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May 22, 2019

The Honorable Gavin Newsom  
 Governor  
 State of California  
 State Capitol  
 Sacramento, CA 95814

The Honorable Toni Atkins  
 President pro Tempore  
 California State Senate  
 State Capitol, Room 205  
 Sacramento, CA 95814

The Honorable Anthony Rendon  
 Speaker  
 California State Assembly  
 State Capitol, Room 219  
 Sacramento, CA 95814

Re: IHSS MOE Proposal: Request to Link Collective Bargaining to Reduced County MOE Inflation Factor

Dear Governor Newsom, President pro Tem Atkins, and Speaker Rendon:

The California State Association of Counties (CSAC), the Urban Counties of California (UCC), and the Rural County Representatives of California (RCRC) write to express our strong support for the Governor’s proposal to revise the county In-Home Supportive Services (IHSS) Maintenance of Effort (MOE); additionally, our organizations remain opposed to the trailer bill language to link an aspect of this proposal with collective bargaining. Our organizations are grateful for the overall IHSS MOE proposal, which will create a more sustainable structure for counties to manage IHSS costs and continue to deliver vital services on behalf of the state. We sincerely appreciate the collaboration with the Administration and the Legislature that resulted in this proposal.

However, we remain opposed to the requested trailer bill language from the United Domestic Workers of America (UDW) that a county’s MOE inflation factor would only be reduced to four percent if they have a collective bargaining agreement in place that pays IHSS providers an amount that exceeds the state minimum wage. Our organizations appreciate that the May Revision did not include this request to link collective bargaining and the reduced inflation factor. We respectfully ask that this request be rejected and not included in the final budget agreement to enact the revised county IHSS MOE. This letter outlines the numerous policy and legal reasons for our opposition.

**Progress on Collective Bargaining**

Counties have made significant strides at reaching collective bargaining agreements; 18 counties reached new collective bargaining agreements to increase IHSS provider wages under the current 2017 MOE. This is notable progress and above the historic pace of new agreements. Most significantly, all of these agreements were done at a time when counties were facing severe 1991 Realignment shortfalls and devastating cuts to health and mental health programs. Despite these current and growing cost pressures, many counties demonstrated a commitment to increasing wages and supporting the IHSS provider workforce.

Last month CSAC surveyed counties on the status of collective bargaining and found that in addition to the 18 counties with new agreements, three counties have current agreements that predate the 2017 MOE, and 24 counties are currently negotiating or in some form of active engagement with provider unions. In the months since the January Budget proposal, there has been noteworthy progress among counties that are currently negotiating. There are additional counties and provider unions that have now reached tentative agreements. This progress will continue when counties are able to bargain in good faith under the better fiscal outlook that is achieved with the IHSS MOE proposal.

Another important finding from CSAC's survey is that eight counties have had no contact from provider unions to schedule negotiations. This demonstrates that it is possible for counties to be punished by the proposed trailer bill language through no fault of their own. If a provider union doesn't come to the table in response to a county's outreach or doesn't take any action to engage in negotiations, then it is not possible for a county to reach an agreement with that provider union. In these examples, a county could be required to have the seven percent inflation factor and higher IHSS costs even though the union itself hasn't engaged on negotiating a new agreement.

### **Raises Constitutional Concerns**

We believe that requiring a higher inflation factor when a county and recognized employee organization fail to reach agreement on an MOU or collective bargaining agreement raises significant constitutional concerns. The courts have unequivocally found that a county Board of Supervisors has plenary authority over the compensation of county employees. (*County of Riverside v. Superior Court (Riverside Sheriff's Assn.)* (2003) 30 Cal.4th 278 (2003); *County of Sonoma v. Superior Court (Sonoma County Law Enforcement Assoc.)* (2009) 173 Cal.App.4th 322.) Similarly, the courts have concluded minimum wage requirements that may apply to other public entities do not apply to counties. (*Sheppard v. North Orange County Regional Occupational Program* (2010) 191 Cal.App.4th 289, 310-311, citing *County of Riverside, supra*, 30 Cal.App.4th at p. 285; *Dimon v. County of Los Angeles* (2008) 166 Cal.App.4th 1276, 1279, 1281; *Curcini v. County of Alameda* (2008) 164 Cal.App.4th 629, 643.) So while the Legislature can impose procedures regarding labor relations, it cannot impose substantive requirements that interfere with the county's ultimate right to set compensation. (*County of Sonoma, supra*, 173 Cal.App. 4th at p. 348.)

To the extent the Legislature arguably has authority to supersede this plenary authority in regard to employee compensation, that authority must be based on an overriding and compelling statewide interest. Thus, the Legislature may, at least as to charter cities, apply a statewide minimum wage to city employees, when that imposition is justified by the "state's interest in protecting the health and welfare of workers by ensuring they can afford the necessities of life for themselves and their families." (*Marquez v. City of Long Beach* (2019) 32 Cal.App.5th 552, 557.) By contrast, the language here, which would decrease the MOE inflation factor from seven percent to four percent only if the county and employee organization reach agreement on an MOU that exceeds the minimum wage, cannot possibly be based on ensuring that IHSS providers can afford the necessities of life (which is the purpose of the *standard* minimum wage), but rather to tip the bargaining scales in favor of the employee organization by penalizing counties that do not agree to provide a wage *exceeding* the minimum wage. The state cannot constitutionally impede on a county's authority through this type of penalty for such a purpose.

Similarly, the Legislature is prohibited from conditioning funds (in this case, the reduced MOE inflation factor) on a county relinquishing its power to control its municipal affairs. In other words, the Legislature may not use a "constitutional power . . . by way of condition to attain an unconstitutional result." (*Sonoma County Organization of Public Employees v. County of*

*Sonoma* (1979) 23 Cal.3d 296, 319.) Thus, this attempt to condition a county's ability to receive the lower MOE inflation factor on its waiver of its plenary authority over compensation itself raises significant constitutional concerns.

We believe these indisputable legal principles apply to IHSS providers as well. While IHSS providers are not employees of the counties for all purposes, the State has delegated the responsibility for implementing the IHSS program to counties (Welfare & Institutions Code, §§ 12302, 12301.6), and each county is required to act as an "employer," or to establish an "employer," for IHSS providers for purposes of the state public employee-employer relations laws. (Welfare & Institutions Code, § 12302.25.) Further, the courts have concluded that IHSS providers are county employees for purposes of state and federal wage laws. (*Guerrero v. Superior Court (Weber)* (2013) 213 Cal.App.4th 912.)

### **Disrupts the Balance of Local Bargaining; Punishes Counties Paying Above State Minimum Wage**

The UDW language tips the scales of local collective bargaining. Under the UDW language, a county could follow all applicable laws, negotiate in good faith, and offer IHSS providers a wage increase above state minimum wage. However, if the provider union doesn't accept that proposal, the county would be punished with a higher inflation factor even though the county did everything within its power and budget to pay IHSS providers above state minimum wage. This request gives the IHSS provider union all of the leverage in a local bargaining situation.

Under the UDW language, there are counties that could be required to have the higher seven percent inflation factor even though that county is paying IHSS providers above the state minimum wage. The UDW language requires a county to both have a current agreement and pay a wage that exceeds the state minimum wage. There are currently four counties (Contra Costa, Napa, Marin, and Sonoma) that don't have a current contract, but pay above the state minimum wage. One of these counties pays the second highest IHSS provider wage in the state and another pays the sixth highest. Some of these counties attempted to initiate bargaining and have been delayed by the provider union. However, despite county efforts to negotiate and the county paying a wage that exceeds the state minimum wage, these counties could end up with the higher seven percent inflation factor because of the UDW language. The UDW's trailer bill language serves to punish counties that are exhibiting the very behavior that the request is trying to encourage.

There are other counties that could potentially fall into this situation in the coming year, including counties that have reached an agreement under the new MOE to increase wages as a wage supplement. This means they will permanently be paying IHSS providers above the state minimum wage, even as the state minimum wage continues to increase in the coming years. However, these counties could also be harmed if they don't have a new agreement when the current one expires.

### **Precedent Setting**

UDW's language would be precedent setting in tipping the scales of local bargaining. The trailer bill language would open the door for other labor unions to seek legislative remedy every time they have a dispute with an employer over collective bargaining.

Counties are complying with the law and continue to negotiate in good faith with local provider unions. There is an existing process available through the Public Employment Relations Board (PERB) for any local labor disputes and this is the appropriate remedy to resolve any local bargaining issues. Failure to bargain in good faith claims can be raised and adjudicated at PERB. Examples from 2009 and 2015 demonstrate that depending on the given facts, sometimes the union prevails, and sometimes the public agency prevails.

## Conclusion

County Supervisors are committed to the IHSS program and proud to partner with the state on this important program that serves more than half a million individuals. Our members recognize the value of the IHSS program, which provides critical services to seniors and disabled individuals to help them remain in their own homes rather than in more expensive institutional care. County social workers, Public Authority workers, and IHSS providers are the backbone of this social services program which has proven to reduce care costs and improve the well-being of residents.

Counties engaged in collective bargaining under the 2017 MOE for nearly two years under an outlook of years of 1991 Realignment shortfalls and cuts to health and mental health programs. Despite that outlook, 18 counties increased IHSS provider wages and that progress will accelerate with the fiscal outlook that is achieved by the IHSS MOE proposal. Now is not the time to engage in a punitive measure of questionable constitutionality that would prevent the full intent of the IHSS MOE proposal from being realized and that would be inconsistent with the collective bargaining responsibilities that the state has required counties to carry out.

Our organizations respectfully request that UDW's language to link collective bargaining and the reduced inflation factor not be included in the final budget agreement to enact the revised IHSS MOE. Should you have any questions about our position, please do not hesitate to contact us. Thank you for your consideration.

Respectfully,



Darby Kernan  
Deputy Executive Director of Legislative Affairs  
California State Association of Counties



Kelly Brooks-Lindsey  
Legislative Representative  
Urban Counties of California



Tracy Rhine  
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Rural County Representatives of California

cc: The Honorable Holly Mitchell, Chair, Senate Budget and Fiscal Review Committee  
The Honorable Phil Ting, Chair, Assembly Budget Committee  
Keely Bosler, Director, Department of Finance  
Mark Ghaly, Secretary, Health and Human Services Agency  
Pat Leary, Acting Director, Department of Social Services  
Ana Matosantos, Cabinet Secretary, Office of Governor Newsom  
Tam Ma, Deputy Legislative Secretary, Office of Governor Newsom  
Chris Woods, Office of the Senate President pro Tempore  
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