

S261247

**In The Supreme Court
OF THE
State of California**

LYNN GRANDE
Plaintiff and Respondent,

v.

EISENHOWER MEDICAL CENTER
Defendant and Petitioner.

FLEXCARE, LLC
Intervener and Appellant.

On Appeal from a Judgment of the Superior Court of the
On Review from the Court of Appeal for the Fourth Appellate District,
Division Two, Appeal Numbers E068730 and E068751
After an Appeal from the Superior Court of Riverside County Honorable
Sharon J. Waters, Case Number RIC1514281

**APPLICATION OF AMERICAN STAFFING ASSOCIATION TO
FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF IN
SUPPORT OF EISENHOWER MEDICAL CENTER**

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**APPLICATION OF AMERICAN STAFFING ASSOCIATION TO
FILE AMICUS CURIAE BRIEF IN SUPPORT OF
EISENHOWER MEDICAL CENTER**

To the Chief Justice and Associate Justices:

The American Staffing Association (ASA), through its attorney, respectfully requests leave to file the accompanying brief as amicus curiae in support of Eisenhower Medical Center.

The American Staffing Association

Founded in 1966, ASA is the largest trade association for the staffing industry and the leading voice in the country for staffing, recruiting, and workforce solutions firms. ASA promotes and protects the interests of staffing firms and the temporary and contract employees they employ.

Through education and advocacy, ASA and its affiliated chapters inform third parties about the staffing industry, how staffing firms operate, and the positive contributions staffing makes to people and the U.S. economy. Through its economic data, survey reports, research, and analysis, ASA provides members valuable market and competitive insight, and clients and industry watchers an informed perspective on the industry. Through its publications, education, and certification programs, ASA helps staffing firms understand and abide by the laws and regulations that apply to employment-related services, especially those protecting temporary and contract employees.

Finally, through outreach and partnerships with government agencies and bodies, ASA works with policymakers to ensure staffing firms' compliance with laws and to further temporary workers' employment opportunities and well-being. By way of example, ASA has worked with California's Division of Occupational Safety and Health (Cal/OSHA) on the important issue of temporary worker safety, and California's Division of Labor Standards Enforcement on a number of regulations and FAQs to ensure California laws reflect the nuances of the staffing relationship.

Interest of ASA in the Outcome of this Case

The staffing industry, comprised of about 25,000 staffing firms (2017 U.S. Economic Census) and 16 million temporary and contract employees (ASA 4Q19 Staffing Employment and Sales Survey), contributes over \$161 billion to the national economy (American Staffing Association, estimate of industry sales) through temporary and contract staffing, recruiting and permanent placement, outsourcing and outplacement, and human resource consulting. On any given day, around three million temporary and contract employees are gainfully employed throughout the country (ASA 4Q19 Staffing Employment and Sales Survey). In 2019, California staffing firms employed a weekly average of 593,100 workers statewide (Census 2018 County Business Patterns), and over 3 million over the course of the year (American Staffing Association estimate).¹ California staffing firms contributed \$38.4 billion to the state's

¹ Twelve percent of these temporary employees work in the health care sector. 2012 U.S. Census, sector sales.

economy (2017 U.S. Economic Census) while providing vital flexibility and support to businesses, and opportunities and flexibility for employees.

Staffing firms supply temporary and contract employees to every industry in every job category, including health care, industrial labor, office support, engineering, science and information technology, and various professional and managerial positions. Staffing firms provide a wide range of human resource services such as recruiting, skills assessment, skills training and upgrading, risk management, and payroll and benefits administration – allowing their clients to concentrate on their core businesses.

California companies in all industries rely upon the staffing industry to provide workforce flexibility and access to talent. Staffing firms help such companies remain competitive by matching necessary resources and payroll to meet ever-changing business needs. As the global economy moves towards requiring a more flexible and agile workforce, the staffing industry plays a vital role by enabling companies to quickly gain access to specialized talent, fill positions quickly, and gauge workers' fit for potential permanent employment.

For workers, the benefits of staffing are no less significant – such benefits include independence and job flexibility for individuals who enjoy working in diverse job settings, as well as skills training and a bridge to permanent employment for those who are just starting out, changing jobs, or out of work. In that regard, nearly nine out of 10 staffing employees report that temporary or contract work makes them more employable. ASA Staffing Employee Survey 2018. One-half indicate it is a way to obtain a permanent job. In fact, typically one-third of temporary and contract

employees are offered permanent positions by clients where they worked on assignments; two-thirds of those accepted the offers of employment. Id. Most staffing employees (73%) work full time, comparable to the overall workforce (74%). Six in 10 staffing employees work in the industry to fill in the gap between jobs or to help them land a job. One in five employees cite schedule flexibility as a reason for choosing temporary/contract work. Id.

In summary, temporary and contract staffing firms play a vital role in the California economy by providing just-in-time labor for businesses and flexibility and a bridge to permanent employment for workers.

The Critical Importance of Health Care Staffing

As addressed above, temporary employees work in virtually all occupations, ranging from skilled trades to degreed professionals, and across industry sectors – including healthcare. In 2020, the critical importance of the healthcare staffing sector was highlighted as a result of the global pandemic. Staffing firms are able to ameliorate nursing shortages in states like California by rapidly recruiting and deploying healthcare workers from other states.

Even before the pandemic, there was a significant nursing shortage in California. This shortage is only expected to worsen as the State’s aging population needs more health care, more people have access to healthcare, and baby-boomer nurses retire in growing numbers.² [bookmark7](#)According

² See “United States Registered Nurse Workforce Report Card and Shortage Forecast” (2012) (<https://www.workingnurse.com/articles/The-Nursing-Shortage-Paradox-in-California>); “United States Registered Nurse Workforce Report Card and Shortage Forecast: A Revisit” Am. Journal of

to predictions from RegisteredNursing.org, based on statistics provided by the Bureau of Health Workforce, California is projected to have the worst nursing shortage in the country by 2030, with a deficit of 44,500 registered nurses.³ California’s nursing shortage exists notwithstanding that it is one of two states with the highest median hourly and yearly wages, according to statistics provided by the Bureau of Labor and Statistics, May 2017 Release.⁴

In short, as baby boomer-aged nurses retire, as our population ages, and as healthcare entities need access to skilled, immediately-available workers to battle COVID-19 and related illnesses, the intense need for qualified nurses, clinicians, and other healthcare professionals is increasing. It is therefore crucial that staffing firms are able to provide competent and experienced healthcare workers to clients in critically-understaffed areas of California.

Although this case involves temporary employees working in the healthcare industry, it has a major impact on other staffing firm clients – regardless of the industry. As a result, ASA has a strong interest in helping this Court understand that affirming the lower court’s decision will have a deleterious impact on the staffing industry, as clients will be disincentivized

Medical Quality, Vol. 33, Issue 3 (2018); “Baby-Boomer Nurse Retirement Wave Hits, Magnifying Nurse Shortages for the Next Decade” (<https://www.amnhealthcare.com/latest-healthcarenews/nurse-retirement-wave-hits/>); “Health-care dilemma: 10,000 boomers retiring each day” (<https://www.cnbc.com/2017/10/03/health-care-dilemma-10000-boomers-retiring-each-day.html>)

³ See “The States with the Largest Nursing Shortages” (2020)

(<https://registerednursing.org/largest-nursing-shortages/>)

⁴ *Id.*

from using temporary workers due to potential unwarranted liability – a result that will harm workers and businesses across the state.

For these reasons, ASA respectfully requests the opportunity to file the below Amicus Brief for the Court’s consideration. Rather than repeat the arguments made by Defendant/Petitioner Eisenhower and Intervenor/Appellant FlexCare, this amicus brief is intended to aid the Court’s understanding of how the issue certified for review impacts the staffing industry’s role in the State of California, its businesses, and its workers.

No party’s counsel has authored this brief, either in whole or in part; nor has any party or party’s counsel contributed money intended to fund the preparation or submission of this brief. Likewise, no person other than the amici curiae, their members, or counsel have contributed money intended to fund the preparation or submission of this brief. Cal. R. Ct. 8.520(f)(4).

CONCLUSION

For these reasons, the application should be granted and the accompanying amicus curiae brief filed.

DATED: December 22, 2020

/s/ Susan Steward
Susan Steward
Attorney for the AMERICAN
STAFFING ASSOCIATION

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AMICUS CURIAE BRIEF

I. Equity and Public Policy Dictate that Plaintiff Is Not Entitled to a Windfall by Recovering from Both FlexCare and Eisenhower on the Same Wage and Hour Claims

The core issue in this case is whether a class of workers may bring a wage and hour class action against a staffing firm, settle that lawsuit, and then bring a second class action against the staffing firm's client based on the same alleged wage and hour violations. Equity and public policy dictate that the answer is clearly "no."

Plaintiff Grande settled her dispute and recovered from FlexCare on her wage and hour claims, and now seeks to recover again from Eisenhower for the exact same claims. If she is successful, the result is a double-recovery of wages and the creation of an inequitable penalty against clients that enter into staffing relationships. Such a result would significantly jeopardize an industry that provides critical temporary health care workers to essential businesses, as those businesses would face a massive disincentive to use such workers. In turn, workers would lose quality job opportunities with essential businesses and nursing shortages would be further exacerbated, all to the ultimate detriment of citizens in need of health care.

Plaintiff Grande alleges that FlexCare and Eisenhower are joint employers that are liable for each party's actions in managing her hours and pay during a nine-day travel nurse assignment. Simply defined, joint employment is a commercial relationship between two or more businesses

in which each has actual or potential legal rights and obligations as an employer with respect to the same employee or group of employees.⁵ The law imposes employer duties on an entity whenever the facts and circumstances establish a sufficient connection with a worker to warrant imposing a legal duty to the worker. In no circumstances of which we are aware, however, does claimed or actual joint employment allow for double recovery, from both employers, based on the same alleged violations.

Staffing firms and their clients often have enough contact with assigned employees that each may be viewed as an employer for specific purposes. The staffing company pays the employee, pays and withholds payroll taxes, provides workers' compensation coverage, has the right to hire and fire, receives and acts on complaints from the employee about working conditions, and more. Clients generally direct the employees' day-to-day work, control conditions at the work site, and determine the length of the assignment. Thus, as a result of this bifurcation of rights and obligations, it is not uncommon for a current or former employee to claim that they were jointly employed by the staffing firm and the client.

Upon completion of the assignment – or, in the case of longer assignments, at the completion of each week of work – the temporary employee's work hours are recorded and verified by the client⁶, and submitted to the staffing firm. For assignments in California, meal periods

⁵ “*Co-Employment: Employer Liability Issues in Third-Party Staffing Relationships*,” author Edward A. Lenz, senior counsel for the American Staffing Association, 9th Edition, 2019.

⁶ Or by the staffing firm's on-site program manager that may assist with collection and approval of hours, but such scenarios are rare in the travel nurse staffing relationship.

are also recorded and verified by the client. The staffing firm uses the record of hours worked to generate employee paychecks and client invoices. Based on the time record, the staffing company pays the employee and bills the client for the services performed. The amount billed covers the employee's wages and benefits, unemployment insurance, and workers' compensation; the staffing firm's selling, general, and administrative expenses; and a profit element. The staffing company's obligation to pay its employees is not dependent on being paid by its clients.

Regarding wage and hour issues, the U.S. Department of Labor regulations expressly impose joint employment obligations in specified circumstances. For example, if an employee is employed jointly by two or more employers during a workweek, all of the employee's work during the week is considered one employment, and all employers are responsible for compliance with the wage and hour provisions for the period worked for each employer. 29 C.F.R. § 791.2. In the case of overtime, if a joint employment issue exists, a client will be jointly liable only if the temporary employee worked more than forty hours in the week for that client. As a practical matter, however, the Department of Labor typically will first seek to recover unpaid overtime from the staffing firm because the firm, and not the client, is the party that controls wages and maintains time records.

Importantly, and equitably, to the extent the Department of Labor recovers lost wages from a staffing firm, it **does not then seek double-recovery of wages** from the client employer.

Apart from federal law and federal agencies, it is not uncommon for California clients to be treated as joint employers with staffing firms for

wage and hour and other employment law purposes. *See* Cal. Code Regs. Tit. 8 §§ 11040, subd. (2)(H); *see also*, DLSE Enforcement Policies and Interpretations Manual §§ 2.2 and 37.1.2 and cases therein. In addition, California law imposes joint liability on clients of labor contractors for failure to pay proper wages. *See* Ca. Labor Code Section 2810.3. The term “labor contractor” is defined as any entity that supplies workers to perform labor within a client’s usual course of business, including staffing firms. Ca. Labor Code Section 2810.3. The law also requires claimants to provide clients with 30 days’ notice prior to filing a lawsuit. This requirement gives clients the opportunity to refer matters to staffing firms for resolution before litigation, and furthers the public policy behind the law – that is, to ensure workers are paid their fully-earned wages. Notably, the law **does not permit double-recovery of wages** against both the staffing firm and client, and for obvious reasons.⁷ A temporary worker is no more entitled to double recovery of lost wages and penalties than he or she would be entitled to double recovery on an unemployment benefits or workers’ compensation claim.

⁷ *See also Sanchez v. Martinez* (2020) 54 Cal.App.5th 535 [held that although an employee who is not authorized and permitted to take a paid 10-minute rest break in compliance with California law may assert a claim for either unpaid wages or seek one additional hour of pay (i.e., a rest break premium) under Labor Code Section 226.7, the employee cannot recover damages under both theories]; Labor Code Section 210(c) [an employee is only entitled to either recover the statutory penalty provided for in this section or to enforce a civil penalty as set forth in subdivision (a) of Section 2699, but not both, for the same violation]. These authorities stand for the proposition that double recovery for the same alleged violation is not permitted, and such recovery cannot be allowed in the instant case.

Indeed, we are aware of no law that would allow for such double recovery, and for good reason—allowing a temporary worker to recover twice for the same alleged violation would put a temporary employee in a distinctly better position than that of a non-temporary employee – a preposterous and inequitable result. That a temporary worker may be jointly employed by more than one entity, therefore, should not and cannot afford such worker greater recovery rights than any other employee.

Plaintiff settled and resolved her wage and hour claims against FlexCare and should not be entitled to double-recovery of those same claims against Eisenhower. To permit otherwise would discourage clients from using temporary workers, a result that would harm the businesses, workers, economy, and citizens of California.

II. Conclusion

For all the foregoing reasons, in addition to those discussed in Eisenhower’s and FlexCare’s Briefs on the merits and briefs of the other amici in support thereof, this Court should reverse the judgment below.

DATED: December 22, 2020

/s/ Susan Steward

Susan Steward

Attorney for the AMERICAN
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PROOF OF SERVICE
(CODE CIV. PROC. § 1013A(3))

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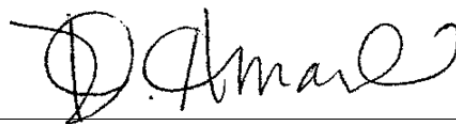
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Supreme Court of California

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Supreme Court of California

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(FLEXCARE)

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