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In the Supreme Court of the State of California

Tamara Skidgel,
Plaintiff and Appellant,

vs.

California Unemployment Insurance Appeals Board,
Defendant and Respondent.

PETITIONER'S REPLY BRIEF ON THE MERITS

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

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I.
INTRODUCTION

The arguments of respondent California Unemployment Insurance Board (the board) boil down to one primary contention: that Unemployment Insurance Code Section 631 is a categorical bar to unemployment insurance for workers who are IHSS providers employed by a spouse or child.[1] In the board's view, it is irrelevant that every IHSS provider has another, non-family, joint employer: the county or IHSS public authority that establishes and enforces all of the details, terms and conditions of employment, has the power to hire and fire, pays providers' wages and taxes, and even pays unemployment insurance premiums for providers.

The board does not dispute that every IHSS provider is jointly employed by his or her IHSS recipient and public entity. Nor does the board dispute that under California's unemployment insurance system, when a worker has joint employers, he or she does not have to be covered by all of the employers to be eligible for benefits. Coverage by one of the joint employers is sufficient.

Ms. Skidgel agrees with the board's premise that IHSS recipients are employers of the IHSS workers that provide services for them. The board, however, dismisses the showing that the county or public authority is also a joint employer as "immaterial in this context." (Answer Brief on the Merits [ABM] at p. 45) The parties diverge on whether the close-family exclusion in section 631 categorically precludes unemployment insurance eligibility, regardless of joint employment by the governmental entity.

The issue turns on the meaning of "services provided . . . in the employ of" in section 631. The board construes the phrase to absolutely and categorically exclude any IHSS provider employed by a spouse or

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

child. (ABM at pp. 14-15, 29, 34, 36 fn. 28, 37.) That reading is overbroad and does not properly analyze the specific language of section 631.

The plain meaning of the phrase does not preclude unemployment insurance eligibility based on employment by a non-family joint employer. IHSS providers for their spouses or children are eligible for unemployment insurance through the public entities that are their joint employers.

II.
STANDARD OF REVIEW

Ms. Skidgel agrees that a Precedent Decision is reviewed using the same rules as a regulation. (ABM at p. 28.) The issue here is a pure question of statutory interpretation – the meaning of the phrase "services performed . . . in the employ of." Courts independently review an agency's interpretation of a statute. (*In Re Lucas* (2012) 53 Cal.4th 839, 849; *Sara M. v. Superior Court* (2005) 36 Cal.4th 998, 1011.) Courts have independent judgment over questions of pure statutory interpretation because an agency has no comparative advantage over courts in interpreting statutes. (*People v. Cole* (2006) 38 Cal.4th 964, 988; *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 12.)

III.
ARGUMENT

A. THE *CALDERA* DECISION IS NOT ENTITLED TO DEFERENCE.

The board contends that its decision in *Matter of Caldera* (2015) P-B-507 is entitled to deference because it is a precedent decision. The board makes this contention despite the fact that the board previously reached the opposite conclusion. (*Matter of Ostapenko* (2014) No. A0-336919.) Indeed, in *Caldera* the board acknowledged that it had issued inconsistent decisions on whether IHSS workers providing services to close-family members are eligible for unemployment benefits. (*Id.*, at p. 3, CT 0011.)

The board cites no authority for its claim that *Caldera* is entitled to deference simply because it is a precedent decision. With all due respect to the board, *Caldera* is still no more than an administrative agency's interpretation of a statute.

The board is also wrong that the formality of its adoption of *Caldera* removes the holding in that decision from the rule that inconsistent agency positions are not entitled to deference. In *Murphy v. Kenneth Cole Productions* (2007) 40 Cal.4th 1094, this Court refused to give deference to a formal regulation because it was inconsistent with four prior opinion letters. Even though the letters were not formal regulations, the Court held that they still expressed a prior agency interpretation; therefore, the formal regulation that was inconsistent with that interpretation was not entitled to deference. (*Id.* at p. 1105 fn. 7; accord, *State Building Construction Trades Council v. Duncan* (2008) 162 Cal.App.4th 289, 303 [no deference to agency precedent decision inconsistent with prior agency position].)

The board avers that *Caldera* is entitled to deference because it is the action of the entire board following public input. But the board's prior decision reaching the opposite conclusion, *Matter of Ostapenko* (2014) No. A0-336919, was also a decision of the entire board. (*See* AR 000106 [listing the four Board members who decided *Ostapenko*]; CT 009 [listing the three Board members who decided *Caldera*].) In addition, the decision in *Ostapenko* followed briefing and oral argument in front of the board. There is no basis for suggesting that *Ostapenko* was any less considered than *Caldera*.

Moreover, the board does not attempt to explain its about-face from *Ostapenko* to *Caldera* in just one year. Two of the board members who decided *Ostapenko* also decided *Caldera*. The only mention in *Caldera* of the prior decision is the acknowledgement that "over time, inconsistent decisions have been issued by the Appeals Board on this topic" with no

explanation why the board suddenly changed its mind. (CT 0011.) Given this lack of explanation, and that two of the Board members in *Ostapenko* reversed themselves for no apparent good reason, the Court should not give deference to *Caldera*. (See *Yamaha*, *supra*, 19 Cal.4th at pp. 12-13.)

B. SECTION 631 DOES NOT EXCLUDE UNEMPLOYMENT INSURANCE ELIGIBILITY FOR A NON-FAMILY, JOINT EMPLOYER.

1. An IHSS Provider May Be "In The Employ" Of Multiple Employers, Including Government Agencies, And Be Eligible For Unemployment Benefits Through The Government Employer.

No language in section 631 precludes unemployment insurance eligibility for an IHSS provider who aids his or her spouse or child when the provider is also jointly employed by a public entity. The plain language of the section must be given its usual, ordinary meaning; every word and phrase should be given significance and construed in context; and a construction that would make some words surplusage is to be avoided. (*Carmack v. Reynolds* (2017) 2 Cal.5th 844, 850.) In arguing that section 631 is a categorical exclusion from eligibility for unemployment insurance benefits, the board fails to give the required significance to every word and phrase in the statute.

The board ignores what "in the employ of" means. In accordance with the usual, ordinary meaning of the phrase, courts use "in the employ of" interchangeably with "employed" or "employment." (See *Russ v. Unemployment Ins. Appeals Bd.* (1981) 125 Cal.App.3d 834, 837 fn. 1 [though the governing statute includes the phrase "in the employ of," the decision itself uses the term "employed" interchangeably].) The board has also held that whether someone was "in the employ of" is determined using the definition of "employment." (*Matter of Nation Flight Services, Inc.*

(1977) P-T-358 at p. 5, CT 00436.) And, courts have held that "in the employ of" includes employment by multiple employers. (*San Francisco-Oakland Terminal Rys. v. Industrial Accident Commission* (1919) 180 Cal. 121, 123; *Pierson v. Industrial Accident Commission* (1950) 98 Cal.App.2d 598, 602.) Thus, whether a person is "in the employ of" another turns on whether that person is an "employee."

The Unemployment Insurance Code uses the common law definition of both "employee" and "employer." (§§ 621, subd. (b), 606.5, subd. (a).) Common law employment is not exclusively between an employee and a single employer; it includes joint employment. (*See, National Labor Relations Board v. Town & Country Electric* (1995) 516 U.S. 85, 94; *Kelley v. Southern Pacific Co.* (1974) 419 U.S. 318, 324; *State ex. rel. Dept. of Highway Patrol v. Superior Court* (2015) 60 Cal.4th 1002, 1008; *Marsh v. Tilley Steel Co.* (1980) 26 Cal.3d 486, 494.) "Employment" for unemployment insurance purposes, thus, includes joint employment.

The phrase "in the employ of" in section 631, therefore, means that an employee can simultaneously be ineligible for unemployment insurance based on employment by a spouse or child, but eligible based on joint employment by another employer—in the present case, a county or IHSS public authority. The board assumes without analysis that "in the employ of" is exclusive, meaning that when an IHSS worker is in the employ of a spouse or child, the inquiry ends. That board ignores the consistent holdings of cases under which "in the employ of" includes in the employ of multiple employers.

The board's tight-fisted construction is contrary to the requirement that the Unemployment Insurance Code be liberally construed to reduce the hardship of employees who become unemployed through no fault of their own. (§ 100; *Gibson v. Unemp. Ins. Appeals Bd.* (1973) 9 Cal.3d 494, 499.) Liberal construction of the Unemployment Insurance Code tips the

scales against Respondent's interpretation that section 631 is a categorical exclusion that precludes unemployment insurance eligibility through a non-family joint employer.

2. Other Statutes And The MPP Confirm That A County Or IHSS Public Authority Is An Employer.

The board stresses that the power to fire an IHSS provider is one of "the most essential attributes of being an employer. . . ." (ABM at p. 40.) The board focuses entirely on statutes conferring the power to fire on recipients, ignoring statutes that confer the power to fire on the relevant government entities.

Under Welfare and Institutions Code section 12305.86, subdivision (c)(1), upon notice from the Department of Justice that a provider has been convicted of criminal offenses specified in section 12305.81, "the county shall . . . terminate" the provider from providing services to any recipient in the IHSS program.[2] Welfare and Institutions Code section 12300.4, subdivision (b)(5) authorizes the Department of Social Services or the county to terminate a provider from the IHSS program for continued, multiple violations of the section's limits on the number of hours the provider is authorized to render services.

Welfare and Institutions Code section 12305.82, subdivision (f) provides general grounds on which the county or public authority may fire a provider. "The failure of a provider or a recipient to comply with program requirements may result in termination of his or her participation in the In-Home Supportive Services program . . . ."

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[2] The crimes specified in Welfare and Institutions Code section 12305.81 are fraud against a government health care or supportive services program, child abuse (Pen. Code § 237(a) and elder or dependent adult abuse (Pen. Code § 368) or similar violation in another jurisdiction.

Furthermore, IHSS providers must acknowledge the government's authority to terminate them. Under subdivision (b) of Welfare and Institutions Code section 12301.24, "at the conclusion of the provider orientation, all applicants shall sign a statement specifying that the provider agrees to all of the following: . . . (5) He or she . . . understands that failure to comply with program rules and requirements may result in the provider being terminated from providing services through the IHSS program."

The Department of Social Services' Manual of Policies and Procedures [MPP] carries section 12301.24 into effect. Section 30-776.43 requires a prospective IHSS provider to sign a "provider enrollment agreement" at the end of orientation. "The provider enrollment agreement includes statements indicating that the individual acknowledges and/or understands that he/she: . . . . . [a]ccepts the responsibility to follow all program rules and requirements explained at the provider orientation, and that failure to follow the program rules and requirements may result in being terminated as a provider." (MPP § 30-776.431, subd. (i).)

Sections 12301.24, subdivision (b), 12305.82, subdivision (f), and the MPP do not specify whether the recipient or the county or public authority may terminate an IHSS provider. But, those provisions can apply to the government entities alone. Statutes give recipients only the power to hire or fire their own providers. (See Welf. & Inst. Code §§ 12302.5, subd. (a); 12301.6, subds. (c)(1) and (2)(B); see also, 12302.5, subd. (b) [entity or agent may not interfere with recipient's right to terminate employment of his or her provider].) No statute gives recipients the power to terminate an IHSS provider from the program altogether.

And, last but not least, Welfare and Institutions Code section 12305.82, subdivision (f) confirms that the county or public authority is an employer. The section authorizes termination of an IHSS provider for failure to comply with program requirements "*subject to all applicable*

federal and state due process requirements." (*Ibid.* [emphasis added].) The Due Process Clauses of the United States and California Constitutions, confer pre-termination rights to notice and a hearing on *government*, not private, employees. (*Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194, 215.)

3. A Service May Be Performed Simultaneously For Multiple Employers.

The board's interpretation of section 631 also ignores the phrase, "service performed." In the board's view, if a provider performs services for a parent or child employer, it is irrelevant that those services are also performed for another employer. The board is wrong.

Section 631's "service performed" language means that only service performed in the employ of a spouse or child does not qualify an IHSS provider for unemployment insurance. But, it is not a total disqualification. It does not make the provider wholly ineligible. Service performed in the employ of another employer does confer eligibility for unemployment insurance. The IHSS provider is, thus, eligible if the service performed is in the employ of both a spouse or child and another, joint employer.

When there is joint employment, by definition, services are provided to each of the joint employers. "Joint employment occurs when two or more persons engage the services of an employee in an enterprise in which the employee is subject to the control of both." (*Morales v. 22nd Dist Agricultural Ass'n* (2016) 1 Cal.App.5th 504, 543 [quoting *In-Home Supportive Services v. Workers Comp. Appeals Bd.* (1984) 152 Cal.App.3d 720, 732 ("*In-Home Supportive Services*")].) In particular, for the IHSS program, IHSS workers provide a valuable service to the public entity. Were it not for IHSS workers providing services to their disabled spouses or children, the spouses and children would have to be served by civil

service employees, employees in institutions or employees of third-party contractors at substantially higher cost. (*In-Home Supportive Services*, *supra*, at p. 731, n. 11.)

The phrase "service performed" means that Section 631 is not a categorical exclusion. "Service performed" is an additional indicator that section 631 does not exclude unemployment insurance eligibility based on joint employment by a spouse or child and a county or IHSS public authority.

This interpretation is further supported by the general rule that joint employers are each individually liable for actions related to joint employment. (*Societa Per Azioni de Navigazion Italia v. Los Angeles* (1982) 31 Cal.3d 446, 461-62; *Marsh v. Tilly Steel Co.* (1980) 26 Cal.3d 486, 494-95 [citations omitted]; see also *Martinez v. Coombs* (2010) 49 Cal.4th 35, 68-78 [analyzing each of multiple joint employers separately to determine liability for unpaid wages].) Interpreting "services performed . . . in the employ of" as not excluding eligibility for unemployment insurance through employment by a joint employer is consistent with this principle.

The board claims that Ms. Skidgel's interpretation would have the Court add the word "solely" to section 631. (ABM at p. 36.) Not so. Ms. Skidgel's interpretation only construes the operative phrase in the statute, "service employed . . . in the employ of" without adding a word. Indeed, Ms. Skidgel's interpretation is supported by the *absence* of words in section 631—i.e., the absence of any words that preclude unemployment insurance eligibility for an IHSS provider who is being employed jointly by both a disabled spouse or child and a government agency.

C. SECTION 634.5 DOES NOT AID THE BOARD'S CONTENTION THAT SECTION 631 IS A CATEGORICAL EXCLUSION FROM UNEMPLOYMENT INSURANCE.

1. The Board's Interpretation And Application Of Section 634.5 Is Nonsensical.

While the board does not dispute that the state, county or IHSS public authority is a joint employer of IHSS providers, the board contends that under section 634.5, joint employment of IHSS providers by government agencies does not render providers eligible for unemployment insurance. (ABM at p. 37.) Under section 634.5, for a public entity (an entity defined by section 605) or a nonprofit organization, employment does not include service that is excluded under several sections including section 631. But the close-family employment exclusion in section 631 cannot possibly apply to public employment for the simple reason that a public entity cannot be a spouse or child of an employee or anyone else.

The board's interpretation of section 634.5 makes no sense. Section 634.5 says nothing about employment by a public entity that is a joint employer separate from another employer who is a spouse or child. The board reads section 634.5 to say that " 'employment' does not include service *provided by another employer that is* excluded under Section . . . 631 . . . ." That is not what the statute says.

Section 634.5's reference to section 631 makes sense when applied to a nonprofit organization because the organization can be owned and operated by a person who employs a spouse or child in the organization. It is nonsense when applied to a public agency, which cannot have a child or spouse, much less be an employee of either.

Section 634.5 establishes that employees of both public entities and non-profit organizations are covered by unemployment insurance, but particular unemployment insurance exceptions apply to their employees.

Both the coverage and the exclusion provisions are lumped together in the same statute. This does not mean that it makes sense that each exclusion (sections 629, 631, 635, and 639 to 648) applies to both types of employers. The Legislature is not required to legislate with surgical precision. As the board itself puts it, "Constructing a program of public benefits 'involves drawing lines among categories of people' that are necessarily imperfect." (ABM at p. 52, quoting *Califano v. Aznavorian* (1978) 439 U.S. 170, 174, 99 S.Ct. 471, 474, 58 L.Ed.2d 435.)

Finally, section 634.5 does not apply to IHSS because the government agency pays the wages of IHSS providers. Subdivision (b) of section 13005 expressly makes the entity that pays wages the employer for unemployment insurance purposes. Here, that is the public agency, which is not and cannot be a close-family employer. Section 634.5 cannot apply here.

2. To The Extent That Section 634.5 Could Be Read To Exclude Services Of An IHSS Worker To A Spouse Or Child From Employment By A Public Entity, The Section Has Been Superseded By Later Statutes That Make Public Entities Employers Of All IHSS Providers.

As previously shown at pages 6-8, *supra*, Welfare and Institutions Code sections 12300.4, subd. (b)(5), 12305.82, subdivision (f), and 12305.86, subdivision (c)(1) confer on counties the ultimate essential element of employment: the power to fire IHSS providers. Section 12301.24 of the same code confirms in subdivision (b)(5) that the county is an employer by requiring an IHSS provider applicant to sign a statement before being enrolled as a provider acknowledging that the county can fire him or her. And subdivision (f) of section 12305.82 unequivocally validates

the IHSS provider's status as a public employee by recognizing the provider's rights of due process.

If section 634.5 does mean that IHSS services to a spouse or child do not constitute employment by a public entity, it irreconcilably conflicts with these statutes. History resolves the conflict.

Section 634.5 was enacted in 1978. (Stats. 1978, ch. 2, § 36.5.) Welfare and Institutions Code sections 12301.24(b)(5), 12305.82(f) and 12305.86(c)(1) were enacted in a comprehensive revision of the IHSS program and restructuring of its administration more than 30 years later. (Stats. 2009, 4th Ex. Sess., ch. 17, §§ 3, 9, 11.) Welfare and Institutions Code section 12300.4, subdivision (b)(5) was enacted five years after that. (Stats. 2014, ch. 29, § 76.)

As the Court recently restated, "[t]he rules for construing irreconcilable statutes are well established. [Citation.] 'If conflicting statutes cannot be reconciled, later enactments supersede earlier ones. . . .' " (*Lopez v. Sony Electronics, Inc.* (2018) 5 Cal.5th 627, 634, quoting *Collection Bureau of San Jose v. Rumsey* (2000) 24 Cal.4th 301, 310.)

The later-enacted provisions of the Welfare and Institutions Code that make counties and IHSS public authorities employers of IHSS providers control over the conflicting, antiquated provisions of section 634.5.

3. The Board's Additional Arguments Do Not Support Its Interpretation Of Section 631.

The board argues that 22 California Code of Regulations section 631-1(e), implies that section 631 applies to an additional employer for the same excluded service. (ABM at pp. 37-38.) The regulation provides: "Services performed in the employ of a partnership by a spouse, father, mother, or child under the age of 18 are excluded when such services would

be excluded if performed for *each partner individually.*" (Cal. Code Regs., tit. 22, §631-1, subd. (e) [emphasis added].) The examples given in the regulation make clear that the regulation applies only to partnerships in which both partners have a relationship with the person providing services that are excluded from unemployment insurance coverage—for example, services of a child under the age of 18 employed by a partnership composed of his or her parents, or the services of a parent employed by a partnership composed of his or her children. The regulation does not apply to partnerships composed of both family and non-family members. (*Id.*)

In fact, in *Matter of Lembo* (1971) P-B-111, the board held exactly contrary to its argument to the Court. In *Lembo*, the unemployment insurance claimant was employed by a partnership composed of the claimant's father and a corporation owned by the claimant's uncle. The board held that services for the claimant's father as a member of the partnership were not covered employment. (*Ibid.* at p. 2, CT 335.) But, the board held, the claimant was also employed by the other partnership member, his uncle's corporation. Consequently, the claimant's entire services were covered employment because, if the claimant had worked only for his uncle's corporation, his services would have been covered employment. (*Ibid.*)

Lembo is further support from the board itself for the conclusion that when there is joint employment and only one of the employers is excluded by section 631, the employment is fully covered employment because the employment is also by the second, non-excluded employer.

Next, the board contends that allowing unemployment insurance coverage through a non-family joint employer when a joint employer is an excluded family member would create an unauthorized exception to section 631. (ABM at pp. 38-39.) Again, not so. Allowing coverage through a covered joint employer is not an exception to section 631. When there is

coverage through a second joint employer, the section 631 exclusion remains for the close-family employer. That does not, however, negate full coverage through the other joint employer. This is not an exception to section 631. Section 631 simply does not apply to a covered joint employer.

The board argues that section 683 further supports its argument that section 631 applies when the IHSS recipient is a spouse or child of the provider. (ABM at pp. 39-40.) The board is correct that section 683 designates the IHSS recipient as an employer. But section 683 does not designate the recipient as the exclusive employer. To the contrary, section 683 states that "'Employer' *also* means" the recipient. (Emphasis added.) As fully explained in the Opening Brief on the Merits [OBM], "also" means in addition to. (*Id.* at p. 21.) Under the plain language of section 683, the IHSS recipient is the employer in addition to the public entity employer.

The board attempts to bolster its section 683 argument by pointing out that the Welfare and Institutions Code states "seven times in various formulations" that the state performs payroll functions "on behalf of" the recipient as employer. (ABM at p. 40.) The argument actually supports Ms. Skidgel's argument. It shows that section 683 does not make the recipient the exclusive employer because section 13005(b) expressly makes the entity that pays wages an employer for purposes of unemployment insurance.

The board claims that under Welfare and Institutions Code section 12302.2, the state performs payroll functions "on 'behalf' of 'the recipient as the employer.'" (ABM at pp. 39-40.) The board selectively quotes the statute. In fact, section 12302.2 also refers to the IHSS recipient as "*an* employer," not solely as "*the* employer."

As with the word, "also," in section 683, the designation of the recipient as "an" employer of an IHSS provider in section 12302.2 contemplates that there can be more than one employer. (*In-Home Supportive Services, supra*, 152 Cal.App.3d at pp. 734, 738; accord, *Guerrero v. Superior Court* (*Weber*) (2013) 213 Cal.App.4th 912, 955 ["*Guerrero*"].)

Furthermore, the legislature could have expressly excluded close-family IHSS providers from unemployment insurance coverage but did not do so. The Legislature knows how to limit the scope of a statute but did not here. (See *Tiemann v. Trustees of California State University* (1982) 33 Cal.3d 211, 219 [statutory protection for nonacademic employees not limited to probationary employees because statute did not so state].) In addition, the Legislature required unemployment insurance contributions for all IHSS providers without exception. (Welf. & Inst. Code § 12302.2(a)(1).)

In short, section 683 sheds no light on whether section 631 applies to a covered joint employer. To the contrary, it supports a construction of section 631 under which IHSS providers for a spouse or child are eligible for unemployment insurance through their joint employment by a public entity.

D. THE LEGISLATIVE HISTORY THE BOARD PRESENTS DOES NOT DEMONSTRATE AN INTENT TO DENY UNEMPLOYMENT INSURANCE COVERAGE TO IHSS PROVIDERS WHO SERVE A SPOUSE OR CHILD.

The board does not deny the showing in the OBM that the legislative history that was before the Court of Appeal does not demonstrate an intent to deny unemployment insurance to IHSS providers serving a spouse or child. (See OBM at pp. 23-25; ABM at pp. 41-44.) Instead, the board attempts to support its claims with other documents from the legislative

files submitted for the first time to this Court. Nothing the board submits is persuasive or affects the interpretation of section 631 presented by Ms. Skidgel.

First, the board discusses legislative history of section 631, noting that other states have similar exclusions and that the Legislature added an exception for disability insurance. (ABM at pp. 41-42.) But, nothing offered by the board discusses, or even mentions the question before the Court: whether the Legislature intended the close-family member exception to unemployment insurance coverage to apply when there is also a non-family, covered joint employer. The legislative history of section 631 that the board submits is irrelevant.[3]

Next, the board offers a memo from the Employment Development Department found in the file of the Senate Committee for Industrial Relations regarding the bill that became section 683, and moves the Court to take judicial notice of it. (ABM pp. 42-43; see also the board's Motion for Judicial Notice ["MJN"] at p. 5, Exh. 12.) Ms. Skidgel has opposed taking judicial notice of the memo because it is addressed to a person with nothing to indicate what connection, if any, she may have had with the legislative process through which section 631 was enacted. Furthermore, the memo is about amendments to AB 3028, the bill that enacted section 631, but it does not identify the amendments it addressed. So, there is no way to know if the memo had anything to do with the final version of AB 3028 that passed.

[3] Ms. Skidgel has filed opposition to the motion for judicial notice of the legislative history discussed in this section. The arguments in this section are presented in the event the court grants the motion and takes judicial notice of the documents Ms. Skidgel has challenged. Should the court deny judicial notice of those documents, the arguments in this section of the brief will be moot and not have to be considered.

Even were the Court to take judicial notice of the memo, it should be given no weight for two reasons. First, despite the board's claim to the contrary, there is no evidence that any legislator saw the memo or relied on it in any way. Legislative history that is not evidence of collective intent of the legislature is not considered. (*Graham v. DaimlerChrysler Corp.* (2000) 34 Cal.4th 553, 572 n. 5.) Letters that state the view of the author but not the intent of the legislature have no persuasive value. (*Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 722.) There is no evidence here that the legislature considered this letter, nor could there be because there is no indication which version of the legislation the memo was addressing. In addition, memos from committee files are not persuasive legislative history. (*Kaufman & Broad Communities Inc. v. Performance Plastering Inc.* (2005) 133 Cal.App.4th 26, 33.)

Second, the memo does not purport to state what the intent of the legislation was. The memo is signed by the chief of the Employment Development Department Estimates Division, not a policy or legislative spokesperson or analyst. (MJN at Exh. 12.) The memo is an estimate of how many people would be excluded if the close-family exclusion applied to IHSS providers, not an indication of what the proposed legislation was intended to mean. (MJN at Exh. 12.) Moreover, there is no way to know whether the version of the legislation the memo discusses is the version that was enacted. The memo says nothing about the intent of section 683.

The board next mentions a document that is not legislative history at all, a fact sheet from the California Department of Social Services ("CDSS") stating that the close-family exclusion applies to IHSS providers. (ABM at p. 43; CT 77-78.) The board neglects to mention that CDSS is not an agency that administers the unemployment insurance program. The board and the Employment Development Department interpret and enforce unemployment insurance law. (§§ 306, 307, 409.)

Deference is owed only to agency pronouncements within the scope of their administration. (*Reno v. Baird* (1998) 18 Cal.4th 640, 660; *Morris v. Williams* (1967) 67 Cal.2d 733, 748.) CDSS' statements and opinion about unemployment insurance eligibility are entitled to no weight or deference. (*POET, LLC v. California Air Resources Board* (2013) 218 Cal.App.4th 681, 748; *Cequel III Communications I, LLC v. Local Agency Formation Com'n of Nevada County* (2007) 149 Cal.App.4th 310, 317.)

Finally, the board discusses legislative history of AB 1930 (2015-2016 Reg. Sess.), a bill that was vetoed by the Governor that would have established a workgroup to study unemployment insurance eligibility for close-family member providers. (ABM at pp. 43-44; MJN, Exhs. 13 and 14.) However, no inferences can be drawn from vetoed legislation. (*Snyder v. Michael's Stores, Inc.* (1997) 16 Cal.4th 991, 1003 fn. 4; *California Labor Federation AFL-CIO v. Industrial Welfare Commission* (1998) 63 Cal.App.4th 982, 994-95.)

Moreover, the legislative history does not contain any legislative finding that IHSS providers for their spouse or child are excluded from Unemployment Insurance. The legislative history only recites that CDSS training materials state that IHSS providers for close-family members are excluded from unemployment insurance. (Sen. Com. Floor Analysis of AB No. 1930 (2015-2016 Reg. Sess.); MJN, Exh. 13 at p. 4.) The legislative history recites that IHSS providers for close-family members are being denied unemployment insurance, but makes no finding or conclusion whether that state of affairs is correct under current law.

Nothing in the legislative history places the Legislature's imprimatur on what the agencies are doing. The legislative history of vetoed AB 1930 says nothing about the legal issue at hand.

E. JOINT EMPLOYMENT IS RELEVANT TO UNEMPLOYMENT INSURANCE COVERAGE FOR CLOSE-FAMILY MEMBERS.

The board contends that whether IHSS providers are jointly employed is irrelevant. (ABM at pp. 44-45.) The board's argument is circular: it assumes its own conclusion that section 631 denies unemployment insurance eligibility even when there is a non-excluded joint employer.

The board spends six pages arguing that *In Home Supportive Services*, *supra*, and *Guerrero*, *supra*, are irrelevant to the interpretation of section 631. (ABM at pp. 45-51.) At the same time, the board acknowledges that *In-Home Supportive Services* holds that the unemployment insurance exclusion at issue in that case did not apply to preclude eligibility through employment by the joint, non-excluded employer. (ABM at p. 48 fn. 46.)

Beyond that, the board's argument misses the point. Both cases hold that IHSS providers are jointly employed. (*In-Home Supportive Services*, *supra*, 152 Cal.App.3d at pp. 734, 738; *Guerrero*, *supra*, 213 Cal.App.4th at pp. 926-40.) The board's entire argument is, again, circular. It assumes the conclusion it is offered to prove—that section 631 is a categorical exclusion from unemployment compensation.

As Ms. Skidgel has shown, section 631 does not bar unemployment insurance eligibility based on a non-family joint employer. Under *In-Home Supportive Services* and *Guerrero*, IHSS providers are jointly employed by the recipient and a government entity. Even if the recipient is a close-family member, an IHSS provider is still eligible for unemployment insurance through his or her non-family, governmental joint employer.

The board further avers that *In-Home Supportive Services* does not apply because the workers' compensation program has a strong remedial purpose. (ABM at pp. 45-47.) However, unemployment insurance has a similar remedial purpose, to provide "benefits for persons unemployed through no fault of their own, and to reduce involuntary unemployment and the suffering caused thereby to a minimum." (§ 100.)

And, both courts and the board have consistently held that unemployment insurance follows workers' compensation law. (See, e.g., *Messenger Courier Association of the Americas v. California Unemployment Insurance Appeals Board* (2009) 175 Cal.App.4th 1074, 1085, 1088, 1091-92; *Air Couriers Int'l. v. Employment Development Department* (2007) 150 Cal.App.4th 923, 932, 936-37; *Santa Cruz Transportation, Inc. v. CUIAB* (1991) 235 Cal.App.3rd 1363.1371, 1372, 1374; *Garrison v. California Employment Stabilization Com.* (1944) 64 Cal.App.2d 820, 826-7; *Matter of Armstrong* (1963, designated precedent 1979) P-T-404 at p. 8, CT 00298.)

The board also claims that *In-Home Supportive Services* does not apply here because it involved a "limited exception" to workers compensation coverage. (ABM at p. 48.) But, there is no reason why the workers' compensation exception at issue in *In Home Supportive Services* is "limited" compared to section 631. Both apply to a defined class of workers—domestic workers who have worked less than 52 hours in In-Home Supportive Services (Lab. Code § 3352) and IHSS providers for a spouse or child here. In addition, the scope of each exclusion is a distinction without difference. It is irrelevant that one may be broader than the other. The point that an exclusion does not apply to an otherwise covered joint employer remains the same.

The board next asserts that the domestic companionship services exception to the Fair Labor Standards Act at issue in *Guerrero* is analogous to the close-family exclusion from unemployment insurance in this case and the *Guerrero* court's discussion of that exception is relevant here. Wrong again. The domestic companionship exception is not analogous in any way to the close-family unemployment insurance exclusion in section 631.

The domestic companion services exception excludes an entire category of employment from coverage under the Fair Labor Standards Act. Joint employment is irrelevant to the exception because it is the work itself that is excluded, regardless of the identity of the employer.

By contrast, section 631 provides an exclusion based on the identity of the employer, not the work performed. The exclusion does not apply to a non-family employer and, therefore, it does not preclude eligibility for unemployment insurance when a joint employer is not the spouse or child of an IHSS provider.

The discussion of the domestic companionship exception in *Guerrero* has about as much to do with this case as the Treaty of Guadalupe Hidalgo.

F. POLICY CONSIDERATIONS ARE RELEVANT TO INTERPRETATION OF SECTION 631.

The board contends that Ms. Skidgel's policy arguments supporting eligibility for unemployment insurance through a joint, governmental employer of IHSS workers should be made to the Legislature. (OBM at pp. 37-39; ABM at pp. 51-52). The board's argument is Janus-faced.

The board itself makes policy arguments to support its interpretation of section 631—that excluding eligibility for unemployment insurance through a joint employer of an IHSS provider subject to the section furthers

the Legislature's policy to prevent collusive unemployment insurance claims. Ms. Skidgel shows why that interpretation does not, in fact, further that policy. (ABM at pp. 30, 34, 40-41.) And she demonstrates how the interpretation of the statute not to exclude "services performed . . . in the employ of" a joint governmental employer promotes significant policies that the unemployment insurance system is intended to serve. (*Ibid.*)

The board states it cannot understand how joint employment reduces the risk of collusion. (ABM at p. 52.) As a joint employer, the public entity is in a direct position to oversee the provision of services to a close-family member by an IHSS provider, and to take action if there is suspicion of fraud or collusion. In addition, the public entity has substantial control over hiring through background checks and required orientation. (Welf. & Inst. Code §§ 12301.6, subd. (e)(2)(A)(i); 12305.86; 12306.5; 12301.24(a)(3).)

Recognizing the public entity as a joint employer significantly limits the possibility of collusive hiring with the intent to terminate employment and fraudulently establish eligibility for unemployment insurance.

The board implies that only the power to fire is relevant to collusion. (ABM at pp. 30, 34, 40-41, 52.) The risk of collusion, however, is that an individual will fraudulently hire a family member, fraudulently hold out the family member as engaging in employment, and finally purport to "fire" that family member. The public entity closely controls IHSS employment to prevent such collusion. The entity, and the entity alone, fixes the terms and conditions of employment—specific tasks the provider may perform for each recipient, the exact time per task, the maximum hours that the provider may spend performing each task and for which he or she may be compensated. (*Guerrero*, *supra*, 213 Cal.App.4th at pp. 921, 935-36; Welf. & Inst. Code § 12301.2.) The public entity enforces overtime restrictions through audits and fraud investigations, imposing penalties for violations,

including barring providers from employment for as long as a year for multiple violations or terminating a persistent violator from being an IHSS provider altogether. (Welf. & Inst. Code §§ 12300.4, subd. (b)(5); 12305.71; CDSS All-County Letter ("ACL") 16-36 at pp.2-7; CT 00254-00259.)

Finally, the public entity as an employer can oppose any unemployment insurance claim that it believes is based on collusion or fraud. Recognizing that such tight and comprehensive control of IHSS employment renders the entity an employer is the surest means both to prevent fraudulent collusion and to nip any collusion that may occur in the bud.

IV.
CONCLUSION

The county, which controls the highly detailed terms and conditions IHSS providers' employment, and has the power to fire IHSS providers, is a joint employer. The close-family unemployment compensation exclusion in section 631 does not apply to the non-family, governmental joint employer. A worker excluded from unemployment compensation for work with one employer is still entitled to benefits when he or she also works for a non-excluded joint employer.

IHSS providers employed by a spouse or child are eligible for unemployment insurance benefits through their joint employment with the public entity.

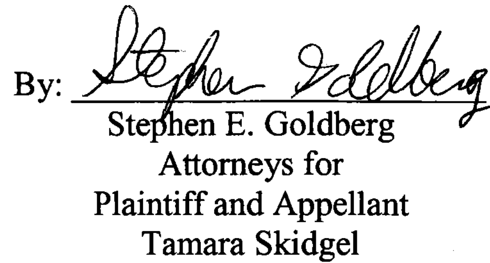
The decision of the court of appeal should be reversed.

Dated: January 30, 2019

Respectfully Submitted,

LEGAL SERVICES OF
NORTHERN CALIFORNIA

DOWNEY BRAND, LLP

By: 

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WORD COUNT CERTIFICATION

I certify pursuant to California Rule of Court 8.204(c)(1) that this **Petitioner's Reply Brief on the Merits** contains 7,130 words, as measured by the word court of the computer program used to prepare this brief.

Dated: January 30, 2019

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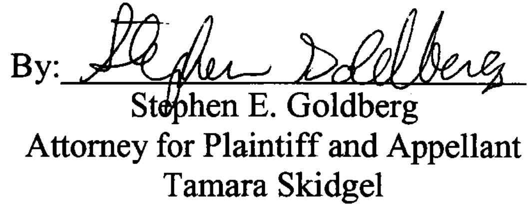
By: 
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PROOF OF SERVICE
(CCP Sections 1013a, 2015.5)

I, Karen Gould, declare:

I am employed in the County of Sacramento, State of California. I am over the age of eighteen years and not a party to the within cause. My business address is 621 Capitol Mall, 18th Floor, Sacramento, CA 95814.

On January 30, 2019, I served the within Petitioner's Reply Brief on the Merits as follows:

Via e-Submission 1 electronic copy	Supreme Court of California 350 McAllister Street, Room 1295 San Francisco, CA 94102-4797
Via FedEx Overnight Delivery (Orig. + 9 copies)	Supreme Court of California 350 McAllister Street, Room 1295 San Francisco, CA 94102-4797
Via FedEx Overnight Delivery	Hadara Stanton, Deputy Attorney General 455 Golden Gate Ave., Suite 11000 San Francisco, CA 94102-004 *Attorneys for Respondent,* *California Unemployment Insurance Appeals Board*
Via FedEx On CD - Per CRC rules 8.70–8.79	1st District Court of Appeal 350 McAllister Street San Francisco, CA 94102
Via FedEx Overnight Delivery	Hon. Judge Robert B. Freedman Alameda County Superior Court Clerk Rene C. Davidson Courthouse 1225 Fallon Street Oakland, CA 94612

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on January 30, 2019 at Sacramento, California.

By:
Karen Gould