



# Implementing the New FLSA Rule for Home Care Providers in California



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## IHSS OVERVIEW

Created in 1973, the In-Home Supportive Services (IHSS) program is the largest publicly-funded home care program in the United States, providing personal care, paramedical, and domestic and related services to eligible low-income Californians through a complex formula of federal, state and county dollars.



## IHSS OVERVIEW

- \$11.2 billion (\$3.5 billion state GF) in FY 16-17
- Department of Social Services (CDSS)/County Social Services
- 503,000 consumers
- Average of 102 hours/month
- 462,000 providers

Three components through CA's approved Medicaid State Plan

- Personal Care Services Program (PCSP)
- IHSS Plus Option (IPO/1915j)
- Community First Choice Option (CFCO/1915k)

## WHO QUALIFIES FOR IHSS?

- Low income seniors and people with disabilities
- Eligibility can be established several ways
- Individuals may still be eligible with a share of cost (SOC)
- County workers verify financial eligibility annually
- County social workers assess the need for services annually
- Maximum hours = 283/month

## WHO IS THE EMPLOYER?

### Client

- Hiring, firing
- Supervising

### State

- Payroll
- Worker's compensation
- Unemployment insurance
- State disability insurance

### Local Public Authority/IHSS Statewide Authority

- “Employer of record” for purposes of collective bargaining

## UDW/AFSCME Local 3930

- Founded in 1977
- Inspired by Cesar Chavez
- Represents 94,000 IHSS workers
- 21 out of the 58 counties
- Strong commitment to disability and senior rights movements



## FAIR LABOR STANDARDS ACT (FLSA)

- 1938
- Minimum wage, overtime and other protections
- Excluded domestic service workers
- Extended to “domestic service” workers outside the home in 1974
- Excluded live-in domestic workers as well as those who provide “Companionship Services” - even if employed by a third party



## PROPOSAL TO CHANGE RULE

December 2011, US Department of Labor (DOL) proposed changes:

1. Substantially narrowed the companionship exemption:
  - Defined “companionship services” to include only “fellowship” and protection”
  - Defined “care” as assistance with ADLs and IADLs
  - Allowed for the provision of “care” if given “attendant to and in conjunction with” the companionship services and does not exceed 20% of total hours
2. Extended coverage to domestic workers living in the home and employed by a third party



## REACTIONS TO THE DOL PROPOSAL

### Opposition:

State of CA, Advocates

- Estimated \$250 million costs
- State budget deficit
- People will lose services
- People will lose their caregiver of choice
- Workers will lose income

### Support

UDW, Labor Unions, Advocates

- Dignity and equal treatment
- Would help recruit new workers
- Federal Government must provide additional funding
- No one should lose services

## FINAL RULE

- Issued on December 1, 2013
- Effective January 1, 2014

## CALIFORNIA'S RESPONSE

January 9, 2014, Governor Brown proposed FY 2014-2015 state budget

- Would prohibit overtime effective July 1, 2014
- Would create “provider backup system” for emergency situations
- Would fund medical wait time and travel time
- No restoration of 7% cut

## UDW OPPOSES GOVERNOR'S PROPOSALS

Legislative goals:

- End 7% cut to hours
- Stop proposal to cap hours = Fully fund overtime

The numbers were important:

- Estimated \$220 million to pay overtime
- Estimated \$117.6 million to restrict overtime
- \$6.3 billion surplus = best budget outlook in over a decade

## THE ONLY SOLUTION IS TO FULLY FUND OVERTIME

### **It's the right thing to do**

- Home care workers deserve same rights as all other workers

### **Capping hours will disrupt continuity of care**

- Unique nature of the provider/consumer relationship
- Shortages in home care workforce

### **It will force providers and consumers into poverty**

- Many living at or below poverty level
- Many workers/clients share household

### **It violates state's Olmstead obligation**

- Clients could be forced into institutional care because there is no alternative provider

### **It will cost a lot of money to enforce the Governor's proposal**

- Cost to implement vs cost to restrict

## CAMPAIGN TO WIN

- Widespread condemnation of the Governor's proposal
- UDW and other labor unions launch joint campaign with motto:

# EVERY HOUR COUNTS

*Reverse the Crisis-Era Cuts & Reject the Hours Cap*



## CAMPAIGN TO WIN

### Legislative

Targeted effort to gain support and identify champions in Legislature

- IHSS Workers lobby in Sacramento and in districts
- Workers and clients testify at Assembly and Senate Budget Committee hearings
- District “Snapshots” depict economic impact of the state’s proposals



## CAMPAIGN TO WIN

### Media

Thousands of IHSS workers and their clients talk about how they will be hurt by state's proposal

- Press conferences, media interviews, social media, petitions  
e.g. Valentine's Day = #HeartofHomecare
- VIP Editorials in targeted publications
- Earned media from rallies throughout the state





## CAMPAIGN TO WIN

### Activate UDW members

- Membership meetings
- Mailers
- Website
- Email blasts
- Facebook/Twitter
- “Tele -town Hall” meetings
- English, Spanish, and Vietnamese



**VICTORY!**

## **Governor signs overtime legislation on June 20, 2014**

Effective January 1, 2015:

- Overtime pay to IHSS and WPCS providers up to 66 hours per week
- Travel time up to 7 hours per month
- Medical wait time pay
- Three month “hold harmless” period
- State appropriates \$162.6 million for FLSA in FY 2014-2015

## WAIVER PERSONAL CARE SERVICES (WPCS)

- Personal care services available through the Nursing Facility/Acute Hospital (NF/AH) Waiver and the In-Home Operations (IHO) Waiver
- Administered through the Department of Health Care Services (DHCS)
- Total WPCS participants for NFAH and IHO Waivers are 1,498 (9/2015)
- Total WPCS providers are 2,556
- Out of these, 1,909 are also IHSS providers

## VICTORY!

However, lots of new rules:

- New maximum weekly hours limit for clients (monthly authorization divided by 4.33)
- New workweek agreements for clients and providers
- Social worker must approve unanticipated overtime
- New violation policy for providers who do not follow new rules
- No specific policy on exemptions, simply intent to not cause harm
- Future study to assess effectiveness and necessity of the new weekly limits
- Contingent on implementation of FLSA new rule on federal level

## Now WHAT?

It started to get complicated:

- The weekly hour cap formula can be harmful depending on how many days there are in a month
- New timesheets are hard to fill out
- Challenge to maintain client flexibility and self-direction
- Continued to urge CDSS to create an exemption policy

Challenges:

- Coordinating outreach across state, local governments, labor unions and partner organizations
- Translating materials into appropriate languages
- Written policies not at appropriate reading level
- Policies do not work well in reality

## *HOME CARE ASSOCIATION OF AMERICA, ET AL. V. WEIL*

- December 2014, U.S. District Judge vacated the Final Rule
- January 2015 issued a temporary restraining order
- CDSS halted implementation of overtime “depending on future court rulings”

UDW to Administration: “Fulfill your commitment on overtime!”

- Lobby visits in Sacramento and in district
- Sign-on letter
- Rallies at the Capitol
- Online petitions to the Governor
- Editorials in local press

## 2015 Timeline

### January

- DOL appeals Lower Court's decision to the DC Circuit Court of Appeals

### May

- Expedited hearing by Court of Appeals

### June

- CA restored 7% cut for one year (\$226 million)
- CA funded FLSA with Oct. 1 start date (\$270 million)

### August

- Court affirmed the Final Rule and reversed the lower court's ruling

### October

- Home Care Association denied stay from the US Supreme Court

### November to December

- Period of non-enforcement by the DOL

## START AGAIN

November, CDSS formally announced state will pay overtime/travel time/wait time starting February 1, 2016. Notices mailed to all IHSS providers and clients.

Many issues outstanding:

- Retroactive pay
- Violations policy
- Exceptions policy
- Updated timesheets
- Training for providers, clients and county staff
- New provider/client mailers
- New workweek agreements
- Updated payroll system





## EXEMPTION POLICIES

January 2016, CDSS announced first exemption to workweek limit

Exemption 1: Live-In Family Care Providers:

Providers employed on or before January 31, 2016 may be allowed to work up to a maximum of 90 hours per workweek, 360 hours a month if:

- They provide IHSS services to two or more IHSS recipients; **and**
- They currently live in the same home as the recipients to whom they provide services; **and**
- They are related to the recipients to whom they provide services as his/her parent, stepparent, adoptive parent or grandparent or be his/her legal guardian

## EXEMPTION POLICIES

January 2016, DHCS announced exemption for WPCS hours:

Providers for participants enrolled in either waiver on or before January 31, 2016 may be allowed to work up to 12 hour work day, 360 hours per month if:

- They live in the same home as the waiver participant. They do not have to be a family member; **or**
- They are now giving care to the waiver participant and have done so for two or more years without a break; **or**
- DHCS agrees that there are no other possible care providers near the waiver participant's home. The waiver participant must work closely with DHCS care managers to try to find more care providers

Most importantly, if a provider receives an exemption through WPCS it is automatically applied to IHSS. Overtime limits apply to WPCS and IHSS hours combined.

## EXEMPTION POLICIES

April 2016, CDSS finally announced the criteria for second exemption

Exemption 2: Extraordinary Circumstances:

Providers may be allowed to work up to a maximum of 90 hours per workweek, 360 hours a month if they provide services to two or more IHSS recipients who would be at serious risk of out of home placement if care can not be provided by the existing provider.

At least one of the following conditions must be met by all recipients:

1. Have complex medical and/or behavioral needs that must be met by a provider who lives in the same home as the recipient; **or**
2. Live in a rural or remote area where there is no other available provider; **or**
3. Be unable to hire a provider who speaks the same language in order to direct his/her own care

Provider does not need to live in the same home as the recipient if the recipients meet conditions 2 and/or 3 above.

## EXEMPTION POLICIES

“An extraordinary circumstance is one in which all possible options for finding another provider to work within the recipient's’ authorized weekly and monthly hours have been explored and exhausted by both the recipients and the county and no other provider is available. As a result, the only viable option during a specific period is to determine the recipients have an extraordinary circumstance, and apply Exemption 2 to allow the IHSS provider to work beyond the statutory workweek limitations to maintain continuity of care and ensure that the IHSS recipients are able to remain safely in their homes.”

All County Letter No. 16-22  
April 1, 2016

## EXEMPTION POLICIES

Outstanding issues:

- Very narrow criteria
- No notice mailed to clients or providers on Exemption 2
- Reliance on counties, not adequately staffed or trained
- No appeals process

As of August 22, 2016:

Exemption 1: 1166 approved; 73 in review

Exemption 2: 95 county referrals; 27 approved; 2 in review; 66 ineligible

## VIOLATIONS POLICY

- CDSS created new violation policy for IHSS providers
- UDW, labor unions asserted right to bargain policy (ongoing)
- Submitted extensive written comments and met with CDSS at length

### Final policy:

- First violation: Written warning
- Second Violation: Second written warning and optional training
- Third Violation: Three-month suspension
- Fourth Violation: One-year suspension
- If no violation for a period of 12 months, one prior violation will be removed
- Right to written appeal

## **FEBRUARY 1, 2016 – FINALLY!**

For the first time in history, IHSS workers receive pay for overtime, travel time, and medical accompaniment time.



## “Hold Harmless” period

- February 1 to April 30
- Many regulations not yet finalized

## UDW lobbied to adopt FLSA “fixes” in FY 16-17 budget

- Extend “Hold Harmless” period
- Expand exemption policies

## UDW continues massive education/outreach

- Trainings, referrals, email blasts, mailings



## The 3 IHSS overtime exemptions you should know

UDW fought hard to win overtime exemptions for IHSS providers who serve clients with extraordinary needs. Read more to see if you qualify.

### The IHSS Extraordinary Circumstances Exemption

I should apply for this exemption if I have at least two IHSS clients whose circumstances would place them at serious risk if I could not provide care beyond the 66 hour workweek limit, and at least ONE of the following situations applies to me:

- 1 My clients have complex medical and/or behavioral needs that must be met by a provider who lives in the same home or else it would put them at risk of being forced to leave in-home care for an institution; OR
- 2 My clients live in a rural or remote area where there is no other available provider; OR
- 3 My clients live in an area where there is no other provider who speaks the same language in order to direct his/her own care.

**IMPORTANT:** If #2 and/or #3 apply, you **do not** have to be a live-in provider to qualify for the exemption.

#### How does the Extraordinary Circumstances Exemption work?

Providers who are approved for this exemption will be allowed to work up to 90 hours per workweek, and no more than 360 hours per month combined for all of their IHSS clients.

#### How do I apply for the Extraordinary Circumstances Exemption?

- Ask the social worker to complete and submit the IHSS Program Exemption from Workweek Limits for Extraordinary Circumstances Referral Justification form (APD 005).
- The county then has 15 business days to review the APD 005 before sending it to CDSS, and CDSS will have 15 business days to review and determine approval or denial.
- During this 30 business day process, you will have a grace period where you are not subject to violations.
- For questions about your exemption application, please call CDSS at 916-551-1011. If you did not receive APD 005 but believe you qualify for this exemption, please call UDW for assistance.

For information on all IHSS overtime exemptions, visit [www.udwa.org/timesheets](http://www.udwa.org/timesheets) or contact UDW at 1-800-621-5016.

[www.udwa.org](http://www.udwa.org) • [facebook.com/UDW](https://www.facebook.com/UDW) • 800-621-5016



## WHAT'S NEXT?

- Revisit Exemption policies in late 2016
- Continue to review violations data
- Continue to review county implementation
- Continue education and outreach
- Report due to Legislature in 2017

# QUESTIONS AND ANSWERS