



RURAL COUNTY REPRESENTATIVES
OF CALIFORNIA

First Look: In-Home Supportive Services (IHSS) Negotiations After SB 90 (Chapter 25, Statutes of 2017)

The 2017-18 state budget package includes changes to collective bargaining and financing for the In-Home Supportive Services (IHSS) program. The state and counties spent several months prior to the budget agreement negotiating changes to IHSS financing after the Director of the Department of Finance ended the Coordinated Care Initiative (CCI) in January. As initially unveiled, the CCI would shift approximately \$600 million in costs to counties and undo statewide collective bargaining for IHSS. SB 90 (Chapter 25, Statutes of 2017) contains the negotiated agreement between the Brown Administration and counties to address the IHSS program. The purpose of this document is to provide an initial review of the issues that may present themselves at the bargaining table over the next few months and to provide rural counties a number of tools to assist with SB 90 implementation and local decision-making. This document is not meant to be final, but a first look at the issues that counties will contemplate this year and in coming years. RCRC anticipates more issues to be raised as implementation continues over the next several weeks and months.

Will the state be issuing additional guidance re: SB 90?

Yes, we anticipate that the state Department of Social Services (DSS) will issue informational guidance to counties regarding the changes in SB 90 in the next few weeks. Additionally, we anticipate that DSS will send County Fiscal Letters (CFLs) to county social services departments with detailed financing information later this Summer.

How does SB 90 change collective bargaining for IHSS providers? Our county doesn't presently have an MOU with the IHSS providers' union. What happens if we don't reach agreement by January 1, 2018? What role does the Public Employment Relations Board (PERB) play?

SB 90 alters the landscape for local IHSS collective bargaining by repealing the provisions that would have eventually transitioned these responsibilities to the IHSS Statewide Authority. This ensures that IHSS bargaining will remain a local function for the foreseeable future, thereby encouraging both counties and provider unions to focus their efforts on reaching local agreements.

More immediately, while SB 90 does not require that an IHSS Public Authority (or consortium) and provider union reach agreement on an MOU by January 1, 2018, it does establish a dispute resolution process applicable if an MOU is not concluded by

that date (this process is temporary, and will be repealed in 2020.) Under this process, either party may request mandatory mediation conducted by a PERB-appointed mediator. If mediation does not produce an agreement, the matter will proceed to a fact-finding panel, which will make an advisory recommendation on the terms of an MOU. After fact-finding, either party may request another round of mandatory mediation. Costs for the mediator and fact-finding panel are split between the employer and the union. This process is somewhat similar to existing fact-finding requirements applicable whenever collective bargaining reaches impasse, except that the SB 90 process includes mandatory mediation both before and after fact-finding, and the process may be triggered any time after January 1, 2018, regardless of whether the parties' negotiations have reached impasse. SB 90 sets forth short timelines for each step in this process; however, the panel of PERB mediators handling these matters statewide is small, and experience with the existing fact-finding requirements suggests that the SB 90 dispute resolution process will take much longer in-practice.

As noted above, these provisions do not require that an MOU actually be reached by January 1, 2018, nor do they dictate the terms of any county's MOU. However, they are clearly designed to encourage the parties to resolve their differences and conclude an MOU without delay. Additionally, the parties' existing obligation to bargain in good faith remains unchanged - failure to do so can result in the filing of an unfair labor practice charge with PERB. Finally, SB 90 requires a report to the Legislature in April 2018 regarding the status of all IHSS bargaining contracts in each county. There may be additional legislative activity in this area if the report indicates that many counties have still not executed MOU's.

Our Board is considering paying the IHSS providers more than the current minimum wage. How does this affect our county's maintenance of effort (MOE) payment? Does it matter whether we agree to a fixed amount (e.g., \$11.00/hour) or to a supplemental wage tied to the minimum wage (e.g., "\$0.50 above minimum wage")?

Generally speaking, if the county agrees to (or imposes) any wage increase after July 1, 2017, the county will pay 35% of the non-federal share of the increased cost (which presently equates to 15.4% of the total cost), and the state will pay the remaining 65% of the non-federal share, provided the state approves the wage increase. If the state disapproves the increase, the county pays 100% of the non-federal share. Additionally, the county is responsible for 100% of the non-federal share for wages over \$12.10 per hour. The county's MOE will be increased to reflect the applicable additional cost amounts.

SB 90 incorporates several provisions recognizing the complications resulting from the steadily increasing minimum wage - and to encourage counties to negotiate provider wages that reflect the rising minimum wage. Under SB 90, counties are generally not responsible for higher costs resulting from minimum wage increases (that is included within the existing MOE.) Further, if a county negotiates a floating "wage supplement"

that is tied to the minimum wage and thus rises with future minimum wage increases (e.g., "\$0.50 above the minimum wage"), the county's MOE will be adjusted only once - when the wage supplement is approved - and will not be adjusted again when the minimum wage increases. For example:

- The current minimum wage for IHSS providers is \$10.50 per hour, and will increase to \$11.00 on January 1, 2018. If the county approves a supplement of "\$0.50 above the minimum wage," provider wages will increase to \$11.00 per hour for 2017, and will rise to \$11.50 per hour on January 1, 2018. However, the County's MOE will be adjusted only once in 2017 to reflect the initial increase, and will not be adjusted again on account of this increment in 2018 or thereafter.
- By contrast, if the county approves a fixed wage of \$11.00 in 2017, the MOE will be adjusted to reflect this increase. Provider wages will not rise on January 1, 2018 (since minimum wage will merely have caught up to the county's negotiated rate). If the county thereafter negotiates another increase in provider wages (e.g., to \$11.50 per hour), the county's MOE will be adjusted again to reflect this new increase, thus resulting in higher county costs.

Additionally, the \$12.10 "cap" for state financial participation will be adjusted commencing in 2019 (when the minimum wage reaches \$12.00 per hour) to an amount equal to \$1.10 above the minimum wage (i.e., \$13.10 per hour in 2019, etc.) SB 90 contains special provisions addressing state participation in wage increases for those counties that currently have provider wage rates of \$12.10 or higher.

How is the County IHSS MOE calculated?

SB 90 contains specific steps about how the County IHSS MOE is calculated. Current law sets the statewide County IHSS MOE base at \$1.769 billion, subject to adjustment based on the 2018 May Revision. The Department of Finance (DOF) is directed to consult with the California State Association of Counties (CSAC) to determine each county's share of the statewide total County IHSS MOE base amount. CSAC has begun working with the Administration on this process. It is likely that county-by-county numbers will be available in August. SB 90 defines the County IHSS MOE to include county administration (costs associated with IHSS case management, information, and payrolling system) and public authority administration. The County IHSS MOE will be adjusted by a 5% inflation factor for 2018-19. As of July 1, 2019, and annually thereafter, the County IHSS MOE base shall be adjusted by 7%. When there is no growth or negative growth in 1991 Realignment sales tax revenues, the MOE inflator will adjust to 0. When 1991 Realignment sales tax revenues grow between 0 and 2% year-over-year, the inflator will be cut in half.

SB 90 contains several adjustments to the County IHSS MOE in addition to the inflator that are linked to collective bargaining:

- The County IHSS MOE will be adjusted for a county's annualized cost of provider wages or health benefits that are locally negotiated, mediated or imposed after July

1, 2017. The state's share of the wage/benefit increase are 65%; the county's share is 35% of the portion not covered by federal funds.

- If state DSS does not approve the wage or benefit increase, the county shall pay the entire non-federal share of the cost increase.
- The County IHSS MOE shall not be adjusted for increases in provider wages that are locally negotiated when the increase has been specifically negotiated to be contingent on state minimum wage increases.
- If a County negotiates a wage supplement linked to the state minimum wage increase the county's County IHSS MOE shall be adjusted once.

Under what circumstances would the state not approve a wage or benefit increase?

State law requires DSS to approve wage/benefit increases for IHSS providers. The law does not specify under what circumstances the state would not approve a wage or benefit increase. DSS has never denied a county's wage/benefit increase; however, DSS has required modifications to IHSS rate packages in the past many counties include language in their collective bargaining contracts making the wage/benefit increase contingent upon state approval to address this risk.

What relief provisions are included in SB 90 to offset the \$592 million in additional IHSS costs?

SB 90 contains several provisions to offset the \$592 million cost shift to counties, including:

- 1) General Fund Offsets. The bill appropriates \$400 million General Fund (GF) in 2017-18, \$330 million GF in 2018-19, \$200 million in 2019-20 and \$150 million in 2020-21 and annually thereafter contribution to offset the \$592 million in additional IHSS costs being shifted to counties. A future Legislature or Governor could change the General Fund offsets in a bill.
- 2) Speeding up 1991 Realignment Sales Tax Distribution. SB 90 revises the 1991 Realignment sales tax provisions to disburse sales tax growth throughout the fiscal year. The sales tax growth will be directed to IHSS within the Social Services Subaccount. The intent is to distribute the sales tax revenues quicker (particularly the sales tax growth) to assist with cash flow. SB 90 also includes provisions to ensure that the Health, Mental Health, County Medical Services Program (CMSP), and Child Poverty and Family Supplemental Support Subaccount bases are fully funded when there are sufficient revenues.
- 3) Vehicle License Fee Growth. SB 90 redistributes the VLF growth to the Social Services Subaccount to assist with the increased IHSS costs. Specifically, 100% of the VLF growth for Health, Mental Health and the County Medical Services Program (CMSP) Subaccounts will be redirected to the Social Services Subaccount to assist

in paying for IHSS for the first three years (2017-18 through 2019-20). From 2020-21 through 2021-22, 50% of the VLF growth will be redirected for the same purpose. SB 90 also clarifies that CMSP VLF funds shall be for the CMSP counties. There is no detail on how the CMSP VLF revenue will be distributed. It will require further discussion between CSAC, DOF, the CMSP Governing Board, and CMSP counties.

SB 90 also requires the State Controller's Office to post a calculation of VLF growth that would have otherwise gone to the Health, Mental Health and County Medical Services Program Subaccounts. While redirecting VLF growth benefits IHSS, it will depress revenues available for health and mental health. The health and mental health accounts are not expected to receive sales tax again in the foreseeable future; neither account will have VLF growth revenue for three years and modest growth for an additional two years.

- 4) Board of Equalization (BOE) Error. SB 90 explicitly forgives counties from BOE accounting errors that occurred from July 1, 2011 through June 30, 2016 that impact 1991 Realignment, 2011 Realignment, and Proposition 172. The BOE accounting errors likely would have caused 1991 Realignment and 2011 Realignment to be adjusted in a way that would have decreased bases; counties potentially could have owed the state several hundred million dollars.
- 5) Mental Health Cost Relief. SB 90 suspends the 3.5 percent COLA for Institutions for Mental Disease (IMD) required under state law in any year in which the Mental Health Subaccount does not receive full growth.

How are county administration costs for IHSS addressed in SB 90?

The Brown Administration chose to include less General Fund in the 2017-18 state budget for county administration of IHSS. The 2017-18 state budget appropriates approximately \$30 million less than what was provided in 2016-17. SB 90 includes language requiring DOF, CSAC and the County Welfare Directors Association (CWDA) to examine the IHSS workload and budget assumptions related to IHSS administration for 2017-18 and 2018-19. The language requires this work to be completed as part of the preparation of the Governor's 2018-19 Budget.

What happens if the Community First Choice Option is eliminated?

Elimination of the Community First Choice Option (CFCO) would result in an increase to each County's MOE. Part of the Affordable Care Act, the CFCO allows states to provide home and community-based attendant services and supports to eligible Medicaid enrollees under their State Plan. This option became available on October 1, 2011 and provides a 6-percentage point increase in federal matching payments to states for service expenditures related to this option. It provides for a Federal Medicaid Assistance Percentage (FMAP) increase to states with IHSS or IHSS-like programs. California has

benefited from this program since it became available, increasing California's FMAP from 50 to 56% for IHSS – which in-turn decreased the amount of state and county funds needed to provide the non-federal match. CFCO is one of several programs being proposed for elimination by the House and the Senate under federal healthcare reform bills. If the CFCO is eliminated, the County IHSS MOE would be increased once to reflect a 35% county share of the new federal financial participation. For example, if elimination of the Community First Choice Option would result in \$400 million in new non-federal costs, the MOE would be adjusted by \$140 million statewide to reflect the 35% county share.

Who can apply for the loan provision?

Any county may apply to the Department of Finance for a low-interest loan related to the additional IHSS costs. However, the loan provision is limited both in the time period that it is available and the amount available. The application period is three years: 2017-18 through 2019-20. Additionally, the sum of all loans may not exceed \$25 million. The Brown Administration included this provision with small county cash flow issues in mind. However, theoretically, one county could apply for the \$25 million loan in 2017-18 and be granted the loan – thus exhausting the availability of the loan provision for the other 57 counties.

What is the “re-opener”?

Counties and organized labor asked the Brown Administration to include language in SB 90 to revisit how the provisions of SB 90 will impact IHSS and 1991 Realignment. Counties' primary concern with the SB 90 framework is the unsustainability of the 7 percent inflator to the MOE in 2019-20 and beyond. Provider unions are concerned about the revenue picture and how it impacts collective bargaining and wages/benefits for IHSS workers, as well as the impacts on their other health and human services workers.

SB 90 requires as part of development of 2019-20 state budget that DOF, CSAC and stakeholders reexamine the 1991 Realignment funding structure. DOF is required to report findings and recommendations to the Legislature related to the County IHSS MOE and impacts on other 1991 realignment programs. DOF must examine: 1) the extent to which revenues available for 1991 Realignment are sufficient to meet program costs that were realigned; 2) whether IHSS program and administrative costs are growing at a rate that is higher, lower or approximately the same as the MOE; 3) the fiscal and programmatic impacts of the County IHSS MOE on the funding available for Health, Mental Health, CMSP and other social services programs included in 1991 Realignment; and 4) the status of collective bargaining for the IHSS program in each county.

Can counties still sue to challenge the state's determination that the Coordinated Care Initiative "will not generate net General Fund savings"?

The elimination of the former MOE was initiated by the Director of Finance's determination in January 2017 that the Coordinated Care Initiative will not generate net General Fund savings. This determination - and the methodology used by the Director to reach this conclusion - was somewhat controversial. While SB 90 does not directly preclude litigation to challenge this determination, it does include provisions retroactively validating a key component of the Director's methodology. Moreover, the Legislature's enactment of new MOE provisions in SB 90 could be viewed as ratifying the Director's actions. These factors tend to make the prospect of litigation less inviting - but as noted, SB 90 does not directly prohibit such lawsuits.