

CALIFORNIA’S INCARCERATED FIREFIGHTERS ARE OWED THE MINIMUM WAGE

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I. INTRODUCTION

In August 2021, Agriculture Secretary Tom Vilsack said, “[s]upporting our brave firefighters with pay, benefits and career opportunities that reflect the importance and danger of the work that they do is critical to facing the mounting wildfire threat.”² Vilsack’s comments were in reference to planned pay increases for federal firefighters whose pay lags far behind state firefighters.³ But there is a large group of firefighters making only a fraction of the wages that both of those groups make: incarcerated firefighters.

There are approximately 1,600 prisoners working at fire camps in California.⁴ These camps, formally called conservation camps, are minimum security sites where incarcerated individuals stay in order to augment firefighting and conservation efforts in the area.⁵ One lieutenant estimated that “inmate . . . crews make up anywhere from 50 to 80 percent of the total fire personnel.”⁶ These firefighters often perform the most grueling work of an already difficult job.⁷ One fire chief described the work the incarcerated firefighters perform: “When the hose can’t get stretched any more, or the bulldozer can’t go, or even the helicopter can’t reach, these guys have to hike in”⁸ California relies heavily on these workers to

² Press Release, *Secretaries Haaland and Vilsack Announce Implementation of New Pay Initiatives for Wildland Firefighters*, U.S. DEP’T OF AGRIC. (Aug. 17, 2021), <https://www.usda.gov/media/press-releases/2021/08/17/secretaries-haaland-and-vilsack-announce-implementation-new-pay> [https://perma.cc/73SU-3T5Z].

³ Adam Edelman, *Firefighters Could Get \$600 Million Boost from Congress. It’s Probably Not Enough.*, NBC NEWS (Aug. 24, 2021, 1:30 AM), <https://www.nbcnews.com/politics/politics-news/firefighters-could-get-600-million-boost-congress-it-s-probably-n1277264> [https://perma.cc/982V-NQDE].

⁴ *Conservation (Fire) Camps*, CAL. DEP’T OF CORR. AND REHAB., <https://www.cdcr.ca.gov/facility-locator/conservation-camps> [https://perma.cc/987Y-PHZP].

⁵ *Id.*

⁶ Jaime Lowe, *The Incarcerated Women Who Fight California’s Wildfires*, N.Y. TIMES (Aug. 31, 2017), <https://www.nytimes.com/2017/08/31/magazine/the-incarcerated-women-who-fight-californias-wildfires.html> [https://perma.cc/HK4L-AP37].

⁷ Lizzie Johnson, *Fewer Prison Inmates Signing Up to Fight California Wildfires*, S.F. CHRON. (Sept. 1, 2017), <https://www.sfchronicle.com/bayarea/article/Fewer-prisoninmates-signing-up-to-fight-12165598.php> [https://perma.cc/5SZJ-V2LC].

⁸ *Id.*

fight fires—fires that have become increasingly common.⁹ However, instead of being compensated commensurate with the dangerous and incredibly necessary service they provide, these workers are paid less than six dollars per day.¹⁰

Even at this low wage, firefighting is one of the best paying jobs in carceral employment. The exact range varies from state to state, but as a point of comparison, the average incarcerated worker is paid less than a dollar per day.¹¹ Still, the best paying jobs for incarcerated workers are a far cry from the minimum wage.¹² Most workers in the U.S. are guaranteed a minimum wage by the Fair Labor Standards Act (FLSA).¹³ The FLSA's minimum wage guarantee was meant to establish a "minimum standard of living necessary for health, efficiency and general well-being of workers."¹⁴ Incarcerated workers, though, have largely been excluded from the protections and benefits that the FLSA affords.¹⁵

When evaluating incarcerated work's exclusion from the FLSA, the main distinction between incarcerated work and non-incarcerated work seems to be the different general purpose—namely incarcerated work's supposed rehabilitative functions. Carceral employment is intended to develop healthy work attitudes, productive habits, and useful skills, and is key to creating functional members of society upon those workers' release.¹⁶ There is plenty of evidence, though, that this rehabilitative ideal is not met by the current carceral employment paradigm: there is not enough work to go around, most of the work is unproductive, and the make-work, inefficiently-managed jobs available do not impart skills that are relevant

⁹ Rob McMillan & Grace Manthey, *Climate Change's Impact on California's Increased Wildfire Risk is 'Quite Hard to Ignore': Expert*, ABC7 L.A. (Sept. 29, 2021), <https://abc7.com/wildfire-climate-change-california-fire/11057618>. [<https://perma.cc/FS2Y-Q87W>].

¹⁰ Eric Escalante, *California's Inmate Firefighters: 9 Things to Know*, ABC10 (Oct. 29, 2019, 5:03 PM), <https://www.abc10.com/article/news/local/wildfire/california-inmate-firefighters/103-0fdca69-2f30-4abe-99a1-838364d395e6> [<https://perma.cc/2UTZ-3HPG>].

¹¹ Wendy Sawyer, *How Much Do Incarcerated People Earn in Each State?*, PRISON POL'Y INITIATIVE (Apr. 10, 2017), <https://www.prisonpolicy.org/blog/2017/04/10/wages> [<https://perma.cc/2UTZ-3HPG>].

¹² *See id.*

¹³ *Fact Sheet #14: Coverage Under the Fair Labor Standards Act (FLSA)*, U.S. DEP'T OF LAB., <https://www.dol.gov/agencies/whd/fact-sheets/14-flsa-coverage> [<https://perma.cc/E9BG-XZLS>]; *Table A-1. Employment Status of the Civilian Population by Sex and Age*, U.S. BUREAU OF LAB. STAT., <https://www.bls.gov/news.release/empsit.t01.htm> [<https://perma.cc/5QHJ-J5BC>].

¹⁴ James K. Haslam, *Prison Labor Under State Direction: Do Inmates Have the Right to FLSA Coverage and Minimum Wage*, 1994 BYU L. REV. 369, 372 (1994).

¹⁵ *See id.*

¹⁶ James J. Maiwurm & Wendy S. Maiwurm, *Minimum Wages for Prisoners: Legal Obstacles and Suggested Reforms*, 7 U. MICH. J.L. REFORM 193, 196 (1973).

beyond the prison walls.¹⁷ Once outside those walls, the economic and employment realities for previously incarcerated individuals are dire. Most will be underemployed or unemployed five years after release.¹⁸ They are ten times more likely than the non-incarcerated public to encounter homelessness.¹⁹ Most employers say they “probably” or “definitely” will not hire previously incarcerated individuals.²⁰

However, incarcerated work still shares other general purposes of work with non-incarcerated work — namely satisfying financial obligations. The ability to satisfy those obligations benefits not only the incarcerated worker who earns the paycheck, but society at large. California’s Senate Appropriations Committee unanimously passed a resolution, S.C.R. 69, calling for “fair and just” wages for incarcerated people.²¹ The resolution points out that allowing people to earn fair wages while incarcerated is likely to offset other costs to the state, to families of incarcerated people, and to the victims of crime. Fifty-five percent of a person’s wages earned in prison are garnished to pay restitution.²² On average, parents entering prison owe over \$10,000 in child support.²³ Increasing the pay of incarcerated workers directly translates to increasing payments to victims, victims’ families, and children who the incarcerated worker is required to support. Additionally, relieving the severe financial distress that comes with exiting incarceration gives those returning to society a better chance at securing housing, food, and a job. With more money to their name when they are released, the financial burden that is typically shouldered by family members or state programs could be handled directly by the person returning.

Fair pay for hard work is crucial to allowing incarcerated individuals to remake their lives and meaningfully contribute economically to the society they will eventually reenter. Recently, California attempted to create a pathway to regular firefighting work for those who fought fires while

¹⁷ *See id.*

¹⁸ Tanzina Vega, *Out of Prison and Out of Work: Jobs Out of Reach for Former Inmates*, CNN BUSINESS (Oct. 30, 2015, 12:28PM), <https://money.cnn.com/2015/10/30/news/economy/former-inmates-unemployed> [https://perma.cc/T9KL-QUG3].

¹⁹ Tanvi Misra, *The Homelessness Problem We Don’t Talk About*, BLOOMBERG (Aug. 16, 2018, 7:01 PM) <https://www.bloomberg.com/news/articles/2018-08-16/the-jail-to-homelessness-pipeline> [https://perma.cc/7N25-KSBA].

²⁰ Harry J. Holzer et al., *Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers*, 49 J. LAW & ECON. 451, 453–54 (2006).

²¹ S.C.R. 69, 2019 Leg., Reg. Sess. (Cal. 2020).

²² *Id.*

²³ *Id.*

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incarcerated and have since been released.²⁴ The state's willingness to create this pathway demonstrates both that it understands the work performed by free and incarcerated firefighters to be substantially the same and that many well-qualified formerly incarcerated workers do not receive fair compensation for firefighting work even after they have left prison.

California's incarcerated firefighters are in a unique position. Specific legislation in California, case law in the Ninth Circuit, and the circumstances of the work done by the California firefighters all come together to create the conditions for recognition of this specific group of workers as employees under the FLSA. That group will be the focus of this paper. Section II gives a brief background of California's Conservation Camp program and formative court opinions regarding carceral labor, specifically attentive to Ninth Circuit opinions, which has reviewed claims by incarcerated workers in California. In section III, I argue that California's incarcerated firefighters are distinct from other incarcerated workers who have brought FLSA claims in the past and cannot be denied for the same reasons. From there, I will speculate on how courts should move forward in unique situations like theirs.

II. BACKGROUND

Due to a shortage in manpower during the Great Depression, California authorized prisons to use prisoner labor for conservation work.²⁵ Incarcerated workers in California during this time "fought wartime forest fires . . . manned 'harvest camps' to insure that needed food production did not slacken . . . [and] led all other states in the volume of industrial war production."²⁶ By the next decade, there were over a dozen permanent or temporary camps doing conservation work across the state.²⁷

According to the California Department of Corrections and Rehabilitation (CDCR), there are now over a thousand incarcerated workers at thirty-five conservation camps, whose "primary mission . . . is to support state, local and federal government agencies as they respond to emergencies such as fires, floods, and other natural or manmade disasters."²⁸ The camps are jointly operated by CDCR, the California Department of Forestry and Fire Protection (CAL FIRE), and, depending on the camp, the Los Angeles

²⁴ See Vanessa Romo, *California Bill Clears Path for Ex-Inmates to Become Firefighters*, NPR (Sept. 11, 2020, 11:47 PM) <https://www.npr.org/2020/09/11/912193742/california-bill-clears-path-for-ex-inmates-to-become-firefighters> [https://perma.cc/6F7F-K45L].

²⁵ Ward M. McAfee, *A History of Convict Labor in California*, 72 S. CAL. Q. 19, 33 (1990).

²⁶ *Id.* at 30.

²⁷ *Id.* at 33.

²⁸ *Conservation (Fire) Camps*, *supra* note 4.

County Fire Department.²⁹ CDCR is “responsible for the selection, supervision, care and discipline of the inmates,” while CAL FIRE “maintains the camp, supervises the work of the inmate fire crews, and is responsible for inmate custody while on daily grade projects.”³⁰ For their work, most incarcerated workers at fire camps earned \$1.45 per day, but some could earn a few dollars more per day depending on their expertise and whether or not there was an emergency.³¹

A. BRIEF HISTORY OF THE FLSA AND INCARCERATED WORKERS

Given the great disparity between minimum wage and the pennies per day that most incarcerated workers earn for their time, incarcerated workers have advocated for rights under the FLSA for decades. In almost every instance, courts have declined to extend those rights to incarcerated workers.

The language of the FLSA is broad and simple. With minor exceptions, an “employee” is defined as “any individual employed by an employer”³² and an “employer” is defined as any entity “acting directly or indirectly in the interest of an employer in relation to an employee.”³³ “Employ” means “to suffer or permit to work.”³⁴ The FLSA explicitly excluded certain groups from receiving its benefits and protections such as family farm workers and volunteers³⁵—but, crucially, did not exclude incarcerated workers. Most courts, including the Ninth Circuit, recognize that this means prisoners are not categorically excluded from rights under the FLSA.³⁶ However, as will be discussed, courts have found other reasons to exclude almost all individual prisoners from FLSA protection.

The Supreme Court has said little about incarcerated workers’ rights in general and has not said anything about their status under the FLSA. In *Goldberg v. Whitaker House Co-op, Inc.*, the Supreme Court was tasked with deciding whether workers who created goods for a cooperative which

²⁹ *Id.*

³⁰ *Id.*

³¹ CAL. DEP’T OF CORR. AND REHAB., DEPARTMENT OPERATIONS MANUAL § 51130.27.3, at 362 (2022).

³² Fair Labor Standards Act, 29 U.S.C. § 203(e)(1).

³³ *Id.* § 203(a), (d).

³⁴ *Id.* § 203(g).

³⁵ *Id.* § 203(e)(3)-(5).

³⁶ *Hale v. Arizona*, 993 F.2d 1387, 1392 (9th Cir. 1993) (“Because Congress has specifically exempted nine broad categories of workers from the minimum wage provisions of the FLSA . . . but not prisoners, we are hard pressed to conclude that it nevertheless intended for all inmates to be excluded.”)

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dealt in “knitted, crocheted, and embroidered goods of all kinds” were “employees” under the FLSA.³⁷ In ruling that the workers were employees, the court emphasized that the coverage under the FLSA is based on the “economic reality” rather than “technical concepts.”³⁸ To properly analyze that “economic reality,” the Court insisted that one keep in mind the totality of the circumstances.³⁹ Since then, circuit courts have struggled with how to apply this test to prisoners.⁴⁰

B. NINTH CIRCUIT CASE LAW RELEVANT TO PRISONER FLSA CLAIMS

1. *Bonnette*

After *Goldberg*, circuit courts created and applied a variety of tests to determine the economic realities of putative employees and employers.⁴¹ In *Bonnette v. California Health and Welfare Agency*, the plaintiffs were workers who provided “domestic in-home services to the aged, the blind, and the disabled through programs that were initiated by and funded in part by the federal government.”⁴² The Ninth Circuit created a four-factor test that considered “whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.”⁴³ The Court noted, however, “[the factors] are not etched in stone” and “[t]he ultimate determination must be based upon the circumstances of the whole activity.”⁴⁴ This case, like *Goldberg*, did not involve prisoners, but the factors test it created was widely adopted for resolving FLSA cases around the country, including prisoner FLSA claims.⁴⁵

³⁷ *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 29 (1961).

³⁸ *Id.* at 33.

³⁹ Matthew J. Lang, *The Search for a Workable Standard for When Fair Labor Standards Act Coverage Should be Extended to Prisoner Workers*, 5 U. PA. J. LAB. & EMP. L. 191, 197 (2002).

⁴⁰ *See generally id.*

⁴¹ *Id.* at 197–99.

⁴² *Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465, 1467 (9th Cir. 1983).

⁴³ *Id.* at 1470.

⁴⁴ *Id.* (quoting *Rutherford Food Corp. v. McComb*, 331 U.S. 772, 730 (1947)).

⁴⁵ Lang, *supra* note 39, at 200 (“Although the factual situation in *Bonnette* did not involve prison workers, within a year many circuit courts began applying the *Bonnette* Factors to prison labor cases.”).

2. *Carter, Watson, and Gilbreath*

Using this new test to determine the economic reality of incarcerated workers making FLSA claims, courts in other circuits initially ruled favorably for incarcerated workers. In *Carter v. Dutchess Community College*, the Second Circuit cracked the door open for FLSA protections for incarcerated workers, finding "an inmate may be entitled under the law to receive the federal minimum wage from an outside employer" and remanded the case back down to a lower court.⁴⁶ Later the Fifth Circuit, in *Watson v. Graves*, became the first court to grant incarcerated workers "employee" status under the FLSA and determined that they must be paid a minimum wage.⁴⁷ There, the sheriff of a small Louisiana parish operated a work release program in which prisoners were allowed to work outside the jail for interested private parties.⁴⁸ The court found that the private parties who utilized the incarcerated workers' labor had de facto power to hire and fire.⁴⁹ The court also found that the private party supervised and controlled the conditions of the workers' employment.⁵⁰ The sheriff set a flat rate of pay at twenty dollars per day and chose who was fit for the program.⁵¹ Neither the sheriff nor the private party kept employment records.⁵² The court concluded that under "a realistic analysis of the four prongs of the economic realities test . . . [plaintiffs] were 'employees' of the [private party] for purposes of FLSA coverage."⁵³

The Ninth Circuit was soon given their chance to apply these factors themselves in *Gilbreath v. Cutter Biological, Inc.* There, the incarcerated workers worked for a plasma center at the prison operated by a private company.⁵⁴ Like in *Carter*, the private company in *Gilbreath* maintained "day-to-day supervision of the inmates' work responsibilities" and could "request some prisoner assignments and removals," although the prison "determined which inmates were eligible to work."⁵⁵ However, as the dissent pointed out, instead of applying the *Bonnette* factors the same way as the court in *Watson*, "[t]he majority correctly outlines the factors to be

⁴⁶ *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8, 14 (2d Cir. 1984).

⁴⁷ *Watson v. Graves*, 909 F.2d 1549, 1550 (5th Cir. 1990).

⁴⁸ *Id.*

⁴⁹ *Id.* at 1555.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 1556.

⁵⁴ *Gilbreath v. Cutter Biological, Inc.*, 931 F.2d 1320, 1321 (9th Cir. 1991).

⁵⁵ *Id.* at 1322.

considered in examining the ‘economic reality’ of the employment situation for the purposes of the FLSA . . . then fails to apply them correctly to the facts of this case.”⁵⁶ The majority, indeed, listed the factors out but did not apply them.⁵⁷ Instead the majority relied on the caveat from the *Bonnette* opinion that the factors were not “etched in stone.”⁵⁸ *Gilbreath* found that Arizona state law requires prisoners to work and that the state possesses complete control over the inmates.⁵⁹ That complete control and requirement to work, it found, “is inconsistent with—the bargained-for exchange of labor which occurs in a true employer-employee relationship.”⁶⁰ The opinion also insisted that Congress could not have meant to allow prisoners access to FLSA protections, saying, “I reject as almost whimsical the notion that Congress could have intended such a radical result as bringing prisoners within the FLSA without expressly so stating.”⁶¹

3. *Hale*

In *Hale*, the Ninth Circuit took on another FLSA claim brought by incarcerated workers and cemented its abandonment of the *Bonnette* factors it had previously developed.⁶² Here, the plaintiffs worked for a program operated by the state’s Department of Corrections.⁶³ They argued that “the prison had the right to ‘hire and fire’ them by allowing or disallowing them to work, controlled the time and conditions under which they worked, determined the rate of pay, and kept records,” thus satisfying the *Bonnette* factors.⁶⁴ The court again used the escape hatch it had devised for itself, reiterating that the *Bonnette* factors “are not etched in stone” and finding that “the totality of the circumstances [did] not bespeak an employer-employee relationship as contemplated by the FLSA.”⁶⁵ The court instead stated that “[r]egardless of how the *Bonnette* factors balance, we join the Seventh Circuit in holding that they are not a useful framework in the case of prisoners who work for a prison-structured program because they have

⁵⁶ *Id.* at 1331 (Nelson, J., dissenting).

⁵⁷ *Id.* at 1324.

⁵⁸ *Id.*

⁵⁹ *Id.* at 1325.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Hale v. Arizona*, 993 F.2d 1387 (9th Cir. 1993).

⁶³ *Id.* at 1390.

⁶⁴ *Id.* at 1394.

⁶⁵ *Id.* at 1395.

to.”⁶⁶ Similar to *Gilbreath*, the court reasoned that the incarcerated workers “had to” perform this work because “Arizona prisoners are required by statute to ‘engage in hard labor for not less than forty hours per week.’”⁶⁷ Importantly, though, the court broke with the majority in *Gilbreath* and stated that it “[could not] agree that the FLSA categorically excludes all labor of any inmate,” thus quietly overruling that part of the *Gilbreath* decision and rolling back to its former position that inmates were not categorically excluded from FLSA protection.⁶⁸

Without the *Bonnette* factors, the court needed a new way to determine the economic reality of the incarcerated workers’ situation. The court attempted to do so, explaining that “the economic reality of the relationship between the worker and the entity for which work was performed lies in the relationship between prison and prisoner. It is penological, not pecuniary,”⁶⁹ and that the prisoners “worked for programs structured by the prison pursuant to the state’s requirement that prisoners work at hard labor, the economic reality is that their labor belonged to the institution.”⁷⁰

4. *Morgan*

The plaintiff in *Morgan v. MacDonald* performed IT work at an education center that provided skills training to incarcerated people.⁷¹ The center was created by prison officials, located on prison grounds, and overseen by a nearby school board.⁷² In its decision, the court, perhaps rightly by this point, complained that there was no “concrete test to apply when analyzing inmate FLSA claims,” and it would have to “rely on the broad principles enunciated in *Hale*.”⁷³ Indeed, the court referenced “penological” purpose and “economic reality,” as it had done in *Hale*:

“*Morgan* and the prison didn’t contract with one another for mutual economic gain, as would be the case in a true employment relationship; their affiliation was ‘penological, not pecuniary.’ Because the economic reality of *Morgan*’s work at the prison clearly indicates that his labor ‘belonged to the institution,’ he cannot be deemed an employee under the FLSA.”⁷⁴

⁶⁶ *Id.* at 1394.

⁶⁷ *Id.*

⁶⁸ *Id.* at 1392.

⁶⁹ *Id.* at 1395.

⁷⁰ *Id.*

⁷¹ *Morgan v. MacDonald*, 41 F.3d 1291, 1292 (9th Cir. 1994).

⁷² *Id.*

⁷³ *Id.* at 1293.

⁷⁴ *Id.*

To reach this conclusion, the court asserted that *Hale* created a two-part test: “inmates cannot be deemed employees under the FLSA when they work for prison-run industries *and* are statutorily required to work as a term of their confinement.”⁷⁵ The court then more clearly defined its terms – “prison-run industries” were programs “established by the prison and operated under the direction of prison officials” that could be overseen by contracted non-prison entities without transforming their prison-run nature.⁷⁶ Additionally, the court determined that statutory “hard-labor” requirements simply refer to state statutes that require work as part of a prison sentence, and were not meant to denote a specific type of strenuous or manual labor.⁷⁷

5. *Burleson*

In *Burleson v. California*, the Ninth Circuit assessed the economic reality of incarcerated workers in California (*Hale* and *Morgan* involved workers in Arizona and Nevada, respectively), and chose to apply the newly formulated test in *Morgan*.⁷⁸ The plaintiffs worked for the Prison Industry Authority (“PIA”), producing goods and performing various services for which the PIA paid them under \$1 per hour.⁷⁹ California has a hard-labor requirement, as did the plaintiffs in *Hale* and *Morgan*, so that element of the new test was satisfied and uncontested.⁸⁰ The issue, instead, was whether a prisoner’s work for the PIA was part of the type of “prison-structured program” required by the new test.⁸¹

The court concluded that the PIA, created by the California legislature to design and oversee many of the jobs held by incarcerated people, was organized under the state’s Department of Corrections, and was thus brought “within the ambit of ‘prison-structured programs.’”⁸² The court determined that simply because it was “separately administered within the [Department of Corrections] does not alter the PIA’s fundamentally

⁷⁵ *Id.* at 1292 (emphasis added).

⁷⁶ *Id.* at 1293.

⁷⁷ *Id.* (“Our holding in *Hale* did not turn on the fact that the prisoners there were engaged in hard labor or purely menial tasks.”).

⁷⁸ See *Burleson v. California*, 83 F.3d 311 (9th Cir. 1996).

⁷⁹ *Id.* at 312.

⁸⁰ *Id.* at 313.

⁸¹ *Id.*

⁸² *Id.* at 314 (“Nevertheless, the PIA is by statute a part of the CDC. CAL. PENAL CODE § 5001. The PIA’s status as a part of the California correctional system clearly brings it within the ambit of ‘prison-structured programs.’”).

penological character as a ‘prison-structured program.’”⁸³ Ultimately, the court concluded that the “prison work scheme cannot be distinguished from *Hale* . . . Plaintiffs are not ‘employees’ under the FLSA.”⁸⁴

III. ARGUMENTS

Many have advocated for incarcerated workers to be considered employees under the FLSA and be granted the protections and the minimum wages that come with that status.⁸⁵ Some have insisted that the “economic realities” test be abandoned entirely.⁸⁶ I, on the other hand, argue that California’s incarcerated firefighters are not excluded from categorization as employees under the FLSA under the *Hale-Morgan-Burleson* analysis developed in the Ninth Circuit. They can and should be afforded that categorization without the need for a Supreme Court decision, new legislation from California, or deviation from the Ninth Circuit’s existing jurisprudence.

A. CALIFORNIA’S INCARCERATED FIREFIGHTERS FIT INTO THE SMALL CATEGORY OF INCARCERATED WORKERS THAT ARE COVERED BY THE FLSA

Hale explicitly left open the possibility that some prisoners may be employees under the FLSA, though the Ninth Circuit carefully avoided a description of the type of prisoners that would qualify.⁸⁷ A synthesis of the Ninth Circuit’s reasoning in the previously summarized cases looks something like this: to analyze a prisoner’s FLSA claim, we must determine the economic reality of the situation; in determining the economic reality, we observe that the relationship that exists between the prisoner and the

⁸³ *Id.*

⁸⁴ *Id.* at 315.

⁸⁵ See Maiwurm & Maiwurm, *supra* note 16, at 193 (“This article explains why statutory minimum wage coverage should be extended to inmates.”); see also Patrice A. Fulcher, *Emancipate the FLSA: Transform the Harsh Economic Reality of Working Inmates*, 27 J. C.R. & ECON. DEV. 679, 680 (2015) (calling for “the application of the FLSA to all working inmates.”); see also Natalie Hurst, *Prisoners Are Not for Sale: Incarcerated Workers Deserve Employee Status*, U. CIN. L. REV. (Nov. 24, 2020) <https://uclawreview.org/2020/11/24/prisoners-are-not-for-sale-incarcerated-workers-deserve-employee-status/> [<https://perma.cc/7427-T3XG>] (“Employment protections should be extended to incarcerated workers by . . . expanding the interpretation of ‘employee’ under the FLSA to include incarcerated workers . . .”).

⁸⁶ See Fulcher, *supra* note 85, at 682 (“This article first argues that the economic realities test should be abolished . . .”).

⁸⁷ *Hale v. Arizona*, 993 F.2d 1387, 1392 (9th Cir. 1993) (“[W]e cannot agree that the FLSA categorically excludes all labor of any inmate.”).

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prison is penological; we know it is penological because the state statutorily requires work as part of a prisoner's sentence and the work is performed for a prison-structured program.

If, however, a prisoner's work can be shown to lie outside the statutory requirement, or if that work is part of something other than a prison-structured program, then that must be where the recognizable prisoner FLSA claims are found. This, I contend, is exactly where California's incarcerated firefighters exist. The work they do is often outside the scope of California's "hard labor" statute and the program for which they work is not "prison-structured" as defined by the court.

1. California's Hard-Labor Statute Does Not Demand the Type of Work that Incarcerated Firefighters Engage In

California has a "hard labor" requirement statute like the one in *Hale*. In fact, *Burleson*, which dealt specifically with Californian incarcerated workers, referred explicitly to the California statute and California prisoners' statutory obligation to work.⁸⁸ But it is worth reviewing exactly what this statute requires. California Penal Code § 2700 requires "every able-bodied prisoner imprisoned in any state prison as many hours of faithful labor in each day and every day during his or her term of imprisonment as shall be prescribed by the rules and regulations of the Director of Corrections."⁸⁹ The CDCR Operations Handbook provides that "five eight-hour days, Monday through Friday, with Saturdays, Sundays, and approved holidays off."⁹⁰ Incarcerated firefighters routinely work far more than this. Kitchen workers at the fire camps worked 16-hour shifts, seven days a week.⁹¹ During wildfires, fire line crews work 24-hour shifts.⁹² The Handbook leaves some leeway for shifts that go long by inclusion of the word "normally," but incarcerated firefighters are routinely working far more hours than those contemplated by the rules and regulations of the Director of Corrections.

⁸⁸ *Burleson v. California*, 83 F.3d 311, 313 (9th Cir. 1996). ("California's work requirement statute, Cal. Penal Code § 2700, is not significantly different from the Arizona and Nevada statutes . . . California's inmates are under legal compulsion to work or to participate in other prison-run programs, as assigned.")

⁸⁹ CAL. PENAL CODE § 2700 (West through Ch. 997 of 2022 Reg. Sess.).

⁹⁰ CAL. DEP'T OF CORR. AND REHAB., *supra* note 31, § 51130.27.2, at 362.

⁹¹ Jaime Lowe, *What Does California Owe Its Incarcerated Firefighters?*, THE ATLANTIC (July 27, 2021), <https://www.theatlantic.com/politics/archive/2021/07/california-inmate-firefighters/619567> [<https://perma.cc/QC7F-VFMG>].

⁹² Escalante, *supra* note 10.

The Nevada statute that the court relied on in *Morgan* does not delegate the creation of work-hour requirements, as the California statute does, but instead finds the number of hours explicitly in the text of the statute itself: “The Director shall require each offender . . . to spend 40 hours each week in vocational training or employment”⁹³ The Arizona statute applicable in *Hale*, conversely, sets the *minimum* required work-hours at 40.⁹⁴ If 24-hour shifts or weeks of 16-hour shifts are not in conflict with what is required by the California statute, it is difficult to imagine the purpose of the existing language in the Handbook, which anchors the work-hours to a regular eight-hour day, five days a week requirement, rather than a minimum hour requirement like the one in Arizona or the maximum in Nevada.

2. California’s Incarcerated Firefighters Do Not Work for a “Prison-Structured” Program

The other prong of the test developed in the previous cases requires that the program in which a prisoner participates is “prison-structured.”⁹⁵ California’s program for incarcerated firefighters was not organized solely under the state’s correctional agency, was not established by the prison, and is not operated solely under the direction of prison officials. The term “prison-structured” or “prison-run,” used interchangeably, appears in the *Hale*, *Morgan*, and *Burleson* cases, but is still not well-defined.⁹⁶ *Morgan* provided that “prison-run industries” were programs “established by the prison and operated under the direction of prison officials” and could be overseen by contracted non-prison entities.⁹⁷ *Burleson* added that the program in that case was run by an organization which was organized under the state’s Department of Corrections, but noted that it could be separately administered and still maintain a “fundamentally penological character as a ‘prison-structured program.’”⁹⁸ These decisions do not create a clear test to determine whether a prison work program is “prison-structured.” However, there are important distinctions between the structure of the programs that

⁹³ NEV. REV. STAT. ANN. § 209.461 (West through 2021 Spec. Sess.).

⁹⁴ ARIZ. REV. STAT. ANN. § 31-251 (West through 2022 Reg. Sess.) (“The director has the authority to require that each able-bodied prisoner under commitment to the state department of corrections engage in hard labor for not less than forty hours per week . . .”).

⁹⁵ See e.g., *Burleson v. California*, 83 F.3d 311, 313 (9th Cir. 1996).

⁹⁶ *Hale v. Arizona*, 993 F.2d 1387, 1394 (9th Cir. 1993); *Morgan v. MacDonald*, 41 F.3d 1291, 1292 (9th Cir. 1994); *Burleson*, 83 F.3d at 313.

⁹⁷ *Morgan*, 41 F.3d at 1293.

⁹⁸ *Burleson*, 83 F.3d at 314.

prisoners worked for in the prior cases and the one which California's incarcerated firefighters participate in.

The opinion in *Burleson* emphasized that the PIA was “by statute a part of the [California correctional system],” and reasoned that the “PIA's status as a part of the California correctional system clearly brings it within the ambit of ‘prison-structured programs.’”⁹⁹ Similarly, the plaintiffs in *Hale* worked for Arizona Correctional Industries, which was statutorily authorized as part of Arizona's Department of Corrections.¹⁰⁰ In the current case, however, the fire camps where the firefighters work were not created under the state's correction authority and operated independently for years.¹⁰¹ In fact, the California Conservation Camp program was formally created by the legislature in the Public Resources Code.¹⁰² Statutes regarding the camps are found in both the Penal Code—like the statute referenced in *Burleson* that governs the PIA, and the Public Resources Code—which governs agencies which have nothing to do with penalizing criminals, like CAL FIRE. Unlike the CDCR, CAL FIRE is not—and was not designed as—a part of the California correctional system. Thus, programs under its control, or at least partly under its control, cannot be understood to be “prison-structured” the way that programs which are entirely controlled by a state's correctional system are.

The fire camps where California's incarcerated firefighters work were not established by the prison and are not operated solely under the direction of prison officials. The court in *Morgan* allowed other entities to oversee the day-to-day operations,¹⁰³ but the fact that the “program [was] established by the prison and operated under the direction of prison officials” was part of what made the program in that case “prison-structured.”¹⁰⁴ That is not the case with firefighters working at California's fire camps. The Conservation Camp program was created jointly by penal and non-penal statutes and interests, and, logically, are operated jointly by penal and non-penal entities—the California Department of Corrections and Rehabilitation and the California Department of Forestry and Fire Protection (and, in some

⁹⁹ *Id.*

¹⁰⁰ *Hale*, 993 F.2d at 1390.

¹⁰¹ *McAfee*, *supra* note 25, at 33–34 (1990) (pointing out that California's conservation camps “operated independently from the Correctional Industries Commission” until 1959, when the camps were expanded and then “put under the authority of the Correctional Industries Commission”). The Correctional Industries Commission was later reconstituted as the PIA. *Id.*

¹⁰² Cal. Pub. Res. Code § 4951 (West) (“It is the purpose of the Legislature to declare the existence of a California Conservation Camp program . . .”).

¹⁰³ *See Morgan*, 41 F.3d at 1293.

¹⁰⁴ *Id.*

cases, a local fire department)—rather than singularly under a correctional authority.¹⁰⁵

3. Penological Purpose

The work that these firefighters engage in does not have a fundamentally “penological purpose.” In *Hale*, the court said that the “economic reality of the relationship between the worker and the entity for which work was performed lies in the relationship between prison and prisoner. It is penological, not pecuniary.”¹⁰⁶ The *Morgan* decision also references this penological nature of the relationship.¹⁰⁷ The *Burleson* court seemed to tie this purpose to the “prison-structured” prong of its analysis, stating that the separate administration of the program in that case “does not alter the PIA’s fundamentally penological character as a ‘prison-structured program.’¹⁰⁸ Whether it is another part of the “prison-structured” prong or is its own consideration separate from the two-prong test is worth exploring.

Plaintiffs in *Burleson* argued that “the PIA’s focus on generating a profit from its industries renders the inmates’ relationship with PIA ‘pecuniary’ rather than ‘penological.’”¹⁰⁹ Noah Zatz, a leading scholar on the economics of prison labor, observes that “[c]ourts rely on the mutual exclusivity of economic and nonpecuniary goals in their interpretation of prisons’ motivations. Once a nonpecuniary motive appears, economic ones disappear from view.”¹¹⁰ Of course, this mutual exclusivity does not exist. As the dissent in *Hale* points out about the plaintiff’s relationship to the prison work program, “[c]ommon sense tells us this relationship is both penological and pecuniary.”¹¹¹ The work done by incarcerated firefighters has an extremely obvious pecuniary purpose—generating extremely cheap labor that saves the state an estimated \$100 million dollars.¹¹² The dissent’s “common sense,” however, was not the holding of the Ninth Circuit. As Zatz points out, the *Burleson* court determined that the penological purpose

¹⁰⁵ CAL. PUB. RES. CODE § 14415 (West through 2022 Reg. Sess.) (“The California Conservation Camp program [is] operated jointly by the Department of Corrections and Rehabilitation and the Department of Forestry and Fire Protection . . .”).

¹⁰⁶ *Hale v. Arizona*, 993 F.2d 1387, 1395 (9th Cir. 1993).

¹⁰⁷ *Morgan*, 41 F.3d at 1293.

¹⁰⁸ *Morgan*, 41 F.3d at 1293; *Burleson v. California*, 83 F.3d 311, 313 (9th Cir. 1996).

¹⁰⁹ *Burleson*, 83 F.3d at 313.

¹¹⁰ Noah D. Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 VAND. L. REV. 857, 891 (2008).

¹¹¹ *Hale*, 993 F.2d at 1403 (Norris, J., dissenting).

¹¹² *Lowe*, *supra* note 91.

of the work program was found to override the statutory mandate that the program make money (in other words, an explicit pecuniary purpose), and as such, “[t]here is no room in this view for the coexistence of penological and pecuniary aims.”¹¹³

At first glance, this forces the court into finding a penological purpose in the firefighting work done by prisoners. But that assumes that the relationship being examined is one “between prison and prisoner,” as it was in *Hale*. CAL FIRE was, of course, not created with penological purposes in mind. Even the partnership between CAL FIRE and the CDCR was not created for this purpose. In the CDCR’s own words, “[d]uring World War II much of the work force that was used by the Division of Forestry . . . was depleted. CDCR provided the needed work force by having inmates occupy ‘temporary camps’ to augment the regular firefighting forces.”¹¹⁴ CAL FIRE’s only interest in a prisoner’s labor is a pecuniary one. This is even acknowledged explicitly in the authorizing statute for the fire camps, which states explicitly that the purpose of the program is “to provide for the training and use of the inmates and wards assigned to conservation camps in the furtherance of public conservation.”¹¹⁵ In most of the Ninth Circuit’s prisoner FLSA decisions, there is some examination of the legislative intent, though it usually focuses on Congress’s intent when passing the FLSA and whether or not they intended it to apply to prisoners as a class. However, to assess the overriding penological purpose of prisoners’ work, an examination of legislative intent may also be appropriate. Helpfully, the title of the above California statute authorizing the fire camps includes “[l]egislative purpose,” directing us exactly to what the legislative intent was: “the furtherance of public conservation.”¹¹⁶ Public conservation has nothing to do with punishment, deterrence, or rehabilitation—in other words, it has no penological purpose.

B. HOW TO MOVE FORWARD

Although the Ninth Circuit has recognized that prisoners are not categorically exempt from FLSA claims, it has not articulated what happens when a prisoner can demonstrate that their work lies outside the *Hale-Morgan-Burleson* economic reality. The court will first need to decide how to determine whether an incarcerated worker succeeds on an FLSA claim

¹¹³ Zatz, *supra* note 110, at 891.

¹¹⁴ *Conservation (Fire) Camps*, *supra* note 4.

¹¹⁵ CAL. PUB. RES. CODE § 4951 (West through 2022 Reg. Sess.).

¹¹⁶ *Id.*

once outside the *Hale-Morgan-Burleson* reality and decide who the appropriate defendant in such a case would be.

1. A Formal Test for Prisoner FLSA Claims

The D.C. Circuit has developed a clear, workable test for prisoner FLSA claims—something the Ninth Circuit should imitate. The D.C. Circuit devised the following test in *Henthorn v. Department of Navy*, as explained by Lang:¹¹⁷

First, the inmate must meet a two-pronged requirement to survive a motion to dismiss. The inmate worker must prove that (1) the work performed was done without legal compulsion (i.e., that it was not part of a hard-labor requirement in the prisoner's sentence); and (2) that the compensation received was set and paid by a non-prison source. If the inmate's claim passes this test, the court would then run the "economic reality" test set forth in *Bonnette*.¹¹⁸

The Ninth Circuit could adopt a similar test with a different two-pronged threshold requirement. That requirement should be a formal articulation of the two-pronged test from the *Hale-Morgan-Burleson* cases: a prisoner's FLSA claim fails if her work is (1) done in order to fulfill a state's hard-labor requirement; and (2) the program for which the work is done is a "prison-structured" program.¹¹⁹ If the work does not satisfy both prongs, the court can return to the *Bonnette* factors for a traditional economic reality analysis. In *Hale*, the court said those factors "are not a useful framework in the case of prisoners who work for a prison-structured program because they have to," implying that they *are* still useful in cases where prisoners' work is *not* statutorily required or for a prison-structured program.¹²⁰

It may seem unusual to see an analysis using these factors, given that much of this paper describes the court's clunky shift away from them. The court, though, moved away from the factors when both prongs of the *Hale-Morgan-Burleson* analysis were met. Since the *Hale-Morgan-Burleson* are not met in the case of California's incarcerated firefighters, it is appropriate to return to the *Bonnette* factors. These factors can also be used to determine

¹¹⁷ *Henthorn v. Dep't of Navy*, 29 F.3d 682, 687 (D.C. Cir. 1994).

¹¹⁸ Lang, *supra* note 39, at 205.

¹¹⁹ *Id.*

¹²⁰ *Hale v. Arizona*, 993 F.2d 1387, 1394 (9th Cir. 1993).

cases of joint employment. The current line of cases supports this use of the factors. The *Morgan* court stated that “[t]he *Bonnette* factors are properly applied when an individual is clearly employed by one of several entities and the only question is which one.”¹²¹ Since the traditional *Bonnette* economic realities analysis usually takes place alongside any question of joint employment, that combined analysis will take place in the following discussion.

2. CAL FIRE and CDCR as Joint Employers

If California’s incarcerated firefighters were to bring an FLSA claim, they should bring it against both CDCR and CAL FIRE as joint employers. This would not be a procedural stretch given the Conservation Camp program even describes itself as a “joint” operation between the CDCR and CAL FIRE.¹²² The FLSA demands that each entity that qualifies as an “employer” of an “employee” is responsible for paying the minimum wage, even if there are other “employers” which exist alongside it.¹²³

Hale, Morgan, and Burluson did not address joint employment claims.¹²⁴ The court did, however, address the issue in *Gilbreath*, in which the plaintiff sued both the corrections agency and the private business that ran a plasma center in the prison under this theory.¹²⁵ In that case, each of the three judges on the panel resolved the question of joint employment by a corrections agency and a third party differently. The majority did not spend much time on the issue, but they assessed each employer separately.¹²⁶ It found that the economic reality of the relationship between the prisoners and the prison was “inconsistent with . . . a true employer-employee relationship,”¹²⁷ and then conducted a separate *Bonnette* factors analysis of the prisoners’ relationship with the private third party.¹²⁸ The

¹²¹ *Morgan v. MacDonald*, 41 F.3d 1291, 1293 (9th Cir. 1994).

¹²² *Conservation (Fire) Camps*, *supra* note 4.

¹²³ Kati L. Griffith, *The Fair Labor Standards Act at 80: Everything Old Is New Again*, 104 CORNELL L. REV. 557, 563 (2019).

¹²⁴ The plaintiff in *Morgan* named the school board and its members which oversaw the program at which they worked – instead of the state or a subsidiary of state corrections as in *Hale* and *Burluson* – as a defendant in their lawsuit. *Morgan*, 41 F.3d 1291; *Hale*, 993 F.2d 1387; *Burluson*, 83 F.3d 311. The circuit court did not make much of this; it found that the plaintiff could not be an employee under the FLSA and thus never addressed the relationship with a potential employer. *Morgan*, 41 F.3d at 1293.

¹²⁵ *Gilbreath v. Cutter Biological, Inc.*, 931 F.2d 1320, 1324 (9th Cir. 1991).

¹²⁶ *See id.*

¹²⁷ *Id.* at 1325.

¹²⁸ *Id.*

majority determined that, because some factors were satisfied in whole or in part by the prison, the private company was also not an employer.¹²⁹ The concurring opinion concluded that neither “the institution or [the private third party] passes the threshold question of whether it, alone, is an ‘employer.’”¹³⁰ Like the majority opinion, the concurring opinion also determined that the nature of the relationship between the prisoners and the prison was not characteristic of an employer-employee relationship, and applied the *Bonnette* factors to the private party to determine whether the private party, standing alone, was an employer.¹³¹ The concurring opinion concluded that “neither alleged ‘employer’ possesses, on its own, the characteristics of an employer.”¹³²

The dissent argues that these opinions missed the point—joint employment is meant specifically to address cases where entities share control over a worker: “two parties are joint employers if they *share* or *co-determine* those matters governing the essential terms and conditions of employment.”¹³³ The dissent found the prison and the private company, Cutter Biological, indeed shared and/or co-determined those essential terms, by together satisfying the *Bonnette* factors: “there is no doubt that together the state and Cutter Biological have the power to hire and fire, supervise and control work schedules and conditions, determine the rate and method of payment and maintain employment records.”¹³⁴ Simply because the two entities shared control over the workers—and thus some of the *Bonnette* factors—did not mean that one of those entities was precluded from being considered an employer, it just meant that it was not the only one. “The fact that Cutter Biological’s control was qualified does not place its employment relationship beyond the scope of the FLSA; it makes Cutter Biological a joint employer.”¹³⁵ The dissent concluded that the appropriate way of determining whether the two entities were employers was not to look at them independently, but to view them together, and found that they were, indeed joint employers: “dividing the responsibilities of employment between the state and Cutter Biological does not mean that neither is the employer; it means that they are joint employers.”¹³⁶

¹²⁹ *Id.* at 1327.

¹³⁰ *Id.* at 1328–29 (Rymer, J., concurring).

¹³¹ *Id.*

¹³² *Id.* at 1330 (Rymer, J., concurring).

¹³³ *Id.* at 1337 (Nelson, J., dissenting).

¹³⁴ *Id.* at 1337–38.

¹³⁵ *Id.* at 1337.

¹³⁶ *Id.*

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a. Application of the *Bonnette* Factors

Each strategy discussed in *Gilbreath* employs the use of the *Bonnette* factors. The majority and concurrence use them to determine whether the private company alone was an employer but use a different test to analyze the relationship between the prisoners and the prison by itself.¹³⁷ The dissent uses them to assess the relationship between the incarcerated workers and the two entities together.¹³⁸ The majority and concurring opinions in *Gilbreath* presuppose that the relationship between the incarcerated workers and the prison precludes the prison from consideration as an employer.¹³⁹ That is not the case for California's incarcerated firefighters, as discussed in Section III-A. Those opinions also, as the dissent pointed out, misapplied the joint employment standard by refusing to acknowledge that it exists where they “*share or co-determine* those matters governing the essential terms and conditions of employment.”¹⁴⁰ For those reasons, the Ninth Circuit should adopt the dissent's view that the employers must be assessed jointly. To do so, we look to the *Bonnette* factors. The fact that essential terms and conditions of employment are split between CAL FIRE and CDCR means that they are both joint employers and do not escape their duties under the FLSA as a result of the other's involvement.

The *Bonnette* factors, again, are whether the putative employer “(1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.”¹⁴¹

CDCR and CAL FIRE together have the power to hire and fire incarcerated firefighters. In *Gilbreath*, the dissent acknowledged that the prison determined the eligibility of prisoners to participate in the program and could remove them from the program, but the private company also got to interview them and could remove prisoners at will.¹⁴² The court implied that this power, in combination with the company's power to promote and demote a prisoner once they had been assigned, created a de facto power to

¹³⁷ *See id.*

¹³⁸ *See id.*

¹³⁹ *See id.*

¹⁴⁰ *Id.*

¹⁴¹ *Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465,1470 (9th Cir. 1983).

¹⁴² *Gilbreath v. Cutter Biological, Inc.*, 931 F.2d 1320, 1336 (9th Cir. 1991) (“[I]t is undisputed that the DOC determined whether a prisoner was eligible to work and could remove him from the job. However, the record indicates that an inmate had to be interviewed and selected by Cutter Biological and could be removed if Cutter Biological did not approve of the prisoner's work.”).

hire and fire.¹⁴³ Here, the prison again has the ultimate ability to choose which prisoners are assigned to fire camps,¹⁴⁴ and the handbook that governs the conservation camp program states that “correctional camp employees”—that is, a mix of CDCR and CAL FIRE employees—“need to carefully study assigned inmates and return to the facility those inmates who they believe to be escape-risks.”¹⁴⁵ As well, CAL FIRE “determines the promotion and/or demotion of inmates in the various pay grades.”¹⁴⁶ This is the same constructive power to hire and fire as was recognized by the dissent in *Gilbreath*.

CDCR and CAL FIRE together supervise and control employee work schedules or conditions of employment. The program describes itself as jointly administered by both CDCR and CAL FIRE.¹⁴⁷ By the program’s admission, “CAL FIRE maintains the camp, supervises the work of the inmate fire crews, and is responsible for inmate custody,” while “CDCR is responsible for the . . . supervision, care and discipline of the inmates.”¹⁴⁸

CDCR and CAL FIRE together determine the rate and method of payment. CDCR pays the regular wages according to a schedule laid out in the training manual,¹⁴⁹ while CAL FIRE pays an additional wage while the workers are actively fighting fires.¹⁵⁰ Additionally, CAL FIRE’s decisions about promotion and demotion to different positions affects the firefighters’ pay—with the highest position making twice the earnings of the lowest position.¹⁵¹

Cooperating agencies like CAL FIRE are advised to “keep a daily record of the work and attitude of each inmate under their supervision.”¹⁵² CDCR presumably keeps records of which workers are assigned to which camp and how much they are paid. These agencies did not provide records when contacted about them, but they did not indicate that they did not

¹⁴³ *Id.* (“The number and qualifications of the workers also were decided by Cutter Biological, and once a prisoner had been hired, Cutter Biological could promote or demote him on the basis of his performance In sum, although Cutter Biological was limited to employing only those selected by the DOC, once an inmate was eligible, Cutter Biological had the power to hire and fire.”).

¹⁴⁴ CAL. DEP’T OF CORR. AND REHAB., *supra* note 31, § 51130.8, at 359.

¹⁴⁵ *Id.*

¹⁴⁶ CAL. DEP’T OF CORR. AND REHAB., *supra* note 31 § 51130.27.1, at 362.

¹⁴⁷ *Conservation (Fire) Camps*, *supra* note 4; CAL. DEP’T OF CORR. AND REHAB., *supra* note 31 § 51130.3, at 357.

¹⁴⁸ *Conservation (Fire) Camps*, *supra* note 4.

¹⁴⁹ CAL. DEP’T OF CORR. AND REHAB., *supra* note 31 § 51130.27.3, at 362.

¹⁵⁰ Escalante, *supra* note 10.

¹⁵¹ CAL. DEP’T OF CORR. AND REHAB., *supra* note 31 §§ 51130.27.3, 51130.27.1, at 362.

¹⁵² CAL. DEP’T OF CORR. AND REHAB., *supra* note 31 § 51130.12.1, at 359.

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exist.¹⁵³ Even if these records remain undisclosed, the court in *Watson* did not let an absence of employment records weigh heavily against the satisfaction of the other factors.¹⁵⁴

Given that the entities maintain joint control over the firefighters' pay, training, scope of work, and supervision, this would indicate that CDCR and CAL FIRE are joint employers of the firefighters.

IV. CONCLUSION

Because the hard-labor statute in California does not demand the scope of work done by incarcerated firefighters in California, and the program for which they work is not the type of prison-structured program contemplated by the court, their work does not fit within the economic realities analysis framework that the Ninth Circuit created in *Hale, Morgan, and Burlison*. As a result, California's incarcerated firefighters have valid FLSA claim against the CDCR and CAL FIRE.

However, a ruling that grants employee status to these workers could prove to be a double-edged sword. Recently, in *Washington v. GEO Group, Inc.*, a district court in the Ninth Circuit ruled that detainees at an immigration detention center were employees under a Washington state labor law and thus were entitled to the state minimum wage.¹⁵⁵ However, after the ruling, detainees were no longer allowed to do the work.¹⁵⁶ Instead of moving from an illegally low wage to the bare minimum under the law, the detained workers lost access to wages altogether. This is concerning given that some incarcerated workers' have valid claims to a large pay increase.

Fortunately, in California, some political support exists for the dedication of additional state dollars to incarcerated workers' salaries. California Senate Concurrent Resolution 69, the resolution that recognizes the need to lift wages for incarcerated workers, specifically mentions how the pay schedule for those who work at fire camps has remained stagnant

¹⁵³ E-mail from Anne Henigan, PRA Coordinator, to Brady Root (Dec 13, 2021, 12:37 PM) (on file with author); E-mail from California Department of Corrections and Rehabilitation Public Records Act Request Team to Brady Root (Jan. 20, 2022, 2:21 PM) (on file with author).

¹⁵⁴ See *Watson v. Graves*, 909 F.2d 1549, 1555 (5th Cir. 1990) (“[I]t is undisputed that neither the Jarreas, nor the Sheriff or the Warden kept any employment records whatsoever. Alone however, those superficial facts do not preclude application of FLSA to *Watson* and *Thrash* when we analyze the economic realities of the Inmate's employment . . .”).

¹⁵⁵ Gene Johnson, *Company Halts Work Program Instead of Upping Detainee Pay*, AP NEWS (Nov. 5, 2021), <https://apnews.com/article/immigration-business-minimum-wage-tacoma-us-immigration-and-customs-enforcement-3fd539e86e1f17539526eabf6afc8abd> [<https://perma.cc/474Y-NQ9K>].

¹⁵⁶ *Id.*

for three decades.¹⁵⁷ This resolution is just that, a resolution, and does not appropriate any actual money for higher wages, but it at least demonstrates that there is some legislative support for such an appropriation.¹⁵⁸

Other scholars who have written about incarcerated workers and the FLSA have urged that “lower courts need clear guidance from Congress or the Supreme Court to aid the determination of whether and which certain types of prison labor are covered under the [Act].”¹⁵⁹ I fear that any “guidance” from Congress or the Supreme Court at this time would foreclose the possibility of fairly compensating incarcerated firefighters. An approach that simply brings an FLSA claim by California’s firefighters in the Ninth Circuit does not require the dubious political strategy of asking a legislature or the Supreme Court to address the issue, both of whom seem unlikely to affirmatively grant more rights to incarcerated workers. This approach simply asks a court to recognize and abide by its own precedent so that workers receive the pay that they deserve.

¹⁵⁷ S.C.R. 69, 2019 Leg., Reg. Sess. (Ca. 2020).

¹⁵⁸ *See generally id.*

¹⁵⁹ Lang, *supra* note 39, at 191.