

CSAC Excess Insurance Authority In-Home Supportive Services Analysis

Purpose

The purpose of this analysis is to identify exposures related to the In-Home Supportive Services programs resulting from legislative changes adopted in 1999, and to outline optional methods for managing that exposure.

Background

AB 1682 (Honda) was signed by the Governor in July of 1999. The bill made changes to the In-Home Supportive Services (IHSS) programs. The legislation did the following:

- Amended Section 16262.5 of the Government Code;
- Amended Sections 12301.6, 12303.4, 14132.95 and 17600 of the Welfare and Institutions Code;
- Added Sections 12301.3, 12301.4, 12301.8 and 12302.25 to the Welfare and Institutions Code;
- Repealed Sections 12302.7, and 17600.11 of the Welfare and Institutions Code.

Some of the additions and amendments listed above are regarding funding issues and/or provider wage issues. This analysis will not include these areas, but will concentrate on the requirement to establish an employer of record for the IHSS personnel and the various exposures/issues that requirement creates.

The IHSS program was created to assure that within each county qualified aged, blind, and disabled persons are provided with services in order to permit them to remain in their own homes and avoid institutionalization. These services include domestic services and services related to domestic services, heavy cleaning, personal care services, accompaniment by a provider when needed during necessary travel to health-related appointments or to alternative resource sites, yard hazard abatement, protective supervision, teaching and demonstration directed at reducing the need for other supportive services, and paramedical services which make it possible for the recipient to establish and maintain an independent living arrangement.

There are three modes of service that can be used to provide the required in-home supportive services. The homemaker mode involves the county hiring homemakers and other in-home supportive personnel in accordance with county civil service or merit system requirements. The contract mode allows the counties to contract with another agency to provide services. The individual provider (IP) mode allows the recipients to choose their own provider for these services. It should be noted that AB 1682 requires counties with an IHSS caseload of more than 500 recipients to offer an IP option if at least one recipient requests it. It is also extremely important to note that in the IP mode, the recipients of IHSS retain the right to hire, fire and supervise the work of the IHSS personnel providing services to them.

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AB 1682 requires that on or before January 1, 2003, each county shall act as, or establish, an employer of record for IHSS. This appears to be primarily for collective bargaining purposes. The homemaker and contract modes comply with this requirement, as the county or the contractor, respectively, act as the employer of record. For the IP mode, the legislation allows the county to act as the employer of record or establish a public authority or nonprofit consortium to act as the employer of record.

Public Authority and Nonprofit Consortium Options

The public authority and nonprofit consortium options are authorized in WIC Section 12301.6. The two options are referred to in unison throughout most of this code section, and most of the responsibilities, requirements and immunities established apply to both. However, one significant exception is that a county is not subject to competitive bidding requirements when establishing a public authority. A county would be subject to these bidding requirements if they wanted to contract with a nonprofit consortium. This exception would seem to make the public authority much more viable. In fact, the nonprofit consortium option was only included in the originating legislation because the City/County of San Francisco was considering the use of such a consortium when the legislation was being drafted. They have since formed a public authority.

Currently there are a number of counties that have established public authorities. These have tended to be the larger counties, although some of the smaller counties are working to establish public authorities as well. According to a study conducted by the California Department of Social Services in February 2000, as of FY1998/99 there were six counties who had established public authorities and those six counties accounted for over 55% of the IHSS caseload statewide. Those numbers have increased significantly since that time and are expected to continue to increase due to a number of factors, including certain funding advantages for the counties associated with the creation of a public authority.

Section 12301.6(e) of the Welfare and Institutions Code identifies the following responsibilities as those that can be transferred to a public authority or nonprofit consortium: (1) the provision of assistance to recipients in finding IHSS personnel through the establishment of a registry, (2) investigation of the qualifications and background of potential personnel, (3) establishment of a referral system under which IHSS personnel shall be referred to recipients, (4) providing training for providers and recipients, (5) performing any other functions related to the delivery of IHSS, and (6) ensuring that the requirements of the personal care option pursuant to Subchapter 19 (commencing with Section 1396) of Chapter 7 of Title 42 of the United States Code are met. The section does not limit public authorities or nonprofit consortiums to these functions.

The county must continue to: 1) authorize services for IHSS recipients; 2) determine a recipient's need for IHSS, the level and quality of services required, and the eligibility of

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individuals to be served; 3) conduct the initial or any subsequent assessment of need for services; and 4) terminate the recipient's participation in the IHSS Program when appropriate. It should be noted that the county retains any liability exposure associated with these activities.

Liability

The public authority and nonprofit consortium options are desirable ones that counties should consider because section 12301.6 also establishes certain immunities that are specific to public authorities and nonprofit consortiums. Section 12301.6(f)(1) establishes that "Any nonprofit consortium contracting with a county pursuant to this section or any public authority created pursuant to this section shall be deemed not to be the employer of IHSS personnel referred to recipients under this section for purposes of liability due to the negligence or intentional torts of the IHSS personnel."

Section 12301.6(f)(2) provides that "In no case shall a nonprofit consortium contracting with a county pursuant to this section or any public authority created pursuant to this section be held liable for the action or omission of any in-home supportive services personnel whom the non-profit consortium or public authority did not list on its registry or otherwise refer to a recipient."

Finally, Section 12301.6(f)(3) states: "Counties and the state shall be immune from any liability resulting from their implementation of this section in the administration of the IHSS program. Any obligation of the public authority or consortium pursuant to this section, whether statutory, contractual, or otherwise, shall be the obligation solely of the public authority or nonprofit consortium, and shall not be the obligation of the county or state."

Our legal counsel feels that taken as a whole, these sections are attempting to provide immunity to all agencies whether County, nonprofit or a public authority for the acts or omissions of the in-home supportive services personnel. However, to our knowledge none of these immunities have been tested in court. It is our recommendation that when establishing a public authority or contracting with a nonprofit consortium, that the ordinance or contract refer to the immunities. There should also be clear indemnification language that obligates the public authority or nonprofit consortium to indemnify, defend and hold harmless the county against any and all liability arising from any act or omission by the public authority or nonprofit consortium.

Any nonprofit consortium contracting with a county for this purpose should be required to maintain general liability coverage including errors and omissions. A public authority that is established with a governing board other than the County Board of Supervisors should also be required to maintain such coverage. This can be accomplished through the county's program by naming the authority on the county's EIA policy, through the CPEIA, through Driver's SLIP program or through some other fully insured program. Those authorities that are governed by the Board of Supervisors can either cover the

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authority's liability through the county's program or purchase separate coverage. There would be no need to name the authority on the county's EIA policy if they should choose to cover them through the county's program.

Some other basic risk management techniques can and should be used to reduce exposure to all entities. The voluntary nature of IHSS should be made very clear throughout the process. The recipients are responsible to hire, fire, supervise and train the personnel providing services to them. They should always be provided with multiple options from the provider registry as far as service providers and given the opportunity to choose the provider that they feel is best for them. The recipients should be encouraged to interview each potential provider before deciding on whom to hire. The public authority, nonprofit consortium or county should develop a procedure for investigating the qualifications and background of the potential providers. They should also provide for training for the providers. The extent and the limitation of these activities should be communicated to the recipient prior to their selection of IHSS personnel. IHSS providers listed on the registry should be asked if they would be willing to provide limited transportation for the recipient. If they are willing, it should be verified that they have a valid California Drivers License, acceptable driving record and adequate auto liability insurance. This information should be disclosed to the recipient if they are in need of transportation from the provider.

A faithful performance bond should be purchased. If the Board of Supervisors governs the public authority, they can be added to the county's master bond. Otherwise, the public authority will need to purchase its own bond and can do so through the EIA's Crime/Bond Program.

Workers' Compensation

New Section 12302.25(c) states that: "Nothing in this section shall be construed to affect the state's responsibility with respect to the state payroll system, unemployment insurance, or workers' compensation and other provisions of Section 12302.2 for providers of in-home supportive services." Therefore, the workers' compensation exposure for the providers themselves remains with the State regardless of the mode of service selected. There is, however, the question of workers' compensation coverage for employees of the public authority or nonprofit consortium. For the nonprofit consortium, this would be a liability of the consortium itself. The County should require that they provide proof of adequate workers' compensation insurance coverage as they do for all other contractors.

If the county Board of Supervisors is the governing body of the public authority, the employees of the authority could be covered through the county's self-insured program and/or through the EIA's Primary and Excess Workers' Compensation Programs. If the county BOS is not the governing board of the authority, the authority should obtain its own coverage. This could be done through the CPEIA, the State Fund or some other fully insured program.

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Advisory Committees

AB 1682 also requires the establishment of an advisory committee, which will make recommendations on the preferred mode(s) of service to be utilized for each given county. Advisory committee members are appointed by the county Board of Supervisors. They will provide ongoing advice and recommendations regarding IHSS to, among others, the county Board of Supervisors. The committees must be made up of no more than 11 members, 50% of whom must be current or past users of personal assistance services. (Section 12301.3 contains other composition requirements that must be adhered to). Counties who establish public authorities or nonprofit consortiums that do not have the county Board of Supervisors as their governing boards are required to establish governing boards in compliance with the same composition requirements. They are therefore, not required to maintain a separate advisory committee.

The advisory committee members should be viewed as volunteers of the county, the same as the members of other county advisory committees. Therefore, the county would cover the liability of the advisory committee in their self-insured programs, and may have coverage under the EIA's Primary General Liability, Excess Liability and GLII Programs. There does not seem to be a significant errors and omissions exposure here as the committees are strictly advisory and have no decision-making authority. The county could also cover the workers' compensation exposure of the committee members if the county Board of Supervisors had passed a resolution extending such coverage to volunteers, if it is determined that the resolution is broad enough to extend to this type of volunteer.

Conclusion

AB 1682, among other things, created the need to establish an employer of record for In-Home Supportive Service personnel for purposes of provisions of statutory law regarding employer-employee relations. This can be accomplished by any of the modes of service already established in the Welfare and Institutions Code. For a variety of reasons, we have concluded that the establishment of a public authority is the most viable option especially for the medium to large counties. The Welfare and Institutions Code provides for a number of immunities for public authorities, provides funding advantages to the counties and allows counties to establish such authorities without subjecting them to competitive bidding requirements. Despite the existence of immunities, there are still a number of exposures that the counties must try to manage. We have attempted to identify these exposures in broad categories and to provide input as to how to address them.