



CDSS

WILL LIGHTBOURNE
DIRECTOR

STATE OF CALIFORNIA—HEALTH AND HUMAN SERVICES AGENCY
DEPARTMENT OF SOCIAL SERVICES

744 P Street • Sacramento, CA 95814 • www.cdss.ca.gov



EDMUND G. BROWN JR.
GOVERNOR

REASON FOR THIS TRANSMITTAL

- State Law Change
- Federal Law or Regulation Change
- Court Order
- Clarification Requested by One or More Counties
- Initiated by CDSS

ALL COUNTY LETTER NO. 16-XX

TO: ALL COUNTY WELFARE DIRECTORS
ALL COUNTY IN-HOME SUPPORTIVE SERVICES PROGRAM MANAGERS

SUBJECT: IN-HOME SUPPORTIVE SERVICES PROGRAM EXEMPTIONS FROM WORKWEEK LIMITS FOR EXTRAORDINARY CIRCUMSTANCES (EXEMPTION 2) – RENEWAL OF APPROVED EXEMPTIONS, CLARIFICATION ON SUBMITTING REFERRALS, AND NEW COUNTY RESPONSIBILITY FOR ASSIGNING HOURS FOR PROVIDERS GRANTED AN EXEMPTION 2

REFERENCE: [ALL COUNTY LETTER NO. 16-22](#); [ALL COUNTY LETTER NO. 16-07](#)

The purpose of this All County Letter (ACL) is to provide counties with information and instructions for requesting renewal of Extraordinary Circumstances Exemptions granted to In-Home Supportive Services (IHSS) program providers who met the conditions specified in ACL No. 16-22, which allow them to work more than the IHSS program workweek limitations established pursuant to Senate Bill (SB) 855 (Chapter 29, Statutes of 2014) and SB 873 (Chapter 685, Statutes of 2014). This ACL also provides clarification on submitting referrals for Extraordinary Circumstances Exemptions, and outlines a new county responsibility for assigning hours for providers granted an Exemption 2.

BACKGROUND

On October 1, 2013, the United States Department of Labor published the Final Rule on the Application of the Fair Labor Standards Act (FLSA) to Domestic Service (RIN 1235-AA05) that effectively extends overtime and minimum wage provisions to IHSS providers. The Final Rule extends the protections of the FLSA to domestic service workers by effectively removing the ability of “third party” agencies to claim an

exemption for personal care workers from minimum wage and overtime pay as providers of “companionship services” or as live-in providers. In addition, the federal rules relating to pay for travel time under FLSA are made applicable to IHSS providers, including compensation for providers traveling between multiple recipients, and the federal rules relating to pay for wait time in certain circumstances under FLSA are made applicable to IHSS providers whose recipients are authorized for medical accompaniment services.

In response to the new federal regulations, two bills, SB 855 and SB 873, were chaptered in California on June 20, 2014, and September 27, 2014, respectively. These bills relate to overtime and travel time compensation for IHSS providers. The provisions of these bills are documented in ACL 16-01 (January 2, 2016). On February 1, 2016, the State began the payment of overtime, travel time and wait time to providers to conform to the federal law changes and implemented the provisions of SBs 855 and 873 that established limits on the number of authorized hours IHSS and Waiver Personal Care Services (WPCS) program providers are permitted to work in a workweek. Under the new rules, the maximum combined amount of time that a provider is allowed to work providing services for two or more recipients is 66 hours in a workweek.

To maintain continuity of care and to ensure that IHSS recipients are able to remain safely in their homes, CDSS established two exemptions for providers which, if granted, allow them to work hours in excess of the workweek limitations. The Live-In Family Care Provider Exemption, or Exemption 1, applies to providers who, on or before January 31, 2016: a) provide services for two or more recipients; b) live in the same home as all of the recipients they provide services for; and, c) are related to all of the recipients for whom they provide services as the recipients’ parent, step-parent, adoptive parent, grandparent, legal guardian or conservator. The Extraordinary Circumstances Exemption, or Exemption 2, applies to providers who provide services for two or more recipients who extraordinary circumstances place them at serious risk of placement in out-of-home care, and all of the recipients meet one of the following criteria:

- **Criteria A** – The recipients for whom the individual provides services have complex medical and/or behavioral needs which must be met by a provider who lives in the same home as the recipient.
- **Criteria B** – The recipients for whom the individual provides services reside in a rural or remote area where available providers are scarce and, as a result, they are unable to hire another provider.
- **Criteria C** – The recipients for whom the individual provides services are unable to hire a provider who speaks his/her same language in order to direct his/her own care.

In order to be granted an Exemption 2, the recipients, with the assistance of the county, as needed, must have explored and exhausted all options for hiring an additional provider(s) so that their authorized service hours can be worked within the workweek limitations.

An IHSS provider granted either Exemption 1 or Exemption 2 is permitted to work up to a total of 360 hours per month combined for two or more recipients they provide services for, not to exceed each IHSS recipient's monthly authorized hours. Both Exemption 1 and Exemption 2 are granted by CDSS based upon, in the case of Exemption 1, a request submitted directly by a provider or, in the case of Exemption 2, a referral submitted by the county on behalf of the provider. The eligibility criteria and other requirements relating to the two exemptions are specified in ACL No. 16-07 and ACL No. 16-22.

Although Exemption 1 is granted to an eligible provider for an indefinite period of time, Exemption 2 is granted to an eligible provider for a limited period of time, either six months or one year depending on upon which of the above-referenced criteria the exemption is granted. An exemption based on Criteria A is granted for a period of one year; an exemption based on either Criteria B or C is granted for a period of six months. If, at the end of the exemption period, the specific circumstances upon which the exemption was granted continue to exist and the exemption is still needed in order for the recipients to remain safely in their own homes, the county must submit a request for renewal of the exemption on behalf of the provider.

RENEWAL OF PREVIOUSLY GRANTED EXEMPTION 2 APPROVALS

County Responsibilities

The county will be responsible for submitting requests for renewal of previously granted Exemption 2 approvals to CDSS on a timely basis as detailed below.

In order to be considered a renewal of an existing Exemption 2, all of the conditions on which the exemption was initially granted must remain the same as the original referral including the provider, recipients and the criteria upon which the exemption was granted. If there is any change, for example, a change in the provider or the addition or substitution in one of the recipients, the request must be submitted as an initial referral for an exemption rather than as a renewal of an existing exemption.

As with an initial referral for an Exemption 2, prior to submitting the renewal request, the social worker must explore and exhaust all options to assist recipients in hiring additional providers. The renewal request must clearly describe the efforts the recipient, with the assistance of the social worker, as needed, has taken, including, but are not limited to:

- Contacting the recipients' relatives, friends, neighbors or others in the recipients' social network (e.g., members of the recipient's church/mosque/temple, etc.) to inquire about their willingness to be a provider to the recipient;
- Contacting provider registries, both in the county where the recipients reside and, if feasible, in neighboring counties;
- Utilizing alternative resources, including Regional Center services, if appropriate, to address any behavioral issues that affect the recipient's ability to tolerate having his/her services provided by an outside provider who he/she is not familiar with.

The renewal request must also clearly explain why the recipients would be at risk of out-of-home care if somebody other than the recipients' current provider were to provide all or a portion of their authorized services.

Revised Exemption From Workweek Limits For Extraordinary Circumstances Referral Justification Form (APD 005)

The CDSS has revised the attached APD 005 so that it can be used by counties either to submit an initial referral for Exemption 2 or to request a renewal of an Exemption 2 that was previously granted and is scheduled to expire.

The items on the APD 005 form have been restructured for improved organization. Also, some additional questions have been included and existing questions have been reworded to allow the county to more easily describe the actions the recipients and the county have taken to find and hire an additional provider(s) so that all of the recipients' authorized services can be provided within the workweek limits. One specific item that has been added is a field for the county to indicate whether the provider is the authorized representative for the recipient. This field has been added so that CDSS, when evaluating the Exemption 2 referral, has a clear understanding of whether the provider has authority to make decisions regarding the receipt of IHSS, including efforts to hire an additional provider(s), on behalf of the recipient. A key principle of the IHSS program is that the recipient is considered to be the employer and is responsible for hiring of his/her provider. Therefore, decisions about hiring an additional provider(s) so that the recipient's authorized services can be provided within the workweek limits should be made by the recipient or his/her authorized representative, not by the provider unless the provider is also the authorized representative, in which case a conflict of interest may exist.

Lastly, the final section of the APD 005 has been revised to require review and approval by the County IHSS Program Manager, rather than supervisory level approval as in the previous version. This change was made based on the fact that CDSS has received a number of referrals which seemed to indicate there had not been adequate county-level review prior to being submitted. Having the Program Manager review and sign the APD 005 will help to ensure the appropriateness of the referral and improve county-level coordination of cases being referred.

Timeframe for Submitting Renewal Requests

When an Exemption 2 has been initially granted by CDSS, the county social worker, as part of his/her ongoing duties, is required to periodically review the recipients' cases and circumstances to determine whether the specific conditions upon which the granting of the exemption was based continue to exist. It was previously stated, in ACL No. 16-22, that renewal reviews must be completed either within six months or one year of the date of Exemption 2 approval, depending on which criteria the exemption was granted, or at the next face-to-face reassessment, whichever occurs first. However, after further consideration, it has been determined that it would prove to be administratively cumbersome to track when renewal of an exemption is required to be completed considering both the six months/one year exemption period expiration date and the reassessment date. The requirement to perform the renewal review at the next face-to-face reassessment if the reassessment occurs prior to the end of the six month/one year exemption period has been eliminated. Thus, renewal reviews on exemptions that were granted on the basis of Criteria A must be completed within one year of the date of approval for Exemption 2, and renewal reviews on exemptions that were granted on the basis of either Criteria B or C must be completed within six months of the date of the Exemption 2 approval. However, the request for renewal must be submitted to CDSS no less than 45 days before an existing exemption expires.

After an initial Exemption 2 renewal is granted, the periodic review and process will continue on the same periodic basis thereafter until the exemption is no longer required.

If, at any point in time, the social worker determines that an Exemption 2 is no longer needed because the conditions upon which the exemption was granted no longer exist, the social worker must discontinue the exemption. To discontinue an Exemption 2, the social worker must, within 30 days of the county's learning that there has been a change in the recipients' circumstances which negates the need for an exemption, send a request to discontinue the exemption to CDSS via e-mail to the following address: APDExemption2@dss.ca.gov.

In addition, within 15 days of the date the county learns of changes in the recipients' circumstances, the county must inform the provider and the recipients in writing that the exemption is being discontinued and provide the reason for discontinuance. CDSS has developed the attached notices, Notice to Provider for Discontinuance of Exemption from Workweek Limitations for Extraordinary Circumstances (IHSS-E 002) and Notice to Recipient for Discontinuance of Exemption from Workweek Limitations for Extraordinary Circumstances (IHSS-E 003), for use by counties for this purpose. The county should attach a copy of the notice that was sent to the provider to the e-mail being sent to CDSS to request discontinuance of an exemption.

Exemption From Workweek Limits For Extraordinary Circumstances Approved Exemption Provider Agreement Form (APD 006)

As a condition of being granted Exemption 2, the provider is required to sign the attached APD 006. The purpose of the APD 006 is to obtain acknowledgement from the provider that he/she understands and agrees that he/she cannot work more than 360 hours per month. The APD 006 is being mailed along with the letter to the provider informing him/her that the exemption requested by the county on his/her behalf has been approved. The letter instructs the provider to sign the APD 006 and return it to the county. A copy of the unsigned APD 006 is also being sent to the county along with the letter informing the county that the exemption has been approved.

When the county receives the signed APD 006, the document should be retained in the corresponding recipients' case files. The provider is only required to sign the APD 006 once, at the initial approval of the exemption; it is not necessary for the provider to sign a new APD 006 each time the exemption is renewed. However, a copy of the signed APD 006 must accompany the county's initial request for renewal of the exemption, although it is not necessary for the county to resubmit the copy of the signed APD 006 with subsequent exemption renewal requests.

Failure to sign the APD 006 and return it to the county makes the provider ineligible for renewal of the exemption. If the provider has not returned the signed APD 006 to the county by the time the social worker is evaluating whether a renewal of the exemption is needed, the social worker should request the signed APD 006. CDSS has developed the attached Notice of Non-Receipt of Exemption from Workweek Limits Provider Agreement (APD 006) (IHSS-E 004) for use by counties for the purpose of requesting the signed APD 006 from the provider.

If the provider refuses to sign the APD 006 or otherwise fails to return the signed document to the county, the social worker should advise the provider that the exemption cannot be renewed. The county must not submit a request for renewal of an exemption to CDSS if the county has not obtained the signed APD 006. The exemption will expire at the end of the period for which it was initially granted. Upon expiration of the exemption, the provider will be required to adhere to the workweek limits, and if he/she submits timesheets reporting working hours that exceed the workweek limits, violations will begin to accrue.

State Responsibilities

As with initial referrals for Exemption 2, CDSS will be responsible for evaluating renewal requests to determine whether the conditions for granting a renewal of the previously granted Exemption 2 have been met. Upon receipt of the completed request for renewal of an approved exemption, CDSS staff will update the Provider Notes, Provider Overtime Violation Exemption, and Recipient Notes screens within the Case

Management, Information and Payrolling System (CMIPS) II to reflect that the renewal request has been received and is pending review.

Within 30 days of the date the request is received, CDSS will evaluate the case to determine whether all of the conditions for renewing the exemption have been met. Upon completion of the review, the same CMIPS II screens referenced above will be updated to reflect whether the request has been approved or determined ineligible for renewal. As with initial referrals, CDSS will notify the county of the outcome of CDSS' review and evaluation of the renewal request. CDSS will send letters to the provider and the recipients informing them of the determination.

CLARIFICATION ON SUBMITTING REFERRALS FOR EXEMPTION 2

Counties have inquired whether it is appropriate to submit a referral for an Exemption 2 to CDSS when a recipient or provider has inquired about or requested one but the county does not consider the recipient's situation to constitute an extraordinary circumstance. As outlined on Page Six of ACL No. 16-22, CDSS believes that the IHSS social worker is in the best position to determine whether an extraordinary circumstance exists. The county shall not submit either an initial referral or a request for renewal to CDSS if the county deems that there are other viable options that the recipient (with county assistance as needed) has not yet explored and exhausted for hiring another provider so that his/her authorized service hours can be provided within the workweek limits and eliminate the need for Exemption 2. If a recipient refuses to explore options for hiring an additional provider simply because he/she states that he/she prefers to have his/her services provided by the existing provider, the social worker must inform the individual that, because he/she has not explored and exhausted all options for finding an additional provider, his/her situation does not meet the criteria for an extraordinary circumstance and that an Exemption 2 will not be requested by the county on his/her behalf. CDSS has developed the attached Notice of Ineligibility to Request Exemption from Workweek Limits for Extraordinary Circumstances (Exemption 2) (IHSS-E 005) for use by counties for this purpose.

The CDSS has received a number of Exemption 2 referrals that have been incomplete or otherwise have provided insufficient information for CDSS to make a determination of whether to grant an Exemption 2 or deem the individual ineligible. To date, CDSS has contacted counties to obtain the necessary information; however, this has led to delays in making determinations. Therefore, going forward, CDSS will not review referrals that are incomplete, fail to fully answer the questions on the APD 005, or fail to provide sufficient justification for why an Exemption 2 should be granted, which must include the options explored for hiring an additional provider, and why the recipient, if his /her care is provided by another provider, would be put at serious risk of placement in out-of-home care. Incomplete referrals or those with insufficient information will be returned to the county without being reviewed by CDSS and CDSS will not notify the provider and recipients under these circumstances. However, if the county does

consider the recipient's situation to constitute an extraordinary circumstance, the county may resubmit the referral with complete information in order for a determination to be made by CDSS.

NEW COUNTY RESPONSIBILITY FOR ASSIGNING HOURS FOR PROVIDERS GRANTED EXEMPTION 2

No later than five business days after receiving notification from CDSS that an Exemption 2 has been approved for a provider, the county shall be responsible for contacting the provider by telephone to inquire how he/she wants the total hours he/she will be permitted to work for the recipients designated in the approved exemption (up to 360 hours per month) to be divided between/among the recipients, documenting the outcome of the discussion in the case notes, and assigning the hours accordingly on the appropriate screens in CMIPS II. Once the hours have been assigned, counties will be permitted to alter the assigned hours as needed based on requests from the provider to temporarily or permanently change the assignment of hours in order to accommodate the recipients' needs.

RESCINDING OF VIOLATIONS INCURRED DURING REVIEW AND EVALUATION OF EXEMPTION 2 REFERRALS

As indicated in ACL 16-22 (Page Eight, Fourth Paragraph), violations incurred by a provider 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. Upon making a determination on a referral, CDSS sends letters to the county as well as to the provider and recipients informing them whether the provider has been approved or found ineligible for an Exemption 2. In these letters, it is stated that counties will be directed to rescind any violations (with the exception of violations for exceeding the seven hour per workweek travel time limit) that the individual has incurred from the date the exemption referral was submitted to CDSS for review until the date on the determination letter. When determining whether a violation should be rescinded, counties should use good judgment, taking into account the time it takes for the provider to receive the determination letter through the mail.

CAMERA-READY COPIES AND TRANSLATIONS OF FORMS

Camera-ready copies of the English language versions of the forms and notices referenced in this ACL may be obtained from the CDSS Forms and Publications webpage at: http://www.dss.cahwnet.gov/cdssweb/FormsandPu_271.htm. Any questions related to obtaining forms and notices may be directed to fmudss@dss.ca.gov.

When translated versions of the forms and notices are completed, pursuant to Manual of Policies and Procedures Section (MPP) 21-115.2, camera-ready copies of the translations will be posted on the Translated Forms and Publications web page at: http://www.dss.cahwnet.gov/cdssweb/FormsandPu_274.htm. For questions on translated materials, please contact Language Services at (916) 651-8876. Until translations are available, recipients who have elected to receive materials in languages other than English should be provided the English version of the form or notice along with the Notice of Language Services (GEN 1365) and county contact information.

Counties shall ensure that effective bilingual services are provided. This requirement may be met through utilization of paid interpreters, qualified bilingual employees, and qualified employees of other agencies or community resources. These services shall be provided free of charge to the applicant/recipient.

In the event that CDSS does not provide translations of a form, it is the county's responsibility to provide the translation if an applicant or recipient requests it. More information regarding translations can be found in MPP Section 21-115.

Questions and/or requests for clarification on the information transmitted in this ACL may be directed to the Adult Programs Division, Policy and Operations Bureau at (916) 651-5350.

Sincerely,

EILEEN CARROLL
Deputy Director
Adult Programs Division

Attachments

c: CWDA

G:\APP_Exemption 2 Review (secured)_Log & Templates\Renewal Documents\Renewal ACL versions\Renewal ACL 10-21-16.docx