

FILED
SUPREME COURT
STATE OF WASHINGTON
10/4/2019 3:40 PM
BY SUSAN L. CARLSON
CLERK

NO. 97216-8

SUPREME COURT OF THE STATE OF WASHINGTON

SEIU 775,

Appellant/Petitioner,

v.

STATE OF WASHINGTON, WASHINGTON STATE DEPARTMENT
OF SOCIAL AND HEALTH SERVICES,

Appellees/Respondents.

BRIEF OF APPELLANT

Darin M. Dalmat, WSBA No. 51384
Jennifer L. Robbins, WSBA No. 40861
Sarah E. Derry, WSBA No. 47189
BARNARD IGLITZIN & LAVITT LLP
18 West Mercer Street, Suite 400
Seattle, WA 98119

Attorneys for Appellant/Petitioner

TABLE OF CONTENTS

INTRODUCTION	1
ASSIGNMENTS OF ERROR	3
ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	3
STATEMENT OF THE CASE	4
I. The provision of personal care services by IPs to clients under DSHS programs, regulations, and authorizations.	4
II. Legal framework governing home care work and pay.	6
III. The development and operation of the Shared Benefit Rule.	11
IV. The development and operation of the Informal Support Rule.	16
V. DSHS co-determines IPs’ terms and conditions of work and, before this litigation, acknowledged its FLSA obligations.	23
VI. The proceedings below	24
ARGUMENT	25
I. Standard of review on appeal of an APA challenge	25
II. The Court should invalidate the Shared Benefit Rule.	27
A. DSHS arbitrarily and capriciously enacted this Rule by failing to address SEIU 775’s concerns that it would require IPs to work without compensation.	27
B. The Shared Benefit Rule impermissibly deducts IPs’ wages based on “in-kind” compensation.	30
C. This Rule discriminates against related IPs.	33
III. The Court should invalidate the Informal Support Rule.	35

A.	DSHS arbitrarily and capriciously enacted this Rule by failing to address SEIU 775’s concerns that it would require IPs to work without compensation. _____	35
B.	The Informal Support Rule impermissibly solicits IPs to volunteer within the scope of their employment. _____	38
C.	This Rule discriminates against related IPs. _____	41
IV.	DSHS must pay IPs in compliance with federal and State wage law. _____	43
A.	DSHS, which has acknowledged its FLSA obligations, jointly employs IPs within the meaning of the FLSA. _____	43
B.	DSHS is directly subject to the MWA minimum wage and overtime requirements, regardless of whether it is an MWA “employer.” _____	46
V.	The trial court erred by denying SEIU 775’s request for permanent injunctive relief. _____	48
	CONCLUSION _____	49

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Estate of Ackerley v. Wash. Dep't of Revenue</i> , 187 Wn.2d 906, 389 P.3d 583 (2017)	29
<i>Acosta v. At Home Pers. Care Servs. LLC</i> , 2019 WL 1601997 (E.D. Va. Apr. 15, 2019)	49
<i>Anfinson v. FedEx Ground Package Sys., Inc.</i> , 174 Wn. 2d 851, 281 P.3d 289 (2012)	48
<i>Arkison v. Ethan Allen, Inc.</i> , 160 Wn.2d 535, 160 P.3d 13 (2007)	48
<i>Bonnette v. California Health & Welfare Agency</i> , 704 F.2d 1465 (9th Cir. 1983)	49
<i>Ctr. for Environmental Law & Policy, v. State of Wash. Dep't of Ecology</i> , 2019 WL 3927427 (Wash. Ct. App. Aug. 20, 2019)	30
<i>Dana's Housekeeping, Inc. v. Dep't of Labor & Industries</i> , 76 Wn. App. 600, 886 P.2d 1147 (1995)	10
<i>Edelman v. State ex rel. Public Disclosure Comm'n</i> , 116 Wn. App. 876, 68 P.3d 296 (2003), <i>aff'd</i> 152 Wn.2d 584, 99 P.3d 286 (2004)	31
<i>Ervin v. Columbia Distributing, Inc.</i> , 84 Wn. App. 882, 930 P.2d 947 (1997)	52
<i>F.C.C. v. Fox Television Stations, Inc.</i> , 556 U.S. 502, 129 S. Ct. 1800, 173 L. Ed. 2d 738 (2009)	42
<i>State ex rel. Hagan v. Chinook Hotel, Inc.</i> , 65 Wn.2d 573, 399 P.2d 8 (1965)	35

<i>Hardgers-Powell v. Angels in Your Home LLC</i> , 330 F.R.D. 89 (W.D.N.Y. 2019)	49
<i>Hill v. Xerox Bus. Servs., LLC</i> , 191 Wn.2d 751, 426 P.3d 703 (2018)	52
<i>Hisle v. Todd Pac. Shipyards Corp.</i> , 151 Wn.2d 853, 93 P.3d 108 (2004)	51
<i>Huntley v. Frito-Lay, Inc.</i> , 96 Wn. App. 398, 979 P.2d 488 (1999)	51
<i>Jenkins v. Dep’t of Soc. & Health Servs.</i> , 160 Wn.2d 287, 157 P.3d 388 (2007)	<i>passim</i>
<i>Kisor v. Wilkie</i> , 588 U.S. ___, 139 S.Ct. 2400, 204 L.Ed. 2d 841 (2019)	30, 34
<i>Long Island Care at Home, Ltd. v. Coke</i> , 551 U.S. 158, 127 S.Ct. 2339, 168 L.Ed 2d 54 (2007)	11
<i>Olmstead v. L.C. ex rel. Zimring</i> , 527 U.S. 581, 119 S.Ct. 2176, 144 L.Ed.2d 540 (1999)	8
<i>Puget Sound Harvesters Ass’n v. Wash. State Dep’t of Fish & Wildlife</i> , 182 Wn. App. 857, 332 P.3d 1046 (2014)	29, 30, 33, 39
<i>Rehkter v. State, DSHS</i> , 180 Wn.2d 102 (2014)	34
<i>Salinas v. Commercial Interiors, Inc.</i> , 848 F.3d 125 (2017)	49
<i>Samantha A. v. Dep’t of Soc. Servs. & Health Servs.</i> , 171 Wn.2d 623, 256 P.3d 1138 (2011)	4, 15, 17, 31
<i>Smaby v. Shrauger</i> , 9 Wn.2d 691, 115 P.2d 967 (1941)	35
<i>Stevens v. Brink’s Home Security, Inc.</i> , 162 Wn.2d 42, 169 P.3d 473 (2007)	34

<i>Tyler Pipe Indus., Inc. v. State, Dep't of Revenue,</i> 96 Wn.2d 785, 638 P.2d 1213 (1982)	53
<i>Wash. Fed'n of State Employees v. State Pers. Bd.,</i> 54 Wn. App. 305, 773 P.2d 421 (1989)	31
<i>Wash. Indep. Tel. Ass'n v. TRACER,</i> 75 Wn. App. 356, 880 P.2d 50 (1994)	31
<i>Wash. Indep. Tel. Ass'n v. Wash. Utilities & Transp.</i> <i>Comm'n,</i> 148 Wn.2d 887, 64 P.3d 606 (2003)	30

Statutes

29 U.S.C. § 206.....	<i>passim</i>
42 U.S.C. § 1396d(a)(24).....	8
RCW 34.05.001	30
RCW 34.05.325(6)(a)(i).....	34
RCW 34.05.570	5, 29
RCW 34.05.574(1).....	5, 53
RCW 34.05.588	27
RCW 49.46.....	14
RCW 49.46.010(2).....	35
RCW 49.46.010(7).....	35
RCW 49.46.020	52
RCW 49.46.020	34
RCW 49.46.800	14, 34, 51, 52
RCW 74.39A.056	11
RCW 74.39A.074-.076.....	11

RCW 74.39A.240	14
RCW 74.39A.270	52
Washington Administrative Procedures Act, RCW 34.05.. 5, 27, 28, 29, 30	
Rules, Regulations, and Other Authorities	
29 C.F.R. § 553.101(a)-(d).....	43
29 C.F.R. § 785.13.....	36
42 C.F.R. § 441.540(b)(5).....	13, 39, 41, 44
29 CFR § 785.11	36
78 FR 60454-01 (Oct. 1, 2013).....	<i>passim</i>
WAC 296-126-002(8)	34
WAC 296-126-028(1)	36
WAC 388-71-0515(3)	33
WAC 388-106-0010	8, 33
WAC 388-106-0015	8
WAC 388-106-0040	9
WAC 388-106-0050(1)	8
WAC 388-106-0055(8), (10)	9
WAC 388-106-0075	9
WAC 388-106-0080	9
WAC 388-106-0130(2)(a)-(b).....	<i>passim</i>
WAC 388-106-0130(5), -0135.....	9

INTRODUCTION

For the third time in less than a decade, this Court is being asked to review Department of Social and Health Services (Department or DSHS) regulations that shortchange Individual Providers (IPs) of pay for the necessary personal care services like bathing, cooking, and housework DSHS itself determines IPs will provide to its Medicaid clients. The rules challenged here should fare no better than the Shared Living Rule did in *Jenkins* or the Children’s Assessment Rule did in *Samantha A.* because they run afoul of these home care workers’ recently-codified wage rights.

Until the last few years, caregivers who served their clients at home had no right to minimum wage or overtime protections. The law has shifted fundamentally. Federally, in 2013, the U.S. Department of Labor (DOL) enacted the Home Care Rule, which extended minimum wage and overtime protections to home care workers beginning in January 2015. In Washington, voters enacted Initiative Measure No. 1433 (I-1433), which amended the Minimum Wage Act (MWA) to extend state law minimum wage, overtime, and paid sick leave rights to IPs—home care workers who provide Medicaid-funded personal care services—as of January 2017.

These legal protections arrived at a critical historical moment: Washington—like the rest of the nation—faces incredible demographic challenges caused by the aging of the baby boomer generation concurrent

with the dwindling of the caregiving generation. To address this challenge, Washington and the nation will need a sustainable, professional home care workforce with adequate wage protections.

Yet, despite the clear federal and state mandates that DSHS pay IPs for all hours worked within the scope of their employment, DSHS promulgated two rules that require IPs to perform some of their work without pay. The first—the Shared Benefit Rule—adjusts a Medicaid client’s authorized base hours, and consequently an IP’s paid hours, downward when DSHS determines an IP shares in the benefit of the work being performed. This rule impermissibly deducts IPs’ wages based on “in-kind” compensation and discriminates against IPs who are related to their clients by family or household status. The second—the Informal Support Rule—asks IPs to volunteer some of their otherwise paid time to perform the work for which they are employed. This rule impermissibly invites volunteerism for work within the scope of IPs’ employment and is likewise discriminatory. Both rules violate federal and state wage law.

On behalf of its member IPs, SEIU 775 petitioned for review of these rules under the Washington Administrative Procedures Act, RCW 34.05 (APA), seeking declaratory and injunctive relief. RCW 34.05.570–.574. The Rules are arbitrary and capricious, and they exceed DSHS’s statutory authority, because (1) DSHS enacted both rules without

responding to the substance of SEIU 775's objections that the Rules violate wage laws; (2) both rules violate federal and state wage laws by causing IPs to work uncompensated time within the scope of their employment; and (3) both rules violate federal wage law by discriminating against IPs who are related to their home care clients. The trial court denied SEIU 775's petition for review. This Court should reverse.

ASSIGNMENTS OF ERROR

1. The trial court erred by denying SEIU 775's petition for review by Order on Petition for Judicial Review entered April 12, 2019.
2. The trial court erred by denying SEIU 775's request for a declaratory judgment by Order on Petition for Judicial Review entered April 12, 2019.
3. The trial court erred by denying SEIU 775's request for injunctive relief by Order on Petition for Judicial Review entered April 12, 2019.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Are the Shared Benefit and/or Informal Support Rules arbitrary and capricious and/or do they exceed DSHS's statutory authority?
(Assignment of Error 1)
2. Does the Shared Benefit Rule violate federal and state wage laws by impermissibly deducting IPs' wages based on "in-kind" benefits?
(Assignment of Error 1).

3. Does the Shared Benefit Rule violate the FLSA by discriminating against IPs related to their clients by family or household status? (Assignment of Error 1)
4. Does the Informal Support Rule violate federal and state wage laws by impermissibly soliciting IPs to volunteer within the scope of their employment relationship? (Assignment of Error 1)
5. Does the Informal Support Rule violate the FLSA by discriminating against IPs related to their clients by family or household status? (Assignment of Error 1)
6. If the answer to any of Issues 1–5 is yes, is SEIU 775 entitled to a declaratory judgment that the Shared Benefit Rule and/or Informal Support Rule(s) are invalid? (Assignment of Error 2)
8. If the answer to any of Issues 1–5 is yes, is SEIU 775 entitled to a permanent injunction enjoining further application of the Shared Benefit and/or Informal Support Rule(s)? (Assignment of Error 3)

STATEMENT OF THE CASE

I. The provision of personal care services by IPs to clients under DSHS programs, regulations, and authorizations.

SEIU 775 is a labor union that represents approximately 46,000 long-term care workers, 35,000 of whom are IPs—*i.e.* people who provide personal care services through DSHS contracts to functionally disabled (or otherwise eligible) clients under Medicaid programs. CP 164–65. These

clients, the State's most vulnerable elderly and disabled residents, require assistance with personal care, such as toileting, bathing, making meals, and household chores. CP 165; WAC 388-106-0010 ("personal care services," "activities of daily living," "instrumental activities of daily living"; 42 U.S.C. § 1396d(a)(24) (defining "personal care services"). Home care clients are able to live in their homes, rather than in far more costly state-run institutions like nursing homes, as a result of these services. WAC 388-106-0015; *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 601 n.12, 119 S.Ct. 2176, 144 L.Ed.2d 540 (1999).

To determine the kind and extent of services each client requires, DSHS has adopted a Comprehensive Assessment Reporting Evaluation (CARE) system. WAC 388-106-0050 through -0145. DSHS uses that system to assess client needs at least annually and more often at clients' request or when they have "significant changes necessitating revisions" to their CARE plan. WAC 388-106-0050(1).

DSHS uses these assessments principally to set clients' "payment rate for residential care or number of hours of in-home care" and to develop "a plan of care," among other purposes. WAC 388-106-0055(8), (10). It does so by gathering information about clients' ability or inability to conduct activities of daily living (ADLs) and instrumental activities of daily living (IADLs). WAC 388-106-0075. DSHS specifically determines

“the amount of long-term care services” by classifying clients into 17 classifications, depending on their needs for assistance, each of which corresponds to a “base number of hours” of care DSHS authorizes for paid personal care services. WAC 388-106-0080. DSHS allows only specifically authorized providers, including IPs, to provide these paid personal care services. WAC 388-106-0040.

DSHS pays IPs only for hours authorized through CARE, WAC 388-106-0130(5), -0135; -0010 (“Authorization”), and does so “strictly on an hourly basis.” CP 331. Nonetheless, through the rules challenged in this litigation and described below, DSHS also adjusts clients’ authorized base hours downward through a formula that assumes IPs perform work that does not count toward payable hours. WAC 388-106-0130(2)(a)–(b).

II. Legal framework governing home care work and pay.

There has been a sea change in both federal and state wage and hour law. Whereas long-term care workers like IPs used to be systematically excluded from minimum wage and overtime protections, the FLSA and the MWA now both expressly provide such rights. DSHS has failed to adapt to this new legal landscape.

In December 2011, DOL provided notice of its intent to undertake rulemaking on what ultimately became the Home Care Rule, published in October 2013 and effective January 1, 2015. Application of the Fair Labor

Standards Act (FLSA) to Domestic Service, 78 FR 60454-01, 60458, (Oct. 1, 2013) (Home Care Rule). This federal rule brought domestic service employees, like the IPs represented by SEIU 775, within FLSA coverage, guaranteeing them minimum wage and overtime protections.

The FLSA did not initially cover home care workers (also called domestic service workers). *Id.* at 60454. In 1974, Congress amended the FLSA to cover domestic service workers, except as provided in two new exemptions—the companionship services and live-in exemptions. *Id.* (discussing FLSA Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55 (1974) and Sections 13(a)(15) and 13(b)(21)).¹ In 1975, DOL promulgated regulations implementing these exemptions, which allowed third-party employers of home care workers to claim both exemptions, thus denying home care workers FLSA protections. *Id.* at 60454–55 (discussing 40 FR 7404 (Feb. 20, 1975)). In 2007, the Supreme Court sustained those regulations but noted DOL’s regulatory discretion to re-define the scope of the exemptions. *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 165–74, 127 S.Ct. 2339, 168 L.Ed 2d 54 (2007).

DOL thereafter exercised that regulatory authority to modify the

¹ Home care workers directly employed by businesses, like home care agencies, have long been covered by Washington’s MWA. See *Dana’s Housekeeping, Inc. v. Dep’t of Labor & Industries*, 76 Wn. App. 600, 609-11, 886 P.2d 1147 (1995) (domestic service exemption under Industrial Insurance Act does not apply to commercial enterprises that employ home care workers); *Paschke v. Chesterfield Services, Inc.*, No. 05-2-05837-4 SEA (King Cty. Super. Ct. May 9, 2006) (unpublished) (same result under MWA).

scope of the two exemptions, culminating in the final Home Care Rule. After conducting a thorough review of legislative history and intent, as well as an analysis of changes in the professionalization of the home care industry, the new rule revised several FLSA regulations. *Id.* at 60455, 60458-59 (recognizing “dramatic expansion and transformation of home care industry” and the professionalization of the workforce while earnings of such employees “remain among the lowest in the service industry”). In ensuring that home care workers are paid for all hours worked, DOL recognized that these skilled employees “are due the respect and dignity that accompanies the protections of the FLSA.” *Id.*² The result of these changes is that professional home care workers, like those represented by SEIU 775, are now generally covered by the FLSA, and third-party employers, like DSHS, can no longer claim the companionship or live-in domestic service employee exemptions. *Id.* at 60455. The Rule became effective January 1, 2015. 78 FR at 60494–95.

In promulgating this Rule, DOL examined in particular how its new regulations apply to providers who are part of a home care client’s family or household. *Id.* at 60487–90. After rejecting the suggestion that the services of paid family care providers should be categorically exempt

² The long-term care industry in Washington has increasingly professionalized along with the rest of the nation. *See, e.g.*, RCW 74.39A.056 (background checks); RCW 74.39A.074-.076 (training requirements); *infra* n. 9 (health care, vacation, and paid time off benefits, among others).

as companionship services, it examined the “unique nature of paid family and household caregiving in certain Medicaid-funded” programs. *Id.* at 60487. Applying longstanding “economic realities” principles of FLSA-covered work, DOL recognized that paid family providers have a dual relationship with their clients: a pre-existing familial relationship and an employment relationship within the scope of a plan of care that “reasonably sets forth the number of hours for which paid home care services will be provided.” *Id.* at 60488. Under “this bifurcated analysis, the employment relationship is limited to the paid hours contemplated in the plan of care or other written agreement developed and approved by certain Medicaid-funded ... programs only if that agreement is reasonable.” *Id.* at 60489.³ It supported that conclusion, in part, based on Medicaid requirements. *Id.* One such regulation requires plans of care to:

Reflect the services and supports (paid and unpaid) that will assist the individual to achieve identified goals, and the providers of those services and supports, including natural supports. Natural supports cannot supplant needed paid services unless the natural supports are unpaid supports that are provided voluntarily to the individual in lieu of an attendant.

³ The converse of course must be true: if the plan of care is not reasonable, then all care provided is part of the employment relationship. *Id.* at 60487-88, 89 (“[T]he Department emphasizes that under this bifurcated analysis, the employment relationship is limited to the paid hours contemplated in the plan of care or other written agreement developed and approved by certain Medicaid-funded...programs only if that agreement is reasonable.”).

42 C.F.R. § 441.540(b)(5). DOL accordingly concluded that a plan of care is reasonable under the rule if it “would have included the same number of paid hours if the care provider had not been a family or household member of the consumer. In other words, a plan of care that reflects unequal treatment of a care provider because of his or her familial or household relationship with the consumer is not reasonable.” 78 FR at 60489.

DOL provided an illustrative example. If a county-administered Medicaid program would ordinarily assess a client as requiring 30 hours of paid services per week beyond existing unpaid assistance from the client’s daughter and the county then adjusts the plan of care by 15 hours per week, “because the woman’s daughter is hired as the paid care provider, the paid hours in the plan of care do not reflect the economic reality of the employment relationship and therefore will not determine the number of hours that must be paid under the FLSA.” *Id.* 60489.

Washington has also recently strengthened minimum wage and overtime protections for home care workers. In November 2016, Washington voters approved Initiative Measure No. 1433, which became effective January 1, 2017. That initiative, codified in pertinent part as RCW 49.46.800, provides: “The state shall pay individual providers, as defined in RCW 74.39A.240, in accordance with the minimum wage, overtime, and paid sick leave requirements of this chapter,” *i.e.*, RCW

49.46, the MWA.

III. The development and operation of the Shared Benefit Rule.

DSHS continues to operate as if the FLSA and MWA do not apply to the State's relationship to IPs. Ignoring the changed legal landscape ushered in by the Home Care Rule and I-1433, DSHS has again promulgated regulations that deny IPs compensation for all hours they work, even though DSHS itself deems that work necessary to fulfill its clients' basic needs so that they may live at home and even though DSHS applies the rules only when the CARE assessment—which determines the client's benefit, the client's care plan, and the IP's authorized hours—includes a determination that the IP will in fact perform the work.

In 2003, DSHS enacted the “shared living rule,” which “reduce[d] recipients' benefits by 15 percent if they live with their caregiver.” *Jenkins v. Dep't of Soc. & Health Servs.*, 160 Wn.2d 287, 290, 157 P.3d 388 (2007). DSHS adopted that rule:

on the theory that if caregivers must clean their own houses, go shopping, and cook meals for their own benefit, certain duplication of efforts are presumed, and, the theory goes, a state should not pay for those tasks that benefit the entire household despite the absence of any specific determination that these tasks are shared.

Id. at 292. When DSHS applied this rule, it reduced the number of hours paid to IPs in tandem with the number of hours authorized to clients. *Id.* at

292–94 (explaining the rule “does not recognize the additional hours their caregivers provide that do not benefit the caregivers or the household in general.”). In 2007, the Supreme Court of Washington invalidated the shared living rule because it violated Medicaid’s comparability requirement. *Id.* at 295–300.

In 2011, this Court invalidated a similar DSHS rule—the Children’s Assessment Rule—that reduced “the financial assistance payable for in-home personal care service (based upon the child’s age and whether the child lives with a parent).” *Samantha A. v. Dep’t of Soc. Servs. & Health Servs.*, 171 Wn.2d 623, 626, 256 P.3d 1138 (2011). As with the shared living rule, this Court held this rule violated Medicaid comparability because it withheld paid services from individuals similarly situated to others who received such paid services. *Id.* at 630–37.

DSHS responded by promulgating a series of emergency rules beginning in November 2011, *see, e.g.*, Rulemaking File (RF) as to WSR 12-14-064 at 1389-477; RF as to WSR 14-04-097 at 347-373, and proposed rules, RF WSR 12-14-064 at 8-28. It then promulgated a permanent rule in March 2014, RF WSR 14-04-097 at 328-346, which amended the CARE regulations to provide adjustments for a so-called “shared benefit” between a paid caregiver and his or her client (hereafter Shared Benefit Rule).

DSHS's Shared Benefit Rule "adjust[s] base hours to account for ... shared benefit," which is defined to occur where "(a) A client and their paid caregiver both share in the benefit of an IADL task being performed; or (b) Two or more clients in a multi-client household benefit from the same IADL task(s) being performed." RF WSR 14-04-097 at 331-334, 345-346. Applying this rule, DSHS reduces authorized (*i.e.*, compensable) base hours downward according to a formula set forth in WAC 388-106-0130(2)(a)–(b) wherever DSHS deems a client and IP to have a "shared benefit." Under DSHS's flawed theory, this "shared benefit" derived from the IP's work "being performed" alleviates the need, in whole or part, for paid services assisting a client with the IADLs of meal preparation, housework, essential shopping, and supplying wood for heat. *Id.*⁴

Early in DSHS's rulemaking regarding "shared benefit," SEIU 775 submitted comments showing the proposed Shared Benefit Rule "would deprive home care workers of compensation for services rendered and is not necessitated by the *Samantha A.* decision." RF WSR 12-14-064 at 40 (capitalizations omitted). In particular, SEIU 775 explained the Shared

⁴ Under this rule, DSHS case managers determine for each IADL how much unpaid support—through "shared benefit"—is available to each client and assigns a numerical value (prescribed by regulation) for each task depending on the amount of unpaid support deemed available. *Id.* A numerical value is similarly assigned to each ADL and IADL for "informal support," discussed *infra*. The CARE tool calculates the shared benefit and informal support adjustments by taking the average assigned value and plugging it into this formula: **Adjusted hours = Base Hours * [(2* avg value + 1)/3]**. *Id.* (WAC 388-106-0130(b)). Under this formula, the more shared benefit (or informal support) a client receives, the more DSHS reduces her authorized hours.

Benefit Rule would “require[] home care workers to perform the same tasks contained in a client’s CARE plan but, upon implementation of the rule, without receiving payment for those tasks.” *Id.* SEIU 775 accordingly objected to the Shared Benefit Rule. *Id.*

DSHS also heard testimony and received letters from numerous IPs who explained in detail how the proposed rulemaking would cause IPs to perform the same amount of work for less pay. *See, e.g.*, RF WSR 12-14-064 at 31–33, 46–95, 305, 314–57.⁵ For example, IP Ada Whitman explained that “DSHS is not paying for add-on hours and I have [to] do this without compensation.” *Id.* at 32–33. IP Jerri McLane explained she works 20 hours per day, 7 days a week, caring for her granddaughter, and a 110 hour reduction in authorized hours for her granddaughter will result in a loss of over \$1200/month for her. *Id.* at 46. IP Katherine Marrow explained that she and her granddaughter client “are relying on the individual provider hours to provide food, clothes and shelter for us,” but “[w]ith the drastic cut in hours, I will no longer be able to support this child in a way she is accustomed to. Where will financial provision come from for food, clothes and shelter?” *Id.* at 76. IP Jessie Norris explained that before the amendments cut 8 hours, she “was getting 160 hours [of pay] and now [she gets] only 152.” *Id.* at 93. IP Suzan Swarhout protested

⁵ Although some of these comments focus on cuts to add-on laundry hours, they also show more generally that regulatory cuts to authorized hours affect IP compensation.

that the cuts to authorized hours have caused “plenty of us caregivers” to lose health benefits, jeopardizing their ability pay their mortgages and to “take proper care of [their] charges” when they cannot keep themselves healthy. *Id.* at 333.

The examples illustrate the obvious: in the real world regulatory cuts to clients’ authorized hours result in cuts to IP pay, and where—as here—the cuts presuppose IPs will provide the same level of work they did before the cuts, the result is uncompensated work by IPs.⁶

DSHS responded to public comments on the Shared Benefit Rule in its January 17, 2014, concise explanatory statement. RF WSR 14-04-097 at 474-480. DSHS observed that SEIU 775 objected to its rule because it “requires home care workers to perform tasks identified in a client’s CARE plan without receiving payment for those tasks” and therefore violated both Medicaid comparability requirements and “incongruously requires home care workers to perform the same tasks contained in a client’s CARE plan but, upon implementation of the rule, without receiving payment for those tasks.” *Id.* at 479. But DSHS made “[n]o change ... as a result of these comments.” *Id.*

DSHS did not contest SEIU 775’s observation that the Shared Benefit Rule requires IPs to perform tasks without receiving payment for

⁶ In 2012, DSHS calculated that 80% of its clients received services from IPs, rather than agency providers. *Id.* at 558–61.

them. *Id.* Instead, it responded only that “[d]etermination of shared benefit is guided by rebuttable presumptions. Each client receives an individual determination during the assessment of the amount of shared benefit based on their individual circumstances.” *Id.* This response indicates that the extent of the Shared Benefit cut on IP pay varies individually; but it leaves uncontested, and thus concedes, the objection that the rule operates to cause IPs to work without pay. *Id.* The only question is by how much.

DSHS promulgated the permanent Shared Benefit Rule a couple of weeks later on February 4, 2014. RF WSR 14-04-097 at 328–346.

IV. The development and operation of the Informal Support Rule.

DSHS regulations have long provided that clients’ authorized base hours will be adjusted downward when some of the clients’ needs are met through “informal supports,” which obviate the need for paid care. Before 2011, DSHS regulations defined “informal support” simply to mean adults who are “available to provide assistance without home and community program funding.” RF WSR 12-14-064 at 13. Family members who do not receive home and community program funding—i.e., family members who are not IPs—have also long qualified as “informal supports” under DSHS rules. *See e.g.*, RF WSR 12-14-064 at 415–421, 441–446.

Construing these rules, the State of Washington Health Care Authority Board of Appeals (HCA BOA) repeatedly held that an IP cannot

be a source of informal support under DSHS’s regulations. *See, e.g., In re _____*, Docket No. 04-2012-HCA-0369, Conc. of Law ¶ 24 (HCA BOA June 30, 2014); *In re _____*, Docket No. 05-2012-HCA-0093, Conc. of Law ¶ 24 (HCA BOA July 8, 2014), cited in RF WSR 15-20-054 at 50–94. That is so because DSHS’s regulations deemed a caregiver to be a source of informal support only if the caregiver was available to provide care without Medicaid funding. Services rendered by paid caregivers—IPs—could not be a basis for reducing a client’s payable hours. *Id.*

In April 2015, DSHS proposed amending the definition of “informal support” to change this policy. RF WSR 15-20-054 at 10–26.

The proposed amendment defined “informal support” as

Assistance that will be provided without home and community program funding. ... Sources of informal support include but are not limited to: family members, friends, housemates/roommates, neighbors, school, childcare, after school activities, church, and community programs. ... [I]f a person is available and willing to provide unpaid assistance to a client, the department may consider the person to be a source of informal support, even if the person is also an individual provider for the client.

Id. at 15–16 (internal alterations omitted). This proposal, in other words, allowed the same caregiver to provide care to a client both “without home and community program funding” and as a paid “individual provider for

the client.” *Id.*

In June 2015, DSHS heard comments on its proposed rule. RF WSR 15-20-054 at 32–26. SEIU 775 opposed DSHS’s proposal first because it did not “accurately reflect the current state of the law,” *i.e.*, the HCA BOA decisions holding that ““a paid caregiver is not a source of informal support.”” *Id.* at 37.⁷ DSHS’s proposed amendments, SEIU 775 explained, “will allow paid caregivers to be considered informal support and thereby reduce the number of hours DSHS will authorize for payment. The result is that [IPs] will not be paid for all of the work the Department expects them to perform under their clients’ service plans.” *Id.*

It further stated:

this course of action is unlawful because the proposed rule amendment unlawfully permits DSHS to request or allow [IPs] to perform their usual job duties without compensation—in other words to do their job for some number of hours as a volunteer. State and federal wage and hour law prohibit employers from allowing their employees to work for free, even if the employee does so voluntarily.

Id. at 37–38.

SEIU 775 further opposed the amendments because “requiring unpaid work of individual providers” would undermine the professionalization of the IP workforce and make it more difficult for

⁷ SEIU 775 provided this testimony both orally and in writing. *Id.* at 35, 37.

DSHS to prepare for the dramatic increase of the aging population in the coming decades. *Id.* at 38–39.

SEIU 775 also submitted written comments opposing the amendments, again on both legal and practical grounds. RF WSR 15-20-054 at 96–104. Legally, SEIU 775 objected because the amendments would depart from current law as articulated by the HCA BOA, violate the duty of good faith and fair dealing that arises from IPs’ contracts with DSHS (citing *Rehker v. State, DSHS*, 180 Wn.2d 102 (2014)), lack any process for verifying IPs’ actual consent to perform unpaid work, and violate state and federal law by soliciting workers to volunteer for work within their usual job duties. *Id.* at 98–102.⁸

DSHS responded to public comments on its Informal Support Rule in its September 2015 concise explanatory statement. Over SEIU 775’s and NJP’s objections, DSHS pressed forward with its proposed change without explaining how its new informal support definition complied with state or federal wage laws or with the Medicaid comparability

⁸ Northwest Justice Project (NJP) also opposed the amendments, objecting that they would further violate Medicaid’s comparability requirements, particularly because, under *Jenkins*, “[b]efore reducing the base hours authorized by the CARE Assessment, the Department must individually determine the extent to which a client’s informal support **actually reduces** his or her need for **Medicaid-paid** care. In other words, if a client receives 100 hours of Medicaid-funded care each month, needs 120 hours per month, and has a provider who provides 20 hours of unpaid care, the fact 20 hours of unpaid care is provided should not reduce the number of hours of Medicaid-funded care.” RF WSR 15-20-054 at 44 (emphasis added). NJP also emphasized that DSHS’s proposal would not clarify, but reverse, governing law, and would do so without any explanation. *Id.* at 45.

requirement. *Cf.*, RF WSR 15-20-054 at 195–96. In particular, DSHS did not acknowledge the DOL’s Home Care Rule, which had by then been in effect for nine months, even though SEIU 775 had specifically contended that the new Informal Support Rule violated federal wage-and-hour law by requiring or permitting IPs to work without compensation. *Id.*; *supra* at 18–19.

Moreover, without acknowledging the HCA BOA decisions holding that IPs could not be considered sources of informal support, DSHS nonetheless claimed that it was merely “clarifying its current and longstanding policy,” without any change. *Id.* at 196. It pointed as justification for its proposal to “federal Medicaid rules that state that Medicaid must not supplant naturally occurring supports.” *Id.* And it contended that it could adequately document IPs’ willingness to provide unpaid services through the assessment process. *Id.* at 195–96.

On September 30, 2015, DSHS enacted the Informal Support Rule. *Id.* at 175-191 (enacted as WSR 15-20-054).

Like the Shared Benefit Rule, the Informal Support Rule in practice assumes that IPs will actually perform the work subject to the rule. *See, e.g.*, RF WSR 14-04-087 at 1096 (policy is that assessor codes a need as “met” when, for the upcoming plan period, it “will be met by informal supports”; similar for “partially met”); 1160 (A good CARE

assessment gives caregivers “clear instructions to meet all identified needs.”) And assessors specifically assign each need to a specific paid or unpaid provider, which is why DSHS assessors give IPs service summaries and assessment details. *Id.* at 1166–67.

In December 2017, DSHS gave notice of further rulemaking amendments to the definition of informal support. RF WSR 18-16-004 at 1 (CP 225). Those amendments, RF WSR 18-16-004 at 56–67 (CP 280–91), became effective in August 2018. DSHS explained the purpose of its rulemaking was to make clear that “paid care givers may not be the source of informal support unless they are household or family members of a client” *Id.* at 56 (CP 280).

The proposed rule deleted the requirement that a source of informal support be “available and willing to provide unpaid assistance to a client,” and instead noted that DSHS “will not consider an individual provider to be a source of informal support unless the individual provider is also a family or household member who had a relationship with the client that existed before the provider entered into a contract with the department.” RF WSR 18-16-004 at 62 (CP 286). These amendments codify the management-bulletin policy DSHS established in May 2016. *Id.* at 56-67, 29–34 (CP 280–91, 253–58).

That bulletin explained that the Home Care Rule made FLSA obligations applicable to “Individual Providers,” a development DSHS perceived as a “significant policy change.” *Id.* at 29 (CP 253). DSHS adopted this policy after the “legislature did not fund the implementation of the Informal Support policy as proposed in the Governor’s budget.” *Id.* at 30 (CP 254).

Under DSHS’s May 2016 policy, for IPs who are related to the client by blood, marriage or adoption, or who lived with the client before working for them (collectively, related IPs), those related IPs may provide informal support under their family/household relationship, “if they are willing and able,” but the IPs are “[n]ot entitled [to] payment for hours provided that exceed those authorized.” RF WSR 18-16-004 at 31-32 (CP 255–56). By contrast, IPs who are not related by family or by household to their clients (stranger IPs or unrelated IPs) may not provide informal support and must, instead, “be paid for all hours they claim they worked,” including those that “exceed those authorized” (*i.e.*, overtime hours), provided, however, that unauthorized overtime may result in DSHS taking a “contract action” (*i.e.*, paying overtime but disciplining the IP for performing unauthorized overtime). *Id.* at 32 (CP 256). To effectuate this policy, in 2016 DSHS reviewed “all client assessments that included both an informal support deduction to client hours and an IP.” *Id.* at 29 (CP

253). As a result, DSHS reassessed clients whose “informal support was attributed to an IP.” *Id.*

When it codified the May 2016 policy into regulation, DSHS included in the administrative record portions of the Home Care Rule and DOL fact sheets. *Id.* at 22–28 (CP 246–52). The rulemaking also contains various questions posed to DOL officials but does not reflect any answers. *Id.* at 35–41 (CP 259–65).

V. DSHS co-determines IPs’ terms and conditions of work and, before this litigation, acknowledged its FLSA obligations.

The State collectively bargains with SEIU 775 on behalf of IPs and the parties have executed a collective bargaining agreement (CBA) that governs IPs’ terms and conditions of employment. CP 304 n.2; 380 n. 10.⁹ The State requires IPs to complete mandatory training,¹⁰ offers paid time off,¹¹ creates a grievance procedure,¹² sets a wage rate,¹³ and provides a benefits package.¹⁴ DSHS also determines “hours of work” through the CBA, including by agreeing to modify the CARE regulations in ways that

⁹Both parties relied on terms of their CBA, which is available at https://ofm.wa.gov/sites/default/files/public/legacy/labor/agreements/17-19/nse_homecare.pdf. *See also* CP 330-331. Because its authenticity and accuracy is not disputed, the Court may judicially note it (ER 201(b)) and consider it in this APA challenge (RCW 34.05.588 does not exclude undisputed facts from judicial review).

¹⁰ CBA Art. 15.

¹¹ CBA Art. 11.

¹² CBA Art. 7.

¹³ CBA Art. 8 and Appendix A.

¹⁴ CBA Arts. 9 and 21.

increase the number of hours authorized by the CARE tool.¹⁵

The State itself recognizes that it must comply with the FLSA. RF WSR 18-16-004 at 29. Indeed, it relied on its FLSA obligations as a basis for exemption from rulemaking procedures that would have applied absent legally required regulatory changes. *Id.* at 2, 22–28 (citing FLSA Home Care Rule and fact sheet).

VI. The proceedings below

SEIU 775’s operative petition for review alleged that both the Shared Benefit Rule and the Informal Support Rule require, suffer, or permit IPs to work without minimum compensation in violation of federal and state wage laws. CP 169, 171, 173–78. It also alleged that the rules impermissibly discriminate against IPs who are related to their clients, in violation of federal law. CP 171–72, 176.

To challenge those violations, in September 2017, SEIU 775 brought this case on behalf of the tens of thousands of IPs it represents to seek review of these rules via the APA. CP 15. After various procedural delays, the Thurston County Superior Court heard argument on March 15, 2019, and denied SEIU 775’s petition. CP 431–40; RP 1–58 (3/15/19).

Without identifying any evidentiary basis in the administrative record, the trial court held that neither rule causes IPs to work

¹⁵ CBA Art. 20.

uncompensated hours nor discriminates against them based on their relationship to their clients. RP 55:23–57:11 (3/15/19); CP 438–39.¹⁶ Again without citing any evidence, the court further reasoned that the Informal Support Rule does not “result in compelled volunteerism.” CP 438; RP 56:7–8 (3/15/19).

The trial court denied the petition; rejected SEIU 775’s claims for declaratory and injunctive relief; and sustained both rules as neither arbitrary, capricious, nor in excess of DSHS’s statutory authority. CP 439. SEIU 775 timely appealed. CP 431–32, 442–43.

ARGUMENT

I. Standard of review on appeal of an APA challenge

This Court reviews the administrative record and all legal conclusions de novo and sits in the same position as the superior court in reviewing the administrative record. *Estate of Ackerley v. Wash. Dep’t of Revenue*, 187 Wn.2d 906, 909, 389 P.3d 583 (2017).

Washington courts declare a rule “invalid” upon finding the rule “violates constitutional provisions,” “exceeds the statutory authority of the

¹⁶ The trial court rendered “rulings,” not findings of fact or conclusions of law, based on its view that it should “not get too deep into the details” of its decision because of the prospect of appellate review. RP 53:3–54:5 (3/15/19). When making these rulings, the trial court acknowledged that it had not understood prior to oral argument “that there can be adjustments to base hours.” RP 54:17–21 (3/15/2019). Unfortunately, that candid admission evinces little familiarity on the part of the trial court with the case or record; the lawfulness of the adjustments to base hours have been the very heart of the parties’ dispute from the beginning as shown by petitioner’s pleadings and both parties’ briefing. *E.g.*, CP 17, 28, 35, 166–67, 176–79, 304–05, 353–54, 399–401.

agency,” was “adopted without compliance with statutory rule-making procedures,” or is otherwise “arbitrary and capricious.” RCW 34.05.570(2)(c).

The “reviewing court must consider the relevant portions of the rule-making file and the agency’s explanations for adopting the rule as part of its review.” *Puget Sound Harvesters Ass’n v. Wash. State Dep’t of Fish & Wildlife*, 182 Wn. App. 857, 945, 332 P.3d 1046 (2014).

Agency action is arbitrary and capricious if it is “willful and unreasoning and taken without regard to the attending facts or circumstances.” *Wash. Indep. Tel. Ass’n v. Wash. Utilities & Transp. Comm’n*, 148 Wn.2d 887, 904, 64 P.3d 606 (2003) (*WITA*). An agency acts arbitrarily and capriciously by cursorily rejecting public comments based on premises that find no support in the administrative record. *Ctr. for Environmental Law & Policy, v. State of Wash. Dep’t of Ecology*, 2019 WL 3927427, at *10 (Wash. Ct. App. Aug. 20, 2019). *Accord Puget Sound Harvesters*, 157 Wn. App. at 950 (finding rules arbitrary where agency’s consideration of factors asserted in public comments “had little effect on the resulting” rule).

Courts should not defer to an agency’s “convenient litigation position or *post hoc* rationalization advanced to defend past agency action against attack.” *Kisor v. Wilkie*, 588 U.S. ___, 139 S.Ct. 2400, 2417, 204

L.Ed. 2d 841 (2019) (internal quotations, alterations omitted).¹⁷ Moreover, because agency authority is subject to applicable federal law, administrative rules that violate federal law are invalid. *See, e.g., Jenkins, supra*, 160 Wn.2d at 295–303 (holding “DSHS exceeded its statutory authority by promulgating a rule that conflicts with federal law”); *Samantha A., supra*, 171 Wn.2d at 629–38 (similar). In determining whether an agency rule violates federal law, courts review agency interpretations of federal law de novo. *Samantha A.*, 171 Wn. 2d at 629.

An “agency’s rule that conflicts with a statute is beyond that agency’s authority and requires invalidation of the rule.” *Edelman v. State ex rel. Public Disclosure Comm’n*, 116 Wn. App. 876, 885, 68 P.3d 296 (2003), *aff’d* 152 Wn.2d 584, 99 P.3d 286 (2004). *Accord Wash. Indep. Tel. Ass’n v. TRACER*, 75 Wn. App. 356, 363, 880 P.2d 50 (1994); *Wash. Fed’n of State Employees v. State Pers. Bd.*, 54 Wn. App. 305, 308, 773 P.2d 421 (1989).

II. The Court should invalidate the Shared Benefit Rule.

A. DSHS arbitrarily and capriciously enacted this Rule by failing to address SEIU 775’s concerns that it would require IPs to work without compensation.

During the rulemaking process, SEIU 775 specifically objected to

¹⁷ Under RCW 34.05.001, this Court should properly construe the Washington APA “consistently with decisions of other courts interpreting similar provisions of ... the federal government”

the Shared Benefit Rule on the ground that it would cause IPs to perform uncompensated work. *Supra* at 14. The administrative record contains testimony and commentary from numerous IPs who explained, based on their lived experience, how rules that cause downward adjustments to clients' authorized hours have impacted IPs' pay. *Supra* at 15. The administrative record contains no contrary evidence.

DSHS's concise explanatory statement noted these comments and did not dispute them but made no change as a result of them. *Supra* at 15–16. Instead, it responded only that DSHS assessors make individualized determinations of the amount of shared benefit to be applied. *Supra* at 16. That response thus concedes that the rule operates to cause IPs to work without compensation for it, and the only question is the extent of the “amount” of unpaid work each IP will be forced to provide upon application of the Shared Benefit Rule. *Id.*

As of the February 2014 promulgation of the Shared Benefit Rule, DOL's Home Care Rule had been final for several months, since October 2013. *Supra* at 7. Although the Home Care Rule would not take effect until January 2015, the very purpose of the delayed effective date was to provide agencies—like DSHS—sufficient time to comply. Yet, DSHS made no attempt during the Shared Benefit rulemaking to explain how its Rule squared with the federal Home Care Rule. *Supra* at 15–16. SEIU

775's objection clearly invited such an explanation. By failing to provide one, DSHS disregarded attending facts and circumstances and thus engaged in arbitrary and capricious rulemaking. *WITA, Center for Environmental Law, Puget Sound Harvesters, supra* at 26–27.

In the litigation below, DSHS's attorneys argued that the Shared Benefit Rule does not, in fact, cause IPs to perform uncompensated work. That contention finds no basis in the administrative record and is contrary to the actual record evidence. *Supra* at 15–16. It is also contrary to the plain language of DSHS's regulations themselves. The regulations clearly and unambiguously provide that the Shared Benefit Rule applies—and the downward adjustments based on “shared benefit” result—only when DSHS determines that a “paid caregiver” **will actually perform** the work that triggers the deduction. WAC 388-106-0010 (defining “shared benefit” to mean “(a) A client and their paid caregiver both share in the benefit of an IADL task **being performed**; or (b) Two or more clients in a multi-client household benefit from the same IADL task(s) **being performed.**”) (emphasis added); WAC 388-71-0515(3) (requiring IPs to provide services “as outlined on the client’s plan of care ... , according to the client’s direction, supervision, and prioritization of tasks within the number of hours authorized”); 388-71-0515(11) (DSHS “does not pay for

shared benefit(s) ... **provided** to the client by anyone, including the IP”) (emphasis added).

The argument that the Shared Benefit Rule does not result in uncompensated work by IPs is also contrary to this Court’s teachings. *See Rekhter v. Wash. State Dep’t of Social and Health Servs.*, 180 Wn.2d 102, 108–20, 323 P.3d 1036 (2014) (recognizing that the Shared Living Rule, the Shared Benefit Rule’s predecessor, caused reductions in clients’ authorized hours that resulted in lost IP compensation).

Finally, the State’s argument should be disregarded as a convenient litigation position or post hoc rationalization that evinces arbitrary rulemaking and commands no judicial deference. *Kisor, supra* at 27. *Accord* RCW 34.05.325(6)(a)(i) (agency’s concise explanatory statement should identify “the agency’s reasons for adopting the rule.”).

B. The Shared Benefit Rule impermissibly deducts IPs’ wages based on “in-kind” compensation.

DSHS’s failure to explain how the Shared Benefit Rule complies with applicable wage law reveals substantive, as well as procedural, defects.

The MWA requires DSHS to pay IPs at least the minimum wage for all hours worked. RCW 49.46.020, -.800. “Hours worked” means “all hours during which the employee is authorized or required by the

employer to be on duty on the employer’s premises or at a prescribed work place.” WAC 296-126-002(8); *Stevens v. Brink’s Home Security, Inc.*, 162 Wn.2d 42, 47, 169 P.3d 473 (2007). This is consistent with the statutory definition of “employ” which “includes to permit to work.” RCW 49.46.010(2). The Washington Department of Labor & Industries (L&I) interprets this language to include “all work requested, suffered, permitted or allowed” L&I, *Hours Worked* (Policy No. ES.C.2, rev. September 2, 2008), CP 333–40.

The MWA defines “wages” to mean “compensation due to an employee by reason of employment, payable in legal tender of the United States or checks on banks convertible into cash on demand at full face value, subject to deductions, charges, or allowances as may be permitted by rules of the director [of the Department of Labor & Industries].” RCW 49.46.010(7). This Court has long read that definition to prohibit employers from deducting wages based on in-kind benefits—such as the value of meals, the laundering of uniforms, and the cost of health insurance—without employees’ express, written consent. *State ex rel. Hagan v. Chinook Hotel, Inc.*, 65 Wn.2d 573, 574, 576, 580, 399 P.2d 8 (1965).¹⁸ Likewise, applicable regulations prohibit employers from

¹⁸ This is consistent with pre-MWA law that prohibited payment in company tokens or other forms of payment that were not redeemable for United States currency. *Smaby v. Shrauger*, 9 Wn.2d 691, 699–700, 115 P.2d 967 (1941) (broadly construing statute with

deducting in-kind benefits from employee compensation unless specific limited exceptions apply, WAC 296-126-028(1), and none do here.

DSHS's Shared Benefit Rule violates these principles by depriving IPs of compensation in legal tender for services rendered based on the theory that the services provide the IPs themselves a benefit. *Supra* at 13. This conclusion follows naturally from the very operation of the Rule, which adjusts the amount of authorized payable hours downward whenever DSHS determines that IPs benefit from performing IADLs. The Rule necessarily has this effect because it presumes that a "paid caregiver"—*i.e.*, an IP—will, in fact, perform an IADL for her client but, as a result of purportedly sharing in the benefit, the client will have proportionally fewer authorized hours from which to pay the IP. *Id.*

Notably, when DSHS promulgated its 2018 amendments to the Informal Support Rule, it re-promulgated the Shared Benefit Rule with only a minor grammatical tweak, notwithstanding that the MWA had already applied to the State in regard to its compensation of IPs for more than a year. RF WSR 15-16-004 at 19.

Causing or even permitting IPs to perform unpaid work also violates the FLSA, which has applied to IPs since the Home Care Rule became effective. *See* 29 U.S.C. § 206; 29 CFR § 785.11 ("Work not

public policy to protect wage earners from "evils," including employers causing delays in payments and paying workers in means other than legal tender).

requested but suffered or permitted is work time.”); 29 C.F.R. § 785.13 (employer cannot “accept the benefits [of work] without compensating for them”). Accordingly, the time spent by IPs performing housework, meal preparation, and shopping, which are required to be worked but without pay pursuant to the Shared Benefit Rule, is compensable work hours, and DSHS’s failure to pay IPs for that time violates the FLSA.

C. This Rule discriminates against related IPs.

The Home Care Rule permits state agencies to limit the employment relationship to the hours authorized in a plan of care only if the plan “would have included the same number of paid hours if the care provider had not been a family or household member of the consumer.” *Supra* at 10. In other words, the Rule permits DSHS to limit payable hours to those authorized by its CARE plans only if the plans provide the same number of payable hours regardless of whether a client’s IP is a related IP or a stranger IP. *Id.* The Home Care Rule does not, however, “condone or intend to overlook subterfuges that may seek to treat family members less equally.” 78 FR at 60489. And its “interpretation may not be used in a manner that interferes with the ability of all direct care workers to enjoy the full protections of the FLSA.” *Id.*

The Shared Benefit Rule fails these standards. Under the Rule, when a client requires housework or the supply of wood for heat, DSHS

will deem those IADLs to be hour-deducting “shared benefits” if the client’s IP lives with him but not otherwise. RF WSR 14-04-097 at 328-346. That is so because housework and the supply of wood for heat both focus on the home and the client/IP living arrangement. *Id.* Where a client and IP live together, DSHS deems housework beneficial to the client also to benefit the IP, resulting in a shared benefit deduction. Likewise, when a client and IP live together, DSHS deems the supply of wood to heat their shared home to benefit both, resulting in a shared benefit deduction. By contrast, when an IP is otherwise a stranger to the client and lives on her own, DSHS deems the IPs’ housework and supply of wood to benefit only the client, not the IP, resulting in no shared benefit deduction.

In short, DSHS’s Shared Benefit Rule results in CARE plans that authorize differing numbers of payable hours, depending precisely on whether the care provider is a “household member of the consumer.” *Supra* at 10.¹⁹ This differential treatment is exactly the sort of discrimination forbidden by the Home Care Rule. The Shared Benefit Rule accordingly violates federal law and must be invalidated.

¹⁹ Meal preparation and essential shopping will often, but not always, result in the same differential treatment. Related IPs, for example, are more likely to eat meals with their clients and to go shopping with their clients than are stranger IPs. So, DSHS’s rule may also result in differential payable hours depending on whether a client receives meal preparation and shopping from a related or stranger IP. Even if that were not the case for some clients, whose authorized hours for meal preparation and shopping remained the same regardless of whether their IP was related or a stranger, that fortuity cannot save the Shared Benefit Rule, which inevitably results in different payable hours for CARE plans, as a whole, based on the differential treatment of housework and wood supply.

III. The Court should invalidate the Informal Support Rule.

A. DSHS arbitrarily and capriciously enacted this Rule by failing to address SEIU 775's concerns that it would require IPs to work without compensation.

Like with the Shared Benefit Rule, DSHS acknowledged but did not substantively address SEIU 775's concerns that the Informal Support Rule violated state and federal wage laws—an especially egregious error because the Home Care Rule had been in effect for several months by the time DSHS enacted the Informal Support Rule in September 2015. *Supra* at 7. That disregard for attendant facts and circumstances demonstrates arbitrary rulemaking. *WITA, Center for Environmental Law, Puget Sound Harvesters, supra* at 26–27.

Rather than address SEIU 775's concerns head-on, DSHS purported to justify the Informal Support Rule based on (uncited) federal Medicaid rules, which DSHS erroneously read to require the rule because Medicaid funding must not supplant naturally occurring supports. *Supra* at 20–21. Presumably, DSHS intended to refer to 42 C.F.R. § 441.540(b)(5), which pertinently provides that “[n]atural supports cannot supplant needed paid services unless the natural supports are unpaid supports that are provided voluntarily to the individual in lieu of an attendant.” That regulation does not justify, but actually condemns, DSHS's Rule.

DSHS read the applicable Medicaid regulation precisely backward: instead of prohibiting Medicaid funding from supplanting (e.g., replacing)²⁰ natural supports (volunteering), the Medicaid regulation prohibits natural supports (volunteering) from supplanting paid Medicaid services subject to one exception. The exception contains three requirements: the natural/informal supports must be (1) unpaid, (2) provided voluntarily, and (3) provided in lieu of an attendant. “Attendant,” in turn, means a paid caregiver—*i.e.*, an IP. Taken together, the exception applies only when a client has available voluntary unpaid services that replace the need for “an attendant,” rather than replacing a portion of his or her own services.²¹ If a client receives so much free support that she does not need to hire an IP, Section 441.540 allows the client to rely on that free support instead of hiring the IP. But the “in lieu of an attendant” provision forecloses an attendant from volunteering as a means to reduce his or her own paid hours, *i.e.*, splitting her time so that she receives pay for some services but not for the rest.

Were there any doubt on the point, the Centers for Medicare & Medicaid Services dispelled it in their December 30, 2016, guidance.

²⁰ “Supplant” means “supersede and replace.” *The New Oxford American Dictionary* (2d ed. 2005).

²¹ DOL has so construed the rule. *See* Home Care Rule, 48 FR at 60489 (Medicaid regulations preclude Medicaid-funded programs from requiring “an increase in the hours of unpaid services performed by the family or household care provider in order to reduce the number of hours of paid services.”).

CMS, *Community First Choice State Plan Option*, SDM #16-011 (Dec. 30, 2016). CMS there clarified that under Section 441.540(b)(5):

Informal caregivers, family members and friends should only provide unpaid supports if they and the individual [i.e., client] determine it is their preferred option **based on the assessment, the person-center planning process, the approved levels of paid support in the plan** and in accordance with the service delivery model(s) selected by the state.

Id. at 2 (emphasis added).²² By requiring that a client’s family, friends, and informal caregivers understand the results of the person-centered planning process (here, the CARE assessments) and the approved levels of paid support in the plan of care **before** making any decision to provide unpaid supports, CMS’s guidance appropriately ensures that the provision of such services beyond the paid services in the care plan is truly voluntary and outside the scope of paid caregivers’ employment. It directly contravenes this guidance to allow the state agency to bake in volunteerism by an otherwise paid care provider to “the approved levels of paid support in the plan.”

Ultimately, the administrative record leaves unanswered SEIU 775’s objection that the Informal Support Rule causes unpaid work and

²²Available online at:
<https://www.medicaid.gov/federal-policyguidance/downloads/smd16011.pdf>

DSHS's purported justification only reinforces SEIU 775's objection.²³

B. The Informal Support Rule impermissibly solicits IPs to volunteer within the scope of their employment.

Both state and federal law prohibit employers from soliciting their employees to volunteer within the scope of their employment relationship.

Under MWA regulations,

An individual will not be considered a volunteer if he or she is otherwise employed by the same agency or organization to perform similar or identical services as those for which the individual proposes to volunteer. Any individual providing services as a volunteer who then receives wages for services, is no longer exempt and must be paid at least minimum wage and overtime pay for hours worked in excess of 40 hours per workweek. Unpaid employment is unlawful. An employee-employer relationship is deemed to exist where there is a contemplation or expectation of payment for goods or services provided.

L&I, *Minimum Wage Act Applicability*, § 6(d) (Policy No. ES.A.1 rev. July 14, 2014), CP 345–47.

Similarly, FLSA regulations prohibit employers from allowing their employees to volunteer, without compensation, additional time to do the same work for which they are employed. 29 C.F.R. § 553.101(d) (“An individual shall not be considered a volunteer if the individual is otherwise

²³ DSHS also departed from existing policy set forth in a series of HCA BOA decisions without acknowledging or explaining the change. *Supra* at 17–19. By doing so, DSHS acted arbitrarily. *See F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–16, 129 S. Ct. 1800, 173 L. Ed. 2d 738 (2009) (an agency may change policy only if it provides a “reasoned explanation for its action,” a requirement that “ordinarily demand[s] that it display awareness that it is changing position.”).

employed by the same public agency to perform the same type of services as those for which the individual proposes to volunteer.”); 29 C.F.R. § 553.102(a) (“the FLSA does not permit an individual to perform hours of volunteer service for a public agency when such hours involve the same type of services which the individual is employed to perform for the same public agency.”). These regulations effectuate the Congressional desire “to prevent any manipulation or abuse of minimum wage or overtime requirements through coercion or undue pressure upon individuals to ‘volunteer’ their services.” 29 C.F.R. § 553.101(b). *Accord* 78 FR at 60488 (paid hours can be limited to those in a plan of care only if the plan reasonably reflects the economic reality of the employment relationship).

The Informal Support Rules, however, accomplish precisely this impermissible solicitation. Under the rules, the CARE assessment process calls for DSHS’s case managers to ask IPs if they are willing to provide some or all of their otherwise paid personal care services without pay. RF WSR 15-20-054 at 180–181; RF WSR 18-16-004 at 62. If so, DSHS deems all those “volunteered” hours to be free services that reduce the number of authorized payable hours in a CARE plan, even though the CARE plans presuppose that IPs will continue to provide those unpaid hours at the levels “volunteered.” *Id.* And DSHS does so without

individualized determinations that an IP's provision of unpaid care services actually reduces the client's need for Medicaid-paid care. *Id.*

As shown above, the Medicaid "natural support" regulation does not justify, but condemns, this solicitation of volunteered work within the scope of the employment relationship. *Supra* at 36–38; 42 C.F.R. § 441.540(b)(5). Yet, DSHS's 2015 Informal Support Rule distorts the approved levels of paid support in its clients' CARE plans by asking paid caregivers, including family caregivers, to provide some of their otherwise paid support for free. Contrary to CMS's guidance, DSHS's Rule calls for paid caregivers to make their "volunteering" decisions before the completion of the assessment process and the approval of paid support levels; such paid caregivers accordingly cannot decide to provide extra services for free "based on" the results of an unbiased CARE plan. Rather, DSHS forces them to bake their "volunteering" into the very assessment process, so that its determination and approval of authorized payable care services will be artificially deflated. In the language of Section 441.540, DSHS asks IPs to provide unpaid services in lieu of themselves—a logical impossibility and a violation of state and federal law.

As a result, DSHS's reliance on Section 441.540 as the basis for its 2015 Informal Support Rule provides no justification whatsoever. DSHS's implementation of its new rule illustrates the point. In an effort to slash its

budget, DSHS reassessed numerous clients who received “informal support” from an IP, causing numerous paid caregivers to provide some of their services for pay and some without pay. *Supra* at 22. This mixing of “volunteer” and paid work within the scope of employment—defined by the CARE plan—is precisely what the anti-solicitation regulations aim to prevent. The Informal Support Rules run headlong against them.

C. This Rule discriminates against related IPs.

These Rules also fail the non-discrimination test: “whether the plan of care would have included the same number of paid hours if the care provider had not been a family or household member of the consumer. In other words, a plan of care that reflects unequal treatment of a care provider because of his or her familial or household relationship with the consumer is not reasonable.” *Id.* at 60489. Under DSHS’s Informal Support Rules, the only IPs deemed sources of informal support are related IPs; DSHS never considers stranger IPs sources of informal support. *Supra* at 22. The intended operation and inevitable effect of these Rules is that the total number of hours authorized for payment in a CARE plan changes depending on whether a client receives care from a related or an unrelated IP: under DSHS’s Rules, a client with a related IP will have fewer authorized payable hours than a similarly situated client with a stranger IP. That is so because if a related IP provides informal support,

DSHS applies a deduction to the client's base hours per WAC 388-106-0130(2); but if an unrelated IP provides the same support, DSHS does not apply the same deduction. *Id.*

To illustrate, suppose Client Kelly makes herself meals every Sunday but relies on her Sister Sarah to make meals on Mondays, Wednesdays, and Fridays, for a total of 10 hours, and on her Neighbor Nancy to make meals on Tuesdays, Thursdays, and Saturdays, for a total of 10 hours. In addition to those 20 hours of meal preparation, naturally supplied, Client Kelly needs another 110 hours of paid assistance to fully meet her needs. DSHS assesses Client Kelly as requiring 110 hours of paid assistance beyond the support she receives from Sister Sarah and Neighbor Nancy. Suppose further that Client Kelly later decides to hire both Sister Sarah and Neighbor Nancy as her paid IPs. Under DSHS's Informal Support Rules, the 10 hours of meal preparation previously furnished by Sister Sarah will continue to be counted as informal support (subject to the deductions of WAC 388-106-0130(2) and not included in the total number of hours authorized for pay) but the 10 hours of meal preparation previously furnished by Neighbor Nancy will not.

Client Kelly's needs have not changed: she still needs 130 hours of care. Because the Informal Support Rule regards only Sister Sarah's meal preparation time—and not Neighbor Nancy's—as informal support,

excludable from authorized hours, DSHS's Informal Support Rules result in CARE plans that do not "include[] the same number of paid hours if the care provider had not been a family or household member of the consumer." 78 FR at 60489. This hypothetical reveals the logical structure of the Informal Support Rule, which causes DSHS to violate the FLSA every time it adjusts a client's base hours downward as a result of treating an IP's work as a source of non-compensable "informal support."

In short, this Rule results in clients receiving differing amounts of authorized paid care depending on whether or not an IP who provided natural support prior to the employment relationship is related to the client. The Rule accordingly violates the Home Care Rule.

IV. DSHS must pay IPs in compliance with federal and state wage law.

A. DSHS, which has acknowledged its FLSA obligations, jointly employs IPs within the meaning of the FLSA.

In this administrative record, DSHS itself has recognized that it must pay IPs in accordance with the FLSA. *Supra* at 24. Indeed, DSHS changed its Informal Support Rule precisely "to comply with [the] Fair Labor Standards Act (FLSA)." RF WSR 18-16-004 at 29 (capitalization altered). The rulemaking expressly asserts that it was exempt from a DSHS executive order because it was "[r]equired by federal or state law or required to maintain federally delegated or authorized programs," *id.* at 2,

citing only the FLSA Home Care Rule and Fact Sheet 79F as the sources of those requirements. *Supra* at 24.

Those admissions made in the course of official rulemaking proceedings should estop DSHS from now denying its obligation to comply with the FLSA. *See Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007) (describing judicial estoppel); *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn. 2d 851, 866, 281 P.3d 289 (2012) (“judicial estoppel may apply to questions of law”).

As IPs’ joint employer under the FLSA, DSHS had good reason to acknowledge its obligations under that statute. Under the FLSA, two entities jointly employ a worker when the employment by one of them is “not completely disassociated” from the employment by the other. *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125, 133 (2017) (quoting 29 C.F.R. § 791.2(a)). This occurs when the two putative employers “share, agree to allocation responsibility for, or otherwise codetermine—formally or informally, directly or indirectly—the essential terms and conditions of the worker’s employment.” *Id.* at 141. *See also Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465, 1467–68 (9th Cir. 1983) (counties jointly employed “chore workers” by establishing rates of pay

and authorizing compensable hours, while the clients hired and fired the workers and supervised their daily activities).²⁴

Consistent with these authorities, DOL has specifically addressed when Medicaid-funded agencies are FLSA-employers. DOL, Wage and Hour Division, Administrator’s Interpretation No. 2014-2 (June 19, 2014), CP 410–26. Specifically, DOL concludes that a state agency employs IPs in consumer-directed Medicaid programs where it collectively bargains with a union representing home care providers and exercises substantial control over the employment relationship by setting wage rates, providing mandatory training, establishing a procedure for resolving grievances, and providing paid leave and other benefits. CP 423. While DOL applies a multi-factor analysis, it deems wage setting to be “so fundamental to the ultimate question of economic dependence that any entity that sets a wage rate will likely be considered an employer.” CP 420. An agency employs a provider under the FLSA where it:

collectively bargains with a union representing home care providers. The public entity exercises control by providing extensive required training, offering paid time off, furnishing equipment, creating a procedure for redress of grievances, setting a wage rate, and offering a benefits package. The public entity also retains some control over

²⁴ See also *See, e.g., Hardgers-Powell v. Angels in Your Home LLC*, 330 F.R.D. 89, 110–12 (W.D.N.Y. 2019) (fiscal intermediary jointly employed home care workers because employment responsibilities were “interwoven” between it and others in the regulatory scheme); *Acosta v. At Home Pers. Care Servs. LLC*, 2019 WL 1601997, *6–8 (E.D. Va. Apr. 15, 2019) (third-party agency joint employer of home care workers).

hiring and firing by completing performance evaluations and reserving the right to terminate a worker for poor performance. A fiscal intermediary processes payroll and tax withholding.

CP 423. *Accord* CP 428–30 (March 11, 2014, Letter from U.S. Department of Labor, Office of the Solicitor to Oregon Department of Human Services).

Applying these principles, DSHS unequivocally employs IPs within the meaning of the FLSA. The State collectively bargains with a union representing IPs and the parties have agreed to a CBA that governs the IPs’ terms and conditions of employment. *Supra* at 23–24. As in the DOL example, the State requires IPs to complete mandatory training,²⁵ offers paid time off,²⁶ creates a grievance procedure,²⁷ sets a wage rate,²⁸ and provides a benefits package.²⁹ DSHS also determines “hours of work” through the CBA, including by agreeing to modify the CARE regulations in ways that increase the number of hours authorized by the CARE tool.³⁰

These facts are common to all IPs. DSHS accordingly jointly employs them all, under the FLSA, as a matter of law.

B. DSHS is directly subject to the MWA minimum wage and overtime requirements, regardless of whether it is an MWA “employer.”

Although the trial court did not reach the issue, DSHS argued below that it is not subject to the MWA with respect to IP compensation

²⁵ CBA Art. 15.

²⁶ CBA Art. 11.

²⁷ CBA Art. 7.

²⁸ CBA Art. 8 and Appendix A.

²⁹ CBA Arts. 9 and 21.

³⁰ CBA Art. 20.

because RCW 49.46.800, in its view, must be reconciled with other statutes. DSHS has contended that the MWA does not require it actually to pay IPs minimum wage and overtime but, instead, only to negotiate wages in a CBA that facially meet or exceed the statutory minimums. The Court should reject this contorted interpretation as it conflicts with the statute's plain meaning and settled law regarding the relationship between MWA rights and CBA terms.

The MWA sets non-negotiable minimum labor standards that cannot be waived by collective bargaining. *See, e.g., Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 864-65, 93 P.3d 108 (2004); *Huntley v. Frito-Lay, Inc.*, 96 Wn. App. 398, 401-02, 979 P.2d 488 (1999); *Ervin v. Columbia Distributing, Inc.*, 84 Wn. App. 882, 891, 930 P.2d 947 (1997). The MWA compels DSHS to pay at least minimum wages for all hours worked by IPs. RCW 49.46.020; RCW 49.46.800. The CBA's terms are thus irrelevant to DSHS's MWA obligations.

DSHS arrives at its misreading of the MWA through a misguided attempt to "harmonize" the MWA with RCW 74.39A.270 and other state laws. CP 368. RCW 74.39A.270 provides that IPs are employees of the state "solely for purposes of collective bargaining." Nothing in that statute conflicts with, or needs to be harmonized with, RCW 49.46.800. That provision simply applied the MWA's minimum wage, overtime, and sick

leave requirements directly to IPs, regardless of whether they are considered “employees” under the MWA. *Supra* at 10–11. A plain reading of that express coverage provision ends the matter.

DSHS’s true dispute is with its MWA obligation to pay IPs for all “hours worked.” “In Washington, hourly workers are entitled to their contractual hourly rate of pay (or the legal minimum wage) for every hour worked.” *Hill v. Xerox Bus. Servs., LLC*, 191 Wn.2d 751, 752, 426 P.3d 703 (2018). DSHS has agreed to treat IPs as hourly workers.³¹ To honor the MWA, DSHS must therefore pay IPs at least minimum wage for every compensable hour worked. DSHS’s CARE plans cannot delimit those hours because they unreasonably intermingle employment and family relationships and discriminate against related IPs. *Supra* at 8–11.

V. The trial court erred by denying SEIU 775’s request for permanent injunctive relief.

SEIU 775 is entitled to injunctive relief, which is expressly available in a petition for review. RCW 34.05.574(1). A party who “seeks relief by temporary or permanent injunction must show (1) that he has a clear legal or equitable right, (2) that he has a well-grounded fear of immediate invasion of that right, and (3) that the acts complained of are either resulting in or will result in actual and substantial injury to him.” *Tyler Pipe Indus., Inc. v. State, Dep’t of Revenue*, 96 Wn.2d 785, 792,

³¹ CBA Art. 8.1 (“All home care workers shall be paid strictly on an hourly basis.”)

638 P.2d 1213 (1982) (quoting *Port of Seattle v. Int'l Longshoremen's & Warehousemen's Union*, 52 Wn.2d 317, 324 P.2d 1099 (1958)).

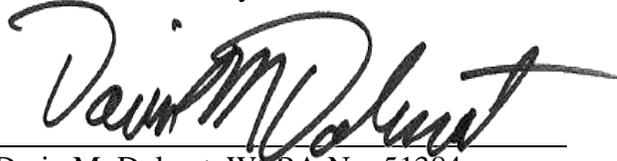
SEIU 775 has established the clear legal rights of the IPs to be paid for all hours worked, not to have compensable hours worked converted to unpaid volunteer hours, and to be free from regulations that discriminate based on household or family status. Both rules and their threatened continued application are thus interfering with and impairing, and will continue to interfere with and impair, the legal rights of the IPs. The IPs, who the rules presume provide the necessary but now underfunded CARE plan, continue to provide the amount of services deemed necessary prior to any adjustment based on “informal support” or “shared benefit” and thus are paid for fewer hours than they actually work, causing them substantial injuries. *See, e.g.*, RF WSR 12-14-064 at 40; RF WSR 14-04-097 at 479; RF WSR 15-20-054 at 32, 37-39.

CONCLUSION

This Court should reverse the judgment below and grant SEIU 775's petition and all requested declaratory and injunctive relief.

/////

Respectfully submitted this 4th day of October, 2019.

A handwritten signature in black ink, appearing to read "Darin M. Dalmat", written over a horizontal line.

Darin M. Dalmat, WSBA No. 51384
Jennifer L. Robbins, WSBA No. 40861
Sarah E. Derry, WSBA No. 47189
Barnard Iglitzin & Lavitt, LLP
18 West Mercer Street, Suite 400
Seattle, WA 98119

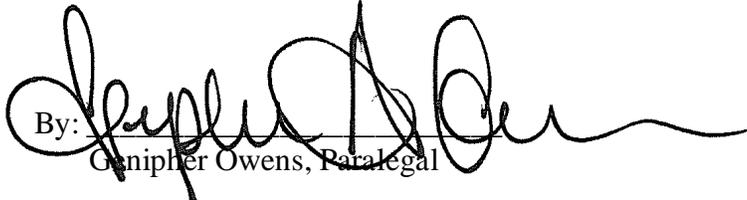
Attorneys for Appellant/Petitioner

DECLARATION OF SERVICE

I, Genipher Owens, declare under penalty of perjury under the laws of the State of Washington, that, on the date set forth below, I served the foregoing document upon the following parties in the manner noted below:

PARTY/COUNSEL	DELIVERY INSTRUCTIONS
William McGinty Margaret McLean Daniel Judge Washington State Attorney General's Office PO Box 40124 Olympia, WA 98504 Williamm1@atg.wa.gov MargaretM@atg.wa.gov DanielJ@atg.wa.gov DawnW@atg.wa.gov RebeccaK@atg.wa.gov SHOADSEF@atg.wa.gov	<input type="checkbox"/> Hand Delivery <input type="checkbox"/> Certified Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Service

DATED this 4th day of October, 2019 at Seattle,
Washington.

By: 
Genipher Owens, Paralegal

FILED
SUPREME COURT
STATE OF WASHINGTON
10/4/2019 3:40 PM
BY SUSAN L. CARLSON
CLERK

NO. 97216-8

SUPREME COURT OF THE STATE OF WASHINGTON

SEIU 775,

Appellant/Petitioner,

v.

STATE OF WASHINGTON, WASHINGTON STATE DEPARTMENT
OF SOCIAL AND HEALTH SERVICES,

Appellees/Respondents.

**SEIU 775's APPENDIX IN SUPPORT
OF BRIEF OF APPELLANT**

Darin M. Dalmat, WSBA No. 51384
Jennifer L. Robbins, WSBA No. 40861
Sarah E. Derry, WSBA No. 47189
BARNARD IGLITZIN & LAVITT LLP
18 West Mercer Street, Suite 400
Seattle, WA 98119

Attorneys for Appellant/Petitioner

APPENDIX PAGE #	DESCRIPTION
1-5	Excerpt of 78 FR 60454-01 (Oct. 1, 2013)

RESPECTFULLY SUBMITTED this 4th day of October, 2019.



Darin M. Dalmat, WSBA No. 51384
Jennifer L. Robbins, WSBA No. 40861
Sarah E. Derry, WSBA No. 47189
Barnard Iglitzin & Lavitt, LLP
18 West Mercer Street, Suite 400
Seattle, WA 98119

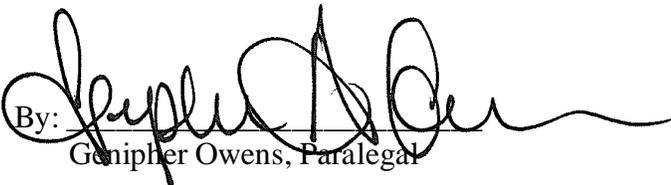
Attorneys for Appellant/Petitioner

DECLARATION OF SERVICE

I, Genipher Owens, declare under penalty of perjury under the laws of the State of Washington, that, on the date set forth below, I served the foregoing document upon the following parties in the manner noted below:

PARTY/COUNSEL	DELIVERY INSTRUCTIONS
William McGinty Margaret McLean Daniel Judge Washington State Attorney General's Office PO Box 40124 Olympia, WA 98504 Williamm1@atg.wa.gov MargaretM@atg.wa.gov DanielJ@atg.wa.gov DawnW@atg.wa.gov RebeccaK@atg.wa.gov SHOADSEF@atg.wa.gov	<input type="checkbox"/> Hand Delivery <input type="checkbox"/> Certified Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Service

DATED this 4th day of October, 2019 at Seattle,
Washington.

By: 
Genipher Owens, Paralegal

78 FR 60454-01, 2013 WL 5428279(F.R.)
RULES and REGULATIONS
DEPARTMENT OF LABOR
Wage and Hour Division
29 CFR Part 552
RIN 1235-AA05

Application of the Fair Labor Standards Act to Domestic Service

Tuesday, October 1, 2013

AGENCY: Wage and Hour Division, Department of Labor.

***60454 ACTION:** Final rule.

SUMMARY: In 1974, Congress extended the protections of the Fair Labor Standards Act (FLSA or the Act) to “domestic service” employees, but it exempted from the Act's minimum wage and overtime provisions domestic service employees who provide “companionship services” to elderly people or people with illnesses, injuries, or disabilities who require assistance in caring for themselves, and it exempted from the Act's overtime provision domestic service employees who reside in the household in which they provide services. This Final Rule revises the Department's 1975 regulations implementing these amendments to the Act to better reflect Congressional intent given the changes to the home care industry and workforce since that time. Most significantly, the Department is revising the definition of “companionship services” to clarify and narrow the duties that fall within the term; in addition third party employers, such as home care agencies, will not be able to claim either of the exemptions. The major effect of this Final Rule is that more domestic service workers will be protected by the FLSA's minimum wage, overtime, and recordkeeping provisions.

DATES: This regulation is effective January 1, 2015.

FOR FURTHER INFORMATION CONTACT: Mary Ziegler, Director, Division of Regulations, Legislation, and Interpretation, U.S. Department of Labor, Wage and Hour Division, 200 Constitution Avenue NW., Room S-3502, FP Building, Washington, DC 20210; telephone: (202) 693-0406 (this is not a toll-free number). Copies of this Final Rule may be obtained in alternative formats (Large Print, Braille, Audio Tape, or Disc), upon request, by calling (202) 693-0675 (not a toll-free number). TTY/TTD callers may dial toll-free (877) 889-5627 to obtain information or request materials in alternative formats.

Questions of interpretation and/or enforcement of the agency's current regulations may be directed to the nearest Wage and Hour Division (WHD) District Office. Please visit <http://www.dol.gov/whd> for more information and resources about the laws administered and enforced by WHD. Information and compliance assistance materials specific to this Final Rule can be found at: www.dol.gov/whd/homecare. You may also call the WHD's toll-free help line at (866) 4US-WAGE ((866)-487-9243) between 8:00 a.m. and 5:00 p.m. in your local time zone..

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Executive Summary

II. Background

III. Summary of Comments on Changes to FLSA Domestic Service Regulations

Some commenters expressed concern that the services paid family care providers typically perform, such as household work, meal preparation, assistance with bathing and dressing, etc., would not fall within the definition of companionship services under the proposed rule. See, e.g., National Association of States United for Aging and Disabilities, ANCOR, NASDDDS. If paid family care providers are not performing exempt companionship services under the FLSA, these commenters wrote, the services they provide would become more expensive, and consequently, the options for employing family members through Medicaid-funded programs or for more than 40 hours per week would be severely limited. *Id.* Additionally, Foothills Gateway, Inc., a non-profit agency that provides Medicaid-funded services to individuals with developmental disabilities in Colorado, expressed concern that if paid family care providers are entitled to minimum wage and overtime for all hours during which they provide services to the consumer, including those that were previously unpaid, the costs of care would far exceed those Medicaid will reimburse, making the paid family caregiving model unsustainable.

The Department is aware of and sensitive to the importance and value of family caregiving to those in need of assistance in caring for themselves to avoid institutional care. It recognizes that paid family caregiving, in particular through certain Medicaid-funded and certain other publicly funded programs, is increasing across the country, and that such programs play a critical role in allowing individuals to remain in their homes. The Department also recognizes that some paid or unpaid caregivers who are not family but are household members, meaning they live with the person in need of care based on a close, personal relationship that existed before the caregiving began—for example, a domestic partner to whom the person is not married—are the equivalent of family caregivers.

The Department cannot adopt the suggestion of several commenters that the services paid family care providers typically perform be categorically considered exempt companionship services. Although as commenters stated, family care providers may often spend a significant amount of time providing assistance with ADLs and IADLs, the Department is defining companionship services to include only a limited amount of such assistance for the reasons described in the section of this Final Rule explaining the revisions to § 552.6. Furthermore, there is no basis in the FLSA for treating domestic service employees who are family members of their employers differently than other workers in that category. Congress explicitly exempts family members when it is its intention to do so. See 29 U.S.C. 203(e)(3); 203(s)(2); 213(c)(1) (A), (B). The provisions of the statute regarding domestic service and companionship services do not indicate intention to exempt family members. See 29 U.S.C. 206(f), 207(l), 213(a)(15).

Interpretation of “Employ” With Regard to Family or Household Care Providers

The Department recognizes the significance and unique nature of paid family and household caregiving in certain Medicaid-funded and certain other publicly funded programs as described above. In interpreting the economic realities test to determine when someone is employed (i.e., suffered or permitted to work, 29 U.S.C. 203(g)), the Department has determined that the FLSA does not necessarily require that once a family or household member is paid to provide some home care services, all care provided by that *60488 family or household member is part of the employment relationship. In such programs, as described above, the Department will not consider a family or household member with a pre-existing close, personal relationship with the consumer, to be employed beyond a written agreement developed with the involvement and approval of the program and the consumer (or the consumer's representative), usually called a plan of care, that reasonably defines and limits the hours for which paid home care services will be provided. The determination of whether such an agreement is reasonable includes consideration of whether it would have included the same number of paid hours if the care provider had not been a family or household member of the consumer.

The Department believes this interpretation follows from the application of the FLSA “economic realities” test to the unique circumstances of home care provided by a family or household member. Ordinarily, a family or household member who provides unpaid home care to another family or household member would not be in an employment relationship with the recipient of the support. But under the FLSA, family members can be hired to be domestic service employees of other family members, in which case, unless a statutory exemption applies, they are entitled to minimum

wage and overtime for hours worked. See [29 U.S.C. 206\(f\), 207\(l\)](#) (requiring the payment of minimum wage and overtime compensation to “any employee engaged in domestic service” without creating any exception for family members); [Velez v. Sanchez, 693 F.3d 308, 327-28 \(2d Cir. 2012\)](#) (explaining that a familial relationship does not preclude the possibility that the economic realities of the situation show that an individual is a domestic service employee). The decision to select a family or household member as a paid direct care worker through a Medicaid-funded or certain other publicly funded program creates an employment relationship under the FLSA, and the services paid family or household care providers perform in those circumstances likely will not, because of the nature of the paid duties and possibly also the involvement of a third party employer, be exempt companionship services. Ordinarily, under the FLSA, including in the domestic service employment context, if an employment relationship exists, all hours worked by an employee for an employer, as defined at 29 CFR part 785 and § 552.102 and discussed elsewhere in this Final Rule, are compensable. But in the case of certain Medicaid-funded and certain other publicly funded programs, different considerations apply where a prior familial or household relationship exists which is separate and apart from the creation of any employment relationship and where the relevant paid services are the provision of home care services. Specifically, in the context of direct care services under a Medicaid-funded or certain other publicly funded home care program, the FLSA “economic realities” test does not require that the decision to select a family or household member as a paid direct care worker means that all care provided by that person is compensable. In other words, in these circumstances, the Department does not interpret the law as transforming, and does not intend anything in this Final Rule to transform, all care by a family or household member into compensable work.

For example, a familial relationship, but not an employment relationship, would exist where a father assists his adult, physically disabled son with activities of daily living in the evenings. If the son enrolled in a Medicaid-funded or certain other publicly funded program and the father decides to become his son's paid care provider under a program-approved plan of care that funds eight hours per day of services that consist of assistance with ADLs and IADLs, the father would then be in an employment relationship with his son (and perhaps the state-funded entity) for purposes of the FLSA. As explained in the sections of this Final Rule addressing [§ 552.6](#) and [§ 552.109](#), based on the nature of the paid services and possibly also the involvement of a third-party employer, the father's paid work would not fall under the companionship services exemption. If the relevant requirements (described below) are met, including that the hours of paid work described in a plan of care or similar document are reasonable as described above, the father's employment relationship with his son (and, if a joint employment relationship exists, the state or certain other publicly funded employer administering the program) extends only to the eight hours per day of paid work contemplated in the plan of care; the assistance he provides at other times is not part of that employment relationship (or those employment relationships) and therefore need not be paid.

The limits on the employment relationship between a consumer and a family or household care provider and a third-party entity and that care provider arise from the application of the “economic realities” test, described in more detail in the section of this Final Rule discussing joint employment. Specifically, where a prior familial or prior household relationship exists separate and apart from any paid arrangement for home care services, the economic realities test applies differently to the two roles played by the family or household member. The Second Circuit has identified a number of useful factors for applying the economic realities test in the family domestic service employment context, calling for consideration of: “(1) The employer's ability to hire and fire the employee; (2) the method of recruiting or soliciting the employee; (3) the employer's ability to control the terms of employment, such as hours and duration; (4) the presence of employment records; (5) the expectations or promises of compensation; (6) the flow of benefits from the relationship; and (7) the history and nature of the parties' relationship aside from the domestic labor.” [Velez, 693 F.3d at 330](#). Based on an analysis of these factors in the special situation of paid family or household care providers, an employment relationship would exist only as defined and limited by a written agreement developed with the involvement and approval of a Medicaid-funded or similar publicly funded program, usually called a plan of care, that reasonably sets forth the number of hours for which paid home care services will be provided.

Under an analysis of the economic realities of the work compensated under a plan of care or similar written agreement, the consumer or the entity administering the Medicaid-funded or similar publicly funded home care program (or perhaps both) are employers of the family or household care provider. (Again, whether the entity administering a program is a third party employer of the care provider is determined as described in the section of this preamble discussing joint employment.) The consumer, and/or the entity, recruit and hire the family or household member to provide the services described in the plan of care, may fire the family or household member from the paid position, and control the number of hours of work and the type of work the family or household member must perform. There is a clear expectation and promise of compensation, and employment records must be kept in order to receive payment. During the hours for which a family or household care provider is *60489 compensated under a plan of care, the care provider is obligated to perform the services he or she was hired to provide. In addition, a paid family or household care provider is not permitted to substitute someone else to receive payment from Medicaid for services provided pursuant to the plan of care without employer approval.

On the other hand, during the time when the family or household care provider may perform similar services beyond the hours that he or she has been hired to work under the plan of care, an analysis of the economic realities of the situation leads to the conclusion that the caregiver is not employed, and that the consumer and any entity administering the Medicaid-funded or similar publicly funded program are not employers. The family or household member has not been hired to perform this additional care, nor was he or she recruited for a paid position performing them. The family or household member has no expectation of compensation, nor has any been promised, and there will not be employment records regarding any unpaid services. During this time, the family or household member's activities are not restricted by an agreement to provide certain services, and the family or household member can choose to come and go from the home and have other family members or other people provide the supports. Importantly, the unpaid support stems from a prior familial or household relationship that is separate and apart from the initiation of any employment relationship.

The discussion above addresses only the unique circumstances that exist in the context of domestic service employment by paid family and household member caregivers. The Department believes this bifurcated analysis is warranted because of the special relationships between family and household members and the special environment of the home. It does not apply outside the home care service context; the Department views work for a family business, for example, as subject to the typical FLSA law and regulations regarding the employment relationship and hours worked. This analysis also does not generally apply to relationships that do not involve preexisting family ties or a preexisting shared household. Therefore, except as noted below, it would not apply to a direct care worker who did not have a family or a household relationship with the individual in need of services prior to the individual's need arising or the creation of the plan of care. In other words, a direct care worker who becomes so close to the consumer as to be "like family," or a direct care worker who becomes part of the consumer's household when hired to be a live-in employee, does not have a bifurcated relationship with the consumer. In those circumstances, all services the direct care worker provides fall within the employment relationship between the consumer and worker and between any third party employer and the worker; therefore, if those direct care services do not fall under the companionship services exemption, they must be compensated as required under the FLSA. By contrast, if the consumer and caregiver enter into a new family relationship during the course of an employment relationship (e.g., through marriage or civil union), then, although the family relationship did not predate the employment relationship, the bifurcated analysis described above would apply.

Additionally, the discussion above applies to third party employers that administer or facilitate the administration of certain Medicaid-funded or certain other publicly funded home care programs. These entities may be public agencies that run such programs or private organizations that have been designated to play a role in the functioning of the programs. These entities may benefit from this unique analysis only because of the entanglement with the special relationships between family and household members that necessarily result from the selection of family and household members as paid care providers through certain Medicaid-funded or certain other publicly funded programs.

Furthermore, the Department emphasizes that under this bifurcated analysis, the employment relationship is limited to the paid hours contemplated in the plan of care or other written agreement developed and approved by certain Medicaid-funded or certain other publicly funded home care programs only if that agreement is reasonable. As noted above, a determination of reasonableness will take into account whether the plan of care would have included the same number of paid hours if the care provider had not been a family or household member of the consumer. In other words, a plan of care that reflects unequal treatment of a care provider because of his or her familial or household relationship with the consumer is not reasonable. For instance, the program may not reduce the number of paid hours in a plan of care because the selected care provider is a family or household member. For example, an older woman who can no longer care for herself may enroll in a Medicaid-funded program. The program is administered by the county in which she lives and she has been assessed to need paid services for 30 hours per week beyond the existing unpaid assistance she receives from her daughter and other relatives. If the hours in the plan of care are reduced by the county to 15 hours per week because the woman's daughter is hired as the paid care provider, the paid hours in the plan of care do not reflect the economic reality of the employment relationship and therefore will not determine the number of hours that must be paid under the FLSA. In addition, a program may not require an increase in the hours of unpaid services performed by the family or household care provider in order to reduce the number of hours of paid services. See [42 CFR 441.540\(b\)\(5\)](#) (mandating that as to certain types of Medicaid-funded home care programs, unpaid services provided by a family or household member “cannot supplant needed paid services unless the . . . unpaid [services] . . . are provided voluntarily to the individual in lieu of an attendant”); Final Rule, [Medicaid Program; Community Choice First Option, Centers for Medicare and Medicaid Services, 77 FR 26828, 26864 \(May 7, 2012\)](#) (explaining that unpaid services “should not be used to reduce the level of [paid] services provided to an individual unless the individual chooses to receive, and the identified person providing the support agrees to provide, these unpaid [services] to the individual in lieu of a paid attendant”). Although the Department distinguishes between an unpaid familial or household relationship and a paid employment relationship between family and household members, it does not condone or intend to overlook subterfuges that may seek to treat family members less equally. This interpretation may not be used in a manner that interferes with the ability of all direct care workers to enjoy the full protections of the FLSA.

The “economic realities” analysis also applies to certain private pay home care situations, such as those funded by long-term care insurance, where a family or household member is paid for home care services. Specifically, where a program permits the selection of a family or household member as a paid home care provider, if a familial or household relationship existed prior to and separate and apart from any employment relationship, use of the bifurcated application of the economic realities test would be appropriate. Application of the factors for applying ***60490** the economic realities test in the family domestic service employment context described earlier in this section could lead to the conclusion that some of the hours of caregiving are part of an employment relationship and some hours are part of a familial or household relationship. How the divide between the two relationships is determined may vary depending on the structure of each program but, as in certain Medicaid and certain other publicly funded programs described above, the Department would look to a written agreement that reasonably sets forth the number of hours for which paid home care services will be provided.

FLSA “Hours Worked” Principles

Although the Department did not propose any changes to its existing rules defining what are considered hours worked under the FLSA, many commenters asked how the hours worked principles under the FLSA apply to domestic service employment. For instance, many commenters raised questions about when domestic service employees are considered to be working even though some of their time is spent sleeping, traveling, eating, or engaging in personal pursuits. The Department emphasizes that its regulations regarding when employees must be compensated for sleep time, travel time, meal periods or on-call time were not a part of this rulemaking, and they are unchanged by this Final Rule. Domestic service employees who do not qualify for the companionship services exemption or the live-in domestic service employee exemption are subject to existing rules on how to calculate hours worked, like any other employee covered under the FLSA. To address commenters' questions, however, the Department is providing the following guidance regarding the Department's established rules on compensable hours worked.

BARNARD IGLITZIN & LAVITT

October 04, 2019 - 3:40 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 97216-8
Appellate Court Case Title: SEIU 775 v. State of Washington, et al.
Superior Court Case Number: 17-2-05201-6

The following documents have been uploaded:

- 972168_Briefs_20191004153357SC648256_9011.pdf
This File Contains:
Briefs - Appellants
The Original File Name was 2019 10 04_Brief of Appellant_FINAL.pdf
- 972168_Other_20191004153357SC648256_5991.pdf
This File Contains:
Other - Appendix
The Original File Name was 2019 10 04_App. ISO Brief of Appellant_FINAL.pdf

A copy of the uploaded files will be sent to:

- DanielJ@atg.wa.gov
- DawnW@atg.wa.gov
- LPDArbitration@atg.wa.gov
- RebeccaK@atg.wa.gov
- SGOOlyEF@atg.wa.gov
- SHOADSEF@atg.wa.gov
- alicia.young@atg.wa.gov
- comcec@atg.wa.gov
- derry@workerlaw.com
- ivy.rosa@columbialegal.org
- jonathan.fork@nwjustice.org
- kathyj@nwjustice.org
- margaretm@atg.wa.gov
- nicole.beck-thorne@atg.wa.gov
- robbins@workerlaw.com
- shsappealnotification@atg.wa.gov
- sujatha.branch@nwjustice.org
- susank@dr-wa.org
- williamm1@atg.wa.gov

Comments:

Sender Name: Jennifer Woodward - Email: woodward@workerlaw.com

Filing on Behalf of: Darin M Dalmat - Email: dalmat@workerlaw.com (Alternate Email: woodward@workerlaw.com)

Address:
18 W. Mercer St., Ste. 400

Seattle, WA, 98119
Phone: (206) 257-6016

Note: The Filing Id is 20191004153357SC648256