

National Employment Law Project

Delivering Economic Opportunity

Via facsimile to Brad.Elftmann@dss.ca.gov and Charissa.Miguelino@dss.ca.gov

Christine L. Owens,
Executive Director

October 16, 2009

National Office

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California Department of Social Services
744 P Street
Sacramento, CA 95814

Oakland Office

405 14th Street, Suite 1400
Oakland, CA 94612
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Re: All-County Letter No. 09-52
New In-Home Supportive Services Provider Enrollment Requirements
and Revised Provider Enrollment Form

Washington, DC Office

1333 H Street, NW
Washington, DC 20005
(202) 533-2573
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Dear Mr. Elftmann and Ms. Miguelino:

Mid-West Office

900 Victors Way, Suite 350
Ann Arbor, MI 48108
(734) 369-5616 tel
(866) 373-8994 fax

We are writing regarding one aspect of All-County Letter No. 09-52, issued recently that concerns background screening of providers of In-Home Supportive Services (IHSS). As outlined further below, the proposed All-County Letter (ACL) overstates federal requirements and mandates unlawful discrimination against IHSS workers of color. Consequently the overbroad and illegal absolute ban on people with any felony and “certain serious misdemeanor” convictions should be withdrawn.

Board of Directors

Beth Shulman
Author and Consultant
NELP Board Chair

The National Employment Law Project (NELP) is a non-profit research and advocacy organization that specializes in the employment rights of people with criminal records. NELP’s Second Chance Labor Project promotes a more fair and effective system of employment screening for criminal records. The Project seeks to protect public safety and security while supporting the rehabilitative value of work and the basic employment rights of all workers, including those with a criminal record. In light of this work, we write to urge the withdrawal of ACL No. 09-52 for the following reasons.

Elaise L. Fox
United Food & Commercial
Workers Union, Local 1657

James Haughton, Director
Fight Back

Jonathan Hiatt, General Counsel
AFL-CIO

Paul Igasaki
Consultant

Contrary to the ACL, federal law does not support a blanket ban on convictions for IHSS workers.

Lucille Logan
Community Activist

The ACL provides in part,

Walter Meginniss
Gladstein, Reif & Meginniss

James Sessions
East Tennessee Interfaith
Coalition for Worker Justice

Michael Shen
Shen & Associates, P.C

Dr. William E. Spriggs
Howard University

Thomas Weeks, Director
Ohio State Legal Services Assoc.

[E]xisting federal Medicaid and state Medi-Cal statutes and regulations provide that any person who has ever been convicted of a felony crime or certain serious misdemeanor crimes is ineligible to be a provider of Medicaid/Medi-Cal-funded services. These rules also prohibit an individual from becoming a provider who, within the past 10 years, has either been found liable in a civil proceeding or entered into a legal settlement in place of a conviction, for fraud or abuse involving a government program.

Cathy Wilkinson
Low-Wage Worker Activist

ACL, p 3. The SOC 426 (Attachment L to the ACL) and accompanying directions (Attachment M) repeat the ban on employing anyone who has been convicted of a felony or certain serious (but unspecified) misdemeanors. Nowhere in the ACL is any federal law cited for this proposition. That is because, in fact, federal law does not require states to bar all persons who have felony or serious misdemeanor convictions from work as service providers, such as the ACL proposes.

Federal law sets out four types of convictions that make service providers ineligible for a period of time, not a lifetime ban.

The barred categories of convictions are offense-specific and related to the job involved.

Federal law does exclude employees with specified types of convictions from working in state health care plans. Subsection (a) of 42 USC §1320a-7 lists four categories of offense-specific convictions that require exclusion from state IHSS work.¹

The barred convictions are time-limited, not lifetime, bans.

Additionally, these four types of convictions are not blanket bars: federal law sets a minimum time limit rather than a life-time ban. *Id.* at (c)(3)(B) (“the minimum period of exclusion shall be not less than five years...”). Thus federal law bars only specified offenses, not a lifetime ban on all offenses, and the ACL’s statement to the contrary is in error.

¹ (a) Mandatory exclusion. The Secretary shall exclude the following individuals and entities from participation in any Federal health care program (as defined in section 1128B(f) [42 USCS § 1320a-7b(f)]):

(1) Conviction of program-related crimes. Any individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under title XVIII [42 USCS §§ 1395 et seq.] or under any State health care program.

(2) Conviction relating to patient abuse. Any individual or entity that has been convicted, under Federal or State law, of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service.

(3) Felony conviction relating to health care fraud. Any individual or entity that has been convicted for an offense which occurred after the date of the enactment of the Health Insurance Portability and Accountability Act of 1996 [enacted Aug. 21, 1996], under Federal or State law, in connection with the delivery of a health care item or service or with respect to any act or omission in a health care program (other than those specifically described in paragraph (1)) operated by or financed in whole or in part by any Federal, State, or local government agency, of a criminal offense consisting of a felony relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct.

(4) Felony conviction relating to controlled substance. Any individual or entity that has been convicted for an offense which occurred after the date of the enactment of the Health Insurance Portability and Accountability Act of 1996 [enacted Aug. 21, 1996], under Federal or State law, of a criminal offense consisting of a felony relating to the unlawful manufacture, distribution, prescription, or dispensing of a controlled substance.

Federal law makes it is illegal for employers to impose absolute bars to employment for people with convictions

Not only does federal law not require a ban on hiring IHSS workers with felony convictions, it in fact requires the opposite: federal law makes it *unlawful* for employers to use absolute bars based on convictions in employment decisions. Certainly it cannot be the intent of the state agency to require employers hiring IHSS workers to violate federal law.

The federal rules making blanket bans on employment of people with convictions unlawful are drawn from Title VII of the Civil Rights Act, 42 USC § 2000e. Title VII's promise of fairness in the workplace prohibits employment discrimination both in employers' direct treatment of workers and in employers' indirect actions that have the effect of discriminating.

Conviction bans have a discriminatory adverse effect on people of color.

The Equal Employment Opportunity Commission (EEOC) is charged with enforcing Title VII. It has recognized the disproportionate impact that consideration of convictions in employment has on people of color. Thus the EEOC presumes a "disparate impact" when employers bar people with convictions:

[A]n employer's policy or practice of excluding individuals from employment on the basis of their conviction records has an adverse impact on [African American and Latino workers] in light of statistics showing that they are convicted at a disproportionately higher rate than their representation in the population.

EEOC Policy Statement on the Issue of Conviction Records (issued 2/4/87), available at <http://www.eeoc.gov/policy/guidance.html> .

Discriminatory adverse effect makes absolute bars unlawful.

Because of their discriminatory effect on protected classes of workers, namely African Americans and Latinos, the EEOC finds absolute employment bars based on convictions are unlawful: "an absolute bar to employment based on the mere fact that an individual has a conviction record is unlawful under Title VII." *Id.*

Federal law requires employers to make individualized decisions regarding workers with convictions.

Instead of imposing life-time bans on employment of people with convictions, the EEOC requires employers to make individualized assessments, to overcome the discriminatory effect that disproportionate arrests and convictions have on African Americans and Latinos. Therefore, the EEOC requires employers making employment decisions to consider

- (1) the nature and gravity of the offense or offenses;
- (2) the time that has passed since the conviction and/or completion of the sentence; and
- (3) the nature of the job held or sought.

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<http://www.eeoc.gov/policy/docs/convict1.html> . This evaluation promotes opportunities for employers to assess the skills of individual workers, overcome the societal discrimination recognized in disproportionate arrest and conviction statistics, and enable those whose past mistakes are dated or irrelevant to perform this important care-giving work.

It is unwise policy for the California Department of Social Services to promote practices through the blanket ban in ACL No. 09-52, the nature of which the EEOC has determined to be unlawful. It would be unlikely for a court to construe favorably the imposition of a state policy with such a broad discriminatory effect.

We urge the Department to withdraw ACL No. 09-52 and remove the unlawful absolute ban on people with convictions, thereby promoting opportunities for workers to be considered fairly based on their current qualifications, experience and dedication rather than on a mistake of the past.

Sincerely,

Margaret Stevenson, Staff Attorney

Maurice Emsellem, Policy Co-Director
National Employment Law Project