Impacts of Immigration Executive Orders on Local Governments Webinar Resource: FAQ

Hosted by the Local Government Legal Center (LGLC), this webinar from January 31, 2025 provides an overview of the new executive orders and federal policies in the area of immigration and how they may impact local governments and local government officials. Presenters provided a high-level overview of the laws at issue and their impact on local government operations and duties.

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1. **What is the most relevant from the recently issued Trump Administration Executive Orders in the area of immigration as it applies to local governments?**
   The Protecting the American People Against Invasion Executive Order specifically talks about "Sanctuary Jurisdictions" (see, Section 17 of the Order). Under this provision of the Order, the President states the Attorney General and the Secretary of Homeland Security shall "to the maximum extent possible under law, evaluate and undertake any lawful actions to ensure that… "sanctuary" jurisdictions, which seek to interfere with the lawful exercise of Federal law enforcement operations, do not receive access to Federal funds…"

   Subject to the issuing of this Order, the Acting Attorney General sent a memo that included language that varied slightly from the Order, indicating consequences from "failure to comply" with "lawful immigration commands and requests..."

   Under the Executive Order, this seems to have limited impact on the rights of local governments in the immigration context. So long as local governments are not actively interfering with federal enforcement of immigration laws, they should be in compliance with the language in the Order. On the other hand, under the language of the memo from the Department of Justice (DOJ), there might be an affirmative obligation by local governments to do certain actions related to the enforcement of immigration laws. Currently, there is no federal law that mandates what local governments MUST do when it comes to enforcement of immigration laws. There is also the question as to whether the existence of such a law is constitutional under principles of federalism and the Tenth Amendment.

2. **What are the broad strokes legal principles that are at play here?**

- **Supremacy Clause:** The Supremacy Clause of the U.S. Constitution states that when federal laws conflict with state and/or local laws, the federal laws will be the “supreme law of the land” or in other words, will take precedence over state or local laws.
- **Immigration and the "Plenary Power” doctrine:** Courts have said that the area of immigration is an exclusive federal power.
- **10th Amendment:** States and localities also have rights under the U.S. Constitution. Under the 10th Amendment, the federal government cannot force states (or local governments, as political subdivisions of the state) to enforce a federal law or implement a federal program or regulation. Nor can the federal government tie state or local participation to a federal grant program if the grant is so vital that the risk of losing it would be a “coercive condition.” This is why there is no federal mandate requiring state or local officials to take specific enforcement actions with respect to immigration. This is also why federal efforts to solicit state and local participation focus on conditions for federal funding.

3. **Are there other sources of law that are related to immigration that local governments should know about?**
   Yes. There are also relevant statutes with provisions that may be relevant to local governments. 8 U.S.C. 1373 and 8 USC 1324 are specifically mentioned in the Executive Order and 8 U.S.C. 1324 is referenced in the Acting Attorney General memo referenced above.
   - **8 U.S.C. 1373 (Communication between government agencies and the Immigration and Naturalization service):** This piece of legislation was passed in 1996. With the premise there is no federal law that forces local governments to affirmatively take any action related to immigration law, this law relates to the duties of local governments on a voluntary basis. Specifically, this law says no state or local official can force or prohibit any other state or local official from providing voluntary communication about immigration information to the federal authorities. It does not mandate cooperation on sharing information, but rather *prohibits local and state actors from stopping other state or local officials from voluntarily sharing such information*. To the knowledge of these authors, there has not been any successful action by the federal government against a state or local government or official on the basis of a failure to comply with this section. At the same time, many cities and counties amended their local policies to comply with Section 1373.
   - **8 U.S.C. 1324 (Bringing in and harboring certain aliens):** This piece of criminal legislation addresses anti-harboring, concealing and shielding of unauthorized aliens. The intent of this law is to make criminal any affirmative action taken to shield or conceal an individual from immigration enforcement or detection. Additionally, there is a separate provision that says any person who encourages or induces an unauthorized alien to come to the United States will also be subject to penalty. To the knowledge of these authors, this law has not

been yet applied to a local government or local official, nor has a court decided whether the “persons” punishable by this law include local governments or local officials acting in their official capacity. In addition, what constitutes harboring or concealing is not defined in the statute, and there are already some differences in interpretation by different appeals courts. This is a criminal statute, so a court might be less inclined to believe that Congress intended to cover local governments as “persons” under the statute. But because this statute has not been applied to local governments and local government officials, there is uncertainty as to whether and how it might apply.

4. **What actions taken by an “official” (ex. City Councilmember, County Commissioner) would be considered permissible or prohibited under 1324?**
   It is unknown how 1324 will be interpreted in the future or even if it will be applicable to local governments. An official statement in support of immigrants would seem to fall well within protected First Amendment activity and not interfere with federal immigration enforcement efforts. On the other hand, the federal government may view warning the community of an impending ICE raid to constitute "harboring" or "shielding" under 1324, though it is not clear if a court would agree. No enforcement action has been taken against local governments or local officials for actions like this in the past.

5. **If a 1324 charge was to be brought against a local official, is it correct the U.S. Attorney for the State would prosecute? If so, is there any information about what other prosecutorial arrangements may be used?**
   It is uncertain to know at this point. While this is the usual reference for prosecution in these types of cases, there are also indications that the Attorney General and the U.S. Department of Justice might take a more direct approach. As referenced in a memo recently sent by the Acting Deputy Attorney General, there is also a “Sanctuary Cities Working Group” being formed at the U.S. Department of Justice. At this time, it is hard to say whether the Department will develop cases and reference to the U.S. Attorney for the State or prosecute themselves.

6. **What is a detainer request and how do they impact local governments?**
   Detainer requests are formal notifications sent by the federal government (largely from the U.S. Immigration and Customs Enforcement (ICE) agency) to request that an individual be detained, typically for up to 48 hours. These detainers are administrative requests from the immigration enforcement agency and are not judicial orders. In many cases, local governments are faced with holding individuals after they would otherwise be released in order to comply with the detainer request, which can lead to both resource and legal issues for localities who comply. The goal of these requests is to facilitate the transfer of individuals who may be released under state related criminal charges to federal custody for purposes of immigration enforcement (such as removal from the country).

There appears to be an effort at the federal level to argue that compliance with federal detainers is mandatory. Courts thus far, however, have largely held that detainers are mere requests, and that states and localities can choose whether to abide by them. *See, e.g.,* Galarza v. Szalczyk, 745 F.3d 634 (3d Cir. 2014). Indeed, several federal courts have suggested any federal effort to compel local governments to comply with immigration detainers or otherwise participate in immigration enforcement would be unconstitutional commandeering, s*ee id.* at 643; County of Santa Clara v. Trump, 275 F. Supp. 3d 1196, 1215–16 (N.D. Cal. 2017) (holding with respect to grant conditions).

If detainers are requested, liability concerns are also raised if localities decide to abide by detainers. The question here is whether the locality can constitutionally justify their detention of an individual identified by an immigration detainer if the locality no longer has probable cause to hold the individual under state law. Because immigration detainers are typically not accompanied by judicial warrants, some courts have held that detainers do not provide "probable cause" for local officials to detain. In addition, because local governments do not enjoy the same immunity as federal officials for civil liability for constitutional violations, many courts have upheld damages against local governments for complying with detainer requests without establishing their own probable cause. S*ee, e.g.,* Galarza v. Szalczyk, 745 F.3d 634, 645 (3d Cir. 2014); Miranda-Olivares v. Clackamas Co., No. 3:12-cv-02317 (D.Or. April 11, 2014); Roy v. City of L.A., No. CV 12-09012-AB (C.D. Cal. Feb. 7, 2018). A federal judge in New York recently held that Suffolk County might be liable for up to $60 Million for complying with ICE detainers. New York City also recently reached a settlement agreement of $92.5 Million for its earlier compliance with detainers.

Even if the federal government has not, and perhaps cannot, mandate compliance with detainers, state legislatures can. Indeed, compliance with detainer requests are mandatory in several states, including Texas, Georgia, and North Carolina. In upholding most of the Texas law, the Fifth Circuit Court of Appeals held that local officials had authority to comply with detainers lacking judicial warrants if the federal government otherwise had probable cause. Through the so-called "collective knowledge doctrine," the court held that the federal government's knowledge can be imputed on local officials in determining whether local officials had probable cause. *City of El Cenizo v. Texas,* 890 F.3d 164 (5th Cir. 2018). This case suggests that as long as the detainers are justified by probable cause, then local officials have probable cause as well when complying with a detainer.

Last, it is worth noting that whether local officials can comply with a detainer may also depend on state law. Just as many states mandate compliance with detainers, others, like Colorado and California, limit that compliance as a matter of state law. In addition, some state courts have held that complying with detainers exceeds the delegated authority under state law. In Lunn v. Commonwealth, 78 N.E.3d 1143 (Mass., 2017),

for example, the Supreme Judicial Court of held that state and local officials in Massachusetts have not been delegated the authority to detain individuals for civil immigration violations without a warrant, thus cannot comply with federal immigration detainers.

Because this area of the law is complicated and varies by jurisdiction, it is important that officials consult with their counsel regarding the state of the law for their locality.

7. **What is the current legislative landscape related to immigration?**
   There are several pieces of new legislation in the bill stage related to immigration. Recently, the Laken Riley Act (PL. 119-1) was signed into law. Under this piece of legislation, the federal government is required to detain certain non-U.S. nationals accused of lower-level crimes (burglary, theft, larceny or shoplifting). It also allows states to bring forth legal action against the federal government if they feel they aren't enforcing immigration laws. Relevant to local governments, this will likely greatly increase the number of detainer requests issued by the federal government, and the need for detention capacity at the state and local level. This legislation does not change previous caselaw that rules on the status of detainer requests for local law enforcement (applicable to some jurisdictions).

   Other legislation has been proposed that has a more direct impact on local governments. While under the Constitution, as discussed above, the federal government has no law that mandates local governments to take certain actions related to immigration, there is pending legislation that would create a private cause of action to sue local governments in certain circumstances. The "Justice for Victims of Sanctuary Cities Act" (S. 185) ould create a private cause of action allowing a private party to sue a local government if there are any unauthorized immigrants that cause harm and allege that is due to the local government's failure to abide by a detainer request. In addition, the proposed bill requires states to waive immunity for themselves and their local governments or risk losing access to a number of federal grants. If enacted, this bill might face constitutional challenges for essentially mandating local participation in a federal program through a private cause of action, or creating an unconstitutional condition by requiring states to waive immunity or risk losing substantial federal grants. Other relevant proposed legislation could have the effect of making it illegal for localities to offer services or any benefits to go to non-legal immigrants subject to the risk of losing federal funding. These are all areas to monitor.

8. **How should local governments respond to administrative warrants from ICE or other immigration authorities? Does this change based on whether it's an arrest or search warrant?**
   Local leaders should check with their counsel to receive advice on this matter under the relevant state law and circuit precedent. In short, while they may have different titles, largely ICE and other immigration federal authorities will issue these

administrative warrants to allow for the detaining and arrest of non-U.S. nationals to be arrested in public. These administrative warrants do not give authority to enter private residences. To do that, you must receive a judicial warrant. Additionally, it is unclear the extent to which an administrative warrant gives local law enforcement authority, however it is unlikely that if an administrative warrant dos not grant ICE or other federal immigration authorities to enter a private residence, it is very unlikely that local law enforcement has that authority from an administrative warrant.

9. **How are these matters tied to federal grants (such as infrastructure grants) and federal agency guidance and communications?**
   Recently, the U.S. Department of Transportation issued a memo that references compliance with federal immigration efforts. It is likely that consistent with the new Administration's agenda, conditions for compliance with federal enforcement of immigration may start appearing in various federal landscapes. The question is to what extent the President can insert conditions on federal grants that weren't referenced in the original authorizing legislation from Congress.

   In 2017-2020, courts considered a version of this legal issue as it related to immigration conditions to Department of Justice grants, namely the Byrne Memorial Justice Assistance Grant (Byrne JAG). Most courts concluded that the Attorney General did not have authority to place conditions on grants if the condition was not in the authorizing statute and nothing in the statue references the ability of the President / Executive to invoke further or later conditions. However, the circuits were split, and the Supreme Court did not take up these cases. It is therefore important to check with your counsel on your jurisdiction's case law.

10. **Can Congress delegate their authority to the President?**
    Congress has the ability to delegate authority to the President, but that delegation is constitutionally limited. The Separation of Powers prevents Congress from giving away its legislative powers to another branch, like the President. With respect to grants, it is generally understood that Congress can delegate the authority to implement conditionsso long as Congress also provides clear standards and goals that Congress wants to implement and accomplish. Moreover, the Supreme Court just recently (in *West Virginia v. EPA*) held that the Executive cannot make decisions on "major questions" without clear authorization from Congress.

    Even if Congress can delegate, the question is still whether it did delegate. Right now, it is not clear that such delegations were made in grants associated with, say, the infrastructure bill.

11. **When Congress starts to include specific language in legislation related to immigration or DEI, are there any legal arguments to be made here? Can Congress delegate their authority to the President?**

Local governments have sound arguments in these areas, but the devil will be in the details in terms of what type of Congressional legislation is being pursued. But there are limitations on Congress' Spending Clause power (conditions on grants cannot be overly coercive, must be germane to the topic of the legislation, and cannot require unconstitutional conduct). There are also anti-commandeering considerations. In short, it will depend on what Congress does but there will likely be legal challenges in this area.

12. **What defines a sanctuary city or county?**
    There is no uniform definition of a “sanctuary” city or county. As a legal term, it is usually referenced in the context of saying that within that jurisdiction there is some level of limitation on immigration enforcement or not fully participating in the enforcement of immigration mandates. However, this remains a gray space for local governments. What a local government may claim about themselves as either a “sanctuary” jurisdiction or not does not necessarily mean the federal government will view it the same way.

    On the Congressional front, there is a bill recently introduced (H.R. 32) which would deny federal funds that a "sanctuary jurisdiction" intends to use to benefit an unauthorized immigrant, including "legal services." A sanctuary jurisdiction is defined by the bill to include any political subdivision of a state that does not comply with all immigration detainers.

13. **Is there a best practice that can be given to staff about how to interact with Immigration Enforcement if they come to the building or the immigrant community?**
    Local leaders should consult with their counsel to determine the most applicable advice relevant to their jurisdiction. The answer to this question will greatly depend on local policies.

    Notably, there appears to be a movement to make the definition of “sanctuary” encompassing of any affirmative support or assistance to or for the non-U.S. national community.

14. **Will localities subject themselves to penalties by sharing information with their community including “Know your rights” type communication?**
    Generally, and currently, the sharing of information to another person related to that person’s rights under the law is not illegal. There has been rhetoric that ICE may now target organizations (including non-profit organizations) for harboring unauthorized aliens if they focus on providing assistance on individual rights or even assistance on understanding what authority ICE has in relation to immigration enforcement. However, no court has found this behavior unlawful to this date as far as the authors are aware.

15. **What are 287(g) agreements and are they considered mandatory for local governments?**
    These agreements are a voluntary formal agreement between a local government and federal immigration authorities (ICE) which grants local governments authority to perform certain immigration enforcement actions. There is no current federal law that mandates local governments perform certain immigration enforcement actions. These agreements are negotiated between the federal law enforcement and local governments and neither party is required to agree to the existence of such an agreement. However, if your state enacts language that requires you to engage in these types of activities or in immigration enforcement, local governments may be subjected to those requirements as political subdivisions of the states. Similarly, some states may seek to prohibit localities from entering into a 287(g) agreement. It is important to understand your state law in this area.

16. **Is it accurate to state that a local government's approach to this situation is set within the parameters that have been set at the state level?**
    State level considerations are important and may be dispositive for some local governments. But not all states have directed policy in this area and some localities are free to determine their own level of compliance with federal immigration enforcement efforts. It is important to review state law as well as federal case law in your jurisdiction to understand what your legal requirements are.

17. **Can local governments prevent ICE agents from entering public areas or demand they leave from public areas (such as a public meeting setting)?**
    Local leaders should consult with their counsel for best practices on how to handle ICE agents entering government areas and public areas. Local governments should carefully consider prohibiting ICE agents from entering certain spaces as that action may be seen as obstructing and interfering with federal immigration enforcement. We do not yet know what will lead to criminal charges under 1324. It is noteworthy that no local government can restrict ICE agents if they have a valid judicial warrant.

18. **What is considered a public vs. non-public space for immigration officers?**
    The distinction between public and non-public spaces for immigration officers is, for the most part, the same as that for law enforcement officials generally. The legal standard that applies is whether a person would have a "reasonable expectation of privacy" in the space. Because of this, determination may also depend on different areas of an establishment. For example, during a regular school day, a school may be considered a non-public space but might be considered public when it is hosting a football game open to members of the public or the community. The lobby or public area of a hospital might be public space, while the patient and treatment rooms, and administrative offices, might be considered non-public.

19. **What is the impact of the “Finding of Mass Influx of Aliens” issued recently by the U.S. Department of Homeland Security (DHS)?**
    The purpose of this finding, and the precise language, is to satisfy the requirements of a regulation at DHS. The regulation states that the federal government can request the assistance of states and local governments in immigration enforcement, ordinarily a federal responsibility, if there is a "mass influx of aliens." The Secretary of DHS is making this finding to comply with the department's internal regulations, perhaps deflecting legal challenges.

20. **Can the federal government claw back American Rescue Plan Act (ARPA) funds if they are used on any DEI related causes?**
    If the federal government pursues this action, it will likely be an area for legal challenges. While the federal government could decide to attempt this action, it does not mean that local governments would be left without opportunities to pursue legal action in the event of a claw back attempt. Local leaders should consult their counsel to discuss these options should this action occur.

21. **How do these recent immigration related actions impact public or private K-12 schools?**
    Generally, while schools are subject to the same laws as local governments, they can be in a more complicated situation in this context. On one hand, the recent Executive Actions seem to be focused on compliance with detainer requests, which are not requests sent to school as entities. On the other hand, there may be future pressure on schools to identify unauthorized immigrants. Impacts on local governments may be increases in school resource officers or police officers assigned to schools. Increasing demands on local law enforcement could impact school operations.

    Related to immigration enforcement administrative warrants, the general consensus is that ICE agents, like law enforcement, need a judicial warrant signed by a judge or magistrate to enter a school. Administrative warrants are authorization for ICE agents to make arrests in public, and since schools are usually not considered public spaces, they are free to consent but are not required to grant entry without a judicial warrant or exigent circumstances. Schools should also consult their counsel to determine their best practices and response, if any, to recent action.