



CALIFORNIA DEPARTMENT OF HUMAN RESOURCES

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VIA ELECTRONIC MAIL AND U.S. MAIL

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1031 18th Street
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RE: ***Comments Regarding Proposed In-Home Supportive Services Employee-Employer Relations Act Regulations***

Dear Counsel:

Thank you for the opportunity to provide written comments on the Public Employment Relations Board (PERB)'s proposed final regulations concerning the In-Home Supportive Services Employee-Employer Relations Act (IHSSEERA). (Gov. Code, § 110000, et seq.) Although the Department of Human Resources (CalHR) is in agreement with the majority of the proposed regulations, CalHR would like to reiterate its objection to proposed regulations 32602, 32610 and 36211, as set forth more fully below. Also, given the additional time for review, CalHR and the Department of Social Services (CDSS) submit these additional comments on the proposed regulations not previously raised in written comment.

- Proposed Regulation 32037, subdivision (b)

This regulations defines an "employee" or "individual provider" that is covered by IHSSEERA and PERB's jurisdiction. We suggest two amendments. First, the definition is verbatim to the definition used in the IHSSEERA itself at Government Code section 110003, subdivision (b), except for one notable exception. The last sentence of the statute is not included in PERB's regulation. It states "Individual providers shall not be deemed to be employees of the Statewide Authority for any other purpose, except as expressly set forth in this title." Given that PERB is utilizing the statutory definition of "employee," the last sentence providing the limitation of the employment relationship should be included.

Second, as you are aware, IHSSEERA initially only applies to the 8 demonstration counties that are part of the Coordinate Care Initiative (CCI). We suggest adding language to the definition of “employee” to capture that limitation. As it reads now, there could be confusion that an In-Home Supportive Services (IHSS) provider in a non-CCI county is covered by the IHSSEERA regulations. We suggest adding language to address this limitation as follows:

(b) “Employee” or “individual provider” means any person authorized to provide in-home supportive services pursuant to Article 7 (commencing with Section 12300) of Chapter 3 of Part 3 of Division 9 of the Welfare and Institutions Code, and Sections 14132.95, 14132.952, and 14132.956 of the Welfare and Institutions Code, pursuant to the individual provider mode, as referenced in Section 12302.2 of the Welfare and Institutions Code. For purposes of these regulations, “employee” does not include any person providing in-home supportive services pursuant to the county-employed homemaker mode or the contractor mode, as authorized in Section 12302 of the Welfare and Institutions Code *or those persons performing in-home supportive services in a non-Coordinated Care Initiative county. Individual providers shall not be deemed to be employees of the Statewide Authority for any other purpose, except as expressly set forth in the IHSEERA.*¹

- Proposed Regulation 32142, subdivision (c)(8)

This regulation states who is the proper recipient for service. Following our previous discussions regarding the proper recipient, PERB agreed to our request to include CDSS and CalHR as required recipients. However, upon further review of the regulations and IHSSEERA, we request the regulation be amended to only reference the Statewide Authority as it is the only employer of record for the purposes of IHSSEERA. While CDSS and CalHR may assist in responding to any unfair practice charges or other filings, the proper recipient of service should be the employer. This requested amendment is consistent with Regulation 32142’s designation of “proper recipient” for the other labor relation acts that PERB administers.

CalHR requests the following edits to regulation 32142, subdivision (c)(8):

in the case of the Statewide Authority as defined in Government Code section 110003(k): the individual designated to receive

¹ Italicized words designate CalHR’s requested additions and strikethrough words designate CalHR’s requested deletions to the proposed regulations.

service at the Statewide Authority, ~~the Department of Social Services and the Department of Human Resources~~ or its designated representative.

- Proposed Regulations 32602, subdivision (a), 32610, subdivision (g), 32611, subdivision (e), 32615, subdivision (a)(4)

As we do not believe there is statutory authority in IHSSEERA that would support processing a violation of a rule adopted by the Statewide Authority as an unfair labor practice, we reiterate our previous objections as follows.

CalHR disagrees with the addition of “and any alleged violations of rules or regulations adopted by the Statewide Authority pursuant to IHSSEERA” to PERB regulation 32602; subdivision (g) of PERB regulation 32610; and subdivision (e) of PERB regulation 32611. CalHR also disagrees with the inclusion in PERB regulation 32615, subdivision (a)(4) of “the applicable rule or regulation adopted by the Statewide Authority pursuant to IHSSEERA...alleged to have been violated.” As recognized by PERB, “If the language of a statute is not ambiguous, then the plain meaning of the language shall govern its interpretation.” (*California State University* (2004) PERB Dec. No. 784-H ; *San Diego Community College District* (2001) PERB Dec. No. 1467). Here, the plain language of IHSSEERA does not permit violations of rules or regulations adopted by the Statewide Authority to be processed as unfair practice charges.

Although IHSS providers historically and currently fall under the jurisdiction of the Meyers-Milias-Brown-Act (MMBA), IHSS providers in the eight demonstration counties will fall under the jurisdiction of the newly enacted IHSSEERA upon the county implementation date, as defined in Government Code section 110005 and Welfare and Institutions Code section 12300. While the IHSSEERA follows the MMBA in many respects, the IHSSEERA differs significantly in regards to the adoption of rules and regulations.

Under the MMBA, Government Code section 3507 provides various enumerated areas where a local agency may adopt rules. The MMBA also expressly provides in Government Code section 3509 that a violation of a rule adopted under section 3507 shall be processed as an unfair practice charge.²

However, the IHSSEERA does not contain a similar statutory provision that parallels MMBA section 3509. Given the other parallel provisions between the two acts, the deliberate exclusion of a parallel authority in IHSSEERA is particularly significant. By allowing alleged

² See also the Trial Court Act and the Court Interpreter Act, which like the MMBA, contains express provisions permitting the violations of rules adopted by the respective employer to be processed as unfair practices. (See Gov. Code, §§ 71639.1 and 71825.)

violations of rules adopted by the Statewide Authority to be processed as an unfair practice charge, the regulation impermissibly adds words to the IHSSEERA. “If the words of the statute are clear, a court should not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history.” (*California State University* (1997) PERB Dec. No. 452-H). Moreover, “where a statute contains a given provision with reference to one subject, the omission of such provision from a similar statute containing a related subject is significant to show that a different intention existed.” (*Cumero v. PERB* (1989) 49 Cal.3d 575, 596). Thus, it cannot be said that the Legislature intended for violations of rules adopted by the Statewide Authority to be processed as unfair practice charges, and any regulation purporting to permit such an unfair would be outside the scope of IHSSEERA.

Indeed, regarding the authority to adopt rules, the IHSSEERA more closely parallels the Ralph C. Dills Act (Dills Act). (See Gov. Code, § 3520.7.) The IHSSEERA and the Dills Act have nearly identical language regarding the respective employer’s ability to adopt reasonable rules.³ The Dills Act, like the IHSSEERA, does not contain a section permitting a violation of a rule to be processed as an unfair practice charge. This lack of statutory authority is also reflected in PERB’s current regulatory scheme as there is no regulation permitting a violation of a rule to be processed as an unfair practice charge for Dills Act parties. Likewise, as there is no statutory authority permitting violations of a rule adopted by the Statewide Authority to be processed as unfair labor charges under the IHSSEERA, there should be no PERB regulation that permits such an unfair practice charge.

The IHSSEERA does, however, permit the challenge of the adoption or enforcement of a rule or regulation as a violation of the IHSSEERA. (Gov. Code, § 110035, subd. (d).) This process is currently captured in the proposed PERB regulations and conveys that adoption or enforcement of a rule that is not in conformance with the IHSSEERA shall be an unfair practice. (Proposed PERB regulation 32610, subd. (f).)

Accordingly, although violations of the IHSSEERA itself may be processed as an unfair practice charge and the adoption or enforcement of a rule that does not conform with the IHSSEERA may also be processed as an unfair practice, there is no statutory support for the proposition that a violation of a rule or regulation adopted by the Statewide Authority is an unfair practice. The proposed regulatory language permitting a violation of a rule to be processed as an unfair practice charge is therefore impermissible as it would be inconsistent with the IHSSEERA. (See *Harris Transportation Co. v. Air Resources Board* (1995) 32 Cal.App.4th 1472, 1479 [“Where a statute empowers an administrative agency to adopt regulations, such regulations must be

³ CalHR acknowledges the IHSSEERA contains an additional area of rulemaking authority the Dills Act does not. (See Gov. Code, § 110035, subd. (a)(4), which does not have a counterpart in the Dills Act.)

consistent, not in conflict with the statute, and reasonably necessary to effectuate its purpose.”].)

- Proposed Regulations 95170, subdivision (a) and 95310, subdivision (a)

We request the time limits in both of these regulations for the Statewide Authority to produce an alphabetical listing of employees be increased to 30 days. Given the complexities of the IHSS workforce and technological limitations, the proposed 20 day timeline is unrealistic.

We continue to look forward to working with PERB on the implementation of the IHSSEERA. If you have any questions or concerns, please do not hesitate to contact us.

Sincerely,



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JMG:lo

cc: Office of Administrative Law

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