



Making FLSA Work in IHSS: Improving Outcomes for All

The current policy places undue pressure on In-Home Support Services (IHSS) consumers and providers to navigate a complex myriad of new rules and procedures for overtime and travel time. Despite our collective efforts to educate IHSS consumers and providers on the new rules, we believe the current rules are unmanageable and a set up for failure. Several aspects of implementation are simply too cumbersome to properly implement. This places IHSS consumers in jeopardy of losing their providers and worse, potentially risks their health and safety.

To prevent unintended and undesired harmful consequences to IHSS consumers, we have identified several issues with the current implementation of Fair Labor Standards Act (FLSA) rules in the IHSS program as well as changes necessary to enable both IHSS consumers and providers to comply with FLSA requirements. We believe changes are needed to simplify and streamline the implementation and believe in the process, this will increase efficiency, decrease administrative burdens, and prevent unintentional harm to consumers and providers.

HISTORY: In 2013, the United States Department of Labor (DOL) published the Final Rule on the application of the FLSA to domestic service workers. That Final Rule essentially requires that personal care workers be afforded the same minimum wage and overtime protections as most other workers in the country. California implemented SB 855 and SB 873 (2014) to ensure the IHSS program conforms to the new federal ruling. However, for reasons stated below, implementing these new requirements is proving to be extraordinarily cumbersome and confusing to both IHSS recipients and providers. There is a grace period until May 1, 2016, at which time providers who do not follow all the rules will start to receive violations, which can lead to eventual suspension from the program.

ANALYSIS: Providers now submit timesheets twice per month, once by the 15th of the month, and again at the end of the month. SB 855 added W&I Code Section 12300.4 to specify that IHSS providers are not permitted to work more than 66 authorized hours within a workweek. The 66 hours is derived by dividing 283 – the maximum IHSS monthly hours – by 4.33, the average number of weeks per month throughout the year, and rounding up to the next whole number. SB 855 also created a “weekly authorized number of hours” of IHSS that a consumer may receive: the consumer’s monthly assessed hours divided by 4.33.

State law defines the workweek for purposes of FLSA calculations as the period beginning at 12:00 a.m. on Sunday and including the next consecutive 168 hours, terminating at 11:59 p.m. the following Saturday.

Problems with the SB 855 calculation of weekly authorized hours:

The “divide by 4.33” formula dictated in SB 855 was problematic and has been discarded by CDSS. This is due to the fact that some months have 28, 29, 30 or 31 days, which means that a consumer’s weekly authorized hours would fluctuate month by month. For example, a consumer authorized for 87 hours per month would see his/her hours fluctuate: 20.3 hours/week

(30-day month) and 19.7 hours/week (31-day month). To simplify the calculation of compensable hours, CDSS has substituted a “divide by 4” maximum weekly hours formula.

CDSS’s alternative is still too complicated and hard to comply with, leading to unintentional violations and extra administrative workload:

County social workers currently assess service hours by the week, then convert this into a monthly total. FLSA now requires an *additional* step of converting back to a weekly amount. Although dividing by 4 is better than the original formula, this solution still falls short because:

- Consumers may falsely assume that they are able to use their maximum weekly hours every week and thus could run out of hours before the end of each month, or claim hours beyond their monthly authorization. For example, a consumer with 25 maximum weekly hours, who uses 25 hours per week from March 1-March 28, will have used her monthly maximum of 100 with three days still to go in the month.
- Some weeks span two months, with a different calculation needed for each month, making it difficult if not impossible to calculate properly.
- If, because of the complexity of the calculations, a provider works more hours than authorized, she will incur violations. Multiple violations may result in a consumer potentially losing his/her provider.

Unintended consequence: Consumers may lose authorized services and be unsafe:

The new rules prohibit providers with one consumer from working more than 70.75 hours and workers with multiple consumers from exceeding the 66 hourly cap per week regardless of the number of recipients they serve.

Providers who work lots of hours for single or multiple clients may be prevented from doing so, and those clients will be forced to find alternative providers. The State estimates that 50,000-60,000 IHSS clients have multiple providers and may be potentially impacted by this policy, and that at least 10,000 additional providers will need to be recruited, screened and hired. Providers are not interchangeable: they must be able to do the work the particular consumer requires, at the consumer’s home, at the time the consumer needs. Some of the consumers who have to find new providers are children, whose parent has been the sole caregiver.

We do not believe that sufficient new appropriate and available providers will be in place by May 1, 2016, particularly for high-risk consumers and for consumers living in more rural counties.

To partially mitigate this concern, DSS will allow providers (who are in the program as of January 31, 2016) to work up to 90 hours per week only if he/she is a live-in provider of two or more consumers and the provider is a parent, grandparent, step-parent, adoptive parent, or legal guardian. The problems:

- Providers enrolling after January 31, 2016 are excluded from this policy.
- There is no exemption for spouses, siblings, adults caring for their parents or anyone else.
- DSS is proposing to provide an individual exemption process for additional providers, but has not yet convened the workgroup to establish this process. It is unclear when and how these exceptions will be implemented and how consumers and provider will know about their availability.

- Meanwhile, consumers will be making decisions based on the information they have. For example, an adult taking care of two parents, for whom there is no other caregiver, may decide to place both parents in nursing homes (at great cost to their personal rights and health and to the taxpayers).
- There is no flexibility allowing a parent or anybody else to care for two or more consumers beyond 90 hours per week, even if the alternative is institutionalization or the consumer going without care because of the unavailability of a suitable additional provider.

Unintended consequence: consumers with high needs lose service because wait time is deducted from their total hours:

Prior to FLSA, IHSS staff assessed for medical accompaniment and factored this into the monthly authorization. FLSA and State Policy now require compensation for the time that providers are “engaged to wait” during medical appointments. The FLSA wait time is a new compensable service, for which reimbursement should be handled similarly to the new travel time payments. If, as CDSS proposes, wait time is deducted from the consumers’ hours, consumers who are at or near the caps for IHSS services and their providers would be unable to use paid wait time without taking away from other authorized services.

PROPOSED SOLUTIONS:

1. **Expand the Grace Period.** Extend the grace period to September 1, 2016, before consequences for violating overtime and travel time limits become effective.
2. **Ensure that consumers can continue to receive services to remain safely at home:**
A small number of IHSS providers care for more than one consumer with highly specialized needs; the overtime limit means that they cannot continue to provide that care if the consumers’ combined hours exceed 66 per week. These providers are parents with more than one child with disabilities, an adult caring for two parents with dementia; an adult caring for a spouse and a child, both with disabilities. There may not be a suitable additional provider available to avoid an overtime situation. When no other provider is available, the consumer cannot receive the services which were authorized as needed for safety in their homes.

The California Department of Social Services (CDSS) has recognized this issue and is attempting to address this administratively. Statutory protections are needed to allow for situations when a provider can work above the CDSS cap of 66 hours/week in certain, limited situations, including:

- Providers who are the parent, step-parent, grandparent or legal guardian of two or more children (including providers approved after Jan 31, 2016);
- Spouses, domestic partners, adult children caring for parents, adult siblings, and adult grandchildren, when no other suitable provider is available; and
- Individual consumer situations when there is no other suitable provider is available, the recipient would be at risk of out-of-home placement, or the recipient’s health (including physical, psychiatric or emotional) or safety would be at risk.

In addition, statute should allow some providers to work over 90 hours/week in limited

situations based on individual consumer needs when there is no other suitable provider is available, the recipient would be at risk of out-of-home placement, or the recipient's health (including physical, psychiatric or emotional) or safety would be at risk.

3. **Align IHSS Authorized Hours with FLSA Policy through the following changes:**

a) **Create 26 equal two-week pay periods, independent of calendar months.** Pay providers on a bi-weekly basis rather than semi-monthly to better conform to the state definition of a workweek and eliminate any confusion about how many weekly hours are authorized.

b) **Eliminate the conversion of the weekly authorization to a monthly authorization.** Currently the vast majority of IHSS services are already assessed weekly and then are converted to monthly by multiplying by 4.33, which is confusing now to consumers and providers. The only services authorized monthly by IHSS are Domestic Services (which 95% of recipients receive), which could be adjusted [see (c)].

c) **Change any IHSS service task hours from monthly to weekly authorization.** For example: Domestic Services are currently authorized at 6 hours per month. Converting this figure to a weekly authorization results in 1.4 hours per week or 1 hour and 24 minutes, which is confusing to consumers and providers. To reduce the confusion, increase the weekly authorization to 1.5 hours per week, or 1 hour and 30 minutes. This would very marginally increase the domestic service hours but would significantly reduce the confusion to consumers and providers.

d) **Flexibility to Adjust Hours based on Client Needs.** Retain the flexibility which allows consumers to shift hours without obtaining county approval, when no new overtime is created.

e) **Provide Equitable Caps. CDSS has created two different OT caps for IHSS providers:** Providers with one consumer may be compensated for hours worked up to 70.75 hours a week while providers with multiple consumers have a lower cap of 66 hours a week. This is unfair to consumers and creates new challenges for Public Authorities to recruit registry providers because workers who agree to work for multiple clients would be subject to the lower cap. This policy should be revised to allow all providers – even those with multiple consumers - to receive compensation up to the 70.75-hour weekly cap.

4. **Pay for Certain Services in Arrears to Align with FLSA:** FLSA requires payment for travel time between consumers on the same day and SB 855 allows travel time to be paid in arrears after the travel is incurred, up to 7 hours per week. The travel time is not taken from the consumers' authorized hours, it is an addition. FLSA also now requires payment for wait time at medical appointments. However, wait time is deducted from authorized hours. Therefore, consumers with the highest need, who are already at or near the 195/238 monthly authorization cap are prevented from actually claiming this new service. This puts them in jeopardy of either not having their provider to assist them at medical appointments, or if the provider claims those wait time hours, they do so at the cost of not

providing other needed services. It is also difficult to accurately predict wait time since doctor's appointments can vary.

In addition, other services occur infrequently, at irregular intervals, or cannot be easily assessed for time until after the tasks are rendered. For example: yard hazard abatement, ice/snow removal, heavy cleaning and teaching and demonstration, are services that occur infrequently but are often critical in maintaining the safety of the recipient in their home and community, and should be paid in arrears.

5. **Permit Waiver Clients to Access Public Authority Registry Services:** Currently Public Authorities are only allowed to provide access to registry services to IHSS consumers. Yet, consumers of Waiver Personal Care Services (WPCS) are excluded from registry services, even though WPCS consumers use IHSS-like services (and often use both IHSS and WPCS services) and are also subject to the new FLSA rules. This proposal would simply allow WPCS consumers to also contact the registry to help them identify in-home providers.

POSSIBLE FISCAL EFFECTS: The following are potential fiscal effects:

1. Increase in service costs from additional overtime paid during extended grace period.
2. Likely administrative cost savings to implement the exemption process, as consumers' needs will be met without disruption, thereby reducing costs to recruit and enroll new providers.
3. Increase in service costs due to the increase in domestic hours (from 1.4 to 1.5 hours/week), calculating one-time services such as heavy cleaning and yard abatement outside of the 70.75-hour cap, compensating medical accompaniment (including wait time) outside of the current service hour caps, and implementing an expanded exemption process.
4. One-time costs to make changes to CMIPS, create new timesheets and forms and instructions for counties, consumers and providers.
5. Offsetting administrative savings from reduced workload as a result of improvements to the FLSA process.

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