

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 9 Federal Immigration Enforcement  
**SPONSOR(S):** Judiciary Committee, Metz  
**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 308

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Judiciary Committee	11 Y, 7 N, As CS	MacNamara	Poche

### SUMMARY ANALYSIS

HB 9 creates the “Rule of Law Adherence Act” (Act) to require state and local governments and law enforcement agencies (covered bodies), including their officials, agents, and employees, to support and cooperate with federal immigration enforcement. Specifically, the bill:

- Prohibits a covered body 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 covered body’s ability to use, maintain, or exchange immigration information for certain purposes;
- Requires a covered body to comply with and support the enforcement of federal immigration law;
- 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- Requires any sanctuary policies currently in effect be repealed within 90 days of the effective date of the Act;
- 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 covered body 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 covered body that violates the Act;
- Imposes a civil penalty of at least \$1,000 but no more than \$5,000 for each day a policy that violates the Act 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 covered body 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
- Suspends state grant funding eligibility for 5 years for a covered body that violates the Act.

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

Provisions of the Act creating penalties are effective October 1, 2018. All other provisions of the bill are effective July 1, 2018.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Background

The federal government has broad power over immigration and alien status, and has established an extensive set of rules governing alien admission, removal, and conditions for continued presence within the United States.<sup>1</sup> 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.<sup>2</sup>

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.<sup>3</sup> Moreover, the federal government's power to preempt activity in the area of immigration is further limited by the constitutional bar against directly "commandeering" state or local governments into the service of federal immigration agencies.<sup>4</sup> States and municipalities have frequently enacted measures, as an exercise of police powers, addressing aliens residing in their communities.<sup>5</sup>

##### Information Sharing

United States Immigration and Customs Enforcement (ICE) relies on local law enforcement sharing information on arrestees or inmates to identify and apprehend aliens who are unlawfully present. Over the years, some states and localities have restricted government agencies or employees from sharing information with federal immigration agencies.<sup>6</sup>

In 1996, Congress sought to end these restrictions on information-sharing through the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA)<sup>7</sup> and Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).<sup>8</sup> Neither PRWORA nor IIRIRA require state or local government entities to share immigration-related information with federal authorities. Rather, 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.<sup>9</sup>

##### 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.<sup>10</sup> ICE issues a detainer:

- 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;
- To request information from a law enforcement agency about an alien's impending release so ICE may assume custody before the alien is released; or

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

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

<sup>3</sup> *Western Turf Ass'n v. Greenberg*, 204 U.S. 359, 363 (1907).

<sup>4</sup> See *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

<sup>5</sup> Congressional Research Service, R43457, *State and Local "Sanctuary" Policies Limiting Participation in Immigration Enforcement*, pg. 3 (July 20, 2015).

<sup>6</sup> *Id.* at pg. 9.

<sup>7</sup> 8 U.S.C. s. 1644.

<sup>8</sup> 8 U.S.C. s. 1373.

<sup>9</sup> 8 U.S.C. ss. 1373, 1644.

<sup>10</sup> See 8 U.S.C. ss. 1226, 1357; Congressional Research Service, *supra* FN 5, at pg. 13.

- 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.<sup>11</sup>

The federal courts and the federal government have characterized an ICE detainer as a request that does not require a local law enforcement agency to comply.<sup>12</sup> 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 commandeering decisions.<sup>13</sup>

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

### Local Sanctuary City Policies

A number of states and municipalities have adopted formal or informal policies which prohibit or limit police cooperation with federal immigration enforcement efforts.<sup>15</sup> Municipalities that have adopted such policies are sometimes referred to as “sanctuary cities.” 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.”<sup>16</sup> Examples of such polices include:

- Not asking an arrested or incarcerated person for his or her immigration status;
- Failing to inform ICE about an alien in custody;
- Not alerting ICE before releasing an alien from custody;
- Failing to transport an undocumented criminal alien to the nearest ICE location; and
- Declining to honor an immigration detainer.<sup>17</sup>

A bulletin issued by the Florida Sheriffs Association highlighted recent federal court decisions<sup>18</sup> 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.”<sup>19</sup> The bulletin

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

<sup>12</sup> See, e.g., *Garza v. Szalczyk*, 745 F. 3d 634, 640-44 (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); *Morales v. Chadbourne*, 793 F.3d 208 (1st Cir. 2015) (“The language of both the regulations and case law persuade the Court that detainers are not mandatory[.]”)

<sup>13</sup> *Garza*, 745 F. 3d at 644.

<sup>14</sup> *Morales*, 793 F. 3d at 214-217 (“Because Morales was kept in custody for a new purpose after she was entitled to release, she was subjected to a new seizure for Fourth Amendment purposes—one that must be supported by a new probable cause justification.”); *Miranda-Olivares v. Clackamas Co.*, No. 3:12-cv-02317-ST at \*17 (D.Or. April 11, 2014) (holding county liable for unlawful seizure without probable cause, based on an immigration detainer); *Galarza v. Szalczyk*, 2012 WL 1080020 (E.D.Pa. Mar.30, 2012) *rev’d on other grounds*, 745 F.3d 634 (3d Cir.2014).

<sup>15</sup> See Congressional Research Service, *supra* FN 5, at pg. 7-20 (providing examples of various types of “sanctuary” policies used across the country).

<sup>16</sup> 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 pg. vii, n.44 (defining “sanctuary” policies for purposes of study).

<sup>17</sup> *Id.* at 11-17.

<sup>18</sup> *Galarza*, 745 F. 3d at 634; *Miranda-Olivares*, 2014 WL 1414305. Neither of these cases are binding authority in Florida.

<sup>19</sup> Florida Sheriffs Association, *Legal Alert: ICE Detainers* (on file with the Civil Justice Subcommittee).

advised sheriff departments to “request a copy of the warrant or the order of deportation to determine that probable cause in fact exists for the continued detention.”<sup>20</sup>

There is no requirement under federal law to show probable cause for the issuance of an ICE detainer.<sup>21</sup> Under the Priority Enforcement Program, in effect from 2015 to 2017, ICE included a determination of probable cause as part of the immigration detainer form.<sup>22</sup> The Priority Enforcement Program was terminated effective February 20, 2017; however, the immigration detainer form developed for the program is still in use on an interim basis, pending the development of a new form.<sup>23</sup>

In a recent report issued by ICE, Alachua County and Clay County were cited as “non-cooperative jurisdictions” due to their failure to honor detainers and their enactment of policies which limit cooperation with ICE.<sup>24</sup>

#### Texas, SB 4

The Texas Legislature recently passed a law prohibiting sanctuary cities. The law, enacted through SB 4, prohibits cities and counties from adopting policies that limit immigration enforcement, allows police officers to question the immigration status of anyone they detain or arrest, and threatens officials who violate the law with fines, jail time and removal from office.<sup>25</sup> It also directs local officials to cooperate with immigration detainer requests.

A number of Texas cities, including Houston, Austin, San Antonio, and Dallas, joined a lawsuit against the state seeking to strike down the law. On August 30, 2017, a federal district court granted a preliminary injunction preventing portions of the law from taking effect.<sup>26</sup> The following provisions of SB 4 were ruled unconstitutional by the court:

- Local entities may not prohibit, through policy or practice, providing enforcement assistance to federal immigration officers;
- Local entities may not endorse, adopt, or enforce a policy which limits the enforcement of immigration laws;
- Local entities may not prohibit or materially limit the enforcement of immigration laws through a pattern or practice; and
- Law enforcement agencies that have custody of a person subject to a detainer request must comply with, honor, and fulfill all actions in the detainer request.

Provisions were held unconstitutional, violating the First, Fourth, and Fourteenth Amendments. Specifically, punishing speakers based on their viewpoint on local immigration enforcement policy violated the First Amendment. Other portions of the law banning policies that “materially limit” enforcement of immigration laws, were unconstitutionally vague under the Fourteenth Amendment.

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<sup>20</sup> Id.

<sup>21</sup> See 8 U.S.C. s. 1357(a). See generally Congressional Research Service, R42690, *Immigration Detainers: Legal Issues* (May 7, 2015).

<sup>22</sup> U.S. Immigration and Customs Enforcement, *Priority Enforcement Program*, <https://www.ice.gov/pep> (last accessed October 25, 2017). See also Dept. of Homeland Sec., *Form I-247D: Immigration Detainer – Request for Voluntary Action*, May 2015, <https://www.ice.gov/sites/default/files/documents/Document/2016/I-247D.PDF> (last accessed October 25, 2017).

<sup>23</sup> Memorandum from John Kelly, Sec’y of Homeland Sec., to Kevin McAleenan, Acting Commissioner of U.S. Customs and Border Protection, et al., *Enforcement of the Immigration Laws to Serve the National Interest* (Feb. 20, 2017), available at [https://www.dhs.gov/sites/default/files/publications/17\\_0220\\_S1\\_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf) (last accessed October 25, 2017).

<sup>24</sup> U.S. Immigration and Customs Enforcement, *Enforcement and Removal Operations Weekly Declined Detainer Outcome Report*, Jan. 28 - Feb. 3, 2017, Section III pg.23-24. ([https://www.ice.gov/doclib/ddor/ddor2017\\_01-28to02-03.pdf](https://www.ice.gov/doclib/ddor/ddor2017_01-28to02-03.pdf)) (last accessed October 25, 2017).

<sup>25</sup> TX S.B. 4, <https://legiscan.com/TX/text/SB4/2017> (last accessed October 25, 2017).

<sup>26</sup> *City of El Cenizo, et al. v. State of Texas, et. al.*, SA-17-CV-404-OLG (August 30, 2017).

Lastly, the court found that prohibiting local officers to act upon information that they may obtain violated the Fourth Amendment in that disregarding such information could lead to unreasonable searches and seizures. The court also prevented the implementation of all provisions of SB 4 related to corrective, disciplinary, or other action against entities or officials violating those parts of the law found to be unconstitutional.<sup>27</sup>

On September 25, 2017, the U.S. Court of Appeals for the Fifth Circuit issued a ruling following an appeal by the state for a stay of the injunction issued by the district court.<sup>28</sup> The Fifth Circuit denied the state's request for a stay with respect to the provisions of SB 4 that address actions or policies "materially limiting" enforcement, and provisions related to the "endorsement" of policies. The court, however, did stay the injunction with respect to requiring law enforcement agencies to "comply with, honor, and fulfill" any immigration detainer request.<sup>29</sup>

### **Effect of Proposed Changes**

HB 9 creates ch. 908, F.S., entitled the "Rule of Law Adherence Act" (the Act), requiring state and local governments and law enforcement agencies to support and cooperate with federal immigration enforcement. The Act prohibits these entities from adopting policies or engaging in practices that limit or prevent them from providing such support or cooperation.

### **Legislative Findings and Intent**

The bill creates s. 908.101, F.S., providing legislative findings regarding immigration enforcement. The bill states it is an important state interest that state entities, local government entities, and their officials owe an affirmative duty to assist the federal government with enforcement of federal immigration laws within the state, including complying with federal immigration detainers. The bill also finds an important state interest in ensuring that efforts to enforce immigration laws are not impeded or thwarted by state or local laws, policies, practices, procedures, or customs as necessary in the interest of public safety and adherence to federal law. 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 of Sanctuary Policies**

The bill creates s. 908.201, F.S., prohibiting a state or local governmental entity, or a law enforcement agency<sup>30</sup> from adopting or having in effect a sanctuary policy, defined 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)<sup>31</sup>, 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 detainer;<sup>32</sup>

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<sup>27</sup> Id.

<sup>28</sup> *City of El Cenzino, et al. v. State of Texas, et al.*, No. 17-50762 (5th Cir., September 25, 2017).

<sup>29</sup> Id. at 6 ("Further, the 'comply with, honor, and fulfill' requirement does not require detention pursuant to every ICE detainer request; rather the...provision mandates that local agencies cooperate according to existing ICE detainer practice and law.")

<sup>30</sup> The definitions of "state entity," "local governmental entity," and "law enforcement agency" include officials, persons holding public office, and representatives, agents, and employees of those entities or agencies.

<sup>31</sup> 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 FN 5, at pg. 10.

<sup>32</sup> "Immigration detainer" is defined in the bill as a facially sufficient written or electronic request issued by a federal immigration agency using that agency's official form to request another law enforcement agency detain a person based on an inquiry into the person's immigration status or an alleged violation of a civil immigration law, including detainers issued

- Complying with a request from a federal immigration agency (FIA) to notify the agency prior to the release of an inmate in the state or local governmental entity or law enforcement agency's custody;
- Providing a FIA access to an inmate to interview;
- Initiating an immigration status investigation; or
- Providing a FIA with the incarceration status or release date of an inmate.

### Cooperation with a Federal Immigration Agency

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

The bill creates s. 908.202, F.S., prohibiting 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 FIA;
- Record and maintain immigration information for purposes of the Act;
- Exchange immigration information with a FIA, state or 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 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 comply with an immigration detainer; or
- Use immigration information to confirm the identity of an individual who is detained by a law enforcement agency.

Additionally, the bill permits 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 to 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 outside of the state.

The bill requires a judge in a criminal case to order a secure correctional facility<sup>33</sup> to reduce a defendant's sentence by not more than 7 days to facilitate transfer to federal custody if the defendant 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 such information becomes available.

The cooperation and support requirements in newly-created s. 908.202, F.S., do not require a state or local governmental entity or law enforcement agency to provide a FIA 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 must be documented in the entity's or

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pursuant to 8 U.S.C. ss. 1226 and 1357. A detainer is considered facially sufficient when it is complete and indicates on its face, or is supported by an accompanying affidavit or order that indicates, the federal immigration official has reason to believe that the person to be detained may not have been lawfully admitted to the United States or is otherwise not lawfully present.

<sup>33</sup> The term "secure correctional facility" is defined as a state correctional institution in s. 944.02, F.S., or a county detention facility or municipal detention facility in s. 951.23, F.S.

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 state Auditor General.

### Arrested Persons and Immigration Detainers

The bill creates s. 908.203, F.S., detailing procedures for a law enforcement agency when a person is arrested and cannot provide proof of lawful presence in the United States. Within 48 hours of the arrest, the agency must review any information available from a FIA. If such information reveals that the person is unlawfully present, the agency must:

- Provide immediate notice of the person's arrest and charges to a FIA;
- Inform the judge authorized to grant or deny the person's release on bail of that fact; and
- Record that fact in the person's case file.

An agency is not required to perform this duty when a person is transferred to them 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.

The bill also creates s. 908.204, F.S., providing duties of a law enforcement agency related to an immigration detainer. If an agency has custody of a person subject to a detainer, the agency must inform the judge authorized to grant or deny bail of that fact. The judge must record the fact in the court record, regardless of whether the notice is received before or after judgment in the case. The agency must also record that fact in the person's case file and must comply with, honor, and fulfill the requests made in the detainer. An agency is not required to fulfill this duty for a person who is transferred to them from another agency if the previous agency performed the duty before transferring custody.

### Reimbursement of Costs for Complying with an Immigration Detainer

The bill creates s. 908.205, F.S., authorizing 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 that individual. However, an individual is not liable for reimbursement if a FIA determines that the immigration detainer was improperly issued.

The bill also authorizes local government or a law enforcement agency to petition the federal government for the reimbursement of costs. The petition may be made for detention costs and the costs of compliance with federal requests when such costs are incurred in support of federal immigration law.

### Duty to Report

The bill creates s. 908.206, F.S., requiring 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 a 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.<sup>34</sup>

The bill protects, pursuant to the state's Whistleblower Act,<sup>35</sup> 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.

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<sup>34</sup> Art. IV, s. 7 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 . . ."

<sup>35</sup> S. 112.3187, F.S.

## Enforcement and Penalties for Violations of the Act

The bill creates s. 908.301, F.S., requiring the Attorney General to provide a form on the Department of Legal Affairs' website for a person to submit a complaint alleging a violation of the Act. The bill does not prohibit a person from filing an anonymous complaint or a complaint in a different format than the one prescribed. Any person has standing to submit a complaint.

The bill creates s. 908.302, F.S., establishing penalties for violations of the Act. The state attorney for the county in which a state entity is headquartered, or a local governmental entity or law enforcement agency is located, has primary responsibility for investigating complaints of violations of the Act. The results of any investigation must be provided to the Attorney General in a timely manner.

A state or local government entity or law enforcement agency for which the state attorney has received a complaint must comply with any document request by the state attorney. If the state attorney determines that the complaint is valid, within 10 days of the determination, the state attorney must provide written notification to the entity that the complaint has been filed and found valid, and that the state attorney is authorized to file an action to enjoin the violation if the entity does not comply with ch. 908, F.S., on or before the 60th day after notification is provided.

Within 30 days of receiving written notification of a valid complaint, a state or local government entity or law enforcement agency must provide the state attorney with a copy of:

- The entity's written policies and procedures with respect to FIA enforcement action, including policies with respect to immigration detainers;
- Each immigration detainer received by the entity from a FIA in the current calendar year-to-date and the two prior calendar years; and
- Each response sent by the entity for an immigration detainer for the current year and two prior calendar years.

The Attorney General, the state attorney who conducted the investigation, or a state attorney under an order by the Governor pursuant to s. 27.14, F.S.,<sup>36</sup> 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. The bill permits the Attorney General to file suit in Leon County, in addition to other appropriate venues under current law.<sup>37</sup>

Upon adjudication or as provided in a consent decree, 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, commencing on October 1, 2018 or the date the sanctuary policy was first enacted, whichever is later. Payment must be remitted to the Chief Financial Officer (CFO), and deposited into the General Revenue Fund.

A "sanctuary policymaker" is defined in the bill 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. The bill requires a consent decree, injunction, or order granting civil penalties to identify each sanctuary policymaker. The court must provide a copy of the final order to the Governor within 30 days. A sanctuary policymaker identified in a final order is subject to suspension or removal from office.<sup>38</sup>

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<sup>36</sup> S. 27.14, F.S., authorizes the Governor to issue an executive order requiring a state attorney from another circuit to replace another state attorney in an investigation or case in which the latter state attorney is disqualified or "for any other good and sufficient reason [when] the Governor determines that the ends of justice would be best served."

<sup>37</sup> See Ch. 47, F.S.

<sup>38</sup> See FN 34, supra.

The bill also prohibits using public funds to defend or reimburse any sanctuary policymaker 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.

#### Cause of Action against State or Local Government Entity, or Law Enforcement Agency

The bill creates s. 908.303, F.S., providing a civil cause of action by a person injured by the tortious conduct of an alien unlawfully present in the United States against any state or local governmental entity or law enforcement agency that violates newly-created ss. 908.201, 908.202, and 908.204, F.S. To prevail, 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. 908.202, F.S., resulting in the alien having access to the person injured or killed when the tortious conduct occurred.

The bill requires a final judgment in favor of a plaintiff to identify each sanctuary policymaker. The court must provide a copy of the final judgment to the Governor within 30 days. A sanctuary policymaker identified in a final judgment is subject to suspension or removal from office.<sup>39</sup>

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, including a sanctuary policymaker. There is no civil cause of action against a state entity, local governmental entity, or law enforcement agency that complies with the Act.

#### Ineligibility for State Grant Funding

The bill creates s. 908.304, F.S., making ineligible a state or local government entity or law enforcement agency that had a sanctuary policy in violation of ch. 908, F.S., for non-federal grant programs administered by state agencies for 5 years from the date of adjudication that the entity had a sanctuary policy in violation of the Act.

The state attorney must notify the CFO of an adjudicated violation by an entity and provide a copy of the final court injunction, order, or judgment. Upon receiving the notice, the CFO must timely inform all state agencies that administer non-federal grant funding of such violation and direct such agencies to cancel all pending grant applications and enforce the ineligibility of the entity. The prohibition on grant funding does not apply to:

- Funding that is received as a result of an appropriation to a specifically named state entity, local government entity, or law enforcement agency in the General Appropriations Act or other law; and
- Grants awarded prior to the date of an adjudication of violation of the Act.

#### Additional Provisions

The bill creates s. 908.401, F.S., providing that ch. 908, F.S., does not apply to the release of information contained in education records of an educational agency or institution, except in conformity with the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. s. 1232g. Education records under 20 U.S.C. s. 1232g, include any record, file, or document which is maintained by an educational agency or institution and contains information directly related to the student. Education records do not include records of instructional or administrative personnel, records created and maintained by a law enforcement unit, or records maintained by certain mental health professionals created in connection with treating the student.<sup>40</sup>

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<sup>39</sup> Id.

<sup>40</sup> 20 U.S.C. s. 1232g(a)(4)(B)

The bill creates s. 908.402, F.S., prohibiting a state or local government entity or law enforcement agency, or a person employed by or otherwise under the direction of such an entity, from basing its actions pursuant to ch. 908, F.S., on the gender, race, religion, national origin, or physical disability of a person, except to the extent allowed by the United States Constitution or the state constitution.

The bill requires any sanctuary policy in effect on the effective date of the Act be repealed within 90 days.

The bill provides that ss. 908.302 and 908.303, F.S., relating to enforcement and penalties for violations of the act and creating a civil cause of action for personal injury or wrongful death attributed to a sanctuary policy, respectively, will take effect on October 1, 2018. All other provisions of the bill are effective on July 1, 2018.

**B. SECTION DIRECTORY:**

**Section 1:** Creates a short title.

**Section 2:** Creates Chapter 908, F.S., consisting of ss. 908.101-908.402, F.S., entitled "Federal Immigration Enforcement."

**Section 3:** Creates an unnumbered section that requires any sanctuary policy in effect on the effective date of the Act must be repealed within 90 days after that effective date.

**Section 4:** Provides an effective date October 1, 2018, for ss. 908.302 and 908.303, F.S.; otherwise provides effective date of July 1, 2018.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

None.

2. Expenditures:

None.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

See "Expenditures," below.

2. Expenditures:

The bill requires a local government entity or law enforcement agency to honor an ICE immigration detainer. Any costs associated with holding an individual pursuant to an immigration detainer are not reimbursed by ICE. However, the bill authorizes a board of county commissioners to enact an ordinance to recover costs for complying with an immigration detainer.<sup>41</sup> The bill also authorizes a local government entity or law enforcement agency to petition the federal government to recover costs of detention and complying with a federal request.<sup>42</sup> Accordingly, the bill may have an indeterminate negative impact on local expenditures

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

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<sup>41</sup> See "Reimbursement of Costs for Complying with an Immigration Detainer" section above.

<sup>42</sup> *Id.*

#### D. FISCAL COMMENTS:

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.<sup>43</sup>

As noted above, a recent federal court decision found that a local law enforcement agency is not required to honor an ICE detainer because such detainers are requests to detain.<sup>44</sup> Federal courts have also held that an ICE detainer must be supported by probable cause.<sup>45</sup> 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 legal action.<sup>46</sup>

Lastly, an entity or agency in violation of Act may be subject to a fine of at least \$1,000 but not more than \$5,000 for each day a policy or practice was in effect. These fines are remitted to the CFO and deposited in the General Revenue Fund.

### III. COMMENTS

#### A. CONSTITUTIONAL ISSUES:

##### 1. Applicability of Municipality/County Mandates Provision:

The bill 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 bill 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.<sup>47</sup> Moreover, it appears that any expenditure that may be required by the bill applies to “all persons similarly situated” because the bill applies to all state and local governmental entities and all law enforcement agencies.

##### 2. Other:

None.

#### B. RULE-MAKING AUTHORITY:

The bill requires the Attorney General to proscribe a form for a person to submit a complaint alleging a violation of the Act, and provide the form through the Department of Legal Affairs' website.

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On November 7, 2017 the Judiciary Committee adopted one amendment that permits the Attorney General to file suit in Leon County against a state or local government entity, a state or local elected official, or an appointed official of a local governmental entity governing body, alleged to have violated provisions of the Act.

The analysis is drafted to the committee substitute as passed by the Judiciary Committee.

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<sup>43</sup> Resolution No. R-1008-13, Board of County Commissioners, Miami-Dade County, Florida (Dec. 3, 2010) .

<sup>44</sup> See “Immigration Detainers,” above.

<sup>45</sup> *Id.*

<sup>46</sup> See *Legal Alert*, supra FN 19.

<sup>47</sup> See “Legislative Findings and Intent” and “Reimbursement of Costs for Complying with an Immigration Detainer,” above.