

ASSEMBLY BILL

No. 2538

Introduced by Assembly Member John A. Pérez
(Principal coauthor: Senator Steinberg)

February 24, 2012

An act to amend Section 12305.87 of the Welfare and Institutions Code, relating to in-home supportive services, and declaring the urgency thereof, to take effect immediately.

LEGISLATIVE COUNSEL'S DIGEST

AB 2538, as introduced, John A. Pérez. In-home supportive services: criminal exclusions.

Existing law provides for the county-administered In-Home Supportive Services (IHSS) program, under which qualified aged, blind, and disabled persons are provided with services in order to permit them to remain in their own homes and avoid institutionalization. Existing law authorizes services to be provided under the IHSS program either through the employment of individual providers, a contract between the county and an entity for the provision of services, the creation by the county of a public authority, or a contract between the county and a nonprofit consortium.

Existing law prohibits an applicant from providing supportive services for 10 years following a conviction for, or incarceration following a conviction for, specified felony offenses. Existing law provides an exception to this criminal exclusion under certain circumstances. Existing law requires the State Department of Social Services, upon receipt of an exception request, to request a copy of the applicant's criminal offender record information search response from the applicable county welfare department.

This bill would instead require the department to request a copy of the applicant's criminal offender record information search response from the applicable county welfare department or public authority.

This bill would declare that it is to take effect immediately as an urgency statute.

Vote: $\frac{2}{3}$. Appropriation: no. Fiscal committee: yes.

State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 12305.87 of the Welfare and Institutions
2 Code is amended to read:

3 12305.87. (a) (1) Commencing 90 days following the effective
4 date of the act that adds this section, a person specified in paragraph
5 (2) shall be subject to the criminal conviction exclusions provided
6 for in this section, in addition to the exclusions required under
7 Section 12305.81.

8 (2) This section shall apply to a person who satisfies either of
9 the following conditions:

10 (A) He or she is a new applicant to provide services under this
11 article.

12 (B) He or she is an applicant to provide services under this
13 article whose application has been denied on the basis of a
14 conviction and for whom an appeal of that denial is pending.

15 (b) Subject to subdivisions (c), (d), and (e), an applicant subject
16 to this section shall not be eligible to provide or receive payment
17 for providing supportive services for 10 years following a
18 conviction for, or incarceration following a conviction for, any of
19 the following:

20 (1) A violent or serious felony, as specified in subdivision (c)
21 of Section 667.5 of the Penal Code and subdivision (c) of Section
22 1192.7 of the Penal Code.

23 (2) A felony offense for which a person is required to register
24 under subdivision (c) of Section 290 of the Penal Code. For
25 purposes of this paragraph, the 10-year time period specified in
26 this section shall commence with the date of conviction for, or
27 incarceration following a conviction for, the underlying offense,
28 and not the date of registration.

29 (3) A felony offense described in paragraph (2) of subdivision
30 (c) or paragraph (2) of subdivision (g) of Section 10980.

1 (c) Notwithstanding subdivision (b), an application shall not be
2 denied under this section if the applicant has obtained a certificate
3 of rehabilitation under Chapter 3.5 (commencing with Section
4 4852.01) of Title 6 of Part 3 of the Penal Code or if the information
5 or accusation against him or her has been dismissed pursuant to
6 Section 1203.4 of the Penal Code.

7 (d) (1) Notwithstanding subdivision (b), a recipient of services
8 under this article who wishes to employ a provider applicant who
9 has been convicted of an offense specified in subdivision (b) may
10 submit to the county an individual waiver of the exclusion provided
11 for in this section. This paragraph shall not be construed to allow
12 a recipient to submit an individual waiver with respect to a
13 conviction or convictions for offenses specified in Section
14 12305.81.

15 (2) The county shall notify a recipient who wishes to hire a
16 person who is applying to be a provider and who has been
17 convicted of an offense subject to exclusion under this section of
18 that applicant's relevant criminal offense convictions that are
19 covered by subdivision (b). The notice shall include both of the
20 following:

21 (A) A summary explanation of the exclusions created by
22 subdivision (b), as well as the applicable waiver process described
23 in this subdivision and the process for an applicant to seek a general
24 exception, as described in subdivision (e). This summary
25 explanation shall be developed by the department for use by all
26 counties.

27 (B) An individual waiver form, which shall also be developed
28 by the department and used by all counties. The waiver form shall
29 include both of the following:

30 (i) A space for the county to include a reference to any Penal
31 Code sections and corresponding offense names or descriptions
32 that describe the relevant conviction or convictions that are covered
33 by subdivision (b) and that the provider applicant has in his or her
34 background.

35 (ii) A statement that the service recipient, or his or her authorized
36 representative, if applicable, is aware of the applicant's conviction
37 or convictions and agrees to waive application of this section and
38 employ the applicant as a provider of services under this article.

39 (3) To ensure that the initial summary explanation referenced
40 in this subdivision is comprehensible for recipients and provider

1 applicants, the department shall consult with representatives of
2 county welfare departments and advocates for, or representatives
3 of, recipients and providers in developing the summary explanation
4 and offense descriptions.

5 (4) The individual waiver form shall be signed by the recipient,
6 or by the recipient's authorized representative, if applicable, and
7 returned to the county welfare department by mail or in person.
8 Except for a parent, guardian, or person having legal custody of a
9 minor recipient, a conservator of an adult recipient, or a spouse or
10 registered domestic partner of a recipient, a provider applicant
11 shall not sign his or her own individual waiver form as the
12 recipient's authorized representative. The county shall retain the
13 waiver form and a copy of the provider applicant's criminal offense
14 record information search response until the date that the
15 convictions that are the subject of the waiver request are no longer
16 within the 10-year period specified in subdivision (b).

17 (5) An individual waiver submitted pursuant to this subdivision
18 shall entitle a recipient to hire a provider applicant who otherwise
19 meets all applicable enrollment requirements for the In-Home
20 Supportive Services program. A provider hired pursuant to an
21 individual waiver may be employed only by the recipient who
22 requested that waiver, and the waiver shall only be valid with
23 respect to convictions that are specified in that waiver. A new
24 waiver shall be required if the provider is subsequently convicted
25 of an offense to which this section otherwise would apply. A
26 provider who wishes to be listed on a provider registry or to provide
27 supportive services to a recipient who has not requested an
28 individual waiver shall be required to apply for a general exception,
29 as provided for in subdivision (e).

30 (6) Nothing in this section shall preclude a provider who is
31 eligible to receive payment for services provided pursuant to an
32 individual waiver under this subdivision from being eligible to
33 receive payment for services provided to one or more additional
34 recipients who obtain waivers pursuant to this same subdivision.

35 (7) The state and a county shall be immune from any liability
36 resulting from granting an individual waiver under this subdivision.

37 (e) (1) Notwithstanding subdivision (b), an applicant who has
38 been convicted of an offense identified in subdivision (b) may seek
39 from the department a general exception to the exclusion provided
40 for in this section.

1 (2) Upon receipt of a general exception request, the department
2 shall request a copy of the applicant's criminal offender record
3 information search response from the applicable county welfare
4 department *or public authority*. Notwithstanding any other
5 provision of law, the county *or public authority* shall provide a
6 copy of the criminal offender record information search response,
7 as provided to the county by the Department of Justice, to the
8 department. The county *or public authority* shall provide this
9 information in a manner that protects the confidentiality and
10 privacy of the criminal offender record information search
11 response. The state or federal criminal history record information
12 search response shall not be modified or altered from its form or
13 content as provided by the Department of Justice.

14 (3) The department shall consider the following factors when
15 determining whether to grant a general exception under this
16 subdivision:

17 (A) The nature and seriousness of the conduct or crime under
18 consideration and its relationship to employment duties and
19 responsibilities.

20 (B) The person's activities since conviction, including, but not
21 limited to, employment or participation in therapy education, or
22 community service, that would indicate changed behavior.

23 (C) The number of convictions and the time that has elapsed
24 since the conviction or convictions.

25 (D) The extent to which the person has complied with any terms
26 of parole, probation, restitution, or any other sanction lawfully
27 imposed against the person.

28 (E) Any evidence of rehabilitation, including character
29 references, submitted by the person, or by others on the person's
30 behalf.

31 (F) Employment history and current or former employer
32 recommendations. Additional consideration shall be given to
33 employer recommendations provided by a person who has received
34 or has indicated a desire to receive supportive or personal care
35 services from the applicant, including, but not limited to, those
36 services, specified in Section 12300.

37 (G) Circumstances surrounding the commission of the offense
38 that would demonstrate the unlikelihood of repetition.

39 (H) The granting by the Governor of a full and unconditional
40 pardon.

1 (f) If the department makes a determination to deny an
2 application to provide services pursuant to a request for a general
3 exception, the department shall notify the applicant of this
4 determination by either personal service or registered mail. The
5 notice shall include the following information:

6 (1) A statement of the department's reasons for the denial that
7 evaluates evidence of rehabilitation submitted by the applicant, if
8 any, and that specifically addresses any evidence submitted relating
9 to the factors in paragraph (3) of subdivision (e).

10 (2) A copy of the applicant's criminal offender record
11 information search response, even if the applicant already has
12 received a copy pursuant to Section 12301.6 or 12305.86. The
13 department shall provide this information in a manner that protects
14 the confidentiality and privacy of the criminal offender record
15 information search response.

16 (A) The state or federal criminal history record shall not be
17 modified or altered from its form or content as provided by the
18 Department of Justice.

19 (B) The department shall retain a copy of each individual's
20 criminal offender record information search response until the date
21 that the convictions that are the subject of the exception are no
22 longer within the 10-year period specified in subdivision (b), and
23 shall record the date the copy of the response was provided to the
24 individual and the department.

25 (C) The criminal offender record information search response
26 shall not be made available by the department to any individual
27 other than the provider applicant.

28 (g) (1) Upon written notification that the department has
29 determined that a request for exception shall be denied, the
30 applicant may request an administrative hearing by submitting a
31 written request to the department within 15 business days of receipt
32 of the written notification. Upon receipt of a written request, the
33 department shall hold an administrative hearing consistent with
34 the procedures specified in Section 100171 of the Health and Safety
35 Code, except where those procedures are inconsistent with this
36 section.

37 (2) A hearing under this subdivision shall be conducted by a
38 hearing officer or administrative law judge designated by the
39 director. A written decision shall be sent by certified mail to the
40 applicant.

1 (h) The department shall revise the provider enrollment form
2 developed pursuant to Section 12305.81 to include both of the
3 following:

4 (1) The text of subdivision (c) of Section 290 of the Penal Code,
5 subdivision (c) of Section 667.5 of the Penal Code, subdivision
6 (c) of Section 1192.7 of the Penal Code, and paragraph (2) of
7 subdivisions (c) and (g) of Section 10980.

8 (2) A statement that the provider understands that if he or she
9 has been convicted, or incarcerated following conviction for, any
10 of the crimes specified in the provisions identified in paragraph
11 (b) in the last 10 years, and has not received a certificate of
12 rehabilitation or had the information or accusation dismissed, as
13 provided in subdivision (c), he or she shall only be authorized to
14 receive payment for providing in-home supportive services under
15 an individual waiver or general exception as described in this
16 section, and upon meeting all other applicable criteria for
17 enrollment as a provider in the program.

18 (i) (1) Notwithstanding the rulemaking provisions of the
19 Administrative Procedure Act (Chapter 3.5 (commencing with
20 Section 11340) of Part 1 of Division 3 of Title 2 of the Government
21 Code), the department may implement and administer this section
22 through all-county letters or similar instructions from the
23 department until regulations are adopted. The department shall
24 adopt emergency regulations implementing these provisions no
25 later than July 1, 2011. The department may readopt any emergency
26 regulation authorized by this section that is the same as or
27 substantially equivalent to an emergency regulation previously
28 adopted under this section.

29 (2) The initial adoption of emergency regulations pursuant to
30 this section and one readoption of emergency regulations shall be
31 deemed an emergency and necessary for the immediate
32 preservation of the public peace, health, safety, or general welfare.
33 Initial emergency regulations and the one readoption of emergency
34 regulations authorized by this section shall be exempt from review
35 by the Office of Administrative Law. The initial emergency
36 regulations and the one readoption of emergency regulations
37 authorized by this section shall be submitted to the Office of
38 Administrative Law for filing with the Secretary of State and each
39 shall remain in effect for no more than 180 days, by which time
40 final regulations may be adopted.

(j) In developing the individual waiver form and all-county letters or information notices or similar instructions, the department shall consult with stakeholders, including, but not limited to, representatives of the county welfare departments, and representatives of consumers and providers. The consultation shall include at least one in-person meeting prior to the finalization of the individual waiver form and all-county letters or information notices or similar instructions.

SEC. 2. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

In order to ensure the well-being of recipients of social services and the most efficient delivery of these services at the earliest possible time, it is necessary that this act take effect immediately.