



NATIONAL
EMPLOYMENT
LAW
PROJECT



U.S. Department of Labor Home Care Rules: Key Considerations for Developing an Exceptions Process for Overtime Caps

This brief is designed to provide workers, consumers, employers, and states with a description of the key elements of an exceptions policy to any worker-hours caps. Any exceptions policy should ensure that individuals are not placed at serious risk of institutionalization as a result of the caps. States should plan an implementation budget that ensures stable worker hours, with no unreasonable reductions that can further destabilize the workforce, reducing the potential for sustaining a long-term, professional workforce.

Department of Labor Home Care Rules

The US Department of Justice and HHS' Office of Civil Rights have urged states implementing caps on home care worker hours to develop an exceptions policy for individuals who might be placed at serious risk of institutionalization as a result of the caps.¹ Their letter reminds states that under the Americans with Disabilities Act (ADA), as interpreted by the Supreme Court's *Olmstead v. L.C.* decision, public entities must ensure that all individuals with disabilities can receive services in the most integrated setting appropriate to their needs. Under federal law, a state will violate the ADA and *Olmstead* if its overtime caps lead to cuts in services that force individuals with disabilities into institutions or cause a decline in their health and safety that places them at serious risk of institutionalization. Furthermore, unreasonable cuts to worker hours can destabilize the workforce, reducing the potential for sustaining a long-term, professional workforce to meet current and future home care demands.

An exceptions process should contain allowances for **short-term exceptions** for emergencies (e.g., a provider unexpectedly quits or is unable to arrive at his/her shift) as well as for **long-term exceptions** for individuals with complex care needs or other reasons. For example, individuals living in rural areas may be unable to hire additional workers.

Exceptions processes that fail to include both short-term and long-term exceptions will not adequately protect states from risk of *Olmstead* violations.

¹ See Dear Colleague letter: http://www.ada.gov/olmstead/documents/doj_hhs_letter.pdf

Criteria for Authorizing Exceptions

The State of Oregon's Office of Developmental Disabilities Services has developed an exceptions process to its 50 hour cap on worker hours. Oregon's policy is a good example of a robust policy that allows for exceptions in a range of circumstances where the cap could lead to a loss in services or negatively impact the individual's health and safety. Specifically, Oregon's policy authorizes exceptions for individuals who meet one or more of the following criteria:

- **Provider Capacity Exception**: No qualified In Home provider agency or [Personal Support Worker] ... within 45 minutes of the individual's service location is able to provide needed services.
- **Provider Unable to Work**: A provider quits, is terminated, no longer meets qualifications, or credentials have expired.
- **Out-of-Town Situations**: An individual requires care to ensure their health and safety, and it is not feasible to bring additional providers.
- **Relief or Substitute Care**: When another provider or caregiver who has been scheduled to provide services becomes unavailable to provide services critical to the health and safety of the individual.
- **Emergent Need**: An urgent need for care arises and exceeding the limit is unavoidable without risking the health and safety of the individual.
- **Unique/Complex Needs**: The individual's health and safety would be compromised by adding additional providers to the service plan.

(Quoted from Oregon Office of Developmental Disabilities Services, Developmental Disabilities Worker's Guide: Exceptions to Individual Support Plan Hourly Cap for Personal Support Workers, published July 20, 2015.²)

These reasons encompass a broad variety of circumstances why an individual may require an exception to state-imposed caps. Furthermore, they cover both **short-term** and **long-term** reasons why an exception request may be necessary to ensure an individual's health and safety, while also ensuring the individual can remain in his or her own home and community in accordance with *Olmstead*.

Oregon's **Unique/Complex Needs** component is of particular importance because it recognizes that in some instances, a particular worker may be required for certain tasks in order to ensure an individual's health and safety. For example, individuals with compromised immune systems may be put at risk by having multiple workers. As the DOJ/HHS letter noted, some individuals "with extraordinary medical or behavioral needs may not be able to tolerate multiple workers in their home."

² Full text available at:

<https://www.dhs.state.or.us/spd/tools/dd/cm/PSW%20Hours%20Limits%20Exceptions%20Worker%20Guide.pdf>

Process for Requesting, Responding To, and Appealing Exceptions Requests

States should ensure that individuals are notified about the exception criteria and the process for requesting an exception. Both individuals themselves and case managers, who should proactively identify circumstances where overtime may be needed, should be able to make a request for an exception.³ States also should ensure that there is a timely response to requests, preferably within a specific timeframe. For example, the state of California responds to exceptions requests in its In-Home Supportive Services (IHSS) program within ten calendar days, although a response may be made immediately if the request is made via telephone:

An IHSS recipient seeking an exception may contact the county to make the request via telephone or written correspondence. If the request is made via telephone, the county IHSS staff may approve or deny the exception request immediately while speaking with the recipient.⁴

As noted above, California also permits written requests to be submitted. It is recommended that all states allow written exceptions requests in addition to telephone requests in order to accommodate individuals who may prefer or require a particular method. Finally, states should ensure that there is a process for individuals to seek review of a denial of an exceptions request, such as through a state's Medicaid appeals system.⁵

Assistance with Addressing Unauthorized Overtime

States should work with consumers and case managers to find solutions to address any unauthorized overtime. The state should provide assistance, additional supports and outreach to individuals whose requests for overtime are denied or who are repeatedly using unauthorized overtime. The state should make clear to consumers and workers that workers must be paid for any work performed and all hours worked, regardless of the policy and even if it is considered "unauthorized" and assist the consumer with finding alternatives to meeting their service needs.

³ Letter from DOJ AAG Perez and HHS OCR Director Rodriguez to Governor Gregoire, October 22, 2012, http://www.ada.gov/olmstead/documents/ltr_gov_gregoire.docx, p.2.

⁴ Quoted from <http://www.cdss.ca.gov/lettersnotices/entres/getinfo/acl/2016/16-01.pdf>, p. 11.

⁵ Letter from DOJ AAG Perez and HHS OCR Director Rodriguez to Governor Gregoire, October 22, 2012, http://www.ada.gov/olmstead/documents/ltr_gov_gregoire.docx, p.2.

Contacts & Resources

If you have any questions, please contact:

- National Employment Law Project (NELP), Sarah Leberstein (sleberstein@nelp.org) or Caitlin Connolly (cconnolly@nelp.org), 202-683-4814, www.nelp.org/campaign/implementing-home-care-reforms
- Bazelon Center for Mental Health Law, Alison Barkoff (alisonb@bazelon.org)
- PHI, Robert Espinoza (respinoza@phinational.org), (718) 928-2085, www.phinational.org/fairpay
- Department of Labor, www.dol.gov/whd/homecare, 1-866-487-9243
- A list of State Labor Offices can be found on the US DOL Wage and Hour website: www.dol.gov/whd/contacts/state_of.htm

Supported, in part, by a grant from the Open Society Foundations.