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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.

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

INTRODUCTION	1
ARGUMENT	2
I. DSHS IS LEGALLY OBLIGATED TO PAY IPs IN ACCORDANCE WITH FEDERAL AND STATE WAGE-AND-HOUR LAWS.	2
A. DSHS jointly employs IPs under the FLSA as a matter of law.	3
B. The MWA expressly requires DSHS to pay IPs in accordance with MWA requirements.	7
II. THE SHARED BENEFIT RULE VIOLATES THE FLSA AND THE MWA.	9
A. DSHS’s belated litigation position cannot cure its failure to address SEIU’s objection during the rulemaking process.	9
B. The Shared Benefit Rule causes IPs to perform uncompensated work because DSHS expects IPs to perform tasks in the CARE plan without authorizing full payment for those services.	11
C. This Rule discriminates against related IPs.	18
III. THE INFORMAL SUPPORT RULE IS UNLAWFUL.	20
A. The Informal Support Rule intermingles family and employment relationships, causing any personal volunteering to spill over into employment.	20
B. The Informal Support Rule impermissibly discriminates against related IPs.	24
CONCLUSION	25

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Anfinson v. FedEx Ground Package Sys., Inc.</i> , 174 Wn.2d 851, 281 P.3d 289 (2012).....	8
<i>Arkinson v. Ethan Allen, Inc.</i> , 160 Wn.2d 535, 160 P.3d 13 (2007).....	4
<i>Becerra v. Expert Janitorial, LLC</i> , 181 Wn.2d 186, 332 P.3d 415 (2014).....	5, 7, 8
<i>Bonnette v. Cal. Health & Welfare Agency</i> , 704 F.2d 1465 (9th Cir. 1983)	6, 7
<i>Chao v. Gotham Registry, Inc.</i> , 514 F.3d 280 (2d Cir. 2008).....	12
<i>Doe v. City of Albuquerque</i> , 667 F.3d 1111 (10th Cir. 2012)	20
<i>Kisor v. Wilkie</i> , 588 U.S. ___, 139 S.Ct. 2400, 204 L.Ed. 841 (2019).....	11
<i>La. Fed. Land Bank Ass’n, FLCA v. Farm Credit Admin.</i> , 336 F.3d 1075 (D.C. Cir. 2003)	10
<i>Ly Chhen v. Boeing Co.</i> , C18-779-MJP, 2018 WL 4103665 (W.D. Wash. Aug. 29, 2018)	5
<i>Mumbower v. Callicott</i> , 526 F.2d 1183 (8th Cir. 1975)	13
<i>Natural Res. Defense Council, Inc. v. SEC</i> , 389 F. Supp. 689 (D.D.C. 1974).....	10
<i>Oliver v. Pac. Nw. Bell Tel. Co., Inc.</i> , 106 Wn.2d 675, 724 P.2d 1003 (1986).....	19

<i>Reich v. Dept. of Conservation & Nat. Resources</i> , 28 F.3d 1076 (11th Cir. 1994)	12
<i>Salinas v. Commercial Interiors, Inc.</i> , 848 F.3d 125 (4th Cir. 2017)	5, 6, 7
<i>St. James Hosp. v. Heckler</i> , 760 F.2d 1460 (7th Cir. 1985)	10
<i>Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123</i> , <i>No. 409</i> , 321 U.S. 590, 64 S. Ct. 698, 88 L. Ed. 949 (1944).....	18
<i>Torres-Lopez v. May</i> , 111 F.3d 633 (9th Cir. 1997)	5, 7
<i>Wash. Indep. Tel. Ass'n v. Wash. Utils. & Transp. Com'n</i> , 148 Wn.2d 887, 64 P.3d 606 (2003).....	10
<i>Williams v. Aona</i> , 121 Hawai'i 1, 210 P.3d 501 (2009).....	5
<i>WSNA v. Sacred Heart Med. Ctr.</i> , 175 Wn.2d 822, 287 P.3d 516 (2012).....	18
<i>Zheng v. Liberty Apparel Co., Inc.</i> , 355 F.3d 61 (2003).....	7

Statutes

Fair Labor Standards Act (FLSA)(29 U.S.C. § 201-19).....	<i>passim</i>
Minimum Wage Act (RCW 49.46).....	<i>passim</i>
RCW 34.05.325(6)(a)(i).....	10
RCW 34.05.375	11
RCW 49.46.010(2).....	8
RCW 49.46.010(3).....	12
RCW 49.46.010(7).....	17

RCW 49.46.800	7, 8
RCW 74.09.520(3).....	17
Other Authorities	
29 C.F.R. § 531.3(d)(1).....	17
29 C.F.R. § 553.101(d)	20
29 C.F.R. § 553.102(a).....	20
29 C.F.R. § 785.11	12
29 C.F.R. § 785.13	12
29 C.F.R. § 785.19	17, 18
Home Care Rule, 78 Fed. Reg. 60454-01 (2013)	<i>passim</i>
Joint Employment Rule, 85 Fed. Reg. 2820, 2859 (Jan. 16, 2020) (codified at 29 C.F.R. § 791.2(3)(i)).....	7
L&I Admin. Policy	
E.S.A.1	12, 20
WAC 296-126-002(3).....	12
WAC 296-126-028(1).....	17
WAC 388-71-0500.....	6
WAC 388-71-0515(3).....	12, 13, 15
WAC 388-103-0130(2).....	15
WAC 388-106-0010.....	16
WAC 388-106-0130(2).....	13, 21, 22
WAC 388-106-0130(2)(a)	13
WAC 388-106-0130(2)(b)	24

INTRODUCTION

The Department of Social and Health Services (DSHS) belatedly asserts that it does not bear any Fair Labor Standards Act (FLSA) obligations to Individual Providers (IPs), even though it has formally acknowledged those obligations in multiple proceedings, and the undisputed terms of its collective bargaining agreement (CBA) with SEIU 775 (SEIU) make it the IPs' joint employer as a matter of law.

DSHS defends the validity of its Shared Benefit Rule based on the mistaken premise, unsupported by the record or the law, that the rule does not require IPs to work without pay. In fact, the Rule's plain text provides that it applies only when an IP *will perform* specified Medicaid-covered services required by their clients. DSHS's CARE plans expressly include those "shared benefit" services and that they are "being performed" by the IPs; they thus fall within the scope of the employment relationship and DSHS is obligated by federal and state law to pay for them. The FLSA and state Minimum Wage Act (MWA) require DSHS to pay for all work it suffers or permits. DSHS's separate rule requiring work to be done "within the number of hours authorized" is thus no defense to its failure to compensate IPs for all work they perform, especially because DSHS expects and benefits from that work.

Its defense of the Informal Support Rule also falls flat because the

Informal Support Rule does not clearly distinguish employment and family relationships such that any volunteering an IP provides falls clearly within the family relationship without affecting the scope of the employment relationship. Instead, DSHS uses an IP's volunteering to apply an across-the-board adjustment to paid hours, artificially deflating the scope of employment. The FLSA and MWA both forbid that result.

Ultimately, the challenged rules cannot pass muster under either law because they do not fairly reflect the economic reality of IPs' employment relationship. Both rules quantify the Medicaid-covered services an IP is expected to and will actually provide to a client. Both rules then convert the frequency of assistance deemed available as "shared benefit" or "informal support" (e.g., the number of times per day or week a task is provided) into a number of hours by which compensable hours are reduced. Because both rules result in a failure to pay IPs for all compensable work, the Court should invalidate them both.

ARGUMENT

I. DSHS is legally obligated to pay IPs in accordance with federal and state wage-and-hour laws.

DSHS concludes its brief by attacking two threshold questions: whether it has FLSA obligations to IPs as their joint employer and whether the MWA allows DSHS to pay IPs only for hours worked within their clients' authorized benefit hours regardless of how its rules distort the

contours of the employment relationship. DSHS Br. 35–43. Understanding the errors in these misplaced attacks is a necessary first analytic step.

A. DSHS jointly employs IPs under the FLSA as a matter of law.

DSHS admits it is subject to the FLSA vis-à-vis IPs. DSHS Br. 10 (acknowledging it amended the Informal Support Rule to attempt compliance with the FLSA).¹ The rulemaking file confirms that DSHS represented to the public and the Legislature that the 2018 Informal Support Rule amendments were mandated by—and compliant with—the FLSA. Rulemaking File (RF) WSR 18-16-004 at 22–41. Yet, DSHS now argues that the rules are not invalid because its compliance with the FLSA is only “voluntary.” DSHS Br. 38–39. When DSHS promulgated the 2018 rule and implemented related policy changes, it did not claim FLSA compliance was only “voluntary.” *See* WSR 18-16-004 at 22–41.²

In fact, DSHS claimed it was exempt from the “DSHS Executive

¹ *See also* H. Final Bill Rep. E2SHB 1725 (available at <http://lawfilesexternal.wa.gov/biennium/2015-16/Pdf/Bill%20Reports/House/1725-S2.E%20HBR%20FBR%2016%20E1.pdf>) (citing FLSA and Home Care Rule as reason for imposing workweek limits on IPs).

² In an official policy document issued “to comply with the FLSA,” DSHS explained: “In August 2015, the Court of Appeals issued a unanimous opinion affirming the original Final Rule decision by the federal Department of Labor (DOL) to have [FLSA] rules apply to virtually all home care workers. FLSA has applied to Home Care Agencies for many years, but application of these rules to Individual Providers is a significant policy change Only hours worked within the scope of the employment relationship are covered by the FLSA.” RF WSR 18-16-004 at 29–34. DSHS re-assessed clients and paid back IPs to April 1, 2016, where informal support adjustments were made inconsistent with DSHS’s view of the FLSA.

Order on rule making” because its new rule was “[r]equired by federal or state law or *required* to maintain federally delegated or authorized programs,” citing only the FLSA throughout the rulemaking file as any source of those requirements. RF WSR 18-16-004 at 2 (emphasis added). If DSHS’s representations were not true, the Executive Order would likely have barred the rulemaking promulgating the Informal Support Rule.³ Because it got the legal benefit of avoiding that bar, judicial estoppel precludes DSHS from now disclaiming FLSA applicability. *Arkinson v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538–39, 160 P.3d 13 (2007).

In any event, DSHS is an FLSA joint employer of IPs as a matter of law. DSHS co-determines IPs’ working conditions through a CBA that, for all IPs, sets a wage rate, determines hours of work, provides for resolution of grievances, establishes mandatory training, offers paid time off, and provides for employment benefits. SEIU Br. 23–24, 43–46. These undisputed facts make DSHS the IPs’ FLSA joint employer under DOL administrative interpretations and applicable case law. SEIU Br. 43–46.

Courts appropriately make joint-employment determinations all the time as a matter of law where material facts are undisputed. *See, e.g.*,

³ Although the rulemaking file refers to the “DSHS Executive Order on rule making,” no such order appears on DSHS’s website and DSHS’s counsel has not provided it upon request, though the State appears willing to respond to SEIU’s Public Records Act request for it. Nonetheless, it is likely similar to the Governor’s Executive Order 10-06, which barred agencies from promulgating rules unless legally required.

Salinas v. Commercial Interiors, Inc., 848 F.3d 125, 145–47, 151 (4th Cir. 2017); *Torres-Lopez v. May*, 111 F.3d 633, 642–45 (9th Cir. 1997); *see also Becerra v. Expert Janitorial, LLC*, 181 Wn.2d 186, 332 P.3d 415 (2014) (“In the joint employment context, summary judgment may be available even if the joint employment factors are split between finding and not finding the relationship exists.”). Here, the Court can hold DSHS is the IPs’ FLSA joint employer as a matter of law because the terms of the parties’ CBA are undisputed.⁴

Those terms more than suffice to make DSHS the IPs’ joint employer under the DOL’s Administrative Interpretation No. 2014-2 (June 19, 2014) (Home Care AI), which concludes that state agencies employ IPs in consumer-directed Medicaid programs where the state agency collectively bargains over wages, training, grievance procedures, and other benefits. SEIU Br. 45–46. DSHS does not address, much less dispute, the application of the Home Care AI.

⁴ The Department acknowledges that the Court may consider “any materials of which the Court may take judicial notice” DSHS Br. 36. SEIU specifically requested judicial notice of the parties’ CBA, as it had in the proceedings below. SEIU Br. 23 n.9. The Department also asked the trial court to consider the CBA. CP 370 n. 10. Judicial notice is entirely proper here because the CBA is publicly available on the State’s official website, SEIU Br. 23 n.9, and is “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” ER 203(b). *See also Williams v. Aona*, 121 Hawai’i 1, 11 n.6, 210 P.3d 501, 511 n.6 (2009) (taking judicial notice of CBA); *Ly Chhen v. Boeing Co.*, C18-779-MJP, 2018 WL 4103665 at *1 (W.D. Wash. Aug. 29, 2018) (same).

The CBA terms and applicable DSHS regulations also show that DSHS and clients jointly employ IPs. DSHS (1) directs and supervises IPs, as it trains IPs, assesses needed personal care services, and sets CARE plan terms, SEIU Br. 23–24, 46; (2) establishes IP qualifications and training requirements; conducts background checks; and may deny payment, reject a client’s choice of provider, terminate an IP contract, or suspend an IP contract for a number of reasons, including performance issues, WAC 388-71-0500 through -05834; (3) determines IPs’ benefits, paid time off, grievance resolution and other critical terms of employment, SEIU Br. 23–24; (4) has a permanent relationship insofar as the clients need Medicaid-funded personal care services; (5) and has such employer functions as payroll and workers’ compensation. *See Salinas*, 848 F.3d at 141 (listing factors).⁵

DSHS’s reliance on *Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983), does not aid its cause because courts have repeatedly recognized that the decision’s four factors—(1) hiring/firing; (2) supervising; (3) wage setting; and (4) maintaining employment records—are sufficient but not necessary to establish joint employment. *See, e.g., Salinas*, 848 F.3d at 136 (*Zheng v. Liberty Apparel*

⁵ DSHS resists this conclusion because, in its view, it has the same relationship to IPs as to other Medicaid contractors. DSHS Br. 37. Yet, it identifies no other contractor for whom it performs all of the employment functions set forth above.

Co., Inc., 355 F.3d 61, 69 (2003)); *Torres-Lopez*, 111 F.3d at 639–42; *Becerra*, 181 Wn.2d at 196-99 (in MWA case, adopting Ninth Circuit framework in *Torres–Lopez*; factors “are not exclusive and are not to be applied mechanically;” trial court erred in failing to consider factors other than those in *Bonnette*).⁶ Even taking the *Bonnette* factors as determinative, DSHS jointly employs IPs because it actually exercises substantial control over wage setting and numerous other working conditions through collective bargaining. *Supra* at 5–7.⁷

B. The MWA expressly requires DSHS to pay IPs in accordance with MWA requirements.

DSHS has now abandoned the view of the MWA it offered to the trial court—that RCW 49.46.800 requires it only to negotiate wages in a CBA that facially meet or exceed statutory minimums. CP 369–70. Instead, it now accuses SEIU of claiming DSHS must pay an IP “for any personal care services the IP provides regardless of the client’s benefit

⁶ The California social workers’ periodic involvement in supervision in *Bonnette* was not determinative of the economic reality of the relationship, which was determined in far greater part by wage-setting and control over compensable work. Especially in light of *Salinas*, *Torres Lopez*, and *Zheng*, this Court should reject DSHS’s crabbed view that significant supervision of daily tasks is a necessary prerequisite to joint employment.

⁷ The Department of Labor’s recent regulation on Joint Employer Status Under the Fair Labor Standards Act makes clear that the exercise of “one or more of these indicia of control” is sufficient to render an entity a joint employer. 85 Fed. Reg. 2820, 2859 (Jan. 16, 2020) (codified at 29 C.F.R. § 791.2(3)(i)). That rule expressly recognizes the ongoing viability of the Home Care AI, *Id.* at 2822 & 2822 n. 33, which noted that wage setting is alone nearly conclusive evidence of joint employment. Home Care AI at 11. “High control consumer-directed programs,” like DSHS’s, establish joint employment of home care providers. *Id.* at 14.

level.” DSHS Br. 41. This grossly misrepresents SEIU’s position. SEIU has never argued that DSHS must pay IPs for care they provide within the scope of personal relationships between them and their clients. Rather, SEIU claims that the MWA’s requirement that “[t]he state shall pay individual providers ... in accordance with the minimum wage, overtime, and paid sick leave requirements of this chapter,” RCW 49.46.800, means that DSHS must pay “IPs at least minimum wage for every *compensable* hour worked.” SEIU Br. 48. That means every hour requested, suffered, permitted or allowed. Dep’t of Labor & Indus. (L&I) Admin. Policy ES.C.2 (rev’d 2008). In other words, only a *reasonable* CARE plan reflecting the economic realities of an IP’s performance of necessary Medicaid-covered services can properly determine the scope of compensable hours. SEIU Br. 8–11.⁸

The challenged rules, however, make DSHS’s CARE plans unreasonable. They unlawfully shortchange IPs of pay for all hours

⁸ The definitions of “employee” and “employ” are “functionally identical under” the FLSA and MWA, and the definition of employee incorporates the economic realities test. 29 U.S.C. 203(g) (“Employ’ includes to suffer or permit to work.”); RCW 49.46.010(2) (“Employ’ includes to permit to work.”); *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 868, 281 P.3d 289 (2012) (relying on legislative history and the liberal construction of the MWA to hold “economic realities” test applies to determining employee status); *Becerra*, 181 Wn.2d at 196 (“economic reality” test applies under FLSA and MWA to determining joint employer relationship). Although Washington has not adopted a corollary to the Home Care Rule, the rule is grounded in the “economic realities” principles. 78 FR at 60488–89. SEIU 775 argues that compensable hours under both statutes are the same (i.e., authorized hours before the rules’ adjustments).

suffered or permitted by artificially deflating the scope of the employment relationship, paying for some work through in-kind benefits rather than legal tender, intermingling family and employment relationships, and treating employees as partial “volunteers.” *See* Parts I–III, *infra*; *cf.*, L&I, Admin. Policy ES.A.1, § 6(d) (rev. July 14, 2014) (prohibiting volunteering within the scope of employment). Because the CARE plans are unreasonable, they cannot be used to set the limit on compensable work.

The MWA, like the FSLA, entitles IPs to pay for all compensable hours, which is the number of hours authorized to provide Medicaid-covered services prior to the unlawful adjustments for shared benefit and informal support.

II. The Shared Benefit Rule violates the FLSA and the MWA.

A. DSHS’s belated litigation position cannot cure its failure to address SEIU’s objection during the rulemaking process.

DSHS acknowledges that at the time it promulgated the Shared Benefit Rule it did not rebut or even respond to SEIU’s objection that the Rule would cause IPs to perform uncompensated work. DSHS Br. 31–33. It claims it was not required to do so because, during this litigation, it has found an explanation based on what it believes to be “a straightforward application of the rule.” *Id.* at 32. The law rejects that post hoc maneuver.

The APA expressly requires an agency's concise explanatory statement to identify "the agency's reasons for adopting the rule." RCW 34.05.325(6)(a)(i). This requirement enables a reviewing court to consider "the agency's explanations for adopting the rule as part of its review in order to determine whether the agency's action was willful and unreasoning and taken without regard to the attending facts or circumstances." *Wash. Indep. Tel. Ass'n v. Wash. Utils. & Transp. Com'n*, 148 Wn.2d 887, 906, 64 P.3d 606 (2003). *Accord Natural Res. Defense Council, Inc. v. SEC*, 389 F. Supp. 689, 701 (D.D.C. 1974) (purpose of comparable requirement under federal APA "is to provide for judicial review an enunciation of the basis and rationale of the agency's action," so reviewing court can determine validity of agency action).

Although agencies are not required to address every fact or opinion offered in comments to proposed rules, they must respond to those "comments which, if true, would require a change in the proposed rule" as SEIU's would. *La. Fed. Land Bank Ass'n, FLCA v. Farm Credit Admin.*, 336 F.3d 1075, 1080 (D.C. Cir. 2003) (cleaned up). DSHS cannot cure its rulemaking failure through its litigation briefs: an agency's "post hoc attempts to respond to ... comments on appeal are insufficient and will not remedy the failure to do so in the basis and purpose statement." *St. James Hosp. v. Heckler*, 760 F.2d 1460, 1469 (7th Cir. 1985) (citing *Motor*

Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983)).

By failing to respond to SEIU's objection, DSHS deprived this Court of any evidentiary basis to show that, during the rulemaking process, it considered whether the Rule would unlawfully result in uncompensated work. This failure entails another fatal consequence. It strips DSHS of any deference that might otherwise be accorded its interpretations of its regulations. *Kisor v. Wilkie*, 588 U.S. ___, 139 S.Ct. 2400, 2417, 204 L.Ed. 841 (2019). This Court should review the Shared Benefit Rule *de novo* without deference to DSHS's litigation position.

Finally, SEIU does not charge DSHS with the procedural defect of failing to complete a concise explanatory statement. *Cf.*, DSHS Br. 49. As explained, that statement provides affirmative evidence that DSHS failed to consider the relevant facts and law, not that it considered relevant material but simply forgot to explain itself. *Supra* at 9–11. The two-year limitation period under RCW 34.05.375 is thus irrelevant.

B. The Shared Benefit Rule causes IPs to perform uncompensated work because DSHS expects IPs to perform tasks in the CARE plan without authorizing full payment for those services.

The Shared Benefit Rule results in IPs performing unpaid work because IPs receive only “in-kind” compensation for some portion of their

work performing Medicaid-covered services. SEIU Br. 11–16, 30–33. The Court should reject each of DSHS’s responses to this argument in turn.

First, DSHS contends that its rule prohibiting IPs from working beyond clients’ authorized hours, WAC 388-71-0515(3), renders such work non-compensable. DSHS Br. 28. This argument is circular. DSHS must pay for all work it suffers or permits, including work it has not affirmatively authorized. 29 U.S.C. § 203(g); 29 C.F.R. § 785.11; RCW 49.46.010(3); WAC 296-126-002(3). Under state law, the Department

may not avoid or negate payment of regular or overtime wages by issuing a rule or policy that such time will not be paid or must be approved in advance. If the work is performed, it must be paid. It is the employer’s responsibility to ensure that employees do not perform work that the employer does not want performed.

L&I Admin. Policy, ES.C.2, § 1. Federal law follows the same approach:

In all such cases it is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed. It cannot sit back and accept the benefits without compensating for them. *The mere promulgation of a rule against such work is not enough.* Management has the power to enforce the rule and must make every effort to do so.

29 C.F.R. § 785.13 (emphasis added); *see also Reich v. Dept. of Conservation & Nat. Resources*, 28 F.3d 1076, 1081–84 (11th Cir. 1994) (where agency constructively knew work was performed beyond 40 hours per week, it was liable to pay overtime for such work, notwithstanding contrary policy); *Chao v. Gotham Registry, Inc.*, 514 F.3d 280, 283–91 (2d Cir. 2008) (similar); *Mumbower v. Callicott*, 526 F.2d 1183, 1187–88

(8th Cir. 1975) (similar).

Here, DSHS clearly suffered or permitted IPs to perform the Medicaid-covered services outlined in the plan of CARE as part of the IP–client employment relationship at the number of hours authorized prior to the shared benefit adjustments, even though DSHS deems only a portion of “shared” IADLs compensable. WAC 388-71-0515(3). Indeed, the very regulation that instructs IPs not to work beyond authorized hours also requires IPs to “provide services as outlined in the client’s plan of care,” which necessarily include those DSHS has determined IPs will provide as shared benefit. *Id.* If the IP did not perform these anticipated “shared benefits,” clients’ needs would be unmet. WAC 388-106-0130(2)(a).

DSHS admits that its CARE plans’ shared benefit determinations reflect the frequency that IPs will perform IADLs in the plan period, as reported to Department case managers. DSHS Br. 13.⁹ At a minimum, then, DSHS expects and knowingly tolerates that IPs will perform the shared benefit IADLs in the CARE plan at the assessed frequency for the plan period. WAC 388-106-0130(2)(a). DSHS has at least constructive knowledge of that work.¹⁰ It thus suffers or permits the performance of

⁹ Where clients employ agency providers or other unpaid providers, the CARE plans also reflect the frequency that those other providers will perform IADLs.

¹⁰ Any mid-year change in their frequency would trigger a reassessment and a new plan. DSHS Br. 46 (citing WAC 388-106-0050(2)(c)).

IADLs for the number of hours called for by the CARE plans prior to the shared benefit adjustments and is liable to pay fully for those services.

Second, DSHS contends that the distributional nature of the CARE program, which allocates a fixed budget appropriation in proportion to clients' assessed needs, allows it to partially pay for employment services. DSHS Br. 29. This purported defense is also circular and misunderstands the operation of the Home Care Rule.

That rule allows agencies like DSHS to limit the scope of the employment relationship through a reasonable plan of care. 78 Fed. Reg. 60454-01, 60488 (2013). Such reasonable plans allow employers to keep preexisting family relationships “separate and apart from” the newly created employment relationship. *Id.* In the employment relationship, the consumer and/or third-party employer hire the caregiver “to provide the services described in the plan of care” and, within the scope of the employment relationship, the “care provider is obligated to perform the services he or she was hired to provide.” *Id.* By contrast, where a caregiver provides care as part of a preexisting family relationship, the caregiver has “no expectation of compensation, nor has *any* been promised” *Id.* at 60489 (emphasis added). Any unpaid support provided as part of this preexisting family relationship must be kept “separate and apart from the initiation of any employment relationship.” *Id.* The Home Care Rule thus

requires the dual relationships between the IP and the client to operate separately: employment services must be fully paid per minimum wage and overtime requirements and family care must be fully unpaid.

Here, services subject to the Shared Benefit Rule fall on the employment side of the line. When a DSHS case assessor determines that a client needs paid assistance with an IADL at a certain frequency—for example, making lunch every week day—the preparation of those week day lunches becomes part of the employment relationship: the client hires an IP to make them, the IP expects to be paid for that work, and the IP is obligated to do it. WAC 388-71-0515(3); *supra* at 14. It is *after* DSHS determines the client needs those lunches and the IP will provide them that DSHS makes the “shared benefit” determination and adjustment. WAC 388-103-0130(2). Having assessed week day lunches as requiring paid services, and thus as part of the employment relationship, DSHS must comply with FLSA and MWA with respect to those services.

In short, the distributional aspect of the CARE program means only that some clients may in fact require personal care beyond the scope of the employment relationship that is either wholly unmet or met through unpaid family relationships. DSHS may use reasonable CARE plans to define the scope of the employment relationship. But once it deems specified services to fall within that relationship, it must adhere to the

FLSA and MWA when compensating for them. The Shared Benefit Rule does not do this. It identifies services that DSHS expects will be provided as part of the employment relationship and then it shortchanges pay for those services. Doing so does not reflect the economic reality of the employment relationship and is unreasonable.

Third, DSHS contends that the “shared” services are not compensable work because, in its view, IPs primarily benefit from those services and clients benefit only incidentally from them. DSHS Br. 30–31. This contention errs factually and legally.

Factually, nothing in the rulemaking file or DSHS’s regulations supports DSHS’s bald claim that it applies the Shared Benefit Rule only to IADLs that “primarily” benefit the IP and only “incidental[ly]” benefit the Medicaid client. DSHS Br. 30; WAC 388-106-0010 (defining shared benefit as whenever a benefit is shared). What’s more, the very inclusion of a client’s IADL in a CARE plan means that the State has determined the client needs that personal care service due to his or her “level of functional disability” RCW 74.09.520(3).¹¹ *Accord* 388-106-0075 (“How is my *need* for personal care services assessed in CARE?”)

¹¹ In the event there is not enough funding to pay for all clients’ needed personal care services, DSHS is directed to prioritize services for those “persons with the greatest need as determined by the assessment of functional disability.” *Id.* It is thus fair to characterize the CARE assessment as determining clients’ needs rather than workers’ benefits.

(emphasis added). This law shows that providing the IADL primarily benefits the client and, at most, only incidentally benefits the IP.

Legally, under the FLSA, without an affirmative showing that a service primarily benefits the employee, employers cannot credit the value of those services toward wages. 29 C.F.R. § 531.3(d)(1) (facilities that are “primarily for the benefit or convenience of the employer” cannot be credited). Under the MWA, wages must be paid in legal tender or by checks on banks, convertible into cash on demand at full face value. RCW 49.46.010(7).¹² And the Home Care Rule expressly refutes DSHS’s position regarding meals. Meal periods are non-compensable only if “the employee is completely relieved from duty for the purposes of eating a regular meal.” 78 Fed. Reg. 60454-01, 60492 (2013) (discussing 29 C.F.R. § 785.19). However, a “domestic service employee is not relieved from duty if he or she is eating with the consumer and is required to feed or otherwise assist that individual while eating.” *Id.*¹³

The Shared Benefit Rule does not relieve IPs from duty when they prepare meals for their clients (and share the meal), get wood to heat their

¹² Other items of value like meals are not wages and cannot be considered part of the wages earned. WAC 296-126-028(1). *Deductions* for such items can be made from gross wages but only where authorized by the employee, in writing, in advance, and accruing to the benefit of the employee. *Id.*

¹³ This Court has followed a similar approach in construing the MWA. *See, e.g., WSNA v. Sacred Heart Med. Ctr.*, 175 Wn.2d 822, 829–33, 287 P.3d 516 (2012) (nurses entitled to overtime compensation for breaks they had to work through).

clients' homes (and are warmed by their clients' stoves), shop for their clients' essentials (and pick up something incidental for themselves), nor clean their clients' homes (and themselves enjoy a clean working or living environment). The IP is hired to do these tasks based on clients' need. Indeed, the time, place, and manner of such efforts would likely differ if they primarily benefited the IP. Clients, not IPs, primarily benefit from these services.¹⁴

Ultimately, none of DSHS's rejoinders overcome SEIU's showing that the Shared Benefit Rule results in the expectation that IADLs will be performed for free at a specified frequency (converted by DSHS into a certain number of hours) within the employment relationship. DSHS has an affirmative obligation, under both the FLSA and the MWA, to ensure work performed within that employment relationship is paid. Its Shared Benefit Rule inevitably leads to violations of that obligation.

C. This Rule discriminates against related IPs.

Contrary to the State's position (DSHS Br. 33), the CARE plan as a whole defines the line between employment and family by outlining which Medicaid-covered services need to be and will be provided by particular care providers. 78 Fed. Reg. at 60489 (assessing whether the

¹⁴ DSHS's reliance on *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, No. 409, 321 U.S. 590, 598, 64 S. Ct. 698, 88 L. Ed. 949 (1944), is thus inapposite.

“plan of care,” as a whole, resulted in discrimination). The CARE plan as a whole—including the Shared Benefit Rule that comprises it in part—is thus subject to the Home Care Rule’s non-discrimination requirement. *Id.*

DSHS admits that the IADL of housework will “usually result in a shared benefit if the provider and the client live together.” DSHS Br. 34–35.¹⁵ It seeks to minimize this discrimination by hypothesizing circumstances it claims will result in “no shared benefit,” DSHS Br. 35, even though it makes no effort to explain how its rule would compel that result. In any event, a rule or practice can fairly be deemed discriminatory if it “falls more harshly on a protected class.” *Oliver v. Pac. Nw. Bell Tel. Co., Inc.*, 106 Wn.2d 675, 679, 724 P.2d 1003 (1986) (citing *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 349, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977)). The hypothetical possibility that the Shared Benefit Rule may not discriminate against related IPs in every conceivable situation does not disprove that it falls more harshly on related IPs in the “usual[.]” situation, which is sufficient to establish discrimination.¹⁶

¹⁵ DSHS does not address SEIU’s contention that the Shared Benefit Rule’s application to wood supply also discriminates against related IPs (SEIU Br. 34), conceding the point.

¹⁶ The standard of review does not bar this conclusion. Although DSHS contends that facial rule challenges require the petitioner to prove that there are “no set of circumstances” in which the rule can lawfully be applied, it confuses the results of facial invalidity with the standard of proof to demonstrate invalidity. *See, e.g., Doe v. City of Albuquerque*, 667 F.3d 1111, 1122–1127 (10th Cir. 2012). Proof of facial invalidity depends ultimately on “the relevant [legal] test,” not proof of invalidity in every conceivable circumstance. *Id.* at 1126. Here, the relevant legal test is discrimination

III. The Informal Support Rule is unlawful.

A. The Informal Support Rule intermingles family and employment relationships, causing any personal volunteering to spill over into employment.

The Informal Support Rule impermissibly mixes family and employment relationships by baking volunteering within the family relationship into the very CARE assessment used to define the employment relationship. SEIU Br. 38–41. This runs headlong into FLSA and MWA regulations that prohibit employers from soliciting employees to volunteer, without compensation, additional time to do work for which they are employed. 29 C.F.R. § 553.101(d); 29 C.F.R. § 553.102(a); L&I Admin. Policy E.S.A.1, § 6(d) (MWA guidance stating same).

DSHS responds with hypotheticals that bear no resemblance to the actual operation of its Rule. DSHS Br. 20–27. For example, DSHS suggests that related IPs could wish to volunteer, for dignitary or personal reasons, to care for their client while at church or when preparing Sunday brunch. DSHS Br. 21 n.10. First, attending church services can never be a Medicaid-covered service. Second, SEIU agrees that if a reasonable plan of care included an IP's preparation of only weekday meals, then a daughter/IP's volunteering to make Sunday brunch for her mother/client

within the meaning of the Home Care Rule. DSHS admits that in the usual case, the Share Benefit Rule discriminates against related IPs. This admission is enough to establish unlawful discrimination.

would be volunteering outside the scope of the employment relationship and within the scope of the family relationship. That is permitted by the Home Care Rule. *See* DOL Fact Sheet #79F, RF WSR 18-16-004 at 27 (third bullet).

The problem with DSHS's Informal Support Rule is not that it allows related IPs to provide some care voluntarily. The problem is that the Rule does not first draw a clear line distinguishing the employment relationship from the family relationship so that any volunteering an IP chooses to do falls clearly within the family relationship without affecting the scope of the employment relationship. Specifically, DSHS aggregates an IP's volunteering on any given task with volunteering for all other personal care tasks and applies an across-the-board percentage discount to cut compensation for *all* paid tasks. WAC 388-106-0130(2). DSHS characterizes this formula as "mathematically complex." DSHS Br. 9. But the formula is simply a linear equation whose independent variable is the average numeric value assigned to the amount, by quartile, of informal support available for each task. SEIU Br. 13 n.4; WAC 388-106-0130(2).

Because DSHS has chosen to adjust CARE hours through an across-the-board percentage discount driven by quartile-based frequency measures, a related IP's decision to volunteer for a particular task within the IP's preexisting family relationship with her client *necessarily affects*

the compensation available to pay for *all paid services within the employment relationship*. WAC 388-106-0130(2)(b). Instead of allowing IPs to volunteer in circumstances clearly outside the employment relationship without affecting the scope of the employment relationship, DSHS's Informal Support Rule perversely measures IPs' personal volunteering and uses that volunteering to shrink the availability of compensable employment hours. The Home Care Rule forbids that unlawful feedback loop. In the language of DSHS's example, when a daughter/IP volunteers to make Sunday brunch for her mother/client, under DSHS's Rule that choice affects not only whether the daughter will be paid for Sunday brunch but—because of the across-the-board percentage discount—all other meal preparation and all other IADLs and ADLs the mother hired her to perform. DSHS converts a task-based amount of help into a reduction to *all* paid hours.

The fungibility of tasks and compensation under the CARE program that DSHS espouses, DSHS Br. 7–8, is proof that DSHS's CARE plans impermissibly fail to keep employment and family relationships “separate and apart.” 78 Fed. Reg. 60488. The Home Care Rule requires this separation so that the employment relationship can operate with all the hallmarks of *bona fide* employment: the parties clearly identify those services the IP has been hired to perform; provide clear expectations of

compensation for those defined services; maintain clear records to receive payment for those services; impose clear obligations for the performance of the employment services; and prohibit unapproved substitution of the personnel performing the required services, thus setting clear expectations of who will be performing them. 78 Fed. Reg. 60488–60489. The clarity of employment expectations also gives families freedom to define their personal relationships: while family members may feel a moral obligation to provide certain care, they have not been hired to do so and are free not to; there is no expectation of payment for family care; there are no records showing exactly what family care has been provided; the family caregiver can provide as much or as little care as her conscience allows, and she can “choose to come and go from the home” as she pleases; and anyone can fill in for the caregiver without approval. *Id.* at 60489.

These distinct relationships only maintain their diametrically opposed characteristics if the two are kept separate and apart. DOL’s Fact Sheet #79F examples underscore the point. Its examples presuppose that it is possible to clearly separate the activities that fall within the employment relationship from those that fall outside of it. AR 18-16-004 at 27–28. In each of its examples of a lawful plan, the amount of paid care is determined based on assessed need and paid care hours remain the same irrespective of the provider. *Id.* Family caregivers can perform as much or

as little additional care outside of the paid care hours as they wish without affecting the number of hours for which they are paid.¹⁷

Not so under the Informal Support Rule. Under that rule, if a family provider helps her loved one so frequently as to increase the quartile of assistance available for an ADL or IADL, the average numerical score under WAC 388-106-0130(2)(b) would increase and DSHS would apply a higher discount to *all paid services*, thus *decreasing* the total amount of paid services the loved one would receive. If DSHS's Informal Support Rule applied to the DOL examples, the volunteered care would decrease the family caregivers' paid hours in violation of the FLSA.

DSHS's formula takes volunteering for *particular* tasks and uses it to reduce paid employment services for *all* tasks. That across-the-board discount taints all employment services, intermingling family and employment relationships, and rendering the CARE plans unreasonable within the meaning of the Home Care Rule.

B. The Informal Support Rule impermissibly discriminates against related IPs.

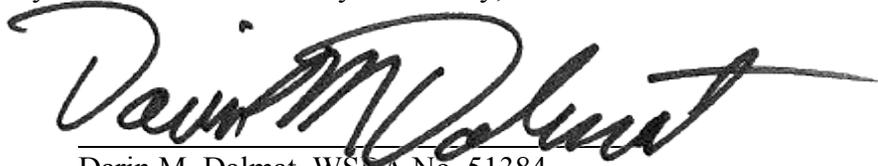
¹⁷ In the first DOL example, a man hires his mother for 40 hours of paid care and a neighbor for another 15 hours of paid care, and the mother's choice to clean her son's apartment "*outside of the 40 paid hours*" is non-compensable family care. AR 18-16-004 at 27 (outside). In this example, the additional apartment cleaning does not reduce the 40 paid hours the mother receives because it occurs "outside" those compensable hours. Similarly, in the third example, a disabled veteran hires two IPs—a stranger and his aunt—for weekday work, and his father takes care of him on the weekends in his personal capacity. Any additional volunteering the aunt-IP does on the weekends does not reduce her paid weekday work. *Id.*

DSHS admits that only related IPs, not unrelated IPs, are allowed to volunteer to provide informal supports within the meaning of its rule. DSHS Br. 25. DSHS tries to justify this concededly differential treatment by claiming the Home Care Rule requires it. DSHS Br. 25. The Home Care Rule does not condone, much less require, any rule that intermingles personal and family relationships such that voluntary personal care within the scope of the family relationship spills over into the employment relationship and reduces it across the board. *Supra* at 20–25. Because the Home Care Rule condemns DSHS’s Informal Support Rule, DSHS cannot rely on the Home Care Rule as a defense.

CONCLUSION

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

Respectfully submitted this 17th day of January, 2020.



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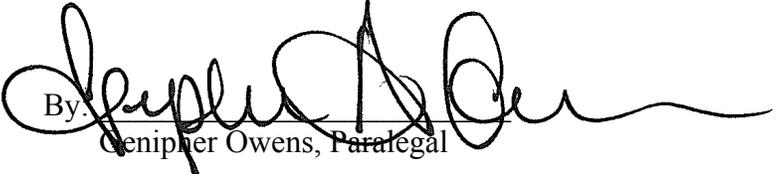
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I, Genipher Owens, declare under penalty of perjury under the laws of the State of Washington, that, on the date set forth below, I served the foregoing document upon the following parties in the manner noted below:

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DATED this 17th day of January, 2020, at Seattle,
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By: 
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