

DEPARTMENT OF SOCIAL SERVICES

744 P Street, Sacramento, California 95814



May 19, 2000

ALL-COUNTY LETTER NO. 00-36

TO: ALL COUNTY WELFARE DIRECTORS
ALL IHSS PROGRAM MANAGERS**REASON FOR THIS TRANSMITTAL**

- State Law Change
- Federal Law or Regulation Change
- Court Order or Settlement Agreement
- Clarification Requested by One or More Counties
- Initiated by CDSS

SUBJECT: IMPLEMENTATION OF ASSEMBLY BILL (AB) 1682

This All-County Letter (ACL) provides information regarding the implementation of AB 1682 (Chapter 90, Statutes of 1999). A provision of this bill added Section 12302.25 to the Welfare and Institutions Code (WIC) which states that each county, on or before January 1, 2003, must act as an employer of record or establish an employer of record for In-Home Supportive Services (IHSS) Program providers for specific legal purposes.

Specifically, this ACL answers questions from an October 7, 1999, meeting where approximately 70 questions and issues were raised. We are answering an initial set of the questions in this letter. State staff is preparing answers to the remaining outstanding questions. When those answers are available, we will provide them in a separate ACL.

The answers provided merely represent the Department's initial reading of the statute. They do not represent the Department's official position with respect to the issues raised. To the extent implementation of the statute will require the Department to officially interpret or make specific its provisions the regulatory process will be invoked.

Counties will recall that AB 1682 requires each county to create an Advisory Committee whose initial responsibilities include providing recommendations to the county's Board of Supervisors on the mode(s) of IHSS delivery the Board should adopt to comply with AB 1682. The Governor has included new funding in the May budget revision for the costs of AB 1682 advisory committees expected to be incurred by counties in the 2000-01 fiscal year.

Given that the role of the Advisory Committee is to furnish advice for consideration by the Board before it makes a decision regarding AB 1682, it follows that the Advisory Committee must be created before a county begins deliberations on the mode(s) of service delivery to select.

The Advisory Committee that is required under AB 1682 is distinct from the governing board required under the Public Authority mode. However, a county may elect to use its Public Authority governing board for the purposes of AB 1682 as long as the functions of the governing board for the purposes of AB 1682 meet the requirements of the bill.

If you have questions or concerns, you may contact Alan Stelmack, Chief, Adult Programs Branch at (916) 229-4583.

Sincerely,

*Original Document Signed By
Donna L. Mandelstam on 5/19/00*

DONNA L. MANDELSTAM
Deputy Director
Disability and Adult Programs Division

Attachment

AB 1682: QUESTIONS AND ANSWERS

1. **Question:** What is meant by “county administration of the Individual Provider mode?”

Answer: We interpret “County administration of the Individual Provider mode” to mean that a county can directly serve as the employer of record or perhaps use a bargaining agent to represent the county in fulfilling the county’s obligations under AB 1682 in the Individual Provider mode. This is distinct from the county employing county staff to provide IHSS program services under the Homemaker mode. The ability to use a bargaining agent as described above should not be presumed. The County’s labor relations counsel should be consulted on this issue.

2. **Question:** Does Welfare & Institutions Code (WIC), Section 12302.25 only refer to current Individual Providers?

Answer: Based upon the plain language of the statute, WIC, Section 12302.25 applies to both current and future Individual Providers.

3. **Question:** Does this statute really eliminate the Individual Provider mode?

Answer: No. The statute does not expressly or by implication eliminate the Individual Provider mode.

4. **Question:** Is this “Individual Provider option” the old Individual Provider mode, a Public Authority, or what?

Answer: The “Individual Provider option” means that a county with over 500 cases will have to establish an employer of record for providers who may continue to work as Individual Providers. The employer of record may be established by using a Public Authority, Non-Profit Consortium or directly administering the Individual Provider mode (see above) of service delivery even if only in a limited way. A county with over 500 cases would not be able to exclusively contract with private agencies or use only the Homemaker mode for all of their cases if a recipient requests the Individual Provider employer option.

5. **Question:** Does this statute call for training and background checks for IHSS providers? Are the costs the responsibility of the county, state, or employer of record?

Answer: AB 1682 does not “require” training or background checks for providers. However, WIC, Section 12301.6 which governs Public Authorities, requires a Public Authority to offer provider training, investigate provider

qualifications establish a referral system, and establish a provider registry. These costs are funded through the hourly rate paid to the Public Authority.

6. Question: Does this bill make IHSS/PCSP an entitlement?

Answer: AB 1682 did not change the current funding arrangements or eligibility requirements for either the PCSP or IHSS programs. As a covered Medi-Cal benefit, PCSP is an entitlement up to the 283 hours per month cap on services based on the assessed need for services.

7. Question: Will the implementation of AB 1682 and its associated costs result in a decrease in authorized hours?

Answer: No. WIC, Section 12302.25(f), specifically requires that no county, Public Authority, Non-Profit Consortium, contractor, or combination will (as the result of the implementation of AB 1682) reduce the amount of hours, determined to be necessary for a program recipient, based on individual need.

8. Question: Does this bill create an entitlement or an unfunded mandate?

Answer: AB 1682 provides that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions. In the case of both the Public Authority and contract modes, administrative costs of the Public Authority or contractor are funded in the approved hourly Public Authority or contract rate. (See also Question 6)

9. Question: What are the implications for the Case Management, Information and Payrolling System (CMIPS) changes for tracking training and other costs?

Answer: We are not contemplating any immediate changes to the CMIPS as a result of AB 1682 and no funds have been allocated for this purpose. At this time it is likely that substantive changes to CMIPS will occur as the result of the re-procurement of the CMIPS contract; however, we are open to ongoing discussions with the counties on CMIPS requirements under AB 1682.

10. Question: If a county has more than 500 cases, can a county interpret that before the passage of AB 1682 counties met the statutory requirement of AB 1682?

Answer: No, unless a county had an employer of record as defined by AB 1682 for their Individual Providers prior to the passage of AB 1682. Only a county with a Public Authority or Non-Profit Consortium could be deemed to have met the requirements of AB 1682 prior to its enactment. Additionally, if a county with more than 500 cases had contracted exclusively with a private agency, or

delivered all IHSS services through the Homemaker mode, the county would have been in compliance with AB 1682 unless a recipient requested the Individual Provider mode. Counties should construe a request from a recipient to use a provider who is not an employee of either a contractor or the county as a “request for the Individual Provider mode.”

- 11. Question:** How does AB 1682 define “mixed mode”? In mixed modes, are there two employers of record?

Answer: A mixed mode is defined as having a mix of the employer of record options. And yes, a county can have more than one option and more than one employer for providers. San Francisco County is an example. San Francisco County has both a Public Authority and a contract mode of service delivery.

- 12. Question:** What do the terms “employer of record” and “for the purpose of collective bargaining” really mean?

Answer: The term “employer of record” is used to designate the employer in a formal employer/employee relationship and is the designated entity that interacts with the provider workforce in the manner referenced in WIC Section 12302.25.

AB 1682 requires each county to act as, or establish, an employer of record for IHSS providers for the purposes of provisions of statutory law regarding employer/employee relations. The employer/employee relations of public agencies, such as Public Authorities, are governed by the Meyers, Milias, Brown Act. The employer/employee relations of private entities, such as IHSS contractors, are governed by other labor relations laws including the National Labor Relations Act.

- 13. Question:** Is there a conflict between the recipient’s right to direct the provider and the provider’s right to negotiate with the employer of record?

Answer: Notwithstanding the provisions of AB 1682 every recipient will continue to have the right to direct their provider of services. We do not believe it was the intent of the Legislature to change the current relationship between a recipient and his or her provider.

- 14. Question:** Are there still some employer functions the recipient retains?

Answer: AB 1682 does not change a recipient’s right to choose the individuals who provide their care and recruit, select, train, reject, or change any provider under the contract mode, or hire, fire, train, and supervise any provider under any other mode of service.

15. **Question:** Will the county be able to create an employer of record and then not negotiate anything?

Answer: The reference in AB 1682 to the Government Code Chapter which commences with Section 3500, expresses the Legislature's intent that the employer of record operates in the manner provided in that Chapter. This Chapter is intended to promote full communication between public employers and their employees, by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations.

Counties should consult with their legal counsel regarding their obligations to meet, confer and bargain with IHSS providers and their representatives under the cited code and under the laws governing private sector employers.

16. **Question:** Can a county establish a contractor to become an employer of record without doing a "contract mode"?

Answer: See Question 1. The county can act as an employer of record or may be able to contract with a bargaining agent to represent the county in fulfilling the requirements of AB 1682 and Government Code 3500. It is not clear, however, that this is an option. Counties will need to consult their labor relations counsel. This would be different from contracting with a private agency to provide IHSS services.

17. **Question:** How does the legislation impact the recipient's right to choose a particular mode?

Answer: Freedom of choice means that an IHSS recipient may choose among "available" modes and participating providers in their county. AB1682 does not change this. However, although recipients in the residual program previously had no right to force a county to operate an Individual Provider mode, it appears now that counties with 500 or more recipients may be required to offer an Individual Provider upon request.

18. **Question:** Where do the rights of recipients come in when there are different service delivery systems and access across state, different wage rates, etc? Does this raise an equal access or equal protection issue? How does local collective bargaining relate to federally approved Medicaid rate?

Answer: PCSP recipients have the right to choose among the IHSS modes and providers available in their area. IHSS residual program recipients are afforded the same opportunity. We do not believe there is an equal access or equal protection issue raised by AB 1682 as long as PCSP recipients continue to be allowed to have their provider of choice. Varying wages currently exist from county to county depending on the mode(s) of operation in the counties;

however, the wage “floor” at the minimum wage is consistent throughout the program.

- 19. Question:** Could a county select one option of employer of record and later change to another?

Answer: Yes, this legislation still provides the counties with flexibility in the establishment of an employer of record and allows counties to change to a different employer of record at another time.

- 20. Question:** How will we evaluate effects of AB 1682 in 3, 5, 10 years down the road?

Answer: Although the bill does not require a formal evaluation, the Department will be held accountable along with the counties to ensure that IHSS services are available and provided when needed in a cost-effective manner. The Department and counties will also be held accountable for the delivery of services of a reasonable quality to accomplish program goals. We expect to review on an ongoing basis the effects of AB 1682 on the availability of IHSS providers, the stability of the IHSS workforce, the quality of the services provided and program costs.

- 21. Question:** How will we evaluate effectiveness of mode of options and impact on clients to give the County Board of Supervisors more information to make decisions?

Answer: WIC, Section 12301.3, provides for an advisory committee that the County Board of Supervisors will utilize prior to implementing an employer of record. Presently, there are counties operating Public Authorities, contracts, Individual Provider, and mixed modes of service delivery that could give valuable insight into an employer of record option. We suggest that counties consult with one another as they consider their options under AB 1682.

- 22. Question:** How do we educate or brief the Boards of Supervisors?

Answer. See question 22.

- 23. Question:** What does it mean that a county can establish regional agreements?

Answer: This means that a group of counties may agree to organize and collectively meet the requirements of AB 1682.

- 24. Question:** If a client asks for a mode the county does not offer, is the county obligated to establish that mode?

Answer: No – with one exception. (See Question 4.) In a county that has an IHSS caseload greater than 500, the county is required to provide the Individual Provider employer option if requested by the recipient.

25. Question: Can you segment a population or run multiple methods to address particular parts of the population?

Answer: Yes. Whatever the manner in which a county decides to deliver IHSS services, the recipient retains the right to choose his or her provider.

26. Question: How does AB 1682 address issues of integrated Long-Term Care (LTC) and vice versa?

Answer: AB 1682 does not address or provide guidance as to its applicability under LTC integration. Specific questions regarding AB 1682 as it relates to LTC integration would require specific analysis.

27. Question: AB 1682 refers to Non Profit Consortium. Could a Non Profit Consortium be a Joint Powers Agreement (JPA)?

Answer: The Non Profit Consortium referred to is “as authorized under Section 12301.6.”

A Non Profit Consortium, as defined in WIC, Section 12301.6, must provide for, but is not limited to, all of the following functions:

1. Assisting recipients to find IHSS personnel through the establishment of a registry.
2. Investigating the qualifications and background of potential personnel.
3. Establishing a referral system under which IHSS personnel are referred to recipients.
4. Providing for training for providers and recipients.
5. Performing any other functions related to the delivery of IHSS.
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.

Counties should work with their legal counsels to make sure that a JPA will allow the involved counties to organize in a manner that meets the requirements for a Non-Profit Consortium.

28. Question: WIC, Section 12301.6(f)(3) states that the counties and the state are immune from liability. What does this mean in practice and is it legally appropriate language? Has it been tested and what protection does it provide?

Answer: The subdivision expresses legislative intent with regard to potential liability arising from implementation of the section. This provision, among other things, is intended to make a Public Authority or Non Profit Consortium solely responsible for the obligations the Public Authority enters into in implementing the WIC, 12301.6 regardless of whether the obligations are statutory, contractual or otherwise.

29. Question: Is there a potential to do a “no strike” policy statewide?

Answer: A “no strike” agreement is within the realm of collective bargaining. Counties should consult with their legal counsel on this issue.

30. Question: If a county has established a Public Authority, what law says that it is in compliance? Is it as simple as it reads or is it more complex?

Answer: If a county has a Public Authority, they have met the statutory requirements in that WIC, Section 12301.6, provides that a Public Authority is deemed the employer for purposes of Chapter 10. Compliance with AB 1682 also requires creation of an Advisory Committee. A county with a Public Authority advisory committee would meet this requirement if the committee’s role were to be expanded to meet AB 1682 requirements. Counties should note that AB 1682 requires each county to create an Advisory Committee whose initial responsibilities include providing recommendations to the county’s Board of Supervisors on the mode(s) of IHSS delivery the Board should adopt to comply with AB 1682.

Given that the role of the Advisory Committee is to furnish advice for consideration by the Board before it makes a decision regarding AB 1682, it follows that the Advisory Committee must be created before a county begins deliberations on the mode(s) of service delivery to select.

The Advisory Committee required under AB 1682 is distinct from the governing board that is required under the Public Authority mode. However, a county may elect to use its Public Authority governing board for the purposes of AB 1682 as long as the functions of the governing board for the purposes of AB 1682 meet the requirements of the bill.

31. Question: How does this legislation impact counties with fewer than 500 cases?

Answer: Counties with fewer than 500 cases must meet all of the requirements of AB 1682 except they do not have to offer the Individual Provider employer option if requested by a recipient. Nevertheless, if the employer of record in a county with fewer than 500 cases is a contractor, or the county opts for the homemaker mode, under Medi-Cal freedom of choice requirements the

county must make arrangements for Medi-Cal recipients to retain their individual providers under the county's mode of choice.

32. Question: Can a county accelerate implementation of the bill?

Answer: Yes, counties have the discretion to fully implement the bill prior to January 1, 2003, subject to cost neutrality. (Please see the next item for further discussion of "cost neutrality".)

33. Question: Does cost neutrality prohibit a county from moving to a more expensive mode of service or expanding an existing mode of service?

Answer: No. The legal requirements of cost neutrality do not prohibit counties from changing modes of IHSS services or increasing costs within a mode. The law does create a framework within which a county may propose to change to a higher cost mode subject to approval by the Department and the Department of Finance, and inclusion in the budget process. The State has the discretion to either grant or deny an increase in costs in the current fiscal year as well as the subsequent budget year. Under the legal requirement for an IHSS county plan, a county can submit an amendment to the county plan requesting a change in the mode of service delivery.

The key consideration for cost neutrality is for the county to make sure that money has been budgeted and is available to fund the county's IHSS mode expansion or change when the county intends to begin its new service mode. We expect to issue guidance to counties on the timing of the budget process as it relates to county planning for compliance with AB 1682.

We are currently reviewing this issue to determine if any changes should be made to current regulations.