# Immigration Issues: Sanctuary Cities, Local Authority and Possible Scenarios Coming to a Location Near You

## von Briesen & Roper, s.c.

## LEAGUE OF MUNICIPALITIES: MUNICIPAL ATTORNEYS INSTITUTE

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## I. WHAT IS A SANCTUARY CITY?

A. While no formal definition exists, the most widely understood definition of a "sanctuary city" is a municipality that opts not to cooperate with federal immigration enforcement authorities ("ICE") upon coming into contact with an undocumented immigrant.

i. Such "contact" may involve a 911 call, a routine traffic stop, an investigation of a crime, etc.

ii. The cooperation that is sought from ICE is generally the adherence to a "detainer request." A "detainer request" is a written request that the local jail or other law enforcement agency detain an individual for an additional 48-hours (excluding weekends and holidays) after his or her release date in order to provide ICE agents extra time to decide whether to take the individual into federal custody for removal purposes.

iii. Another form of cooperation often sought from ICE is the provision of information surrounding the immigration status of individuals housed within local prisons and jails.

B. There are over 300 jurisdictions across the country that fall under the above-definition of a "sanctuary city."

C. Interestingly, counties are typically affected at a greater level than cities with regard to requests from ICE. This is because the bulk of detained individuals reside in county jails or prisons.

## II. WHAT ARE THE ARGUMENTS FOR AND AGAINST SANCTUARY CITIES?

A. Municipalities that opt not to cooperate with ICE or otherwise enforce federal immigration law to the extent possible argue that the basis for that decision is to ensure maximum cooperation between all of the municipality's citizens and local law enforcement.

i. The argument goes, if illegal immigrants believe they may be deported or detained for a 48-hour period as a result of their illegal status, then illegal immigrants will avoid contacting law enforcement to report known criminal activity and/or avoid cooperating with police during active investigations. According to those in support of sanctuary cities, the result would be a less-safe community for everyone, as information sharing between community members and law enforcement would be imperiled.

ii. Proponents of sanctuary cities further argue that the practice of detaining illegal immigrants for 48-hours who have not been charged with a crime is unconstitutional.

iii. Another popular argument against adhering to detainer requests is that it is a drain on local resources, as federal immigration law explicitly prohibits the federal government from providing federal funds to localities in return of costs expended in enforcing ICE detainer requests.

B. Municipalities that choose to cooperate with ICE or otherwise enforce federal immigration law to the greatest possible extent argue that it is law enforcement's duty to enforce any and all laws for which they are charged with enforcing. Further, proponents of this position argue that illegal immigrants are given such title for a reason – they are here illegally. Thus, cooperation with ICE is part and parcel of law enforcement's duty to enforce the law to the fullest extent possible.

i. Multiple states in opposition to sanctuary jurisdictions have taken formal action to prevent local agencies from ignoring ICE detainer requests.

1. For example, Virginia's House of Delegates passed a bill on January 27, 2017 seeking to require that state and local jailers hold detainees under ICE detainer requests.

2. Texas has taken an even stronger approach, as the State is attempting to pass through a piece of legislation that would waive sovereign immunity and hold municipalities liable for all felony-related damages resulting from any person freed from custody while subject to an ICE detainer request – for ten years following release.

## III. WHAT IS THE LAW?

A. Immigration law is enforced by U.S. Immigration and Customs Enforcement ("ICE"), a subset of the Department of Homeland Security. The pertinent law which ICE enforces is the Immigration and Nationality Act ("INA"). See 8 U.S.C. § 1101, *et seq*. The specific provisions of the INA that are applicable with regard to sanctuary cities are the following:

> (a) . . . a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.
> (b) . . . no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information

regarding the immigration status, lawful or unlawful, of any individual:

1. Sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service.

2. Maintaining such information.

3. Exchanging such information with any other Federal, State, or local government entity.

8 U.S.C. § 1373(a)-(b).

B. Under 8 U.S.C. § 1373, local law enforcement officials are not required to turn over information about the citizenship or immigration status of prisoners in their custody, especially if no such information exists; however, the law prohibits efforts by cities and states to prevent the sharing of that information once it is collected.

## IV. EXECUTIVE ORDER 13768

A. On January 25, 2017, President Trump signed Executive Order 13768. The Executive Order states that the policy of the executive branch is as follows:

**(**a) Ensure the faithful execution of the immigration laws of the United States, including the INA, against all removable aliens, consistent with Article II, Section 3 of the United States Constitution and section 3331 of title 5, United States Code;

(b) Make use of all available systems and resources to ensure the efficient and faithful execution of the immigration laws of the United States;

(c) Ensure that jurisdictions that fail to comply with applicable Federal law do not receive Federal funds, except as mandated by law;

(d) Ensure that aliens ordered removed from the United States are promptly removed; and

(e) Support victims, and the families of victims, of crimes committed by removable aliens.

B. The Executive Order states that illegal immigrants who meet any of the following criteria are considered “priorities” under the terms of the Executive Order:

(a) Have been convicted of any criminal offense;

(b) Have been charged with any criminal offense, where such charge has not been resolved;

(c) Have committed acts that constitute a chargeable criminal offense;[1]

(d) Have engaged in fraud or willful misrepresentation in connection with any official matter or application before a governmental agency;

(e) Have abused any program related to receipt of public benefits;

(f) Are subject to a final order of removal, but who have not complied with their legal obligation to depart the United States; or

(g) In the judgment of an immigration officer, otherwise pose a risk to public safety or national security.

C. The Executive Order further provides that the Secretary of the Homeland Security will seek to engage with Governors of the States, as well as local officials, for the purpose of entering into agreements under section 287(g) of the INA (8 U.S.C. 1357(g)).

i. These agreements give local law enforcement officers the powers of ICE agents with regard to enforcing the laws under the INA. However, the INA explicitly states that no federal funds are to be spent to reimburse localities for their costs in enforcing detainers.

D. To give the Executive Order teeth, section 9(a) of the Order states: "the Attorney General and the Secretary, in their discretion and to the extent consistent with law, shall ensure that jurisdictions that willfully refuse to comply with 8 U.S.C. 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes by the Attorney General or the Secretary."

[1] As noted above, being an illegal immigrant is not a criminal act. Thus, additional conduct would have to be engaged in by an illegal immigrant for the immigrant to have "committed acts that constitute a chargeable criminal offense."

## V. ATTORNEY GENERAL SESSIONS' CLARIFICATION OF EXECUTIVE ORDER 13768

A. On May 22, 2017, Attorney General Sessions issued a memorandum entitled "Memorandum for all Department Grant-Making Components." The purpose of this memorandum was to clarify the extent to which Executive Order 13768 changed federal immigration law as it existed prior to the Order.

B. The memorandum clarifies that the Order applies solely to federal grants administered by the Department of Justice or the Department of Homeland Security, and not to other sources of federal funding. In other words, only the following three federal grants could actually be blocked by the Department of Justice without Congressional approval: (1) the Edward Byrne Memorial Justice Assistance Grant Program ("JAG"); (2) the Community Oriented Policing Services ("COPS"); and (3) the State Criminal Alien Assistance Program ("SCAAP").

   i. In 2016, $274.9 million in JAG funds were allocated to the U.S. states and territories. Over the past 5 years, on average $200 million in COPS funds were annually allocated to the U.S. states and territories. Although SCAAP was awarded $210 million in 2016, the program's website indicates that no funding is being sought for 2017 and the program is not being renewed.

C. Another substantial clarification made in the May 22 memorandum is what the definition of "sanctuary jurisdiction" means as it is used in Executive Order 13768. Specifically, the memo states that the term refers only to jurisdictions that "willfully refuse to comply with 8 U.S.C. 1373."[2]

   i. The memorandum further provides: "While the term 'sanctuary jurisdiction' is narrow, nothing in the Executive Order limits the Department's ability to point out ways that state and local jurisdictions are undermining our lawful system of immigration or to take enforcement action where state or local practices violate federal laws, regulations, or grant conditions."

D. The blocking of federal grants to jurisdictions which "willfully refused to comply with 8 U.S.C. 1373" was permitted before the issuance of Executive Order 13768.

[2] As stated above, 8 U.S.C. 1373 prohibits efforts by municipalities and states to block communications between ICE and such entities regarding the citizenship or immigration status of prisoners in their custody. However, the actual exchange of information regarding the citizenship or immigration status of prisoners is not required under federal law, especially when no such information is in the state or local agencies possession.

## VI. CAN THE DEPARTMENT OF JUSTICE ENFORCE EXECUTIVE ORDER 13768 IN ACCORDANCE WITH ITS ORIGINAL INTENT?

A. A debate exists as to the legality of Executive Order 13768. A growing number of states and localities, including California, Connecticut, New York City, Newark, Cook County, New Orleans, and Washington D.C., have adopted laws or policies limiting their involvement with ICE detainers, or declining to treat them as a basis for detention. The Florida Sheriffs Association, the largest union in the country, has also come out against the Executive Order and the manner in which it is being enforced.

B. A number of other localities, including Seattle and San Francisco, have sued the federal government, alleging that the Executive Order is unconstitutional on the grounds that it violates the 10th Amendment.

i. On April 25, 2017, a judge in the Northern District of California issued an injunction to enjoin the federal government from withholding federal grant money under the Executive Order. The injunction was issued because the judge determined that San Francisco and Santa Clara County were likely to succeed on the merits of all five of the following claims: (1) a violation of separation of powers; (2) a violation of the Spending Clause; (3) a violation of the Tenth Amendment; (4) a violation of the Fifth Amendment due to vagueness; and (5) a violation of the Fifth Amendment's procedural due process requirements. *See County of Santa Clara, City and County of San Francisco County v. Donald J. Trump, et al*., Case No. 17-cv-00574-WHO (N.D. Cal. 2017).

ii. With regard to the Counties' claims that the Executive Order violates the 10th Amendment, the court quoted *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 579 (U.S. 2012), stating it is well-established that "[l]egislation that 'coerces a State to adopt a federal regulatory system as its own' 'runs contrary to our system of federalism.'" *See Id*. at p. 39.

1. Instead, states must have a "legitimate choice whether to accept the federal conditions in exchange for federal funds." *Id*. (quoting *Sebelius*, 567 U.S at 578).

2. The court continued: "The Executive Order threatens to deny sanctuary jurisdictions all federal grants, hundreds of millions of dollars on which the Counties rely. The threat is unconstitutionally coercive." *Id*.

iii. The court further held that the Counties sufficiently established that the Executive Order would produce irreparable harm, particularly with regard to the Counties' and City's ability to establish their budgets and properly serve their residents. *See Id.*

iv. The result of the temporary injunction is that the Department of Justice is temporarily blocked from placing new restrictions on federal funding without going through Congress; however, the ruling does not prevent the Department of Justice from enforcing existing rules on federal grants (*i.e.*, 8 U.S.C. § 1373 cited above).

C. Adding to the 10th Amendment concerns surrounding Executive Order 13768, multiple courts have ruled that ICE detainers violate the 4th Amendment and 5th Amendment rights of illegal immigrants.

i. For example, the Third Circuit of the U.S. Court of Appeals held on March 5, 2014 that Lehigh County Prison's action of holding Ernesto Galarza, a U.S. citizen, for three days after he was subject to release violated his 4th Amendment and procedural due process rights. *See Galarza v. Szalczyk et al.*, 745 F.3d 634 (3rd Cir. 2014).

1. The court reached this conclusion for various reasons. First, guidance issued to ICE states that detainers "shall be for a maximum of 48 hours." Galarza was detained for nearly 72 hours. Second, Lehigh County Prison officials refused to look into Galarza's status as a legal U.S. citizen despite his repeated claims that he was born in Newark, NJ and, therefore, a legal citizen. Third, officials refused to tell Galarza why he was being detained.

2. The court noted that state and local law enforcement agencies must be careful with regard to detainers, as ICE routinely issues detainers that are not adequate with regard to establishing "probable cause" for detaining alleged illegal immigrants. Holding an alleged illegal immigrant without such "probable cause" can lead to violations of the individual's constitutional rights.

3. The court also noted that detainers are a <u>request,</u> not a mandate, from ICE that state and local law enforcement agencies detain an alleged illegal immigrant on behalf of ICE. To construe detainers otherwise would violate the principles of federalism clearly established under 10th Amendment.

ii. Similarly, on March 9, 2016, a judge in the Northern District of Illinois for the Eastern District held that detainers issued for two individuals already in prison violated the individuals' constitutional rights. Both of the individuals were U.S. citizens despite the issuance of the detainers. The legal analysis surrounding the court's holding was much the same. *See Moreno v. Napolitano*, 2014 U.S. Dist. LEXIS 136965 (N.D. Ill. Sept. 29, 2014).

1. The court spent a considerable amount of time warning local law enforcement agencies that detainers issued by ICE, without more, may be insufficient to establish "probable cause" under the Fourth Amendment.

2. The court noted precedent which requires a showing that the arresting officer must "reasonably believe that the alien is in the country illegally and that she 'is likely to escape before a warrant can be obtained for her arrest.'" According to the court, the language "reasonably believe" requires a finding of probable cause.

3. To ensure compliance with the U.S. Constitution, local law enforcement agencies must be sure a determination is made by ICE that such illegal immigrant is "likely to escape" within the meaning of 8 U.S.C. § 1357(a)(2).

4. The court clarified that one's status as an illegal immigrant does not result in a *per se* finding that he or she is "likely to escape." A more particularized inquiry must be conducted into that individual's background and propensities.

5. The court also reinforced the concept that compliance with ICE detainers is not mandatory, but rather permissive, under the 10th Amendment.

iii. While the above cases involve U.S. citizens, the United Supremes Court has made it clear that illegal immigrants enjoy the protections found under the First, Fourth, Fifth, Sixth, and Fourteenth Amendments. *See Almedia-Sanchez v. United States*, 413 U.S. 266 (U.S. 1973). Thus, the principles discussed above apply to illegal immigrants, too.

## VII. WHAT LAW ENFORCEMENT AGENCIES SEEKING TO IGNORE ICE DETAINERS SHOULD KNOW

A. State and local agencies are legally permitted to ignore ICE detainer requests. As stated above, numerous courts have made this clear. Therefore, such conduct will not subject local agencies to the loss of federal grants. If federal grants were to be reduced or eliminated on those grounds, it would constitute coercion and would therefore be contrary to the 10th Amendment.

B. That being said, agencies must be careful not to go too far. Current law prevents state and local law enforcement agencies from instituting and enforcing policies that altogether prohibit communication with ICE altogether with regard to the citizenship of prisoners in their custody. While the law does not require state and local agencies to turn that information over, the outright prohibition via

departmental policy against such communication would violate the law and could result in the loss of federal grants.

i. Many agencies have instituted policies that prohibit officers from inquiring about the immigration status of individuals detained in the respective agency's jail or prison. This prevents agencies from having information to share with ICE when asked to do so, thereby preventing agencies from being accused of "prohibiting communication with ICE" about the immigration status of incarcerated individuals.

C. Whatever the policy of the respective agency is, such policy should be clearly communicated to all employees to ensure consistent application of the policy. One wrong step by a particular employee can lead to constitutional violations or the loss of federal funding.

D. As with all matters, the decision to ignore ICE detainer requests may lead to publicity. Some may perceive this approach as "soft on crime." Further, agencies should be aware that the Department of Justice has issued various letters via press releases essentially shaming "sanctuary cities" for their "soft on crime" mentalities. Agencies should be prepared to deal with such publicity.

## VIII. WHAT LAW ENFORCEMENT AGENCIES SEEKING TO ADHERE TO ICE DETAINERS SHOULD KNOW

A. State and local agencies are legally permitted to adhere to ICE detainer requests.

B. However, such agencies must proceed with caution when doing so. To legally comply with detainer requests, an arresting officer must "reasonably believe that the alien is in the country illegally and that she 'is likely to escape before a warrant can be obtained for [her] arrest.'"

C. Agencies must ensure both of the above-requirements are met before detaining an alleged illegal immigrant to avoid violating the individual's constitutional rights and incurring liability under § 1983 of the U.S. Code.

i. One way to do this is to obtain a determination from ICE that the alleged illegal alien is "likely to escape" within the meaning of 8 U.S.C. § 1357(a)(2), although ICE has historically been hesitant to issue such determinations.

ii. Another approach to ensure the aforementioned requirements have been met is to demand a warrant from ICE in conjunction with its detainer request.

D. Agencies should also conduct their own due diligence with regard to the immigration status of the alleged illegal immigrant for purposes of determining

whether the individual is truly here illegally. Ignoring statements from the individual or failing to otherwise conduct such due diligence is another avenue for potentially violating the individual's constitutional rights and incurring liability under § 1983.

E. Whatever the policy of the respective agency is, such policy should be clearly communicated to all employees to ensure consistent application of the policy. One wrong step by a particular employee can lead to constitutional violations or the loss of federal funding.

F. The decision to adhere to ICE detainer requests may lead to negative publicity. Some may perceive the decision to adhere to such detainer requests as a violation of an individual's civil liberties and as discriminatory. Further, some may argue that the practice will chill communication between community members and law enforcement, thereby making the community a less-safe place to live. Agencies should be prepared to deal with such publicity.

## IX. A MIDDLE GROUND EXISTS

A. For agencies that would like to assist ICE with detainer requests supported by probable cause, but fear doing so could chill communication between law enforcement and illegal immigrants within the community, one option to consider is the U visa.

B. The U visa is an immigration benefit that can be sought by victims of certain crimes who are currently assisting or have previously assisted law enforcement in the investigation or prosecution of a crime, or who are likely to be helpful in the investigation or prosecution of a criminal activity.

C. The U visa provides eligible victims with nonimmigrant status for purposes of allowing the victims to temporarily remain in the United States while assisting law enforcement. If certain conditions are met, an individual with U nonimmigrant status may adjust to lawful permanent resident status. It should be noted that Congress has capped the number of available U visas to 10,000 per fiscal year.

D. One of the primary conditions that must be met before an illegal immigrant may obtain a U visa is that he or she must receive certification from the law enforcement agency which he or she has assisted, or is likely to assist. The form which must be certified is the USCIS Form I-918, Supplement B.

E. Another primary condition that must be met is that illegal immigrants seeking a U visa must have been victim to one of the specific crimes listed within the U visa certification guide, which is available on the Department of Homeland Security's website. The crimes contained within that list are those which are more serious in nature, such as abduction, abusive sexual contact, domestic violence, felonious assault, kidnapping, manslaughter, murder, rape, prostitution, etc.

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