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New Rules for IHSS: Overtime and Related Changes

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This publication explains how federal and state overtime laws affect In-Home Supportive Services (IHSS) or Waiver Personal Care Services (WPCS) providers who work more than 40 hours per week.

NEW FEDERAL RULES & STATE LAWS SAY THAT:

- In-Home Supportive Services (IHSS) and Waiver Personal Care Services (WPCS) providers will be paid overtime at a rate equal to one and one-half times the regular rate of hourly pay, when their time worked exceeds 40 hours per workweek.
 - Daily overtime not applicable
- IHSS providers will now be paid, under certain circumstances, for wait time associated with accompaniment to medical appointments or alternative resource sites, like adult day centers. (Manual of Policies and Procedures ("MPP") § 30-757.15; All-County Letter 17-42 ("ACL 17-42") *Clarification on the Authorization of Medical Accompaniment in the IHSS Program*, available for download at <http://www.cdss.ca.gov/Portals/9/ACL/2017/17-42.pdf?ver=2017-06-26-111014-097>.)
- IHSS providers who work for more than one recipient at different locations on the same work day can be paid for time spent traveling between the two recipients, up to 7 hours per workweek.

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 total amount of 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” is defined in statute and 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.

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

Example: Consumer Sally receives IHSS and is on the Home & Community-Based Alternatives Waiver (formerly known as 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.

- 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 toward the weekly or monthly IHSS maximum. There is a question about whether the SLS and IHSS hours will be combined for the payment of overtime in the future.

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

1. Overtime Calculation: Monthly hours will be divided by 4, to determine a maximum weekly allocation. Timesheets will show hours worked in each workweek. No change to total monthly authorization of hours. The recipient and his/her provider will receive a Notice of Maximum Weekly Hours (SOC 2271A or 2271). These documents should be used to help establish the weekly work schedule of the provider(s).

2. Workweek Limitation for Providers Who Work for One Consumer:

- A provider who works for one consumer cannot work more than 70 hours and 45 minutes per week for IHSS and/or WPCS combined. (Welf & Inst. Code § 12300.4.)

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. Workweek Limitations for Providers of Multiple Consumers:

- Providers who work for more than one consumer cannot work more than 66 hours per week for IHSS and/or WPCS combined, unless they are approved for IHSS Exemption 1 or 2 or the WPCS exemption. (Welf. & Inst. Code §§ 12300.4(d)(3)(A)-(B); 14132.99(d)(1)(B)(2).
- Providers with an exemption may exceed the 66-hour limit up to a maximum of 360 hours a month. For more information on the IHSS and WPCS exemptions, see publication [*#5603.01 Recent Changes to IHSS and WPCS Workweek Exemptions for Providers*](#). Each provider must inform each consumer for whom he/she works of the number of hours that the provider is available to work for that consumer. (Welf. & Inst. Code § 12300.4(b)(4)(A)).
- Consumers with multiple providers must submit an IHSS Program Recipient and Provider Workweek Agreement (SOC 2256) to establish a work schedule that complies with the recipient's maximum weekly hours. The submitted agreement must be signed by the recipient and each of his/her providers.

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, unless she is approved for an exemption. 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): Providers for the Home and Community-Based Alternatives Waiver (formerly known as the Nursing Facility/Acute Hospital Waiver (“NF/AH”) or In-Home Operations Waivers participants or applicants are subject to the 66-hour weekly maximum or 70 hours and 45 minutes, unless they are authorized for a WPCS exemption. WPCS is combined with IHSS for purposes of calculating overtime

- A provider of WPCS (or both IHSS and WPCS) who is approved for an exemption may work up to a total of 12 hours per day, and up to 360 hours per month for IHSS and WPCS combined. (Welf. & Inst. Code § 14132.99(d)(1)(B)(2)).

5. Adjusting Weekly Hours: Sometimes, it may be necessary for a recipient to authorize his/her provider to work more than the recipient's maximum weekly hours identified on the SOC 2271A.

CAN I ADJUST MY WORKER'S HOURS?

When No Overtime Is Triggered

A consumer may authorize a provider to work more than the consumer's maximum weekly hours without requesting approval from the county 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 hours or less in a workweek; OR
- Do not result in a provider receiving more overtime than she/he normally works in a calendar month;*

AND

- 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: In cases where a consumer has multiple providers, and one of the providers becomes ill and cannot work, the consumer can assign some or all of his weekly hours to the other provider, even if this creates overtime for a worker who doesn't normally work overtime. (All-County Letter 16-01 ("ACL 16-01") at ¶ 3 on page 8, available for download at <http://www.cdss.ca.gov/lettersnotices/entres/getinfo/acl/2016/16-01.pdf>.)

When Overtime Is Triggered

If a recipient needs his/her provider to work more than their maximum weekly hours and the work performed will not meet one of the criteria above, the recipient must be exception to allow the provider to work overtime, or more additional overtime. An exception is defined as a request

by an IHSS recipient to a county to allow the recipient to adjust his/her maximum weekly hours to allow her provider to work additional hours during a particular workweek, which may cause the provider to work and be compensated for additional overtime hours within a calendar month. (See ACL 16-01 at ¶ 4 on page 9.) Counties should consider the following criteria in determining whether to approve an exception:

- The additional hours are necessary to meet an unanticipated need;
- 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
- 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.

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 for which she 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 (or 90 hours per week with an exemption).

WHAT HAPPENS TO REGIONAL CENTER CLIENTS IF OVERTIME CAUSES LOSS OF SERVICES?:

Regional Center consumers should go to an Individualized Program Plan (“IPP”) meeting if payment of overtime would mean that they lose supported living services (“SLS”) or providers.

It is DRC’s position that 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 workweek exemption is still inadequate to meet needs).

IHSS AND WPCS EXEMPTIONS

People who qualify for an exemption may work up to 90 hours per week and 360 hours per month. For an in-depth explanation of these exemptions, see publication [#5603.01 Recent Changes to In-Home Supportive Services \(IHSS\) and Waiver Personal Care Services \(WPCS\) Workweek Exemptions for Providers, available for download.](#)

IHSS Exemption 1 (formerly Family Exemption):

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

- Provide IHSS services to two or more IHSS recipients; and
- Live in the same home as all of the IHSS recipients for whom they provide services; and
- Are related to the IHSS recipients to whom they provide services as his/her parent, stepparent, foster or adoptive parent, grandparent, legal guardian, or conservator. (Welf. & Inst. Code § 12300.4(d)(3)(A)(i)-(iii)).

IHSS Exemption 2 (formerly Extraordinary Circumstances

Exemption): Providers who provide services to 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:

- Has complex medical and/or behavioral needs that must be met by a provider who lives in the same home as the recipient; OR
- 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
- 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. (Welf. & Inst. Code § 12300.4(d)(3)(B)(i)-(iii)).

Waiver Personal Care Services Exemptions: Providers for the Home and Community Based Services (HCBS) Waiver (formerly known as the Nursing Facility/Acute Hospital (NF/AH) 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:

- The provider lives in the same home as the waiver applicant or participant, even if the provider is not the family member; OR
- The provider currently provides care to the waiver participant, and has done so for two or more years continuously; OR
- 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 his or her own care. (Welf. & Inst. Code § 14132.99(d)(1)(A)).

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.

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

- Violations incurred by a provider for submitting timesheets reporting hours that exceed the workweek limits for submitting timesheets reporting hours that exceed the workweek limits during the Exemption 2 referral and evaluation process will be rescinded regardless of whether the provider is approved or found to be ineligible for the exemption. (All-County Letter 17-13 ("ACL 17-13") available at <http://www.cdss.ca.gov/Portals/9/ACL/2017/17-13.pdf?ver=2017-04-07-144620-147>, at ¶ 1 on page 9.
- Violations are 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
- **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.

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 be paid for travel more than 7

hours per week. The travel time will not be deducted from the consumer's service hours. For more information on travel time, see publication [#5607.01 IHSS Provider Wait and Travel Times](#).

- **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 must help the consumer return to home. Hours will be added to assessment to cover this but the 283 hour maximum remains. For more information on travel time, see publication [#5607.01 IHSS Provider Wait and Travel Times](#).

WHAT NOW?

- The following All-County Letters may be helpful to you:
 - ACL 16-01 covers the new rules and forms, including overtime implementation, wait time, travel time compensation, at <http://www.cdss.ca.gov/lettersnotices/entres/getinfo/acl/2016/16-01.pdf>.
 - ACL 17-42 clarifies policies and procedures related to the authorization of wait time for accompaniment to medical appointments, at <http://www.cdss.ca.gov/Portals/9/ACL/2017/17-42.pdf?ver=2017-06-26-111014-097>.

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