



Department of Health Care Services
MEMORANDUM

DATE: August 5, 2016

TO: Tribal Chairpersons, Designees of Indian Health Programs, and Urban Indian Organizations

FROM: Original Signed By Sandra "Sam" Willburn, Chief,
Primary, Rural, and Indian Health Division

SUBJECT: Notice of Proposed Change to the Medi-Cal Program

The purpose of this memo is to provide information regarding a proposed change to the Department of Health Care Services' (DHCS) Medi-Cal Program that will be submitted to the Centers for Medicare and Medicaid Services (CMS). DHCS is forwarding this information for your review and comment.

DHCS is required to seek advice from designees of Indian Health Programs and Urban Indian Organizations on Medi-Cal matters having a direct effect on Indians, Indian Health Programs or Urban Indian Organizations per the American Recovery and Reinvestment Act of 2009 (ARRA). DHCS must solicit the advice of designees prior to submission to CMS of any State Plan Amendment, waiver requests or modifications, or proposals for demonstration projects in the Medi-Cal program.

Please see the enclosed summary for a detailed description of this DHCS proposal.

QUESTIONS AND COMMENTS:

Indian Health Programs and Urban Indian Organizations may also submit written comments or questions concerning this proposal within 30 days from the receipt of notice. Comments may be sent by email to tyra.taylor@dhcs.ca.gov or by mail to the address below:

Contact Information

Department of Health Care Services
Long- Term Care Division
ATTN: Tyra Taylor
MS 4502
PO Box 997437
Sacramento, CA 95899-7413

In addition to this notice, DHCS plans to cover this proposal in the next quarterly Medi-Cal Indian Health webinar. Please note that Indian Health Programs and Urban Indian Organizations may also request a consultation on this proposal at any time as needed.

Enclosure



**Department of Health Care Services (DHCS)
Tribal and Designees of Indian Health Programs Notice**

PURPOSE:

This notice is to provide information of tribal interest regarding the implementation of regulation changes to the federal Fair Labor Standards Act (FLSA) and corresponding State law provisions affecting In-Home Supportive Services (IHSS) under the Medi-Cal program.

BACKGROUND

On October 1, 2013, the United States Department of Labor (DOL) published the Final Rule on the Application of the Fair Labor Standards Act (FLSA) to Domestic Service (RIN 1235-AA05). 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 serving Medi-Cal members, 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 Medi-Cal recipients are authorized for medical accompaniment services. The Final Rule was scheduled to go into effect on January 1, 2015.

In response to the new federal regulations, two bills, Senate Bill (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 working for Medi-Cal members. The provisions of these bills are documented in All County Letter (ACL) 14-76 (October 8, 2014).

On December 22, 2014 and January 14, 2015, the United States District Court for the District of Columbia vacated the Final Rule insofar as it 1) prevented third-party employers from claiming applicable wage and overtime exemptions for services provided by live-in providers and employees performing companionship services and 2) revised the definition of companionship services (*Home Care Association of America v. David Weil* (2014) 76 F. Supp. 3d 128 and *Home Care Association of America v. David Weil* (2015) 78 F. Supp. 3d 123).

On August 21, 2015, the Appellate Court for the District of Columbia Circuit reversed the District Court's decisions (*Home Care Association of America v. David Weil* (2015) 799 F. 3d 1084). This decision effectively reinstated the final rule described above adopted by DOL. As a result of this reversal, the California Department of Social Services, which operates the IHSS program on behalf of the Medicaid Agency, Department of Health Care Service (DHCS), is implementing the workweek, overtime, and travel time requirements for IHSS providers serving Medi-Cal members in the State of California.

On November 6, 2015, the State announced that the payment of overtime, travel time, and wait time compensation to providers of IHSS Medi-Cal recipients would be implemented as of February 1, 2016. DHCS intends to submit proposed State Plan Amendment (SPA) 16-026, which will include any changes to existing IHSS payment methods and standards deemed necessary by the federal Centers for Medicare and Medicaid Services to implement FLSA regulation changes, and/or corresponding technical edits to update the relevant State Plan pages in accordance with current State law governing the IHSS program.

SUMMARY OF PROPOSED CHANGES

As of February 1, 2016, IHSS providers serving Medi-Cal members will be paid overtime, at a rate equal to one and one-half times the regular rate of hourly pay, when their time worked exceeds 40 hours per workweek. The term "workweek" is defined in statute 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.

In addition, as of February 1, 2016, IHSS care providers serving Medi-Cal members will be paid for travel time when the provider works for multiple recipients and is required to travel from one job site directly to another job site during the same workday. A provider will not be compensated for travel to and from his/her home to any Medi-Cal IHSS recipient's location.

IMPACT TO TRIBAL HEALTH PROGRAMS

The proposed changes will not impact tribal health programs or alter the services they currently offer in any way, as the tribal health programs do not administer IHSS.

IMPACT TO FEDERALLY QUALIFIED HEALTH CENTERS (FQHCs)

The proposed changes will not impact FQHCs. IHSS can only be administered via approved care providers. To become an IHSS care provider an individual must complete a mandatory orientation process that includes but is not limited to submitting to a criminal background check and completing provider enrollment documents. IHSS is administered by CDSS through the counties and, in some counties, a county-established public authority, not through other health care providers such as FQHCs. Consequently, FQHCs will not be impacted by the proposed changes.

IMPACT TO INDIAN MEDI-CAL BENEFICIARIES

The proposed changes will impact all Medi-Cal beneficiaries who receive IHSS; including Indian Medi-Cal beneficiaries, by allowing them to have a provider work overtime. Medi-Cal beneficiaries who have providers working IHSS hours in an amount greater than the maximum amount of hours permitted in a workweek will need to have one or more additional providers. The proposed changes do not impact Indian Medi-Cal beneficiaries in any manner different than they impact other Medi-Cal beneficiaries.

RESPONSE DATE

Indian Health Programs and Urban Indian Organizations may also submit written comments or questions concerning this proposal within 30 days from the receipt of notice. Comments may be sent by email to tyra.taylor@dhcs.ca.gov or by mail to the address below:

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