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SB 855: PROBLEMS

INTRODUCTION

The new federal rules on overtime for domestic workers require that IHSS providers be paid overtime (one and one-half times their hourly wage) for work above 40 hours per week. Most IHSS consumers will not be affected by these new rules; some IHSS consumers may benefit by increased household income if they share a home with their provider, and others may benefit if the new rules enhance the job and attract a bigger pool of good providers. The state has no control over the federal rules, which define the state as the “third-party” employer of the IHSS providers. However, the state’s response to those rules, embodied in SB 855, causes several serious problems for IHSS consumers and providers.

SB 855 is complicated; our publication explains its impacts. See <http://www.disabilityrightsca.org/pubs/555401.pdf>. In brief, it:

- Confirms that overtime is connected to the provider’s total hours (including hours for multiple consumers and hours for IHSS and Waiver Personal Care Services combined).
- Limits the total hours a provider can work to 61 hours per week, no matter how many IHSS consumers employ that provider. (Although SB 855 refers to a 66 hour per week cap, the only consumers and their providers for whom the 66 hour limit applies are those consumers whose documented unmet needs insulated them from the 8%/7% cut. The vast majority of providers will be capped at 61 hours.)

- Divides the monthly IHSS hours into weekly hours, because overtime is calculated by the week.

The two most serious problems with SB 855 are:

1. There are no exceptions to the 61 hour per week limit.
2. People who are on the Nursing Facility/Acute Hospital (NF/AH) and IHO waivers may lose services because of overtime.

NOTE: On July 3, 2014, the Centers for Medicare and Medicaid Services (CMS) issued an Information Bulletin to the states covering the new overtime rules in Self-Direction programs. (IHSS is one of those programs.) It includes this directive:

When states impose limitations on overtime or the use of compensable travel time, they will need to develop strategies that continue to protect individuals' access to the services and supports authorized in his/her person-centered plan. For example, as identified in the 1915(c) Waiver Technical Guide, these strategies may need to include exceptions made in the event of state-defined circumstances, such as worker shortages or when requiring additional caregivers would place an individual at risk of harm due to specialized needs of the individual or in an emergency situation. As always, states should not only consider Medicaid requirements, but also those under the Americans with Disabilities Act and the Supreme Court's decision in Olmstead v. L.C., 527 U.S. 581 (1999).

Below is a more detailed explanation of the problems with SB 855.

1. NO EXCEPTIONS TO 61 HOUR PER WEEK LIMIT

Providers shall not work more than 66 hours per week, minus the 7% reduction while it is in effect. This limitation applies even if the provider works for more than one consumer. For most providers, this means that their weekly limit is 61 hours per week, unless one or more of the consumers they serve has an exception to the 7% reduction. There are no other exceptions to this limitation.

Examples:

A. Consumer Brown receives 30 hours per week of IHSS. Her provider works 35 hours per week providing IHSS services to another consumer. Because that provider cannot work more than 61 total hours per

week, one or both of these consumers will have to find another provider. The two consumers don't know each other, but now their IHSS is intertwined because they share a provider. Aside from the problem of figuring out which consumer has to find another provider, if one of the consumers cannot find a second provider, because of her location, or the few hours she needs to be filled, or any other reason, there is no exception process which would enable Consumer Brown to continue with her desired current provider.

B. A family has two children (including an adult child) on IHSS. The mother is the IHSS provider, and although she may really work round-the clock, each child gets 35 hours per week for which the mother is paid. Because she can't work more than 61 hours per week, she must find another caregiver to work the hours above 61. Some IHSS consumers will not tolerate a stranger as caregiver, the parent may not be able to find a caregiver who will perform the needed tasks and the family has relied on the IHSS income to keep their household together and their children out of institutions.

Moreover, the only way parents of minor children are allowed to be IHSS caregivers is by demonstrating that there is no other suitable caregiver and that they left employment or are barred from seeking employment because of the needs of their children. Now, they are being told that there ARE other caregivers, without any evidence that this is so. There is no exception in SB 855 for these families, who just want to continue caring for their children.

2. LOSS OF SERVICES FOR NF/AH WAIVER PARTICIPANTS

About 3,600 Californians are on the NF/AH Waiver. They have a fixed individual cost cap (budget) for their services; the budget covers IHSS as well as services under the Waiver. Most people on the Waiver receive IHSS. Many but not all people on the Waiver receive Waiver Personal Care Services (WPCS), which is similar to IHSS and often delivered by the same provider who delivers the IHSS services.

When the cost of IHSS goes up, either through a wage increase or overtime, the Waiver budget does not go up. If the consumer is at the limit of the Waiver budget, the consumer loses services instead. So even though the consumer has been assessed as needing a certain level and type of service, those services are reduced when the cost of the service goes up. For instance, if the individual cost cap is \$4,000 per month, and \$3,000 of that is spent on IHSS, if a IHSS overtime pushes the cost of

IHSS to \$3300 per month, the consumer loses \$300 worth of Waiver services.

The statute says that it is the state's **intent** that people who get Waiver Personal Care Services will not lose services. Intent is not a guarantee and this language offers nothing to the people who get IHSS and nursing services or other Waiver services, and no WPCS.

Examples:

A. Consumer Green is on the NF/AH waiver; Provider White is his primary caregiver for 27 years. Consumer Green's needs, combined with the low Waiver caps, mean that he is at the limit of his Waiver budget. Provider White currently provides all of Mr. Green's IHSS and WPCS services since their only other provider left for a higher-paying job. In theory, Provider White can work and be paid overtime for the hours between 40 and the cap. However, if she does that, Mr. Green loses services because his Waiver budget will decrease. In reality, she is limited to 40 hours per week, while almost every other provider can work up to 61 hours. This may decrease her income, and because Provider White and Consumer Green share a household, Mr. Green's ability to stay at home would be at risk. SB 855 says that the state is supposed to help them avoid a reduction in hours, but we understand that to mean that the state will only help them find other providers. However, from experience, they are unlikely to be able to find providers to do all the hours above 40 per week. If Provider White works all of Mr. Green's authorized hours in the absence of another provider, she either a) doesn't get paid for it; or b) puts it on her timesheet, gets paid for it, and risks suspension from the IHSS program. If she doesn't do the work, Mr. Green is in immediate jeopardy.

B. Consumer Blue is on the NF/AH Waiver and gets maximum IHSS, but the Waiver pays for nursing services at home instead of WPCS because he needs the nursing. When the cost of IHSS goes up because of overtime, he will lose nursing services or IHSS or both, both of which he is assessed as needing. He has no protection in the statute, because he does not receive Waiver Personal Care Services.