

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Judiciary

BILL: SB 168

INTRODUCER: Senators Gruters and Bean

SUBJECT: Federal Immigration Enforcement

DATE: February 8, 2019

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Davis	Cibula	JU	Pre-meeting
2.			IS	
3.			RC	

I. Summary:

SB 168 creates the “Rule of Law Adherence Act” in chapter 908, F.S. The act seeks to ensure that state and local governments cooperate with federal government officials to enforce, and not obstruct, immigration laws. In its most general and broad terms, the bill prohibits sanctuary jurisdictions, requires state and local entities to comply with federal immigration detainers, and provides legal remedies to redress noncompliance with the act.

In more specific terms, the bill:

- Requires a covered government body to comply with and support the enforcement of federal immigration law.
- Prohibits a state entity, local governmental entity, or law enforcement agency from having a law or procedure which impedes a law enforcement agency from communicating or cooperating with a federal immigration agency on immigration enforcement matters.
- Prohibits any restriction on a covered body’s ability to use, maintain, or exchange immigration information for certain purposes.
- Provides procedures for a law enforcement agency and court to follow when an arrested person cannot provide proof of lawful presence in the United States or is subject to an immigration detainer.
- Requires any sanctuary policies currently in effect be repealed within 90 days after the effective date of the act.
- Authorizes a board of county commissioners to enact an ordinance requiring those detained pursuant to a properly issued immigration detainer to reimburse the county for its costs of complying with the detainer.
- Requires an official or employee of a covered body to promptly 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 government body that violates the act.
- Permits an official who supported a sanctuary policy or voted against its repeal to be suspended or removed from office.
- Creates a civil cause of action against a governmental entity for the death of or injuries to a person by an alien which were made possible by the governmental entity's application of a sanctuary policy.

With the exception of two sections, the bill takes effect July 1, 2019. The two sections establishing penalties and civil causes of action for injury or death take effect October 1, 2019.

II. Present Situation:

General Overview

The Federal Government is responsible for both establishing and enforcing immigration laws. Congress has enacted legislation, which the federal courts have interpreted, and the body of immigration law has developed. The responsibility for enforcing immigration laws rests with the Division of Homeland Security's U.S. Immigration and Customs Enforcement (ICE) and its Enforcement and Removal Operations (ERO). It is the mission of Enforcement and Removal Operations to identify, apprehend, and remove aliens who are a risk to national security or public safety, enter the country illegally, or seek to undermine the integrity of the country's immigration laws or border control efforts.¹ In order to carry out its mission, ICE depends, in part, on the assistance of local and state law enforcement agencies to identify removable aliens.² However, some state and local jurisdictions have chosen to expressly define or limit their roles in immigration enforcement and have become known as "sanctuary" jurisdictions. The critics of sanctuary jurisdictions argue that they limit law enforcement's abilities and encourage illegal immigration. Those who support sanctuary jurisdictions argue that they are necessary to prevent local law enforcement resources from being diverted to enforce immigration laws.³

Federal Immigration Law

The Federal Government's authority to regulate immigration law is established in the United States Constitution. This power is extensive. The Constitution grants Congress the power to "establish an uniform Rule of Naturalization,"⁴ and to "regulate Commerce with foreign Nations."⁵ Additional authority is found in the Federal Government's broad powers over foreign affairs.⁶

The individual states are not granted similar powers under the Constitution and they may not encroach upon federal authority in this area. When states enact immigration laws, they are often

¹ U.S. Immigration and Customs Enforcement, *Enforcement and Removal Operations, Mission*, <https://www.ice.gov/ero>

² Congressional Research Service, *Sanctuary Jurisdictions and Criminal Aliens: In Brief* (Jan. 10, 2017), <https://www.everycrsreport.com/reports/R44118.html#Content>.

³ *Id.*

⁴ U.S. CONST. art. 1, s. 8, cl. 4.

⁵ U.S. CONST. art. 1, s. 8, cl. 3.

⁶ *Toll v. Moreno*, 458 U.S. 1 (1982).

challenged on the grounds that the law is preempted by federal law under the Supremacy Clause of the Constitution.⁷ The federal preemption doctrine is a principle of law which holds that federal laws take precedence over state laws, and as such, states may not enact laws that are inconsistent with the federal law.

Yet, the U.S. Supreme Court has noted that this vast federal power is not without limits. In *De Canas v. Bica*, a 1976 decision, the U.S. Supreme Court held that federal immigration law does not inherently preempt state court jurisdiction over all matters involving immigration issues. The Court noted that it has never held that every state statute “which in any way deals with aliens is a regulation of immigration and thus *per se* pre-empted by this constitutional power.”⁸ In *Arizona v. United States*,⁹ a 2012 U.S. Supreme Court ruling, the Court similarly stated that “In preemption analysis, courts should assume that ‘the historic police powers of the States’ are not superseded ‘unless that was the clear and manifest purpose of Congress.’”

Tenth Amendment and Anti-Commandeering Doctrine

While the Federal Government has substantial authority to preempt state or local immigration regulations, the authority is restricted by the anti-commandeering principles of the Tenth Amendment.¹⁰ Those principles prevent Congress from “commandeering” or forcing state or local governments to implement a federal regulatory program.¹¹ Some state and local jurisdictions have relied on this principle to avoid enforcing federal immigration policies and, as a result, have established sanctuary jurisdictions.¹²

Sanctuary Jurisdictions

Although the term “sanctuary jurisdiction” is not defined in federal statute or regulation, it is generally understood to be a jurisdiction that has adopted a law or policy intended to significantly limit participation in the enforcement of federal immigration activities. States and municipalities have adopted varying degrees of sanctuary policies which have taken on multiple forms. Some jurisdictions have adopted “don’t enforce” policies in which law enforcement is restricted from cooperating with federal immigration authorities who are attempting to apprehend removable aliens. Other jurisdictions have adopted “don’t ask” policies that restrict

⁷ U.S. CONST. art. 6. The Supremacy Clause states that the Constitution and federal laws “shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.”

⁸ *De Canas v. Bica*, 424 U.S. 351, 355 (1976).

⁹ *Arizona v. United States*, 567 U.S. 387, 400 (2012). See also *United States v. California*, 314 F. Supp. 3d 1077, 1085 (E.D. Cal. 2018)

¹⁰ The Tenth Amendment to the United States Constitution provides “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

¹¹ *New York v. U.S.*, 505 U.S. 144, 188 (1992). In weighing whether a federal law that created incentives for states to dispose of low-level radioactive waste violated the anti-commandeering doctrine the Court held, “Whatever the outer limits of that sovereignty may be, one thing is clear: The Federal Government may not compel the States to enact or administer a federal regulatory program.” See also *Printz v. United States*, 521 U.S. 898 (1997). The Court has also held that every federal requirement imposed on state or local entities is not necessarily a violation of the anti-commandeering doctrine. Some federal statutes that require states to collect and report information to federal agencies are acceptable. *Reno v. Condon*, 528 U.S. 141 (2000).

¹² Sarah S. Herman, Congressional Research Service, *State and Local “Sanctuary” Policies Limiting Participation in Immigration Enforcement* (March 23, 2017), <https://fas.org/sgp/crs/homsec/R44795.pdf>.

law enforcement officials from inquiring about someone's immigration status. Yet other entities have adopted "don't tell" policies that restrict local law enforcement officials from sharing information with federal immigration officials. These last measures are primarily directed at preventing federal immigration officials from relying on the information to identify and arrest for removal aliens who are unlawfully present. Some jurisdictions have even adopted policies that prevent law enforcement officials from alerting federal immigration officials about the release status of aliens who are incarcerated.¹³

Sanctuary Jurisdictions in Florida

It is difficult to determine how many sanctuary jurisdictions, if any, exist in Florida because organizations use different criteria for making their determinations. For example, the Federation for American Immigration Reform (FAIR) released a list of sanctuary jurisdictions in May 2018 which stated that, as of April 2018, 12 counties and 3 cities qualified as Florida sanctuary jurisdictions.¹⁴ The Center for Immigration Studies provided a list of sanctuary jurisdictions, updated October 2018, which stated that Alachua and Clay Counties were sanctuary jurisdictions.¹⁵

Perhaps one of the most objective ways to measure whether an entity is a sanctuary jurisdiction is to determine whether it is disqualified from receiving federal criminal justice grant funds due to perceived violations of federal immigration law. Those violations generally involve limiting or restricting communication and information between a state or local entity and the Department of Homeland Security (DHS) about an immigrant's status or release. The Florida Department of Law Enforcement (FDLE) serves as the state administering agency for the federal Byrne Justice Assistance Grant Program.¹⁶ According to FDLE and the U.S. Department of Justice (DOJ), Office of Justice Programs, applicants that seek grant funding¹⁷ from the Department of Justice must submit specific certifications from the attorney general and the chief executive officer, which is either the governor or mayor, stating that the applicant complies with 8 U.S.C. s. 1373¹⁸

¹³ *Id.*

¹⁴ Federation for American Immigration Reform, *Sanctuary Jurisdictions Nearly Double Since President Trump Promised to Enforce Our Immigration Laws*, 52-55 (May 2018), <http://www.fairus.org/sites/default/files/2018-05/Sanctuary-Report-FINAL-2018.pdf>. FAIR stated that it drew its information from resolutions, ordinances, and policy directives as well as secondary sources. The counties listed were Alachua, Bradford, Broward, Flagler, Gulf, Highlands, Leon, Palm Beach, Seminole, St. Lucie, Volusia, and Washington. The cities were Key West, St. Petersburg, and West Palm Beach.

¹⁵ Center for Immigration Studies, *Fact Sheet, Sanctuary Cities, Counties, and States* (Oct. 2018), <https://cis.org/Fact-Sheet/Sanctuary-Cities>.

¹⁶ Email from Rona Kay Cradit, Bureau Chief, Office of Criminal Justice Grants, Florida Department of Law Enforcement (Feb. 5, 2019) (on file with the Senate Committee on Judiciary).

¹⁷ The grants are Edward Byrne Memorial Justice Assistance Grant program, funded through the U.S. Department of Justice, the largest source of criminal justice grant funding.

¹⁸ The requirements of 8 U.S.C. s. 1373 have been found unconstitutional by federal district courts with respect to the jurisdictions in those cases. However, the issues in those cases are under appeal. See *State of New York v. Department of Justice*, 343 F.Supp.3d 213, (S.D.N.Y. 2018), *appeal docketed*, No. 19-275 (2nd Cir. Jan. 28, 2019). The text of 8 U.S.C. s. 1373 is as follows:

§1373. Communication between government agencies and the Immigration and Naturalization Service

(a) In general

Notwithstanding any other provision of Federal, State, or local law, 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,

and does not restrict communications between state and local agencies and DHS entities regarding someone's citizenship or immigration status. Beginning in 2017, the Office of Justice Programs added two requirements for applicants to receive grant funding: an award recipient must permit DHS access to correctional and detention facilities to meet with an alleged alien to inquire about his or her right to be in the country; and an award recipient must also provide DHS a minimum of 48 hours' advance notice concerning the scheduled release time and date of someone in the jurisdiction's custody when DHS requests that notice in order to take the person into custody.¹⁹

As of February 5, 2019, FDLE has received 188 executed attorney general certifications and 111 executed chief executive officer certifications from county and municipal governments.²⁰ In essence, these entities are stating that they comply with federal law and do not limit, restrict, or prohibit the exchange of information between governmental entities, agencies, or persons concerning the citizenship or immigration status of a person. This is the criteria many groups use to determine what constitutes a sanctuary jurisdiction.

Only one Florida municipality, the City of West Palm Beach, appeared on a compliance review list released by DOJ in January 2018.²¹ The city was required to submit documentation to the Department of Justice demonstrating whether its employees could communicate with DOJ, DHS, ICE, or their agents.²² The City of West Palm Beach now appears on the current FDLE list of jurisdictions that have submitted certifications stating that it is in compliance with federal immigration laws.

or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

(b) Additional authority of government entities

Notwithstanding any other provision of Federal, State, or local law, 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.

(c) Obligation to respond to inquiries

The Immigration and Naturalization Service shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information.

¹⁹ U.S. Department of Justice, Office of Justice Programs, *Overview of Legal Requirements Generally Applicable to OJP Grants and Cooperative Agreements – FY 2017 Awards; Alert: New Requirements for Certain FY 2017 Programs* (2017), <https://ojp.gov/funding/Explore/SolicitationRequirements/index.htm>.

²⁰ See Email from Rona Kay Credit, *supra* note 16.

²¹ *Id.*

²² Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice, Correspondence to the City of West Palm Beach, p. 25-26 (Jan. 24, 2018), <https://www.justice.gov/opa/press-release/file/1028311/download>.

Immigration Law and Removals

The Federal Government, through immigration law,²³ seeks to control the number and type of aliens who are granted permission to enter, remain in the United States, and become citizens. Just as the Federal Government has established criteria for entering the country, it has also established formal criteria and procedures for removing or deporting an alien from this country who has violated the immigration laws. An alien may be removed for a number of reasons, including entering the country illegally, remaining longer than a visa authorizes, committing marriage fraud to obtain entry, or committing certain crimes.²⁴

Immigration Detainers

An immigration detainer is a notice that the Department of Homeland Security issues to a law enforcement agency, whether federal, state, or local, to notify the agency that Immigration and Customs Enforcement (ICE) intends to take custody of someone in the custody of that law enforcement agency. A copy of the federal detainer form currently used by the Department of Homeland Security appears at the end of this analysis.²⁵

A detainer serves three purposes:

- To serve notice to a law enforcement agency that ICE intends to take custody of an alien who is in the agency's custody once he or she is no longer subject to that agency's detention;
- To request information from the law enforcement agency concerning the alien's upcoming release so that ICE may gain custody before the alien is released; and
- To request a law enforcement agency to maintain custody, for no more than 48 hours, of an alien who otherwise would be released in order to permit ICE enough time to assume custody. The 48 hour period excludes Saturday, Sundays, and holidays.²⁶

According to U.S. Immigration and Customs Enforcement, detainers are an essential tool ICE needs to identify and remove criminal aliens who are currently in the custody of federal, state, or local law enforcement. ICE is dependent on state and local law enforcement to cooperate and partner with them in this effort.²⁷

Whether to comply with a federal immigration detainer has been a challenging issue for local law enforcement agencies. For many years, sheriffs' offices simply honored detainers and provided the requested information about the detention or upcoming release of someone held in custody. In 2014, this changed. Two federal court cases²⁸ questioned the legality of detaining an

²³ The Immigration and Nationality Act of 1952 and its amendments contain the current body of immigration law. It is contained in 8 U.S.C.A., Title 8 – Aliens and Nationality.

²⁴ 8 U.S.C. s. 1227.

²⁵ DHS Form I-247A.

²⁶ *Ice Detainers: Frequently Asked Questions*, U.S. Immigration and Customs Enforcement (Dec. 28, 2011), <https://www.ice.gov/ice-detainers-frequently-asked-questions>.

²⁷ *Id.* The authority to issue a detainer stems from federal regulations found at 8 C.F.R. § 287.7, which arises from the Secretary's power under the Immigration and Nationality Act § 103(a)(3), 8 U.S.C. 1103(a)(3), to issue "regulations ... necessary to carry out [her] authority" under the INA, and from ICE's general authority to detain individuals who are subject to removal or removal proceedings."

²⁸ *Galarza v. Szalczyk*, 745 F. 3d 634 (3d Cir. 2014) and *Miranda-Olivares v. Clackamas County*, No. 3:12-cv-02317-ST, 2014 WL 1414305 (D. Ore. April 11, 2014).

inmate based solely upon a detainer from ICE when there was no accompanying probable cause to support the detention.²⁹ In both cases the plaintiffs were detained pursuant to ICE detention orders. Information was provided to the counties which indicated that investigations were being undertaken to learn whether the plaintiffs were candidates for removal and deportation. Both counties were ultimately held civilly liable for an unlawful seizure, even though the counties complied with a federal regulation cited in the detainer form that gave them the apparent authority to detain the inmates. Not surprisingly, ICE detainers have been interpreted by federal courts to be requests, not mandatory commands that deprive an agency of any discretion whether to detain an alien. In *Galarza*, the court noted that under the Tenth Amendment, immigration officials may not command state and local officials to imprison suspected aliens, because doing so would be inconsistent with the anti-commandeering principle of the Tenth Amendment.³⁰

New Enforcement Policy Between ICE and 29 Florida Sheriffs

On January 17, 2018, the U.S. Immigration and Customs Enforcement office issued a news release announcing that 17 basic ordering agreements had been agreed to with sheriffs around the state. The number of agreements is now at 29.³¹ These agreements detail “a new process to clarify that aliens held by these jurisdictions are held under the color of federal authority.” As such, the local law enforcement jurisdictions receive “liability protection from potential litigation as a result of faithfully executing their public safety duties.” The news release stated that sheriffs will no longer have to choose between releasing criminal illegal aliens from their custody back into the community or exposing themselves to potential civil liability for violating the alien’s civil rights. The participating sheriffs will also receive compensation for complying with the detainers.³²

Texas Legislation and Litigation

In 2017, Texas enacted SB 4, a law that, among other things, prohibited local authorities from restricting their cooperation or communication with federal immigration enforcement officials and directed local law enforcement to comply with ICE detainer requests.³³ Several cities moved for preliminary injunctive relief before the bill became effective. The plaintiffs challenged the bill in Federal District Court on the grounds of federal preemption and violations of First Amendment free speech and Fourth Amendment search and seizure protections.³⁴ The court granted a preliminary injunction preventing several sections of the law from taking effect. The state appealed to the U.S. Court of Appeals for the Fifth Circuit and requested a stay of each injunction. The Fifth Circuit ultimately upheld the majority of the statute.³⁵ In a lengthy decision the court determined that:

- Texas was not preempted from enacting the legislation;

²⁹ Florida Sheriffs Association, *Legal Alert: ICE Detainers* (on file with the Senate Committee on Judiciary).

³⁰ *Galarza*, 745 F. 3d at 643.

³¹ Email from Matt Dunagan, Deputy Executive Director of Operations, Florida Sheriffs Association (Feb. 7, 2019) (on file with the Senate committee on Judiciary).

³² U.S. Immigration and Customs Enforcement, News Releases, *ICE, 17 FL Sheriffs Announce New Enforcement Partnership* (Jan. 17, 2018) <https://www.ice.gov/news/releases/ice-17-fl-sheriffs-announce-new-enforcement-partnership>.

³³ *Texas Senate Bill 4* (2017-2018), <https://legiscan.com/TX/bill/SB4/2017>.

³⁴ *City of El Cenizo, et al., v. State of Texas, et. al.*, 264 F. Supp. 3d 744 (2017).

³⁵ *City of El Cenizo, et al., v. State of Texas, et al.*, 890 F. 3d 164 (2018).

- A requirement that law enforcement agencies comply with an immigration detainer request when the agency had custody of a person who was the subject of the detainer was not facially unconstitutional;
- The Fourth Amendment prohibition against unlawful search and seizure did not require probable cause of criminality in order to detain someone in the context of immigration law; and
- The Texas constitution did not prevent the state from pre-empting the home-rule authority of cities when it passed the law.

The *City of El Cenizo* opinion, the case upholding Texas SB 4, has been somewhat distinguished by other cases, one of which is a Florida federal district case in Miami that is still in the discovery stage.³⁶ In that case, the plaintiffs, comprised of aliens and immigrant advocacy groups, brought an action against Miami-Dade County and alleged that the county violated their civil rights under the Fourth Amendment when it arrested them based upon an ICE detainer request and without probable cause to believe that they had committed a crime. Miami-Dade County moved to dismiss the plaintiffs' case. The court concluded that it "does not find the analysis in *EL Cenizo* persuasive or helpful . . ." and ruled that the plaintiffs had alleged enough facts under the Fourth Amendment to withstand a complete motion to dismiss. This case is ongoing.

III. Effect of Proposed Changes:

The Rule of Law Adherence Act

SB 168 creates the "Rule of Law Adherence Act" in chapter 908, F.S. The act seeks to ensure that state and local governments cooperate with the federal government to enforce, and not obstruct, immigration laws. In its most general terms, the bill prohibits sanctuary jurisdictions, requires state and local entities to comply with federal immigration detainers, and provides legal remedies to redress noncompliance with the act. The act is divided into four general categories: Findings and Definitions; Duties; Enforcement; and Miscellaneous.

Part I – Findings and Definitions

Findings and Intent (s. 908.101, F.S.)

The first legislative findings note two important state interests:

- State and local governments and their officials owe the citizens and other persons lawfully present a duty to assist the Federal Government with enforcement of immigration laws, including the duty to comply with federal immigration detainers; and
- In the interest of public safety and adherence to federal law, the state must support federal immigration enforcement efforts and ensure that those efforts are not impeded by laws, policies, or similar procedures.

The third and final point is that state and local entities and their officials who encourage the unlawful presence of persons in the state or who shield those persons from personal responsibility for their unlawful actions breach their duty and should be held accountable.

³⁶ *C.F.C. et al., v. Miami-Dade County*, 2018 WL 6616030.

Part II – Duties

Sanctuary Policies are Prohibited (s. 908.201, F.S.)

A state entity, local governmental entity, or law enforcement agency is prohibited from adopting or having a sanctuary policy. A sanctuary policy is generally defined as a law or policy which contravenes 8 U.S.C. s. 1373(a) or (b), by:

- Prohibiting or restricting information between a Federal, state, or local government agency and the Immigration and Naturalization Service regarding the citizenship or immigration status of an individual; or
- Prohibiting or restricting a Federal, state, or local government entity from sending, requesting, receiving, maintaining, or exchanging information regarding the immigration status of an individual to, or from, the Immigration and Naturalization Service.

Additionally, a sanctuary policy means a policy which knowingly prohibits or impedes a law enforcement agency from communicating or cooperating with a federal immigration agency with regard to federal immigration enforcement, including, but not limited to, limiting or preventing a state entity, local governmental entity, or law enforcement agency from:

- Complying with an immigration detainer;
- Complying with a request from a federal immigration agency to notify the agency before the release of an inmate or detainee in its custody;
- Providing a federal immigration agency access to an inmate for an interview;
- Initiating an immigration status investigation; or
- Providing a federal immigration agency with an inmate's incarceration status or release date.

Cooperation with Federal Immigration Authorities is Required (s. 908.202, F.S.)

A state entity, law enforcement agency, or local governmental entity must comply with and support the enforcement of federal immigration law. However, this requirement only applies to an official, representative, agent, or employee when he or she is acting within the scope of official duties or scope of employment.

The bill prohibits any restrictions on a state entity, local governmental entity, or law enforcement agency's ability to:

- Send information regarding a person's immigration status to, or requesting, receiving, or reviewing that information from a federal immigration agency;
- Record and maintain immigration information for purposes of the act;
- Exchange immigration information with a federal immigration agency, state entity, local 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 a determination of residence or domicile is required under federal or state law, local government ordinance or regulation, or pursuant to a judicial order;
- Use immigration information to comply with an immigration detainer; or
- Use immigration information to confirm the identity of a person who is detained by a law enforcement agency.

Criminal Cases

The bill requires a judge in a criminal case to order a secure correctional facility where the defendant is to be confined to reduce a defendant's sentence by not more than 7 days if the facility determines that the reduction will facilitate the defendant's seamless transfer into federal custody if he or she is subject to an immigration detainer. The judge must indicate on the record that the defendant is subject to an immigration detainer or otherwise indicate that the defendant is subject to transfer into federal custody when making the order. If a judge does not have this information at the time of sentencing, he or she must issue the order to the secure correctional facility as soon as the information becomes available.

Transport

The bill permits a law enforcement agency that has received verification from a federal immigration agency that an alien in the law enforcement agency's custody is unlawfully present in the United States to securely 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 first obtain judicial authorization before transporting the alien outside of the state.

Victims or Witnesses

The cooperation and support requirements in this section do not require a state entity, 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 timely cooperates in good faith in the investigation or prosecution of the crime. A victim or witness's cooperation must be documented in the entity's 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.

Duties Related to Certain Arrested Persons (s. 908.203, F.S.)

The bill details procedures for a law enforcement agency to follow when a person is arrested and he or she cannot provide proof of lawful presence in the United States. Within 48 hours after the arrest and before he or she is released on bond, the agency must review any information available from a federal immigration agency. If the information reveals that the person is not a citizen and is unlawfully present, the agency must:

- Provide immediate notice of the person's arrest and charges to a federal immigration agency;
- Notify the judge authorized to grant or deny the person's release on bail of that information; and
- Record the arrest and charges in the person's case file.

A law enforcement agency is not required to perform this duty when a person is transferred to it from another agency if the previous agency performed the duty before the transfer. A judge who receives notice of a person's immigration status pursuant to this duty must record the status in the court record.

Duties Related to Immigration Detainers (s. 908.204, F.S.)

The bill establishes the duties of a law enforcement agency when it has custody of someone subject to an immigration detainer. If an agency has custody of a person subject to a detainer, the agency must:

- Inform the judge who is authorized to grant or deny bail that the person is subject to a detainer;
- Record the detainer information in the person's case file; and
- Comply with, honor, and fulfill the requests made in the detainer.

A law enforcement agency is not required to perform the three duties listed above for a person who is transferred from another law enforcement agency if the previous agency performed the duty before transferring custody. Additionally, a judge who receives notice that someone is subject to an immigration detainer must ensure that the detainer information is recorded in the court record, regardless of whether the detainer notice is received before or after a judgment is rendered in the case.

Reimbursement of Costs from a Detained Person (s. 908.205, F.S.)

The bill authorizes a board of county commissioners to adopt an ordinance requiring any person detained pursuant to an immigration detainer to reimburse the county for any expenses incurred in detaining that person. However, the person is not liable for expenses if a federal immigration agency determines that the immigration detainer was improperly issued.

The bill also authorizes a local government or a law enforcement agency to petition the Federal Government for the reimbursement of detention and compliance costs when the costs are incurred in support of federal immigration law.

Duty to Report Violations (s. 908.206, F.S.)

An official or employee of a state entity, local governmental entity, or law enforcement agency must promptly report a known or probable violation of the act to either the Attorney General or a state attorney having jurisdiction over the entity or agency. If he or she willfully and knowingly fails to report a known or probable violation of the act, he or she may be suspended or removed from office under general law and Article IV section 7 of the State Constitution.³⁷

The bill protects, pursuant to the state's Whistleblower Act,³⁸ any official or employee of a state entity, 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.

³⁷ Article IV, section 7 of the State 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 . . ."

³⁸ Section 112.3187, F.S.

Implementation (s. 908.207, F.S.)

Chapter 908, F.S., which is the substance of the bill must be implemented to the fullest extent authorized by federal law regulating immigration and the legislative findings announced earlier in the bill.

Part III – EnforcementComplaints (s. 908.301, F.S.)

The Attorney General must provide, through the Department of Legal Affairs' website, the format for someone to submit a complaint alleging that a violation of this chapter has occurred. Anonymous complaints are permitted as well as complaints submitted in a different format. Anyone has standing to submit a complaint.

Penalties (s. 908.302, F.S.)

The responsibility to investigate credible complaints rests with the state attorney for the county where the state entity is headquartered or where a local governmental entity or law enforcement agency is located. The results of the investigation must be provided to the Attorney General in a timely manner.

When the state attorney receives a complaint, the entity in question must comply with a document request by the state attorney. If the state attorney determines that a complaint is valid, he or she, no later than 10 days after the determination is made, must provide written notification to the entity that:

- The complaint has been filed.
- The state attorney has determined that the complaint is valid.
- The state attorney is authorized to file an action to enjoin the violation if the entity does not comply with chapter 908, F.S., on or before the 60th day after notice is provided.

Within 30 days after receiving a written notice from the state attorney of a violation, the entity must provide the state attorney with a copy of:

- The entity's written policies and procedures regarding federal immigration agency enforcement actions, including policies and procedures for immigration detainers.
- Each immigration detainer received from a federal immigration agency in the current calendar year-to-date as well as the two previous calendar years.
- Each response sent by the entity for an immigration detainer in the current calendar year-to-date and the two previous calendar years.

The Attorney General, the state attorney who conducted the investigation, or a state attorney who has been ordered by the Governor³⁹ to conduct an investigation, may institute proceedings in circuit court to enjoin an entity or law enforcement agency found to be in violation of this act. The circuit court is required to expedite the action, including setting a hearing at the earliest practicable time. If the Attorney General brings an action, the venue may be in Leon County.

³⁹ Section 27.14, F.S. authorizes the Governor to issue an executive order requiring a state attorney from one circuit to replace a state attorney for an investigation, case, or matter "for any other good and sufficient reason" when the Governor determines that the ends of justice would be best served."

Upon an adjudication, or as provided in a consent decree,⁴⁰ that a sanctuary policy violation has occurred, the court must enjoin the unlawful sanctuary policy and order the violating entity to pay a civil penalty to the state of at least \$1,000, but not more than \$5,000, for each day the sanctuary policy was in effect. This calculation begins on October 1, 2019, or the date the sanctuary policy was first enacted, whichever occurs later, and is measured until the date the injunction was granted. The court maintains continuing jurisdiction over the parties and subject matter and may enforce its orders by imposing additional civil penalties as provided for in the bill and with contempt proceedings as provided by law. Payments must be remitted to the Chief Financial Officer who will deposit the payment into the General Revenue fund.

When a court approves a consent decree or grants an injunction or civil penalty as discussed above, the court must include written findings of fact that describe with specificity the existence and nature of the sanctuary policy that violates the act and identify each sanctuary policymaker who voted for, allowed to be implemented, or voted against repeal of prohibition of the sanctuary policy. The court must provide a copy of the consent decree or order with written findings to the Governor within 30 days after issuing the decree or order. The sanctuary policymaker identified in an order, injunction, or penalty may be suspended or removed from office under the provisions of general law or the State Constitution.⁴¹ All civil penalties must be paid to the CFO who will deposit the penalties into the General Revenue Fund.

The bill prohibits using public funds to defend or reimburse a sanctuary policymaker, official, or entity who knowingly and willfully violates the provisions of the act unless the payment is required by law.

Civil Causes of Action for Personal Injury or Wrongful Death (s. 908.303, F.S.)

The bill provides a cause of action for someone injured or killed by the tortious acts or omissions of an alien unlawfully present in the United States. The cause of action may be against a state entity, local governmental entity, or law enforcement agency for violation of a sanctuary policy prohibition or for not cooperating with federal immigration authorities.

To prevail, the injured person or personal representative must prove by the greater weight of the evidence the existence of a sanctuary policy in violation of s. 908.201, F.S., and either

- A failure to comply with the provisions requiring cooperation with the federal immigration authorities that results in the alien having access to the person harmed; or
- A failure to comply with an immigration detainer that results in the alien having access to the person harmed.

A lawsuit brought for personal injury or death may not be brought against a person who holds public office or who has official duties as a representative, agent, or employee of a state entity, local governmental entity, or law enforcement agency, including a sanctuary policymaker.

A trial by jury is a matter of right in these actions. A final judgment for a plaintiff must include written findings of fact that describe with specificity the existence and nature of the violative

⁴⁰ A consent decree, sometimes referred to as a consent order, is a court decree in which all parties agree. BLACK'S LAW DICTIONARY (10th ed. 2014).

⁴¹ See the constitutional framework for suspensions and removals, *supra* note 37.

sanctuary policy and identify each policymaker who voted for the policy, allowed it to be implemented, or voted against its repeal or prohibition. The court must provide the Governor a copy of the final judgment within 30 days after the judgment is rendered. A sanctuary policymaker identified in the final judgment may be suspended or removed from office as provided by law.

The bill does not create a private cause of action against a state entity, local governmental entity, or law enforcement agency that complies with the bill.

Ineligibility for State Grant Funding (s. 908.304, F.S.)

If a state entity, local governmental entity, or law enforcement agency is found to have a sanctuary policy in effect that is a violation of chapter 908, F.S., that entity is not eligible to receive funding from a nonfederal grant program administered by state agencies that receive funding from the General Appropriations Act for 5 years from the date of adjudication that the policy is a violation of the chapter.

The state attorney must notify the Chief Financial Officer of an adjudicated violation of this chapter and provide him or her with a copy of the final court injunction, order, or judgment. When the CFO receives the notice, he or she must timely inform the pertinent state agencies of the adjudicated violation and direct the agencies to cancel all pending grant applications and enforce the ineligibility of the entity. These provisions do not apply to:

- Funding received as a result of an appropriation to a specifically named entity or agency in the General Appropriations Act or other law; or
- Grants awarded before an adjudication that an entity had a sanctuary policy in effect that was a violation of this chapter.

Part IV – Miscellaneous

Education Records (s. 908.401, F.S.)

The bill provides that it does not apply to the release of education records of an educational agency or institution, unless that release conforms to the provisions of the Family Educational Rights and Privacy Act of 1974. For purposes of that bill, education records mean those records, files, documents, and other materials which contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for the agency or institution. Education records do not include records of instructional, supervisory, and administrative personnel, records maintained by a law enforcement unit of the educational agency or institution, certain employment records for people who are not in attendance at the agency or institution, and medical or psychological records used in treating a student.⁴²

Discrimination Prohibited (s. 908.402, F.S.)

The bill prohibits discrimination based upon a person's gender, race, religion, national origin, or physical disability, except as authorized by the United States Constitution or State Constitution.

⁴² 20 U.S.C. 1232g(a)(4)(A) and (B).

Repeal of Sanctuary Policies Required (Section 3)

Any sanctuary policy, as defined in the bill, in effect on the effective date of the act must be repealed within 90 days after the act's effective date.

Effective Dates

The act takes effect on July 1, 2019, but the sections pertaining to enforcement penalties contained in s. 908.302, F.S., and civil causes of action for injury or death by an unlawfully present alien, s. 908.303, F.S., take effect on October 1, 2019.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

It appears that the bill, by requiring counties and municipalities to comply with immigration detainers, requires a "county or municipality to spend funds or to take an action requiring the expenditure of funds" as described in Article VII, section 18 of the Florida Constitution. However, the bill contains legislative findings that "it is an important state interest that state and local governmental entities and their officials" assist the Federal Government in its enforcement of federal immigration laws, including their compliance with federal immigration detainers. The bill authorizes a board of county commissioners to adopt an ordinance to recover the detainer costs incurred by complying with an immigration detainer. Additionally, many sheriffs' offices have entered into basic ordering agreements with the Federal Government and are reimbursed for housing inmates, pursuant to a detainer, at a rate of \$50 for up to 48 hours of detention.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates the following sections of the Florida Statutes: 908.101, 908.102, 908.201, 908.202, 908.203, 908.204, 908.205, 908.206, 908.207, 908.301, 908.302, 908.303, 908.304, 908.401, and 908.402.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

DEPARTMENT OF HOMELAND SECURITY
IMMIGRATION DETAINER - NOTICE OF ACTION

Subject ID:
Event #:

File No:
Date:

TO: (Name and Title of Institution - OR Any Subsequent Law Enforcement Agency)

FROM: (Department of Homeland Security Office Address)

Name of Alien: _____

Date of Birth: _____ Citizenship: _____ Sex: _____

1. DHS HAS DETERMINED THAT PROBABLE CAUSE EXISTS THAT THE SUBJECT IS A REMOVABLE ALIEN. THIS DETERMINATION IS BASED ON (complete box 1 or 2).

- A final order of removal against the alien;
- The pendency of ongoing removal proceedings against the alien;
- Biometric confirmation of the alien's identity and a records check of federal databases that affirmatively indicate, by themselves or in addition to other reliable information, that the alien either lacks immigration status or notwithstanding such status is removable under U.S. immigration law; and/or
- Statements made by the alien to an immigration officer and/or other reliable evidence that affirmatively indicate the alien either lacks immigration status or notwithstanding such status is removable under U.S. immigration law.

2. DHS TRANSFERRED THE ALIEN TO YOUR CUSTODY FOR A PROCEEDING OR INVESTIGATION (complete box 1 or 2).

- Upon completion of the proceeding or investigation for which the alien was transferred to your custody, DHS intends to resume custody of the alien to complete processing and/or make an admissibility determination.

IT IS THEREFORE REQUESTED THAT YOU:

- **Notify DHS** as early as practicable (at least 48 hours, if possible) before the alien is released from your custody. Please notify DHS by calling U.S. Immigration and Customs Enforcement (ICE) or U.S. Customs and Border Protection (CBP) at _____. If you cannot reach an official at the number(s) provided, please contact the Law Enforcement Support Center at: (802) 872-8020.
 - **Maintain custody** of the alien for a period **NOT TO EXCEED 48 HOURS** beyond the time when he/she would otherwise have been released from your custody to allow DHS to assume custody. The alien **must be served with a copy of this form** for the detainer to take effect. This detainer arises from DHS authorities and should not impact decisions about the alien's bail, rehabilitation, parole, release, diversion, custody classification, work, quarter assignments, or other matters
 - Relay this detainer to any other law enforcement agency to which you transfer custody of the alien.
 - Notify this office in the event of the alien's death, hospitalization or transfer to another institution.
- If checked: please cancel the detainer related to this alien previously submitted to you on _____ (date).

(Name and title of Immigration Officer)

(Signature of Immigration Officer) (Sign in Ink)

Notice: If the alien may be the victim of a crime or you want the alien to remain in the United States for a law enforcement purpose, notify the ICE Law Enforcement Support Center at (802) 872-8020. You may also call this number if you have any other questions or concerns about this matter.

TO BE COMPLETED BY THE LAW ENFORCEMENT AGENCY CURRENTLY HOLDING THE ALIEN WHO IS THE SUBJECT OF THIS NOTICE:

Please provide the information below, sign, and return to DHS by mailing, emailing or faxing a copy to _____ .

Local Booking/Inmate #: _____ Estimated release date/time: _____

Date of latest criminal charge/conviction: _____ Last offense charged/conviction: _____

This form was served upon the alien on _____, in the following manner:

- in person by inmate mail delivery other (please specify): _____

(Name and title of Officer)

(Signature of Officer) (Sign in Ink)