



STATE OF CALIFORNIA—HEALTH AND HUMAN SERVICES AGENCY
DEPARTMENT OF SOCIAL SERVICES
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EDMUND G. BROWN JR.
GOVERNOR

April 7, 2017

ALL COUNTY LETTER NO. 17-13

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 AND
CLARIFICATION ON SUBMITTING REFERRALS**

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.

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, the California Department of Social Services (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 whose extraordinary circumstances place them at serious risk of placement in out-of-home care, and all of the recipients meet at least 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 who are associated with the approved exemption, 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 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. When CDSS approves an exemption in which (at least) one recipient qualifies under Criteria A, and the other recipient(s) qualifies under Criteria B or C, the exemption period granted for both (all) recipients is one year.

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 recipients (or their authorized representatives) must explore and exhaust all options in hiring additional providers. The renewal request must clearly describe the efforts the recipients (or their authorized representatives) have taken, including but not limited to the following:

- 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 recipients (or their authorized representatives) are ultimately responsible for taking these and other steps to hire additional providers. Social workers should assist recipients (or their authorized representatives) in these efforts, as needed, by making appropriate referrals to Public Authorities and other community resources and offering recommendations for other possible hiring solutions, e.g., placing advertisements, etc.

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. When submitting the ADP 005 to request a renewal of a previously granted exemption, if there has been no change in the circumstances upon which the initial exemption was granted, it is not necessary for the county worker to complete all sections on the form; only those sections identified on the form as General Questions must be completed on a renewal request.

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. Furthermore, as noted in ACL 16-22, the IHSS program, is

intended to meet the recipient's needs, and the financial impact of the workweek limits on a provider should not be a factor in determining when an extraordinary circumstance exists. 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 recipient's authorized representative and/or the recipient's parent, guardian, legal custodian, conservator, spouse or registered domestic partner.

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 and coordinate 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.

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 30 calendar days before an existing exemption expires. To assist counties in ensuring this deadline is met, the Case Management, Information and Payrolling System (CMIPS) II will be programmed to automatically alert (assign a task) to the social worker 60 calendar days in advance of the expiration of the exemption period. Once an alert is received, the social worker shall notify the provider as well as the recipients he/she provide services for, of the approaching expiration of the exemption period by mailing them the attached Notice to Provider of Expiration of Exemption From Workweek Limits (IHSS-E 006) and Notice to Recipient of Provider's Expiration of Exemption From Workweek Limits (IHSS-E007).

Please note that CDSS has taken a proactive approach and extended the expiration of the approval period for those cases granted an Exemption 2 which either expired prior to the release of this ACL or were slated to expire without allowing counties sufficient time to meet this timeframe. As a result, the earliest date that any approved Exemption 2 will expire is April 30, 2017.

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 and/or the conditions upon which the exemption was granted no longer exist, (e.g., provider granted an exemption on the basis of Criteria A no longer lives in the same home with the recipients'), 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.

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. The county should print out a copy of the unsigned APD 006 it received from CDSS (along with the letter informing the county that the exemption was approved) and attach it to the IHSS-E 004 that is sent to the provider. 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 current exemption or granting of a future exemption for the same or different recipients.

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 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. The CDSS will send letters to the provider and the recipients informing them of the determination.

CLARIFICATION ON SUBMITTING REFERRALS FOR EXEMPTION 2

Social workers should utilize the initial assessment as an opportunity to inform applicants, and their providers, of the workweek limits and inquire about options the applicant has to hire an additional provider(s) as well as to inform them about provider registry maintained by the Public Authority and any other available resources for hiring an additional provider(s). At the same time, when conducting assessments – both the initial assessment and subsequent reassessments, social workers should be mindful of a recipient's special circumstances that may indicate either an immediate or future potential need for an exemption from the workweek limits to ensure that the individual is

able to remain safely in his/her home.

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. The CDSS has developed the attached Notice of Ineligibility to Request Exemption from Workweek Limits for Extraordinary Circumstances (Exemption 2) – Provider (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 recipients' situation to constitute an extraordinary circumstance, the county is encouraged to carefully review the referral, revise it to include complete information and resubmit it to CDSS for a determination. If there are any questions regarding a referral which has been deemed insufficient, the county worker may contact CDSS for clarification.

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 have been instructed 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, with the exception of those forms/notices with an APD prefix in the form number (e.g., APD 005, etc.), may be obtained from the CDSS Forms and Publications webpage at: <http://www.cdss.ca.gov/inforesources/Forms-Brochures>. Any questions related to obtaining forms and notices may be directed to fmudss@dss.ca.gov.

The notices will be translated in the current threshold languages: Armenian, Chinese and Spanish. When the translated versions are completed, pursuant to Manual of Policies and Procedures Section (MPP) 21-115.2, camera-ready copies of them will be posted on the Translated Forms and Publications web page at: <http://www.cdss.ca.gov/inforesources/Translated-Forms-and-Publications>. 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,

Original Document Signed By

DEBBI THOMSON
Deputy Director
Adult Programs Division

Attachments

[Note: The form(s) originally included with this letter is outdated and has been removed. To access more updated information, please see [ACL No. 18-31](#).]

c: CWDA