

# New Rules for IHSS: Overtime and Related Changes

January 25, 2016

## NEW FEDERAL RULES & STATE LAWS SAY THAT:

- IHSS providers must receive overtime when they work more than 40 hours in a week
  - o Daily overtime not applicable.
- IHSS providers will get paid for wait time at medical appointments in some circumstances
- IHSS providers will get paid for up to 7 hours a week travel time between consumers on the same day
- Overtime starts February 1, 2016

## WHAT IS OVERTIME AND HOW IS IT CALCULATED?

- For the first time, maximum IHSS consumer hours will be calculated by week and by month (using 4 weeks per month). No change to consumer authorization.
- The maximum weekly hours are  $283 \div 4 = 70.75$ 

**Example:** Consumer is authorized for 260 hours IHSS per month.  $260 \div 4 =$  maximum 65 hours/week. Provider is entitled to up to 25 hours of overtime per week.
- Consumers must spread their hours over the whole month, no matter how many days in the month, and may not exceed their monthly authorized hours.

Workweek: The IHSS workweek begins at 12:00 a.m. on Sunday, includes the next consecutive 168 hours (24 hours x 7 days), and ends at 11:59 p.m. the following Saturday.

- Overtime is paid at 1 ½ times the regular hourly wage.

**Example:** If the IHSS wage is \$10/hr.: Provider works 50 hours in one week, she will receive \$10/hr for 40 of those hours, and \$15/hr for 10 hours in that week.

## HOW IS CALIFORNIA IMPLEMENTING OVERTIME RULES?

- State agrees to pay SOME overtime
  - o State is concerned that providers and consumers will change work patterns so that more providers can qualify for overtime, driving up the costs of IHSS...
- ... so it placed some limits on how much overtime can be worked.

## FOR THE GREAT MAJORITY OF CONSUMERS, THESE NEW LIMITS WILL NOT CHANGE HOW THINGS WORK NOW.

## WHAT WORK COUNTS TOWARDS OVERTIME?

- State is employer of all IHSS providers for the purpose of calculating overtime. A provider's total weekly hours include:
  1. All hours worked for all consumers if a provider works for more than one consumer.

**Example:** Provider Peter works 25 hours per week for Consumer John and 33 hours per week for Consumer Sam. Peter's total weekly hours are 58. He gets 18 hours per week of overtime.

2. IHSS and Waiver Personal Care Services (WPCS) are combined.

**Example:** Consumer Sally receives IHSS and is on the Nursing Facility/Acute Hospital (NF/AH) Waiver. Provider Danielle works for Sally providing 30 hours per week of IHSS and 30 hours per week of WPCS. Total weekly hours are 60. Danielle gets 20 hours per week of overtime.

3. IHSS and Supported Living Services (SLS) hours:

The California Dept. of Social Services is not combining SLS and IHSS hours on the IHSS time sheet or towards the weekly or monthly IHSS caps. There is a question about whether the SLS and IHSS hours will be combined for the payment of overtime in the future.

## CALIFORNIA LIMITS OVERTIME IN TWO WAYS

### 1. Workweek Limitation for Providers:

- Providers who work for more than one consumer are limited to 66 hours each week, unless they get the IHSS “parental exemption”, the IHSS individual exception or the WPCS exemption, which allow up to 90 hours per week. (See slide 19 for rules on exemptions.)
- Providers who work for only one consumer can work up to that consumer’s weekly maximum, which may be as high as 70.75 hours. (WPCS exemption may allow more weekly hours and consumers with high hours may flex hours, resulting in a workweek higher than 70.75).

### 2. Consumer Has Monthly Authorization and Weekly Authorization:

For the first time, the authorized total monthly hours will be divided into a weekly amount, to be used only for calculating overtime. ***This is not a reduction in hours!***

## HOW DO THE NEW PROVIDER HOURS RULES AFFECT CONSUMERS? 5 WAYS

1. **Overtime Calculation:** Monthly hours will be divided by 4, to make a weekly allocation. No change to total monthly authorization of hours. New timesheets which will show hours worked in each workweek. Form SOC 2271 and 2271a show maximum weekly hours.
2. **Workweek Limitation for Providers:** Providers who work for more than one consumer are limited to 66 hours each week, unless they get one of the exemptions or exceptions, which allows them to work up to 90 hours per week.

Providers who work for only one consumer can work up to that consumer’s weekly maximum, with flexibility described later.

New form SOC 2256 Workweek Agreement for Consumers with more than one provider.

**Example:** Bernice is authorized for 283 hours of IHSS per month. Her weekly allotment is 70.75 hours. Bernice’s mother Elsie is her only provider, and Elsie does not work for any other IHSS consumer. Elsie will

receive overtime for hours over 40 per week, up to a maximum of 30.75/week x 4 weeks = 123/month.

Also, Elsie cannot work more than 283 hours per month – Bernice’s maximum. Bernice must spread Elsie’s hours over the whole month, as she has always done.

Bernice can adjust Elsie’s hours; Elsie may work over 70.75 hours per week as long as her total overtime in a month does not exceed 123 hours.

3. Multiple Consumers: If an IHSS provider works for more than one IHSS consumer, the total hours worked for all consumers are added together each week and the provider cannot work more than 66 hours per week, unless the provider gets an exemption. Each provider must inform each consumer for whom she works of the number of hours that the provider is available to work for that consumer. Workweek agreements must be submitted.

**Example:** Provider Paula works for two consumers—she provides services for 30 hours per week for one consumer, and 40 hours per week for other. Paula may NOT continue to work 70 hours per week; she may work only 66 hours per week, combined. One or both consumers will need to find another provider for the 4 hours per week that Paula may not work.

4. Waiver Personal Care Services (WPCS): Some participants on Nursing Facility/Acute Hospital (NF/AH) or In-Home Operations Waivers receive WPCS, which is combined with IHSS for calculating overtime. Overtime costs will not cause a reduction in services, even if the costs exceed the individual cost-cap.

- Providers are subject to the 66 hour or 70.75 hour weekly cap, and the Waiver 12 hour/day cap.
- DHCS has an exception policy for some providers, who will be permitted to work 360 hours/month, 12 hour/day.

5. Adjusting Weekly Hours:

#### **Part A: WHEN NO OVERTIME IS TRIGGERED**

A consumer may authorize a provider to work more hours than the consumer’s weekly authorized hours without county approval as long as the hours worked:

- Do not result in the provider working more than 40 hours in a workweek when the consumer is authorized for 40 or less hours in a workweek; AND
- Do not result in a provider receiving more overtime than she/he normally works in a calendar month\*; OR
- Do not result in a provider, who works for multiple consumers, working more than 66 hours per week.

\*DRC disagrees with this interpretation of the statute.

NOTE: Consumers can swap hours between workers under some circumstances and within certain restrictions, even if it creates overtime for a worker who doesn't normally work overtime.

### **Part B: WHEN OVERTIME IS TRIGGERED**

Consumers may request an adjustment when that adjustment will cause overtime, or more overtime. The consumer's total monthly hours must not go above the authorized limit. For one-time requests, the county shall approve the request only if\*:

1. "The additional hours are necessary to meet an unanticipated need;
2. The additional hours are related to an immediate need that cannot be postponed until the arrival of a back-up provider (as designated on SOC 827); and
3. The additional hours must be related to a need that would have a direct impact on the IHSS recipient and would be needed to ensure his/her health and/or safety."

\*Note: DRC thinks this policy goes beyond the statute and is overly restrictive.

The consumer can request the exception before or after the schedule change happens. ***The county welfare department shall not unreasonably withhold approval of a consumer request.***

The county can also make an adjustment for a need that will be repeated, such as a regular medical appointment.

- At each annual reassessment, the consumer can tell the social worker about any need to adjust weekly hours. The county can also authorize an adjustment to weekly hours at other times.

**Example:** Consumer Rita has the flu and needs her worker to work extra in week 2 of the month. Her worker usually works 38 hours per week, but in the week when Rita is sick, her worker works for 44 hours. Rita may call the county (while or soon after the hours are worked) and ask for the overtime approval. Rita must adjust her worker's hours so she doesn't work more monthly hours than Rita is authorized.

**Example:** Consumer Andrew has 138.5 hours per month, or 34.6 weekly hours of IHSS. Andrew wants the provider to work 38 hours in week one of the month and 26 hours the next week. Andrew does not need to get permission to shift the hours in his own schedule because the change will not cause overtime.

**Example:** The same Consumer Andrew who gets 138.5 hours per month, or 34.6 weekly hours of IHSS, wants his provider to work 42 hours in Week 1 and 22 in Week 2. He does have to ask the county for an exception because his request will cause his provider to work 2 hours of overtime in Week 1.

**Example:** Consumer Carla gets 186 hours per month, or 46.5 hours per week of IHSS. Her provider normally gets 26 hours per month of overtime. She can flex her weekly hours so that her provider works more than 46 hours in some weeks and less in others, as long as the net overtime is not more than 26 hours per month.

**Note:** In the examples above, if the providers work for other consumers, the consumers cannot authorize a provider to work more than 66 hours per week in total.

## REGIONAL CENTER CLIENTS

### IF OVERTIME CAUSES LOSS OF SERVICES:

- RC consumers should go to an IPP if payment of overtime would mean that they lose SLS or lose providers.

There should always be a way to get an individualized exception from the Regional Center to pay overtime if needed because, for example:

- The consumer has relationships with providers whose loss would harm the consumer;

- The consumer has 24 hour needs and/or need for fewer transitions of staff, etc.
- Even if the consumer does not receive SLS, the consumer can go to the Regional Center for additional attendant care, respite, or other services to make up for loss of services due to overtime (e.g., if overtime exception is not adequate to meet needs).

## EXEMPTIONS AND EXCEPTIONS

**IHSS Parental Exemption:** People who qualify for this exemption may work up to 90 hours per week and 360 hours per month.

The exemption policy covers IHSS providers who meet all the following conditions on or before January 31, 2016\*:

- Provide IHSS services to two or more IHSS recipients;
- Live in the same home as all of the IHSS recipients for whom they provide services;
- Are related to the IHSS recipients to whom they provide services as his/her parent, stepparent, adoptive parent or grandparent or are his/her legal guardian; and
- CDSS will send a form to people who may qualify; the provider must verify that she or he does meet all the criteria.

**\*NOTE:** These providers are “grandfathered”; new providers don’t qualify for this exemption. See next slide for possible exception.

- **Individual Exception from IHSS rules:** CDSS is also creating an individual exception policy so that providers not covered under the parental exemption, who meet certain criteria, can work more than 66 but not more than 90 hours per week and not more than 360 hours per month. CDSS has not announced the criteria for individual exceptions or the process for applying for an exception.
- **Waiver Personal Care Services Exceptions:** For providers who work for Waiver participants who are enrolled on January 31, 2016 (grandfathered), DHCS will allow overtime up to the waiver limit of 12-hour work days, 90 hours per week or 360 hours per month for an individual WPCS provider, if:

- The care provider lives in the same home as the waiver participant (the provider does not have to be a family member); or
  - The care provider is now giving care to the waiver participant and has done so for two or more years without a break; or
  - DHCS agrees that there are no other possible care providers near the waiver participant's home. The waiver participant must work closely with DHCS care managers to try to find more care providers.
- ***Exceptions for providers who provide Waiver Personal Care Services for NF/AH and IHO waiver participants who enroll in either waiver after January 31, 2016***
  - DHCS will allow some providers to work up to the waiver limit (12 hours a day, 360 hours per month). This would be granted on a case-by-case basis, such as for WPCS participants who may be at risk of being placed in out-of-home care (e.g., they cannot find a local caregiver who speaks the same language).
  - DHCS will work with stakeholders on the conditions and rules for this exception process, will mail information to waiver participants, and DHCS care managers will work with waiver participants and providers to approve more overtime hours under this exception.

## WILL THERE BE A PENALTY IF MY PROVIDER DOES NOT FOLLOW THE NEW RULES?

- **Grace Period until April 30, 2016:** Because these new rules are complicated, for the first three months timesheets will be paid in excess of the weekly limitation, with no violation incurred by the provider.
- **Violations:** As of May 1, 2016, providers will receive violation notices as part of a disciplinary process.
- **Termination:** The State Department of Social Services or a county may terminate a provider from providing services under the IHSS program if a provider continues to violate the limitations of the rules on multiple occasions.
- ***Violations assessed in a four-stage process:***  
**First violation:** consumer and provider will receive a written warning



**Second violation:** consumer and provider will receive a second written warning notice. The provider will receive instructional materials and can avoid the violation by then signing a notification acknowledging that he/she has read and understood the material.

**Third violation:** 3-month suspension for provider

**Fourth violation:** one year suspension for provider

## WHAT ELSE DO I NEED TO KNOW ABOUT THE NEW RULES?

- **Travel time:** Workers will get paid for travel time between consumers on the same day. Workers may not travel more than 7 hours per week. The travel time will not be deducted from the consumer's service hours. New form SOC 2255 includes Part B, Travel Time.
- **Wait time:** Workers can get paid for accompanying a consumer at a medical appointment if the worker is "on duty" – e.g. the worker is required to remain because at any moment the provider will help the consumer return to home. Hours will be added to assessment to cover this but the 283 hour maximum remains.
- **Advance pay:** The policy for Advance Pay has not changed. For the Feb. 1 overtime implementation, the Advance Pay consumer's provider will submit a monthly reconciling timesheet and if there are overtime hours claimed, the system will calculate the overtime hours and issue a supplemental warrant directly to that provider. The consumer must continue to sign and approve the reconciling timesheet.
- **Appeal rights for consumers:** The law is silent about consumer appeal rights, which we assume means that consumers have ordinary appeal rights to challenge any decision, including a decision to deny a request to move hours.
- **Appeal rights for providers:** There is a county dispute process and State Administrative Review process for only the 3rd and 4th violations. Violation notices will contain information about appeals.

## WHAT NOW?

- Various notices and forms are being sent to consumers and providers.

- All-County Letters have been issued. See ACL 16-01 for details about the rules and copies of all the forms. Another ACL will cover the exemptions and exceptions.

***Disability Rights California is funded by a variety of sources, for a complete list of funders, go to <http://www.disabilityrightsca.org/Documents/ListofGrantsAndContracts.html>***