ("IHSS") providers. Per Curiam Op. 10. The opinion rightly holds that based on the County's economic and structural control over the employment relationship, the County is a joint employer of IHSS providers. Per Curiam Op. 18. Notwithstanding that conclusion, the majority holds that because, as a practical matter, the State controlled the payroll system (1) the County acted in good faith for purposes of determining whether it has established a defense to liquidated damages; and (2) the County's failure to pay overtime wages could not have been willful for purposes of determining the applicable statute of limitations. Per Curiam Op. 18–21. I disagree as to each of these holdings. Although the result the majority reaches on liquidated damages and willfulness may seem equitable, it is not consistent with the standards we are obligated to apply under the Federal Labor Standards Act ("FLSA"). I would therefore reverse the

district court's denial of partial summary judgment to the plaintiffs ("Ray") as to liquidated damages, as well as the district court's grant of partial summary judgment to the County on the question of willfulness.

I.

"In addition to overtime compensation, successful FLSA plaintiffs are entitled to liquidated damages in the amount of the unpaid overtime compensation (i.e. double damages)." *Haro v. City of Los Angeles*, 745 F.3d 1249, 1259 (9th Cir. 2014) (citing 29 U.S.C. § 216(b)). "Liquidated damages are 'mandatory' unless the employer can overcome the 'difficult' burden of proving both subjective 'good faith' and objectively 'reasonable grounds' for believing that it was not violating the FLSA." *Id.* (quoting *Alvarez v. IBP, Inc.*, 339 F.3d 894, 909–10 (9th Cir. 2003), *aff'd*, 546 U.S. 21 (2005)); *see* 29 U.S.C. § 260. Thus, Ray is entitled to partial summary judgment on this issue if the County is unable to meet its burden of establishing either of these two prongs. Because the County falls short on both, I would hold that the district court erred in denying the motion for partial summary judgment.

The majority's analysis of this issue begins with the premise that "the assessment of liquidated damages [is] reserved for the most recalcitrant of violators." Per Curiam Op. 19. That starting premise is just wrong. Under the FLSA, "liquidated damages represent compensation, and not a penalty." *Chao v. A-One Med. Servs., Inc.*, 346 F.3d 908, 920 (9th Cir. 2003)

(quoting *Local 246 Util. Workers Union v. S. Cal. Edison Co.*, 83 F.3d 292, 297 (9th Cir. 1996)). "Double damages are the norm; single damages are the exception." *Id.*

Here, Ray moved for partial summary judgment as to the County's liability for liquidated damages for the time period after October 13, 2015, the date *Home Care Ass'n of Am. v. Weil* ("*Weil II*"), 799 F.3d 1084 (D.C. Cir. 2015), mandated. The district court denied Ray's motion on two grounds, ruling first that there was a "factual dispute as to whether the County [was] Plaintiffs' employer," and, second, that the County had "presented evidence of its efforts to comply with the FLSA, sufficient to avoid summary judgment as to its good faith defense to liquidated damages at this stage." The per curiam opinion's holding that the County employs IHSS providers eliminates the first ground. And I disagree with the district court's holding that the County's evidence creates a triable issue as to whether the County's effort *eventually* to comply with the FLSA's overtime requirements is a viable affirmative defense to the usual liquidated damages for the period between October 13, 2015, and February 1, 2016, for which overtime wages have never been paid.

"To satisfy the subjective 'good faith' component, the County [is] obligated to prove that it had 'an honest intention to ascertain what the FLSA requires and to act in accordance with it.'" *Bratt v. Cnty. of Los Angeles*, 912 F.2d 1066, 1072 (9th Cir. 1990) (alterations omitted). For the objective component, the County must prove it had "objectively 'reasonable grounds' for believing

that it [did] not violat[e] the FLSA" for the period between October 13, 2015, and February 1, 2016. *See Haro*, 745 F.3d at 1259.

The County cites a single case, *Bratt*, in which we concluded that an employer (also Los Angeles County in that case) had successfully made out a good faith defense to liquidated damages under the FLSA. In *Bratt*, there was no evidence "that the County had anything other than an honest intention to comply with the Act," satisfying the subjective component of the test. 912 F.2d at 1072. And the County's conclusion that certain employees were exempt from FLSA coverage, based on its interpretation of FLSA regulations, was "incorrect" but "not unreasonable," satisfying the objective component. *Id.*

Here, the County has asserted on the merits that it does not employ IHSS providers. But Ray introduced evidence that the County knew that courts could well decide it was an employer of IHSS providers for FLSA purposes: the County knew that DOL and state agencies had taken the position that it was a joint employer of IHSS providers; there was pending litigation on the issue; and other counties had been held liable for both back wages as well as liquidated damages. And the existing judicial precedents, as well as decisions of the California Labor Commissioner, pointed toward holding the County liable as a joint employer. *See Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983); *Guerrero v. Superior Court*, 213 Cal. App. 4th 912, 930–37 (2013).

Moreover, unlike in *Bratt*, the County does *not* argue, for purposes of meeting the narrow defense to the liquidated damages obligation, that it believed IHSS providers were not entitled to overtime pay during the relevant period. Ray pointed to evidence that the County knew the overtime rule would take effect on October 13, 2015, when *Home Care Ass'n of Am. v. Weil* ("*Weil II*"), 799 F.3d 1084 (D.C. Cir. 2015) mandated. *See infra* pp. 8–9, 12.

Instead, the County maintains that it showed subjective good faith because paying overtime wages required California to make "sweeping" and "complex" changes to the IHSS program, and the County participated in the State's efforts. In other words, complying with the FLSA was difficult and took time, and the State and County implemented overtime pay as quickly as they could.

The problem with this argument is that, even if the County could show that it was not practical to pay overtime wages before February 1, 2016—more than three months after *Weil II* mandated—that showing alone would not satisfy the subjective component of the good faith test. To this day, IHSS providers have never been paid overtime wages for the period between October 13, 2015, and February 1, 2016. And although the County contends it "took substantial steps to help the State comply with the FLSA in 2015 and 2016," nowhere does the County argue that it raised the matter of paying overtime wages for the period from October 13, 2015, and February 1, 2016 with the State, or that it took other steps to promote compliance with their

joint obligation to pay overtime for that period, even retroactively. Given the complete failure to pay the IHSS providers overtime wages for that period either when they were owed or retroactively *and* the absence of any contention by the County that it believed payment was not required,[1] the County has not demonstrated "an honest intention to ascertain what the FLSA requires and to act in accordance with it." *Bratt*, 912 F.2d at 1072.

Nor has the County raised a triable issue on the second required showing, whether it had "objectively 'reasonable grounds' for believing that it was not violating the FLSA" after October 13, 2015. *See Haro*, 745 F.3d at 1259. Notably, the majority's liquidated damages discussion does not address this essential prong at all.

The County's argument on objective reasonableness is threefold: (1) the U.S. Department of Labor ("DOL") guidance on the final rule "highlighted the State"; (2) the February 1, 2016, implementation date was objectively reasonable, in light of the "shifting legal landscape" and DOL's time-limited nonenforcement policy; and (3) the State controls payroll for IHSS providers, and the County had no authority to pay overtime wages sooner.

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[1] That the County was aware of the overtime obligation for the contested period is reinforced by County documents in the record, which discuss the possibility that IHSS providers would be owed retroactive pay for overtime after October 13, 2015.

In support of its first argument, the County cites an announcement from DOL indicating that the federal agency, in exercising its enforcement discretion, would give "particular consideration . . . 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 Rule." 79 Fed. Reg. at 60,974. The County does not explain the significance of this quotation—which on its face refers to "States *and other entities,*" not just "States." 79 Fed. Reg. at 60,974 (emphasis added). The sentence certainly is not sufficient to override the rule that "joint employers are individually responsible for compliance with the FLSA." *Bonnette*, 704 F.2d at 1469. Nor does it establish that DOL does not consider any counties to be employers of IHSS providers. Elsewhere, DOL has said just the opposite. In 2014, DOL issued an opinion letter entitled "Joint employment of home care workers in consumer-directed, Medicaid-funded programs by public entities under the Fair Labor Standards Act," which explained that "a state itself, a statewide agency that oversees Medicaid programs, or a county department of aging could all be potential joint employers of home care workers providing services through a consumer-directed program." Dep't of Labor, Administrator's Interpretation No. 2014-2, 2014 WL 2816951, at *4 (June 19, 2014).

As for the County's second contention, DOL's time-limited non-enforcement policy does not excuse the State and County's failure to pay overtime wages before February 1, 2016. After *Weil II* upheld the overtime rule,

DOL said it would not begin enforcing the rule until November 12, 2015, and that through December 31, 2015, it would "exercise prosecutorial discretion in determining whether to bring enforcement actions." 80 Fed. Reg. 65,646, 65,646 (Oct. 27, 2015). But as recognized in *Ray v. County of Los Angeles* ("*Ray I*"), 935 F.3d 703 (9th Cir. 2019), "[a]n agency's discretionary decision to hold off enforcement does not and cannot strip private parties of their rights to do so." *Id.* at 715; *see Kinkead v. Humana at Home, Inc.*, 450 F. Supp. 3d 162, 187, 189 (D. Conn. 2020) (holding, in a private action to enforce the overtime rule, that defendants' reliance on DOL's non-enforcement policy as a defense to liability and liquidated damages was "not reasonable").

Moreover, there is record evidence that private enforcement actions could still go forward, and that the County knew that. Minutes from an October 1, 2015, meeting of the County's FLSA Steering Committee noted that the overtime rule would be "effective 10/13/15" and that the "only way to 'postpone' implementation is if agencies file a motion with the United States Supreme Court."[2] On November 30, 2015, the California Welfare Directors Association sent the County a Q&A document noting that DOL's non-enforcement policy "doesn't insulate employers from potential lawsuits." Earlier that month, the California Association of Counties had circulated similar guidance. As these

[2] The Supreme Court denied an application for a stay of the mandate on October 6, 2015. The Supreme Court denied a petition for writ of certiorari on June 27, 2016. *Home Care Ass'n of Am. v. Weil*, 579 U.S. 927 (2016).

communications attest, DOL's decision to delay federal enforcement of the overtime rule until November 12, 2015 is not informative as to whether the County had an objectively reasonable belief that no overtime wages were due to IHSS provides for the period between October 13, 2015, and February 1, 2016.

The County's third argument—that it lacked authority to pay IHSS providers—is more substantial. We recognized in *Ray I* that the County had "no discretion over the action (or inaction) that subjected it to potential liability here: payment of overtime wages under the FLSA." 935 F.3d at 711. But although it may seem anomalous to hold the County liable for unpaid overtime wages when it ordinarily did not directly remit payment, the FLSA compels that result.

The County has not pointed to any cases excusing a joint employer from compliance with the FLSA on the ground that only the other employer had the usual authority directly to take the actions that would constitute compliance. Such a result would be inconsistent with the well-established rule that "joint employers are individually responsible for compliance with the FLSA." *Bonnette*, 704 F.2d at 1469. That rule reflects the "broad remedial purposes of the [FLSA]," *Torres-Lopez v. May*, 111 F.3d 633, 639 (9th Cir. 1997) (citation omitted), a statute we "construe[] liberally in favor of employees," *Rosenfield v. GlobalTranz Enters., Inc.*, 811 F.3d 282, 285 (9th Cir. 2015) (citation omitted). Allowing joint employers to avoid liability for violations of the FLSA by showing they ordinarily did not perform a particular employer function would risk

undermining the statute's remedial purposes. Holding joint employers "individually and jointly" responsible for compliance, regardless of whether, for example, one joint employer "is controlled by" the other employer and may not perform some functions, is consistent with DOL's longstanding guidance on joint employment. 29 C.F.R. § 791.2(a), (b)(3) (2019).

I would reverse the district court's denial of partial summary judgment to Ray on the issue of liquidated damages.

II.

I would also reverse the district court on the issue of willfulness. The FLSA has a two-year statute of limitations for actions for unpaid overtime compensation unless the violation was "willful," in which case the statute of limitations is three years. 29 U.S.C. § 255(a).

Ray filed suit on June 7, 2017, seeking relief for unpaid overtime wages between January 1, 2015, and February 1, 2016. For IHSS providers who opted into the collective action after the complaint was filed, the timeliness of their claims is measured from the date they filed a written consent to opt into the action. *See* 29 U.S.C. § 256(b). The district court equitably tolled the statute of limitations from September 28, 2017, the date the district court denied the County's motion to dismiss, to December 11, 2019, the date the court conditionally certified the collective.[3] Ray maintains that

[3] That ruling has not been appealed.

the County's alleged violation of the FLSA was willful beginning on October 13, 2015, when *Weil II* mandated. Although some providers opted into the collective action within two years of that date (not counting the time during which the statute of limitations was equitably tolled), others did not.

To show a willful violation, Ray must prove that "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988). I would hold that Ray introduced evidence sufficient to raise a triable issue as to whether the County "either knew or showed reckless disregard for the matter of whether its conduct" violated the FLSA between October 13, 2015, and February 1, 2016. *See id.*

As I have explained, there was evidence that the County knew (1) that the overtime rule would take effect when *Weil II* mandated on October 13, 2015, and (2) that there was a likelihood the courts would hold it was liable as a joint employer of IHSS providers, particularly given *Bonnette*, DOL's position, and the fact that other counties had been deemed liable. *See Bonnette*, 704 F.2d at 1470; *Guerrero*, 213 Cal. App. 4th at 930–37. And Ray introduced evidence that the County knew that employers could face liability in private lawsuits for failing to pay overtime wages after October 13, 2015, even if DOL was not yet enforcing the new rule. *See supra* pp. 8–9.

The County maintains that it had no ability to implement overtime pay because the State controls payroll for IHSS providers. But, again, the County does not cite any authority excusing it from complying with the FLSA because it is a joint employer with only partial responsibility for implementing the program. Ray's evidence was sufficient to create a triable issue as to whether the County knew or showed reckless disregard for whether the failure to pay overtime wages beginning on October 13, 2015, violated the FLSA. I would therefore hold that the district court erred in granting partial summary judgment to the County on the issue of the length of the limitations period.

III.

For the foregoing reasons, I would hold that the County is, on the record here, liable for liquidated damages for the period between October 13, 2015 and February 1, 2016. Further, for purposes of determining whether its conduct was willful and so triggered a three-year limitations period, I would hold that Ray raised a triable issue of fact as to whether the County knew or showed reckless disregard that its conduct violated the FLSA during that period. I therefore respectfully dissent as to those two issues.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 17-04239 PA (SKx)	Date	October 27, 2020
Title	Trina Ray, et al. v. California Department of Social Services, et al.		

Present: The Honorable	PERCY ANDERSON, UNITED STATES DISTRICT JUDGE
G. Garcia	Not Reported
Deputy Clerk	Court Reporter / Recorder
N/A	
Tape No.	
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
None	None

Proceedings: MOTION FOR PARTIAL SUMMARY JUDGMENT

Before the Court is a Motion for Partial Summary Judgment filed by plaintiffs Trina Ray and Sasha Walker ("Plaintiffs"). (Dkt. No. 132 ("Mot.").) Defendant the County of Los Angeles (the "County") filed an Opposition (Dkt. No. 143) and Plaintiffs filed a Reply (Dkt. No. 144). The Court construed the County's Opposition as the County's own Motion for Summary Judgment (Dkt. No. 148) and allowed Plaintiffs the opportunity to oppose the County's Motion (Dkt. No. 151). Pursuant to Rule 78 of the Federal Rules of Civil Procedure and

Local Rule 7-15, the Court finds this matter appropriate for decision without oral argument.

I. Factual and Procedural Background

The following facts are undisputed. California provides domestic in-home services to the aged, the blind, and the disabled through programs that were initiated by and funded in part by the federal government. Homecare providers such as Plaintiffs help recipients with daily activities including housework, meal preparation, and personal care. Since 1974, these services have been provided under California's In-Home Supportive Services ("IHSS") plan. Cal. Welf. & Inst. Code ("CWIC") §§ 12300-12308 (West 1980). 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, including the County. CDSS ensures uniformity across the State by issuing regulations and other guidelines to direct counties in their administrative roles. Id. §§ 12301.

The State, counties, and IHSS recipients all play roles in implementing the IHSS program. See Guerro v. Superior Court, 213 Cal. App. 4th 912, 920-22 (2013). The State sets the rules for the program and delegates day-to-day administration of the program to the counties. The State identifies specific services authorized under the IHSS program, and creates standardized "hourly task guidelines" and a "uniform needs assessment tool" for counties to use in assessing individual

service needs and service-hour requirements.. CWIC §§ 12301.1, 12301.2.

Following State guidelines and protocols, counties process a recipient's application for IHSS services, assess a recipient's needs, authorize services and hours, and periodically reassess a recipient's needs. Id. § 12301.1. Counties also provide for delivery of IHSS services to recipients and carry out "quality assurance" including background checks, orientations, and unannounced home visits to confirm service delivery. Id. §§ 12301.24, 12305.7-12305.87.

Counties have three options for assisting the State. Counties can: (1) hire in-home supportive personnel, (2) contract with a city, county, agency, local health district, or individual, or (3) make direct payment to a recipient for the purchase of services. Id. § 12302. The County uses the third option, known as the Direct Payment Mode. Under the Direct Payment Mode, IHSS providers in the County are paid directly by the State. The State must "perform or ensure the performance of all rights, duties and obligations of the recipient relating to [the] services as required for purposes of unemployment compensation, unemployment compensation disability benefits, workers' compensation, retirement savings accounts, . . . federal and state income tax, and federal old-age, survivors, and disability insurance benefits." Id. § 12302.2(a)(1). This payroll function includes paying or transmitting contributions, premiums or taxes under these programs "on the recipient's behalf as the employer," and making relevant payroll deductions from checks paid directly to

providers. Id. §§ 12302.1(a)(2), 12302.2(b). The State is responsible for collecting time cards, maintaining timekeeping records, and issuing paychecks drawn on the State's treasury. Id. § 12300.4.

In addition, each county must act as or establish an employer for purposes of collective bargaining. Id. § 12302.25, subd. (a). If a county establishes a public authority or contracts with a nonprofit consortium, those entities are deemed the employer for purposes of collective bargaining. Id. § 12301.6. In 1997, the County created the Public Assistance Services Counsel ("PASC") to act as the employer of record for collective bargaining, to establish a registry of potential providers interested in working in the IHSS program, and to provide access to training for providers and recipients. The PASC bills the County for its services. The PASC coordinator also provides background checks for the County. However, the State continues to perform payroll services on the recipient's behalf. Id. §§ 12301.6(i)(1), 12302.2(a)(2) ("[c]ontributions, premiums, and taxes shall be paid or transmitted [by the State] on the recipients behalf as the employer.").

Recipients of the IHSS program "retain the right to hire, fire, and supervise the work of any in-home supportive services personnel providing services for them." Id. § 12301.6(c)(2)(B). Recipients are responsible for setting their provider's schedule. In addition, the recipient supervises the provider's work. Providers work at the times selected by the recipient, subject to the recipient's total allotted service hours as determined by the County in accordance with State

guidelines. Recipients of personal care services choose their own provider. Id. § 12303.4.

On January 1, 2015, federal regulations changed to provide overtime payments to IHSS providers like Plaintiffs under the Fair Labor Standards Act ("FLSA"). Following this new rule, the California Assembly charged CDSS and other State actors with implementing the new overtime rules. Id. § 12300.4(k). The State shared draft guidance, including All-County Letters, All-County Informational Notices, and Program Manager Letters to guide all 58 counties in implementing the new overtime rules. The State also developed web seminars and videos to train counties and staff on implementation, held FLSA time sheet training, and had monthly meetings where CDSS informed the counties of upcoming changes. The County used the State's letters and training materials to develop handouts, FAQs, and instructions for IHSS providers.

On June 7, 2017, Plaintiffs filed a putative collective action under Section 216(b) of the FLSA against the State of California and the County. Plaintiffs' Complaint seeks relief for themselves and the putative collective for unpaid overtime wages between January 1, 2015 and February 1, 2016. Plaintiffs originally sued both the State and the County. (See Dkt. No. 1.) Plaintiffs later dismissed the State as a defendant. (See Dkt. No. 29.) Both Plaintiffs and the County now seek summary judgment on the diapositive issue of whether the County is an employer of HISS providers.

II. Evidentiary Objections

Both Plaintiffs and the County have objected to evidence submitted in connection with the motions for partial summary judgment. Plaintiffs' evidentiary objections to the County's evidence are denied as moot, as the Court does not rely on any evidence submitted by the County that Plaintiffs' objected to. See American Guard Services, Inc. v. First Mercury Insurance Co., 15-cv-9259, 2017 WL 6039975, at * fn. 5 (C.D. Cal. Apr. 14, 2017) (overruling plaintiff's evidentiary objections "as moot because the Court [did] not rel[y] on any evidence to which an evidentiary objection [was] asserted").

The Court also overrules the County's evidentiary objections to Plaintiffs' evidence. First, the County objects to virtually all of Plaintiffs' exhibits for failure to include a stipulation, declaration, or testimony regarding the exhibits' authenticity. (See Dkt. No. 143-1, Def.'s Obj. to Plf. Separate Statement.) "On summary judgment, the non-moving party's evidence need not be in a form that is admissible at trial . . . as long as a party submits evidence which, regardless of its form, may be admissible at trial." Brimberry v. Northwest Mut. Life Ins. Co., 13-cv-00127, 2013 WL 4677592, at *3 (C.D. Cal. Aug. 28, 2013). The Court therefore overrules the County's evidentiary objections based on the exhibits' authenticity because these exhibits, most of which came from the County's own productions, may be admissible at trial. For this same reason, the Court overrules the County's hearsay objections. See Atkinson v. Kofoed, 06-cv-2652, 2008 WL 508410, at *1 (E.D.

Cal. Feb. 22, 2008) ("As to [defendant's] arguments about hearsay and authentication, the court finds that [defendant] fails to support these objections with any argument that would justify exclusion of the record.")

Similarly, the Court overrules the County's objections to evidence based on the evidence's probative value purportedly being "outweighed by . . . unfair prejudice." Fed. R. Evid. 403. "In the summary judgment context, a court need not exclude evidence for danger of unfair prejudice, confusion of issues, or any of the other grounds outlined in Federal Rule of Evidence 403." Brimberry, 2013 WL 4677592, at *3.

III. Legal Standard

1. Summary Judgment

Summary judgment is proper where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). The moving party has the burden of demonstrating the absence of a genuine issue of material fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). "[T]he burden on the moving party may be discharged by 'showing' - that is, pointing out to the district court - that there is an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). The moving party must affirmatively show the absence of such evidence in the record, either by deposition testimony, the inadequacy of documentary evidence, or by any other form of admissible evidence. See Celotex, 477

U.S. at 322. The moving party has no burden to negate or disprove matters on which the opponent will have the burden of proof at trial. See id. at 325.

As required on a motion for summary judgment, the facts are construed "in the light most favorable to the party opposing the motion." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). However, the nonmoving party's allegation that factual disputes persist between the parties will not automatically defeat an otherwise properly supported motion for summary judgment. See Fed.R.Civ.P. 56(c). A "mere 'scintilla' of evidence will be insufficient to defeat a properly supported motion for summary judgment; instead, the nonmoving party must introduce some 'significant probative evidence tending to support the complaint.'" Fazio v. City & County of San Francisco, 125 F.3d 1328, 1331 (9th Cir. 1997) (quoting Anderson, 477 U.S. at 249, 252).

2. Employer Under the FLSA

"A defendant must be an 'employer' of the plaintiff to be liable under the FLSA." Johnson v. Serenity Transportation, Inc., 15-cv-02004, 2017 WL 1365112, at *5 (N.D. Cal. Apr. 14, 2017) (citing Bonnette v. Cal. Health & Welfare Agency, 704 F.2d 1465, 1470 (9th Cir. 1983), abrogated on other grounds by Garcia v. San Antonio Metro. Transit Auth., 465 U.S. 528 (1985)). Under the FLSA, "employer" is defined as "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d). Two or

more employers may be "joint employers" for the purposes of the FLSA. Id. "All joint employers are individually responsible for compliance with the FLSA." Bonnette, 704 F.2d at 1469. Whether an entity is a "joint employer" under the FLSA is a question of law. Torres-Lopez v. May, 111 F.3d 633, 638 (9th Cir. 1997).

"The Ninth Circuit has stated that the concept of joint employment should be defined expansively under the FLSA." Maddock v. KB Homes, Inc., 631 F. Supp. 2d 1226, 1232 (C.D. Cal. 2007) (citing Torres-Lopez v. May, 111 F.3d 633, 639 (9th Cir. 1997)). "On the other and, '[t]aken literally and applied in this context [too expansive a definition of employer] would make any supervisory employee, even those without any control over the corporation's payroll, personally liable for the unpaid or deficient wages o[f] other employees." Id. (citing Baird v. Kessler, 172 F. Supp. 2d 1305, 1311 (E.D. Cal. 2001)).

To determine whether a defendant is an employer, courts look to the "economic reality" behind the relationship, and consider the following four factors: whether the alleged employer "(1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records." Bonnette, 704 F.3d at 1470.

These factors are meant to guide a court's analysis, but the ultimate determination must be based "upon the circumstances of the whole activity."

Rutherford Food Corp. v. McComb, 331 U.S. 772, 730 (1947); Bonnette, 704 F.2d at 1470 ("The [] factors . . . provide a useful framework for analysis . . . but they are not etched in stone and will not be blindly applied." "As a result, summary judgment may be proper even when some factors favor joint employment and others do not." Johnson, 2017 WL 1365112 at *5. The Ninth Circuit has identified additional factors that might be applicable, depending on the situation. See Torres, 111 F.3d at 639.[1]

IV. Analysis

1. Prior Case Law Establishes that the County does not Employ IHSS Providers

A California Court of Appeal has already held that the County does not employ IHSS providers. Service Employees International Union v. County of Los Angeles ("SEIU") 225 Cal. App. 3d 761 (1990). The Court of Appeal affirmed a trial court's finding that

> The [C]ounty has no authority to screen providers, control who will be a provider, control the number of providers (which is unlimited), or regulate their hours of work, vacations hiring or termination. While the county is required to fix the providers' compensation at not less than the minimum wage, the compensation is paid from the state treasury, with the

[1] The only Torres factors that apply here are largely duplicative of the Bonnette factors. Thus, the Court does not address these factors separately.

> state assuming responsibility for various deductions for insurance and other benefits.

Id. at 766-77. Under the Direct Payment Mode used by the County, the Court of Appeal affirmed the trial court's finding that the County "exercises no supervisory control over providers." Id. at 766.

The case law by Plaintiffs is distinguishable. In Bonnette, the Ninth Circuit looked at whether Solana County, San Francisco County, Sacramento County, and California are joint employers of IHSS providers. 704 F.2d at 1467. All three counties at issue in Bonnette chose the first option for assisting the State with the IHSS program. In other words, the counties opted to hire providers directly with money provided by the counties. The Ninth Circuit found that the counties, along with the state, "exercised considerable control over the structure and condition of employment," including by, among other things, paying plaintiffs' wages, controlling the rate and method of payment, and maintaining employment records. Id. The Court therefore found that the counties and state's "power over the employment relationship by virtue of their control over the purse strings was substantial," and found that the counties and the state are joint employers of IHSS providers.

Here, in contrast, the County chose the third option, the Direct Payment Mode, for assisting the State with IHSS providers. Under this option the State pays providers directly. As discussed in more detail below, under the Direct Payment Mode the County does not

control the purse strings.[2] This makes the present case distinguishable from Bonnette, and as discussed in more detail below, means that the County is not an employer of IHSS providers.

2. The Bonnette Factors

The Court finds that the Bonnette factors weigh in favor of finding that the County is not an employer of IHSS providers as a matter of law.

a. Power to Hire and Fire IHSS Providers

The Court first looks to whether the County has "[t]he right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers." Torres-Lopez, 111 F.3d at 640. Here, the Court finds as a matter of law that the County does not have the authority to hire or fire IHSS providers, and that this factor weighs in favor of finding that the County is not an employer of IHSS providers.

Considering all of Plaintiffs' evidence in the light most favorable to Plaintiffs, the facts show that the County plays an administrative roll on behalf of the State and that the County has no power, absent State authority, to hire or fire IHSS providers. Plaintiffs'

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[2] Plaintiffs also cite to Guerrero v. Superior Court as authority for finding the County employs IHSS providers. 213 Cal. App. 4th 912 (2013). However Guerrero involved a demurrer, not a motion for summary judgment. The court merely held that, at the pleading stage, a county and public authority could be joint employers.

argue the County plays a large role in the hiring of IHSS providers because "[b]efore providers can work in the County IHSS program, they have to meet the enrollment requirements, which are to attend an in-person orientation, to sign the provider enrollment agreement, to sign the provider responsibility form, to provide identification for identity purposes, and also submit and pass a criminal background check." (Mot. at 2, Helland Decl. Ex. 48, Decl. M. Magallanes).) Plaintiffs argue that because these steps take place at County offices, and providers cannot work in the IHSS program until they completed these steps, this demonstrates that the County has the ability to hire IHSS providers. The Court disagrees.

The undisputed facts show that the County performs these administrative tasks at the direction of the State. The County does not, absent State authority, have the ability to deviate from these onboarding tasks or independently determine whether to hire IHSS providers. All of the onboarding documents are provided by the State, and the orientation for providers is held on behalf of the State at County offices. (See id. 86:4-13 ("It's not that they [the County] themselves are doing a presentation. . . . [The State] give[s] them the preliminary things that are going to happen that day, but it's . . . [the County's] just facilitating.")). That the County helps facilitate the onboarding process on behalf of the State by providing a space for providers to watch training videos and sign some documents does not demonstrate that the County has any authority to hire providers. See Johnson, 2017 WL 1365112, at

*13-44 ("[T]he County's limited involvement in the hiring process does not establish that the County had the power to hire . . . technicians for the purposes of this Bonnette factor," particularly where "there is evidence that the County must comply with certain state . . . requirements."). Once a provider completes all of the State mandated onboarding tasks, the County has no authority to refuse to hire a provider. That the County was "somewhat involved in the hiring process" does not "tip the balance in favor of joint employment." Id. at * 14.

In addition, Plaintiffs argue the County "exercises its power to hire through the PASC. (Mot. at 3.) The County created the PASC in 1997 to "[a]ct as employer of record for collective bargaining purposes," "maintain a registry to assist IHSS recipients in finding eligible providers," "[p]rovide training to both providers and recipients," and "administer new provider enrollment requirements such as background checks." (Mot. at 3, Helland Decl. Ex. 2 PASC's Role After In-Home Supportive Services Statewide Authority Takes Over Collective Bargaining). Plaintiffs argue that if the County chose to end its relationship with PASC, it would resume authority for the PASC's functions, and effectively be an employer of IHSS providers. The Court disagrees that taking over PASC's current duties would render the County an employer.

PASC plays an administrative role similar to that provided by the County. Namely, PASC helps with onboarding, screening, and maintaining a list of available providers. None of these tasks demonstrate that

the PASC has any discretionary authority when it comes to hiring and firing providers. See Montoya v. 3PD, Inc., 13-cv-8068, 2014 WL 3385116, at * (D. Ariz. July 10, 2014) (granting summary judgment under the FLSA, and finding that "Home Depot requiring [truck driver] Montoya to pass a criminal background check and meet [Department of Labor] requirements d[id] not establish that it had the power to hire and fire him."). The California Welfare Code specifically states that the power to hire and fire remains with the recipient. CWIC § 12302.25(a) ("Recipients of in-home supportive services shall retain the right to choose the individuals that provide their care and recruit, select, train, reject, or change any provider under the contract mode or to hire, fire train, and supervise any provider under any other mode of service."). That the PASC and the County assist the State with administrative onboarding tasks does not give the PASC or the County any independent authority to hire providers.

The evidence likewise demonstrates that the County does not have the power to fire IHSS providers. Plaintiffs argue the County has "the power to terminate providers if they repeatedly exceeded the number of weekly hours the County approved for the provider's recipient." (Mot. at 3.) Plaintiffs provide evidence showing that IHSS providers receive a "violation" if they worked more than the budgeted overtime hours without County approval, or exceed the limit of seven hours of travel time per month. (Id. at 4, Helland Decl. Ex. 5 Dep't of Public Social Services FLSA Presentation.) However, Plaintiffs' own evidence demonstrates

that a county issues violations based solely on the State's guidelines, and the State determined when to fire an IHSS provider after a certain number of violations. (See Mot., Ex. 49, Maria Magallanes Dep. 49:2-11 ("Based on the instructions from the State, if a provider had a second violation, they were sent information they had to review and read."); Id. 60: 7 - 61:7 ("[T]he different violations have a time limit. So based on the review and whatever outcome it was as a violation, if it was a fourth violation . . . the State would then terminate that provider."); Ex. 9, Fair Labor Standards Act In-Home Supportive Services Program Presentation at COLA 002950 (noting that CDSS had the ultimate authority to determine whether a violation warranted firing a provider)).

Based on the above, the Court finds as a matter of law that the County does not have the power to hire and fire IHSS providers, and that this Bonnette factor weighs in favor of finding that the County is not an employer of IHSS providers.

b. Control Over Providers' Work Schedules and Conditions of Employment

Next, the Court finds the County did not exercise control over the structure and conditions of IHSS provider's employment. Even considering all of the County's evidence, the Court finds as a matter of law that IHSS recipients, not the County, controlled the providers' work schedules and conditions of employment. Plaintiffs argue the County "exerted substantial

control over providers' work schedules by setting the maximum number of hours, approving deviations from those hours, and adjudicating punishment for exceeding those hours." (Mot. at 21.) The Court disagrees.

Plaintiffs' evidence shows that recipients of IHSS services applied through the County. (Mot. at 5, M. Magallanes Decl. 71:14 - 72:15.) A County social worker would review the recipient's application and perform an in-home assessment of the recipient's needs." (Id. 74:19 - 75:1.) ("Based on the information that the applicant has provided and briefly described to the social worker during the initial call, [the social worker] will go into the home and complete the IHSS application form, asking them different questions on the form, as well as review the 25 services that IHSS provides individually, using the State guidelines they gave us.") The social worker would then assign a "functional rank index" number of 1-5 for each of the services the recipient qualified for, based on an index provided by the State. (Id., 75:2-12.) The State provided hourly task guidelines, which assign a range of eligible hours for each service at each functional ranking. (Id., P. 77:11-16, 78:4-10.) After the social worker finishes their assessment, the social worker inputs data into the State's Case Management and Information Payroll System ("CMIPS"), and the State's CMIPS generates an approval notice that the County then mails to the provider. (Id. 82:18-23.) This approval notice identifies how many hours the recipient can receive. The County social worker cannot make a determination on their own as to the number of hours to give

a recipient outside of the index provided by the State. (Id. 76:11 - 77:22.)

In addition, the IHSS sheet provided by the State, and filled out by a County social worker notes that it is the "responsibility of the [r]ecipient to set a schedule within the authorized hours [provided to the [r]ecipient] each month." (Mot. at 6, Helland Decl. Ex. 20.) If the recipient has "more than one provider, it is the responsibility of the [r]ecipient to set a schedule for each provider so that the total hours worked by all providers does not exceed monthly authorized [hours]." (Id.) Further, if a recipient receives services for more than the authorized number of hours, it is the "responsibility of the [r]ecipient to provide payment for those hours." (Id.) The County conducts annual oversight of the recipient's needs. CWIC § 12301.1(b)(1).

Even taking all of these facts as true, the Court finds that the County's supervision over the number of hours an IHSS recipient needs does not mean the County controls the IHSS provider's work schedule or conditions of employment. Here, the County's own evidence demonstrates that the County provides minimal oversight to ensure IHSS recipients receive adequate care in compliance with State regulations. While the County recommends the number of hours an IHSS recipient needs, the recipient, not the County, is responsible for setting a provider's work schedule, deciding when a provider should come and go, determining how many of the recipient's allotted hours a provider would work, and paying a provider should the recipient want more services than the hours they were

allotted through the IHSS program provided. Id. § 12301.6(c)(2)(B). For example, an IHSS recipient given 10 hours of care under the IHSS program can choose to hire one provider who works 5 hours two days a week, one provider who works two hours five days a week, or two providers, one who works five of the recipients' provided hours, and a second who works the other five hours. The number of hours a recipient is provided does not determine a provider's work schedule. See Zhao v. Bebe Stores, Inc., 247 F. Supp. 2d 1154, 1160 (C.D. Cal. 2003) (holding defendant was not liable under the FLSA as a joint employer, finding the defendant did not control plaintiffs' work conditions because the employer's supervisors, not the defendant's personnel, were primarily responsible for the day-to-day management of the employees in that it was they who managed employee assignments, shifts, and work hours.).

Further, while Plaintiffs suggest that a County worker's periodic visits to IHSS recipients' homes demonstrates the County acted as an employer, the Plaintiffs' own evidence shows otherwise. These home visits were simply to ensure that the IHSS program was performed according to regulations set by the State. The home visits were to make sure IHSS recipients' needs were being met and that the recipient didn't require any additional assistance. (Mot. at 7, Holland Decl. Ex. 48, M. Magallanes Decl. P. 99 L. 25 - 100 L. 2 (County workers "go in and make sure the recipient is safe in their home and there [are] not additional needs required.") The use of County employees

to ensure State regulations are being met does not demonstrate that the County has control over providers' work places. See Zhao, 247 F. Supp. 2d at 1160-61(clothing store's use of a compliance monitor to ensure garment manufacturer's compliance with labor laws that the Department of Labor required did not indicate control for determining joint employer relationship); Taylor v. Waddell & Reed Inc., 2010 WL 3212136, at *3 (S.D. Cal. Aug. 12, 2010) ("[C]ompliance with legal requirements is not indicative of control for purposes of establishing an employer-employee relationship.").

Finally, Plaintiffs suggest that the fact that the County provided training and resources for IHSS providers about overtime and travel time requirements demonstrates that the County was an employer of IHSS providers. Again, the Court disagrees. Plaintiffs point to several documents the County created in an effort to help train IHSS providers and recipients on regulations regarding overtime hours and travel time hour requirements. (See Mot. at 7-9, Exs. 25-35) These documents simply show that the County provided training materials and guidance to IHSS providers and recipients on behalf of the State. This evidence does not show that the County exercises control over a provider's work schedule or conditions of employment. See Godlewska v. HDA, 916 F. Supp. 2d 246, 259 (E.D.N.Y. 2013) ("Exercising quality control by having strict standards and monitoring compliance with those standards does not constitute supervising and controlling employees' work conditions. . . . This is especially

true where the quality control's purpose is to ensure compliance with the law or protect clients' safety.").

Based on the above, the Court finds the County does not exercise control over IHSS providers' work schedules and conditions of employment. Therefore, this second Bonnette factor weighs in favor of finding that the County is not an employer of IHSS providers.

c. Control Over the Rate and Method of Payment

The third Bonnette factor looks to whether the alleged employer determined the rate and method of the employees' pay. Here again, the Court finds this factor weighs in favor of finding as a matter of law that the County is not an employer of IHSS providers.

First, Plaintiffs argue the County shares financial responsibility for IHSS providers' wages through a "Maintenance of Effort" ('MOE') arrangement with the State." (Mot. at 9, Ex. 53 30(b)(6) Dep. of V. Zamirripa 15:4-8 ("So the State gives us every month, for, for our MOE requirement – which is the maintenance of effort apportionment that the State imposes on counties – and in the case of LA County, we receive a monthly billing from the State requesting payment for . . . that").) Under this agreement, the State sends the County a bill each month for its share of IHSS costs, which the Department of Social Services pays out of County funds appropriated in an annual budget." (Id.) The money goes towards funding the County's share of the program. (Id. 18:19-23.) In addition, Plaintiffs

argue the County "urg[ed] the Board of Supervisors to 'join Alameda and Ventura counties to provide a path to an increased compensation, including health benefits, above $12.00 per hour." (Mot. at 21.)

The Court finds this evidence does not demonstrate as a matter of law that the County had control over the rate or method of payment for IHSS providers. First Plaintiffs' own evidence demonstrates that the County helped negotiate a pay increase alongside the IHSS providers' union, and the County's minor role in supporting IHSS providers in adjusting wage rates was subject to State approval, and ultimately paid by the State. (Holland Decl. Ex. 53, 30(b)(6) Decl. V. Zamirripa 29:9-14 ("[T]he County has the ability to negotiate for wage increases for the providers . . . with the union.")

In SEIU, the California Court of Appeals affirmed the trial court's finding that "[w]hile the [C]ounty [of Los Angeles] is required to fix the provider's compensation at not less than the minimum wage, the compensation is paid from the state treasury, with the state assuming responsibility for various deductions for insurance and other benefits." 225 Cal. App. 3d at 766-77. Further, the Ninth Circuit has already recognized that the State controls IHSS providers' payroll. Ray v. County of Los Angeles, 935 F. 3d 703, 712 (9th Cir. 2019) ("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."). The facts provided by Plaintiffs merely demonstrate that the County can advocate for the State to provide a pay

raise to IHSS providers, but the State ultimately determines whether or not to provide a raise. Thus, the County, absent State authority, does not have the discretion to provide pay raises for IHSS providers.

The case law cited by Plaintiffs does not support finding otherwise. (See Mot. at 21, citing Hardgers-Powell v. Angels in Your Home LLC, 330 F.R.D. 89, 109 (W.D.N.Y. 2019)). In Hardgers-Powell, the Court found that the fiscal intermediary was an employer of Consumer Directed Personal Assistance Program (CDPAP) aides where the fiscal intermediary "processes each CDPAP's wages and benefits, processes all tax and wage withholdings, complies with worker's compensation, disability, and unemployment insurance requirements, and maintains personnel records." Id. The Court found the "fiscal intermediary's responsibilities [went] beyond those of a mere payroll-processing company." Id. "Most importantly, the fiscal intermediary [was] responsible for establishing the amount of each [CDPAP's] wages." Id. (internal quotations omitted). Here, Plaintiffs' own evidence demonstrates the County did not have the authority to set wages absent the State's approval. Thus, the Count finds this factor weighs in favor of finding that the County is not an employer of IHSS providers.

d. Maintaining Employment Records

The final Bonnette factor considers whether the County maintains employment records for IHSS providers. Plaintiffs argue "[t]he [C]ounty maintained a

file on each provider in its offices, first in hard copy form and then in electronic form." (Mot. at 23.) Plaintiffs further argue that when "providers needed to change their address, they called the County." (Id.) Finally, Plaintiffs argue the "undisputed facts show that County employees were directly responsible for entering information about providers into CMIPS." (Id.)

Even assuming all of this is true, this does not demonstrate that the County maintained employment records for purposes of establishing an employer-employee relationship. First, the fact that the County has access to CMIPS, which undisputedly is a centralized State database, "cannot and should not be equated with [the County's] control, either direct or indirect, over Plaintiffs' payroll records, wages, or working conditions." Zhao, 247 F. Supp. 2d at 1160. Similarly, the County's maintenance of background documents does not support a finding that the County is an employer. See Johnson, 2017 WL 1365112, at *17. The State undisputedly requires the County to maintain certain records as part of its quality control function. This is not the role of an employer. See Godlewska, 916 F. Supp. 2d at 262 (finding fourth Bonnette factor did not weigh in favor of employer-employee relationship where the defendant only reviewed certain employment records) (internal quotations omitted). Thus, the Court finds the fourth Bonnette factor weighs in favor of finding that the County is not an employer of IHSS providers.

Conclusion

Considering all of the evidence submitted by Plaintiffs, the Court finds as a matter of law that the "economic reality" is that the County is not an employer of IHSS providers. The Court therefore denies Plaintiffs' Motion for Summary Judgment and, after providing Plaintiffs an opportunity to respond and submit additional briefing, grants summary judgment in favor of the County. Zhao, 247 F. Supp. 2d at 1161 (denying plaintiffs' motion for summary judgment on issue of joint employer status and finding as a matter of law that defendant was not a joint employer under the FLSA).

Under the FLSA, only an "employer" can be held liable for failing to pay overtime compensation. 29 U.S.C. § 207. Because the Court finds as a matter of law that the County is not an employer of HISS providers, the County cannot be held liable for failing to pay overtime compensation. Thus, Plaintiffs cannot state a claim for violation of the FLSA against the County. Therefore, even though the parties' motions are framed as partial motions for summary judgment, the issue of whether the County is an employer of HISS providers is diapositive of the entire case. Moreau v. Air France, 356 F.3d 942, 946-47 (9th Cir. 2004) (affirming order granting summary judgment where plaintiff failed to establish that defendant was plaintiff's employer). Thus, the Court grants summary judgment in favor of the County. The Court will issue a judgment consistent with this Order.

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.

Order

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.

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

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 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

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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 Angeles is not entitled to Eleventh Amendment immunity

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

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

[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

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 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

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> 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.

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 grounds.[3] In the alternative, the County moved to strike all references in the complaint to overtime wages allegedly

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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.

[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.

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 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 Supreme Court once said that Eleventh Amendment immunity does not extend to municipal corporations.

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

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 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

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[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.

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 County Sheriff's Department (LASD) would check its systems, before releasing a prisoner, to see if

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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.

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 pre-release 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.

* * *

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

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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).

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]

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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

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 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)).

> 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.

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)).

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.

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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.

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 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

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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.

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]

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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

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.

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

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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.

Moor v. 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 enforcement rights of Plaintiffs and the putative collective. Because the putative collective began receiving overtime wages on February 1, 2016, the putative

[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.

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 notice to nearly 200,000 members of the collective, if the County elects to appeal the Court's denial of its

[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.

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.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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, and CALIFORNIA DEPARTMENT OF SOCIAL SERVICES, Defendant.	No. 20-56245 D.C. No. 2:17-cv-04239-PA-SK Central District of California, Los Angeles ORDER (Filed Dec. 20, 2022)

Before: BERZON and RAWLINSON, Circuit Judges, and KENNELLY,* District Judge.

Judge Rawlinson has voted to deny appellants' petition for rehearing en banc, Dkt. No. 44. Judge Kennelly recommends denial of appellants' petition for rehearing en banc. Judge Berzon recommends granting appellants' petition for rehearing en banc. The full

* The Honorable Matthew F. Kennelly, United States District Judge for the Northern District of Illinois, sitting by designation.

court has been advised of appellants' petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellants' petition for rehearing en banc is rejected.

Section 207 of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 207, provides in pertinent part:

> (a)(1): Except as otherwise provided in this section, no employer shall employ any of his employees . . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

Section 203 of the FLSA, 29 U.S.C. § 203, provides in pertinent part:

> (d) "Employer" includes any person acting directly or indirectly in the interest of the employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.
>
> . . .
>
> (g) "Employ" includes to suffer or permit to work.

Section 12300.4 of the California Welfare and Institutions Code provides in pertinent part:

> (a) Notwithstanding any other law, . . . a recipient who is authorized to receive in-home supportive services pursuant to this article . . . shall direct these authorized services, and the authorized services shall be performed by a provider or providers within a workweek and

> in a manner that complies with the requirements of this section.
>
> . . .
>
> (i) The state and counties are immune from any liability resulting from implementation of this section.

Section 12301.6 of the California Welfare and Institutions Code provides in pertinent part:

> (c)(2)(B) Recipients shall retain the right to hire, fire, and supervise the work of any in-home supportive services personnel providing services for them.
>
> (f)(1) . . . [A]ny public authority created pursuant to this section shall be deemed not to be the employer of in-home supportive services personnel . . . for purposes of liability due to the negligence or intentional torts of the in-home supportive services personnel. . . .

Section 12301.8 of the California Welfare and Institutions Code provides in pertinent part:

> (a)(2) For purposes of this section, an "employer" means an aged or disabled adult, or that individual's authorized representative. . . .

Section 12302.2 of the California Welfare and Institutions Code provides in pertinent part:

> (a)(1) If the state or a county makes or provides for direct payment to a provider chosen by a recipient or to the recipient for the purchase of in-home supportive services, the

department shall perform or ensure the performance of all rights, duties, and obligations of the recipients relating to those services as required for unemployment compensation, unemployment compensation disability benefits, workers' compensation, retirement savings accounts . . . , federal and state income tax, and federal old-age survivors, and disability insurance benefits.