In the Supreme Court of the State of California

TAMARA SKIDGEL,

Plaintiff and Appellant,

v.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD,

Defendant and Respondent.

Case No. S250149

First Appellate District, Division Five, Case No. A151224
Alameda County Superior Court, Case No. RG16810609
Hon. Robert B. Freedman, Judge

ANSWER BRIEF ON THE MERITS OF RESPONDENT CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

XAVIER BECERRA
Attorney General of California
EDWARD DUMONT
Solicitor General
*JANILL L. RICHARDS
Principal Deputy Solicitor General
State Bar No. 173817

JULIE WENG-GUTIERREZ
Senior Assistant Attorney General
SUSAN M. CARSON
Supervising Deputy Attorney General
HADARA R. STANTON
Deputy Attorney General
State Bar No. 227040
1515 Clay Street, 20th Floor
P.O. Box 70550
Oakland, CA 94612-0550
(510) 879-0858
Janill.Richards@doj.ca.gov
Attorneys for Defendant and Respondent California Unemployment Insurance Appeals Board

TABLE OF CONTENTS

Page

Issue Presented 13

Introduction 13

Background 15

I. Unemployment Insurance and Services Excluded from Covered "Employment" 15

II. The In-Home Supportive Services Program and the Evolution of Employment Benefits for Service Providers 18

III. The Employment Development Department and the California Unemployment Insurance Appeals Board 23

Statement of the Case 24

Legal Standard and Standard of Review 28

Summary of Argument 29

Argument 31

I. The Unemployment Insurance Appeals Board's Precedent Decision Interpreting the Close-Family Service Exclusion Is Entitled to Great Weight 31

II. Unemployment Benefits Are Not Available to Close-Family In-Home Supportive Services Providers 33

A. In Context and by Their Terms, Sections 631 and 683 Categorically Exclude Close-Family In-Home Supportive Services from Unemployment Insurance Coverage 34

B. The Legislative History Confirms the Legislature's Intent to Retain the Close-Family Exclusion Even as the Relevant Programs Evolved 41

III. Any "Joint Employment" Here Cannot Reinstate Unemployment Benefits Coverage, Which Is Categorically Excluded for Close-Family Service 44

TABLE OF CONTENTS
(continued)

Page

IV. Appellant's Policy Arguments Must Be Made to the Legislature 51

Conclusion 53

TABLE OF AUTHORITIES

Page

Cases

Am. Federation of Labor v. Unemp. Ins. Appeals Bd.
(1996) 13 Cal.4th 1017 ..... 15, 16, 23, 24

Apple Inc. v. Superior Court
(2013) 56 Cal.4th 128 36

Assn. of Cal. Ins. Cos. v. Jones
(2017) 2 Cal.5th 376 ..... 29, 32

Ayala v. Antelope Valley Newspapers, Inc.
(2014) 59 Cal.4th 522 40

Barrentine v. Arkansas–Best Freight System, Inc.
(1981) 450 U.S. 728 49

Basden v. Wagner
(2010) 181 Cal.App.4th 929 ..... 18, 19, 20

Bonnette v. Cal. Health and Welfare Agency
(9th Cir.1983) 704 F.2d 1465 50

Briggs v. Cal. Emp. Com.
(1946) 28 Cal.2d 50 35

Cal. Emp. Com. v. Kovacevich
(1946) 27 Cal.2d 546 34

Califano v. Aznovorian
(1978) 439 U.S. 170 52

Carmack v. Reynolds
(2017) 2 Cal.5th 844 33

Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund
(2001) 24 Cal.4th 800 46

City of Sacramento v. State of Cal.
(1990) 50 Cal.3d 51 ..... 15, 16

TABLE OF AUTHORITIES
(continued)

Page

County of Sacramento v. State of Cal.
(1982) 134 Cal.App.3d 428 18

Encino Motorcars, LLC v. Navarro
(2016) __ U.S. __, 136 S.Ct. 2117 49

Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC
(2016) 61 Cal.4th 830 33

Gibson v. Unemp. Ins. Appeals Bd.
(1973) 9 Cal.3d 494 33

Guerrero v. Sup. Ct.
(2013) 213 Cal.App.4th 912 ..... 19, 45, 49, 50, 51

In-Home Supportive Services v. Workers' Compensation Appeals Bd.
(1984) 152 Cal.App.3d 720 ..... 45, 46, 47, 48

Kowalski v. Shell Oil Co.
(1979) 23 Cal.3d 168 48

Lockheed Aircraft Corp. v. Industrial Acc. Com.
(1946) 28 Cal.2d 756 45

Lopez v. Sony Electronics, Inc.
(2018) 5 Cal.5th 627, 635-636 39

Miller v. Dept. of Human Resources Dev.
(1974) 39 Cal.App.3d 168 ..... 40, 41, 52

Miller v. Woods
(1983) 148 Cal.App.3d 862 19

Pacific Legal Found. v. Unemp. Ins. Appeals Bd.
(1981) 29 Cal.3d 101 ..... 28, 29, 32

Paratransit, Inc. v. Unemp. Ins. Appeals Bd.
(2014) 59 Cal.4th 551 16

TABLE OF AUTHORITIES
(continued)

Page

People v. Chatman
(2018) 4 Cal.5th 277, 283 52

People v. Pennington
(2017) 3 Cal.5th 786, 795 33

San Francisco-Oakland Terminal Rys. v. Industrial Acc. Com.
(1919) 180 Cal. 121 45

Shoemaker v. Myers
(1990) 52 Cal.3d 1 46

Skidgel v. Cal. Unemp. Ins. Appeals Bd.
(2018) 24 Cal.App.4th 574 ..... 20, 27, 28, 37

Statutes

26 U.S.C.

§ 3301 et seq. 15

§§ 3302–3304 16

29 U.S.C.

§ 201 et seq. 49

§ 207(a) 49

§ 213(a)(15) 50

42 U.S.C. §§ 501-503 15

Corp. Code, § 16202, subd. (a) 38

Gov. Code, § 11425.60 24

Lab. Code

§ 3300 47

TABLE OF AUTHORITIES
(continued)

Page

§ 3351, subd. (d) 46

§ 3351.5, subd. (b) 22, 47

§ 3352, subd. (a)(1) 48

§ 3352, subd. (a)(8) 47

§ 3352, subd. (h) 47

Unemp. Ins. Code

§ 100 16

§ 101 15

§ 135 17

§ 301 23

§ 306 23

§ 401 et seq. 24

§ 409 ..... 24, 32

§ 409.2 ..... 24, 26, 28

§ 601 ..... 29, 34

§§ 601-611 34

§ 603.5 34

§ 605 37

§ 605, subd. (a) 37

§ 606.5 35

§ 611 17

TABLE OF AUTHORITIES
(continued)

Page

§ 621 35

§§ 621-623 35

§ 621, subd. (b) 35

§§ 625-628 17

§§ 625-657 29

§ 629 ..... 17, 21, 22, 39

§§ 629-657 ..... 16, 35

§ 629, subd. (a) 17

§ 631 ..... 13 *et passim*

§ 634.5 37

§ 675 35

§§ 675-687.2 35

§ 676 35

§ 682, subd. (a) 36

§ 683 ..... 14 *et passim*

§ 683, subd. (a) 14, 29, 39

§ 685 22

§ 702.5 ..... 18, 38

§ 976, et seq. 15

§ 1251 16

§ 1326 ..... 16, 23

TABLE OF AUTHORITIES
(continued)

Page

§ 1334 24

§ 1335, subd. (c) 24

§ 1336 24

§ 2601 35

§ 13005 37

Welf. & Inst. Code

§§ 10600 et seq. 19

§ 12000 et seq. 18

§ 12300 et seq. 13, 19

§ 12300, subd. (b) 18

§ 12300, subd. (e) 20

§ 12300.4, subd. (a) 20

§ 12301.6, subd. (a)(2) 49

§§ 12301.6, subds. (c)(1) & (c)(2)(B) 20, 40

§ 12302 ..... 19, 20

§ 12302.2 ..... 22, 23, 27, 39, 40

§ 12302.2, subd. (a)(1) 20

§ 12302.2, subd. (a)(3) 20, 40

§ 12302.5, subd. (b) 20, 40

§ 12302.25, subd. (a) 20, 40

§ 12304, subd. (a) 20, 40

TABLE OF AUTHORITIES
(continued)

Page

§ 12305.71 19

§ 12305.86 19

Regulations

29 C.F.R.

§ 552.6 50

§ 791.2(a) 49

Cal. Code Regs., tit. 22

§ 631-1 ..... 23, 37

§ 631-1, subd. (e) 38

§ 1326-1 16

§ 5100 et seq. 24

Dept. of Social Services, Manual of Policies and Procedures, Social Service Standards

§ 30-702 19

§ 30-761.215(c) 20

§ 30-769.723 20

§§ 30-767.11 to 30-767.13 20

§ 30-769.73 20

Ch. 30-700 19

Other Authorities

68 Ops. Cal. Atty. Gen. 194 (1985) 37

TABLE OF AUTHORITIES
(continued)

Page

Assem. Bill 1420 (1971 Reg. Sess.) § 1, Apr. 1, 1971 42

Assem. Bill 1930 (2015-2016 Reg. Sess.) 44

Assem. Comm. on Fin. and Ins., analysis of Assem. Bill 1420 (1971 Reg. Sess.) as amended May 6, 1971 42

Assem. Comm. on Ways and Means, staff analysis of Assem. Bill 3028 (Reg. Sess. 1978) as amended June 8, 1978 21

Assem. Office of Research, 3rd reading analysis of Assem. Bill 644 (1977-1978 Reg. Sess.) as amended Jun. 22, 1977 17

Assem. Office of Research, 3rd reading analysis, Assem. Bill 3028 (1978 Reg. Sess.) as amended June 8, 1978 22

Dept. of Finance, enrolled bill report, Assem. Bill 3028 (1978 Reg. Sess.) July 13, 1978 22

Dept. of Hum. Res. Dev., enrolled bill report, Assem. Bill 1420 (1971 Reg. Sess.) Nov. 2, 1971 42

Dept. of Social Services, enrolled bill report, Assem. Bill 3028 (1978 Reg. Sess.) July 7, 1978 22

Emp. Dev. Dept., Amendments proposed May 30 to A.B. 3028, as amended May 10, 1978, Assem. Bill 3028 (1978 Reg. Sess.) June 19, 1978 43

Empl. Dev. Dept., analysis of Assem. Bill. 3028 (1978 Reg. Sess.) June 29, 1978 ..... 20, 21

Emp. Dev. Dept., Information Sheet, Exempt Employment 23

Emp. Dev. Dept., enrolled bill report, Assem. Bill 3028 (1978 Reg. Sess.) July 10, 1978 22

Letter from U.S. Dept. of Labor to Emp. Dev. Dept., Aug. 8, 1977 17

TABLE OF AUTHORITIES
(continued)

Page

In re Mercedes W. Caldera,
AO-359822 (Mar. 30, 2015) 25, 26

In re Mercedes W. Caldera,
P-B-507 (Oct. 13, 2015) ..... 13 *et passim*

In re Nellay Ostenpenko,
AO-33619 (Aug. 27, 2014) 25

Sen. Floor Analysis, Governor's Veto, Assem. Bill 1930
(2015-2016 Reg. Sess.) as enrolled Aug. 30, 2016 44

Sen. Rules Comm., Office of Sen. Floor Analyses, 3rd
reading analysis of Assem. Bill. 1930 (2015-2016 Reg.
Sess.) as amended Aug. 1, 2016 ..... 43, 44

Stats. 1935, ch. 308 16

Stats. 1935, ch. 352, art. 1, § 2 15

Stats. 1935, ch. 352, art. 1, § 7 16

Stats. 1935, ch. 352, art. 2, § 7 16

Stats. 1953, ch. 308, art. 2 16

Stats. 1971, ch. 1447 ..... 18, 38

Stats. 1973, ch. 1216, § 37 18

Stats. 1975, ch. 591 17

Stats. 1978, ch. 1447, § 1 18

Stats. 1978, ch. 2, § 30 ..... 17, 21

U.S. Dept. of Labor, Comparison of State Unemployment
Laws 2018, Coverage 42

ISSUE PRESENTED

Unemployment Insurance Code section 631 provides in relevant part that "employment" for purposes of non-disability-related unemployment compensation "does not include ... service performed by an individual in the employ of his son, daughter, or spouse ...."

The issue presented, as summarized in Plaintiff and Appellant's Opening Brief on the Merits, is whether "In-Home Supportive Services workers (Welf. & Inst. Code, § 12300 et seq.) who are providers for a spouse or a child [are] eligible for unemployment insurance benefits[.]" (Opening Brief on the Merits (OBM) 10.)

INTRODUCTION

Plaintiff and Appellant Tamara Skidgel is the caregiver for her disabled daughter under the In-Home Supportive Services (IHSS) program, Welfare & Institutions Code, § 12300 et seq. The IHSS program—funded by the federal, state, and local governments and administered by counties under state-agency supervision—provides no-cost, in-home domestic and related services to elderly, blind, and disabled persons so that they may live at home and avoid institutionalization. Appellant earns wages for her IHSS work, is protected by workers' compensation and wage laws, and can choose to opt into disability insurance coverage. But, as the California Unemployment Insurance Appeals Board held in a precedent benefit decision, *In re Mercedes W. Caldera*, P-B-507 (Oct. 13, 2015), Appellant is not covered by the State's unemployment insurance system.

The Appeals Board in *Caldera* interpreted and applied Unemployment Insurance Code section 631, which expresses the Legislature's intent that "employment" for purposes of unemployment insurance does not include "service performed by an individual in the employ of his son, daughter, or spouse ...." The close-family service

exclusion from unemployment insurance reduces the potential for collusion in this context, where a family-member employer would otherwise have the ability to confer benefits by terminating employment. This exclusion from unemployment benefits coverage has existed unchanged since 1935, even as the Legislature extended the option for *disability*-related unemployment insurance to close-family service, and added additional classes of service, including domestic work, to those covered by the unemployment compensation system. And the Legislature was aware of the close-family service exclusion when it defined the employer of an individual IHSS provider to be the service recipient, where (1) the recipient chooses her service provider, and (2) the government makes "direct payment" for that service, either by paying wages to the provider or paying reimbursement for wages to the recipient. (Unemp. Ins. Code, § 683, subd. (a).)[1]

By its terms, section 631's exclusion from unemployment insurance coverage applies whenever the circumstances of service it describes are present. Here, it is undisputed that a close-family IHSS caregiver chosen by the recipient and paid directly by the government—as is Appellant—is "in the employ of" the services recipient. (See OBM 33.) That is true as a legal matter, by operation of section 683, and as a practical matter, because the IHSS recipient has the power to hire, direct, and fire the provider.

While Appellant spends much of the opening brief arguing that the IHSS recipient and the government are both employers of the provider, any "joint employment" status is beside the point, because section 631's close-family service exclusion from the unemployment benefits program is *categorical*. The fact that government entities perform certain activities that may be associated with employer status—setting the ground rules for

---

[1] All further statutory references are to the Unemployment Insurance Code unless otherwise noted.

and overseeing service, paying wages, and providing payroll services—cannot serve to reinstate coverage where the close-family service exclusion applies. This reading of section 631 makes sense in light of the close-family exclusion's anti-collusion purpose, because even with government oversight and involvement, the IHSS recipient retains the ultimate right to terminate the provider's employment.

Because the Appeals Board has not clearly erred in construing section 631 as a categorical bar to unemployment benefits coverage, the court of appeal's decision denying Appellant's request to declare the *Caldera* precedent benefit decision invalid should be affirmed.

BACKGROUND

I. UNEMPLOYMENT INSURANCE AND SERVICES EXCLUDED FROM COVERED "EMPLOYMENT"

In 1935, in the midst of the Great Depression, California enacted a state unemployment insurance program "as a part of a National plan of unemployment reserves and social security, and for the purpose of assisting in the stabilization of unemployment conditions." (Stats. 1935, ch. 352, art. 1, § 2, p. 1227.) California "participates in a cooperative unemployment insurance program with the federal government, codified as the Federal Unemployment Tax Act." (*Am. Federation of Labor v. Unemp. Ins. Appeals Bd.* (1996) 13 Cal.4th 1017, 1024, citing 26 U.S.C. § 3301 et seq. and § 101 [integration of state and national plans].) State unemployment programs certified by the Secretary of Labor—as California's program is—qualify for federal administrative funds. (*City of Sacramento v. State of Cal.* (1990) 50 Cal.3d 51, 58, citing 42 U.S.C. §§ 501-503.) Employers with obligations under California's program are required to make contributions to a state fund that pays out unemployment benefits. (§ 976,

et seq.)[2] An employee covered by the program may apply for benefits and has the burden of establishing eligibility. (*Am. Federation of Labor, supra*, 13 Cal.4th at p. 1024; see also §§ 1251, 1326; Cal. Code Regs., tit. 22, § 1326-1.) "The fundamental purpose" of the program "is to reduce the hardship of unemployment by 'providing benefits for persons unemployed through no fault of their own.'" (*Paratransit, Inc. v. Unemp. Ins. Appeals Bd.* (2014) 59 Cal.4th 551, 558, fn. omitted, quoting § 100.)

While its purpose has always been remedial and its reach broad, from its inception, California's unemployment insurance law excluded certain types of service from coverage. (See Stats. 1935, ch. 352, art. 1, § 7, pp. 1227-1228; Stats. 1953, ch. 308, art. 2, pp. 1471-1477; §§ 629-657 [excluded services].)[3] In 1935, the State's unemployment scheme excluded such things as "[a]gricultural labor," service performed in the employ of federal, state, or local government (with some exceptions), "domestic service in a private home," and relevant to this case, "[s]ervice performed by an individual in the employ of his son, daughter, or spouse ...." (Stats. 1935, ch. 352, art. 2, § 7, p. 1228; see also discussion at pp. 21-23, below.)[4]

---

[2] Because California's unemployment insurance program is federally certified, employers in this State may credit their contributions to the state system against the federal tax (up to 90 percent). (*City of Sacramento, supra*, 50 Cal.3d at p. 58, citing 26 U.S.C. §§ 3302–3304.)

[3] The State's unemployment insurance laws were consolidated into a comprehensive Unemployment Insurance Code in 1953. (Stats. 1953, ch. 308, pp. 1457-1553.)

[4] The close-family service exclusion from unemployment insurance coverage also extends to minor children in the employ of a parent. (Stats. 1935, ch. 352, art. 2, § 7, p. 1228 [previous law reflecting 21 as the age of majority]; see § 631 [current law reflecting 18 as the age of majority].) Because this part of the exclusion is not at issue in this case, it will not be discussed further.

The Unemployment Insurance Code's many exclusions from unemployment insurance-eligible "employment" have evolved and changed over the ensuing eight decades—as these cited examples attest. The original exclusion of agricultural work was subject to multiple amendments and was eventually repealed in its entirety in 1975. (Stats. 1975, ch. 591, pp. 1304-1308 [repealing exclusions at §§ 625-628 and enacting § 611, expressly providing that "'[e]mployment' includes agricultural labor"].) The wholesale exclusion of domestic work, and the exclusion of most government work, ended in January 1978, when the Legislature amended section 629 to bring state law into conformance with the federal Unemployment Compensation Amendments of 1976. (See Respondent's Motion for Judicial Notice (MJN) 1[5] and 2.[6]) As of that date, "employment" for purposes of state unemployment and disability insurance has included "domestic service in a private home if performed for an employing unit or a person who paid in cash remuneration of one thousand dollars ($1,000) or more to individuals employed in the domestic service in any calendar quarter in the calendar year or the preceding calendar year."[7] (Stats. 1978, ch. 2, § 30, p. 16; § 629, subd. (a).)

In 1971, the Legislature tempered the effect of section 631, amending it to allow for unemployment *disability* coverage in the close-family service context, provided the parties to the arrangement (child and parent, or

---

[5] Assem. Office of Research, 3rd reading analysis of Assem. Bill 644 (1977-1978 Reg. Sess.) as amended Jun. 22, 1977, at pp. 1-4. The court of appeal took judicial notice of this document. (Order (5/3/2018).)

[6] Letter from U.S. Dept. of Labor to Emp. Dev. Dept., Aug. 8, 1977 [describing consequences should California fail to enact conforming legislation].

[7] "Employing unit" is defined in section 135 and can include an individual.

spouse and spouse) elect to make contributions to the Unemployment Disability Fund. (Stats. 1971, ch. 1447, § 1, p. 2858; § 631; see also § 702.5 [setting out election requirements].)[8] The Legislature left the close-family service exclusion from unemployment benefits coverage in place.

II. THE IN-HOME SUPPORTIVE SERVICES PROGRAM AND THE EVOLUTION OF EMPLOYMENT BENEFITS FOR SERVICE PROVIDERS

Responding to changes in federal law, and to qualify for federal funds, the Legislature in 1973 enacted legislation for supplemental payments and services for aged, blind, and disabled Californians. (Welf. & Inst. Code, § 12000 et seq., added by Stats. 1973, ch. 1216, § 37, pp. 2904-2918; see *County of Sacramento v. State of Cal.* (1982) 134 Cal.App.3d 428, 430-431 [summarizing changes in law]; *Basden v. Wagner* (2010) 181 Cal.App.4th 929, 933 [same].) California's In-Home Supportive Services program, included in this legislation, was part of a movement against institutionalization. (*Basden, supra*, 181 Cal.App.4th at p. 933.) The program, funded by the federal, state, and local governments, provides those eligible with "domestic services, heavy cleaning, personal care services" and a variety of "other supportive services" to "make it possible for the recipient to establish and maintain an independent living arrangement." (Welf. & Inst. Code, § 12300, subd. (b); see *County of Sacramento, supra,* 134 Cal.App.3d at p. 431 [explaining federal, state, and

---

[8] The Unemployment Compensation Disability Fund is not at issue in this lawsuit. (See Appellant's Opening Brief, No. A151224 (7/19/2017) at 28-29; CT 00361-00362 [Plaintiff's Points and Authorities in Support of Declaratory Relief, No. RG16810609 (7/6/2016)]; Hearing Transcript, No. RG16810609 (10/21/2016) at 6:17-20.) For discussion of the legislative history of this amendment, see p. 42, below.

local funding]; *Basden, supra*, 181 Cal.App.4th at p. 933, fn. 4 [explaining component programs and funding sources].)[9]

The California Department of Social Services (DSS or Department) "promulgates regulations that implement the program ...." (*Basden, supra*, 181 Cal.App.4th at p. 934, citing *Miller v. Woods* (1983) 148 Cal.App.3d 862, 868; see also Welf. & Inst. Code, §§ 10600 et seq. [DSS's powers and duties] and 12300 et seq. [IHSS program]; DSS, Manual of Policies and Procedures, Social Service Standards (DSS Manual), Ch. 30-700 [governing IHSS].)[10] Counties, in turn, administer the program under DSS's supervision. (*Guerrero v. Sup. Ct.* (2013) 213 Cal.App.4th 912, 922-923.) They "process applications for IHSS, determine the individual's eligibility and needs, and authorize services." (*Basden, supra*, 181 Cal.App.4th at p. 934.) In addition, they perform important quality-assurance functions, such as conducting background checks of prospective service providers, monitoring for fraud, and conducting home visits to confirm service delivery. (See, e.g., Welf. & Inst. Code, §§ 12305.71 [county QA/QC-related tasks], 12305.86 [background checks]; see generally DSS Manual, § 30-702.)

Counties are "obligated to ensure that services are provided to all eligible recipients ...." (Welf. & Inst. Code, § 12302.) A county may meet its service delivery obligation through (1) county employees; (2) an agency contractor (such as a local agency or health district, a nonprofit agency, or a private agency); or (3) individual providers selected by the recipient. (DSS

---

[9] For a description of IHSS's predecessor programs, see <http://www.cdss.ca.gov/agedblinddisabled/res/VPTC2/1%20Introduction%20to%20IHSS/History_of_IHSS.pdf> [as of Jan. 10, 2019].

[10] The DSS Manual consists of regulations and is available at <http://www.cdss.ca.gov/ord/entres/getinfo/pdf/ssman2.pdf> [as of Jan. 10, 2019].

Manual, §§ 30-767.11 to 30-767.13; Welf. & Inst. Code, §§ 12302, 12302.2, subd. (a)(1).)

Recipients themselves "direct [the IHSS] authorized services." (Welf. & Inst. Code, § 12300.4, subd. (a).) They sign their service providers' timesheets and have the authority to hire, supervise, and fire the provider. (DSS Manual, §§ 30-761.215(c) and 30-769.723; Welf. & Inst. Code, § 12302.25, subd. (a); see also *id.*, §§ 12301.6, subds. (c)(1) & (c)(2)(B); 12302.2, subd. (a)(3); 12302.5, subd. (b); 12304, subd. (a).)

From the outset of the program, counties and recipients have gravitated toward individual providers in part because it "permits the disadvantaged person the most control over the care … provided." (Respondent's MJN 3.[11]) Individual providers may include friends or family members, including the recipient's spouse or parents.[12] These providers receive wages either through direct payment from the government to the provider, or through direct payment from the government to the recipient to purchase services. (DSS Manual, § 30-769.73; see also CT 0036 [DSS comment letter discussing the two direct-payment options].) For ease of reference, this brief will refer to services delivered by individual providers selected by recipients and paid by the government as the "direct-payment" option, as did the court of appeal. (*Skidgel v. Cal. Unemp. Ins. Appeals Bd.* (2018) 24 Cal.App.4th 574, 579.)

---

[11] Empl. Dev. Dept., analysis of Assem. Bill. 3028 (1978 Reg. Sess.) June 29, 1978 at p. 2.

[12] A parent who has a legal duty to care for the IHSS-eligible child cannot be paid through the program unless the parent has left full-time employment to care for the child, or is prevented from seeking full-time employment because of the child's need for the parent's care. (*Basden, supra*, 181 Cal.App.4th at pp. 934-935, citing Welf. & Inst. Code, § 12300, subd. (e).)

In the initial years of the IHSS program (as noted above), domestic work—including the work of service providers—was excluded from workers' compensation and unemployment and disability benefits. By 1978, federal and state law required some employment benefits for domestic workers in certain circumstances. (Respondent's MJN 3;[13] see also Stats. 1978, ch. 2, § 30, p. 16 [amending § 629, creating exception to exclusion from unemployment and disability coverage for domestic workers meeting $1,000-remuneration requirement].) At that time, over 80% of IHSS services were provided by individual providers selected by the services recipient and paid by the government. (Respondent's MJN 3.[14])

To ensure IHSS workers received the newly-enacted benefits, federal and state enforcement agencies increasingly took the position that counties were responsible for payment of taxes and premiums for individual service providers' employment benefits where the county paid the provider directly. (Respondent's MJN 3[15] and 4.[16]) In response, many counties threatened to move away from individual providers to the remaining two options—that is, contracting with agencies to provide in-home supportive services, or using county civil service workers for the same. (*Ibid.*) At the time, it was predicted that such shifts could result in significant additional

---

[13] Empl. Dev. Dept., analysis of Assem. Bill. 3028 (1978 Reg. Sess.) June 29, 1978 at p. 1.

[14] Empl. Dev. Dept., analysis of Assem. Bill. 3028 (1978 Reg. Sess.) June 29, 1978 at p. 2.

[15] Assem. Comm. on Ways and Means, staff analysis of Assem. Bill 3028 (Reg. Sess. 1978) as amended June 8, 1978, at p. 2. The court of appeal took judicial notice of this document. (Order (5/3/2018).)

[16] Empl. Dev. Dept., analysis of Assem. Bill 3028 (Reg. Sess. 1978) June 29, 1979, p. 2.

costs to the State—the first option imposing approximately $80 million, and the second imposing approximately $116 million in additional state expenses. (*Ibid.*)

In response, the Legislature amended the law to make clear that for unemployment and disability insurance purposes, where the section 629 remuneration requirement is met, the services *recipient* is the employer "if the state or county makes or provides for direct payment to a provider chosen by the recipient or to the recipient of such services for the purchase of services, subject to the provisions of Section 12302.2 of the Welfare and Institutions Code." (§§ 683 [unemployment] and 685 [disability]; see also Respondent's MJN 5, 6, 7, and 8.[17])[18] Welfare and Institutions Code section 12302.2, one of the laws governing the administration of the IHSS program, was amended to provide that in the direct-payment circumstance, the State (not the county) would process and make all necessary withholdings, contributions, and payments related to provider-employee

---

[17] Assem. Office of Research, 3rd reading analysis, Assem. Bill 3028 (1978 Reg. Sess.) as amended June 8, 1978, at p. 1; Dept. of Social Services, enrolled bill report, Assem. Bill 3028 (1978 Reg. Sess.) July 7, 1978; Emp. Dev. Dept., enrolled bill report, Assem. Bill 3028 (1978 Reg. Sess.) July 10, 1978; Dept. of Finance, enrolled bill report, Assem. Bill 3028 (1978 Reg. Sess.) July 13, 1978. The court of appeal took judicial notice of these documents. (Order (5/3/2018).)

[18] For workers' compensation purposes, the Legislature amended the Labor Code to provide that a covered domestic service employee "shall be deemed an employee of the recipient of such services for workers' compensation purposes if the state or county makes or provides for direct payment to such person or to the recipient of in-home supportive services for the purchase of services, subject to the provisions of Section 12302.2 of the Welfare and Institutions Code." (Lab. Code, § 3351.5, subd. (b); see pp. 47-48, below.)

benefits, including unemployment compensation, on behalf of the *recipient as employer.*[19]

Where section 631 applies, the Department of Social Services does not make unemployment insurance contributions on the recipient's behalf. (See Welf. & Inst. Code, § 12302.2; CT 0078; see also Emp. Dev. Dept., Information Sheet, Exempt Employment, available at <https://www.edd.ca.gov/pdf_pub_ctr/de231fam.pdf> [as of January 10, 2019].)[20]

III. THE EMPLOYMENT DEVELOPMENT DEPARTMENT AND THE CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

The Employment Development Department is charged with administering the State's unemployment benefits system. It "may adopt, amend, or repeal such regulations as are reasonably necessary" to enforce the Department's functions under the Unemployment Insurance Code. (§ 306.)[21] In addition, the Department receives and processes claims for unemployment benefits. (*Am. Fed. of Labor, supra,* 13 Cal.4th at p. 1024.)[22] The Department "investigates the [unemployment benefits] claim and makes an initial eligibility determination in a nonadversarial setting." (*Id.*, citing §§ 301, 1326 et seq.) If it "denies an application for benefits, a claimant may file an administrative appeal, which is heard by an

---

[19] For additional legislative history, including a recent bill that was enacted but vetoed, see pp. 41-44, below.

[20] Appellant's assertion that DSS makes unemployment insurance contributions on behalf of "all IHSS workers" is not supported. (OBM 25; see also *id.* at p. 16.)

[21] The Department has adopted a regulation interpreting section 631. (Cal. Code Regs., tit. 22, § 631-1; see CT 0040.) The regulation is discussed at pp. 37-38, below.

[22] The Department was previously under the Health and Welfare Agency, but now resides in the Labor and Workforce Development Agency. (See <https://labor.ca.gov/> [as of Jan. 10, 2019].)

administrative law judge. (*Id.* at pp. 1025-1025, citing §§ 1334, 1335, subd. (c) and Cal. Code Regs., tit. 22, § 5100 et seq.) And "[i]f the administrative law judge denies eligibility on reconsideration, a claimant may … appeal to the [California Unemployment Insurance Appeals] Board …" (*Id.* at p. 1025; see §§ 1336 [proceedings by Appeals Board], 401 et seq. [provisions governing Appeals Board]; see also <https://www.cuiab.ca.gov/#> [as of Jan. 10, 2019].)

The Appeals Board's administrative law judges sit in review of unemployment insurance decisions. (§§ 1336, 401 et seq.) In addition, the Appeals Board as a whole may "consider and decide cases that present issues of first impression or that will enable the appeals board to achieve uniformity of decisions by the respective members." (§ 409.) Toward that end, the whole Board may designate certain of its decisions as precedents. (*Ibid.*; see also Gov. Code, § 11425.60 [discussing effect of precedent decisions].) "The director [of the Employment Development Department] and the appeals board administrative law judges shall be controlled by those precedents except as modified by judicial review." (§ 409.) Further, "[a]ny interested person or organization may bring an action for declaratory relief in the superior court in accordance with the provisions of the Code of Civil Procedure to obtain a judicial declaration as to the validity of any precedent decision of the appeals board …." (§ 409.2.)

STATEMENT OF THE CASE

In February 2015, the Appeals Board issued a proposal to adopt a precedent decision addressing how the close-family service exclusion from unemployment insurance coverage in section 631 applies in the IHSS context. (CT 0031.) It noted that an Appeals Board panel in a non-precedent decision had recently "announced a new theory" to justify providing unemployment benefits to an IHSS provider, notwithstanding

section 631. (*Id.*, citing *In re Nellay Ostenpenko*, AO-33619 (Aug. 27, 2014).) The *Ostenpenko* majority concluded that both the claimant's son and the public authority under contract with the county were the caregiver's employers, and therefore section 631 did not apply. (CT 00139, 00149-00150.)[23] At the time of the proposal, the Appeals Board had received three additional appeals (CT 00031), requiring it to resolve whether or not the panel's new joint-employer theory was a correct reading of the law and should be applied in all unemployment benefits claims by close-family IHSS providers. In all three of the pending appeals, the Employment Development Department had denied benefits; the intermediate reviewing administrative law judge affirmed the denial in two of the cases, but reversed and awarded benefits in one case (*In re Mercedes W. Caldera*, AO-359822 (Mar. 30, 2015)). (CT 00031.)

The Appeals Board stated in its proposal that "additional input on the issues presented ... will be beneficial to its consideration of the appeals pending in these matters." (CT 0032.) It announced that it would take judicial notice of comments it had previously received from the Employment Development Department and the Department of Social Services. Both entities expressed the view that sections 631 and 683 precluded unemployment benefits where a parent is the IHSS provider for his or her child, or a spouse is the provider for his or her spouse. (CT 0035-0044.) The Board also called for public comment on the application of sections 631 and 683 in the IHSS context. (CT 0032.) Many of the

---

[23] The dissenting judge on the *Ostenpenko* panel would have held that theories of joint employment were irrelevant in light of the "unambiguous" language of sections 631 and 683. "[T]he claimant's son is, if not her only employer, at least one of two employers. The claimant is therefore performing services in the employ of her son and her wages from that service cannot be counted toward the amount needed to be eligible for [unemployment] benefits." (CT 00151.)

commenters contended that the parent or spouse in-home supportive services recipient should be considered a joint employer of the provider, together with the relevant public authority. (See, e.g., CT 0045, 0081-0082, 0088-0089.)

After the close of public comment, in September 2015, the Appeals Board proposed to adopt its decision denying a parent caregiver unemployment benefits in *In re Mercedes W. Caldera*, AO-359822, as a precedent benefit decision. (CT 00111.) After additional public comment, on October 13, 2015, the Board took that action. (CT 009-0017.) In *Caldera*, the Employment Development Department appealed from the administrative law judge's decision awarding unemployment benefits to the claimant based on wages she earned as the IHSS provider for her son, "notwithstanding the provisions of section 631 of the Unemployment Insurance Code." (CT 0010.) The Appeals Board reversed the administrative law judge's decision, holding that "[t]he claimant's wages as an IHSS worker caring for her son cannot be used to support the claimant's unemployment insurance claim because code section 631 excludes from the definition of 'employment' services performed by an individual in the employ of her son." (CT 0017.) "Whether or not those services might also be deemed to have been in the employ of another employer is immaterial to the operation of the exclusion under code section 631." (*Ibid.*)

Appellant Skidgel, a parent IHSS caregiver, filed an action in Alameda County Superior Court to invalidate the *Caldera* precedent benefit decision. (CT 0001-0017; see § 409.2.) The trial court denied the motion for declaratory relief, reasoning that regardless of whether a government entity is also an "employer" of the provider, a parent IHSS caregiver by operation of section 683 is "in the employ of" the IHSS child recipient for purposes of section 631. It held that *Caldera* "appropriately determined that the 'joint employer' rationale, advanced by the IHSS provider in that

case and by [Skidgel] in this case, does not provide a basis for making the statutory exclusion in [Unemployment Insurance Code] § 631 inapplicable." (CT 00508.) The trial court entered judgment in favor of the Appeals Board. (CT 00516-00517.)

The court of appeal affirmed. (*Skidgel, supra,* 24 Cal.App.5th 574.) Beginning with the text of the relevant statutes, it noted that section 683 defines the recipient as "employer" where the recipient chooses her provider and the government makes direct payment for services. (*Id.* at p. 586.) The court read section 12302.2 of the Welfare and Institutions Code as requiring the State to provide mere payroll services, in order "to relieve the recipients of these administrative burdens" that would otherwise fall to them as employers. (*Id.* at p. 587.) Further, it noted that "as *Caldera* reasons and the trial court ruled, the fact that Unemployment Insurance Code section 631 includes an express exception to the close-family-member exclusion supports an inference that the Legislature did not intend other exceptions to be implied." (*Id.* at p. 587.)

The reviewing court also considered the legislative history surrounding the 1978 enactments of section 683 and Welfare and Institutions Code section 12302.2.[24] "The legislation came not long after domestic workers"—which include IHSS providers—"were first added to the unemployment and workers' compensation statutory schemes." (*Skidgel, supra,* 24 Cal.App.5th at p. 589.) The statutes were "proposed in response to administrative and court decisions that counties were the employers of IHSS providers ...." (*Id.* at p. 590.) Counties threatened to move to alternative methods of delivering services, specifically, "contracting out IHSS services or using civil service employees as IHSS

---

[24] The legislative history of these statutes is discussed in detail at pp. 41-44, below.

providers," which would "greatly increase[e] state costs[.]" (*Ibid.*) "[T]he legislation authorized the state to serve as the payroll servicer for recipients and assume for itself those employer costs[.]" (*Ibid.*) "The clear intent was to relieve counties of the burdens of employer status in the IHSS program altogether." (*Ibid.*)

The court of appeal concluded that "the best reading of the statutes, in light of their plain language and legislative history, is that IHSS recipients were intended to be the sole employers of IHSS providers under the Direct Payment Mode for purposes of unemployment insurance coverage" and that "[i]t follows that Unemployment Insurance Code section 631 excludes IHSS providers who serve close-family-member recipients." (*Skidgel, supra*, 24 Cal.App.5th 586, fn. omitted.) The court did not "address *Caldera*'s argument, adopted by the trial court, that Unemployment Insurance Code sections 631 and 683 exclude close-family-member IHSS providers from coverage even if government entities are otherwise joint employers with recipients." (*Id.* at p. 586, fn. 12.)

This Court granted review.

LEGAL STANDARD AND STANDARD OF REVIEW

In a third-party declaratory relief action under section 409.2, courts do not conduct substantial evidence review to determine whether the Appeals Board correctly resolved disputes on adjudicative facts. Rather, exercising independent judgment, "the courts may only determine whether the board decision accords with the law that would govern were the rule announced articulated as a regulation." (*Pacific Legal Found. v. Unemp. Ins. Appeals Bd.* (1981) 29 Cal.3d 101, 111 [addressing Board precedent decisions].) As with interpretive regulations, "because of the agency's expertise, its view of a statute or regulation it enforces" expressed in a precedent decision "is

entitled to great weight unless clearly erroneous or unauthorized." (*Ibid.*; see also *Assn. of Cal. Ins. Cos. v. Jones* (2017) 2 Cal.5th 376, 397.)

SUMMARY OF ARGUMENT

The Appeals Board interpreted Unemployment Insurance Code sections 631 and 683 as categorically excluding close-family IHSS service providers from unemployment insurance coverage. Its interpretation is set out in a precedent benefit decision—*In re Caldera*—the culmination of a formal, considered, and public process akin to rulemaking. It reflects not only the Appeals Board's own experience and expertise, but also that of the Employment Development Department and the Department of Social Services. Under these circumstances, the Board's interpretation is entitled to great weight and should be rejected only if clearly erroneous. It is not.

Even if this Court were to consider the meaning of these statutes on a blank slate, the Appeals Board's interpretation is eminently reasonable and serves the underlying legislative intent. Starting with the text and structure of the Unemployment Insurance Code, coverage turns on whether there is "employment" as defined in the statute. The statute first makes a broad sweep, drawing in all "service, including service in interstate commerce, performed by an employee for wages or under any contract of hire, written or oral, express or implied." (§ 601.) It then excludes from coverage specific categories of service (§§ 625-657), such as "service performed by an individual in the employ of his son, daughter, or spouse ...." (§ 631.) By operation of section 683, an IHSS provider is in the employ of the recipient where, as here, the State or county makes "direct payment" and the recipient chooses the provider. (§ 683, subd. (a); see OBM 33-34.) It follows necessarily that if the IHSS provider is a parent or spouse of the recipient, there is no unemployment benefits coverage.

This reading of section 631 and 683 gives effect to the Legislature's considered decision to make only a limited exception to section 631 to allow for opt-in disability coverage. And it makes sense in light of other statutes assigning roles and responsibilities under the IHSS program. While government entities serve important oversight and payroll functions, the IHSS recipient is consistently defined and referred to as an employer, and, importantly, retains the power to hire, supervise, and fire the provider. Excluding close-family service where the provider is a parent or spouse of the recipient thus serves the underlying intent of section 631—to reduce the possibility of collusion where a close family member would otherwise have the power to trigger unemployment benefits.

The Appeals Board's interpretation is also consistent with the legislative history. The Legislature retained the close-family exclusion even as it elected to provide unemployment insurance coverage to new classes of service, including domestic work (which encompasses in-home supportive services). And the Legislature considered, but elected not to extend, opt-in unemployment coverage in the close-family context, choosing instead to allow opt-in *disability* coverage only, where there is arguably a lower likelihood of collusion. Further, the Legislature was informed and fully aware of the effects of the close-family exclusion—that it bars parent and spouse IHSS providers from receiving unemployment benefits—when it chose to define the IHSS services recipient as the provider's employer in "direct payment" circumstances.

Appellant spends much of the opening brief arguing that government entities should also be considered employers of the provider. (See OBM 11, 21, 30 ["The proper focus is whether there is joint employment"].) As a general matter, authorities addressing "employer" and "employee" status under the common law and in the context of other benefit schemes can often assist agencies and courts in answering questions that may arise under

the Unemployment Insurance Code. But this case turns more specifically on the operation of section 631's exclusion from unemployment benefits coverage. And where section 631 applies, there is no occasion for further inquiry into the possibility of additional employers. As the Appeals Board correctly concluded, whether the IHSS recipient is *an* employer, or *the* employer of the provider is "immaterial to the operation of the exclusion under code section 631." (CT 0017.) If service is excluded from the Unemployment Insurance Code's definition of covered "employment" by operation of section 631 because the worker is in the employ of a child or spouse, that service is *categorically* excluded from unemployment benefits, and the fact that a worker might have an additional employer related to that same service cannot serve to reinstate coverage.

To be sure, other mechanisms might be available to reduce or avoid collusive claims for unemployment benefits by close-family IHSS providers. But to date, the Legislature has chosen a categorical service exclusion to address the risk and conserve program resources. Neither the Appeals Board nor the courts may override that clear, reasonable, and long-established policy decision.

ARGUMENT

I. THE UNEMPLOYMENT INSURANCE APPEALS BOARD'S PRECEDENT DECISION INTERPRETING THE CLOSE-FAMILY SERVICE EXCLUSION IS ENTITLED TO GREAT WEIGHT

Appellant contends that the Board's interpretation of sections 631 and 683 to preclude unemployment benefits for close-family IHSS providers, as set out in the *Caldera* precedent benefit decision, is not entitled to weight, asserting that the agency's position has been "inconsistent" and "vacillating." (OBM 20.) This misunderstands the procedural history of this case and the precedent decision process.

"[P]recedent decisions are akin to agency rulemaking, because they announce how governing law will be applied in future cases." (*Pacific Legal Found., supra,* 29 Cal.3d at p. 109.) Necessarily, the need for precedent decisions will arise where there is uncertainty or confusion about the law, and it is unsurprising that they are sometimes preceded by inconsistent, *non*-precedential decisions, as is true here. (See CT 0011 [acknowledging that "over time, inconsistent decisions have been issued by the Appeals Board on this topic"].) The circumstances that precede and require a precedent decision should not preclude affording the resulting precedent decision appropriate deference.

Unlike the decisions of individual Appeals Board panels, a precedent decision is a decision of the Board "acting as a whole" and therefore reflects the expertise of the Board as an institution. (§ 409; see also *Pacific Legal Found., supra*, 29 Cal.3d at p. 111 [weight given to precedent decisions results from agency expertise].) In addition, a precedent decision is adopted after a full and public process, with input from stakeholders and other entities with relevant experience and expertise. Here, the Board's interpretation of the relevant statutes was reached after considering public comments, and is consistent with and reflects the input of the Department of Social Services and the Employment Development Department (CT 0035-0044), expert agencies with intimate knowledge of the law and the relevant programs. The administrative expertise embodied in the *Caldera* precedent benefit decision, and the care with which it was adopted, strongly favor affording the Appeals Board's interpretation of section 631 great weight. (See *Assn. of Cal. Ins Cos., supra,* 2 Cal.5th at p. 390.)

II. UNEMPLOYMENT BENEFITS ARE NOT AVAILABLE TO CLOSE-FAMILY IN-HOME SUPPORTIVE SERVICES PROVIDERS

This case turns primarily on the proper interpretation of Unemployment Insurance Code sections 631 and 683, in the context of close-family in-home supportive services. The rules of construction are well-known to this Court. Courts must ascertain the Legislature's intent to effectuate the purpose of the statute. (*Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC* (2016) 61 Cal.4th 830, 837.) They begin with the text of the statute as the most reliable indicator of that intent, affording words their usual and ordinary meanings, and construing them in context. (*Id.* at pp. 837-838.) Courts bear in mind "that '[t]he meaning of a statute may not be determined from a single word or sentence' ... and that apparent 'ambiguities often may be resolved by examining the context in which the language appears and adopting the construction which best serves to harmonize the statute internally and with related statutes[.]'" (*People v. Pennington* (2017) 3 Cal.5th 786, 795, internal citations omitted.) Only if the words are susceptible to more than one meaning do courts turn to other indicia of legislative purpose. (*Ibid.*) The statute's legislative history, and the wider historical circumstances of its enactment, may assist in ascertaining the Legislature's intent. (*Carmack v. Reynolds* (2017) 2 Cal.5th 844, 850.)

As to the particular statutes at the center of this appeal, "[t]he provisions of the Unemployment Insurance Code must be liberally construed to further the legislative objective of reducing the hardship of unemployment." (*Gibson v. Unemp. Ins. Appeals Bd.* (1973) 9 Cal.3d 494, 499; see OBM 25.) But this interpretive preference favoring the extension of benefits does not override the normal rules of statutory interpretation, which recognize the Legislature's intent as the ultimate touchstone. "While it is true that such legislation should be liberally construed so as to afford

all the relief which the language of the act indicates that the Legislature intended to grant ... the interpretation should not exceed the limits of the statutory intent." (*Cal. Emp. Com. v. Kovacevich* (1946) 27 Cal.2d 546, 550-551, internal citation omitted [applying statutory provision excluding agricultural labor from unemployment insurance coverage].)

A. In Context and by Their Terms, Sections 631 and 683 Categorically Exclude Close-Family In-Home Supportive Services from Unemployment Insurance Coverage

The structure of the Unemployment Insurance Code, in particular, its reliance on included and excluded categories of service; the plain and categorical language of section 631's close-family service exclusion; the Legislature's decision to include only a limited opt-in disability exception to section 631; the relationship of section 631 to section 683 and other provisions that specifically address the recipient's role in the IHSS program, including those that reserve to the recipient the power to fire the provider; and the underlying anti-collusion purpose of section 631 all support the conclusion that close-family IHSS service providers are not eligible for unemployment compensation.

The Code's structure is apparent on review of division 1, part 1 (Unemployment Compensation), chapter 3 (Scope or Coverage). Article 1 (Employment) addresses the presumptive coverage of the unemployment benefits program. (§§ 601-611.) It begins with an expansive definition of "employment" as "service, including service in interstate commerce, performed by an employee for wages or under any contract of hire, written or oral, express or implied." (§ 601.) Article 1 includes a number of additions and clarifications to presumptive coverage—for example, that service in Canada may be included if the service is directed from California. (§ 603.5.)

Article 1.5 (Employment, §§ 621-623) establishes "employee" status for such service, which excludes independent contractors and includes "[a]ny individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee." (§ 621, subd. (b).)[25] Article 2 (Excluded Services) then operates to exclude certain service from coverage (§§ 629-657), including close-family service.

Article 3 (Subject Employers) contains definitions that assist in construing certain exclusions (including section 631) and identifies the employer(s) responsible for contributing to the benefits program where service is covered. (§§ 675-687.2.) The primary definition of "employer" is any "employing unit" that has "one or more employees" and "pays wages for employment in excess of one hundred dollars ($100) during any calendar quarter." (§ 675; see also § 676.)[26] In general, "[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.) Article 3 includes a number of additional, more specific definitions of "employer." For example, the term "also means" one who employs individuals to perform

---

[25] An independent contractor is not an "employee" and therefore is not engaged in service covered by the Unemployment Insurance Code. (*Briggs v. Cal. Emp. Com.* (1946) 28 Cal.2d 50, 54.) The Appeals Board in *Caldera* did not "ignore" section 621 or the common law definition of employee, as Appellant contends. (OBM 29.) Rather, because there is no dispute that IHSS providers are "employees" and not independent contractors, section 621 has no application in this case. (See, e.g., OBM 18, 27, 31, citing § 621, subd. (b).)

[26] Section 676 contains the same core definition of "employer" for which "services are performed that are included in 'employment' solely for the purposes of Part 2 (commencing with Section 2601) of this division [disability insurance]."

domestic service and pays wages of $1,000 or more in a defined time period. (§ 682, subd. (a).) Thus, for purposes of determining eligibility for unemployment compensation, the threshold question is whether the *type of service* at issue is included or excluded from coverage.[27] As discussed above, under section 631, "employment" eligible for unemployment benefits does not include "service performed by an individual in the employ of his son, daughter, or spouse ...."[28]

Read reasonably, the excluded service is any service where a son, daughter, or spouse is *an* employer of the individual and thus in a position to take action that would trigger unemployment benefits for that individual if they were available. Effectively, Appellant would have the courts rewrite section 631 to exclude service for purposes of unemployment benefits only where the "individual [is] in the *sole* employ of his son, daughter, or spouse ...." Whatever the merits of that approach, it is not the statute the Legislature enacted. Courts do not "under the guise of construction, rewrite the law or give the words an effect different from the plain and direct import of the terms used" and "must assume that the Legislature knew how to create an exception if it wished to do so[.]" (*Apple Inc. v. Superior Court* (2013) 56 Cal.4th 128, 158, citations and quotations omitted.)

Provisions of the Unemployment Insurance Code specifically addressing service for a public entity support reading section 631 as

---

[27] As noted (pp. 17-18, above), there is an exception to section 631's close-family service exclusion that applies only to opt-in disability insurance. This exception is discussed further below. (See pp. 38-39.)

[28] The Appeals Board did not "ignore" the common law definitions of "employer." (OBM 29.) Instead, it determined that under section 631, where the IHSS recipient is an employer of the provider, a categorical service exclusion from unemployment benefits applies and there is no need to further inquire into the presence of other potential employers. (CT 0017.)

categorically excluding close-family service from unemployment benefits coverage, regardless of the presence of other potential employers. Section 605 generally includes service for a public entity under the Code's definition of covered employment. (See § 605, subd. (a).) Such service is included "[e]xcept as provided by section 634.5[,]" (*id.*); section 634.5 in turn provides that "with respect to an entity defined by Section 605 ... 'employment" does not include service excluded under Section[] ... 631[.]" The plain language of section 605 thus precludes coverage based on a theory that an individual working in close-family service is, *by the same work*, also providing a valuable service to the IHSS program or a public entity as a "joint employer." (See OBM 28, stating that "[t]he IHSS worker provides a valuable service to the public entity.")[29] Where section 631 applies, its exclusion from unemployment benefits is categorical.[30]

This reading is also consistent with the Employment Development Department's regulation interpreting 631. (Cal. Code Regs., tit. 22, § 631-1.) Among other things, it "*extends* the [close-family service] exclusion to employment by a partnership consisting solely of close-family-member partners to avoid a subterfuge of the exclusion." (*Skidgel, supra*, 24 Cal.App.4th at p. 589, fn. 15, italics in original.) The regulation provides that "[s]ervices performed in the employ of a partnership by a spouse,

---

[29] See also 68 Ops. Cal. Atty. Gen. 194, *4 (1985) [concluding that an individual IHSS provider chosen by the recipient and paid by the government is the employee solely of the recipient]; *Skidgel, supra*, 24 Cal.App.5th at pp. 586-594.

[30] Appellant cites section 13005 for the proposition that the State, county, or public authority should be deemed an employer of any IHSS service provider. (OBM 22-23.) But that provision, found in division 6, governs responsibilities for unemployment withholding from wages. Its application necessarily assumes that the service at issue is not excluded by operation of the provisions in division 1, part 1, chapter 3, governing the scope of unemployment insurance coverage.

father, [or] mother ... are excluded when such services would be excluded if performed for each partner individually." (Cal. Code Regs., tit. 22, § 631-1, subd. (e).)[31] The implication of this regulation is that the exclusion cannot be avoided by showing there is an additional employer for the same excluded service, but rather by showing that the true employer is not the individual's child or spouse—as in the example provided in the regulation, that the employer is a valid partnership (one not designed to skirt the exclusion).

Refusing to create a multi-employer exception to the close-family service exclusion from unemployment benefits respects the Legislature's decision to make only a limited exception to section 631, extending an opt-in *disability* insurance option to those working in the close-family context. (Stats. 1971, ch. 1447, p. 2858; see pp. 17-18, above and discussion of the legislative history at p. 42, below.) The exclusion in section 631 applies "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." Section 702.5 (located in article 4, Elective Coverage), allows an employer to file a written election, agreed to by the employer and its employees, that services that do not constitute employment under section 631 "shall be deemed to constitute employment by an employer for all the purposes of Part 2" governing disability compensation. (§ 702.5.) Under the ordinary rules of statutory construction, if an exemption or exception is specified in a statute, and—as here—the omission of others appears intentional, courts should not imply

---

[31] In general, "the association of two or more persons to carry on as coowners a business for profit forms a partnership, whether or not the persons intend to form a partnership." (Corp. Code, § 16202, subd. (a).)

additional ones. (*Lopez v. Sony Electronics, Inc.* (2018) 5 Cal.5th 627, 635-636.)

The Legislature could, of course, have chosen to write an IHSS-specific exception to the exclusion for close-family service or otherwise avoided its application in this context. (See, e.g., § 629 [excluding the category of "domestic service in a private home" but "except[ing]" from the exclusion such service that meets stated remuneration requirements].) It did not do so. And it placed into article 3 a definition of IHSS "employer" that "also means ... [t]he recipient of such services, if the state or county makes or provides for direct payment to a provider chosen by the recipient or to the recipient of such services for the purchase of services ...." (§ 683, subd. (a).) The Legislature understood that in applying section 631 to in-home supportive service, the relevant agencies and the courts would look to the article 3 definitions of "employer," including section 683, and, further, that the "recipient" will always be an individual (not a public entity) who will sometimes be a close family member. A plain reading of section 631, together with 683, is that where the IHSS provider serves his or her son, daughter, or spouse, the service falls out of the scope of coverage of the State's unemployment compensation program.

Moreover, when the Legislature specified the governmental responsibilities in administering the IHSS program, it took care to reserve "employer" status for the recipient where the conditions in section 683, subdivision (a) are satisfied. Section 683 references section 12302.2 of the Welfare and Institutions Code. That section requires that in the direct-payment circumstance, where the IHSS recipient chooses the individual provider and the State or county pays wages, the State (through the Department of Social Services) handles all benefits-related payroll functions. As the provision repeatedly reiterates, these governmental duties do not extinguish the recipient's role as an IHSS provider's "employer."

Rather, the State performs these functions on "behalf" of "the recipient as the employer"; this or similar phrasing occurs some seven times in various formulations in Welfare and Institutions Code section 12302.2. Indeed, there is no dispute that an IHSS recipient is an employer of an IHSS provider in the close-family context. (OBM 33; see also CT 00365; Appellant's Opening Brief, No. A151224 at p. 29.) Further, the Welfare and Institutions Code expressly recognizes and retains for the IHSS recipient some of the most essential attributes of being an employer—specifically, the ability to hire, supervise, and *fire* the IHSS provider. (Welf. & Inst. Code, § 12302.25, subd. (a); see also *id.*, §§ 12301.6, subd. (c)(1) & (c)(2)(B); 12302.2, subd. (a)(3); 12302.5, subd. (b); 12304, subd. (a); *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 531-532 [discussing common law factors distinguishing employment from independent-contractor arrangement, including power to control work and to fire].)

The text of the relevant statutes, read together, establish that the Legislature did not choose to make unemployment benefits available in the close-family IHSS service context. And that makes sense: the stated purpose of section 631 is to reduce the potential for collusion in the triggering of unemployment benefits for close family members. (See p. 42, below, setting out legislative history; see also *Miller v. Dept. of Human Resources Dev.* (1974) 39 Cal.App.3d 168, 172.) Concerns about collusion are not obviated simply because there may be another "employer" (here the government) handling payment and payroll services, where the IHSS recipient retains the ability to fire his or her close-family provider for any reason.[32] Reading section 631 as a categorical service exclusion from

---

[32] Granted, the parent or spouse IHSS provider's work might also end because the family-member recipient becomes sick and must be

(continued...)

unemployment compensation thus serves the statute's purpose by reducing the possibility of improper claims.

Because the Appeals Board's interpretation of section 631 and related statutes in *Caldera* hews closely to the text and statutory purpose, it should be upheld.

B. The Legislative History Confirms the Legislature's Intent to Retain the Close-Family Exclusion Even as the Relevant Programs Evolved

Appellant asserts that "the legislative history does not show an intent to limit coverage." (OBM 24.) To the extent the Court finds any ambiguity in the text of section 631, read together with section 683 and related statutes, the evolution of the relevant laws and their legislative histories support the Appeals Board's interpretation.

As noted (p. 16, above), the close-family service exclusion from unemployment insurance has existed unchanged since 1935, even as the Legislature extended the option for disability-related unemployment insurance to close-family workers in 1971. Further, the Legislature retained the close-family service exclusion from unemployment insurance even as it added new classes of covered service, including domestic work, in early 1978. (See p. 17, above.) This evolution suggests that the retention of this particular service exclusion was not a legislative oversight. Indeed, California's initial adoption and continued retention of the close-family exclusion is "consistent with the vast majority of the states and the federal government itself in excluding family employment from the coverage of the unemployment insurance program." (*Miller, supra,* 39 Cal.App.3d at p. 173; U.S. Dept. of Labor, Comparison of State

---

(...continued)
hospitalized, or dies. Constructing a public benefits program involves legislative line-drawing that is necessarily imperfect. (See p. 52, below.)

Unemployment Laws 2018, Coverage, p. 1-9 ["[a]ll states exclude service performed for an employer by a spouse or minor child and, with few exceptions, service of an individual in the employ of a son or daughter"].[33])

The Legislature's decision not to extend unemployment insurance to close-family service was a considered one. The original version of the bill would have allowed for elective coverage for unemployment insurance as well. (Respondent's MJN 9.[34]) The proposal drew opposition from the Department of Human Resources Development because of what it referred to as a "collusion hazard" presented by "elective coverage for unemployment insurance for family members"; "[t]his opposition was removed when the bill was restricted to disability insurance only." (Respondent's MJN 10;[35] see also MJN 11 [observing that since disability benefits "cannot be obtained without a doctor's certificate of disability there is obviously less chance of fraudulent claims being filed than exists with respect to unemployment insurance benefits for these same persons"].[36])

And the Legislature was fully aware of the effect of the close-family service exclusion on IHSS providers when, later in 1978, it defined the employer of an individual IHSS provider to be "[t]he recipient of [IHSS] services, if the state or county makes or provides for direct payment to a provider chosen by the recipient or to the recipient of such services for the purchase of services ...." (§ 683.) During the bill process, the

---

[33] Available at <https://oui.doleta.gov/unemploy/pdf/uilawcompar/2018/coverage.pdf> [as of Jan. 10, 2019].

[34] Assem. Bill 1420 (1971 Reg. Sess.) § 1, Apr. 1, 1971.

[35] Dept. of Hum. Res. Dev., enrolled bill report, Assem. Bill 1420 (1971 Reg. Sess.) Nov. 2, 1971 at p. 1.

[36] Assem. Comm. on Fin. and Ins., analysis of Assem. Bill 1420 (1971 Reg. Sess.) as amended May 6, 1971.

Employment Development Department—the state entity that accepts and processes unemployment benefits claims—commented that the extension of unemployment benefits to IHSS workers did not run to the benefit of IHSS providers who were excluded from such benefits by operation of section 631. As the Department's June 19, 1978 memo to lawmakers states: "It is estimated that family relationships will bar UI payments to 10 percent of providers otherwise eligible and that the unemployment rate of providers will be 20 percent." (Respondent's MJN 12;[37] see also MJN 13 [noting effect of section 631].[38]) In current guidance materials, IHSS providers are informed that close-family relationships prevent unemployment insurance benefits. (CT 0077-0078.) As a factsheet for IHSS providers states, "Unemployment Insurance (UI) benefits may be available to you *if you are not the parent or spouse of your employer / recipient* and become unemployed, able and available to work and you meet certain eligibility requirements." (CT 0078, italics added.)

More recent legislative activity confirms that the Legislature understands and intends that close-family IHSS providers are not eligible for unemployment insurance benefits. In 2016, in response to calls for reform from the United Domestic Workers/Home Care Providers Union, the Legislature drafted and enrolled a bill that would have created a new advisory committee to study whether to extend unemployment and other benefits to close-family IHSS providers. (Assem. Bill 1930 (2015-2016

---

[37] Emp. Dev. Dept., Amendments proposed May 30 to A.B. 3028, as amended May 10, 1978, Assem. Bill 3028 (1978 Reg. Sess.) June 19, 1978 at pp. 1-2. This document is located in the file of the Senate Committee for Industrial Relations. A.B. 3028 was signed by the Governor on July 18, 1978.

[38] Sen. Rules Comm., Office of Sen. Floor Analyses, 3rd reading analysis of Assem. Bill. 1930 (2015-2016 Reg. Sess.) as amended Aug. 1, 2016, at p. 5.

Reg. Sess.).)[39] The legislative history for this bill notes that "[s]ection 631 of the California Unemployment Insurance Code states, in part, that 'Employment' does not include service performed by ... an individual in the employ of his (or her) son, daughter, or spouse. Therefore, these family employees are excluded from Unemployment Insurance (UI), Employment Training Tax, and State Disability Insurance coverage." (Respondent's MJN 13.)[40] The bill was vetoed by the Governor, who observed that the already existing "In-Home Supportive Services Stakeholder Advisory Committee ... has the ability and expertise" to examine the issue and advise on legislative changes. (Respondent's MJN 14.)[41]

Unless and until the Legislature amends section 631, consistent with legislative intent, close-family IHSS service is not covered by California's unemployment insurance system.

III. ANY "JOINT EMPLOYMENT" HERE CANNOT REINSTATE UNEMPLOYMENT BENEFITS COVERAGE, WHICH IS CATEGORICALLY EXCLUDED FOR CLOSE-FAMILY SERVICE

Much of Appellant's Opening Brief on the Merits is devoted to arguing that an IHSS provider is "jointly employed by the public agencies and the IHSS recipient"—under the common law and the Restatement and applying analyses that appear in cases involving other types of employment benefits such as workers' compensation and wage and hour laws. (OBM

---

[39] See <https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160AB1930> [as of Jan. 10, 2019]; see also <http://www.udwa.org/2016/10/veto-wont-stop-push-for-justice-for-family-caregivers/> [as of Jan. 10, 2019].

[40] Sen. Rules Comm., Office of Sen. Floor Analyses, 3rd reading analysis of Assem. Bill. 1930 (2015-2016 Reg. Sess.) as amended Aug. 1, 2016, at p. 5.

[41] Sen. Floor Analysis, Governor's Veto, Assem. Bill 1930 (2015-2016 Reg. Sess.) as enrolled Aug. 30, 2016, at p. 3.

11-12; see *id.* at pp. 21-23, 26-36.) But as noted in the *Caldera* precedent benefit decision and discussed above, under section 631, service in the employ of a child or spouse is categorically excluded from unemployment benefits coverage. Any joint employment therefore is "immaterial," in this context, as the Appeals Board held. (CT 0017.)

Appellant contends that reading section 631 of the Unemployment Insurance Code as a categorical service exclusion would be in conflict with other cases finding joint employment relevant for determining eligibility for other employment benefits. (OBM 27, 33-35.) But Appellant's view fails to account for the different structure and purpose of those benefit laws, and takes their discussions of joint employer status out of context. Appellant's two main and representative authorities—*In-Home Supportive Services v. Workers' Compensation Appeals Board* (1984) 152 Cal.App.3d 720 (*IHSS*) and *Guerrero v. Superior Court* (2013) 213 Cal.App.4th 912—do not support a rule that joint employment is always relevant in determining any type of employment benefits coverage.[42] Rather, whether joint employment is relevant turns on the language of the particular benefits statute.

In *IHSS,* a provider sent by the county to assist several in-home supportive services recipients was injured on the job. (*IHSS, supra*, 152 Cal.App.3d at p. 726.) The Third District Court of Appeal held that in determining eligibility for workers' compensation benefits, it was not limited to considering only the employee-employer relationship that the provider had with each individual recipient, viewed in isolation, but could also consider the provider's relationship to the State as employer given its

---

[42] See also OBM 27, citing e.g., *San Francisco-Oakland Terminal Rys. v. Industrial Acc. Com.* (1919) 180 Cal. 121 [workers' compensation] and *Lockheed Aircraft Corp. v. Industrial Acc. Com.* (1946) 28 Cal.2d 756 [workers' compensation].

IHSS oversight role. (*Id.* at p. 725.) The court held that the provider was entitled to workers' compensation benefits based on an injury that occurred while working for one recipient, even though she did not meet certain minimum hours-worked and wages-earned requirements in her work for that single recipient, because she met those requirements when her work for several recipients was considered. (*Id.* at pp. 724-726, 737-738.)

The *IHSS* court explained that "[t]he workers' compensation law predicates coverage for work injuries upon defined employment relationships" which generally turn on definitions of "employee." (*IHSS, supra*, 152 Cal.App.3d at p. 727.) Thus, under the workers' compensation law, coverage can be based on any employer-employee relationship that is not otherwise excluded by the terms of the statute. (See *id.* at pp. 735-736.)[43] The court noted that the Labor Code includes a "broad" class of employment relationships which expressly include a person "employed by the owner or occupant of a residential dwelling" engaged in domestic services. (*Id.* at pp. 727-729; see also *id.* at p. 735, citing Lab. Code, § 3351, subd. (d) [domestic services]).[44] The Labor Code then excludes

---

[43] The focus on employer-employee relationships reflects that "[t]he underlying premise behind this statutorily created system of workers' compensation is the "'compensation bargain.'" (*Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund* (2001) 24 Cal.4th 800, 811, quoting *Shoemaker v. Myers* (1990) 52 Cal.3d 1, 16.) "Pursuant to this presumed bargain, 'the employer assumes liability for industrial personal injury or death without regard to fault in exchange for limitations on the amount of that liability. The employee is afforded relatively swift and certain payment of benefits to cure or relieve the effects of industrial injury without having to prove fault but, in exchange, gives up the wider range of damages potentially available in tort.'" (*Vacanti, supra*, 24 Cal.4th at p. 811, quoting *Shoemaker, supra*, 52 Cal.3d at p. 16.)

[44] Employers are broadly defined as: "(a) [t]he State and every State agency"; "(b) [e]ach county, city, district, and all public and quasi public corporations and public agencies therein"; (c) [e]very person including any

(continued...)

from this broad group limited types of employee-employer relationships—including a person performing domestic services "whose employment by the employer to be held liable" does not meet certain minimum hour and wage requirements. (*Id.* at pp. 727, 736, citing Labor Code, § 3352, subd. (h) [repealed]; see Lab. Code, § 3352, subd. (a)(8).)[45]

With this structure in mind, the *IHSS* court refused to infer categorical exclusion from workers' compensation benefits based on Labor Code section 3351.5, subd. (b). (*IHSS, supra*, 152 Cal.App.3d at pp. 736-737.) That provision defines "employee" to include any person performing domestic services as an IHSS provider, and deems the person to be "an employee of the recipient of such services for workers' compensation purposes if the state or county makes or provides for direct payment to such person or to the recipient of in-home supportive services for the purchase of services ...." (Labor Code, § 3351.5, subd. (b); see *IHSS, supra*, 152 Cal.App.3d at pp. 736-737.) In the court's words, "subdivision (b) of section 3351.5 (literally) does no more, and no less, than specify the conditions to coverage that attach *if* coverage is predicated upon 'an' employment relationship with the IHSS recipient." (*IHSS, supra*, 152 Cal.App.3d at pp. 737-738, italics in original.) For purposes of workers' compensation, "[t]hat an IHSS recipient is an employee of the IHSS recipient is not a barrier to the conclusion that the state is also the worker's employer." (*Id.* at p. 732; see also *Kowalski v. Shell Oil Co.* (1979) 23

(...continued)
public service corporation, which has any natural person in service"; and "(d) [t]he legal representative of any deceased employer." (Lab. Code, § 3300.)

[45] At the time *IHSS* was decided, the exclusion was contained in Labor Code, section 3352, subd. (h). (*IHSS, supra*, 152 Cal.App.3d at p. 726.) The exclusion is now located in section 3352, subd. (a)(8).

Cal.3d 168, 175 [observing that where there is "dual employment," a worker may look to both employers for workers' compensation benefits].)[46]

IHSS is distinguishable in that it did not involve a categorical exclusion that completely bars workers' compensation benefits, as section 631 does in the unemployment context, but rather a limited exclusion that applies only to workers' compensation benefits that flow from a specified employer-employee relationship. Further, the limited nature of the exclusion in *IHSS* makes sense in light of the purposes of the workers' compensation statute. It would be anomalous if one individual service provider sent by the county would be entitled to workers' compensation for work-related injury simply because he or she served a single recipient, while another individual provider sent by the county, working the same number of hours and earning the same wages, would be excluded only because his or her service was divided among multiple recipients. (See *IHSS, supra*, 152 Cal.App.3d at p. 732.) Here, however, the anti-collusion purposes of section 631 are served only if the categorical nature of the exclusion is honored—if a child or spouse is *an* employer of the IHSS provider and thus would be in a position to trigger unemployment benefits, the service is categorically barred from coverage.

In *Guerrero*, the First District Court of Appeal held that the trial court erred in sustaining a demurrer to the wage and hour claims of an IHSS provider who had not been paid for almost three months of services.

---

[46] The *IHSS* court noted in passing the close-family exclusion in the workers' compensation law, observing that a domestic worker's coverage cannot be based on an employer-employee relationship with the homeowner, if the homeowner is the worker's parent, spouse, or child. (*IHSS, supra*, 152 Cal.App.3d at p. 736, citing Lab. Code, § 3352, subd. (a)(1).) Under the court's reasoning, this exclusion would not prevent coverage based on a different, additional employer-employee relationship covered by workers' compensation law.

(*Guerrero, supra*, 213 Cal.App.4th at pp. 917-918.)[47] Appellant focuses on that part of the case holding that the county, and public authority under contract with the county, could also be the provider's "employers" under the Fair Labor Standards Act.[48] But that holding is specific to the legal question presented there. As the *Guerrero* court observed, the Fair Labor Standards Act's wage and hour protections run to all employers, and its implementing regulations expressly recognize the possibility of joint employers. (*Id.* at p. 928; see also 29 C.F.R. § 791.2(a) ["all joint employers are responsible, both individually and jointly, for compliance with all of the applicable provisions of [the FLSA]"].) Under the structure of the FLSA, "[t]he threshold issue [ ] is whether County, Public Authority, or both of them were Guerrero's 'employer' for purposes of federal and state wage and hour laws." (*Id.* at p. 920.) After considering the powers held and responsibilities exercised by the county and the public authority, in light of the factors that the Ninth Circuit deemed relevant in a similar case (*Bonnette v. Cal. Health and Welfare Agency* (9th Cir.1983) 704 F.2d 1465), the court held "not only the recipient, but also real parties may be

---

[47] The federal Fair Labor Standards Act (29 U.S.C. § 201 et seq.) was "enacted in 1938 to 'protect all covered workers from substandard wages and oppressive working hours.'" (*Encino Motorcars, LLC v. Navarro* (2016) __ U.S. __, 136 S.Ct. 2117, 2121, quoting *Barrentine v. Arkansas–Best Freight System, Inc.* (1981) 450 U.S. 728, 739.) Among other things, "the FLSA requires employers to pay overtime compensation to covered employees who work more than 40 hours in a given week." (*Ibid.*) "The rate of overtime pay must be 'not less than one and one-half times the regular rate' of the employee's pay." (*Ibid.*, quoting 29 U.S.C. § 207(a).)

[48] The county at issue, Sonoma County, by ordinance established a public authority to carry out the day-to-day administration of the IHSS program. (*Guerrero, supra*, 213 Cal.App.4th at p. 923; see Welf. & Inst. Code, § 12301.6, subd. (a)(2).)

joint employers of the IHSS service provider under the FLSA ...." (*Id.* at 937.)

The holding of *Guerrero*, too, makes sense in the context of the Fair Labor Standards Act. It is reasonable to read that Act to require government entities to bear certain responsibilities for meeting federal wage and hour requirements in a program that is overseen, shaped, and funded by local, state, and federal entities. But the fact that a government entity may be a joint employer for Fair Labor Standards Act purposes does not answer the question presented here: whether the potential presence of an additional employer is relevant under the Unemployment Insurance Code where section 631 applies. For the reasons stated above, it is not.

There is another aspect of the *Guerrero* case, however, that Appellant does not discuss, and that provides a useful analogy. The court went on to examine the county's alternative basis for demurrer—that the IHSS provider's work was subject to a categorical exemption for domestic "companionship" service. (*Guerrero, supra*, 213 Cal.App.4th at p. 940.) That exemption provides that FLSA minimum wage and maximum hour requirements "shall not apply with respect to ... any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations ...)[.]" (29 U.S.C. § 213(a)(15).) Regulations implementing the FLSA in turn define exempted "companionship services" as including household work, provided that work is incidental and does not exceed 20 percent of total weekly hours. (*Guerrero, supra*, 213 Cal.App.4th at p. 941, discussing 29 C.F.R. § 552.6.)

The *Guerrero* court held that whether the domestic service companionship exemption (with its embedded household work-based exception to the exemption) applies is a complicated and fact-intensive

inquiry that cannot be resolved on demurrer. (*Guerrero, supra*, 213 Cal.App.4th at pp. 942-943.)[49] That question, the court held, must wait for summary judgment or trial (*id.* at p. 943)—the implication being that if the domestic service companionship exemption is established, then the Fair Labor Standards Act's wage and hour requirements *would not apply at all*, regardless of the existence of joint employers.

This part of *Guerrero* confirms that where, as here, there is a categorical service-based exemption or exclusion from the coverage of an employment benefits law, and the requirements of that categorical exemption or exclusion are met, the presence of the categorical exemption or exclusion obviates the need for further inquiry into joint employer status.

IV. APPELLANT'S POLICY ARGUMENTS MUST BE MADE TO THE LEGISLATURE

Finally, Appellant disputes the utility and wisdom of "the anti-fraud purpose of Section 631—to prevent collusion between family members to obtain unemployment insurance ...." (OBM 37.) Appellant notes that the law governing the IHSS program contains a number of generally applicable requirements to screen providers and to verify and audit timekeeping. (OBM 37-38.) She asserts that "[g]iven the high level of control exercised by the public agency employer, which applies equally to all IHSS providers, Section 631's core purpose of preventing fraud does not justify the

---

[49] For similar reasons, the *Guerrero* court held that the trial court erred in determining as a matter of law that the county and public authority were not joint employers of the IHSS provider under the State's minimum wage and overtime provisions (*Guerrero, supra*, 213 Cal.App.4th at pp. 945-951) and in determining that, as a matter of law, the "personal attendant" service exemption applied (*id.* at pp. 955-958). The court noted that under state law, this service exemption would preclude only overtime, but not minimum wage, claims. (*Id.* at p. 957.)

exclusion of family member IHSS providers from unemployment insurance." (OBM 39.)

It is unclear how these general provisions would address the potential for collusion that arises from the unilateral ability of the child or spouse IHSS recipient to terminate the parent or spouse IHSS provider—an event that, without section 631, would confer unemployment benefits on the provider. In any event, the close-family service exclusion reflects a classic policy decision that is for the Legislature to make. Constructing a program of public benefits "involves drawing lines among categories of people" that are necessarily imperfect. (*Califano v. Aznovorian* (1978) 439 U.S. 170, 174; see also *People v. Chatman* (2018) 4 Cal.5th 277, 283 (["in a world of limited resources[,]" Legislature permitted to draw rational lines including some persons in government-funded benefits and excluding others].) As the Second District Court of Appeal held over four decades ago in upholding section 631 against an equal protection challenge, the provision reflects a rational "administration of the program in a manner which would protect against unwarranted or improper claims in order to preserve the fund with which to achieve the legislative policy." (*Miller, supra,* 39 Cal.App.3d 168 at p. 172.)

Granted, service exclusions in the Unemployment Insurance Code have evolved over time. As noted above, the close-family service exclusion for disability insurance, also motivated by collusion concerns, was eliminated in 1971. Whether the close-family service exclusion for unemployment benefits could be eliminated or reduced in scope without ill effects to the program is a policy question for the Legislature—a body that, to date, has elected to keep the exclusion in place.

CONCLUSION

The judgment of the court of appeal upholding the Appeals Board's interpretation of Unemployment Insurance Code section 631 as set out in the *Caldera* precedent benefit decision should be affirmed.

Dated: January 10, 2019

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
EDWARD C. DUMONT
Solicitor General

/s/ *Janill L. Richards*

JANILL L. RICHARDS
Principal Deputy Solicitor General
JULIE WENG-GUTIERREZ
Senior Assistant Attorney General
SUSAN M. CARSON
Supervising Deputy Attorney General
HADARA R. STANTON
Deputy Attorney General
Attorneys for Defendant and Respondent California Unemployment Insurance Appeals Board

CERTIFICATE OF COMPLIANCE

I certify that the attached **ANSWER BRIEF ON THE MERITS OF RESPONDENT CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD** uses a 13 point Times New Roman font and contains 11,797 words.

Dated: January 10, 2019

XAVIER BECERRA
Attorney General of California

/s/ *Janill L. Richards*

JANILL L. RICHARDS
Principal Deputy Solicitor General
Attorneys for Respondent California Unemployment Insurance Appeals Board

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***Tamara Skidgel v. California Unemployment Insurance Appeals Board***
Case No.: **S250149**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On January 10, 2019, I served the attached **ANSWER BRIEF ON THE MERITS OF RESPONDENT CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Stephen E. Goldberg
Legal Services of Northern California
517 12th Street
Sacramento, CA 95814-1418
Attorneys for Plaintiff and Appellant

Wade Askew
Legal Services of Northern California
1810 Capitol Street
Vallejo, CA 94590
Attorneys for Plaintiff and Appellant

Clerk of the Court
California Court of Appeal
First Appellate District, Division Five
350 McAllister Street
San Francisco, CA 94102
Case No. A151224
First.District@jud.ca.gov
(Via TrueFiling Submission)

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 10, 2019, at San Francisco, California.

M. Campos
Declarant

M. Campos
Signature