

In-Home Support Services: Client Risks and Burdens

Summary

The 2005-2006 Grand Jury became aware that two individuals with criminal convictions had recently worked as in-home support caregivers under the program operated by the Ventura County In-Home Support Services Public Authority (Authority). This caused the Grand Jury to investigate the operation of the Authority, focusing on the risks and employer responsibilities placed on the Authority's clients.

The Grand Jury concluded that current practices place the Authority's clients at risk of physical and financial injury by In-Home Support Service (IHSS) providers whose backgrounds have not been sufficiently investigated. An existing program of background checks operated by the California Department of Justice is not used by the Authority. Failure to use that Department of Justice program may create a risk of lawsuit against the Authority and the Board of Supervisors by an injured IHSS client. There is also a risk of loss of Authority funds paid to ineligible service providers.

The Grand Jury also concluded that an unacceptable administrative burden has been placed on the Authority's clients to act as employers. This burden involves verifying eligibility to work in the United States (Form I-9). Federal laws allow the Authority to perform this task as the agent of IHSS clients. The Authority is more capable of performing this task than are the disabled and handicapped persons who are the Authority's clients.

The Grand Jury learned that the Authority plans to remedy some of the deficiencies in the way background checks are performed. The Authority is urged to use the California Department of Justice program to perform background checks on all current and future service providers. The Grand Jury also urges the Authority to complete Form I-9 for all current and future service providers.

Background

In-Home Support Services are locally operated programs funded by California with support from the federal government to provide non-medical housekeeping and personal-care services to the handicapped and disabled so that they may remain at home and not be institutionalized. Among these services are grocery shopping, cooking, bathing, and dressing. These programs provide services to clients (recipients) who are unable (in part or entirely) to afford such services on their own.

Note: In this report, the following terms are used:

- Authority: This is the Ventura County In-Home Support Services Public Authority, which operates the IHSS program within Ventura County.
- Registry: A Registry of IHSS providers, which is maintained by the Authority

- IHSS: In-Home Support Services. This term is used to describe clients of the Authority and the providers of services to those clients under the Authority's program.
- W&IC: California Welfare and Institutions Code
- CMIPPS: Case Managed Individual Provider Payroll System, the system by which IHSS providers are paid for their services

Methodology

The Grand Jury interviewed several staff members of the Human Services Agency, the Authority, and the Ventura County District Attorney's office.

The Grand Jury obtained and reviewed W&IC requirements for employing home support providers, the California Penal Code, copies of informational materials provided to IHSS clients and in-home caregivers, and forms required of in-home caregivers. The Grand Jury also reviewed administrative tasks placed on employers by the federal government.

Findings

Authority Operations

- F-01.** The Authority was created under W&IC §12301.6 as a government entity distinct from Ventura County, with the Ventura County Board of Supervisors as the governing board of the Authority.
- F-02.** W&IC §12301.6(f) generally grants the Authority immunity from civil liability to IHSS clients resulting from actions by their providers. However, this W&IC section has not been litigated. Thus, the boundaries of that immunity are not clearly defined.
- F-03.** Under the W&IC, the Authority client is the actual employer of in-home service providers, having the right to hire and fire providers.
- F-04.** The Authority is the employer of record for purposes of labor-management relations (e.g., collective bargaining) and required reports to the state.
- F-05.** Under the W&IC, an IHSS client receives subsidized in-home services because of an inability to pay the entire costs of such services. Those services are provided because the clients' disabilities or handicaps prevent them from performing normal personal-care and housekeeping tasks for themselves. By subsidizing these services, the Authority allows its clients to avoid being institutionalized.
- F-06.** As required by W&IC §12301.6(e), the Authority operates the Registry from which IHSS clients may employ providers.
- F-07.** The number of providers registered with the Authority is insufficient to meet the needs of all IHSS clients.
- F-08.** 22% of disabled and handicapped IHSS clients use providers obtained through the Authority's Registry.

- F-09.** 78% of the IHSS clients choose to use providers obtained on their own (often relatives, neighbors, or friends).

Eligibility of Individuals to be IHSS Providers

- F-10.** W&IC §12305.81 prohibits payment of a provider for in-home services under the IHSS program if the provider was convicted within the last 10 years of certain crimes. Those crimes include Medicaid fraud, MediCal fraud, fraud under Titles V, XX, or XXI of the federal Social Security Act, child neglect (California Penal Code §273a(a)), and elder abuse (Penal Code §368).
- F-11.** The prohibition of payments to providers under W&IC §12305.81 (see F-10 above) applies whether or not the provider was hired by the IHSS client through the Authority.
- F-12.** Providers are checked by the state of California for prior convictions of Medicaid fraud based on information supplied by the Authority for entering providers into the CMIPPS.
- F-13.** According to the Authority, background checks for providers on the Registry are done by the Ventura County Sheriff's Department. The scope of these checks only reveals crimes committed in Ventura County.
- F-14.** In 2005, two providers were sentenced in Ventura County courts for crimes against IHSS clients under Penal Code §368(e). In both cases, the Authority had referred the providers to the clients, although it is not known if the providers were actually listed on the Registry. Also in both cases, the providers had prior criminal records that indicated they were not suitable for employment as IHSS providers, including prior convictions that may have made them ineligible under W&IC §12305.81.
- F-15.** For background checks on providers not on the Registry, clients may request the Authority to perform the same checks as provided for those on the Registry, at the client's own unreimbursed expense.
- F-16.** While other criminal background checks of IHSS providers may be so intrusive as to be prohibited [Ref-01], the California Department of Justice provides criminal background information on providers to local IHSS registries and to client-employers when requested in accord with W&IC §15660.
- F-17.** In accord with W&IC §15660, a criminal background report on an IHSS provider requires the fingerprints of providers be submitted to the Department of Justice. A background report specifically tailored for local IHSS programs includes whether the person must register for having committed a sex offense against a minor (Penal Code §290) or has been convicted within the last 10 years for child neglect, child abuse, elder abuse, theft, robbery, burglary, or any felony.
- F-18.** When a criminal background report on an IHSS provider has been issued by the Department of Justice in accord with W&IC §15660, a follow-up report is issued if that person is subsequently arrested for certain specified crimes.
- F-19.** The Authority proposes that, starting in the 2006-2007 fiscal year, more extensive background checks will be performed on all new IHSS providers entered into the Registry.

- F-20.** The Authority proposes that, starting in the 2006-2007 fiscal year, background checks requested by IHSS clients of providers not on the Registry will be performed at the same level as for providers on the Registry and at the expense of the Registry, but only when so requested.
- F-21.** The Authority has not yet proposed to perform the more extensive background checks on existing providers, both those on and off the Registry.
- F-22.** In accordance with Penal Code §1150 (and other sections), complete background checks of IHSS providers by the Authority will require an enabling resolution by the Board of Supervisors acting as the governing board of the Authority.

IHSS Provider Payroll

- F-23.** The hourly rate of pay and fringe benefits for IHSS providers is negotiated between the Authority and the Service Employees International Union.
- F-24.** The state of California operates CMIPPS to provide payroll services for local IHSS programs with respect to the providers.
- F-25.** The Authority verifies timesheets submitted by in-home support providers through IHSS clients and arranges payment of provider wages through the CMIPPS.
- F-26.** Using the CMIPPS, the Authority determines the withholding of taxes from the pay of IHSS providers and remits those taxes, along with employer payroll taxes, to the appropriate state and federal taxing agencies. The clients do not pay employer payroll taxes; these taxes are paid by the Authority from IHSS funding.

Requirements on IHSS Clients as Employers

- F-27.** Although the W&IC does not specify requirements for legal residency of IHSS providers, federal law requires all employers to verify that each employee has the legal status to work in the United States. This is done by both the employee and employer completing a Form I-9 for each employee within three days of the beginning of employment.
- F-28.** The *Handbook for Employers* [Ref-02], which explains Form I-9, contains 36 pages.
- F-29.** Authority literature advises IHSS clients to complete Forms I-9 for their providers.
- F-30.** The Authority obtains the appropriate identification of those IHSS providers placed on the Registry sufficient to complete Form I-9, but the Authority does not actually complete the form.
- F-31.** For IHSS providers not on the Registry, the Authority does not obtain appropriate identification sufficient to complete Form I-9. Only a provider's Social Security number and name are collected.
- F-32.** The federal penalty on an employer for failing to complete a Form I-9 varies from \$100 to \$1,000 for each employee.

- F-33.** A Form I-9 must be retained for three years after employment begins or one year after employment ends, whichever is later.
- F-34.** The Authority is authorized by the federal government to process and retain Form I-9 for provider-employees as an agent of IHSS client-employers.
- F-35.** An undocumented worker residing in the United States may be arrested and deported by the U.S. Citizenship and Immigration Services.
- F-36.** Every employer in the United States is required by the Internal Revenue Code to prepare a Form W-2 for each employee, itemizing wages and taxes withheld. An employer must file one copy of Form W-2 for each employee with the Social Security Administration along with one signed Form W-3 from that employer.
- F-37.** *Instructions for Forms W-2 and W-3* [Ref-03] contains 15 pages.
- F-38.** As the payroll agent for the IHSS clients, the Authority is permitted by the Internal Revenue Service to issue and sign the Forms W-3 on behalf of those client-employers.
- F-39.** The Authority currently prepares Forms W-2 and W-3 and distributes the employee copies of Form W-2 to the IHSS providers and both forms to the Social Security Administration.

Conclusions

- C-01.** While backgrounds of providers are checked by the state to protect the IHSS program from fraud, background checks requested by the Authority may be too narrow and limited to protect IHSS clients from physical and financial injury. (F-12, F-13, F-14, F-15)
- C-02.** Although W&IC §12305.81 prohibits service providers from being employed and paid through IHSS programs if those individuals have criminal records involving specified crimes, the current screening of providers by the Authority is insufficient to enforce that law. This must be done before any non-registry provider can be paid. (F-10, F-11, F-13, F-14, F-15)
- C-03.** IHSS clients are both indigent and unable to perform daily living tasks. The large majority of clients who obtain providers without resorting to the Registry must choose to request background checks and then pay for them. This discourages them from obtaining any protection against hiring providers who might have a criminal history. (F-05, F-09, F-15)
- C-04.** An IHSS client suffering physical or financial injury from the criminal action of a provider whose prior criminal history was not sufficiently examined by the Authority might constitute actionable negligence. The scope and limits of the immunity from liability granted to the Authority and to the Ventura County Board of Supervisors (acting as the Authority's governing board) is untested. Thus, risk of damages payable by the Authority or the Board of Supervisors to an injured client remains unknown. (F-01, F-02, F-13, F-15)
- C-05.** If the Authority enters a provider into the CMIPPS who is ineligible to be an IHSS provider under W&IC §12305.81 and that provider is actually paid by the Authority for services to a client, the Authority or the Board of Supervisors

might be required to refund subsidies funded by the state and federal governments. (F-01, F-10, F-11, F-24)

- C-06.** A report is available from the Department of Justice on any criminal offenses that would make a person ineligible under W&IC §12305.81 to be employed as an IHSS provider. That report is available not only to the Authority but also to its clients. Once such a report has been requested, follow-up reports are automatically distributed if the provider is then arrested for certain specified crimes. For the Authority to obtain these reports and provide them to IHSS clients, Penal Code §1150 requires an enabling resolution from the Board of Supervisors. (F-16, F-17, F-18, F-22)
- C-07.** The Authority plans to perform complete background checks on all new providers entered into the Registry. The Authority also plans to perform complete background checks on all new providers not on the Registry when requested by IHSS clients. However, the Authority does not plan to perform these background checks on existing providers or where clients fail to request such checks on new non-Registry providers. Thus, compliance with W&IC §12305.81 cannot be assured for a large number of IHSS providers, even with the planned improvement in background checks. (F-09, F-10, F-11, F-20, F-21)
- C-08.** Requiring IHSS clients to act as employers for completing Forms I-9 for their providers places a burden on handicapped and disabled individuals, a burden which is often handled by trained staff within the human resources departments or outside agents for many other employers. (F-27, F-28, F-29)
- C-09.** By not acting as the agent for its clients in completing Forms I-9, the Authority places those clients at the risk of financial loss they cannot afford. It also places those clients at the risk of abrupt loss of necessary services rendered by IHSS providers who are deported because they are not legal residents of the United States. (F-05, F-30, F-34, F-35)
- C-10.** It may be more cost-effective for the Authority to handle all Forms I-9 as a matter of course instead of individually assisting each IHSS client when requested. Such action would also ensure that the Authority is in compliance with federal laws when issuing payroll checks to IHSS providers. (F-27, F-30, F-34)
- C-11.** The Authority is performing its proper role as payroll agent for its IHSS clients by preparing and distributing Forms W-2 and W-3. (F-36, F-37, F-38, F-39)

Recommendations

- R-01.** The proposal by the Authority to perform complete background checks on IHSS providers added to the Registry should be implemented. The services offered by the California Department of Justice under W&IC §15660 should be utilized for this purpose. (C-01, C-02, C-04, C-05, C-06)
- R-02.** As a normal part of entering a provider into the CMIPPS, the Authority should request a criminal background report from the California Department of Justice under W&IC §15660 as soon as an IHSS client informs the Authority that he or she has employed a provider who is not on the Registry. In order to

comply with W&IC §12305.81, this should be done for all such providers, not merely when requested by the client. This must be done before any non-registry provider can be paid. (C-01, C-02, C-03, C-04, C-05, C-06)

- R-03.** The Authority should develop a plan and schedule to obtain background reports from the California Department of Justice under W&IC §15660 for all current IHSS providers in order to comply with W&IC §12305.81. (C-01, C-02, C-03, C-04, C-05, C-06)
- R-04.** The Authority should develop procedures that promptly remove from IHSS employment any provider who is ineligible under W&IC §12305.81 according to a report from the California Department of Justice under W&IC §15660. (C-04, C-05, C-06)
- R-05.** Once the Authority obtains an initial background report on an IHSS provider from the California Department of Justice, the Department will notify the Authority regarding subsequent arrests of that provider. The Authority should develop procedures to monitor the progress of criminal cases filed so that a person who becomes ineligible to be a provider under W&IC §12305.81 because of a criminal conviction is promptly removed from IHSS employment. (C-05, C-06)
- R-06.** A report on an IHSS provider received from the California Department of Justice under W&IC §15660 should be provided by the Authority to any client who employs that provider. This includes not only a report that shows the provider is eligible under W&IC §12305.81 but also follow-up reports of subsequent arrests of the provider. (C-05, C-06)
- R-07.** The Board of Supervisors (as the governing board of the Authority) should enact the enabling resolution necessary to permit background checks of IHSS providers. (C-06)
- R-08.** When a person applies to be placed on the Registry as an IHSS provider, the Authority should complete a Form I-9 for that person as a normal part of processing the application in accordance with federal law. (C-08, C-09, C-10)
- R-09.** When an IHSS client informs the Authority that he or she has employed a provider not on the Registry, the Authority should complete a Form I-9 for that provider as a normal part of entering the provider into the CMIPPS in accord with federal law. (C-08, C-09, C-10)
- R-10.** The Authority should develop a plan and schedule to complete Form I-9 for all current IHSS providers. (C-08, C-09, C-10)
- R-11.** The Authority should develop procedures to maintain files of Form I-9 for all providers either on the Registry or entered into CMIPPS. These procedures must include retaining a Form I-9 for a provider in accord with federal law. The procedures must also provide for supplying copies of the Form I-9 to an IHSS client for each provider the client employs. (C-08, C-09, C-10)

Responses

Responses Required From:

Ventura County In-Home Support Services Public Authority (R-01, R-02, R-03, R-04, R-05, R-06, R-08, R-09, R-10, R-11) (Note: For recommendations R-03 and R-10, the Grand Jury requests copies of the indicated schedules when they become available.)

Ventura County Board of Supervisors (R-07)

Bibliography

References

- Ref-01. Attorney General letter-opinion to County Counsel, Yolo County, 5 September 2003
- Ref-02. *Handbook for Employers, Instructions for Completing Form I-9*, U. S. Department of Justice, Publication M-274, 1991
- Ref-03. *Instructions for Forms W-2 and W-3*, Internal Revenue Service, Catalogue #25979S, 2005