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GAVIN NEWSOM
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DATE: May 27, 2022

Policy Letter No. 22-001

TO: Home and Community-Based Alternatives (HCBA) Waiver Agencies
HCBA Participants and WPCS Providers

SUBJECT: Waiver Personal Care Services (WPCS) Workweek Overtime Exemption
Request and Secondary Review Process

PURPOSE

The purpose of this policy letter is to describe the WPCS Workweek Overtime Exemption application and Secondary Review Process for the Home and Community Based Alternatives (HCBA) Waiver for HCBA Waiver Agencies, HCBA participants, and WPCS providers.

BACKGROUND:

WPCS is a service offered to participants enrolled in the HCBA Waiver (formerly known as the Nursing Facility/Acute Hospital (NF/AH) waiver).

In 2013, the United States Department of Labor stated that overtime and minimum wage laws apply to In-Home Supportive Services (IHSS) and WPCS providers.¹ These providers must receive overtime pay for hours worked over 40 hours in a workweek at a rate not less than time and one-half times their regular rate of pay. Legal challenges caused a delay in the rule going into effect.

Based on this change, California law changed to add overtime and travel time pay for IHSS and WPCS providers with limitations.² On February 1, 2016, Medi-Cal began paying providers for overtime, with limits on the number of authorized WPCS and IHSS hours one provider is allowed to work in a workweek.

Overtime is paid for the authorized hours a provider works over 40 hours in a week, taking into account both WPCS and IHSS hours. If a provider works both WPCS and IHSS hours, those hours are added together to calculate the total hours worked per week and the amount of overtime due per week.

¹ Final Rule on the Application of the Fair Labor Standards Act (FLSA) to Domestic Service (RIN 1235-AA05).

² Welfare and Institutions Code section 12300.4. Senate Bill (SB) 855 (Chapter 29, Statutes of 2014) and SB 873 (Chapter 685, Statutes of 2014), were chaptered in California on June 20, 2014, and September 27, 2014, respectively.

REGULAR RULES FOR OVERTIME HOURS

California law limits the number of overtime hours that an IHSS/WPCS provider can work under normal circumstances.³ The total IHSS and/or WPCS hours worked by any one provider (no matter how many Medi-Cal participants they work for) cannot be more than 283 hours in a month. Please see [CDSS All-County Letter 16-01](#) for a detailed explanation of the following calculations.

A. Providers who work for two or more participants:

A provider working for two or more Medi-Cal participants can work up to 12 hours in a day, up to a total of 66 hours worked in one week, with a limit of no more than 283 hours worked in a month.

B. Providers who work for one participant:

A provider who works for only one Medi-Cal participant can work no more than 12 hours in a day, up to a total of 70 hours and 45 minutes per workweek, with a limit of no more than 283 hours worked in a month.

WPCS WORKWEEK OVERTIME EXEMPTIONS

To maintain continuity and quality of care and enable WPCS participants to remain safely in their homes, the Department of Health Care Services (DHCS) has two WPCS Workweek Overtime Exemptions (Exemptions) that approve providers to work additional hours above the limits discussed above. **An approved Exemption allows a WPCS provider to work and be paid for up to a maximum of 12 hours per day, for a total of 360 hours per month of IHSS and WPCS combined, not to exceed the participant's monthly authorized hours.**⁴

The HCBA Waiver requires that any participant authorized for more than 360 hours of combined IHSS and WPCS care must have at least two providers before the participant and provider can request an Exemption for the provider.

The provider and participant must submit a request for the exemption to DHCS **before** the provider works beyond the standard overtime limits. If the provider does not have an approved Exemption from DHCS, the provider will get a violation if they work more than the standard overtime limit. Multiple violations will result in the provider being suspended or terminated from working as an IHSS and WPCS provider.

³ WIC section 12300.4

⁴ The WPCS Workweek Overtime Exemption is separate from and analogous to the IHSS request for exemption from workweek limits authorized under WIC section 12300.4. Both exemptions will allow an IHSS/WPCS provider to work up to a maximum of 360 hours per month of combined IHSS and WPCS hours, not to exceed the participant's monthly authorized hours. Providers only need one approved exemption, either an IHSS or WPCS Overtime Exemption, to be approved to work up to 360 hours per month. They do not need to have both exemptions.

Regardless of the number of waiver participants served by the provider, the overtime Exemption process is the same. Exemptions from the regular overtime workweek limit will only be allowed by DHCS in the following limited circumstances:

Exemption 1: Waiver Participants Enrolled *On or Before* January 31, 2016

For Waiver *participants* who were enrolled in the NF/AH Waiver or In Home Operations (IHO) Waiver *on or before* January 31, 2016, and whose functional and/or behavioral needs require that the IHSS and/or WPCS services be provided by a specific provider, an Exemption from the regular overtime rules will be approved if any one or more of the following is shown to be true:

- (i) The provider lives in the same home as the waiver participant, at least five days and nights per week on a regular basis even if the provider is not a family member.
- (ii) The provider currently provides care to the waiver participant at least eight hours per day, and has done so for two or more years continuously.
- (iii) The waiver participant is unable to find an additional local caregiver who speaks the same language as the participant, resulting in the participant being unable to direct his or her own care.

Exemption 2: Waiver Participants Enrolled *After* January 31, 2016:

For participants who were enrolled in the NF/AH or IHO Waivers after January 31, 2016, or were originally enrolled in the HCBA Waiver (which was effective January 1, 2017), an exemption from the regular overtime rules will be approved, on a case-by-case basis, if both (a) and (b) are present:

a. At least one of the following is shown to be true:

(1) The care provider lives in the same home as the waiver applicant or participant at least five days and nights per week on a regular basis. They do not have to be a family member;

-OR-

(2) The care provider is now furnishing consistent care to the Waiver participant at least eight hours per day and has done so for two or more years, without a break;

-OR-

(3) The waiver participant is unable to find an additional local caregiver who speaks the same language as the participant, resulting in the participant being unable to direct his or her own care;

-OR-

(4) The provider provides WPCS for more than one **Waiver** participant;

-AND-

b. DHCS agrees that there are no other possible care providers to assist with the Waiver participant's care. To meet this requirement, the participant and provider must do the following:

(1) The Waiver participant must work closely with Waiver Agency Care Management Team (CMT), and/or DHCS nurses when there is no Waiver Agency, to attempt to find other care providers. DHCS will require documentation of reasonable attempts to hire other providers. Possible reasons that a Waiver participant may not be able to find a new provider include, but are not limited to:

- The Waiver participant lives in a rural area;
- No providers are available who speak the Waiver participant's primary language;
- The participant's functional and/or behavioral care needs are such that they require the assistance of a specific provider.

(2) To demonstrate that they have tried to find other providers, the Waiver Agency CMT and Waiver participant will be required to provide documentation that they have:

- Posted ads for the job, and either no one responded or those that did were unable to fill the Waiver participant's needs; and/or
- Contacted the Public Authority for a Provider Registry list and no providers were available or could meet the Waiver participant's needs; and/or
- Contacted Home Health Agencies and Personal Care Agencies; and/or
- Kept track of any other ways the Waiver participant has tried to find a provider.

(3) The Waiver Agency CMT and participant may be required to submit a log to DHCS detailing:

- How many possible care providers were contacted ; and
- Names, phone numbers, and dates for care providers contacted; and
- The reason(s) why the Waiver participant did not hire the care provider.

WPCS WORKWEEK OVERTIME EXEMPTION REQUEST PROCESS

DHCS has updated the *Waiver Personal Care Services (WPCS) Workweek Overtime Exemption Request* form (DHCS 2279). The prior version of DHCS 2279 form can no longer be used to apply for the workweek exemption.

Effective July 1, 2022, all new WPCS workweek exemption requests *must* go through an initial review and approval process with the participant's assigned HCBA Waiver Agency, or DHCS Administrative Case Manager when there is no Waiver Agency.

1. The HCBA Waiver Agency CMT will work with the WPCS participant in exploring available options for hiring additional providers prior to completing the DHCS 2279 form. All attempts to find/utilize other providers must be documented by the

participant and Waiver Agency CMT and included with the DHCS 2279 form that is submitted to DHCS.

2. In order for a request to be submitted to DHCS the Waiver Agency CMT must agree and certify on the DHCS 2279 form that the Waiver participant/provider qualifies for the overtime Exemption and that the Waiver Agency CMT and participant has made reasonable efforts to find other providers in accordance with the guidelines set forth herein by signing the DHCS 2279 form. If the Waiver Agency does not agree that such is the case, then the Waiver Agency will deny the request in writing along with instructions on how to request a Secondary Review. Forms without the Waiver Agency CMT's certification will not be accepted by DHCS.

3. The DHCS 2279 form must be filled out completely, signed and submitted electronically to CareManagement@dhcs.ca.gov, or by mail to:

Department of Health Care Services
Integrated Systems of Care Division
1501 Capitol Avenue, MS 4502
P.O. Box 997413
Sacramento, CA 95899-7413
ATTN: WPCS OT Exemption Review

The form must be submitted directly by the Waiver Agency on behalf of the participant.

4. The Waiver Agency must document in MedCompass that a completed and signed Exemption request was submitted to DHCS and all supporting documentation must be uploaded to the MedCompass document center.

5. Upon receipt of the completed DHCS 2279, DHCS will review the Exemption request according to state and federal laws and regulations. Within 30 days of receipt of the request from the Waiver Agency, DHCS will mail a written approval or a denial notification letter to the Waiver Agency, WPCS provider and the waiver applicant/participant. An approval will be in effect for the period of one year. A denial notification letter will include instructions on how to request a Secondary Review.

6. All WPCS workweek overtime Exemption requests must be renewed every year. The Waiver Agencies will set up a "Task" in MedCompass six weeks prior to the due date to complete the renewal form, if necessary. This renewal process will entail the participant and provider submitting a new Exemption request with supporting documentation to the Waiver Agency for initial review and approval, which will be due to DHCS for review 30 days prior to the termination of the current overtime Exemption.

WPCS WORKWEEK OVERTIME EXEMPTION SECONDARY REVIEW PROCESS

DHCS has established and implemented a secondary review process for WPCS Workweek Overtime Exemption denials. If a provider/participant disagrees with the

denial, from either the Waiver Agency or DHCS, and/or they wish to submit additional supporting documentation, they may request a Secondary Review. When a provider/participant receives an initial WPCS Workweek Overtime Exemption Request denial letter from the Waiver Agency or DHCS, they have 30 days from the date of that letter to file a request for a Secondary Review, as specified below. If a provider/participant fails to request a Secondary Review within 30 days of the initial denial, the denial will stand and the provider/participant may not submit another request for an Overtime Exemption until 90 days have passed since the initial denial of the Overtime Exemption Request.

Providers/participants may choose to submit additional documentation or justification of the need for the WPCS Workweek Overtime Exemption. However, providers/participants can request such a Secondary Review with or without presenting additional/new information in support of their overtime Exemption request. The provider/participant may simply wish to have a different person within DHCS review their initial claim.

Upon completion of its review of the information, DHCS will make a final decision to either uphold or overturn the denial and will issue written notification to the Waiver Agency CMT, participant, and provider.

The provider/participant may work with the Waiver Agency CMT to begin collecting the appropriate documentation to submit a **new** Overtime Exemption request 3 months (90 days) from the date of the initial denial letter, with the required documentation. This submission would become a new request for an overtime Exemption. During this 90-day time frame, the provider/participant should be working with the Waiver Agency CMT to find new providers and document efforts of searching for other care providers to submit with their new request.

How to Request Secondary Review

A provider, or a participant, whose request for an Exemption from the normal overtime rules has been denied, may request a Secondary Review of the denial by submitting a written request on the *WPCS Workweek Overtime Exemption Secondary Review Request* form (DHCS 2280) within 30 days of the denial notice. The DHCS 2280 form must be filled out completely, signed and submitted electronically to CareManagement@dhcs.ca.gov, or by mail to:

Department of Health Care Services
Integrated Systems of Care Division
1501 Capitol Avenue, MS 4502
P.O. Box 997413
Sacramento, CA 95899-7413
ATTN: WPCS OT Exemption Secondary Review

The form may also be submitted directly by the Waiver Agency on behalf of the participant.

Once DHCS receives the properly executed DHCS 2280 form, DHCS will:

- Review the original overtime exemption request as well as any additional documentation submitted by the provider/participant. If necessary, the documentation will also be reviewed by DHCS' clinical consultant team.
- If necessary, schedule a phone conference with the participant and/or provider to discuss the Secondary Review Request. If the additional documentation submitted is sufficient to authorize the request, no phone conference will be scheduled.
- DHCS will make a final decision within 30 days of receipt of the Secondary Review Request, and, will mail a letter to the participant and provider to notify them of DHCS' decision. If a telephone conference was held, the decision may take up to 45 days.
- If DHCS grants the overtime Exemption request after the secondary review process, the overtime exemption will be effective retroactive to the date DHCS received the initial request and will expire 1 year after that date.

DHCS Tracking and Reporting Requirements

DHCS will record the number of secondary review requests that are received, the number of requests approved (i.e., those in which DHCS' initial denial is overturned), and the number of requests determined ineligible (i.e., those in which DHCS' initial denial is upheld). These statistics will be posted on the DHCS website on a quarterly basis.

If you have questions regarding the requirements of this Policy Letter, please contact the WPCS Hotline at (916) 552-9214.

Sincerely,

Original Signed By

Joseph Billingsly
Assistant Deputy Director and Acting Chief
Integrated Systems of Care Division

Attachments:

Waiver Personal Care Services (WPCS) Workweek Overtime Exemption Request (DHCS 2279)

WPCS Workweek Overtime Exemption Secondary Review Request form (DHCS 2280)