



*California's protection & advocacy system*

## Recent Changes to Workweek Exemptions for Providers of In-Home Supportive Services (IHSS) and Waiver Personal Care Services (WPCS)

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This publication is for people who receive In-Home Supportive Services (IHSS) and Waiver Personal Care Services (WPCS) and the people who provide their care.<sup>1</sup> This publication contains information about how to request an exemption to the maximum number of hours that some providers may work each month in the IHSS and WPCS programs. With an exemption, providers may work up to 360 hours per month.

### **BACKGROUND**

#### Federal Overtime Rules and State Workweek Limits

In response to a change in federal Department of Labor regulations, the state of California agreed to pay overtime for in-home workers in the IHSS and WPCS programs. The state is now paying overtime for any hours worked above 40 hours per week. For more information on overtime rules generally, see publication #5586.01 *New Rules for IHSS: Overtime and Related Charges* at <https://www.disabilityrightsca.org/publications/new-rules-for-ihss-overtime-and-related-changes>.

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<sup>1</sup> WPCS is a service offered through the Home and Community Based Alternatives Waiver (formerly known as the Nursing Facility/Acute Hospital, or NF/AH Waiver). WPCS is unlicensed attendant care that helps Waiver participants with their personal care and other needs they have to remain living at home. ["Return to Main Document"](#)

At the same time, the state placed limits on the maximum weekly number of hours an IHSS or WPCS provider can work in a workweek. In general:

- A provider who works for only one recipient cannot work more than 70 hours and 45 minutes per week for IHSS and/or WPCS combined.
- A provider who works for more than one recipient cannot work more than 66 hours per week for IHSS and/or WPCS combined.<sup>2</sup>

### California's Administrative Exemptions (2016)

Beginning February 1, 2016, the California Department of Social Services (CDSS) established two exemption categories which allowed some IHSS providers to work more than the limits outlined above: the "Family" exemption and the "Extraordinary Circumstances" exemption. Unlike the workweek limits, these exemptions were not codified in statute or regulation, but rather were announced through All-County Letters sent to county welfare directors and IHSS program managers.<sup>3</sup> Providers who are granted either exemption were/are still limited to a maximum of 90 hours per workweek, not to exceed 360 hours per month.<sup>4</sup> The California Department of Health Care Services (DHCS) also issued similar guidance about the maximum daily, weekly and monthly hours a provider can work for a consumer who gets WPCS alone or WPCS and IHSS combined.<sup>5</sup>

### IHSS and WPCS Provider Workweek Exemptions Become Law in 2017

As of July 1, 2017, there are now two IHSS exemptions which are codified in California state law.<sup>6</sup> Providers who are approved for an exemption may exceed the 66-hour workweek limit up to a maximum of 360 hours per month combined for all IHSS recipients they serve.

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<sup>2</sup> Welf. & Inst. Code §§ 12300.4, 12301.1. ["Return to Main Document"](#)

<sup>3</sup> All-County Letter No. 16-07, ("ACL 16-07"), available at <http://www.cdss.ca.gov/lettersnotices/entres/getinfo/acl/2016/16-07.pdf>.  
["Return to Main Document"](#)

<sup>4</sup> All-County Letter No. 16-22 ("ACL 16-22"), available at <http://www.cdss.ca.gov/lettersnotices/EntRes/getinfo/acl/2016/16-22.pdf>.  
["Return to Main Document"](#)

<sup>5</sup> DHCS Letter No. 16-001, available at <http://www.dhcs.ca.gov/services/ltc/Documents/WPCSOvertimeBulletin.pdf>.  
["Return to Main Document"](#)

<sup>6</sup> Welf. & Inst. Code § 12300.4(d)(3)(A)-(B). ["Return to Main Document"](#)

There are also two exemptions available for WPCS providers, which allow approved providers to work up to a total of 12 hours per day up to a maximum of 360 hours per month combined for the IHSS and WPCS that he/she provides.<sup>7</sup>

## **IHSS EXEMPTIONS**

### **1. General Information**

#### *1.1. How Do I Know If I Qualify for an IHSS Exemption?*

During the assessment or reassessment, the county IHSS program will evaluate you to determine if your circumstances indicate that your provider may be eligible for Exemption 1 or 2 (discussed below). The county shall inform potentially qualifying recipients about the exemption(s) and the process by which you or your provider may apply.<sup>8</sup>

#### *1.2. If My Provider Gets an Exemption, Can She Work All of the Authorized Hours for the Recipients She Provides IHSS for?*

No. Even with an exemption, providers cannot work more than 360 hours per month. Because the state will not pay a provider for more than 360 hours per month, DRC is not able to help you get an exemption above the maximum limit. If the total number of hours for the provider's recipients are more than 360, you will have to hire another IHSS provider to work the rest of the hours.

### **2. IHSS Exemption 1 (formerly Family Exemption)**

#### *2.1. Who is Eligible for Exemption 1?*

Exemption 1 is available for providers who met ALL of the following conditions on or before January 31, 2016:

1. Provide services to two or more IHSS recipients; and
2. Live in the same home as all of the recipients for whom they provide services; and
3. Are related biologically, by adoption, or as a foster caregiver, legal guardian, or conservator, to all of the recipients for whom he or she

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<sup>7</sup> Welf. & Inst. Code § 14132.99(d)(1)(B)(2). ["Return to Main Document"](#)

<sup>8</sup> Welf. & Inst. Code § 12300.4(d)(3)(C). ["Return to Main Document"](#)

provides services as the recipients' parent, stepparent, foster or adoptive parent, grandparent, legal guardian, or conservator.<sup>9</sup>

## 2.2. *How Do I Apply For Exemption 1?*

Before Exemption 1 (formerly known as the Family Exemption) was codified in statute, CDSS sent a letter and form to providers who were identified as meeting the criteria. If your provider met the criteria but was not sent a notice, CDSS is advising counties and recipients to complete an Exemption 1 application and mail it to CDSS directly. The three-page application is attached to All-County Letter 16-07 and available for download at

<http://www.cdss.ca.gov/lettersnotices/entres/getinfo/acl/2016/16-07.pdf>.

You can mail your completed application to:

CDSS – Adult Programs Division  
744 P Street, Mail Stop 9-7-96  
Sacramento, CA 95814

If you would like to apply but do not have access to the Internet, you can call CDSS at (916) 651-5350 and ask them to send you a paper application form. Remember to leave a brief message with your name and phone number so your call may be returned. You can also ask your county social worker for the application.

## **3. IHSS Exemption 2 (formerly Extraordinary Circumstances Exemption)**

### *3.1. Who is Eligible for Exemption 2?*

Providers who work for two or more IHSS recipients are eligible for Exemption 2 if each recipient has at least ONE of the following circumstances that puts the recipient at serious risk of placement in out-of-home care if the services could not be provided by that provider:

Criteria A: Has complex medical and/or behavioral needs that must be met by a provider who lives in the same home as the recipient; OR

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<sup>9</sup> Welf. & Inst. Code § 12300.4(d)(3)(A). [“Return to Main Document”](#)

Criteria B: Lives in a rural or remote area where available providers are limited, and as a result, the recipient is unable to hire another provider; OR

Criteria C: Is unable to hire another provider who speaks the same language as the recipient, and as a result, the recipient is unable to direct his or her own care.<sup>10</sup>

### 3.2. *How Do I Qualify for Exemption 2?*

Before Exemption 2 was codified in statute, the state's guidance <sup>11</sup> required both the county and recipients to explore and exhaust all possible options for finding another provider to work within the recipient's authorized weekly and monthly hours. The statute does not include this requirement and you therefore no longer need to exhaust all provider options; however, some counties mistakenly continue to require this. According to a newer All-County Letter issued by the state, "In addition to meeting one of the exemption criteria [A-C above], the recipients, with the assistance of the county, as needed, must have explored available options for hiring an additional provider(s). ***Prior documented attempts to find/utilize other providers may be considered in meeting this requirement.***" (emphasis added).<sup>12</sup>

### 3.3. *How Do I Apply For Exemption 2?*

At the time of each county assessment or reassessment, the county social worker must evaluate whether the recipient's circumstances appear to indicate that the provider for that recipient maybe eligible for an exemption. The county shall then inform those recipients about the potentially applicable exemptions and the process by which their provider may apply for exemption.<sup>13</sup> The provider should ask for, complete, and submit to the county, an exemption request form (SOC 2305).

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<sup>10</sup> Welf. & Inst. Code § 12300.4(d)(3)(B); All-County Letter No. 18-31 ("ACL 18-31") at 2, available at: <http://www.cdss.ca.gov/Portals/9/ACL/2018/18-31.pdf?ver=2018-03-23-130932-073>. ["Return to Main Document"](#)

<sup>11</sup> ACL 16-22 at 3. ["Return to Main Document"](#)

<sup>12</sup> ACL 18-31 at 2. ["Return to Main Document"](#)

<sup>13</sup> ACL 18-31 at 2. ["Return to Main Document"](#)

### 3.4. *What Happens After I Submit My Application?*

The county will review Exemption 2 requests and consider whether a denial would place you at serious risk of placement in out-of-home care due to any of the circumstances in 1, 2, or 3 above. Within 30 days of receiving an Exemption 2 application, the county IHSS program will mail a written notification letter to the provider and the recipients for whom they provide services if their application has been approved or denied.<sup>14</sup>

### 3.5. *What Should the County Consider When It Reviews My Application For An Exemption Under Criteria A?*

For Criteria A, a complex medical and/or behavioral condition for the purpose of Exemption 2 means that an IHSS recipient has personal care services which “require specific attention and care, and these services cannot be provided by anyone other than his or her live-In IHSS provider without having an impact on the recipient’s physical tolerance and/or an impact on their behavioral temperament as it relates to a mental health condition (e.g., autism spectrum disorder, dementia, Alzheimer’s, etc.). If the services were provided by someone other than the existing provider, it would cause the IHSS recipient harm due to physical and/or emotional stress leading to out-of-home care.”<sup>15</sup> Counties are instructed to consider whether the recipient(s) receive paramedical or services that require specialized care (such as bowel and bladder care or repositioning), whether they have diagnoses they may indicate behavioral needs, and whether they receive care from others such as in a day program or from other IHSS providers.<sup>16</sup>

### 3.6. *What Should the County Consider When It Reviews My Application For An Exemption Under Criteria B?*

For Criteria B, a rural or remote area is one that is “outside of urbanized areas and urban clusters.” The county should evaluate the recipient’s access to providers in their area and also consider the number of available providers (including the provider registry, family members, neighbors, etc.) that are willing to travel a lengthy distance to provide services. The county should document identified barriers that limit the recipient’s ability to hire

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<sup>14</sup> Welf. & Inst. Code § 12300.4(d)(3)(E)(ii); ACL 18-31 at 3. [“Return to Main Document”](#)

<sup>15</sup> ACL 18-31 at 3-4. [“Return to Main Document”](#)

<sup>16</sup> ACL 18-31 at 4-5. [“Return to Main Document”](#)

additional providers.<sup>17</sup> Providers do not need to live in the same home as recipients.

### 3.7. *What Should the County Consider When It Reviews My Application For An Exemption Under Criteria C?*

For Criteria C, the county must determine the extent to which the recipient's inability to hire a provider who speaks his/her same language presents a barrier in the provision of the recipient's authorized services. The county must assess if certain tasks, e.g., domestic and related services tasks, can be accomplished effectively by a provider who does not speak the recipient's same language after some initial interpretative assistance. An extraordinary circumstance only exists when the recipient's inability to hire a provider who speaks his/her same language results in a barrier to the recipient directing his/her own care which cannot be overcome.<sup>18</sup>

### 3.8. *In Order To Get An Exemption, Do I Need To Look For Other Providers First?*

Before granting an Exemption 2 request, the county must review available providers. The county must help look for additional providers if requested. **It is important to note that according to the state, “[t]he review can include both current and prior attempts to identify to find/utilize additional providers.”** The county may consider, and must document, any history of a detrimental impact on the recipient(s) from being served by other providers, even if this happened before making the exemption request. Such history may satisfy the requirement of searching for additional providers.<sup>19</sup>

### 3.9. *How Long Will My Exemption 2 Approval Last?*

Approvals for Exemption 2 will last for one year and can be renewed if there has not been a change in circumstances.<sup>20</sup> If there has been a change in circumstances, but an exemption is still needed for a different reason, the county should treat it as a new application.

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<sup>17</sup> ACL 18-31 at 5. [“Return to Main Document”](#)

<sup>18</sup> ACL 18-31 at 5. [“Return to Main Document”](#)

<sup>19</sup> ACL 18-31 at 6. [“Return to Main Document”](#)

<sup>20</sup> ACL 18-31 at 9. [“Return to Main Document”](#)

### *3.10. What Should I Do If My Application Is Denied?*

If the county denies the exemption, the county must also explain in the notification letter the reason for the denial and information about the process to request a review by CDSS, independent of the county's decision. This process is called ESAR (Exemption 2 State Administrative Review). Providers or recipients may request a review by CDSS.<sup>21</sup> During this process, overtime violations will be suppressed, regardless of the state's decision.<sup>22</sup>

In order to request an ESAR review, within 45 days of the county Notice of Ineligibility, you must mail a form SOC 2313 to:

California Department of Social Services  
Appeals, Administrative Review and Reimbursement Bureau  
Attention: Exemption 2 State Administrative Review Unit  
744 P Street, MS 9-12-04  
Sacramento, CA 95814

The ESAR will send you a notice setting a telephone conference within 10 business days of the date the ESAR request was received. During the telephone conference, you can provide additional information, which may include "documentation about past incidents of harmful impact on the recipient as a result of having services provided by another provider. Examples include, but are not limited to, letters from health care providers, family members, friends or others based on their observations or experience of how the health and/or safety of the recipient was negatively impacted by the introduction of a new provider."<sup>23</sup> You can also request to submit additional written information which must be faxed or postmarked within 10 business days of the telephone conference.

### *3.11. What Happens After My Review?*

CDSS will mail its written decision within 20 days of the date that you are scheduled to speak with its staff conducting the review, unless you have been granted additional time to submit information. The written decision will inform the provider and his/her recipients if the exemption is granted or

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<sup>21</sup> Welf. & Inst. Code § 12300.4(d)(3)(E)(iii)(I); All-County Letter 18-58 ("ACL 18-58"). ["Return to Main Document"](#)

<sup>22</sup> ACL 18-58 at 4. ["Return to Main Document"](#)

<sup>23</sup> ACL 18-58 at 4. ["Return to Main Document"](#)

denied. If CDSS denies the exemption, they must also explain in the written decision the reason for the denial.<sup>24</sup> If the exemption is denied, the provider may not work more than 66 hours per week (or 264 per month) and the recipient(s) will need to find another provider to cover the remaining hours.

#### **4. IHSS Workweek Exemptions and Parent Provider Regulations**

DRC has received a number of questions about the IHSS workweek limits when parents are providers for their children and the exemptions do not cover all of the recipients' authorized hours. The rules for these situations are explained below through examples.<sup>25</sup>

**Example #1:** I am the mother and parent provider for my three minor children who receive a combined total of 460 IHSS hours per month. My request for an IHSS workweek exemption was just granted, but I need an additional provider to cover the additional 100 hours.

*4.1. Will I lose my eligibility as a parent provider of minor children if I find a provider to work the hours over 360 per month?*

No. The IHSS Exemptions allow a parent who was granted the exemption to hire an additional provider to meet the needs of the children if they have monthly authorized hours above 360 (or 264 hours per month without an Exemption), without jeopardizing the parent provider's eligibility for the exemption. The additional hours may be provided by a non-family member.

*4.2. Will it be possible for my children's father to work the additional hours above 360 per month?*

In some cases, yes. The regulation governing IHSS parent providers allows two parents to be paid providers for their two or more minor children, but both parents MUST meet the parent provider requirements in MPP § 30-763.451. This regulation requires that the parent has left full-time employment, or is prevented from full-time employment (defined as 40 or more hours per week) due to the care needs of the children; no other suitable provider is available; and the inability of that parent to perform the services may result in inappropriate placement or inadequate care. Here,

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<sup>24</sup> ACL 18-58 at 5. ["Return to Main Document"](#)

<sup>25</sup> See ACL 18-31 at 6-7 for an explanation of these rules. ["Return to Main Document"](#)

the second parent (the father) may work hours in excess of the first parent provider's 360-hour maximum, so long as he meets the other requirements in MPP § 30-763.451.

**Example #2:** I am the mother of two 10 year-old boys with autism. Both receive IHSS and protective supervision: Michael receives 212 hours per month and Joey receives 218 hours per month, for a combined total of 430 hours per month. I was granted Exemption 1. I work 25 hours per week as an administrative assistant and am prevented from full-time employment in order to provide IHSS to my sons. My husband works part-time, and wants to provide the remaining IHSS hours in excess of 360 a month. I am worried that I will lose my parent provider eligibility if my husband requests to be the additional provider.

When one parent provider has reached the maximum cap (264 or 360 per month with an Exemption), the other parent can provide the remaining balance of hours if he/she meets the requirements of MPP § 30-763.451. Here, once mom reaches the 360 hours per month maximum, she is considered "unavailable." At that time, dad may provide the remaining 70 hours because he meets the parent provider requirements in MPP § 30-763.451 (*i.e.*, he works less than 40 hours per week in order to provide IHSS to the children, no other suitable provider is available, and dad's inability to provide IHSS may result in inappropriate placement or inadequate care).

Note that mother's unavailability is based solely on the fact that she has reached the maximum hours allowed. Her unavailability is NOT due to one parent working for one child and being unavailable to work for the other child.

## **WAIVER PERSONAL CARE SERVICES (WPCS) EXEMPTIONS**

Providers for the Home and Community Based Alternatives (HCBA) Waiver (formerly known as the Nursing Facility/Acute Hospital Waiver) or In-Home Operations (IHO) Waiver participants or applicants, who were enrolled in either waiver on or before January 31, 2016, and whose medical or behavioral needs require that services be provided by the requested provider, are eligible for the WPCS exemption if ANY of the following circumstances exists:

1. The provider lives in the same home as the waiver applicant or participant, even if the provider is not the family member; OR

2. The provider currently provides care to the waiver participant, and has done so for two or more years continuously; OR
3. The waiver applicant or participant is unable to find a local caregiver who speaks the same language as the applicant or participant, and as a result, they are unable to direct their own care.<sup>26</sup>

**1. I enrolled in the HCBA (NF/AH) or IHO waiver after January 31, 2016. Am I eligible for a WPCS exemption?**

For a participant who enrolls in either the IHO or HCBA waiver after January 31, 2016, DHCS shall grant a provider an exemption from the 66-hour workweek limits on a case-by-case basis.<sup>27</sup>

**2. I was granted a WPCS exemption. Does this mean I can work as many hours as I want?**

No. Please note that a provider of IHSS or WPCS (or both) who is granted an exemption may work up to a total of 12 hours per day, and up to 360 hours per month combined for the IHSS and WPCS that he or she provides, not to exceed each waiver participant's monthly authorized hours.<sup>28</sup>

**3. How Do I Apply for the WPCS Exemption?**

At the time of initial application, and at least annually, DHCS shall inform all waiver applicants or participants whose providers may be eligible for an exemption and their providers about the exemptions and the application process.<sup>29</sup> On a one-time basis, DHCS will mail an informational notice and exemption request application form to all providers who may be eligible for an exemption and to the waiver participants to whom those providers provide services.<sup>30</sup>

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<sup>26</sup> Welf. & Inst. Code § 14132.99(d)(1)(A)(i)-(iii). ["Return to Main Document"](#)

<sup>27</sup> Welf. & Inst. Code § 14132.99(d)(1)(B). ["Return to Main Document"](#)

<sup>28</sup> Welf. & Inst. Code § 14132.99(d)(1)(B)(2). ["Return to Main Document"](#)

<sup>29</sup> Welf. & Inst. Code § 14132.99(d)(1)(B)(4). ["Return to Main Document"](#)

<sup>30</sup> Welf. & Inst. Code § 14132.99(d)(1)(B)(3). ["Return to Main Document"](#)

#### **4. What Happens After I Submit My Application?**

DHCS will review the exemption requests pursuant to a process developed with input from stakeholders. In making its determination, DHCS will consider whether the waiver applicant or participant meets one of the criteria as explained on page 7.<sup>31</sup>

Within 30 days of receiving an exemption request from a provider and from a waiver applicant or participant on behalf of a provider who enrolled in either waiver after January 31, 2016, DHCS will mail a written letter notifying both the provider and waiver applicant or participant of its approval or denial of the exemption. DHCS will develop a standardized notification letter with input from stakeholders.<sup>32</sup>

#### **5. What Should I Do If My Application Has Been Denied?**

If your request was denied, DHCS must explain in its letter the reason for the denial.<sup>33</sup> Currently, there is no way to appeal an unfavorable decision. If you requested an independent review and were still denied an exemption, you will have to hire another provider to cover the remaining hours and ensure that your needs are being met.

#### **HOW WILL WE KNOW IF THE NEW PROCESSES ARE WORKING?**

With regard to the IHSS exemptions, counties must record how many exemption requests they receive and the number of requests approved or denied, and submit these numbers to CDSS. Similarly, CDSS will record how many requests for review they receive and the number of requests that are approved or denied through the review process. These numbers will be posted every three months on CDSS' website.<sup>34</sup> They can be found here: <http://www.cdss.ca.gov/inforesources/IHSS-New-Program-Requirements>.

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<sup>31</sup> Welf. & Inst. Code § 14132.99(d)(1)(B)(5)(A). [“Return to Main Document”](#)

<sup>32</sup> Welf. & Inst. Code § 14132.99(d)(1)(B)(5)(B). [“Return to Main Document”](#)

<sup>33</sup> Welf. & Inst. Code § 14132.99(d)(1)(B)(5)(B). [“Return to Main Document”](#)

<sup>34</sup> Welf. & Inst. Code § 12300.4(d)(3)(E)(iv). [“Return to Main Document”](#)

With regard to the WPCS exemptions, DHCS will record the number of exemptions requests it receives and the number of requests that are approved or denied. These numbers shall be posted no later than every three months on the DHCS website.

### **HOW CAN I GET HELP IF I AM DENIED AN EXEMPTION?**

If you believe your exemption request was wrongly denied, please contact DRC at 1-800-776-5746. Please note that, because the state will not pay a provider more than 360 hours per month, we cannot help you get an exemption above the maximum limit. You will need to find additional providers to work the hours above those for which your provider is authorized.