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OPINION	:	No. 84-308
of	:	JULY 23, 1985
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THE HONORABLE RICHARD E. FLOYD, MEMBER OF THE CALIFORNIA ASSEMBLY, has requested an opinion on the following question:

Where an in-home supportive services program aid recipient hires and supervises the domestic services worker, is the worker also the "employee" of the state and/or county for purposes of unemployment insurance, disability insurance, collective bargaining, level of compensation, health insurance, sick leave, vacation leave, holiday benefits, pension and retirement benefits, credit union membership, and payroll deductions and payments covering social security, federal and state income taxes, and other voluntary designations?

CONCLUSION

Where an in-home supportive services program aid recipient hires and supervises the domestic services worker, the worker is accorded the same treatment as a

state "employee" for some but not all purposes. For purposes of withholding federal and state income taxes, social security and, where applicable, retirement contributions, the state must compute and make these deductions in the wages owing the worker. For purposes of unemployment and disability insurance, the worker is covered as the employee of the aid recipient. The aid recipient's contributions to the unemployment insurance program must be made by the state. The aid recipient's obligation to collect the worker's contributions to the disability insurance program must be performed by the state. For purposes of retirement, pension, and health benefits, the worker is covered only if his or her particular work situation qualifies for coverage under the Public Employees' Retirement Law. For purposes of membership in employee credit unions, the by-laws of the individual credit union would govern the right of each worker to join. For purposes of voluntary payroll deductions, the workers are not included in the uniform state payroll system and for this reason are not entitled to the benefits of the voluntary deduction system administered by the State Controller. For purposes of collective bargaining, because the workers are not members of the state civil service system, there is no coverage under the State Employer-Employee Relations Act. As the counties are significantly involved in the day-to-day administration of the In-Home Supportive Services Program, the workers would be deemed employees of the counties for purposes of collective bargaining under the Meyers-Milias-Brown-Act.

ANALYSIS

In *Bonnette* v. *California Health and Welfare Agency* (9th Cir. 1983) 704 F.2d 1465, 1468-1470, the Ninth Circuit ruled that in-home supportive services (IHSS) workers were the "employees" of the state and counties for purposes of the minimum wage provisions of the Fair Labor Standards Act (29 U.S.C. §§ 201-219).

In *In-Home Supportive Services* v. *Workers' Comp. Appeals Bd.* (1984) 152 Cal.App.3d 720, 725-741, the Court of Appeal ruled that IHSS workers were the "employees" of the state for purposes of workers' compensation coverage (Lab. Code, §§ 3351-3352). The question presented for resolution is whether these workers are the "employees" of the state and/or counties for various other purposes: unemployment insurance, disability insurance, collective bargaining, level of compensation, health insurance, sick leave, vacation leave, holiday benefits, pension and retirement benefits, credit union membership, social security, federal and state income tax withholding, and voluntary payroll deductions. We conclude that the answer depends upon the application of the law in each particular situation.

Preliminarily, we note that the IHSS program (Welf. & Inst. Code, §§ 12300-12314)[1] is designed to provide disabled, blind, and aged public assistance aid recipients with domestic services, nonmedical personal services, transportation, and supervision, without which they could not safely remain in their homes. (See §§ 12300, 12304; *In-Home Supportive Services* v. *Workers' Comp. Appeals Bd.*, *supra*, 152 Cal.App.3d 720, 725; *County of Sacramento* v. *State of California* (1982) 134 Cal.App.3d 428, 430-431; *City and County of San Francisco* v. *State of California* (1978) 87 Cal.App.3d 959, 961; *Driskill* v. *Woods* (1977) 70 Cal.App.3d 622, 624; *Bonnette* v. *California Health and Welfare Agency*, *supra*, 704 F.2d 1465, 1467; 56 Ops.Cal.Atty.Gen. 341, 341-343 (1973).)

The program is administered by the counties under the supervision of the state in compliance with federal law. (See §§ 12301.1, 12302; *In-Home Supportive Services* v. *Workers' Comp. Appeals Bd.*, *supra*, 152 Cal.App.3d 720, 725, 729-731; *County of Sacramento* v. *State of California*, *supra*, 134 Cal.App.3d 428, 432-433; *City and County of San Francisco* v. *State of California*, *supra*, 87 Cal.App.3d 959, 961-968; *Driskill* v. *Woods*, *supra*, 70 Cal.App.3d 622, 624; *Bonnette* v. *California Health and Welfare Agency*, *supra*, 704 F.2d 1465, 1467-1468.)[2]

The counties are authorized to implement the program in three different ways: by using their own civil service or merit system employees to provide the services, by contracting out to private and public agencies for the services, and by having the aid recipient hire and supervise the worker. (See §§ 12302, 12302.2; *In-Home Supportive Services* v. *Workers' Comp. Appeals Bd.*, *supra*, 152 Cal.App. 3d 720, 725, 730-731; *Driskill* v. *Woods*, *supra*, 70 Cal.App. 3d 622, 625, 627; *Bonnette* v. California *Health and Welfare Agency*, *supra*, 704 F.2d 1465, 1467.)

It is the third method of implementing the program which is the subject matter of this opinion. Although the aid recipients have various responsibilities in the hiring and supervising of the workers under this method, it has been judicially determined that the state and/or counties (1) pay the workers directly through a state payrolling system, (2) control the rate and method of payment, (3) maintain the employment records, (4)

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[1] All unidentified section references prior to footnote three are to the Welfare and Institutions Code.

[2] Although both state and county funds are used for the program, "[t]he brunt of the burden in furnishing these social services rests on the federal government." (*City and County of San Francisco* v. *State of California*, *supra*, 87 Cal.App.3d 959, 963; see § 12306; *In-Home Supportive Services* v. *Workers' Comp. Appeals Bd.*, *supra*, 152 Cal.App. 3d 720, 725; *County of Sacramento* v. *State of California*, *supra*, 134 Cal.App.3d 428, 431-433; *Driskill* v. *Woods*, *supra*, 70 Cal.App.3d 622, 624; *Bonnette* v. *California Health and Welfare Agency*, *supra*, 704 F.2d 1465, 1467.)

exercise considerable control over the structure and conditions of employment, (5) determine the amount and nature of the services required by the recipient, (6) make the final determination of the number of hours to be worked and tasks to be performed, (7) determine the types of services to be provided, the service delivery method, and the number of hours per service per week, (8) intervene when problems arise between the recipient and the worker, (9) have periodic and significant involvement in supervising the worker's job performance, (10) hire and fire the worker when the aid recipient is unable to do so, (11) exercise direct hiring and firing control when they discern that the work is not being performed in accordance with the assessment of need, (12) have substantial power over the employment relationship by virtue of their control over the purse strings, (13) exercise considerable control over the nature and structure of the employment relationship, and (14) have complete economic control over the employment relationship. (*In-Home Supportive Services* v. *Workers' Comp. Appeals Bd.*, *supra*, 152 Cal.App.3d 720, 730-731; *Bonnette* v. *California Health and Welfare Agency*, *supra*, 704 F.2d 1465, 1470.)

We know of no significant changes in the IHSS program that would render inapplicable the above judicial findings made in *In-Home Supportive Services* and *Bonnette*. Additionally, while the usual test of an employment relationship (the extent of direction and control) would normally be a question of fact to be determined in each particular case, we recognize that "in public law cases uniformity of decision is important, and where essential facts are not in conflict the question of the legal relations arising therefrom is a question of law." (*Sadduth* v. *California Emp. Stab. Com.* (1955) 130 Cal.App.2d 304, 311; see *Isenberg* v. *California Emp. Stab. Com.* (1947) 30 Cal.2d 34, 41; *Bemis* v. *People* (1952) 109 Cal.App.2d 253, 269.)

We thus examine the various statutory schemes relating to the issues presented in light of the facts found in *In-Home Supportive Services* and *Bonnette*. In so doing, we must necessarily focus upon the intent of the Legislature and purpose of the specific legislation being analyzed. (See *Laeng* v. *Workmen's Comp. Appeals Bd*. (1972) 6 Cal.3d 771, 778, fn. 7; *Adcock* v. *Board of Administration* (1979) 93 Cal.App.3d 399, 404; 31 Ops.Cal.Atty.Gen. 194, 196 (1958).)

1. Unemployment Insurance

Among the definitions of "employee" for purposes of unemployment insurance coverage is "[a]ny individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee." (Unemp. Ins. Code, § 621, subd. (b).)[3]

[3] All unidentified section references hereafter prior to footnote four are to the Unemployment Insurance Code.

The principle test to be applied, although several secondary factors may be considered, "is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired." (*Tieberg* v. *Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, 946; see *Isenberg* v. *California Emp. Stab. Com., supra*, 30 Cal.2d 34, 39; *Sudduth* v. *California Emp. Stab. Com.*, *supra*, 130 Cal.App.2d 304, 311.)

Moreover, if one is an employee for purposes of workers' compensation coverage, "[i]t cannot seriously be contended that one . . . is not engaged in 'employment' within the meaning . . . of the California Unemployment Insurance Act." (*Isenberg* v. *California Emp. Stab. Com.*, *supra*, 30 Cal.2d 34, 38.)

Applying the above definitions and principles, one could conclude that the state or county would be "an" employer of an IHSS worker hired and supervised by the aid recipient. As found in *In-Home Supportive Services* and *Bonnette*, the state and counties have substantial direction and control over the manner and means by which the work is performed.

The specific provisions of section 683, however, require consideration:

> "'Employer' also means any employing unit which employs individuals to perform domestic service comprising in-home supportive services under Article 7 (commencing with Section 12300), Chapter 3, Part 3, Division 9 of the Welfare and Institutions Code and pays wages in cash of one thousand dollars ($1,000) or more for such service during any calendar quarter in the calendar year or the preceding calendar year, and is one of the following:
>
> "(a) *The recipient of such services, if the state or county makes or provides for direct payment to a provider chosen by the recipient or to the recipient of such services for the purchase of services*, subject to the provisions of Section 12302.2 of the Welfare and Institutions Code.
>
> "(b) The individual or entity with whom a county contracts to provide in-home supportive services.
>
> "(c) Any county which hires and directs in-home supportive personnel in accordance with established county civil service requirements or merit system requirements for those counties not having civil service systems." (Italics added.)

Does the fact that the Legislature has specifically included the IHSS aid recipient as an employer of the IHSS worker preclude a finding that the state or county is

also an employer for purposes of unemployment insurance coverage? In *In-Home Supportive Services*, the court examined the legislative history of the relevant statutes and concluded that such specific inclusion of one employment relationship did not require the exclusion of other general ones. (*In-Home Supportive Services* v. *Workers Comp. Appeals Bd*., *supra*, 152 Cal.App.3d 720, 734-738.) There, however, the court was dealing with an area of law (workers' compensation) that recognized the concept of "dual" or "joint" employments--one employee with two or more employers. (*Id*. at pp. 732- 733.) The same concept was the basis of the *Bonnette* decision dealing with the Fair Labor Standards Act. (*Bonnette* v. *California Health and Welfare Agency*, *supra*, 704 F.2d 1465, 1469-1470.)

Here, on the other hand, the concept of dual employments is not to be found in the area of unemployment insurance coverage. (Compare §§ 926, 976, 1251, 1252 with Lab. Code, §§ 3351, 3352; see *B. P. Schulberg Prod*. v. *Cal. Emp. Com.* (1944) 66 Cal.App.2d 831.) Since section 683 expressly defines a recipient of in-home supportive services as the "employer" for purposes of computing unemployment benefits, such designation excludes consideration of the state or a county as the employer under the unemployment insurance statutory scheme.

We thus conclude that the IHSS workers in question are the employees of only the IHSS aid recipients for purposes of unemployment insurance coverage. Nevertheless, pursuant to Welfare and Institutions Code section 12302.2, the State Department of Social Services has an obligation to assure that each IHSS aid recipient's duties under the unemployment insurance laws are met. Section 12302.2 provides in part:

> "(a) If the state or a county makes or provides for direct payment to a provider chosen by a recipient or to the recipient for the purchase of in-home supportive services, the department shall perform or assure the performance of all rights, duties and obligations of the recipient relating to such services as required for purposes of unemployment compensation, unemployment compensation disability benefits, workers' compensation, federal and state income tax, and federal old-age survivors and disability insurance benefits."

2. Disability Insurance

Our analysis of what constitutes an employment relationship for purposes of unemployment insurance is equally applicable to disability insurance. (See § 2602.) Sections 685 and 2606.5 expressly designate the IHSS aid recipient as the employer for purposes of disability insurance. Under Welfare and Institutions Code section 12202.2, the State Department of Social Services has the responsibility to perform or assure performance of the IHSS aid recipient's obligation to collect the IHSS worker's disability contribution.

3. Collective Bargaining, Level of Compensation, Sick Leave, Vacation, and Holiday Benefits

While the concept that IHSS workers may have more than one "employer" appears appropriate for purposes of some laws, it would seem inappropriate and unworkable for purposes of collective bargaining under California statutes.

Under the Meyers-Milias-Brown-Act (Gov. Code, §§ 3500-3510),[4] local governments such as counties may enter into collective bargaining agreements with their employees concerning "wages, hours, and other terms and conditions of employment" (§ 3505).

Under the State Employer - Employee Relations Act (3512-3524), the state may enter into collective bargaining agreements with its employees concerning "wages, hours, and other terms and conditions of employment" (§ 3512).

Just as the word "wages" in these statutes contemplates the determination of the level of compensation, the words "other terms and conditions of employment" therein include sick leave, vacation, and holiday benefits for employees covered by collective bargaining agreements.

It is clear that the IHSS workers would not meet the definition of state employees for purposes of collective bargaining since they are not "civil service" employees (3513, subd. (c)).[5]

Under the legislation for county employees, however, coverage is broadly authorized for those "employed" by the county. (See § 3501, subd. (d).) In analyzing this statutory provision, the Court of Appeal recently applied the primary "right of control" test, as well as considered the usual secondary factors regarded as relevant. (*Service Employees Internat. Union* v. *Superior Court* (1982) 137 Cal.App.3d 320.) The court looked at which party had the right to hire, supervise, promote, discipline, and discharge the employees, as well as which party set and paid the salaries, the nature of the services, and the belief of the parties. (*Id*., at pp. 324-326.)

We believe that the *Service Employees* case supports the conclusion that the IHSS workers are county employees for purposes of collective bargaining. The counties

[4] All unidentified section references hereafter are to the Government Code.

[5] To obtain state civil service status, one must comply with the elaborate requirements of the State Civil Service Act (§§ 18500-19798) as administered by the State Personnel Board.

control the rate and method of payment, determine the amount and nature of the services required by the recipient, and are significantly involved in supervising the worker's job performance. Our conclusion is supported by "the strong policy in California favoring peaceful resolution of employment disputes by means of arbitration" (*Fire Fighters Union* v. *City of Vallejo* (1974) 12 Cal.3d 608, 622) and allows for the salutary goals of the collective bargaining process (see § 3500; *International Brotherhood of Electrical Workers* v. *City of Gridley* (1983) 34 Cal.3d 191, 201; *Glendale City Employees' Assn., Inc.* v. *City of Glendale* (1975) 15 Cal.3d 328, 336; *Chula Vista Police Officers' Assn.* v. *Cole* (1980) 107 Cal.App.3d 242, 247-248) to be met.

Consequently, for purposes of collective bargaining, we conclude that the IHSS workers may be considered the employees of the counties.

4. Pension and Retirement Benefits

Under the County Employees' Retirement Law of 1937 (§§ 31450-31895), counties provide pension and retirement benefits to their employees.[6] Section 31469 defines "employee" in a number of ways, none of which would be applicable to IHSS workers.

Under the Public Employees' Retirement Law (§§ 20000-21500), the state provides pension and retirement benefits to its employees; a county may also elect to participate in this system as a "contracting agency." For purposes of the legislative scheme, "employee" is defined in part as "[a]ny person in the employ of the state" and "[a]ny person in the employ of any contracting agency." (§ 20012.)

In *Adcock* v. *Board of Administration*, *supra*, 93 Cal.App.3d 399, 404, the Court of Appeal recently interpreted the provisions of section 20012, noting "the well-established rule that pension legislation should be liberally construed, resolving all ambiguities in favor of the applicant." (See *Gorman* v. *Cranston* (1966) 64 Cal.2d 441, 444; *Adams* v. *City of Modesto* (1960) 53 Cal.2d 833, 840; *Durham* v. *City of Berkeley* (1970) 7 Cal.App.3d 508, 513.) Nonetheless, it ruled against the applicant, primarily because the state paid only a de minimis portion of his salary and lacked significant control over him. Here, on the other hand, the IHSS workers are paid entirely by state warrant, perform services on behalf of the state in a state program, and are subject to strict control by the state and counties.

We are informed that 35 counties have contracted with the Public Employees Retirement System. In these counties, the eligibility of IHSS workers for retirement

[6] Special statutory schemes cover peace officers and firefighters. (§§ 31900-33000.)

benefits would not be dependent upon whether they are county or state employees. Whatever their status, eligibility for retirement benefits would be governed by the Public Employees Retirement Law. With respect to those counties that are not members of the Public Employees Retirement System and which, because of the narrow definition of "employee" in section 31469, cannot include IHSS workers in their retirement systems, we believe that under the liberal construction demanded of section 20012, such IHSS workers may be considered the employees of the state for purposes of the pension and retirement provisions of the Public Employees' Retirement Law.

However, not all employees of the state (or of contracting agencies) are automatically entitled to participate in the Public Employees Retirement System. Part-time employees are excluded under the provisions of section 20334:

> "An employee serving on a part-time basis is excluded from this system unless:
>
> "(a) He or she is a member at the time he or she renders part-time service.
>
> "(b) His or her position requires service for at least an average of 20 hours a week, or requires service which is equivalent to at least an average of 20 hours a week, and he or she is not excluded pursuant to Section 20336.
>
> "(c) He or she is a member of the Board of Prison Terms, the State Personnel Board, or the Air Resources Board and elects to become a member of this system pursuant to Section 20360.
>
> "(d) He or she is participating in partial service retirement, pursuant to Article 1.7 (commencing with Section 19996.30) of Chapter 7 of Part 2.6.
>
> "(e) He or she is included by specific provision of the board relating to the exclusion of part-time employees."

Section 20336 excludes from coverage employees who, in the opinion of the Public Employees Retirement Board, work on a "seasonal, limited-term, on-call, emergency, intermittent, substitute, or other irregular basis" unless one of the following conditions is met:

> "(a) The appointment or employment contract fixes a term of full-time, continuous employment in excess of six months or, if a term is not fixed, full-time employment continues for longer than six months, in which

case membership shall be effective not later than the first day of the seventh month of employment.

"(b) The person is employed in one of the positions which provide state safety membership in accordance with Section 20017.6.

"(c) The person is a member at the time of entering such employment.

"(d) The person works more than 15 days, if employed on a per diem basis or, if employed on other than a per diem basis, 1,000 hours within the fiscal year, in which case membership shall be effective not later than the first day of the month following the month in which 125 days or 1,000 hours of service were completed."

Assuming that an individual IHSS worker's particular circumstances meet one of the specific conditions, the remaining issue would be whether the worker is an "independent contractor," a status excluded from coverage under section 20330, subdivision (b). Based upon the factors cited in *In-Home Supportive Services*, *supra*, and *Bonnette*, *supra*, we believe that an IHSS worker would not be regarded as an independent contractor.

In summary, the eligibility of IHSS workers to retirement benefits is governed by the Public Employees Retirement Law and specifically sections 20334 and 20336.

5. Health Insurance

Under the Public Employees' Medical and Hospital Care Act (§§ 22751-22856), health insurance is provided to "any officer or employee of the State of California" as well as to "any officer or employee" who is a "member of the Public Employees' Retirement System" and "employed by a [county] which has selected to be or otherwise has become subject to" sections 22751-22856, "except persons employed on an intermittent, irregular or less than half-time basis." (§ 22754, subd. (b).) Regulations issued pursuant to this statutory scheme (see § 22810, 38 Ops.Cal.Atty.Gen. 86, 87-88 (1961)) also exclude certain employees from participation in the program (see Cal. Admin. Code, tit. 2, § 599.501.)

As we concluded for purposes of retirement benefits, IHSS workers meeting certain conditions would be part of the Public Employees Retirement System; those IHSS workers meeting such conditions would be entitled to health benefits under the Public Employees' Medical and Hospital Care Act.

6. Credit Union Membership

We have found no law which excludes or includes IHSS workers as state or county employees for purposes of credit union membership. Indeed, the most relevant statute we have found merely provides that "[e]very credit union may admit to membership those persons qualified for membership, as provided in the credit union bylaws, upon payment of an entrance fee or the purchase of a share in the credit union." (Fin. Code, § 14800, subd. (a).)

Hence, whether an IHSS worker would be eligible for membership in a credit union as either a state or county employee would depend upon the bylaws of the particular credit union.

7. Social Security

It is our understanding that the Social Security Administration treats the IHSS workers as the employees of only the IHSS aid recipients. Pursuant to Welfare and Institutions Code section 12302.2, discussed previously in connection with unemployment and disability insurance, the state has the responsibility to perform or assure the performance of the duties and obligations of the IHSS aid recipients under the social security laws. This function is performed through a fiscal intermediary under contract to the State Department of Social Services.

8. Federal and State Income Taxes

Compensation paid to IHSS workers for their services is income subject to tax under the Internal Revenue Code. The general requirement for the withholding of federal income taxes from an employee's wages is contained in section 3402 of the Internal Revenue Code: "Except as otherwise provided in this section, every employer making payment of wages shall deduct and withhold upon such wages a tax . . . ." Compensation paid to IHSS workers for their services is also income subject to tax under California's Personal Income Tax Law. (Rev. & Tax Code, § 17001 et seq.) State withholding statutes generally parallel federal law in requiring employers to withhold state income taxes from the wages of their employees. (See Unemp. Ins. Code, § 13020.) The actual withholding of state or federal income taxes from a particular IHSS worker's compensation depends upon the application of the federal and state withholding statutes and their associated regulations.

It is our understanding that the Internal Revenue Service has ruled that IHSS workers are employees of the IHSS aid recipients and that this ruling has been implemented for both federal and state income tax purposes. As with the social security, unemployment,

and disability insurance programs, the responsibility of the aid recipients to withhold federal and state income taxes is performed or assured by the state on behalf of the recipient through a fiscal intermediary under contract to the State Department of Social Services. (See Welf. & Inst. Code, § 12302.2.)

9. Voluntary Payroll Deductions

Sections 1150-1151 authorize state employees to designate the deduction of various voluntary payments from their salaries. For purposes of the legislation, "state employees" are defined as "all persons who receive wages for services through the uniform payroll system established and administered by the Controller under Section 12470." (§ 1150, subd. (a).)

Section 12470 states:

> "In conformity with the accounting system prescribed by the Department of Finance pursuant to Section 13300, the Controller shall install and operate a uniform state payroll system for all state agencies, except the University of California. The Controller may provide for the orderly inclusion of state agencies into such system, and may make exceptions from the operation thereof for such periods as he determines necessary."

The State Controller does not regard IHSS workers as employees of a state agency for purposes of inclusion in the uniform state payroll system and does not maintain a roster of IHSS workers or compute any deductions for such workers. Mandatory deductions are calculated by a private fiscal intermediary under contract to the State Department of Social Services. The fiscal intermediary forwards a computer tape to the State Controller who issues a warrant in the net amount calculated by the fiscal intermediary. To the extent voluntary deductions are allowed to IHSS workers, they would be covered by the contract between the State Department of Social Services and the fiscal intermediary.

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