*LABOR LAW*

# Hot off the press: 9th Circuit finds county is 'joint employer'

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*In a recent case, a group of employees who assist home-bound individuals sought unpaid overtime wages under the Fair Labor Standards Act (FLSA). In a complex situation in which four separate entities controlled different aspects of the employment relationship, the employees targeted Los Angeles County as the responsible party. In light of its deep involvement in administering the support program, the county's efforts to take the target off its back failed, but its good- faith efforts to address the situation significantly reduced a possible damages award.*

## IHSS workers

In-Home Supportive Services (IHSS) workers perform essential, day- to-day services that support home-bound individuals—typically disabled individuals and senior citizens. They are the lifeline for the people they work for.

In performing the services, many IHSS providers often are doing no better than eking out a living because their commitment to their recipient prevents full and gainful employment in the normal world of work.

## Who is the 'employer'?

As employees, IHSS workers are covered by the FLSA, which requires their employer to pay overtime for time worked exceeding work period allowances. But who is their employer?

In this instance, the state provides funding and pays IHSS providers. The county administers the programs in accordance with state rules. Recipients monitor and supervise the day-to-day work of providers and approve their time

registry of providers, coordinates background checks, provides training for providers and recipients, and is the "employer of record" for collective bargaining purposes.

## Bonnette

The FLSA defines "employer" as "any person acting directly or indirectly in the interest of an employer."

The key federal case— Bonnette v. Cal. Health & Welfare Agency, decided by the U.S. 9th Circuit Court of Appeals (whose rulings apply to all California employers) in 1983—provides that an entity is the "employer" if it has the power to:

- Hire and fire the employees;
- Supervise and control employee work schedules or conditions of employment;
- Determine the rate and method of payment; and Maintain employment records.

Applying these factors, *Bonnette* concluded that the state of California and three counties (not including Los Angeles County) were joint employers.

## IHSS employee's argument

The IHSS employees argued Bonnette's finding that counties were FLSA "employers "applied equally to Los Angeles County in this case because its authority over them was very similar to that of the counties in Bonnette. In response, the county argued that since 1993, the state had attained significantly more authority and involvement in IHSS programs, including direct funding.

The employee's argument, however, carried the day. The 9th Circuit panel held that, despite differences between the IHSS program in Bonnette and the current case, the "considerable" economic and structural control the county exercised over the employment relationship rendered it an employer. It didn't matter that other entities, or the providers themselves, were also potential "employers." Reversing the district court, the decision cleared the way for trial.

## Damages

Despite the loss, the county was able to protect against maximum financial exposure. Over the

dissent of Justice Marsha Berzon, the panel held that the county's actions weren't necessarily "willful"—a distinction reserved for the most recalcitrant violators attempting to evade their duty to comply with the FLSA—and therefore didn't justify a liquidated damages award. Here, the only reason the county failed to pay the required overtime wages sooner is because the state—which controlled the purse strings—delayed providing funding. The panel majority held the county acted in good faith, preventing a runaway-train damages award. Rey et al. v. Los Angeles County Department of Public Social Services (9th Cir., 20-5 6245(11/4/22).

## Bottom Line

For IHSS institutions, this must be a "lesson learned." As "employers," they must carefully monitor provider hours to assure no unintended slippage into overtime hours—despite the difficulty of monitoring irregular hours in a recipient's home. Similarly, however, this case is a lesson for all employers, private and public. In any single or potential "joint" employer situation, properly regulating and monitoring working hours is imperative.

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