



March 1, 2016

The Honorable Holly Mitchell, Chair
Senate Committee on Health and Human Services

Honorable Members
Senate Budget Subcommittee No. 3

RE: Making FLSA Work in IHSS: Improving Outcomes for All

The undersigned organizations respectfully request your consideration of necessary statutory changes to support the implementation of the Fair Labor Standards Act (FLSA) as it applies to the In-Home Support Services (IHSS) Program. These changes are needed to enable IHSS consumers and providers to comply with the new mandates and reduce possible harm that may result absent these changes.

We have serious concerns with the current policy, which places undue pressure on 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 changes necessary to enable both IHSS consumers and providers to comply with FLSA requirements. Below we identify specific areas of needed changes and these changes are presented in order of what we believe are the priority areas to be addressed:

1. **Extend the Grace Prior to September 1, 2016 before Violations Begin to Toll:** The current grace period for providers, before violations begin to toll, begins May 1, 2016. Given the significant changes in the program and challenges in recruiting additional IHSS providers, this grace period should be extended, to September 1, 2016, before consequences for violating overtime and travel time limits become effective. This will give additional time to make programmatic changes necessary to comply with FLSA.
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. However, 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:** Current law requires a monthly authorization of hours, yet FLSA requires consumers and providers to track their hours by the week. When counties perform assessments, the majority of tasks are assessed at a weekly amount, then converted to a monthly amount. By overlaying FLSA requirements, consumers now have to take an *additional* step of converting back to a weekly amount. These extra steps are not only unnecessary, but can easily lead to errors in the calculation, which may result in a provider working more than s/he is permitted. This can increase costs to the IHSS program and could result in violations, and eventual termination, of the provider. The following changes are needed to align FLSA implementation with the IHSS Program:

- **Pay Providers on a bi-weekly basis in 26 equal pay periods:** Currently the IHSS program pays providers twice per month (1-15th and 16-30/31st day of each month). SB 855 now requires recipients/providers to track hours worked per week (Saturday through Sunday). Because a workweek can break across two different months, this makes tracking time worked and overtime difficult and inconsistent with SB 855. Aligning the pay period to the SB 855 workweek will require a one-time programming change to the CMIPS Payrolling System and align the IHSS pay schedule with the FLSA work week.
- **Create equitable caps in overtime for IHSS Providers:** CDSS has created two different caps for providers: providers serving one consumer may be compensated for hours worked up to 70.75 hours per week, while providers serving multiple consumers may be compensated at 66 hours per week. This is unfair to consumers and creates new challenges to Public Authorities to recruit additional registry providers for clients. This policy should be revised to allow providers with multiple consumers to receive compensation up to the 70.75 hour weekly cap.
- **Authorize all IHSS tasks by the week:** Most tasks are already assessed according to a workweek except for Domestic Services, which is assessed up to 6 hours per month, and under this proposal, would be assessed up to 1.5 hours per week to align with all other IHSS tasks.

- **Retain current flexibility in the IHSS program:** Consumers have fluctuating needs for services based on their health needs, and the IHSS program has always provided flexibility to adjust hours to the consumer's needs, so long as the total hours remained within their monthly authorization. Consumers should be able to retain this flexibility to move hours without having to contact the county to seek permission.
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.

We anticipate these changes will reduce confusion to IHSS consumers and providers as they try to comply with the new overtime rules. While we are still developing a fiscal estimate for these changes, but ultimately, we believe these changes will result in marginal new costs for additional overtime paid during the grace period and expansion of service hours. There are one-time costs associated with changes to the CMIPS system to convert to a bi-weekly pay period. We believe there will also be offsetting savings as a result of reduced county workload to address provider violations and helping consumers to find new providers and back-up providers, and potential savings in hospitalizations and other institutional care settings by avoiding unintentional harm to consumers and providers. Once we have additional information regarding the overall fiscal impact we will provide that to the Committee and staff.

The attached analysis provides additional background on each of the aforementioned proposals.

Thank you for your consideration of our request.

Sincerely,

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Attachment

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