UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

RALPH TALARICO, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARY SITUATED, Plaintiffs, vs. PUBLIC PARTNERSHIPS, LLC, D/B/A/ PCG PUBLIC PARTNERSHIPS, Defendants.	Case No. 17-2165 Judge Schmehl

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

Plaintiffs are Direct Care Workers (DCWs) who assert that Defendant PPL is their joint employer, exercising substantial control over their employment, while sharing some authority with the participants for whom the DCWs provide care. Discovery has proven Plaintiffs' allegations true. PPL had free rein to choose which DCWs to depose, and also selected all but one of the participants deposed. The rest of the evidence consists of PPL's own documents and the testimony of its Rule 30(b)(6) designees. Thus, this record—chock full of evidence from which a fact-finder could, and indeed should, reasonably conclude that PPL is Plaintiffs' joint employer—is PPL's best case. On each element used to evaluate joint employer status, there are material fact disputes precluding summary judgment. Defendant's motion should be denied.

II. STATEMENT OF FACTS

A. PPL's Relationship with the Participants and Overview of the Program

Contrary to PPL's portrayal of itself as acting at the participants' direction, participants have no choice but to use PPL if they want to obtain home-care services through the Participant Directed Services program ("PDS"); they cannot select a different agent or operate without an agent.[1] PPL acts in the name of the participant, but without direction from the participant and actually gives the participant direction.[2] PPL also uses standardized paperwork to enroll

[1] *See* 30(b)(6) Deposition of David Horvath ("Horvath Dep.") 109:6-11, Ex. 1; MJ Dep. 87:10-25, Ex. 2; *see also* Stewart Decl. ¶ 11, Ex. D to Mot.; EW Decl. ¶ 4, Ex. 3; DS Dep. 51:4-10, Ex. 4; LZ Dep. 111:18-112:20, Ex. 5. Participants in the PDS program are identified by their initials throughout, as PPL has designated their identity as confidential.

[2] EW Decl. ¶¶ 2, 4, 5, 9, 11, 12; MJ Dep. 90:4-11 (she had no choice but to use PPL, and no control over what duties PPL undertook); HCBS Waiver Application ("Waiver App.") at 24-25, 170, 174, Ex. 6 (listing PPL's authority as "fiscal/employer agent"); PPL Consumer-Participant Handbook ("PPL Handbook") at 1253, Ex. 7; DS Dep. 57:9-58:10 (all he did was sign documents he was provided so that he could receive services); EW Dep. 71:25-72:13, 97:10-98:1 (PPL required him to sign forms, he couldn't use different forms), Ex. 8.

participants and requires them to complete the paperwork (to PPL's standards) before it will pay the participants' DCWs.[3] This paperwork dictates to participants the duties PPL will undertake as their "agent," and requires the participant to authorize PPL to handle various tax issues.[4] Participants testified they do not choose tasks for PPL, or have any say over decisions PPL made; they were often unaware exactly what PPL would do.[5] Moreover, PPL sends forms out already completed and simply directs participants to sign.[6]

PPL further controls the participants' relationship with their DCWs by having its Enrollment Specialists train participants either in-person or telephonically.[7] This training covers

[3] *See* 30(b)(6) Deposition of Regina Stewart ("Stewart Dep.") 91:18-104:19 (describing forms), 113:23-25 (PPL assists in completing enrollment forms), Ex. 9; PPL Common Law Employer Packet ("CLE Packet") at 1014 (containing "employer enrollment paperwork that you need to complete and return to PPL"), Ex. 10; PPL Handbook at 1255-56 (same), Ex. 7; New CLE Forms at 995, 996, Ex. 11; 2012 Pennsylvania Request for Proposals ("2012 RFP") at 4106-10 (explaining the general process), Ex. 12; Waiver Appl. at 171, Ex. 6; DS Dep. 62:22-63:6 (he has to sign all forms sent to him by PPL to receive services through the program; LZ Dep. 110:8-23, 113:5-10 (PPL provides paperwork and required her to complete).

[4] *See* Stewart Dep. 70:15-23 (duties), 98:11-20 (PPL's duties could not be negotiated); CLE Packet at 1015, Ex. 10. Required tasks for participants include completing tax paperwork that authorizes PPL to file taxes and obtain Employer Identification Numbers (EINs) for each participant. *See* Waiver App. at 24-25, 170, 174, Ex. 6; Stewart Dep. 104:20-105:6, 105:17-106:3, 106:21-24, 107:2-10, 107:23-108:6; 2014 Pennsylvania Request for Proposals ("2014 RFP") at 1806-10 (describing PPL's tax- and IRS-paperwork for participants), Ex. 13.

[5] DS Dep. 56:16-57:7 (he did not pick tasks he wanted PPL to perform or select which insurance company to use for workers' compensation coverage); EW Dep. 66:5-21 (he did not even know what actions PPL was taking in his name, such as obtaining an employer ID number), 73:19-74:2 (PPL told him they were taking over and would pay his caregivers), 75:13-20 (he didn't know if he could tell PPL which tasks to perform). Similarly, the participants have to sign the CLE Agreement sent them by PPL and cannot alter its terms. DS Dep. 90:4-20.

[6] DS Dep. 59:17- 61:13 (he received forms already completed, and when he had questions, he called PPL for direction); EW Dep. 67:2-10, 69:14-71:18 (he received forms already completed, and did not know PPL was exercising certain power).

[7] *See* Targeted Enrollment for Service Level Agreement at 1221, Ex. 15; Waiver App. at 24-25, 171, Ex. 6; Grant Agreement at 759 (PPL "will provide common law employer orientation and skills training"), Ex. 17; Stewart Dep. 51:18-52:6, 57:12-19; 2012 RFP at 4101-05 (detailing PPL's agreement to and process for providing employer orientation and skills trainings), Ex. 12;

topics such as hiring, training, setting wage rates, supervising, and firing DCWs; completing PPL's required paperwork (including hiring paperwork and timesheets); establishing schedules for DCWs; and workplace safety.[8] PPL also works with service coordinators to provide "ongoing skills training" to participants in need of additional employer skills training.[9] Finally, PPL reports to the State and the participant's service coordinator when PPL independently determines that a participant is no longer capable of directing their own care.[10] In sum, the record shows PPL acts independently, not as an agent of the participants.

B. PPL Shares Control Over Hiring and Terminating DCWs

PPL exercises considerable control over the hiring of DCWs. PPL requires DCWs to complete an application, meet certain qualifications, undergo a background check, and sign a DCW Agreement (*see infra* §II.C).[11] Thus, while participants can say whom they want to have

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2014 RFP at 1834-38 (same), Ex. 13.

[8] *See* Stewart Dep. 114:7-116:15, 117:4-118:3 (handbook), 178:16-179:8 (handbook was created in part by PPL and is available on PPL's website); MJ Dep. 103:24-104:19, 104:25-105:1, 106:13-18; CLE Packet at 1028-29 (workplace safety training); PPL Handbook (instructing participants on how to recruit, interview and select DCW, including mandatory qualifications, questions to ask or not ask, how to schedule the DCW, and how to set up the participant's home to provide a safe work environment) at 1259-1267, Ex. 7. *See also* Stewart Dep. 118:18-22 (PPL provides a customer service line for participants).

[9] Waiver App. at 171, Ex. 6; Stewart Dep. 118:4-17; 2014 RFP at 1838-39.

[10] *See* Waiver App. at 26, 159, 172, Ex. 6; Stewart Dep. 119:22-121:12, 124:13-22.

[11] ***Qualifications:*** Deposition of Ralph Talarico ("Talarico Dep.") 98:24-99:10 (qualifications set forth in documents PPL sent), Ex. 19; MJ Dep. 121:24-122:6 (requirements listed were set by PPL, not her); New DCW Packet at 1048, Ex. 21. ***Background check:*** *see* n.18, *infra*; PPL pays for the background check, 2012 RFP at 4002-04, Ex. 12. ***DCW Agreement:*** *see* DCW Informational Packet ("DCW Packet") at 1925, 1929 ("This agreement tells you the policies, qualifications, and duties of the direct care worker."), Ex. 20; New DCW Packet ("New DCW Packet") at 1038, 1044-1046, 1048, Ex. 21; Talarico Dep. 183:21-24 (forms were the same for each participant); Stewart Dep. 72:23-73:6 (forms are required), 81:7 (PPL provides forms), 83:9-11 (PPL specifies which forms are required), 85:21-86:3, 130:12-22 (PPL provides forms), 140:7-11 (explaining that "good-to-go" status is based in part on proper submission of the required paperwork), 145:8-21, 146:11-23, 147:20-23, 151:18-152:4, 153:4-15; 2012 RFP at 4413-14 (describing DCW enrollment forms); New CLE Forms at 995

work as their DCW, that choice is subject to PPL's approval.[12] PPL provides an instruction manual and customer service helpline for questions about these applications, agreements, and other required forms, to ensure that they are filled out to PPL's standards.[13] PPL uses this paperwork—which it developed with the Office of Long Term Living ("OLTL")—to impose a number of specific obligations on the DCW, regardless of the participant's wishes.[14]

After receiving the required paperwork, PPL determines if a DCW is "qualified."[15] PPL also verifies each DCW's citizenship status, and requires DCWs to submit to criminal

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(explaining that DCWs must return all required paperwork to PPL), Ex. 11; CLE Packet at 1016 (DCW Agreement "provide[s] important information to the DCW about employment policies and rules"), Ex. 10; MJ Dep. 86:22-87:9 (paperwork was required by PPL, not participant), 94:18-95:10 (PPL decided which forms the DCW had to completed, which were optional); Lang Dep. 120:24-121:15 (PPL required her to complete documents, not the participant); EW Dep. 86:20-87:2 (if form not completed and returned to PPL, PPL would not let caregiver work for him); LZ Dep. 121:3-24 (if she had not returned paperwork to PPL, they would not have paid her DCW, even if she asked them to start before paperwork sent in).

[12] Lang Dep. 123:4-11; *see also* n.19 *infra*. Further, participants had the same degree of control over selection of DCWs employed by agencies, where there is no dispute that the agency is the employer. See DS Dep. 29:5-11 (his DCW was previously employed by agency), 31:18-33:9 (no difference in practice between when DCW employed by agency and by PPL), 47:9-20 (when his DCW employed by agency, he could still decide if he wanted him or someone else to work as DCW), 48:19-49:14 (DS knew his DCW and asked agency to hire him); Deposition of Julie Skovera ("Skovera Dep.") 20:25-21:11 (participant can select DCW whether through agency or PPL); 23:1-25 (whether agency or PPL, participant can still give instruction to DCW, so long as consistent with the ISP), 24:12-17 (under either model, participants can say don't want DCW they have, and seek a different DCW), Ex. 22.

[13] *See* Stewart Dep. 82:3-4, 129:14-130:11, 126:14-16; *cf.* Deposition of Latiesha Santiago ("Santiago Dep.") 141:14-142:9 (she called PPL for help completing form), Ex. 23.

[14] *See infra* §II.C; Stewart Dep. 94:12-17, 128:20-24, 132:12-23 (PPL worked with OLTL to develop instructions), 132:24-133:2; Talarico Decl. ¶ 3, Ex. 24. Unsurprisingly, DCWs see their agreement as *with* PPL. Lang Dep. 112:22-113:12; Santiago Dep. 78:10-19; *cf.* Deposition of Saschelle Simms ("Simms Dep.") 82:11-15 (she understood she had to report change in status to PPL), Ex. 25; Santiago Dep. 76:3-78:4 (she regularly interacted directly with PPL about paperwork, access to their online portal, and questions about her pay). Indeed, even participants testified they were unclear on whether PPL was the DCW's employer. EW Dep. 27:2-7.

[15] Waiver App. at 6, Ex. 6; *see generally* 2012 RFP at 4417-20 (describing how PPL determines if a DCW is qualified), Ex. 12.

background checks and child abuse clearances before they are hired, and periodically thereafter.[16] PPL ensures that DCWs are not on the state's List of Excluded Individuals and Entities (LEIE); if a DCW is on this list, PPL does not permit that DCW to provide services to any participants and will not pay them.[17] PPL conducts each of these checks regardless of whether the participant wants them done, and will not pay DCWs for any work performed before completing all these approval checks.[18] Only after all of these steps are completed to PPL's satisfaction will it determine that a DCW is "good to go," the prerequisite before DCWs may

[16] Waiver App. at 24-25, Ex. 6; Stewart Dep. 154:17-155:3 (PPL requires completed I-9 form before processing payroll for the DCW); DCW Packet at 1925, 20, Ex. 20; DCW Packet at 1942 (background checks are mandatory and paid for by PPL) & 1945-46 (child abuse checks), Ex. 20; New DCW Packet at 1040-41, 1044, 1064, Ex. 21; Talarico Dep. 57:5-8, 111:25-112:17 (PPL required the background checks, not participants); Stewart Dep. 55:9-14, 83:17-23, 103:20-104:2 (participants cannot work with a DCW who has a criminal record unless they complete a PPL form, *see also* 260:12-17); *see also* VF/EA Special Provider Agreement at 1007 ¶ 4, Ex. 26; PPL Handbook at 1258, Ex. 7; 2014 RFP at 1868-69 (describing PPL's agreement to and process for conducting background checks), Ex. 13; 2012 RFP at 4002-05 (same), Ex. 12; 2018 Pennsylvania Request For Proposals ("2018 RFP") at 1580-83 (same), Ex. 27; Waiver App. at 25, 64, Ex. 6; LZ Dep. 48:14-24, 132:2-5; EW Dep. 88:5-10 (it was PPL's requirement, not his, that DCW not begin work until background check completed). Although a participant can, by completing a PPL form, go forward with hiring an individual who has a criminal history, a participant cannot waive the background check, or any other elements of the good-to-go process. Stewart Dep. 71:11-73:6, 102:10-104:2.

[17] *See* New DCW Packet at 1045 (DCW "will not be permitted to work or be paid in this program" if DCW is on a state exclusion list), Ex. 21; Stewart Dep. 134:13-135:7, 143:10-22, 312:8-10, 313:7-314:12; 2012 RFP at 4006-07, Ex. 12. This rule came from PPL, not the participants. LZ Dep. 138:19-139:3, 139:5-16 (it was PPL's requirement, not hers, that the DCW could not appear on LEIE list; if her mother appeared on the LEIE list, she would not be permitted to hire her); MJ Dep. 120:4-11 (rule barring workers on LEIE list was not hers, but "all PPL"); Lang Dep. 102:20-103:27 (this rule came from PPL, and PPL could bar her from working in this program if she appeared on the list).

[18] *See* Stewart Dep. 323:6-13; DS Dep. 69:4-16 (participant understood that if a DCW had a criminal history, that would block the individual from being employed); MJ Dep. 107:8-24 (she did not request background check and did not know if she could tell PPL to skip it), 112:2-4, 112:12-23 (she did not believe she could tell PPL not to do check, and if DCW had not completed check, she did not think she would be allowed to hire him); EW Dep. 87:9-17 (background check was PPL's requirement, not his).

begin work and receive pay for work performed.[19]

PPL, not the participant, also requires that DCWs "requalify" every two years, essentially replicating the process from initial hiring, and if the requalification paperwork and background check are not completed on time, PPL will once again refuse to pay for the DCW to work for the participant until PPL decides that the DCW is again "good to go."[20]

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[19] Stewart Decl. at C2-4 (explaining that the DCW must "be approved [by PPL as qualified] prior to providing any services under this PDS program"); Stewart Dep. 59:2-4 (PPL determines if the DCW meets the program requirements), 79:10-13, 80:25-81:3, 86:8-14, 86:16-87:5 (PPL requires completed forms to deem DCW "good to go"), 91:21-92:13, 125:6-22, 127:17-128:17, 131:5-8, 133:10-16, 135:19-21, 136:7-16, 138:21-139:4, 139:25-140:11, 187:11-14 (even at transition, PPL required the DCW Agreement); CLE Packet at 1016 ("you must present each DCW with the Employment Agreement before they can be paid as a DCW. This document needs to be signed and dated by the DCW and yourself before PPL can issue a paycheck for services rendered."), 1018 ("You will be considered 'Good to Serve' once you and your direct care worker (DCW) review, sign, and complete all required paperwork"), Ex. 10; DCW Packet at 1924 ("In order to be paid for services provided to your participant employer, you must complete all required forms and meet the appropriate DCW qualifications."), 1925-26, 1928, Ex. 20; 2014 RFP at PPL1860-63, Ex. 13; 2012 RFP at 4413-20, Ex. 12; Enrollment Process Flowchart, Ex. 29; New DCW Packet at 1038-39, 1040-41, 1045, Ex. 21; Talarico Dep. 89:14-15, 90:1-6 (PPL required forms be sent to PPL), 92:3-22, 115:10-11, 195:17-19, 214:15-215:3; Talarico Decl. ¶ 3; MJ Dep. 95:13-22 (if DCW did not fill out forms PPL required, "they could not hire them, PPL would not pay them"), 98:5-12 (DCW would not be paid by PPL if DCW started work before PPL gave approval), 101:17-102:15 ("anything that didn't suit them to a T, they [PPL] would refuse to pay"), 110:4-111:18 (PPL required DCW agreement be completed, and if any part were blank, they sent it back and directed her to correct it, even though it was always "small stuff," they would not pay the DCW if she didn't follow direction), 148:13-149:21 (PPL notified her when DCW was permitted to begin working for her, she could not set start date for DCW "because they had to approve the worker first"); EW Dep. 84:22-85:14 ("a caregiver couldn't work or get paid unless he's okayed through PPL"); Lang Dep. 99:10-20 (PPL, not participant, decided when she was "good to go" and permitted to start work); Santiago Dep. 39:7-41:8, 74:2-16 (she understood from participant that her paperwork was completed and she should start work, but she was not paid for three weeks because PPL had not approved her as good to go, and despite participant's request, she was never paid for those three weeks); Jaggers Decl. ¶ 9, Ex. 54; Cotto Decl. ¶ 9, Ex. 56; Wance Decl. ¶ 9, Ex. 57; Stone Decl. ¶ 9, Ex. 17; Yonkin Decl. ¶ 8, Ex. 53; Segers Decl. ¶ 9, Ex. 55; Reeser Decl. ¶ 7, Ex. 18; Tamburo Decl. ¶ 4, Ex. 46.

[20] *See* Stewart Dep. 161:7-15, 220:17-25; Talarico Dep. 109:24-25, 110:23-24, 113:20-21, 111:7-8, 162:17, 198:1-3; EW Dep. 94:16-25 (PPL, not participant, required requalification); LZ Dep. 47:4-16.

PPL also shares control over termination. As noted above, if a DCW ever appears on the LEIE list, PPL will terminate that DCW. *Supra* n.17. If PPL finds that the DCW has not properly re-qualified, PPL will bar the DCW from continuing to work. *Supra* n.20. In addition, PPL can, and has, terminated a DCW without any request from the participant, if PPL decides that the DCW has not worked for a participant for a sufficiently long period of time. For example, when PPL determined that Mr. Talarico had not worked for participant EJ in several months, it marked Mr. Talarico as terminated from EJ's care in its system, without consulting EJ or seeking paperwork from EJ in support of this termination.[21]

C. PPL Establishes Terms of Employment with the DCW Agreement

PPL requires all DCWs and participants to sign the DCW Agreement.[22] Participants have no control over the contents of the DCW Agreement.[23] The Agreement establishes duties the DCW must agree to perform, and terms the DCW must agree to in order to be deemed "good to go" by PPL and to be paid.[24]

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[21] Stewart Decl. ¶ 56, F30; *cf. id.* at F31-36 (forms documenting EJ's request to terminate workers other than Plaintiff); Disassociated Direct Care Workers Lists, Ex. 30; Stewart Dep. 307:10-14, 308:23-309:4, 309:10-15 (PPL has a common practice of removing DCWs who have not provided services to a participant within the past year). PPL also retains the power to terminate a participant from the program, which would effectively terminate the relationship between the participant and the DCW. *See* Stewart Dep. 305:24-306:3; 2012 RFP at 4421-26 (describing process), Ex. 12.

[22] *See supra* n.11; MJ Dep. 110:4-111:18; Lang Dep. 62:17-63:8 (acknowledging she signed Agreement without fully reading or understanding because PPL told her she had to sign in order to be paid to provide services her son needed), 94:3-95:7 (PPL mailed her the Agreement, neither she nor her participant played any role in establishing terms of the agreement).

[23] DS Dep. 63:8-64:17; MJ Dep. 110:4-24, 120:22-121:1 (she could not change any term of the DCW Agreement); EW Dep. 94:4-13; Lang Dep. 105:21-106:7 (participant could not change terms of DCW Agreement).

[24] DS Dep. 82:13-83:11, 88:22-89:5 (DCW must agree to abide by rules and policies of the program, DS was unaware of that, but he did not write the document, he had to agree to everything in the document in order to get services he needed). *Cf.* Talarico Dep. 103:23-25 (explaining that he understood PPL sent him his job duties in these documents). The agreement

PPL requires that all DCWs report abuse, neglect, or "critical events" to service coordinators, regardless of what the participants want.[25] It further requires all DCWs to participate in meetings about the participant when asked to do so by the service coordinator, PPL, or any other entity.[26] Since at least July 2017, PPL—through the DCW Agreement—has required DCWs to complete mandatory orientations and trainings before providing services to the participant, regardless of the participant's needs or preferences.[27] PPL uses this training to instruct DCWs on their job duties.[28] These and the other duties detailed in the DCW Agreement

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contains boilerplate recitations that PPL is not the employer and that the participant is the "common law employer." As discussed below at III.A, the test for establishing an employment relationship does not consider the parties' chosen labels.

[25] Stewart Dep. 147:24-15; New DCW Packet at 1045, Ex. 21; DS Dep. 74:10-76:2, 77:4-12, 79:7-80:12 (DS had not realized PPL's DCW Agreement directed the DCW to report certain events, he believed he should decide what to report, but, since he could not pay the DCW himself, he and the DCW had to agree to that requirement, it was outside his control); MJ Dep. 116:7-119:1 (MJ had no control over inclusion of this requirement, and thought she should have the last say in what was reported, but that's not what the DCW Agreement says); Lang Dep. 101:13-102:19; LZ Dep. 134:14-135:24, 136:6-137:19; Talarico Dep. 101:10-21.

[26] *See* Stewart Dep. 148:16-149:12; New DCW Packet at 1045, Ex. 21; DS Dep. 80:14-82:11 (DS testified there was no reason for DCW to speak with anyone other than DS himself, but that term was required in agreement); MJ Dep. 116:7-119:1; LZ Dep. 135:11-24, 136:6-137:9; Lang Dep. 101:13-102:19.

[27] *See, e.g.*, Stewart Decl. at C2-4; *see also* New DCW Packet at 1045, Ex. 21; Waiver App. at 64-65 (DCW must complete any necessary training related to the participant's service plan; must comply with Department policies and procedures for provider qualifications), Ex. 6; Stewart Dep. 24:24-25:3 (training will continue in the future), 205:20-23 (PPL provides an instruction manual about the web portal) 258:20-259:10, 259:14-260:6 (DCWs need complete training only once, even if they work for more than one participant), 260:21-261:8, 266:17-23; PPL Web Portal Instructional Manual, Ex. 32; 2014 RFP at 1854-58, 1864-65, Ex. 13; Stewart Dep. 252:12-253:5 (participants did not want training); PA DHS FLSA Meeting Agenda (same), Ex. 33; Talarico Dep. 98:24-99:10 (documents sent by PPL contained training requirements). PPL developed this training without consulting or receiving input from the participant. *See* Stewart Dep. 251:4-19, 253:25-254:9, 264:19-265:14; Pre-Service DCW Orientation, Ex. 34; DCW Orientation Handouts, Ex. 35.

[28] *See* Pre-Service DCW Orientation at 1313, 1320-26, 1402, Ex. 34; DCW Orientation Handouts at 2685-86, 2703, Ex. 35; Simms Dep. 16:3-7 (during orientation with PPL she was instructed as to her responsibilities and duties), 20:20-21:12 (she reviewed paperwork with a PPL employee during orientation), 36:13-37:3, 55:20-56:16, 56:24-58:1, 94:2-95:1 (she went through

demonstrate that PPL continues to maintain control over DCWs' work.

D. PPL Has Substantial Control Over Pay Rates of DCWs

PPL, not the participants, pays DCWs directly and later receives reimbursements from the state for those wages.[29] When participants transitioned to PPL in January 2013, PPL chose not to ask any participants what they wanted to pay their DCWs.[30] Instead, PPL independently determined to pay workers based on the pay data transmitted by the prior employer.[31]

Even with participants who joined the program after the transition, PPL "is responsible for informing the participant of the established rate" for the services he or she receives.[32] PPL

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orientation that addressed PPL policies and procedures, she understood the DCW agreement was between her and PPL since it was PPL that explained it to her in the telephone orientation; telephone call also addressed what services she should provide to the participant).

[29] *See* Stewart Dep. 234:24-236:5. Many DCWs consider PPL their employer because PPL pays them. *See, e.g.*, Talarico Dep. 173:7-9 ("whoever gives me my paycheck and gives me my tax papers are the people who I work for"); Lang Dep. 112:22-113:12; Santiago Dep. 78:10-19; Simms Dep. 15:14-19, 55:20-56:16; Seeley Decl. ¶ 11, Ex. 52 (she was told she could not qualify for forgiveness under student loan program because her employer was PPL, a for profit company); Yonkin Decl. ¶ 14-15 (there was no difference in employment policies and practices between the two participants to whom he provided services, since PPL employed him to work for both; he previously worked as DCW through an agency and the level of control by the agency and PPL were comparable); Tamburo Decl. ¶¶ 2-3.

[30] *See* Stewart Dep. 187:5-188:17, 189:21-23, 201:12-202:1; DS Dep. 98:21-99:17; EW Dep. 30:22-31:5 ("PPL paid him whatever their going rate was at the time."), 51:7-19 (he did not recall being offered the chance to fill out a rate sheet to set a pay rate for his DCW); MJ Dep. 127:11-128:2 (she recalls PPL required her to wait a year before she was permitted to ask for a raise for her DCW). Although it claimed that "certain participants" were asked to set a pay rate as part of the transition, it could only identify a single example, LZ. *See* PPL's response to Interrogatory 13, re: RFA No. 2, Ex. 36, *see also* Tamburo Decl. ¶ 7. That rate sheet, *on its face*, specifies that the participant *must* set forth the rate the DCW was paid prior to PPL taking over. DCW Transition Rate Form, Ex. 37; *see also* LZ Dep. 79:25-80:13, 145:2-6, 147:5-11.

[31] *See* Stewart Dep. 187:5-188:17, 189:21-23; *see also* Talarico Dep. 131:24-132:15, 133:25-134:5.

[32] Waiver App. at 213, Ex. 6; Stewart Dep. 170:16-21, 172:2-9, 173:5-18; MJ Dep. 126:14-23 ("There was a schedule, but I had to follow that schedule. I could not make up my own rates."), Ex.2; Simms Dep. 73:4-12 (when asked how her participant, her mother, set her rate, she explained "That is what she was told to put on the paper from PPL . . . I don't know who she spoke to, a representative, I guess, she needed help filling out the paperwork."); EW Dep. 75:19-

calculates the maximum wage rate a participant can pay a DCW and regularly recalculates this rate as the participant's insurance rates change.[33] After the participant requests a particular wage rate, PPL reviews and confirms that the requested rate is within its guidelines.[34]

PPL must review and approve all requested wage rates.[35] PPL does not permit the participant to select a rate above the maximum calculated by PPL, even if the participant wants to do so.[36] Several DCWs reported that PPL denied a raise requested by their participant.[37] PPL also gives participants guidance about selecting wage rates within its guidelines through written training materials (that suggest setting an initial wage rate below the maximum).[38]

PPL has authority to reduce a DCW's wage rate if it decides that is appropriate. If PPL

77:3 ("PPL is the one that said how much each worker was gonna get paid . . . I might have asked them after our period of time, did you get a raise, but that doesn't always pan out."); EW Decl. ¶ 6; Talarico Decl. ¶ 8; Jackson Decl. ¶ 6, Ex. 31.

[33] *See* Stewart Dep. 166:16-23, 174:8-19, 176:6-9, 182:24-184:2; *see also* Stewart Dep. 184:6-12 (participants can find the maximum wage rate on PPL's web portal or by calling PPL); DCW Rate Sheet & Instructions at 1096, Ex. 38; DCW Packet at 1932, Ex. 20; *see also* Simms Dep. 40:20-23 (when asked if she called the Office of Long Term Living to ask about the maximum wage rate, she responded that she always called PPL for that information).

[34] Waiver App. at 213, Ex. 6; Stewart Dep. 182:5-16, 291:9-17 (PPL checks minimum wage since at least Jan. 1, 2016); Simms Dep. 36:1-12 (her participant doesn't set the wage rate herself, if she wants to give a raise she has to ask PPL for permission).

[35] Stewart Dep. 180:5-25. *Cf.* Talarico Dep. 201:15-202:6, 202:22-203:10 (even though EJ initiated wage rate changes for Mr. Talarico, PPL still needed to approve her chosen rate as she could not unilaterally change Mr. Talarico's wage rate); EW Dep. 77:10-17 (he could ask PPL about a raise, but PPL was the one who decided on giving the raises).

[36] *See* Stewart Dep. 180:9-181:5, 181:21-182:39; MJ Dep. 72:19-23, 126:25-127:5 (PPL sets a cap on rates and will not pay her DCW more than that), 129:6-130:17 (because she could not afford to pay out of pocket, she had to comply with PPL's rate schedule, even though she thought the PPL scale was "sorely inadequate," she had been told she could not give any more raises to her DCW); Lang Dep. 90:14-91:11 (her participant asked for a raise for her, but PPL denied the request, saying she was paid the maximum they would allow).

[37] Jackson Decl. ¶ 6; Wance Decl. ¶ 10, Yonkin Decl. ¶ 9a, Segers Decl. ¶ 10a.

[38] *See, e.g.*, PPL Handbook at 1267, Ex. 7; Stewart Dep. 176:18-178:16 (PPL provides guidance on setting DCW wage rates), 179:17-25 (PPL advises setting sub-maximal wages), 184:3-12.

determines that a DCW's rate exceeds the maximum (e.g., when the maximum rate is recalculated due to changes in unemployment insurance costs), PPL sends the participant a rate change sheet identifying the lower rate and requires the participant to sign the form for the DCW to continue being paid.[39] For example, PPL lowered Mr. Talarico's rate without explanation; PPL told him that lowering the rate was required and was not a decision left to the participant.[40]

More significant than the specific hourly rate – which has to be selected within the fairly narrow range PPL sets – PPL exercises sole control over the rate at issue here: whether overtime hours are paid at one and one-half (1.5) times the regular rate, or whether they are paid only at a straight time (1.0) rate. Participants have no control over that decision.[41] PPL admits that it adopted a consistent policy of denying overtime to any DCWs prior to January 1, 2016.[42] After January 1, 2016, without any participant input or involvement, PPL determined to pay overtime

[39] *See* Stewart Dep. 185:18-186:15 (PPL required participants to reduce the wage rate for some transitioned DCWs who exceeded their maximum amount), 192:2-7 (PPL gave direction to reduce wages in 2014); 193:13-194:6; Rate Reduction Letter, Ex. 39.

[40] Talarico Decl. ¶ 8; *see also* Talarico Dep. 130:6-131:14, (explaining that PPL controlled wages, even when changes were requested by participants, and PPL reduced Mr. Talarico's wages when it determined he made too much money), 204:11-205:16, 206:5-7 (PPL forced EJ to drop Mr. Talarico's pay rate, and EJ was mad), 281:2-12 (other DCWs upset about PPL unilaterally decreasing their wages). Participant MJ reported that PPL cut wages for DCWs once, shortly after it took over management of the program, and she had no control over that decision. MJ Dep. 131:3-132:5. Participant LZ testified that she had asked for and been permitted to increase her DCW's rate to $13.98, and then was informed that was too high and she had to decrease the rate to $13.89. LZ Dep. 102:23-103:12, 154:6-16; LZ Dep. Exs. 28 (March 23, 2015 rate sheet) & 29 (May 10, 2015 rate sheet), Exs.40 & 41. DCW Wance was also told by PPL his rate had to be reduced. Wance Decl. ¶ 10.

[41] Santiago Dep. 38:6-39:2 (told to contact PPL when she asked her participant if she would be paid overtime); Simms Dep. 25:8-20 (participant directed her to PPL when she asked about overtime), 29:18-22 (hours were corrected after she raised questions, but she still did not get paid at the 1.5 overtime rate for her hours over 40); LZ Dep. 154:17-155:8 (she could not ask PPL to pay her DCW at the overtime rate for overtime hours).

[42] *See* Stewart Dep. 268:10-21, 275:15-16; Horvath Dep. 14:19-15:14; PPL's Response to Plaintiffs' First Interrogatories No. 3, 4, & 9 (March 16, 2018), Ex. 42.

at the proper 1.5 rate in some circumstances,[43] but continues to deny the overtime premiums to many DCWs who qualify for them.[44] In particular, PPL has a policy of not considering all hours worked when a DCW works for more than one participant, in determining whether a DCW is entitled to overtime for working over 40 hours per week.[45] Further, PPL chooses to classify some DCWs as "live-ins" and refuses to pay them overtime.[46] At no time has PPL asked the participants if or when they want to pay overtime to their DCWs.[47]

E. PPL Decides Whether or Not to Pay DCWs for Hours Approved by the Participants, and Handles All Queries About Paychecks

PPL requires all DCWs and participants to report time to PPL using timesheets or an online portal that PPL created. Upon receipt, PPL reviews the timesheets to determine which hours will be compensated and which will be rejected.[48] "Timesheets are validated [by PPL]

[43] Revisions to the federal Fair Labor Standards Act (FLSA) prompted the revisions. *See* 29 C.F.R. § 552.109(a); *see also* Stewart Dep. 278:13-19, 283:10-18, 285:5-15, 296:22-297:13; *cf.* Talarico Dep. 249:8-17.

[44] *See* Stewart Dep. 280:4-20 (describing the need to obtain authorizations for overtime in 2016, which delayed payment), 297:22-298:13 (same, received some authorizations too late to pay overtime claims), 299:12-24.

[45] Stewart Dep. 288:5-15. Consistent with the overtime policy PPL set, Mr. Talarico did not receive overtime before January 1, 2016, even though he regularly worked 50-60 hours per week for his client EW, 6 hours per week for his client MJ, and additional sporadic hours for clients EJ and KS. After January 1, 2016, he received overtime premiums only for the hours in excess of 40 that he worked for EW; he never received an overtime premium for the additional hours—which also exceeded 40 in a work week—that he worked for MJ, EJ, or KS. *See* Talarico Dep. 68:18-69:25, 70:5-16, 70:17-71:3, 255:14-22.

[46] *See* Stewart Dep. 283:16-17, 285:5-15, 286:7-11; Horvath Dep. 106:7-12, 160:3-7; Answer ¶ 38, Dkt. 44.

[47] Stewart Dep. 269:24-270:7, 285:16-286:11 (if participant requested overtime pay, PPL still would not pay), 300:25-301:6 (even after overtime pay was available, PPL did not ask participants if they wanted it paid to their DCWs); Horvath Dep. 15:6-18.

[48] *See* Timesheet Policies at 614-16, Ex. 43; Stewart Dep. 203:20-23, 205:7-23, 210:16-211:3, 211:13-24; EW Dep. 74:13-20 (PPL told him they would review and could reject timesheets). *See also* n.19 (PPL refused to pay DCWs for work performed before PPL determined the DCW was "good to go").

against the participant's eligibility and service authorization information imported to [PPL's] web portal."[49] PPL tracks DCWs' time worked to ensure compliance with the number of hours established in the participant's Individual Service Plan (ISP).[50] PPL also reviews timesheets to ensure no overlap with time reported from that same DCW for any other participant or for that participant from any other DCWs.[51] PPL will not pay timesheets that fail its review, even if the participant has approved the timesheet and wants PPL to pay it.[52] Instead, PPL unilaterally determines if timesheets are "good to pay" after its review and issues paychecks to the DCWs.[53]

Whenever Mr. Talarico or other DCWs have issues with their timesheets or pay, they have to address those issues with PPL; the participants can do nothing to remedy the issues other than refer the DCWs to PPL.[54] Further, it is PPL, not the participant, that decides whether to pay

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[49] Waiver App. at 214, Ex. 6; Stewart Dep. 84:6-8, 202:20-23, 203:24-204:3, 204:9-12, 205:7-13, 210:16-21, 211:7-12, 212:14-213:5, 224:14-18, 237:2-13, 256:8-10, 256:24-257:5, 257:12-15; 2014 RFP at 1880-84 (describing PPL's process), Ex. 13; 2012 RFP at 4127-33 (same), Ex. 12; *see also* Timesheet Policies, Ex. 43.

[50] *See* Stewart Dep. 212:14-213:5; Waiver App. at 159, Ex. 6. DCWs also testified that PPL told them the cap on their weekly hours. Simms Dep. 59:12-19 (she was told 44 hours/week by PPL), 100:24-101:3 (PPL "do not set the schedule but they do allocate the hours").

[51] *See* Stewart Dep. 213:6-11, 215:25-216:5, 216:17-217:2, 218:13-21; Horvath Dep. 89:13-23, 92:1-14, 96:20-97:21; Talarico Dep. 224:5-225:5, 213:6-11, 215:25-216:5, 216:17-217:2, 218:15-21.

[52] *See* Stewart Dep. 232:5-18, 237:2-13; 2014 RFP at 1880-84, Ex. 13; Horvath Dep. 117:15-19; *see also* Rejected Timesheets, Ex. 44; EW Dep. 98:8-99:10; LZ Dep. 114:22-115:14, 134:3-10, 143:18-144:25 (participant could do nothing to get PPL to pay DCWs when PPL decided to delay or deny pay, timesheets rejected for purely clerical errors and participant could not direct they be paid); MJ Dep. 125:23-126:12 (PPL rejected timesheets and she could not make them pay her DCWs); Lang Dep. 113:13-116:9 (called PPL and told she was not paid because she had not filled out a form correctly; her participant could not address the issue for her or require PPL to pay her).

[53] *See* Stewart Dep. 210:22-3.

[54] MJ Dep. 81:18-82:1 (called PPL to ask when her DCW will get paid, why it was taking so long to get them on payroll), 125:23-126:12 (PPL rejected timesheets and she could not make them pay her DCWs); EW Decl. ¶ 9; Lang Dep. 53:16-54:21 (called PPL about missing paychecks, and learned PPL had not paid her because they had lost some paperwork she sent in),

overtime to DCWs who work over 40 hours in a work week.[55] As noted in Section II.D above, PPL applies a uniform policy to all members of the putative class pursuant to which PPL categorically denies overtime premiums under the following circumstances: (a) if the overtime was worked before January 1, 2016; (b) if the DCW works for two or more participants, hours are not tallied together; and (c) if the DCW lives with his or her participant.

F. PPL Maintains Records and Controls Payroll, Tax Filings, and Insurance

Evidence also establishes that PPL is responsible for every aspect of creating and maintaining the DCWs' employment records (including the DCW Agreement, timesheets, and similar forms), obtaining workers' compensation and unemployment insurance, withholding taxes and making required tax filings for the participant, preparing and issuing payroll checks to the DCW (including withholding payroll taxes), processing any judgments or garnishments of wages as required by law, and issuing W-2 forms, without any specific direction from the participants.[56] PPL further requires workers to complete applications for tax exemptions, which

113:13-116:9 (she called PPL and was told she was not paid because she had not filled a form out correctly; her participant could not resolve the issue or require PPL to pay her); Santiago Dep. 72:15-73:7 (she did not receive paychecks, and when she asked her participant, she was directed to call PPL); 74:2-16 (PPL would not pay her for three weeks she worked, because it was before PPL declared her good to go); Jackson Decl. ¶ 8; Talarico Decl. ¶ 13; Talarico Dep. 79:9-12, 267:12-268:22, 269:19-270:8, 270:20-272:3, 272:14-16 (he called PPL over 74 times seeking assistance with issues related to his pay); Tamburo Decl. ¶ 11 (as "CLE" for her husband, she observed issues with DCW paychecks, and tried calling PPL to fix but they did not follow her direction); Stewart Dep. 267:10-13 (DCWs would call customer service); Horvath Dep. 118:20-119:8 (PPL had a customer service line to assist with pay issues).

[55] Stewart Dep. 269:24-270:7, 283:16-18, 284:2-5, 286:7-11 (explaining that a participant could not direct the payment of overtime where hours for that participant were under 40 but nonetheless put the DCW over 40 hours in a work week), 300:25-301:6; Talarico Decl. ¶ 15; EW Decl. ¶ 11. PPL also has the power to recoup money from DCWs' paychecks for various reasons. For example, it recouped money from Mr. Talarico without his participant's approval. *See* Talarico Dep. 260:15-261:24, 265:15-16, Ex 19; *cf.* Stewart Dep. 303:19-20.

[56] Waiver App. at 24-25, Ex. 6; Stewart Dep. 42:2-21, 84:20-23, 85:13-19, 158:6-10, 159:5-11, 189:24-190:10, 234:5-6, 237:14-16; Grant Agreement at 760 (PPL is required to retain at

PPL mandates DCWs to take if it determines they are eligible.[57] PPL creates and controls the timesheets and online timekeeping system that it requires all DCWs to use.[58] PPL issues payroll checks to DCWs bearing its logo and name on the check face.[59] PPL also issues W-2 forms listing the employer as "Public Partnerships for PA HH ER Agent for (redacted)."[60]

In addition to submitting all paperwork and payments required for unemployment insurance, PPL directs DCWs that they can apply for unemployment, and how to apply.[61]

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least "the completion of required background checks and the I-9 form"), Ex. 16; CLE Packet at 1015, Ex. 10; DCW Packet at 1944 ("PPL secures, pays, and maintains" workers' compensation policies), Ex. 20; 2014 RFP at 1801-10 (PPL retains documents for six years after participant leaves the program), 1870-76, 1878, 1880, 1884-1900, 1906-12, 1913-17 (requiring procurement and oversight of worker's compensation insurance), Ex. 13; 2012 RFP at 4071 ("PPL will receive *and maintain* the participant's initial and updated Individual Service Plans . . . ." (emphasis added)), 4133-43 (explaining PPL's financial management and financial-record retention tasks), 4147-50 (describing PPL's tax duties), 4157-64 (describing PPL's record-retention duties), 4171-4173 (describing PPL's duties regarding workers' compensation insurance), 4427-52 (describing PPL's payroll process), Ex. 12; EW Dep. 21:10-23 (PPL handled all payroll functions, unemployment, tax withholdings and payments, etc.), 66:5-21, 68:13-71:18 (he was unaware of specifics of what PPL did in his name), 97:10-98:1 (he had no input into which company provided workers' compensation coverage, the terms of coverage, or whether he would have coverage at all). PPL "maintain[s] documentation to support its compliance with the OLTL VF/EA FMS Provider Standards" and "books, records and . . . documents available for inspection by OLTL" or other agencies. *See* 2014 RFP at 1912, Ex. 13; VF/EA-FMS Special Provider Agreement at 1007 ¶¶ 3, 9, Ex. 26.

[57] Stewart Decl. at E5-7; Stewart Dep. 157:12-158:5; New DCW Packet at 1062, Ex. 21.

[58] MJ Dep. 124:8-125:6 (timesheets were created by PPL, then replaced by online form PPL created); EW Dep. 71:25-72:13 (if he did not use the forms PPL created to report time, DCW would not be paid).

[59] *See* Stewart Decl. at C28, D42, E35, F27; Talarico Dep. 146:4-10, 149:7-8, 171:10-12 ("I look at the paycheck stub, which says Public Partnerships. That's who pays me. That is my employer."); *cf.* Talarico Dep. 220:5-12 (PPL managed direct deposit based on paperwork submitted by DCWs).

[60] *See* Stewart Decl. at C29-31, D43-45, E36-37, F28-29; *see also* Talarico Dep. 151:14-15, 186:8-25; Indeed, initially PPL was listed on the W-2 form, without any reference to the participant. Stewart Dep. 244:4-9 (agreeing that there is no way to determine which 2013 W-2 belongs to which participant), 246:15-16 (no way to connect W-2s to participant's EIN); Ralph Talarico's W-2s, Ex. 45.

[61] Simms Dep. 90:1-91:4 (when she was unable to continue work as DCW because of her own health issues, PPL directed her on how to apply for unemployment, which she received).

Plaintiff Talarico applied for unemployment, named PPL as his employer, and received benefits. Talarico. Dep. 42:14-43:4.

III. ARGUMENT

PPL is a joint employer under both federal and state law. PPL cannot meet its heavy burden of establishing that there are no disputes of fact or that the inferences that may reasonably be drawn from undisputed facts establish as a matter of law that PPL is not Plaintiffs' joint employer. Under Rule 56, the Court may grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. "A genuine issue is present when a reasonable trier of fact, viewing all of the record evidence, could rationally find in favor of the non-moving party in light of [the] burden of proof." *Doe v. Abington Friends Sch.*, 480 F.3d 252, 256 (3d Cir. 2005) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-26 (1986)); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-52 (1986)). The non-moving party's evidence is to be believed and all reasonable inferences drawn in his favor. *Anderson*, 477 U.S. at 255.

Whether an entity is a joint employer, "although dependent on the facts, is a question of law, because it requires the court to draw a legal conclusion from the facts." *In re Enterprise Rent-a-Car Wage & Hour Emp't Practices Litig.*, 735 F. Supp. 2d 277, 338 n.21 (W.D. Pa. 2010), *aff'd* 683 F.3d 462 (3d Cir. 2012); *see also Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 76 (2d Cir. 2003) (characterizing "the ultimate decision as to whether a party is an employer" as a "legal conclusion"); *Hardgers-Powell v. Angels in Your Home LLC*, -- F.R.D. ---, 2019 WL 409276, at *14 (W.D.N.Y. Feb. 1, 2019) (quoting *Zheng*, 355 F.3d at 76).

As set forth in detail below, the record demonstrates several key factual disputes. As to each factor considered in evaluating whether PPL is a joint employer, PPL contends it has absolutely no control, while Plaintiffs submit evidence showing PPL exercised substantial

control. For example, the parties dispute PPL's role in approving DCWs for hire, establishing work rules governing DCWs, setting wage rates, approving timesheets for payment, deciding on workers' compensation and unemployment insurance, and maintaining employment records. Perhaps the only thing the parties do agree on is that PPL, not the participants, determined whether DCWs would be paid the overtime premium when they worked over 40 hours per week. Even when the parties agree on a particular fact, they dispute the inferences to be drawn from that fact, which also precludes summary judgment. If the court resolves these disputes in Plaintiffs' favor, then PPL is the DCWs' joint employer.

A. Economic Realities Determine an Entity's Status as an Employer, and Relevant Federal Authority Expressly Contemplates Joint Employers in this Context

PPL relies heavily on the agreement it presents to participants and DCWs, in which both purport to acknowledge that the participant, not PPL, is the DCW's employer.[62] Mot. at 12-14. However, such an agreement is legally meaningless. The parties' labels (e.g., the assertion in the Agreement that PPL is not the DCWs' employer) do not control whether there is an employment relationship; rather, the FLSA's test for employment—the economic realities test—governs. *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 301 (1985) (finding persons were employees despite their insistence they were volunteers, holding "these protestations, however sincere, cannot be dispositive. The test of employment under the Act is one of 'economic reality.'"); *Falk v. Brennan*, 414 U.S. 190, 193, 195 (1973) (despite agreement designating one

[62] Both participants and DCWs testified that they did not understand the meaning of the term "common law employer" included in the Agreement and did not know what a "joint employer" was, or that the participant and PPL can both be joint employers. DS Dep. 44:11-16; Talarico Dep. 146:16-23 (saw "common law employer" but did not have understanding that EW was his employer), 147:20-23 (does not have understanding of "common law employer"); Talarico Decl. ¶ 5; Simms Dep. 61:5-7, 76:20-77:2, 80:18-20, 82:1-15; Santiago Dep. 91:14-92:11, 120:11-121:17; EW Dep. 64:19-65:10; Lang Dep. 84:2-5.

entity as the employer, economic realities test showed both entities were joint employers).[63]

The irrelevance of the parties' labels flows from the Supreme Court's multiple, unambiguous rulings holding that employees may not voluntarily waive their FLSA rights. *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 740 (1981) ("FLSA rights cannot be abridged by contract or otherwise waived because this would 'nullify the purposes' of the statute and thwart the legislative policies it was deigned to effectuate."); *Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 602-03 (1944) (contract "cannot be utilized to deprive employees of their statutory rights").[64]

As the Third Circuit held, "The Supreme Court has even gone so far as to acknowledge that the FLSA's definition of an employer is the 'broadest definition that has ever been included in any one act.'" *In re Enter. Rent-A-Car Wage & Hour Emp't Pracs. Litig.* (*Enterprise*), 683 F.3d 462, 467-68 (3d. Cir. 2012) (*citing United States v. Rosenwasser,* 323 U.S. 360, 363 n.3 (1945)). The FLSA's broad definition of employer governs here, not common law employer standards, which differ.

PPL also argues that it is not a joint employer because the statutes and regulations governing the Medicaid program providing funding here require the participant to be the sole

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[63] *See also* U.S. Dep't of Labor, Wage & Hour Div., Administrator's Interpretation No. 2014-2 at 5 (June 19, 2014), ("AI2014-2"), *available at* https://www.dol.gov/whd/opinion/adminIntrprtn/FLSA/2014/FLSAAI2014_2.pdf (last visited March 28, 2019) (an employment analysis is necessary regardless of the name used by the third party (e.g., fiscal/employer agent)), citing DOL guidance that titles are not determinative, *e.g.*, 29 C.F.R. § 541.2 (2017); U.S. Dep't of Labor, Wage & Hour Div., Division Field Operations Handbook § 22a04 (rev. 661 Nov. 29, 2010), *available at* https://www.dol.gov/whd/FOH/FOH_Ch22.pdf (last visited March 28, 2019).

[64] *See also Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947) ("Where the work done, in its essence, follows the usual path of an employee, putting on an 'independent contractor' label does not take the worker from the protection of the Act."); *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of Am.,* 325 U.S. 161, 167 (1945) (refusing to permit waiver of FLSA rights that would undermine the Act's purpose of "achiev[ing] a uniform national policy of guaranteeing compensation for all work or employment engaged in").

employer. Mot. at 19-20. But PPL is both factually and legally wrong. With respect to governing law, the Supreme Court held that "employer-employee classifications under other statutes are not of controlling significance" in determining who the employer is under the FLSA. *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150 (1947). With respect to the factual record, *all* relevant government agencies contemplated that entities like PPL could be a joint employer under the "consumer-directed model" at issue here.

First, the U.S. Department of Labor (DOL) directly addressed the joint employer question in the context of the relevant Medicaid program. *See* AI2014-2 at 15, 17, Ex. O to Mot. AI2014-2 explicitly contemplates that entities other than the Medicaid recipient would be found to be an employer or joint employer of the workers providing care under the consumer-directed Medicaid program. *Id.* at 1-2. The DOL concluded that "in most, but not all, consumer-directed models, a third party will be a joint employer of a provider [DCW]." *Id.* at 2.

Likewise, the federal Center for Medicaid and CHIP Services (CMCS) issued an Informational Bulletin on July 3, 2014 regarding the interaction of Self-Direction Program Options for Medicaid Payments and the FLSA's rules for treatment of "companionship services." U.S. Dep't of Health & Human Servs., Ctrs. for Medicare and Medicaid Servs., CMCS Informational Bulletin (July 3, 2014), *available at* https://www.medicaid.gov/Federal-Policy-Guidance/Downloads/CIB-07-03-2014.pdf (last visited March 28, 2019). The CMCS guidance specifically directs states to review programs for compliance with the FLSA, stating:

> [I]t is anticipated that many states will determine that, for purposes of the FLSA, home care workers in self-direction programs have joint third-party employer(s) in addition to being employed by the beneficiary. In self-direction models where there is a third-party joint employer, the DOL regulation states that all work is subject to minimum wage and overtime requirements.

Id. at 1. The Bulletin acknowledges that the economic realities test applies and that a third-party joint employer cannot claim the companionship care exemption. *Id.* at 2.

The state of Pennsylvania also explicitly contemplated the participant may not be the sole employer. The HCBS Waiver application acknowledged that the participant may be a joint employer, noting that "[t]he participant may function as the common law employer *or the co-employer* of workers." Ex. 6 at 170 (emphasis added). Further, the Grant Agreement between Pennsylvania and PPL contemplated that the overtime provisions of the FLSA might be found to apply to workers providing services through this program. Stewart Decl. at A9, Ex. D to Mot. The participant can, as the Medicaid program contemplates, provide day-to-day supervision over services and have substantial (though not exclusive) control over who provides those services, without being the sole employer to the exclusion of joint employers such as PPL. Indeed, courts have so found with respect to the implementation of this Medicaid program in other states. *Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983) (finding that the recipients of domestic in-home services were responsible for day-to-day supervision of chore workers but that public social service agencies were still joint employers); *Hardgers-Powell*, 2019 WL 409276, at *14-17 (finding fiscal intermediary is a joint employer even though program participants are responsible for hiring and supervising home care workers).

In short, the PDS program does not inherently require finding that the participant is the sole employer. Neither CMCS, OLTL, nor any government agency, other than the DOL, is authorized to opine on whether PPL is Plaintiffs' employer or not, and any such opinions are not binding on this Court. More significantly, there is nothing inconsistent between participants exercising the degree of control contemplated by the PDS program, and PPL or another agency being the employer or joint employer of the DCWs. The economic reality of Plaintiffs' relationship with PPL, as set forth below, shows that PPL is Plaintiffs' joint employer.

B. PPL Is Plaintiffs' Joint Employer Under the FLSA

1. The FLSA Recognizes an Employee May Have More than One Joint Employer

The DOL's governing regulations provide that a single worker may be "an employee to two or more employers at the same time." 29 C.F.R. § 791.2(a) (2017).[65] In such cases, the joint employers are responsible, both individually and jointly, for FLSA compliance, including paying overtime compensation for all hours worked during the workweek. *Id.*; *Baystate Alt. Staffing, Inc. v. Herman*, 163 F.3d 668, 675 (1st Cir. 1998) ("The FLSA contemplates several simultaneous employers, each responsible for compliance with the Act."). A worker has joint employers when "the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly." 29 C.F.R. § 791.2(b)(3) (2017). Thus, the focus of the joint-employment regulation is the degree to which the two possible joint employers share control with respect to the employee and the degree to which the employee is economically dependent on the purported joint employers. *Id*. PPL's status as a joint employer does not turn on showing that it controls every aspect of employment to the exclusion of the participant.[66] Rather, a showing of shared control, including indirect control, is sufficient: "the 'joint employer' concept recognizes that the business entities involved are in fact separate but that they *share* or co-determine those matters governing the essential terms and conditions of employment." *NLRB v. Browning-Ferris Indus. of Pa., Inc.*, 691 F.2d 1117, 1123 (3d Cir. 1982); *cf. Hardgers-Powell*, 2019 WL 409276, at *17 (finding fiscal agent was joint employer of care workers where employer responsibilities were

[65] For purposes of overtime liability, it is irrelevant whether PPL is Plaintiff's sole employer or one of many joint employers. *See* 29 C.F.R. § 552.109(a).

[66] "[T]he question in 'joint employment' cases is not whether the worker is more economically dependent on [one potential joint employer or another], with the winner avoiding responsibility as an employer." *Antenor v. D & S Farms*, 88 F.3d 925, 932 (11th Cir. 1996).

shared with participant, and the two "work in tandem" to exercise authority over employee); *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125, 141-42, 145-46 (4th Cir. 2017) (finding joint employment where two entities were "not completely disassociated").

2. The Factors Considered in Evaluating Joint Employer Status

The determination of whether an employer-employee relationship exists does not depend on "isolated factors but rather upon the circumstances of the whole activity." *Rutherford Food*, 331 U.S. at 730. The Third Circuit has identified four factors as a "starting point" for considering joint employer status:

> [D]oes the alleged employer have: (1) authority to hire and fire employees; (2) authority to promulgate work rules and assignments, and set conditions of employment, including compensation, benefits, and hours; (3) day-to-day supervision, including employee discipline; and (4) control of employee records, including payroll, insurance, taxes, and the like.

Enterprise, 683 F.3d at 469.[67] The Court considered both direct and indirect control in each area. *Id.* at 467-69. Moreover, the Court emphasized that "these factors *do not constitute an exhaustive list* of all potentially relevant facts" and that deciding if a defendant is a joint employer "must be based on a consideration of the total employment situation and the economic realities of the work relationship," without resort to "narrow legalistic definitions." *Id.*; *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 33 (1961) (the touchstone is "economic reality"). Because the ultimate question is whether the worker is economically dependent on the alleged employer, the factors are not considered as a checklist, adding up how many areas an entity controls, but instead are evaluated qualitatively. *See* 29 C.F.R. § 791.2 (2017); 29 C.F.R. § 500.20(h) (2017); *Charles v. Burton*, 169 F.3d 1322, 1329 (11th Cir. 1999); *Lopez v.*

[67] The DOL considered these same factors in its discussion of joint employment in the context of this Medicaid program, but divided the second factor into two separate items: (a) establishing wages and benefits, and (b) setting hours and scheduling. AI2014-2 at 9-14.

Silverman, 14 F. Supp. 2d 405, 414-17 (S.D.N.Y. 1998).

DCWs are economically dependent upon PPL. Participants do not have money of their own to pay workers. And PPL's documents demonstrate that DCWs' continued employment is explicitly conditioned on the participants' ongoing enrollment in the PDS program that PPL administers. Stewart Decl. at C2-4, C14-16, D2-4, D14-16, D23-25, E2-4, E14-16, F2-4, F14-16. PPL effectively controls when and whether a DCW can begin employment, when and whether any given timesheet approved by the participant will actually be paid, and whether overtime premiums will be paid. *Supra* at II.B, D, E. *See Donovan v. DialAmerica Mktg., Inc.*, 757 F.2d 1376, 1385 (3d Cir. 1985) (test for economic dependence is "whether the workers are dependent on a particular business or organization for their continued employment").

As set forth in detail above, PPL does not operate as a traditional agent, chosen freely by the participant and acting only at the participant's direction. *Supra* at II.A. Instead, PPL's influence permeates every aspect of the employment relationship. PPL provides direction to the participant and acts without any participant-initiated request. *Id*. PPL can, and does, refuse to pay DCWs even if participants submit approved timesheets, because PPL has not yet deemed the DCW "good to go," or because PPL perceives some error with the timesheet. *Supra* at II.BII.E. Thus, despite PPL's attempts to portray its role as akin to ADP, a well-known payroll processing company (Mot. at 6, 23-24, 29, 36, 40), PPL's actions place it in a very different posture. *Cf. Nerviano v. Contract Analysis Sys.*, 2018 WL 2240533 (E.D. Pa. May 16, 2018) (Mot. at 23) (dismissing ADP from case where there were no allegations that ADP exercised any control over termination, or any other aspect of employment). [68]

[68] Indeed, if PPL believes that the participant is not making good decisions, PPL can seek to have a representative appointed for the participant, effectively removing the participant as even a

3. PPL Controls the Hiring and Firing Process for DCWs and Requirements that the DCWs and Participants Have to Follow

PPL instructs participants they are not permitted to employ DCWs until PPL decides that the DCW is "good to go." Where the participant asks the DCW to begin work before PPL's "good to go" approval, PPL refuses to pay the DCW for work performed, despite the participant's request. *Supra* at n.19. What is more, PPL requires a prospective DCW to undergo a background check before it will authorize the participant to hire that DCW, whether the participant wants such a check or not. *Supra* at nn.16, 18. PPL argues this is irrelevant because only individuals whom participants wish to hire are subject to this screening. But, Plaintiffs need not show that participants had no role in hiring to establish a joint employer relationship. Mot. at 24. PPL's next argument that participants may hire an individual even if the background check turns up a criminal record misses the point. *Id*. The entire hiring process includes multiple steps required by PPL, not the participant. No DCW can be hired or paid until PPL approves.

Further, PPL requires that the DCW and participant both complete documents to PPL's satisfaction to obtain PPL's "good to go" authorization for the DCW to begin work. *Supra* at n.19. Numerous DCWs complained that PPL had lost or failed to process paperwork, or PPL required participants and DCWs to redo their paperwork because PPL determined they were deficient. *Supra* at nn. 19, 54. The required documentation includes confirmation that the DCW

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pro forma "employer." *Supra* at n.10. While this power may not be used as frequently as PPL's power to delay hiring a DCW, refusal to pay a DCW for a given timesheet, or refusal to pay DCWs overtime, the existence, not frequency of exercise, of this authority is what matters. *Ruiz v. Fernandez*, 949 F. Supp. 2d 1055, 1067 (E.D. Wash. 2013) (explaining that the frequency with which the entity exercised its right to fire is not indicative of employment; the fact that the entity had the power to fire is what is relevant); *see also Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 139 (2d Cir. 1999) (observing that joint employer's exercise of limited or occasional control did not remove employment relationship from protections of the FLSA); AI2014-2 at 10.

meets PPL's, not the participant's, qualifications. *See* n. 11. Not only does the required documentation include qualifications not set by the participant, in some cases, PPL already determines the DCW is qualified before sending the documentation to the participant for signature.[69] And PPL requires DCWs to sign an Agreement that establishes various terms of employment, as discussed below in section III.B.4.a.

Finally, PPL can at any moment in time bar a participant from hiring, or require a participant to fire, any DCW who appears on Pennsylvania's LEIE. *Supra* at n.17. PPL can veto hiring or require the firing of DCWs under this independent authority. *Id.*

These facts demonstrate that PPL shares authority over hiring. *See Rapczynski v. Directv, LLC*, No. 3:14-CV-2441, 2016 WL 1071022, at *5 (M.D. Pa. Mar. 17, 2016) (where defendant required workers to obtain certifications before being assigned to work for it and imposed quality standards, inference that defendant had authority over hiring was reasonable); *see also* AI2014-2 at 10 (imposing qualifications on providers, such as fulfilling state-administered training requirements, should be considered a strong indicator of employer status); *see also Bonnette*, 704 F.2d at 1470 (holding, in a similar home care program where the recipient of services had substantial say over selection of the workers, while defendant had indirect control, that "[r]egardless of whether the appellants are viewed as having had the power to hire and fire, their power over the employment relationship by virtue of their control over the purse strings was substantial"); *Hardgers-Powell*, 2019 WL 409276, at *14-17 (despite finding fiscal agent exercised no control over hiring, it was a joint employer based on control over other areas).

PPL baldly asserts that it has no authority over hiring and that alone precludes finding it is Plaintiffs' employer. Mot. at 22-24. Defendant is wrong. The evidence shows PPL shares

[69] DS Dep. 115:12-118:3; MJ Dep. 79:12-21; EW Dep. 95:3-12; Tamburo Decl. ¶ 5.

significant authority over hiring; regardless of the participant's wishes, until PPL determines a DCW is "good to go," it does not employ or pay a DCW. And while PPL does not recruit and propose DCW candidates to all participants,[70] recruiting is only one facet of hiring. PPL's approval of the hiring decision is required, and it is often delayed and can be withheld.

None of PPL's cited cases relied solely on lack of hiring authority in deciding joint employment status. For example, *Garcia v. Nunn*, No. 13-6316, 2015 WL 5585451, at *4 (E.D. Pa. Sept. 23, 2015), cited a laundry list of factors for which there was no allegation of involvement by the purported joint employer. *Id.* ("[N]o mention in the amended complaint that Defendant Weis had the authority to hire and fire the plaintiff employees, that it trained the employees, that it paid the employees directly, or that it set the employees' conditions of employment in terms of compensation, benefits, and work schedules, including the rate and method of payment."). Similarly, in *Yue Yu v. McGrath*, 597 F. App'x 62, 66 (3d Cir. 2014), the plaintiff worked on a specific project through a contract between her employer and a staffing agency, which in turn had an agreement through a consulting firm to place her with the defendant. The fact that defendant could not fire her from her position with her primary employer, but only terminate her assignment with defendant, was hardly the only factor weighing against a finding of joint employment. *Id.* Instead, the court noted that the defendant "did not set Yu's compensation, benefits, or rate and method of payment," "had no control over payroll, insurance, or tax records," and even gave performance feedback in part through the intermediary agencies. *Id.* In *Nerviano*, the plaintiff sued both her employer and ADP, which

[70] Although not the source of DCWs for the four deposed participants, PPL *does* maintain a registry of available workers from which participants may select their DCWs. *See* https://www.mychoice4care.com/ (last visited March 28, 2019); Stewart Decl. at C11-13, D20-22 (showing that a worker could be "found using PPL's MyChoice4Care Provider directory"); Stewart Dep. 263:7-15, 264:12-13.

provided payroll and related services to her employer, regarding her termination. *Nerviano*, 2018 WL 2240533 at *2-3. The complaint did not allege that ADP controlled any aspect of plaintiff's employment, nor allege any involvement in the decision to terminate her. *Id.*

It is hardly surprising that these cases did not turn on any one factor, considering the Third Circuit specifically cautioned against such an approach in *Enterprise*, 683 F.3d at 469, and has also flatly held that "[w]e do not agree that power to hire and fire is dispositive." *Haybarger v. Lawrence Cty. Adult Prob. & Parole*, 667 F.3d 408, 418 n.9 (3d Cir. 2012). Considering the evidence of PPL's shared control over hiring and firing in light of the governing standard, this factor weighs in favor of finding that PPL is a joint employer. Even if PPL did not have direct involvement in hiring and firing, its "power over the employment relationship by virtue of [its] control over the purse strings was substantial," which weights this factor in favor of an employment relationship. *Bonnette*, 704 F.2d at 1470.

4. PPL Controls Compensation, Benefits, General Rules, and Hours Paid

a. *Terms and Conditions of Employment*

Through the DCW Agreement, PPL establishes a variety of work rules that DCWs must follow. Participants uniformly testified that they did not chose these work rules. *Supra* at nn.23, 25, 26. Specifically, despite participants testifying that they did not believe such requirements were appropriate, the Agreement includes provisions requiring the DCW to report certain events to the service coordinator, and to participate in meetings about the participant. *Id.* PPL's claim that it does not promulgate any work rules or assignments cannot be reconciled with its requirement that participants and DCWs comply with, and sign, a DCW Agreement PPL drafted and presented to them, rather than negotiating their own terms. *Supra* at II.C. PPL argues that because participants, not PPL, specify DCWs' duties in the ISP and schedule which hours DCWs will work, PPL cannot be a joint employer. This argument fails. Such control by participants is

akin to that exercised by companies who contract with staffing agencies, and courts nonetheless find staffing agencies to be employers. *See, e.g., Baystate*, 163 F.3d at 676; *cf. Barfield v. N.Y.C. Health & Hosps. Corp*., 537 F.3d 132, 144, 147 (2d Cir. 2008) (finding hospital and staffing agency qualified as joint employers even though hospital had control over hours and tasks assigned); *Yue Yu*, 597 F. App'x at 64-66 (plaintiff was employee of staffing agency, not of client that controlled work assignments).[71]

b. *Compensation, Benefits, and Hours Worked*

PPL exercises control over compensation, benefits, and hours in a number of ways. PPL exercises substantial control over pay rates, particularly the overtime rate at issue here. When PPL transitioned thousands of DCWs to its system in 2013, it established its ultimate control over pay rates by deciding to pay the DCWs the same rate they had been paid by their prior employers, depriving participants of the opportunity to set a different rate. *Supra* nn.30, 31.

The DOL considers setting a wage rate 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." AI2014-2 at 11. Case law also supports the idea that control over the pay rate is a strong factor in identifying an employment relationship. In *Barrientos v. Taylor*, 917 F. Supp. 375 (E.D.N.C. 1996), a farm labor contractor depended on cash from the farm owner to such an extent he had no discretion in setting the pay rates for plaintiffs, so the court concluded that "[e]ssentially, the [farm owner] dictated what plaintiffs would receive" and was a joint employer. *Id*. at 382-83. Similarly, in *Hodgson v. Griffin & Brand of McAllen, Inc.*, 471 F.2d 235 (5th Cir.

[71] PPL's citation to *Richardson v. Bezar*, 2015 WL 5783685 (E.D. Pa. Oct 5, 2015) (Mot. at 24) is inapposite. There, a complaint was dismissed for failing to allege defendant played a role in any of the *Enterprise* factors. Here, Plaintiffs have not only alleged such a role under each factor, but presented substantial evidence establishing how that role was carried out by PPL.

1973), the Fifth Circuit found that the defendant set the workers' pay, determined whether to pay on an hourly or piece-rate basis, and deducted Social Security contributions, all of which weighed strongly in favor of finding a joint employment relationship. *Id*. at 238.

As described above, PPL set the wage rates of all DCWs transitioned in 2013, and has had substantial say over pay rates thereafter. The fact that PPL shares control, to a certain extent, with participants does not undermine PPL's significant role as a joint employer. *Browning-Ferris*, 691 F.2d at 1123 (finding two entities that shared control or co-determined employment issues were joint employers); *Hardgers-Powell*, 2019 WL 409276, at *17 (finding fiscal agent was joint employer of care workers where it "work[ed] in tandem" with participant).

In hiring new workers, PPL gives participants substantial guidance on selecting rates. *Supra* at nn.32-34, 38.[72] PPL must approve any requested rate or rate change before it can go into effect, and PPL enforces limits on pay rates. *Supra* n.35, 36. Contrary to PPL's claim that it plays no role, participant EW testified that PPL set pay rates, and he did not control raises. EW Dep. 51:7-19, 75:19-77:3, 77:10-17. PPL does not alert participants to their limited authority to change the pay rate, leaving many participants unclear on what they can do.[73] Not only does

[72] The Waiver Application goes further, stating that PPL will inform the participant of the acceptable rate, ask the participant to complete a form specifying that rate, then review to ensure compliance with the approved rate, before implementing that rate. Waiver App. at 213, Ex. 6.

[73] EW testified that PPL set the rate, and he did not control raises, EW Dep. 51:7-19, 75:19-77:3, 77:10-17; *see also* EW Decl. ¶ 6 (PPL wouldn't tell him about possible raises); LZ testified that she learned about opportunities to increase pay rates from friends who participated in the program, not PPL (LZ Dep. 87:8-12, 102:3-8). Further, while PPL's Rule 30(b)(6) designee identified the year-end letters it sends participants as evidence it informs them of the opportunity to increase pay rates (Stewart Dep. 197:13-19, 202:7-8), those documents show that only in 2014 and 2015, was there reference to a possible pay increase, the latter years did not provide such information at all. 2014 Letter, Ex. 48; 2015 Letter, Ex. 49; 2016 Letter, Ex. 50; 2017 Letter, Ex. 51. The fact that PPL might provide some information on its website, buried in electronic fine print, is not meaningfully informing participants about the possibility of changing rates.

PPL strictly control pay increases, but it has required *reductions* in DCW pay rates. *Supra* n.39, 40. Indeed, among the participants and DCWs deposed to date, such forced reductions were common. *Id.* (PPL reduced Talarico's rate when working for EJ; MJ testified that PPL cut wages for all her DCWs; LZ testified she was required to reduce the rate for her DCW shortly after she was approved for an increase).[74]

PPL also controls compensation by deciding whether or not to pay individual timesheets, *after* participants approve them. Participant approval is not sufficient, as it would be if PPL were merely a payroll processing company like ADP. *Compare* II.E *with Jimenez v. S. Parking, Inc.*, No. 07-23156-CIV, 2008 WL 4279618, at *2 (S.D. Fla. Sept. 16, 2008) (describing employer sending written log of employees' hours to ADP which then issued checks). PPL reviews each timesheet, checking a lengthy series of items, and rejects some timesheets, declining to pay DCWs even when the participant has verified those hours were worked. *Supra* at nn.48-54. Such instances are not unusual: three of four participants testified about such issues, as did three of four DCWs who were deposed. *See* nn.52, 54. Contrary to PPL's claim that issues with paychecks are all directed to participants for resolution, Mot. at 33, the record consistently shows PPL making decisions about issuing paychecks and declining to follow participants' requests.

Participants consistently direct their DCWs to go to PPL for answers to questions about pay or benefits.[75] PPL also provides workers compensation coverage and unemployment

[74] Moreover, while PPL claims (Mot. at 5), that participants are provided a budget of funds they control, the evidence is clear that participants are authorized for a certain number of hours, not a dollar amount; participants cannot propose a lower hourly rate for and use funds that are saved to obtain additional hours of service. Stewart Dep. 169:14-24; Skovera Dep. 33:9-17 (plan authorizes hours, and hours will not vary based on pay rate).

[75] *See*, *supra* at n.54; Santiago Dep. 151:13-152:23 (DCW asked participant about holiday pay or time off, and was referred to PPL, she called and was told PPL did not offer such benefits); LZ Dep. 153:4-19 (she could not give her DCW's paid sick time, ask PPL to provide health insurance or other benefits).

insurance, *supra* at n.56, which was a tangible benefit to Plaintiff Talarico who received such benefits when he identified PPL as his employer. *Supra* at 16. While PPL does not provide paid sick leave or other benefits, Mot. at 27, the same can be said about many employers. The failure to provide a better benefits package does not abrogate PPL's status as an employer.

Finally, PPL enforces a limit on the number of hours worked, refusing to process timesheets approved by the participant if the hours worked exceeded the limit. *Supra* at n.49. With respect to Plaintiff's work hours, PPL informed Plaintiff of the number of hours per week that he was authorized to work for each participant; only the specific schedule as to what time of day those hours were worked was determined by the participant.[76] DOL guidance states that when an entity "sets an explicit number of hours for which the consumer may receive home care services from which the consumer may not deviate, and the consumer controls the scheduling within that timeframe," that is a moderate indicator of employer status for the entity. AI2014-2 at 13. It is common for a client receiving services from a staffing agency to control when the work is completed, and such control neither suggests that the client is the sole employer nor divests an agency of its status as employer. *Garcia*, 2015 WL 5585451, at *4 (finding that defendant's control over schedule for cleaning services did not make it a joint employer); *Yue Yu*, 597 F. App'x at 66 (reasoning that though client oversaw assignments, it was not joint employer). This factor, in combination with others, supports finding PPL is a joint employer.

c. *PPL Controls Overtime Rates*

In addition to setting wage rates, PPL controls the overtime rates at the center of this litigation. Indeed, when the ISP authorizes a DCW to work over 40 hours a week, PPL, not the participant, decides whether those overtime hours will be paid at a rate of one and one-half (1.5)

[76] Talarico Decl. ¶ 8; EW Decl. ¶ 7.

times the regular rate or paid only at the straight time (1.0) rate. PPL alone determined not to pay any hours at the overtime rate prior to 2016 (*supra* n.42), despite being aware that DOL had adopted regulations in January 2015 limiting the exemption for companionship care, and being aware that Pennsylvania's program did not limit DCWs to duties that qualified as "companionship care."[77] When PPL began paying overtime in 2016, if a DCW worked for more than one participant, it determined to keep the hours worked separated by participant, rather than totaling the hours together for that week; effectively, PPL prevents DCWs from earning overtime premiums.[78] Similarly, PPL excludes altogether from its overtime policies any DCWs who live at the same address as their participants, designating those individuals as subject to a "live in" exemption even though the live in exemption, like the companion care exemption, does not apply to third-party employers.[79]

Thus, the employment decision at the center of this case—whether hours worked over 40 per week should be paid at 1.5 times the regular rate—is controlled by PPL. PPL *never* sought any input from the participants on this point, or followed their requests when made.[80] PPL's control over the overtime rate weighs strongly in favor of finding it liable as a joint employer. *Hardgers-Powell*, 2019 WL 409276, at *15-17 (noting that fiscal agent made compensation decisions, including whether to pay at overtime rate); *Keating v Pittston City Hous. Auth*, 2018

[77] Stewart Dep at 270:9-16, 274:7-275:12, 277:16-278:2; Horvath Dep. 30:11-31:18.

[78] Stewart Dep. 288:5-15; Jaggers Decl. ¶ 10; Stone Decl. ¶ 10; Yonkin Decl. ¶ 12; Segers Decl. ¶ 10.

[79] *Supra* at n.46; Stewart Dep. 283:10-284:16; 29 C.F.R. § 552.109(c) (2015) (live in exemption cannot be claimed by third-party joint employer, only by individual receiving services). PPL knew that joint employer status was at issue. Horvath Dep. 40:1-19, 43:19-44:7. Further, PPL decided on its own when "live in" criteria were met based on examining addresses on file for the DCW and participant. *Id.* Jaggers Decl. ¶ 10; Cotto Decl. ¶10; Wance Decl. ¶11; Stone Decl. ¶10; Seely Decl. ¶7; Yonkin Decl. ¶9; Reese Decl. ¶8; Tamburo Decl. ¶9.

[80] Stewart Dep. 269:24-270:7, 285:16-286:11, 300:25-301:6; Horvath Dep. 15:6-18.

WL 1414459, at *5 (M.D. Pa. Mar. 21, 2018) (in evaluating joint employer issue, the joint control should be linked to the alleged wrongdoing); *Nerviano*, 2018 WL 2240533, at *3-4 (noting there were no allegations of control in support of joint employer claim against ADP, and specifically singling out lack of ADP's involvement in the termination decision challenged).[81] PPL may claim that it does not get paid enough by the state of Pennsylvania to be able to pay overtime premiums, but surely any employer required to pay overtime could complain that it cannot afford to pay overtime if its customers do not pay enough for their goods or services, but that argument simply does not affect an employer's legal obligations to pay overtime.

5. Day-to-Day Supervision of Work

Subject to the DCW Agreement's work rules discussed above, participants supervise the DCWs on a day-to-day basis, much as someone who obtains a temporary worker from a staffing agency is able to direct work on their premises, without undermining the employer-employee relationship between the staffing agency and the worker. This discretion, however, is cabined by requirements PPL imposes, described above at II.C.

In *Garcia*, this district described such a level of supervision as acting as "any consumer would who was paying for a service. It contracted for its stores to be cleaned on a nightly basis, and it made certain that the service for which it paid was performed properly." 2015 WL

[81] PPL's argument, Mot. at 31-32, is simply that it does not control whether a DCW works over 40 hours. It entirely ignores its control over whether the hours worked are paid at overtime rates or not. And, it cites no legal authority for its claim that the decision of whether someone will work more than 40 hours/week is all important, and the decision of whether to compensate those overtime hours at the proper 1.5 rate is meaningless. But, while asking someone to work over 40 hours per week does not violate the FLSA, failing to pay those overtime hours at the correct rate does. Moreover, PPL's claim that "OLTL requires such hours to be specifically allocated and denoted as overtime" is not supported by the evidence it cites. Mot. at 32. That evidence simply establishes that there are codes used to designate overtime hours, describe how Ms. Simms began working for PPL, and that Mr. Talarico's former employer and participant service coordinator told him the number of hours he was permitted to work.

5585451, at *4; *see also Yue Yu*, 597 F. App'x at 66; *Bonnette*, 704 F.2d at 1470 (recipient of services provided day-to-day supervision, but state was nonetheless the employer). While a client that is sufficiently involved may, unlike the defendant in *Garcia*, be found to be a joint employer along with the agency that directly employs the worker, the agency is not let off the hook simply because the client provides day-to-day supervision.

In *Baystate*, a staffing agency denied that it was the employer of the workers it provided to various clients, claiming they were either independent contractors or employees only of the client where they performed their work duties, much as PPL here claims only the participants are the employer of DCWs. *Baystate*, 163 F.3d at 676. The First Circuit found that the staffing agency was a joint employer, applying factors similar to the Third Circuit's *Enterprise* test. The court specifically held that supervision of day-to-day work by the client instead of the agency was irrelevant given all of the other direct and indirect control the defendant exercised. *Id.*

Reporting hours worked also falls under this factor, and PPL plays a substantial role. PPL requires DCWs to use PPL's online portal to report their hours. PPL asserts those hours must be confirmed by the participant, but the completed timesheets PPL produced do not show any approval was registered. Stewart Decl. at C27, D41, E34, F26. Where verification from the participant is not required, the DOL recognizes that as a strong indicator that the entity is an employer. Even if the participant retains the ultimate responsibility for verifying Plaintiffs' timesheets, this factor is a moderate indicator that the entity is an employer. AI2014-2 at 13 n.10. When a staffing agency provides workers, verifying the hours worked at the client's location is considered a normal client action that does not undermine the staffing agency's joint employer status, or establish the client as a sole employer. *Yue Yu*, 597 F. App'x at 66 (client approved timesheets, was not employer); *Garcia*, 2015 WL 5585451, at *2, *4.

6. PPL Controls Payroll and Other Aspects of Employment Administration and Maintains All Employment Records

PPL carries out all core employer functions including ensuring required documentation such as I-9 forms are completed at the time of hire, maintaining all employment records, processing payroll, issuing checks, computing required withholdings and making payments to the IRS, issuing W-2 forms annually, and obtaining workers' compensation insurance. *Supra* n.56. It seeks to frame all of these activities, for which it is solely responsible, as tasks it carries out as the agent of the participant. Mot. at 17-18, 28-29. However, aside from the fact that it presents no evidence whatsoever that any participant has ever affirmatively directed PPL to engage in such activities on his or her behalf, rather than passively accepting such services, PPL's argument fails because the record is clear that none of the participants had any control over these employer tasks that PPL undertakes. *See supra* at II.A, II.F. PPL should not be relieved of responsibility by simply claiming to be acting at the direction of participants.

This case is similar to *Falk*, 414 U.S. at 192-95. There, the Supreme Court found that a real estate management company was a joint employer of maintenance workers, along with the building owners, despite the contract between the building owners and management company identifying the maintenance workers as employees only of the building owners. *Id*. Like here, the management company in *Falk* was responsible for paying the maintenance workers, and acted under the "nominal supervision" of the building owners, which did not relieve it of employment responsibility. *Id.* More recently, another fiscal agent was held to be a joint employer, with the participants, based in part on it carrying out these very same duties as PPL does here. *Hardgers-Powell*, 2019 WL 409276, at *14-17.

Godlewska v. HDA, 916 F. Supp. 2d 246, 262 (E.D.N.Y. 2013), *aff'd*, 561 F. App'x 108 (2d Cir. 2014), cited by PPL, lends further support for the conclusion that this factor strongly

favors finding PPL is a joint employer. The court in *Godlewska* noted that all the employment records were maintained by the home care agency, which weighed in favor of the agency being the employer. Here too, PPL has produced complete files for each plaintiff and deponent who worked as a DCW, *see, e.g.,* exhibits to Stewart Decl., and payroll data for all class members, while none of the participants who were deposed had those records.

Contrary to PPL's claim, there is no evidence that any participant "compiled, maintained, and transmitted" records of hours worked to PPL. Mot. at 28, citing Stewart Decl. ¶¶ 24, 35, 44, 54. The cited paragraphs of the Stewart Declaration refer only to the participant *approving* the hours worked, not compiling, maintaining, or transmitting those hours. Indeed, the rest of the Stewart Declaration directly undermines such a claim, since it describes Plaintiff entering his hours worked into an on-line system maintained by PPL.[82] Stewart Decl. ¶¶ 23, 34, 43, 53. *See also* section 5, above, addressing verification of hours worked.

Finally, while, as discussed above at III.A, the parties' labels do not define or control joint employer status, PPL has also misstated the record in claiming that DCW paystubs identify the participant as the DCW's employer, and that no document identifies PPL as employer. Mot. at 31. First, every paycheck shows it is issued by PPL, not the participant. *See, e.g.*, Santiago-L 0000006, Ex. 47. Second, even though more recent W-2 forms list Public Partnerships with the qualification "for PA HH ER Agent for [participant]," earlier W-2 forms listed only PPL as the employer. *Compare* PPL000000053 *with* PPL000000041, Ex. 45. Third, the two paystubs PPL cites listing the participant as the "common law employer" were both recently printed from PPL's online system. *See* Santiago-L0009, 00011, Ex. 47; Santiago Dep. 88:17-91:8 (testifying

[82] Further, the HCBS Waiver Application reflects that PPL would "distribute, collect and process support worker timesheets." Ex. 6 at 24-25. Workers were also expected to submit timesheets directly to PPL. *Id.* at 214.

that to produce documents in connection with this litigation, she used PPL's website to print two pay stubs she was missing). Unlike these two paystubs, Ms. Santiago's pre-litigation paystubs list the participant as the "client served." *See* Santiago-L000006-8, 10, 12-19, Ex. 47. PPL's attempt to muddy the waters by relying on post-litigation paystubs should be rejected.

7. Totality of Factors, Economic Reality Shows PPL is Joint Employer

Considering all of the factors discussed above in which PPL exercises substantial control, the economic reality is that PPL is a joint employer. As the court held in *Hardgers-Powell*, analyzing this same type of Medicaid waiver program as implemented in New York, the so-called "fiscal intermediary" and the program participant "work in tandem to control each [DCW's] working conditions and to ensure the delivery of home health care services." 2018 WL 409276, at *17. That shared control makes the fiscal intermediary a joint employer. *Id.* And only by recognizing the entity with control over paychecks as the joint employer will the entity with the power to ensure compliance with the FLSA be given responsibility to do so. *Id.*

In response to a question about the mandatory DCW Agreement, participant DS aptly summarized how little he controls as a nominal employer, and how the real decisions are made by those with the money to pay the workers – not him or other participants:

> I think that this whole program is wrapped around what Harrisburg wants to be done. And these are the ques- -- this is their wording. These are the things that they've instructed someone else to write, and I have to agree to them, and so does the direct-care worker. It's like any employer. Somebody at the top of the chain, whoever is putting up the money, they're the ones who make the decisions.

DS Dep. 97:9-17.

PPL sought out the opportunity to contract with the state of Pennsylvania, and voluntarily agreed to undertake all of the responsibilities it carries out and enforce all of the rules that it imposes, in exchange for being paid millions of dollars. PPL maintains or controls the money to issue the paychecks, and thus possesses the leverage to make decisions. While PPL will no

doubt argue that it is required by its contract with Pennsylvania, and Pennsylvania's agreement with Medicaid, to act as it does, that does not undermine the conclusion that PPL acts as an employer within meaning of the FLSA. The "[e]conomic reality inquiry requires us to examine the nature and degree of the alleged employer's control, not *why* the alleged employer exercised such control." *Scantland v. Jeffry Knight*, 721 F.3d 1308, 1316 (11th Cir. 2013) (finding that defendant was employer, rejecting independent contractor claim, over defendant's argument that the control it exercised over the workers was due to the nature of the business, or required by defendant's agreements with others) (emphasis added); *Hughes v. Family Life Care*, 117 F.Supp.3d 1365 (N.D. Fla. 2015) (same, where defendant acted as it did in order to comply with its contract with the state government, defendant's actions nonetheless demonstrate it acted as employer); *see also 303 W. 42nd St. Enters., Inc. v. IRS*, 916 F. Supp. 349, 362 (S.D.N.Y. 1996), *rev. on other grounds*, 181 F.3d 272 (2d Cir. 1999) (in assessing status as an employer for tax purposes, "the critical point is not the motivation for the control, but rather the fact that control is exercised" in finding employment relationship, thus fact that company enforced various rules in order to avoid running afoul of state law does not diminish that the control established company was employer); *Harris v. Med. Transp. Mgmt., Inc.*, 300 F. Supp. 3d 234, 245 (D.D.C. 2018) (joint employer claim stated against company despite its argument that its activities were "implementation and enforcement of the [government's] contractually-imposed standards" and thus should not count towards joint employer elements).

Indeed, in *Hardgers-Powell*, 2019 WL 409276, at *14-17, addressing joint employer in the same context as this case, the court specifically cited to the regulations requiring the fiscal agent to undertake various responsibilities as proof that the defendant had exercised such control, favoring a finding it was a joint employer, rather than undermining such a claim. Further, PPL's

designated Rule 30(b)(6) witness acknowledged that PPL does *not* simply follow orders from the state: if PPL understood IRS, FLSA or other regulations to require PPL to act differently than what the state directs, PPL would not follow the state's direction. Horvath Dep. 26:1-22.[83]

C. Pennsylvania State Law Claims

1. PPL Is Plaintiffs' Employer Under Pennsylvania Law

The parties agree that Pennsylvania follows the FLSA in many respects, including determining the existence of an employer or joint employer relationship for the Pennsylvania Minimum Wage Act (MWA). Mot. at 36-37. Thus, for the reasons set forth above, PPL is also liable as Plaintiffs' joint employer with respect to MWA claims.[84]

2. The Pennsylvania Wage Payment Collection Law Applies

Plaintiffs may use Pennsylvania's Wage Payment Collection Law (WPCL) to seek redress for unpaid wages in two contexts. The first exists where a contract or agreement entitles the worker to certain wages. *See, e.g.*, *Andrews v. Cross Atl. Capital Partners, Inc.*, 2017 PA Super 72, 158 A.3d 123, 133-34 (Pa. Super. Ct. 2017). Whether the contract must be written or may instead be oral or implied remains an open question. *Cf. Woodard v. FedEx Freight E., Inc.*,

[83] *Gallagher v Cerebral Palsy of Mass.*, 92 Mass. App. Ct. 207 (2017) is inapposite. The claim there was brought under Massachusetts state law, where the governing legal standard is unlike the *Enterprise* standard applicable here. Further, there was no description of the factual background and hardly any discussion about the joint employer issue. On appeal, the court simply stated there was no evidence the fiscal agent exercised any control over employment. Here, the factual record is replete with evidence of PPL exercising such control.

[84] *Markham v. Wolf*, 190 A.3d 1175 (Pa. 2018) does nothing to alter the analysis. At issue there was the Governor's power to issue an Executive Order which, *inter alia*, permitted DCWs to select a representative to participate in an advisory council. *Id.* at 1177-78. In opposing this executive order, now affirmed, certain participants argued that permitting DCWs to select a representative impinged on a participant's rights to supervise the DCW. While the court accepted as uncontested, the employment relationship between participant and DCW, it did not address PPL's joint employer status. The existence of one employer does nothing to establish another entity is not a joint employer. PPL's reliance on the 2009 ruling from the Governor's General Counsel, which predates by four years PPL's appearance on the scene, is misplaced.

250 F.R.D. 178, 184 (M.D. Pa. 2008) (noting this open question); *Hartman v. Baker*, 2000 PA Super 140, 766 A.2d 347, 351 (Pa. Super. Ct. 2000) (finding sufficient for WCPL liability that a contract had been formed by conduct, rather than a signed document); *Zebroski v. Gouak*, No. 09-1857, 2009 WL 2950813, at *1 (E.D. Pa. Sept. 9, 2009) (permitting allegations of an oral agreement to survive summary judgment). Plaintiffs have alleged an implied contract with PPL, as their employer, to perform the responsibilities of their jobs in exchange for proper and timely payment. *Cf. Hartman*, 766 A.2d at 351. These allegations and the evidence set forth above create a fact issue that withstands summary judgment.

In the alternative, the second context also applies here and permits plaintiffs to use the WPCL as a vehicle to enforce their rights to recover unpaid wages owed under another statute, such as the MWA, "regardless of the source of their employer's obligation to pay the wages." *Hively v. Allis-Chalmers Energy, Inc.*, No. CIV.A. 13-106, 2013 WL 2557629, at *2 (W.D. Pa. June 10, 2013) (internal citations and quotation marks omitted); *Lugo v. Farmers Pride, Inc.*, 2009 PA Super 5, 967 A.2d 963, 969 (Pa. Super. Ct. 2009). Since *Lugo*, several courts have permitted plaintiffs to bring WCPL claims without the existence of a written contract. *See, e.g.*, *Zebroski*, 2009 WL 2950813, at *1 (denying a motion to dismiss a WCPL claim that sought to enforce MWA rights); *Turner v. Mercy Health Sys.*, Nos. 3670 & 5155, 2010 WL 6761223 (Pa. Ct. Com. Pl. Mar. 10, 2010) (same). This Court should do the same and hold that Plaintiffs have stated a legally cognizable WPCL claim to enforce their MWA rights, even if it finds that an implied contract does not exist between Plaintiffs and PPL. On both bases addressed herein, the Court should deny PPL's motion for summary judgment on this count.

IV. CONCLUSION

For the foregoing reasons, Defendant's Motion for Summary Judgment should be denied.

April 8, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2019, I electronically filed the *Plaintiff's Opposition to Defendant's Motion for Summary Judgment* with the Clerk of the Court using the CM/ECF, who in turn sent notice to all counsel of record:

Dated: April 8, 2019

/s/ Christine E. Webber
Christine E. Webber