

**New Rules for IHSS: Overtime and Related Changes
October 21, 2014**

**Elissa Gershon, Senior Attorney
Deborah Doctor, Legislative Advocate II
DISABILITY RIGHTS CALIFORNIA**

NEW FEDERAL RULES & STATE LAWS SAY THAT:

- IHSS providers must receive overtime when they work more than 40 hours in a week
 - State law overtime rules (8 hours per day) not applicable
- IHSS providers will get paid for wait time at medical appointments
- IHSS providers will get paid for up to 7 hours a week travel time between consumers
- Rules in effect starting January 1, 2015

WHAT IS OVERTIME AND HOW IS IT CALCULATED?

- For the first time, IHSS consumer and provider hours will be calculated by week and by month. No change to consumer authorization.

Example: Consumer is authorized for 260 hours IHSS per month.
 $260 \div 4.33 = 60$ hours/week. Provider is paid 20 hours of overtime per week.

- 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.

WHAT IS OVERTIME AND HOW IS IT CALCULATED? (cont'd)

- Overtime is paid at 1 ½ times the regular hourly wage. Wages range by county from \$9 to \$12.44 per hour.

Example: 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,
 - Providers can work up to 66 hours per week and earn up to 26 hours per week of overtime, but...
 - 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 they placed some limits on how much overtime can be worked.

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.

WHAT WORK COUNTS TOWARD OVERTIME? (cont'd)

2. IHSS and Waiver Personal Care Services (WPCS) are combined
Example: Consumer Sally receives IHSS and is a participant 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 MAY be combined – we are not sure yet.
Example: Provider Tanya works for South Coast SLS agency providing 32 hours per week of SLS services to Consumer Xavier. She also provides 12 hours per week of IHSS to Xavier. Her total weekly hours are 44, but it is not yet clear whether these hours are aggregated for overtime purposes.

CALIFORNIA LIMITS OVERTIME IN TWO WAYS

1. Workweek Limitation for Providers:
Providers cannot work more than 66 hours each week, minus the 7% reduction while it is in effect (we refer to as the 61-66 hour cap). The State will create a very limited exception for parents (and maybe other relative providers) of more than one consumer...stay tuned.
2. Consumer Monthly Authorization Becomes a Weekly Authorization:
For the first time, the authorized total monthly hours will be divided into a weekly amount. This is not a reduction in hours!

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

A WORD ABOUT THE 66 HOURS AND 7% REDUCTION

- The 66 hour weekly limit is based on the maximum hours any IHSS-only consumer gets – 283 – divided by 4.33 weeks per month. The 7% reduction means that most consumers get no more than 263 hours per month, or 61 hours per week.
- The 7% reduction means that only a small number of consumers, those with documented “unmet need,” now receive more than 61 hours per week. If a provider is working for a consumer who still receives more than 61 hours per week, that provider can work up to 66 hours per week. All other providers are limited to 61 hours per week.
- Because of this, we refer to the cap as 61-66 hours.

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

1. Overtime Calculation: Monthly hours will be divided by 4.33, to make a weekly allocation. No change to total monthly authorization of hours. New timesheets which will show hours worked in each workweek.

Important Note: All consumer calculations will reflect the overall 7% reduction in hours that went into effect on July 1, 2014. See

<http://www.disabilityrightsca.org/pubs/552401.pdf> for more information.

Example: Raymond is determined to need 150 hours of IHSS per month. With the 7% reduction, his monthly authorization is 139.5 hours per month. Under the new rules, 139.5 is divided by 4.33 for a weekly allotment of 32.2 hours per week.

HOW DO THE NEW PROVIDER HOURS RULES AFFECT CONSUMERS? 5 WAYS (cont'd)

2. Workweek Limitation for Providers: Most providers may not work more than 66 hours per week, minus the 7% reduction while it is in effect. This limitation applies even if the provider works for more than one consumer. Limited exceptions for:
 - a) parent or relative providers who work with more than one consumer. State is developing 1915(i) State Plan Amendment—DETAILS NOT YET KNOWN.
 - b) consumers who have only one provider who already works overtime each week, and only if the net monthly overtime does not increase.

HOW DO THE NEW PROVIDER HOURS RULES AFFECT CONSUMERS? 5 WAYS (cont'd)

Example: Bernice is authorized for the maximum of 283 hours of IHSS per month. With the 7% reduction, her authorization is 263 hours per month. Her weekly allotment is 60.7 hours. Bernice's mother is her only provider, and if she works 60.7 hours per week, she will receive 20.7 hours of overtime per week, or about 90 hours per month.

Bernice's mother may work over 61 hours per week as long as her total overtime in a month does not exceed 90 hours—for example, 68 hours in week 1, 54 hours in week 2, and regular hours for the rest of the month.

HOW DO THE NEW PROVIDER HOURS RULES AFFECT CONSUMERS? 5 WAYS (cont'd)

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 61-66 hours per week. 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 35 hours per week for other. Paula may NOT continue to work 65 hours per week since neither consumer is exempted from the 7% reduction. Paula may work only 61 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.

HOW DO THE NEW PROVIDER HOURS RULES AFFECT CONSUMERS? 5 WAYS (cont'd)

4. Waiver Personal Care Services (WPCS) and Supported Living Services (SLS):
 - Some participants on Nursing Facility/Acute Hospital (NF/AH) or In-Home Operations Waivers receive WPCS, which is combined with IHSS for calculating overtime. DHCS assured us that individual cost-cap would not reduce services because of overtime costs.
 - As of now, providers still subject to 61-66 hours weekly cap, and 12 hour/day cap in Waiver
 - Still unclear if SLS and IHSS hours are combined.

HOW DO THE NEW PROVIDER HOURS RULES AFFECT CONSUMERS? 5 WAYS (cont'd)

5. Consumer Flexibility: A consumer may authorize a provider to work more hours than the consumer's weekly authorized hours without notifying the county welfare department if:

The authorization does not exceed the consumer's authorized hours of monthly services; AND

If the consumer does not normally have overtime: the authorization does not result in more than 40 hours of authorized services per week being provided; OR

If the consumer does normally have overtime: the authorization will not result in a net increase in overtime during the month.

HOW DO THE NEW PROVIDER HOURS RULES AFFECT CONSUMERS? (cont'd)

Example: Consumer Andrew has 138.5 hours per month, or 32 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 32 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 43 hours per week of IHSS. Her provider normally gets 13 hours per month of overtime. She can flex her weekly hours so that her provider works more than 43 hours in some weeks and less in others, as long as the net overtime is not more than 13 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 61-66 hours per week in total.

MAKING AN ADJUSTMENT TO WEEKLY HOURS

In addition to flexibility to shift hours that will not cause any, or any additional, overtime, the State will develop a process for requesting and approving adjustments to the consumer's weekly hours when that adjustment will cause overtime, or more overtime.

- All-County Letter in progress to explain the parts of the new law which say that:
 - A consumer may ask the county welfare department to adjust his or her weekly authorized hours of services to go above 40 hours. The consumer's total monthly hours must not go above the authorized limit.
 - 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.

MAKING AN ADJUSTMENT TO WEEKLY HOURS (cont'd)

- The county can make an adjustment for a need that will be repeated, such as a regular medical appointment. The county can also make an exception for a temporary need or unexpected need.
- 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 come 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 comes for 44 hours. Rita may call the county (while or soon after the hours are worked) and ask for the overtime approval and the county must not unreasonably say no. Rita must adjust her worker's hours so she doesn't work more monthly hours than Rita is authorized.

WILL THERE BE A PENALTY IF I OR MY PROVIDER DON'T FOLLOW THE NEW RULES?

- **First Three Months Grace Period:** Because these new rules are complicated, for the first three months, timesheets may be paid in excess of the 61-66 hour weekly limitation, if the number of hours worked by the provider within a month do not exceed the monthly authorized hours of the consumer or consumers for whom the provider works.
- **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 this section on multiple occasions.

WILL THERE BE A PENALTY IF I OR MY PROVIDER DON'T FOLLOW THE NEW RULES? (cont'd)

Violations assessed in a four-stage process:

- First violation the provider will receive a written warning
- Second violation: the provider will receive a second written warning notice and will be required to attend a mandatory training
- Third violation or the provider does not attend the training, 3-month suspension
- 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.
- Wait time: Workers can get paid for staying with the consumer at a medical appointment. Hours will be added to assessment to cover this.
- We are working with the State to make sure that materials that are being developed are accessible for people with visual impairments. Stay tuned...

WHAT ELSE DO I NEED TO KNOW ABOUT THE NEW RULES? (cont'd)

- Advance pay: We do not have information yet on how the new rules work for people who receive advance pay
- 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 an exception to the weekly authorization cap for their provider.
- Appeal rights for providers: There is a county appeal process for violations that providers should use.

WHAT NOW?

- Notices will be sent to consumers in November, 2014
- 6-7 All-County Letters in progress
- Call DRC 1-800-776-5746 if you have questions about:
 - NF/AH and IHO Waiver participants;
 - Providers who care for more than one relative consumer; and
 - Consumers who receive supported living services.

DRC Fact Sheet, June 2014:

<http://www.disabilityrightsca.org/pubs/555401.pdf>

Thank you!