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In the Supreme Court for the State of California

SUPREME COURT  
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Tamara Skidgel,  
*Plaintiff and Appellant,*

Deputy

vs.

California Unemployment Insurance Appeals Board,  
*Defendant and Respondent.*

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**PETITIONER'S OPENING BRIEF ON  
THE MERITS**

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After a Published Opinion  
from the First District court of appeal, No. A151224  
On Appeal from a Judgment after the Sustaining of a Demurrer  
Alameda County Superior Court No. RG16810609  
The Honorable Robert Freedman

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**I.**  
**ISSUE PRESENTED**

Are In-Home Supportive Services workers (Welf. & Inst. Code § 12300 et seq.) who are providers for a spouse or a child, eligible for unemployment insurance benefits?

**II.**  
**INTRODUCTION**

Unemployment Insurance provides subsistence benefits to Californians who become unemployed through no fault of their own. This includes individuals employed as In-Home Supportive Services (IHSS) providers who furnish services under a state public assistance program that allows disabled persons unable to perform necessary tasks without assistance—such as cooking, housekeeping, feeding, providing personal cleanliness and hygiene—to remain in their own homes instead of being placed in expensive long-term care facilities.

Under the IHSS program, an able-bodied spouse may be an IHSS provider for a disabled spouse, and a parent may be an IHSS provider for a child. The California Unemployment Insurance Appeals Board (“the board”) held in *Matter of Caldera*, Precedent Benefit Decision P-B-507 (2015), that IHSS workers who provide needed services for their spouses or children are ineligible for unemployment insurance benefits. In the board’s view, these IHSS workers are employees of the recipient—the spouse or child to whom they provide needed services but who does not pay unemployment insurance contributions for the provider spouse or parent. In the present case, Division 5 of the First Appellate District ratified the board’s *Caldera* decision, holding that a spouse or parent IHSS provider is

ineligible for unemployment insurance because he or she is an employee of the IHSS recipient spouse or child.

That decision, which carves out approximately 135,000 IHSS workers from eligibility for unemployment insurance benefits, is not supported by, and is contrary to the intent of, applicable statutes. Although IHSS providers are employed by the recipients they serve, various public entities exercise substantial control over who can be an IHSS provider, training of IHSS providers, the exact tasks that an IHSS provider performs, and the amount of time the IHSS provider is allotted for each task. The California Department of Social Service (“CDSS”) defines rules for the program and pays unemployment insurance contributions and Worker’s Compensation premiums. The counties determine the exact tasks and time per task for each individual recipient and monitor the program for fraud and overtime violations. In counties where public authorities are established, the public authorities have a registry of available providers, train providers, and handle wages. In counties without a public authority the county handles those functions. CDSS, the county and the public authority act as agents for each other in operating the program.

Taken together, these functions give CDSS, the counties and the public authority substantial control over the employment of IHSS providers and their working conditions. As a result, these workers are jointly employed by the public agencies and the IHSS recipient. The Third Appellate District so held over 35 years ago in *In-Home Supportive Services v. Workers’ Comp. Appeals Bd.* (1984) 152 Cal.App.3d 720, 731-34. The Third District also held that an eligibility exclusion that applied to employment by the IHSS provider did not apply to joint employment by the public entity. (*Id.* at pp. 737-41.) In this case, the First District incorrectly disagreed with the Third District’s analysis in *In-Home Supportive Services*. These workers are, and this Court should confirm, eligible for

Unemployment Insurance benefits based upon their joint employment with a public agency.

### III.

#### **THE UNEMPLOYMENT INSURANCE AND IHSS PROGRAMS**

##### **A. Unemployment Compensation Insurance**

The unemployment compensation insurance (“UI”) program reduces the hardship of unemployment by providing benefits to employees who become unemployed through no fault of their own. (*Paratransit, Inc. v. Unemployment Ins. Appeals Bd. (Medeiros)* (2014) 59 Cal.4th 551, 558.) The program is funded by employer contributions. (Unemp. Ins. Code §§ 13005(b), 13020(a)(1).)<sup>1</sup> Provisions of the Code are interpreted liberally to advance the legislative objective of reducing the hardship of unemployment. (*Robles v. Employment Development Department* (2012) 207 Cal.App.4th 1029, 1035 [citation omitted]; see also § 100.)

##### **B. In-Home Supportive Services**

The IHSS program is a state social welfare program that provides service workers to disabled individuals who are at risk of out-of-home placement. (Welf. & Inst. Code § 12300(a); CDSS Manual of Policies and Procedures [“MPP”] § 30-700.1, CT 00236.)<sup>2</sup> IHSS workers may assist these disabled individuals with tasks including housecleaning, preparing meals, laundry, bowel and bladder care, bathing, grooming, ambulation, accompaniment to medical appointments, and, for the mentally impaired, protective supervision. (Welf. & Inst. Code § 12300.) The state

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<sup>1</sup> All further statutory references are to the Unemployment Insurance Code unless otherwise indicated.

<sup>2</sup> The MPP contains CDSS’s regulations enacted pursuant to the Administrative Procedures Act. (See MPP § 10-001, CT 00246.)

compensates IHSS workers who provide these services. (*Guerrero v. Superior Court (Weber)* (2013) 213 Cal.App.4th 912, 920.) The program also trains and monitors IHSS workers. (*Id.*)<sup>3</sup>

CDSS sets the program rules, which the counties implement and enforce. The counties determine the specific services, the exact time per task, and the maximum hours of service that each recipient receives. (*Guerrero, supra*, 213 Cal.App.4th at pp.921, 935-36; Welf. & Inst. Code § 12301.2.) A county may establish a separate entity called a “public authority” to deliver services, maintain a registry of qualified IHSS providers, and perform background checks and training for new providers. (Welf. & Inst. Code § 12301.6(e); MPP § 30-767.2 *et. seq.*) The county oversees operation of the program including enforcing overtime restrictions and performing audits and fraud investigations. (Welf. & Inst. Code § 12305.71; CDSS All-County Letter (“ACL”) 16-36 at pp.2-7, CT 00254-00259.)

Counties may provide IHSS services by hiring IHSS workers as civil service employees, by contracting with a third party such as another public entity, nonprofit or proprietary agency or an individual, or by making direct payments to the IHSS recipient to purchase the services. (Welf. & Inst. Code § 12302; MPP § 30-767.1 *et. seq.*, CT 00238-00240.) A county may also contract with a nonprofit consortium or a public authority it has

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<sup>3</sup> According to amici curiae in the court of appeal, IHSS is low-wage work. It pays only \$10.72 per hour. (Amicus Brief in Support of Petitioner Tamara Skidgel from National Employment Law Project, United Domestic Workers of America, AFSCME Local 3930, AFL-CIO, and Service Employees International Union, Local 2015 at p.16.) Often providers for their family members leave higher paying jobs and have little retirement savings. (*Id.* at pp.15-16.) IHSS providers also save substantial money for the state—and the taxpaying public—because it is three times more expensive to provide care in a nursing home. (*Id.* at p.17.)

established “to provide for the delivery of in-home supportive services.” (Welf. & Inst. Code § 12301.6, 12301.6(a)(2); MPP § 30-767.2 *et. seq.*, CT 00240-00244.)

The public authority is a separate entity from the county, and it provides for the delivery of services pursuant to agreement with the county. (Welf. & Inst. Code § 12301.6(a)(1)(A) and (2); MPP § 30-767.2, .214, .215.) Unless the county itself delivers IHSS services, all workers employed as IHSS providers must be referred to the public authority for wages, benefits and other terms and conditions of employment. (*Guerrero, supra*, 213 Cal.App.4th at p.930; Welf. & Inst. Code § 12301.6(h).) The county or the public authority investigates the qualifications and background of all prospective IHSS providers and trains all providers. (*Id.* at p.935; Welf. & Inst. Code § 12301.6(e)(2),(4); see also CDSS All County Information Notice (ACIN) I-69-09, CT 00191-00199 [requirements for fingerprinting, background checks, provider orientation and provider agreement with the county or public authority].)

Counties must either act as an employer of IHSS workers for collective bargaining purposes or designate another agency as the IHSS employer for collective bargaining purposes. (Welf. & Inst. Code § 12302.25(a).) In a county that has established a public authority, the public authority is the IHSS workers’ employer for purposes of collective bargaining. (Welf. & Inst. Code § 12301.6(c)(1); *Guerrero, supra*, 213 Cal. App. 4th at p.924.) The public authority is also the employer for purposes of obtaining fingerprints of applicants for IHSS provider positions. (Welf. & Inst. Code § 15660(a)(1).) The public authority establishes a registry of qualified IHSS workers to assist recipients in finding providers, a referral system for caregivers to providers, and performs “any other functions related to the delivery of” IHSS. (Welf. & Inst. Code § 12301.6(e); MPP § 30-767.2 *et seq.*)

The county does a background check of all providers in counties without a public authority and for providers not listed on the public authority registry, and enforces various exclusions from eligibility to work as an IHSS provider. (Welf. & Inst. Code §§ 12305.86, .81.) The county gives written notice to the IHSS recipient when his or her chosen provider is excluded. (Welf. & Inst. Code § 12305.87.) The recipient may request a waiver of exclusion, which the county decides.

All prospective providers must attend an in-person orientation that covers all aspects of the IHSS program. (Welf. & Inst. Code § 12301.24.) The county ensures that all prospective providers attend the orientation prior to beginning work. (ACL 09-54 at p.3, CT 00250.)<sup>4</sup>

CDSS limits overtime and travel time that an IHSS provider can earn. (Welf. & Inst. Code § 12300.4.) Counties enforce the overtime rules by issuing violations. (ACL 16-36 at pp. 2-7, CT 00254-00259.) These violations can result in the county suspending a provider from work for as long as a year. (*Id.* at pp.3-4.) The county decides appeals of alleged violations. (*Id.* at p.4.) Subject to CDSS review, the county also decides requests for exceptions from the overtime rules. (ACL 16-22 at pp.5-7, CT 00270-00272.)

The county determines the exact amount of time the provider works and the exact tasks done to the tenth of an hour. (*Guerrero, supra*, 213 Cal.App.4th at pp.935-36.) CDSS defines the amount of time per task that IHSS providers perform that can only be modified based on a special circumstances request to the county. (*Id.* at p.921; Welf. & Inst. Code § 12301.2.)

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<sup>4</sup> ACLs, although not promulgated under the Administrative Procedures Act, are CDSS official pronouncements. (*In Re Social Services Cases* (2008) 166 Cal.App.4th 1249, 1271-72.)



The county and the state maintain all employment records and handle payroll for all providers. (*Guerrero, supra*, 213 Cal.App.4th 912 at pp.934-5; MPP § 30-769 *et. seq.*, CT 0069-0076.) CDSS pays contributions, premiums and taxes for unemployment insurance, workers' compensation, and Social Security on behalf of IHSS providers. (Welf. & Inst. Code §§ 12301.6(i)(1), 12302.2(a)(1), (3); Unemp. Ins. Code § 683(a), MPP § 30-769.8 *et. seq.*, CT 0075-0076.) Nothing in the establishment of a public authority changes the state's responsibility for payment of unemployment insurance contributions, workers' compensation, payroll or Social Security taxes. (Welf. & Inst. Code § 12301.6(i)(1); ACL 98-20 at p.3.)

#### IV. STATEMENT OF FACTS

Tamara Skidgel provides IHSS services for her severely disabled daughter, Briannah. (CT 002.) Ms. Skidgel expected when she agreed to be an IHSS provider that she would be eligible for and receive UI when her employment as Briannah's IHSS provider ultimately ends. (*Id.*) However, because of the board's *Caldera* decision, Ms. Skidgel will be ineligible for UI. (Clerk's Transcript [CT] 005.)

In *Caldera*, the board held that IHSS workers who provide services for their spouses or children are categorically ineligible for UI benefits under section 631, which provides:

“Employment” does not include service performed by a child under the age of 18 years in the employ of his father or mother, or service performed by an individual in the employ of his son, daughter, or spouse, except to the extent that the employer and the employee have,

pursuant to Section 702.5, elected to make contributions to the Unemployment Compensation Disability Fund.

In the board's view, the recipient spouse or child is the IHSS worker's employer and, as a result, Section 631 bars eligibility for unemployment insurance, regardless of whether IHSS providers are jointly employed. (*Id.* at p.1.)

Just a year before deciding *Caldera*, an overlapping panel of the board held exactly the opposite in a non-precedent decision, *Matter of Ostapenko*, CUIAB No. AO-336919 (2014). (CT 00137-00150.) Nellia Ostapenko was the IHSS provider for her disabled son from age four until he died at 23. (CT 00138.) Ms. Ostapenko filed for unemployment insurance benefits after his death. (*Ibid.*) The board held that IHSS workers serving their spouses or children are eligible for unemployment insurance because IHSS workers are employed jointly by the recipient of services *and* the public authority. (*Id.*) Those workers, therefore, were eligible through their employment with the public authority. (*Id.*)

Ms. Skidgel filed a Complaint for Declaratory Relief under Section 409.2, requesting that the court invalidate *Caldera*. (CT 001.) Ms. Skidgel made two primary arguments. First, she contended that an IHSS worker providing services to a spouse or child is jointly employed by both the service recipient and the public agency. Therefore, the section 631 bar on unemployment insurance eligibility for persons employed by their spouses or children does not apply to bar eligibility for UI based on employment by the joint, public agency employer. (CT 00358-60, 00365-68.)

Second, Ms. Skidgel contended that, notwithstanding section 631, under section 683, in the IHSS program, “[e]mployer *also* means any employing unit which employs individuals to perform domestic service.” (Emphasis added.) Section 683, she argued, adds to the definition of

“employer” for unemployment insurance purposes and affords coverage for all IHSS workers, including those serving family members. (CT 00360, 363, 411.)

Subject to exceptions that do not apply here, “[w]hether an individual or entity is the employer of specific employees shall be determined under common law rules applicable in determining the employer-employee relationship. . . .” (§ 606.5(a).) Likewise, § 621(b) defines “employee” as: “Any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee.”

Under common law, an employee may be employed by joint employers. (*National Labor Relations Board v. Town & Country Electric* (1995) 516 U.S. 85, 94; *State ex. rel. Dept. of Highway Patrol v. Superior Court* (2015) 60 Cal.4th 1002, 1008.) Joint employment exists when an employee is subject to the control of two or more employers. (*In-Home Supportive Services, supra*, at p.732; *Guerrero, supra*, at pp.947-948 [citing *Martinez v. Combs* (2010) 49 Cal.4th 35][both cases involving IHSS workers].)

The trial court rejected Ms. Skidgel’s argument and, accepting the board’s analysis and decision in *Caldera* in full, the court held that she was ineligible for unemployment insurance because her employer was the IHSS recipient she served, her daughter. (CT 506-511, 516-17.) The trial court based its holding on Section 683(a), which it construed to mean that an IHSS provider is employed by the IHSS recipient. (*Id.*)

The First Appellate District, Division 5, affirmed. The court held that, in the case of an IHSS worker serving a spouse or child, the service recipient is the worker’s only employer and, as a result, IHSS providers for their spouses or children are ineligible for UI benefits under Section 631. (Slip opn. at pp.12, 16-18.) The court of appeal did not reach the issue

whether the IHSS workers are jointly employed. (*Id.* at p.8 fn.7, p.22.) The court of appeal also did not reach the issue held to be dispositive in *Caldera*: whether a second, joint employer not excluded by section 631 can support unemployment insurance eligibility. (*Id.* at p.12 fn.11.)

The court acknowledged Ms. Skidgel's argument that "also" in Section 683 means that the definition of "employer" in that section is in addition to any other definition of "employer" for unemployment insurance purposes. (*Id.* at p.12.) But, the court held, the legislative intent of the section was to define the recipient as the *sole* employer for unemployment insurance purposes. (*Id.*)

The court also acknowledged that its reading of the legislative history was inconsistent with *In-Home Supportive Services, supra*, 152 Cal.App.3d at pp.736-740.) There, the Third Appellate District held that the Legislature did not intend in the relevant statutes to make the IHSS recipient the provider's sole employer for workers' compensation purposes. The state is also an employer of the IHSS worker. Consequently, although an IHSS recipient does not provide unemployment insurance coverage for his or her IHSS worker, the worker is covered by his or her joint employment by the state for job-related injuries. (*Id.* at pp.736 fn.18, 738, 740.)

In the present case, however, the First Appellate District disagreed, holding that the Third District erred in misreading the legislative history. (Slip opn. at pp.21-22.)

Ms. Skidgel petitioned for rehearing. The court modified its opinion without changing the judgment and denied rehearing. The court added footnote 5 to the opinion, acknowledging that Welfare and Institutions Code Section 12302.2(a)(1) says that the IHSS recipient is "*an* employer." But, the court held, that language reveals little about legislative intent to

make the state an IHSS worker's joint employer because the section also refers to the IHSS recipient as "the employer." (*Id.* at p.4 fn. 5.)

## V. STANDARD OF REVIEW

The standard of review is de novo.

This action is a complaint for declaratory relief under Section 409.2, which allows persons affected by board precedent decisions judicial recourse similar to that available to challenge the validity of regulations. (*Pacific Legal Foundation v. CUIAB* (1981) 29 Cal.3d 101, 109 [*PLF II*].) The issue is purely a question of statutory construction, which is a matter of law for the courts. (*Id.* at p.111.) This court's review, therefore, is de novo. (*People ex. rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432.)

Although an administrative agency's construction of a statute it administers is ordinarily entitled to deference, if the agency's construction has been inconsistent, it does not receive deference. "[A] vacillating position ... is entitled to no deference.'" (*Yamaha v. State Board of Equalization* (1998) 19 Cal.4th 1, 13.)

The board has been inconsistent in construing sections 631 and 683 to determine whether IHSS providers for their spouses or children are eligible for unemployment insurance benefits. As noted in the statement of facts above, a year prior to *Caldera*, two of the three board members who signed *Caldera* reached the opposite conclusion in *Ostapenko*. (CT 00136-00156.) *Caldera* acknowledged that the board has been inconsistent about the issue. (*Caldera* at p.3, CT 0011.) The board's inconsistent, vacillating position means that *Caldera* is not entitled to deference. (*Yamaha, supra*, 19 Cal.4th at p.13.)

VI.  
ARGUMENT

A. **The Court Of Appeal Erred In Holding That IHSS Recipients Are The Only Employers Of Workers Who Provide Supportive Services.**

1. **Under section 683, the recipient of IHSS services is “also” an employer, not the sole employer, of an IHSS worker.**

Section 683 provides that, for purposes of IHSS worker eligibility for unemployment insurance, “Employer’ *also* means” the IHSS recipient. [Emphasis added.] The word “also” means “as well” and “in addition to.” (*Schilling v. Central California Traction Corp.* (1931) 115 Cal.App. 30, 35.) Dictionaries define “also” as “in addition.” (Cambridge Dictionary, <https://dictionary.cambridge.org/us/dictionary/english/also>, accessed October 10, 2018; Oxford English Dictionary, <https://en.oxforddictionaries.com/definition/also>, accessed October 10, 2018.)<sup>5</sup> “Also . . . indicate(s) an intention to include something not therefore included.” (*Henne v. Summers* (1911) 16 Cal.App. 67, 71.) Section 683, in short, is a basis for UI eligibility *in addition to* any other bases.

The court of appeal acknowledged that under Section 683, the IHSS recipient is “also” an employer, but the court held that the “apparent purpose” of the statute was to designate only the recipient as the employer. (Slip opn. at p.11) This reading makes “also” in Section 683 meaningless. “Courts should give meaning to every word of a statute if possible, and should avoid a construction making any word surplusage.” (*Ennabe v. Manosa* (2014) 58 Cal.4th 697, 719 [citations omitted].) Statutes are to be

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<sup>5</sup> Courts rely on dictionaries for the usual meaning of words. (*Marriage of Bonds* (2000) 24 Cal.4th 1, 15.)

harmonized and read together to give effect to all provisions whenever possible. (*State Department of Public Health v. Superior Court* (2015) 60 Cal.4th 940, 955.)

The court of appeal also held that Section 621, the general definition of “employee” for unemployment insurance purposes—i.e., “[a]ny individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee”—does not apply to IHSS workers because Section 683 is the more specific statute. (Slip opn. at p.13.) This assumes that there is a conflict between Sections 621 and Section 683. The rule that specific statutes govern over general statutes applies only when statutes cannot be reconciled. (*Lopez v. Sony Electronics, Inc.* (2018) 5 Cal.5th 627, 634 [citations omitted].)

Sections 621 and 683 are not irreconcilable. They are simultaneously and equally operative and effective. Section 683 simply broadens the definition of “employer” beyond the general definition in Section 621.

Section 683 does not exclude joint employment for IHSS providers under the general definition of employee in Section 621.

**2. Section 13005 makes the state an employer of IHSS providers because it pays their wages.**

Section 13005(a) defines “employer” for unemployment insurance purposes generally as any entity, including the state or any political subdivision of the state, “making payment of wages to employees for services performed within this state.” In the IHSS program, the state provides the funds to the county or public authority to make payment for the work of IHSS providers. The state and the county or public authority

are, thus, employers of the IHSS provider. (See also *Guerrero, supra*, 213 Cal.App.4th at 930-937.)

The court of appeal ignored this point.

Both the state and the county or public authority are intricately involved in paying IHSS providers for their work. The county handles the actual payment of wages. (MPP §§ 30-767.13, 30-769.23, .24.) The state handles payroll deductions, which includes deducting for UI. (Welf. & Inst. Code § 12302.2.)

The court of appeal described the State's role as performing merely a "payroll function on behalf of the recipient . . ." (Slip opn. at p.12.) What the court missed is that under Section 13005(a), this "payroll function" makes the county and the state employers for UI purposes.

IHSS providers' employment by the county and state renders them eligible for unemployment insurance benefits.

**3. The legislative history does not demonstrate an intent to limit unemployment insurance coverage for IHSS providers.**

The court of appeal held that the legislative intent of Section 683 and Welfare and Institutions Code Section 12302.2 was to relieve counties of the burdens of being employers of IHSS workers, burdens such as social security coverage, collection and payment of taxes and workers' compensation, and UI contributions. (Slip opn. at p.16.) The court acknowledged that its reading of the legislative history conflicts with the Third Appellate District's reading of the legislative history in *In-Home Supportive Services, supra*. There, the court held that the intent of the statutes was to relieve *recipients* of in-home supportive services of the burdens of being deemed the employer of IHSS workers. (*In-home Supportive Services, supra*, 152 Cal.App.3d at pp.736, 738.]