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## Nursing Facility/Acute Hospital (NF/AH) & In-Home Operations (IHO) Waivers Overtime Exemptions May 19, 2016

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As required by new state and federal rules, California started paying overtime to In-Home Supportive Services (“IHSS”) and Waiver Personal Care Services (“WPCS”) care workers on February 1, 2016. WPCS is a service offered through the Nursing Facility/Acute Hospital (“NF/AH”) Waiver and the In-Home Operations (“IHO”) Waivers. WPCS is unlicensed attendant care that helps Waiver participants with their personal care and other needs they have to remain living at home.

The Department of Health Care Services (“DHCS”) has made rules about the maximum daily, weekly and monthly hours a provider can work for a consumer who gets WPCS or WPCS and IHSS combined. For information on overtime rules generally, see Disability Rights California publication #5586.01 *New Rules for IHSS: Overtime & Related Changes* <http://www.disabilityrightsca.org/pubs/558601.pdf>. For information about IHSS overtime exemptions, see publication #5585.01 *IHSS Overtime Exemptions* <http://www.disabilityrightsca.org/pubs/558501.pdf>.

### **What are the Rules for Overtime in the WPCS Program?**

In January, 2016, DHCS mailed informational packet Temp # 3001 about the overtime rules and possible exemptions from the rules. Call DHCS at (916) 552-9214, if you did not get this packet and one will be sent via mail.

Overtime is paid for hours worked over 40 in a week for WPCS, for IHSS, or for a combination of IHSS and WPCS. If a provider works both WPCS

and IHSS hours, those hours are added together to figure out the total hours worked per week and the amount of overtime due per week.

## **What are the Limits on Overtime in the WPCS Program?**

There are two kinds of limits on the number of hours a provider can work: Waiver Limits and Overtime Limits.

1) Waiver limits: The IHO and NF/AH Waivers allow providers to work up to a 12-hour day for WPCS and IHSS hours combined. Not all waiver consumers receive that many hours. However, 12 hours a day exceeds the new overtime limits (see #2, below). If you need a WPCS provider for more than 12 hours per day, you must hire more providers.

2) Overtime limits: DHCS has limits on the number of overtime hours that can be worked by a WPCS provider, unless the provider gets an exemption.

### ***a) Providers who work for two or more participants:***

--Can work no more than 12 hours in a day, and up to a 66-hour workweek.

--A provider who works a 66-hour workweek will be paid overtime for 26 hours per week.

### ***b) Providers who work for one participant:***

--Can work no more than 12 hours in a day, and up to a 70-hour and 45-minute workweek, not to exceed 283 hours worked in a month.

--A provider who works a 70-hour and 45-minute workweek will be paid overtime for 30 hours and 45 minutes per week.

### ***c) Waiver participants who have more than one provider working for them, and their provider does not work for any other participants:***

--Providers can work no more than 12 hours in a day, and up to a 70-hour and 45-minute workweek, not to exceed 283 hours worked in a month.

--A provider who works a 70-hour and 45-minute workweek will be paid overtime for 30 hours and 45 minutes per week.

d) Without an exemption, no provider can work more than 283 hours in a month.

## **What Happens if a Provider Works More than He/She is Allowed?**

Since the law is new, there was a three month grace period for violations. Violations will be given beginning May 1, 2016.

DHCS says that providers must get approval from DHCS before working "extra overtime hours." A provider who does the following "may" or "will" get a violation if:

--The provider works more than 40 hours, without approval from DHCS, when the participant is authorized 40 hours or less in a workweek and the provider is identified to only work up to 40 hours in a work week;

--The provider works more than the participant's maximum weekly hours, without approval from DHCS.

--The provider works for more than one participant and works more than 66 hours in a work week.

--The provider claims more than 7 hours of travel time in a work week.

## **What Are the Overtime Exemptions and How Can My Provider Get One?**

### ***Who is eligible for an exemption from the workweek limits?***

DHCS has created an exemption from the workweek limits for providers for IHO or NF/AH waiver participants who were enrolled in the NF/AH or IHO Waiver on January 31, 2016. DHCS is considering another exemption and

exemption process for providers and consumers who were enrolled in the program after January 31, 2016.

DHCS may allow some providers to work more hours in WPCS than the overtime work week limits shown above; up to the waiver limit (a 12-hour work day or 360 hours per month). However, the provider and participant must request an exemption before a provider works beyond the overtime limits. Without the exemption, the provider may get a violation. To apply for an exemption, see “the exemption criteria and process” below.

DHCS will allow more overtime on a case-by-case basis, if:

- (1) The worker lives in the same home as the Waiver participant. The worker does not have to be a family member; or
- (2) The worker is now giving care to the Waiver participant, and has done so for two or more years, without a break; or
- (3) DHCS agrees that there are no other possible care providers to assist with the care. The Waiver participant must work closely with DHCS care managers. The DHCS care manager will ask the participant to show that he/she tried many times to get another provider.

***How Can a Waiver Participant Show that There Are No Other Workers Able to Provide Care?***

Reasons a participant may not be able to find a new provider include:

- Participant lives in a rural area;
- Participant cannot find available providers who speak the participant’s primary language;

To show DHCS that the participant has tried to find a provider, the participant needs to demonstrate that he/she has:

--Posted ads for the job but no one responded;  
--Contacted the Public Authority for Provider Registry list and no providers were available or could meet the participant's needs; and  
--Kept track of any other ways the participant has tried to find a provider.  
The participant must include:

--How many possible care providers the participant met with;  
--Why the participant did not hire the care provider, or  
--Whether the provider refused the job.

### ***What is the Process for Getting an Exemption?***

DHCS care managers will work with Waiver participants and providers to approve exemptions on a case- by-case basis.

To ask for an overtime exemption, providers must fill out the Workweek Exemption for WPCS Care Providers form DHCS 2279.

(<http://www.dhcs.ca.gov/services/ltc/Documents/WPCSCareProvidersExemptionRequestForm.pdf>)

The participant (or his or her authorized representative) and the provider must sign the form, and return it to the Department of Health Care Services.

The DHCS care manager will check the form. The DHCS care manager may need to ask the provider and participant for more information. Then the DHCS care manager will go over all the information and make a decision. The provider and the participant will get a letter, within two weeks from the receipt of the exemption request that says if the request was approved, denied, or if DHCS needs additional information.

Approved exemption requests will begin on May 1, 2016 to avoid any potential violations. DHCS will send a Participant Assignment of Authorized Hours Agreement Form, with the approval letter. This is also known as Form DHCS 2256. This form has the participant's authorized hours. The participant needs to fill out the provider's weekly schedule and return it to DHCS.

DHCS will continue to monitor each Waiver participant's care and provider situations. This is to safeguard waiver participants' health, safety, and welfare and ensure all waiver rules are followed.

***Who Should I Call if I Have Questions?***

If you have questions, call your IHO care manager or the WPCS Hotline at (916) 552-9214.

If you need a copy of this notice in another language, in Braille, or in large print, call (916) 552-9105.

***What Should I Do if My Provider is Denied an Exemption?***

You should ask for a denial notice and file for a Medi-Cal appeal if your provider is denied an exemption. DRC is keeping track of these denials, so if you have tried to get an exemption and were not able to, please call DRC at 1-800-776-5746.

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