

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCS for HB 675 Federal Immigration Enforcement

SPONSOR(S): Civil Justice Subcommittee

TIED BILLS: None. **IDEN./SIM. BILLS:** SB 872

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Civil Justice Subcommittee		Malcolm	Bond

SUMMARY ANALYSIS

Although the federal government has broad powers over immigration enforcement, federal immigration agencies rely on state and local law enforcement agencies to assist and cooperate in the enforcement of federal immigration laws. The PCS creates the "Rule of Law Adherence Act" (Act) to require state and local governments and law enforcement agencies, including their officials and employees, to support and cooperate with federal immigration enforcement. Specifically, the PCS:

- prohibits a state or local governmental entity or law enforcement agency from having a law, policy, practice, procedure, or custom which impedes a law enforcement agency from communicating or cooperating with a federal immigration agency on immigration enforcement;
- prohibits any restriction on a state or local governmental entity or law enforcement agency's ability to use, maintain, or exchange immigration information for certain enumerated purposes;
- requires a state or local governmental entity and law enforcement agency to comply with and support the enforcement of federal immigration law;
- authorizes a board of county commissioners to enact an ordinance to recover costs for complying with an immigration detainer;
- requires an official or employee of a state or local governmental entity or law enforcement agency to report a violation of the Act to the Attorney General or state attorney, failure to report a violation may result in suspension or removal from office;
- authorizes the Attorney General or a state attorney to seek an injunction against a state or local governmental entity or law enforcement agency that violates the Act;
- requires a state or local governmental entity or law enforcement agency that violates the Act to pay a civil penalty of at least \$1,000 but no more than \$5,000 for each day the policy was in effect;
- creates a civil cause of action for a person injured by the conduct of an alien unlawfully present in the United States against a state or local governmental entity, law enforcement agency, or elected or appointed official whose violation of the Act contributed to the person's injury;
- prohibits the expenditure of public funds to reimburse or defend a public official or employee who violates the Act; and
- waives sovereign immunity for actions brought under the newly-created cause of action.

The PCS may have an indeterminate impact on local government expenditures. The PCS does not appear to have a fiscal impact on state government.

The PCS has an effective date of July 1, 2016.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

The federal government has “broad, undoubted power over the subject of immigration and the status of aliens,” and thus has established an “extensive and complex” set of rules governing the admission and removal of aliens, along with conditions for aliens’ continued presence within the United States.¹ While the federal government’s authority over immigration is well established, the Supreme Court has recognized that not “every state enactment which in any way deals with aliens is a regulation of immigration and thus per se preempted” by the federal government.² The Tenth Amendment’s reservation of powers to the states includes traditional “police powers” concerning the promotion and regulation of safety, health, and welfare within the state.³ Pursuant to the exercise of these police powers, states and municipalities have frequently enacted measures which address aliens residing in their communities.⁴ The federal government’s power to preempt activity in the area of immigration may be further limited by the constitutional bar against directly “commandeering” state or local governments into the service of federal immigration agencies.⁵

Information-Sharing

United States Immigration and Customs Enforcement (ICE) relies heavily on local law enforcement sharing information regarding an arrestee or inmate to identify and apprehend aliens who are unlawfully present in the United States. Over the years, some states and localities have restricted government agencies or employees from sharing information with federal immigration agencies.⁶

In 1996, Congress sought to end these restrictions on information-sharing through the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA)⁷ and Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).⁸ Neither PRWORA nor IIRIRA require state or local government entities to share immigration-related information with federal authorities. Instead, they bar any restrictions that prevent state or local government entities or officials from voluntarily communicating with federal immigration agencies regarding a person’s immigration status.⁹

Immigration Detainers

An immigration detainer is a document by which ICE advises state and local law enforcement agencies of its interest in individual aliens whom those agencies are currently holding in relation to criminal violations.¹⁰ ICE issues a detainer in three situations:

- To notify a law enforcement agency that ICE intends to assume custody of an alien in the agency’s custody once the alien is no longer detained by the agency;
- To request information from a law enforcement agency about an alien’s impending release so ICE may assume custody before the alien is released from the agency’s custody; and
- To request that a law enforcement agency maintain custody of an otherwise releasable alien for no longer than 48 hours to allow ICE to assume custody.¹¹

¹ *Arizona v. United States*, 132 S. Ct. 2492, 2497 (2012).

² *De Canas v. Bica*, 424 U.S. 351, 355 (1976); see *Arizona*, 132 S. Ct. 2492.

³ *Western Turf Ass’n v. Greenberg*, 204 U.S. 359, 363 (1907).

⁴ Congressional Research Service, *State and Local “Sanctuary” Policies Limiting Participation in Immigration Enforcement*, 3 (July 20, 2015).

⁵ See *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

⁶ Congressional Research Service, *supra* note 4, at 9.

⁷ 8 U.S.C. §1644.

⁸ 8 U.S.C. §1373.

⁹ 8 U.S.C. §§ 1373, 1644.

¹⁰ See 8 U.S.C. ss. 1226 and 1357; Congressional Research Service, *supra* note 4, at 13.

The federal courts and the federal government have characterized an ICE detainer as a request that does not require the receiving local law enforcement agency to comply with the detainer.¹² The federal courts have held any purported requirement that states hold aliens for ICE may run afoul of the anti-commandeering principles of the Tenth Amendment. For example, in *Galarza v. Szalczyk*, the U.S. Court of Appeals for the Third Circuit noted that if states and localities were required to detain aliens for ICE pursuant to a detainer, they would have to “expend funds and resources to effectuate a federal regulatory scheme,” something found to be impermissible in prior Supreme Court decisions regarding commandeering.¹³

Additionally, a number of recent federal courts have held that ICE detainers requesting that local law enforcement detain (as opposed to notify) an otherwise releasable individual must specify that there is sufficient probable cause to detain that individual.¹⁴

“Sanctuary cities”

A number of states and municipalities have adopted formal or informal policies which prohibit or limit police cooperation with federal immigration enforcement efforts.¹⁵ Municipalities that have adopted such policies are sometimes referred to as “sanctuary cities,” though there is no consensus as to the meaning of this term. The term “sanctuary” jurisdiction is not defined by federal law, though it has been used by the Office of the Inspector General at the U.S. Department of Justice to reference “jurisdictions that may have [laws, ordinances, or policies] limiting the role of local law enforcement agencies and officers in the enforcement of immigration laws.”¹⁶ Examples of such policies include: not asking an arrested or incarcerated person his or her immigration status, not informing ICE about an alien in custody, not alerting ICE before releasing an alien from custody, not transporting an undocumented criminal alien to the nearest ICE location, and declining to honor an immigration detainer.¹⁷

It appears that there are seven local government entities in Florida that have adopted policies limiting cooperation with ICE specifically by placing conditions on honoring immigration detainers: Hernando, Pasco, Hillsborough, Pinellas, Palm Beach, Broward, and Miami-Dade.¹⁸ In each of these counties except Miami-Dade, the policy was enacted by the Sheriff’s Office. In Miami-Dade, the policy was enacted by the county commission.

¹¹ Law Enforcement Systems and Analysis, Department of Homeland Security, *Declined Detainer Outcome Report*, October 8, 2014 (redacted public version), at 3.

¹² See, e.g., *Garza v. Szalczyk*, 745 F. 3d 643, 641-644 (3d Cir. 2014) (noting that all Courts of Appeals that have commented on the character of ICE detainers refer to them as “requests” or as part of an “informal procedure.”); *Ortega v. U.S. Immigration & Customs Enforcement*, 737 F. 3d 435, 438 (6th Cir. 2013); *Miranda-Olivares v. Clackamas County*, 2014 WL 1414305, slip op. (D. Oregon April 11, 2014); Memorandum from R. A. Cuevas, Jr. to Board of County Commissioners of Miami-Dade County, RE: Resolution directing the Mayor to implement policy on responding to detainer requests from the United States Department of Homeland Security Immigration Enforcement, Resolution R-1008-13, p 14 (Dec. 3, 2013) (containing correspondence from David Ventura, Assistant Director, U.S. Immigration and Customs Enforcement to Miguel Marquez, County Counsel, County of Santa Clara re: U.S. Immigration and Customs Enforcement Secure Communities Initiative).

¹³ 745 F. 3d at 644.

¹⁴ *Morales v. Chadburn*, 793 F. 3d 208, 214-217 (1st Cir. 2015); *Miranda-Olivares*, slip op. at 9-11; *Mendoza v. Osterberg*, 2014 WL 3784141 (D. Neb. 2014); *Uroza v. Salt Lake County*, 2013 WL 653968 (D. Utah 2013); *Galarza v. Szalczyk*, 2012 WL 1080020 (E.D.Pa. Mar.30, 2012) *rev'd on other grounds*, 745 F.3d 634 (3d Cir.2014).

¹⁵ See Congressional Research Service, *supra* note 4, at 7-20 (providing examples of various types of “sanctuary” policies used across the country).

¹⁶ U.S. Dep’t of Justice, Office of the Inspector General, Audit Division, *Cooperation of SCAAP Recipients in the Removal of Criminal Aliens from the United States*, January 2007 (redacted public version), at vii, n.44 (defining “sanctuary” policies for purposes of study).

¹⁷ *Id.* at 11-17.

¹⁸ Law Enforcement Systems and Analysis, *supra* note 10, at 10, 13-14, 26; Frank Cerabino, *PBSO quietly changes policy on fed detainee requests*, PALM BEACH POST, July 15, 2015, <http://www.mypalmbeachpost.com/news/news/crime-law/cerabino-pbso-quietly-changes-policy-on-fed-detain/nmzTT/> (last visited Jan. 4, 2016); Center for Immigration Studies, Map: Sanctuary Cities, Counties and State (July 2015), <http://www.cis.org/Sanctuary-Cities-Map> (last visited Jan. 4, 2015).

In the six counties where the policy was enacted by the Sheriff's Office, an ICE detainer will not be honored unless it is supported by probable cause, such as a warrant from a federal judge or an order of deportation.¹⁹ These policies appear to have been enacted after a Florida Sheriffs Association bulletin highlighted recent federal court decisions²⁰ relating to ICE detainers and explained that "sheriffs should be aware that any detention of an ICE detainee without probable cause may subject the sheriff's office to liability for an unlawful seizure."²¹ The policy adopted by the county commission in Miami-Dade provides that an ICE detainer will only be honored if the federal government agrees to reimburse the county for costs incurred in complying with the detainer and the inmate subject to the detainer has a previous conviction for a forcible felony or the inmate has pending charges for a non-bondable offense.²²

Effect of Proposed Changes

The PCS creates ch. 908, F.S., consisting of ss. 908.001-908.009, F.S., to create the "Rule of Law Adherence Act." The Act requires state and local governments and law enforcement agencies to support and cooperate with federal immigration enforcement.

Legislative Findings and Intent

The PCS creates s. 908.001, F.S., to provide legislative findings regarding immigration enforcement. The PCS states it is an important state interest that state agencies, local governments, and their officials owe an affirmative duty to assist the Federal Government with enforcement of federal immigration laws within this state, including complying with federal immigration detainers. It is also an important state interest that in the interest of public safety and adherence to federal law, this state must ensure that efforts to enforce immigration laws are not impeded or thwarted by state or local laws, policies, practices, procedures, or customs. Accordingly, state agencies, local governments, and their officials who encourage persons unlawfully present in the United States to locate within this state or who shield such persons from responsibility for their actions breach this duty and should be held accountable.

Prohibition against Sanctuary Policies

The PCS creates s. 908.003, F.S., to prohibit a state or local governmental entity, or a law enforcement agency²³ from adopting or having in effect a sanctuary policy. A "sanctuary policy" is defined in the PCS as a law, policy, practice, procedure, or custom adopted or permitted by a state entity, law enforcement agency, or local governmental entity which contravenes 8 U.S.C. s. 1373(a) or (b)²⁴, or which knowingly prohibits or impedes a law enforcement agency from communicating or cooperating with a federal immigration agency with respect to immigration enforcement" Examples of prohibited sanctuary policies include limiting or preventing a state or local governmental entity or law enforcement agency from:

- complying with an immigration detainer²⁵;

¹⁹ Julie B. Maglio, *HCSO Policy on Illegal Immigrant Detainment*, HERNANDO SUN, 2015, http://hernandosun.com/illegal_immigrant (last visited Jan. 4, 2015); Elizabeth Behrman, *Fla. sheriffs deny claims of 'sanctuary' cities in state*, The Tampa Tribune, July 19, 2015, <http://www.tbo.com/news/crime/fla-sheriffs-deny-claims-of-sanctuary-cities-in-state-20150718/> (last visited Jan. 4, 2016); Broward County Sheriff's Office, *Legal Bulletin, Updated Immigration Detainers: Probable Cause Required*, July 17, 2014; Cerabino, *supra* note 4.

²⁰ *Galarza* 745 F. 3d 634; *Miranda-Olivares*, 2014 WL 1414305.

²¹ Florida Sheriffs Association, *Legal Alert: ICE Detainers* (on file with the Civil Justice Subcommittee).

²² Resolution No. R-1008-13, Board of County Commissioners, Miami-Dade County, Florida (Dec. 3, 2010).

²³ The definitions of "state entity," "local governmental entity," and "law enforcement agency" in the PCS include officials, persons holding public office, representatives, agents, and employees of those entities or agencies.

²⁴ 8 U.S.C. s. 1373(a) and (b) generally bar any restrictions that prevent state or local government entities or officials from voluntarily communicating with federal immigration agencies regarding a person's immigration status. See also *Congressional Research Service, supra* note X at 10.

²⁵ "Immigration detainer" is defined in the PCS as "a written request issued by a federal immigration agency to another law enforcement agency to provide notice of release and to detain an individual based on an inquiry into the individual's immigration status or an alleged violation of a civil immigration law, including detainers issued pursuant to 8 U.S.C. ss. 1226 and 1357."

- providing a federal immigration agency access to an inmate for interview;
- initiating an immigration status investigation; or
- providing a federal immigration agency with the incarceration status or release date of an inmate.

Cooperation with Federal Immigration Authorities

The PCS creates s. 908.004, F.S., to prohibit any restriction on a state or local governmental entity or law enforcement agency's ability to:

- send information regarding a person's immigration status to, or requesting or receiving such information from, a federal immigration agency.
- maintain immigration information for purposes of the Act.
- exchange immigration information with a federal immigration agency, or governmental entity, or law enforcement agency.
- use immigration information to determine eligibility for a public benefit, service, or license.
- use immigration information to verify a claim of residence or domicile if such a determination of is required under federal or state law, local government ordinance or regulation, or pursuant to a court order.
- use immigration information to confirm the identity of an individual who is detained by a law enforcement agency.

The PCS requires a state or local governmental entity and a law enforcement agency to fully comply with and support the enforcement of federal immigration law. This requirement only applies with regard to an official, representative, agent, or employee of such entity or agency when he or she is acting within the scope of his or her official duties or employment.

Additionally, the PCS provides that a law enforcement agency that has received verification from a federal immigration official that an alien in the agency's custody is unlawfully present in the United States, the agency may transport the alien to a federal facility in this state or to a point of transfer to federal custody outside the jurisdiction of the agency. However, the law enforcement agency must obtain judicial authorization before transporting the alien to a point of transfer outside of this state.

The cooperation and support requirements in newly-created s. 908.004, F.S., do not require a state or local governmental entity or law enforcement agency to provide a federal immigration agency with information related to a victim or witness to a criminal offense, if the victim or witness cooperates in the investigation or prosecution of the crime. A victim or witness's cooperation pursuant to this exemption must be documented in the entity or agency's investigative records, and the entity or agency must retain the records for at least 10 years for the purposes of audit, verification, or inspection by the Auditor General.

Reimbursement of Costs for Complying with an Immigration Detainer

The PCS creates s. 908.005, F.S., to authorize a board of county commissioners to adopt an ordinance requiring any individual detained pursuant to a lawful and valid immigration detainer to reimburse the county for any expenses incurred in detaining the individual. However, an individual is not liable under an ordinance enacted pursuant to this provision if a federal immigration agency determines that the immigration detainer was improperly issued.

Duty to Report

The PCS creates s. 908.006, F.S., to require an official or employee of a state or local governmental entity or law enforcement agency to promptly report a known or probable violation of the Act to the Attorney General or the state attorney. An official or employee's willful and knowing failure to report a

violation may result in his or her suspension or removal from office pursuant to general law and the Florida Constitution.²⁶

The PCS provides protections under the Whistle-blower's Act²⁷ to any official or employee of a state or local governmental entity or law enforcement agency who is retaliated against by the entity or agency or denied employment because he or she complied with the duty to report in s. 908.005, F.S.

Enforcement of Violations of the Act

The PCS creates s. 908.007, F.S., to provide for the enforcement of violations of the Act and establish penalties for such violations. The Attorney General or a state attorney may institute proceedings in circuit court to enjoin a state or local governmental entity or law enforcement agency that violates the Act. The court must expedite the action, including setting a hearing at the earliest practicable date.

Upon adjudication by the court or as provided in a consent decree declaring that a state or local governmental entity or law enforcement agency has violated the Act, the court must enjoin the unlawful policy or practice and order that the entity or agency pay a civil penalty of at least \$1,000 but not more than \$5,000 for each day the policy or practice was in effect. The court may award court costs and reasonable attorney fees to the prevailing party.

A state or local governmental entity or law enforcement agency ordered to pay a civil penalty must remit payment to the Chief Financial Officer for appropriation as provided in the General Appropriations Act, or if not provided for in the General Appropriations Act, such funds will revert to the General Revenue Fund.

The PCS also prohibits the expenditure of public funds to defend or reimburse any sanctuary policy maker or any official, representative, agent, or employee of a state entity, local governmental entity, or law enforcement agency who knowingly and willfully violates the Act.

Complaint by a Private Individual

The PCS creates s. 908.008, F.S., to require that the Attorney General provide a form on the Department of Legal Affairs' website for a person to submit a complaint alleging a violation of the Act. A person may still file an anonymous complaint or a complaint different than the prescribed format.

Cause of Action against State or Local Governmental Entity, Law Enforcement Agency, and any Sanctuary Policymaker

The PCS creates s. 908.009, F.S., to provide a civil cause of action for a person injured by (or the personal representative of a person killed by) the tortious conduct of an alien unlawfully present in the United States against any state or local governmental entity or law enforcement agency in violation of newly-created ss. 908.003 and 908.004, F.S., and any sanctuary policymaker of the entity or agency. To prevail in the new cause of action, the plaintiff must prove by the greater weight of the evidence:

- The existence of a sanctuary policy; and
- Failure to comply with any provision of newly-created s. 908.004, F.S., resulting in the alien having access to the person injured or killed when the tortious conduct occurred.

A "sanctuary policymaker" is defined in the PCS as "a state or local elected official, or an appointed official of a local governmental entity governing body, who has voted for, allowed to be implemented, or voted against repeal or prohibition of a sanctuary policy."

²⁶ Section 1, Art. IV of the Florida Constitution provides that the governor may suspend "any state officer not subject to impeachment . . . or any county officer for malfeasance, misfeasance, neglect of duty, drunkenness, incompetence, permanent inability to perform official duties, or commission of a felony, and may fill the office by appointment for the period of suspension. The suspended officer may at any time before removal be reinstated by the governor." The senate then "may. . . remove from office or reinstate the suspended official . . ."

²⁷ s. 112.3187, F.S.

A cause of action pursuant to this section may not be brought against a public official or employee of a state or local government or law enforcement agency, unless he or she is a sanctuary policymaker.

The parties in an action brought under this section have the right to trial by jury. Additionally, the PCS waives sovereign immunity for the state, its political subdivisions, and any sanctuary policymaker under the Florida Constitution and current law²⁸ for actions brought under this section.

Additional Provisions

The PCS also creates s. 908.0010, F.S., to provide that the Act be implemented to the fullest extent permitted by federal immigration law and the legislative findings and intent declared in s. 908.001, F.S.

The PCS provides that it will take effect on July 1, 2016

B. SECTION DIRECTORY:

Section 1 creates a short title.

Section 2 creates ch. 908, F.S., consisting of ss. 908.001-908.0010, F.S., entitled “Federal Immigration Enforcement.”

Section 3 provides an effective date of July 1, 2016

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The PCS does not appear to have any impact on state revenues.

2. Expenditures:

The PCS does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

See “Expenditures” section below.

2. Expenditures:

The PCS requires a local government or law enforcement agency to honor an ICE immigration detainer. Any costs incurred by a local government or law enforcement agency in holding an individual pursuant to an immigration detainer are not reimbursed by ICE.²⁹ However, the PCS authorizes a board of county commissioners to enact an ordinance to recover costs for complying with an immigration detainer.³⁰ Accordingly, the PCS may have an indeterminate negative impact on local expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The PCS does not appear to have any direct economic impact on the private sector.

D. FISCAL COMMENTS:

²⁸ s. 768.28(9), F.S.

²⁹ Resolution No. R-1008-13, *supra* note 21.

³⁰ See “Reimbursement of Costs for Complying with an Immigration Detainer” sections above.

It is unknown how much it costs local governments to comply with immigration detainers. According to the Board of County Commissioners in Miami-Dade County, compliance with immigration detainers in 2011 and 2012 cost the county \$1,002,700 and \$667,076, respectively.³¹

As noted above, recent federal courts have determined that a local law enforcement agency is not required to honor an ICE detainer because such detainers are simply requests to detain.³² Federal courts have also held that an ICE detainer must be supported by probable cause.³³ Based on these two lines of federal cases, it appears that a law enforcement agency that voluntarily complies with an ICE detainer that is not supported by probable cause may be subject to a federal civil rights action.³⁴

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The PCS appears to require a county or municipality to spend funds or take an action requiring the expenditure of funds as described in article VII, section 18 of the Florida Constitution, specifically by requiring the county or municipality to comply with an immigration detainer. However, the PCS contains legislative findings that state and local government assistance and cooperation with federal immigration enforcement fulfills an important state interest, and it authorizes a board of county commissioners to enact an ordinance to recover costs for complying with an immigration detainer.³⁵

2. Other:

None.

B. RULE-MAKING AUTHORITY:

Newly-created s. 908.008, F.S., in the PCS requires the Attorney General to prescribe and provide through the Department of Legal Affairs' website a form for a person to submit a complaint alleging a violation of the Act.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

³¹ Resolution No. R-1008-13, *supra* note 21.

³² See "Immigration Detainers" section above.

³³ *Id.*

³⁴ See *Legal Alert*, *supra* note 20.

³⁵ See "Legislative Findings and Intent" and "Reimbursement of Costs for Complying with an Immigration Detainer" sections above.