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New Overtime Rule for DSPs Impacting Services to Individuals with Developmental Disabilities

The earnings of Direct Support Professionals (DSPs) remain among the lowest in the service industry. Studies have shown that this low income continues to impede efforts to improve both the circumstances of DSPs and the quality of the services they provide to people with disabilities.¹

Hourly wage employees in other professions receive protection under the Fair Labor Standards Act to receive overtime pay when working in excess of 40 hours per week. Up until recently, DSPs who support people with developmental disabilities to live in their own homes, assist them with self-care, and play a vital role in ensuring they experience a high quality of life, were not entitled to overtime pay. By exempting DSPs from overtime pay, our society (and the law) has demonstrated little value for the work they do.

Fortunately, the U.S. Department of Labor changed the overtime regulations for DSPs in 2014, enforcing a new rule that pays them “time and a half” when they work more than 40 hours per week. This rule was scheduled to go into effect in January 2015, but was challenged in court. On October 13, 2015, the U.S. Court of Appeals issued its mandate upholding the rule in *Home Care Association of America v. Weil*, No. 15-5018 (D.C. Cir.).

The Council has long advocated for increased pay for DSPs and celebrates the long-term impact of this decision, but recognizes that without an increase in rates for these services, waiver providers and those utilizing self-direction will face many challenges in the days ahead.

Some waiver providers began implementing the new rule in January, opting not to wait for the outcome of the court challenge. Others are just beginning implementation now. Waiver participants in self-direction were informed of the impact of the rule last week in a letter from Assistant Secretary Mark Thomas with the Office for Citizens with Developmental Disabilities (OCDD). The letter advised participants of two options for coming into compliance with the rule:

- schedule their staff to work 40 hours per week (or less), or
- establish a rate of pay that allows overtime pay for staff to work more than 40 hours per week.

Neither of these options is easy and making the necessary changes will undoubtedly cause hardship for many individuals, families and DSPs. The news in the letter caught many waiver recipients in self-direction by surprise and they were understandably upset that more notice was not provided to them

¹ Application of the Fair Labor Standards Act to Domestic Service, 29 C.F.R. § 552 (2013). Retrieved from <http://www.regulations.gov/#!documentDetail;D=WHD-2011-0003-9830>





by the Department of Health and Hospitals (DHH) in order to begin planning for the changes. DHH reports that since the rule was in litigation, its applicability was in question until the day it became effective.

DHH further reports that support coordinators and Acumen (the fiscal agent for self-direction) are being provided information to assist waiver participants in making any necessary changes to staff, wages, and/or schedules. The state must ensure the health and safety of waiver participants. Waiver participants who are unable to find a solution that works for them are encouraged to contact their [Local Human Services District/Authority Office](#) or [OCDD Central Office](#).

Knowing this rule was coming, DHH included funding to cover the cost of the overtime in their budget request for this fiscal year, but it was not included in the Governor's Executive Budget. DHH Secretary Kathy Kliebert has once again requested funding to cover the cost of the overtime in DHH's budget request for the upcoming fiscal year.

It is vitally important that the new Governor and legislature understand how this funding will impact the lives of individuals with developmental disabilities, their families, and the staff that support them when they are making decisions in the Special Legislative Session that will be called after the January 11th Inauguration.

Those interested in more information about this new rule can click [here](#).

