



CDSS

WILL LIGHTBOURNE
DIRECTOR

STATE OF CALIFORNIA—HEALTH AND HUMAN SERVICES AGENCY
DEPARTMENT OF SOCIAL SERVICES

744 P Street • Sacramento, CA 95814 • www.cdss.ca.gov



EDMUND G. BROWN JR.
GOVERNOR

April 1, 2016

ALL COUNTY LETTER NO. 16-22

REASON FOR THIS TRANSMITTAL

- State Law Change
- Federal Law or Regulation Change
- Court Order
- Clarification Requested by One or More Counties
- Initiated by CDSS

TO: ALL COUNTY WELFARE DIRECTORS
ALL COUNTY IN-HOME SUPPORTIVE SERVICES PROGRAM MANAGERS

SUBJECT: EXEMPTION FROM THE IN-HOME SUPPORTIVE SERVICES PROGRAM WORKWEEK LIMITATIONS DUE TO EXTRAORDINARY CIRCUMSTANCES AND CLARIFICATION ON THE POLICIES FOR THE LIVE-IN FAMILY CARE PROVIDER EXEMPTION

REFERENCE: [ALL COUNTY LETTER NO. 15-97](#), [ALL COUNTY LETTER NO. 16-01](#), [ALL COUNTY LETTER NO. 16-07](#)

This All County Letter (ACL) provides counties with information and instructions for implementing the Extraordinary Circumstances Exemption to the In-Home Supportive Services (IHSS) program’s workweek limitations that are outlined in ACL 16-01 pursuant to the United States Department of Labor (DOL) Final Rule on the Application of the Fair Labor Standards Act (FLSA) to Domestic Service (RIN 1235-AA05), Senate Bills (SB) 855 and SB 873 (Chapters 29 and 685, Statutes of 2014).

Additionally, this ACL provides clarification for the requirements of the Live-In Family Care Provider Exemption (for a parent, step-parent, adoptive parent, grandparent, legal guardian or conservator) as set forth in ACL 16-07, and transmits a list of acceptable documentation that counties shall use for verification at the time of the reassessment.

BACKGROUND

On February 1, 2016, the California Department of Social Services (CDSS) implemented the provisions of SB 855 and SB 873 that established limitations on the number of authorized hours providers in the IHSS and Waiver Personal Care Services

(WPCS) programs are permitted to work in a workweek. Under the new rules, the maximum amount of time that an individual is allowed to work providing services for two or more IHSS recipients in a single workweek is 66 hours. Beginning May 1, 2016, providers who submit timesheets reporting work hours that exceed the workweek limitations will accrue violations that could result in an IHSS provider's program eligibility being suspended or terminated up to one year.

To maintain continuity of care and to ensure that IHSS recipients are able to remain safely in their homes, CDSS established two exemptions from the workweek limitations for IHSS providers:

1. The Live-In Family Care Provider Exemption applies to IHSS providers who, on or before January 31, 2016: a) provide services for two or more IHSS recipients; b) live in the same home as all of the recipients for whom they provide services for; and, c) are related to all of the recipients for whom they provide services for as the recipients' parent, step-parent, adoptive parent, grandparent, legal guardian or conservator. The specific requirements for this exemption were provided in ACL 16-07, and additional clarification is provided in the latter part of this ACL.
2. The Extraordinary Circumstances Exemption applies to IHSS providers who provide services for two or more recipients whose circumstances leave them vulnerable and place them at serious risk of placement in out-of-home care if their IHSS authorized hours could not be provided by the existing provider. The specific requirements for this exemption are discussed in detail below.

To maintain quality of care, an IHSS provider granted either of these exemptions will be permitted to work up to a total of 12 hours a day, up to 360 hours per month combined for the IHSS recipients they provide services for, not to exceed each IHSS recipient's monthly authorized hours.

Both exemptions are applicable to IHSS providers working for two or more recipients. As described in the previous ACL 16-01, a single IHSS provider working for a single recipient may work the IHSS recipient's maximum weekly hours. Additionally, if circumstances arise that require the IHSS provider to adjust their maximum weekly hours to accommodate the recipient's needs, it is permissible for the IHSS provider to adjust the workweek schedule as long as he/she works fewer hours in another week to avoid exceeding the recipient's monthly authorized hours, and the adjustment does not result in exceeding the total number of hours worked that are compensable at an overtime rate that the provider would have been authorized to work in that month if the weekly hours had not been adjusted. As such, the providers in the one-to-one relationship would not be in need of an exemption.

Coordination and implementation procedures will be developed by the Department of Health Care Services' (DHCS) and CDSS to ensure that exemptions that apply to IHSS recipients will be extended to WPCS program recipients.

EXTRAORDINARY CIRCUMSTANCES EXEMPTION (EXEMPTION 2)

Exemption Criteria

To be considered for Exemption 2, the provider must work for two or more IHSS recipients whose circumstances put them at serious risk of placement in out-of-home care.

In order to qualify for Exemption 2, all recipients the provider works for must meet at least one of the following conditions:

- A. Have complex medical and/or behavioral needs that must be met by a provider who lives in the same home as the recipient.
- B. Live in a rural or remote area where available providers are limited and as a result the recipient is unable to hire another provider.
- C. Be unable to hire a provider who speaks his/her same language in order to direct his/her own care.

The provider need not live in same home as the recipient(s) to qualify for Exemption 2 if the recipients meet conditions B and/or C above.

Evaluation of cases to determine whether an exemption will be granted or denied will be conducted by CDSS and counties.

An extraordinary circumstance is one in which all possible options for finding another provider to work within the recipients' 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.

CRITERIA A: COMPLEX MEDICAL AND/OR BEHAVIORAL NEEDS

A complex medical and/or behavioral condition for the purpose of Exemption 2 means that an IHSS recipient has personal care services authorized in the IHSS program, pursuant to the Manual of Policies and Procedures (MPP) Section 30-757 et seq., which requires specific attention and care, and these services cannot be provided by anyone other than their primary IHSS provider without having an impact on the recipients' physical tolerance and/or behavioral temperament as it relates to a mental health condition (e.g. autism spectrum disorder, dementia, Alzheimer's, etc.). If services were provided by someone other than the existing provider, it would cause the IHSS recipient harm due to physical and/or emotional stress leading to out-of-home care.

CRITERIA B: LIMITED PROVIDERS DUE TO RURAL OR REMOTE LOCATION

For the purposes of determining whether a recipient meets the condition of living in a rural or remote area, the United States Census Bureau definition of "rural" will be the standard for both rural and remote areas. According to that definition, a rural area is defined as, "all territory, population, and housing units located outside of urbanized areas and urban clusters. Urbanized areas include populations of at least 50,000, and urban clusters include populations between 2,500 and 50,000 (<https://www.census.gov/geo/reference/urban-rural.html>).” Counties are best suited to determine which areas within their geographic boundaries qualify as rural and/or remote; therefore, when submitting a referral for Exemption 2, the county must indicate whether the location where the recipient resides meets the established standard for being considered rural or remote.

CRITERIA C: LANGUAGE/COMMUNICATION BARRIER

When determining whether an extraordinary circumstance exists related to the recipient's inability to hire a provider who speaks his/her same language, the county must determine the extent to which the circumstance presents a barrier in the provision of the recipient's authorized services. Simply because a recipient is unable to hire a provider who speaks his/her same language does not necessarily mean that the recipient is unable to direct his/her own care. Certain tasks, e.g. domestic and related services tasks, do not require significant direction by the recipient; thus, they could be performed by a provider who does not speak the recipient's same language. Even other tasks, including some personal care services, which require the recipient to direct the provider to some degree, could be accomplished effectively by a provider who does not speak the recipient's same language after some initial interpretation assistance. An extraordinary circumstance only exists when the recipient's inability to hire a provider who speaks his/her same language results in an consistent barrier to the recipient directing his/her own care which cannot be overcome.

It is important to emphasize that the IHSS program, as a Medi-Cal service, is intended to meet the recipient's needs, thus the financial impact on a provider due to the workweek limits is not among the exemption criteria and shall not be a consideration when determining whether an extraordinary circumstance exists.

In circumstances where an Exemption 2 approval is granted and the IHSS recipients' combined hours total more than 360 hours a month, the IHSS recipient(s) will be required to hire an additional IHSS provider(s) to work their remaining authorized IHSS hours.

County Responsibilities

Counties are currently in the process of reviewing their caseloads and working with IHSS recipients and providers to ensure that the requirements for implementation of the workweek limitations as outlined in ACL 16-01 are understood by IHSS recipients and providers, and to ensure that IHSS recipients employ enough IHSS providers to provide their authorized IHSS hours within the workweek limitations. Counties have a pre-existing obligation to continue this effort and examine their existing caseloads, including the IHSS Program Provider Workweek and Travel Agreements (SOC 2255) to identify IHSS providers who work for two or more recipients whose combined hours total more than 66 hours per week. In those cases the IHSS recipient(s) may need to employ an additional provider to ensure that they receive their full authorized IHSS and prevent their existing provider from working more than 66 hours in a workweek. For recipients who receive services from these providers, counties must engage in the following activities to assist recipients in having their needs met.

Counties shall make every effort to assist IHSS recipients with hiring additional IHSS providers, including but not limited to, working with the Public Authority to utilize the provider registries to obtain additional providers, and also following up with back-up providers [identified on the IHSS Program Individualized Back-Up Plan and Risk Assessment form (SOC 864)]. These providers may be able to provide the remaining authorized services within the workweek limitations. In the event of an emergency or unforeseen circumstance, the IHSS recipient's back-up provider will be called upon to provide authorized IHSS. Back-up providers shall be required to work within the statutory workweek limitations.

Counties shall ensure that all IHSS recipients have a completed SOC 864 with identified back-up provider(s) listed, and these back-up providers must also be listed on the IHSS Program Recipient and Provider Workweek Agreement (SOC 2256). In cases where Exemption 2 has been granted to the primary IHSS provider, but not yet approved for the back-up provider, the County will review the circumstances on a case-by-case basis

to determine if the back-up provider qualifies for Exemption 2 and will be permitted to work beyond the workweek limitations.

As part of the ongoing assessment/reassessment process, IHSS Social Workers become very familiar with their caseloads and their assigned IHSS recipients' needs, and shall consider the complexity of each recipient's IHSS needs (physical and behavioral) to further assist with the hiring of additional IHSS providers. The IHSS Social Worker shall evaluate if the hiring of an additional IHSS provider would put the recipient(s) at serious risk of placement in out-of-home care if any of their authorized personal care needs are provided by someone other than their primary IHSS provider. For example, the IHSS Social Worker should evaluate if the recipient's temperament and tolerance related to their medical and/or behavioral condition (e.g., autism spectrum disorder, dementia, etc.) prohibits other IHSS providers from performing their personal care needs thus putting the recipient at serious risk of placement in out-of-home care. In situations where the combined recipients' authorized hours exceed 360 hours per month, the recipient will still need to hire an additional provider who can be directed to provide the domestic or non-intimate services with the remaining IHSS hours.

To further assist with directing the recipient's care, the IHSS Social Worker shall review each recipient's authorized services to determine if there are non-personal care services that could be assigned to a newly hired provider, as this may be the least disruptive to the working relationship between the recipient and primary provider, thus allowing the existing primary provider to continue providing the personal care services. In circumstances where an additional IHSS provider is hired, the IHSS Social Worker shall assist the IHSS recipient with assigning hours to each provider to ensure that all of the authorized IHSS are provided and that each provider works within their maximum weekly hours.

Once a county IHSS Social Worker has exhausted all possibilities to assist the recipients with finding additional providers, he/she may then determine that there is an extraordinary circumstance that cannot be resolved with additional providers, leaving recipients with remaining IHSS hours that cannot be delivered.

If the IHSS Social Worker determines that there is an extraordinary circumstance as described above, he or she will complete the IHSS Program Exemption from Workweek Limits for Extraordinary Circumstances Referral Justification form (APD 005). The county IHSS Program Supervisor/Program Manager shall review the APD 005 before sending it to CDSS for consideration of an Exemption 2 approval. The county shall have 15 business days from the date of identifying a recipient that may be eligible for Exemption 2 to complete and submit the APD 005 to CDSS.

CDSS Responsibilities

Within 15 business days of receiving a completed APD 005 from a county, CDSS shall evaluate the case to determine whether all of the conditions for granting Exemption 2 have been met.

Referrals that fail to include all required information will result in follow-up with the county to obtain clarification on the written justification or to obtain the necessary information, including but not limited to additional guidance/narrative as proof of describing outreach activities to demonstrate that all viable options for obtaining another provider have been explored and exhausted. Counties are advised to provide complete justifications and any necessary documentation as incomplete referrals may lead to delays in review and determinations.

Periodic Review and Renewal Process

When an Exemption 2 has been granted by CDSS, the Social Worker, as part of his/her ongoing duties, shall periodically review the recipient's case and circumstances that warranted approval to determine whether the exemption should be renewed. For approvals that were granted on the basis of Complex Medical/Behavioral Needs, the county shall determine if there has been a change in the health condition(s) in any or all associated IHSS recipients' cases that would no longer require the exemption. Renewal reviews on exemptions that were granted on the basis of Complex Medical/Behavioral Needs must be done within 12 months of the Exemption 2 approval or at the next face-to-face IHSS reassessment, whichever occurs first.

Renewal reviews on exemptions that were granted on the basis of Rural/Remote or Language/Communication shall be done within 6 months of the Exemption 2 approval or at the next face-to-face IHSS reassessment, whichever occurs first. The county will

determine if the circumstances that were the basis for granting the Exemption 2 still exist, and the county will explore all available options for finding another provider(s) so all of the recipient's authorized hours could be provided within the workweek limitations. Only when all other options have been explored and exhausted should an Exemption 2 be renewed.

After an initial Exemption 2 renewal is granted, the review and renewal process will continue on the same periodic basis thereafter until the exemption is no longer required. Counties shall maintain in the recipients' case file a copy of the initiating Exemption 2 referral (APD 005), all supporting evidence and justification documentation, and all additional evidence/documentation utilized by the IHSS Social Worker as part of their periodic review.

The county will submit all requests for renewals of Exemption 2 to CDSS for evaluation. The procedure for submitting Exemption 2 renewal requests will be addressed in a forthcoming ACL. For IHSS cases in which the extraordinary circumstances no longer exist, the county will send a notice to the affected provider and all his/her recipients to inform them that the exemption has been discontinued with an explanation for the discontinuance.

IHSS Provider Violations for Working beyond the Workweek Limitations

Violations incurred by a provider for submitting timesheets reporting hours that exceed the workweek limitations during the Exemption 2 referral and evaluation process will be rescinded regardless of whether the exemption is granted or denied. Counties will be notified of the outcome of Exemption 2 referrals and instructed to then rescind the violations incurred for working beyond the workweek limitations. Any violations incurred as a result of an IHSS provider claiming travel time of more than seven hours in a workweek will not be rescinded as part of the Exemption 2 referral and evaluation process.

LIVE-IN FAMILY CARE PROVIDER EXEMPTION (EXEMPTION 1)

Clarifications for Exemption 1

As stated in ACL 16-07, the Live-In Family Care Provider Overtime Exemption (Exemption 1), allows IHSS live-in providers, who work for two or more recipients, and who are related to those recipients as parent, step-parent, adoptive parent, grandparent, legal guardian or conservator, to work above the maximum of 66 hours in a workweek. IHSS providers must have met the following requirements on or before January 31, 2016 in order to qualify for Exemption 1 and be allowed to work up to a total

of 12 hours a day, up to 360 hours per month combined for the IHSS recipients they provide services for, not to exceed each IHSS recipient's monthly authorized hours:

1. The IHSS provider must work for two or more IHSS recipients; and
2. The IHSS provider lives in the same home as all the IHSS recipients for whom he/she provides services; and
3. The IHSS provider is related to all the IHSS recipients for whom he/she provides services, as his/her parent, step-parent, adoptive parent, grandparent, legal guardian or conservator.

The CDSS began mailing out notices (i.e., the IHSS Program Live-In Family Care Provider Overtime Exemption, SOC 2279) in February 2016 to providers and recipients who were identified in CMIPS II to have met the above criteria. The CDSS is currently in the process of reviewing these exemption request forms and sending out approval or denial notices to the IHSS recipients and their providers. Since implementation of ACL 16-07, CDSS has received inquiries regarding the eligibility requirements for Exemption 1 and the following addresses those questions.

Provider Eligibility

In order to qualify for Exemption 1, providers must have been enrolled as an IHSS provider and met all of the above qualifications, including providing services to two or more IHSS recipients, on or before January 31, 2016. Providers who had not completed the provider enrollment requirements, including the completion of the IHSS Provider Enrollment Form (SOC 426), criminal background check, provider orientation and completion of the Provider Enrollment Agreement (SOC 846), and were not providing services nor being paid as an enrolled IHSS provider to two or more recipients on or before January 31, 2016, are not be eligible for Exemption 1.

For example, a mother who would like to be the parent provider for two of her minor children, but as of January 31, 2016 had not yet been assigned to her children's cases because her criminal offender record information (CORI) had yet to be received by the county/public authority and to be reviewed; was not an enrolled provider on or before January 31, 2016; and therefore, would not be eligible for Exemption 1. Although she may have started the provider enrollment process prior to January 31, 2016, she would have had to been identified in CMIPS II as an enrolled provider on or before January 31, 2016 in order to be eligible for Exemption 1.

Provider and Recipient May Qualify at a Later Date for Exemption 1

IHSS recipients whose providers meet all of the criteria for Exemption 1 on or before January 31, 2016, but do not currently have a need for this exemption, may qualify for the exemption at a later date should the needs of the IHSS recipient(s) change, thus putting the existing IHSS provider at risk of incurring a violation by working beyond the current workweek limits of 66 hours a week for two or more IHSS recipients.

For example, on or before January 31, 2016, a mother is the live-in provider for her two minor-recipient children and one of the children becomes ill and requires hospitalization. The mother would not need the exemption while the child is in the hospital and on “leave status”. When the child later returns home with an increased need, the mother may then be eligible for Exemption 1 if her children’s combined hours would require her to work beyond the statutory workweek limits.

Minor Recipients Living with Two Parents

The regulations for minor recipients living with parents as set forth in MPP Section 30-763.44 et seq., are still in effect with this exemption. If a minor lives with two parents, the second parent is not permitted to be an additional paid provider if they do not meet the requirements of MPP Section 30-763.451. Pursuant to MPP Section 30-763.451, IHSS may only be purchased from a parent when that parent has left full-time employment, or is prevented from obtaining full-time employment because no other suitable provider is available. As specified in MPP Section 30-763.452, “[a] suitable provider who is a person having a duty pursuant to the Family Code need only be able and available to provide the needed IHSS...”

Once a parent provider has been granted Exemption 1 and has worked up to 360 hours a month, if one or more of the IHSS recipients he/she provide services to still has IHSS hours left, then one or more of the IHSS recipients will need to hire another IHSS provider to work their remaining authorized IHSS hours.

Exemption 1 may be applicable in cases where there are both minor and adult children living in a two-parent home, when one parent could provide IHSS for the minor children and the other parent can provide IHSS to the adult children. For example, if a mother is providing IHSS to two of her minor children, and the father is providing IHSS to their adult child, the father is not an available suitable provider for the minor children. In this scenario, the mother may continue to provide IHSS for the minor children and may be eligible for Exemption 1.

Two or More Recipients Living with Two Providers who have the Familial Relationships Described in Exemption 1

Exemption 1 is only allowed for households where one live-in family care provider is providing IHSS for two or more recipients. If a household has two providers and two recipients, these providers would not be eligible for Exemption 1, even if their relationship to the recipients otherwise meets the criteria of Exemption 1. In these cases, each of the live-in family care providers shall be assigned all the hours of only one recipient and may work up to 70.75 hours per workweek for that one recipient.

For example, a mother and father are the parent providers for two of their adult children. Exemption 1 is only allowed if one provider provides IHSS to two or more recipients. In this scenario, each parent would be assigned the hours of one of the adult children and be able to work up to 70.75 hours per week; therefore neither parent would qualify for Exemption 1.

County Responsibilities

For providers that are granted an Exemption 1, at the time of the recipients' next reassessment, the IHSS Social Worker will be required to verify that the provider meets the residence and relationship criteria with all of his/her recipients who reside in the home in order to continue the exemption. The IHSS Social Worker will first use information that is available in the DHCS Medi-Cal Eligibility Data System (MEDS) to identify the address and the provider-recipient relationship for each IHSS recipient. The Pending/Denied Application and Appeals (QP) screen in the Client Inquiry Summary (INQS) in MEDS provides identifying information about Medi-Cal beneficiaries, including relationship and residence. If this information is not available, or cannot be verified through MEDS, the IHSS Social Worker must then contact the Medi-Cal office to obtain verification.

If a provider and recipient's relationship and residence are verified, either in MEDS or by the county Medi-Cal office, then the provider and recipient would be confirmed to meet the relationship and residence exemption requirements and Exemption 1 may be continued.

However, if a provider and recipient's relationship and residence cannot be verified, the IHSS Social Worker shall notify the provider and recipient at the time of scheduling the next reassessment that they must provide specific documents to verify their home address and the provider's relationship to all of the IHSS recipients to whom services are provided. The Live-in Family Care Provider Workweek Exemption, Acceptable Documents to Verify Relationship and Residence (APD 006) is attached and IHSS recipients must provide the required documents as listed on this form at the time of the next reassessment.

IHSS Social Workers should refer to the APD 006 and inform the provider and recipients of what documentation will be deemed acceptable when scheduling the reassessment.

If providers and recipients do not have the acceptable verification documents at the reassessment, the IHSS Social Worker shall follow-up within 10 days of the reassessment. If the relationship and residence still cannot be verified at that time, it shall be determined that the IHSS provider and recipient do not meet all of the Exemption 1 requirements and will no longer qualify for the exemption. The provider will be subject to the existing workweek limitations of 66 hours per week.

NOTIFICATION OF APPROVAL OR DENIAL

Upon final review of Exemption 2 (APD 005) referrals and the SOC 2279 for Exemption 1, CDSS will send approval and/or denial notices to both providers and recipients. Upon approval, CDSS will update the Case Management and Information Payrolling System II (CMIPS II) with an indicator to identify the type of exemption (Exemption 1 or Exemption 2) that was granted. Counties will be provided with a list of IHSS providers who have been granted approval for Exemption 1 or Exemption 2.

Questions and requests for clarification on the information provided in this letter may be directed to the Adult Programs Division, Policy and Operations Bureau at (916) 651-5350.

Sincerely,

Original Document Signed By:

EILEEN CARROLL
Deputy Director
Adult Programs Division

Attachment: [In Home Supportive Services \(IHSS\) Program Exemption From Workweek Limits For Extraordinary Circumstance Referral Justification](#)

c: CDWA