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New In-Home Supportive Services (IHSS) Overtime Rules: What Do the New Rules Mean for Consumers?

June 2014, Pub. #5554.01

WHY ARE THERE NEW RULES ABOUT OVERTIME FOR IHSS PROVIDERS?

The federal government made new rules that say that IHSS providers must receive overtime when they work more than 40 hours in a week. The new rules go into effect on January 1, 2015. Governor Brown said that California would not pay overtime to IHSS providers. He proposed to limit the number of hours any IHSS provider could work to 40 per week, whether it was for one consumer or multiple consumers. The Legislature's budget subcommittees rejected that proposal and voted to pay overtime to IHSS providers without restricting hours. DRC opposed the Governor's proposal and supported the position of the budget subcommittees.

In the final budget deal, the Legislature and the Governor agreed to pay some overtime as of January 2015, if the new federal rule requiring overtime goes into effect on that date. The deal is complicated, changes some important parts of IHSS, and has new rules for some consumers and providers.

WHY IS THE STATE LIMITING HOW MUCH OVERTIME IT WILL PAY?

In addition to setting overall limits on how much IHSS funding is spent on overtime, the Administration is concerned that providers and consumers will change work patterns so that more providers can qualify for overtime, driving up the costs of IHSS. The State has chosen two ways to control costs:

1. A limit on how many hours an IHSS provider can work in a week: providers cannot work more than 66 hours each week, minus the 7% reduction while it is in effect, with no exceptions. See <http://www.disabilityrightsca.org/pubs/552401.pdf> for more information on the reduction, which decreases from 8% to 7% on July 1, 2014.

The 66 hour limit is based on the maximum hours any IHSS-only consumer gets – 283 – divided by 4.33 weeks per month. However, the 7% reduction means that only a small number of consumers, those with “unmet needs”, 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, **throughout this document, we will refer to the cap as 61-66 hours.**

2. A limit on how many hours of service an IHSS consumer can use in a week. This is not a reduction in hours. For the first time, the authorized total monthly hours will be divided into a weekly amount.

This means there are two limits on consumers and providers: the number of hours per week an IHSS provider can work and the number of hours per week a consumer can receive services. There are some exceptions to the limits on a consumer’s service hours. ***For many consumers, these two new limits will not change how things work now.***

WHAT IS OVERTIME AND HOW IS IT PAID?

Federal law says that IHSS providers who work more than 40 hours in a week must receive overtime pay. Overtime is calculated per week, so for the first time, IHSS consumer and provider hours will be calculated by the

week. The workweek begins at 12:00 a.m. on Sunday, includes the next consecutive 168 hours, and ends at 11:59 p.m. the following Saturday. Overtime is paid at time-and-one-half the regular hourly wage. For example, if the IHSS wage is \$10 per hour, and an IHSS provider works 50 hours in one week, she will receive \$10 per hour for 40 of those hours, and \$15 per hour for 10 hours in that week.

HOW DO THE NEW PROVIDER HOURS RULES AFFECT ME?

1. **Overtime Calculation:** Overtime is calculated on a weekly basis. Monthly hours will be divided by 4.33, to make a weekly allocation. This weekly calculation will be used only to calculate and control overtime and will not change the total monthly authorization of hours. The state is designing new timesheets which will show hours worked in each workweek.

Important Note: All consumer calculations will reflect the overall 7% reduction in hours scheduled to go into effect on July 1. See <http://www.disabilityrightsca.org/pubs/552401.pdf> for more information.

2. **Workweek Limitation for Providers:** Providers shall 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. **There are no exceptions to this limitation.**
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.
4. **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 result in more than 40 hours of authorized services per week being provided; AND

- the authorization does not exceed the consumer's authorized hours of monthly services.

Example: Consumer A has 138.5 hours per month, or 32 weekly hours of IHSS. The consumer wants the provider to work 38 hours in week one of the month and 26 hours the next week. Consumer A does not need to get permission to shift the hours in her own schedule because the change will not cause overtime.

Example: The same Consumer A who gets 138.5 hours per month, or 32 weekly hours of IHSS, wants her provider to work 42 hours in Week 1 and 22 in Week 2. She does have to ask the county for an exception because her request will cause her provider to work overtime in Week 1.

Note: In the examples above, if that provider works for other consumers, Consumer A cannot authorize a provider to work more than 61-66 hours per week because of the new rule for provider hours.

DRC wants to hear from consumers and/or their providers for whom the 61-66 hour weekly cap will create a hardship.

ARE THERE EXCEPTIONS TO THE NEW RULES ABOUT CONSUMERS' WEEKLY HOURS?

The State will develop a process for requesting and approving adjustments to the consumer's weekly hours when that adjustment will cause overtime.

The process will 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 and the county can do that on its own. 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.

- 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.

WHAT IF MY REQUEST FOR AN EXCEPTION TO MY WEEKLY HOURS ALLOTMENT IS DENIED?

If you request an exception and it is denied or if you do not get a response from the county, DRC believes you should be able to request a fair hearing. We suggest that whenever possible, a request for a workweek adjustment be made in writing.

WHAT WILL THE NEW RULES MEAN FOR MY PROVIDER'S SCHEDULE?

Some consumers will have to shift their providers' schedule or hire new providers to work some hours and some will not. Here are the different categories of consumers:

One Consumer/one Provider:

A consumer who employs one provider who works only for that one consumer will not have to find another provider because the provider can work up to 61-66 hours/week. No IHSS-only consumer is authorized for more than 283 hours a month, which equals 66 hours per week.

One Consumer/multiple Providers:

Consumers who employ more than one provider may have to hire additional providers to avoid any provider working more than 61-66 hours per week.

One Provider/Multiple Consumers:

Consumers whose providers work for more than one consumer may have to hire additional providers or change their schedule:

- If the provider does not work more than 61-66 hours per week total for all consumers, the consumer does not have to hire additional providers.
- If the provider works more than 61-66 hours per week total for all consumers, one or more of the consumers has to change that provider's schedule or find additional providers because no provider can work more than 61-66 hours per week. The provider is required to tell the consumer how many hours he or she can work each week.

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 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.

HOW DO THE NEW RULES AFFECT PEOPLE ON THE NF/AH OR IHO WAIVERS?

The new overtime rules apply to both IHSS and Waiver Personal Care Services (WPCS). That means that if a person is on the Nursing Facility/Acute Hospital (NF/AH) or In-Home Operations (IHO) Waiver and receives both IHSS and WPCS, the hours authorized for each program are added together for overtime purposes. If a consumer has providers who provide both IHSS and WPCS, the 61-66 hour per week rule applies. The Department of Health Care Services is required to help you arrange providers' schedules and/or help you find additional providers if the 61-66 hour weekly cap will be a problem for you.

The new law says that: ***“It is the intent of the Legislature that this section shall not result in reduced services authorized to recipients of waiver personal care services.”***

Unfortunately, this is not a guarantee. Also, not everybody on a waiver gets waiver personal care services. Some people receive only IHSS and nursing services, so they are not included in the “intent” language. The “intent” language covers only people who DO get waiver personal care services.

In addition, if your current IHSS and waiver services add up to an amount at or close to the waiver dollar cap, the increased cost of overtime hours may cause a decrease in the amount of services.

Example: Consumer B receives IHSS and home nursing, both of which are counted in the waiver budget. If the cost of IHSS goes up due to overtime (or if the county increases hourly IHSS wages), and the total service package is at the waiver cost cap, the consumer will be told that the amount of nursing services has to come down.

DRC wants to hear from any person on the IHO or NF/AH waiver who receives a notice saying that services will decrease because of overtime or county increases in IHSS wages.

I GET ADVANCE PAY, HOW DO THE NEW RULES AFFECT ME?

This has not been decided yet. We will provide more information when we know.

HOW WILL THE STATE KNOW IF THE NEW RULES ARE WORKING OR IF CONSUMERS ARE BEING AFFECTED?

The State is required to study the effects of the new federal rules and the new state rules related to overtime. The study will start after the three-month grace period and cover 24 months. The State will consult with stakeholders and will give stakeholders information periodically. The stakeholders will include representatives of consumers and providers, counties and legislative staff. When the study is done, the Legislature will use it to decide whether to make any adjustments to the state’s rules. We encourage consumers to contact their legislators to let them know if there are problems with the new rules.

DO NEW RULES ABOUT TRAVEL TIME AFFECT CONSUMERS?

DRC will prepare a separate fact sheet about the new rules which allow paying IHSS providers for some travel time directly between different consumers on the same day.

Disability Rights California is funded by a variety of sources, for a complete list of funders, go to <http://www.disabilityrightsca.org/Documents/ListofGrantsAndContracts.html>.