

HOT TOPICS
Legislation & Litigation

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Possible Federal Legislative/Regulatory Action

Various members of Congress have introduced a number of immigration-related bills over the past several months, most of which are not expected to pass both houses and become law. However, they may serve as markers for future bills and are therefore worth noting. Here is a summary of some of the legislation that has been introduced:

On 3/28/17, Senators Menendez (D-NJ) and Harris (D-CA) introduced the **Protecting the Rights of Families and Immigrants Who Legally Entered from Detention Act**, which would rescind EO 13768 and protect against unlawful detentions and prohibit racial profiling by law enforcement or agencies. AILA Doc. No. 17032932

On 3/16/17, Senator Tom Carper (D-DE) introduced S.668, a bill to rescind President Trump's Executive Order 13767, entitled "Border Security and Immigration Enforcement Improvements." The bill is co-sponsored by 26 senators. AILA Doc. No. 17032900.

On 3/10/17, Representative Zoe Lofgren (D-CA) introduced the **SOLVE Act 2.0**, which aims to defund and void President Trump's Executive Order 13780, "Protecting the Nation From Foreign Terrorist Entry Into the United States." One hundred seventy-two Democratic members co-sponsored the bill. AILA Doc. No. 17032202

On 2/7/17, Representative Zoe Lofgren (D-CA) introduced the **Protecting Our Border Communities Act of 2017** (H.R. 920) to prohibit the use of federal funds to enforce Executive Order 13767, entitled "Border Security and Immigration Enforcement Improvements." The bill is cosponsored by 25 Democrats. AILA Doc. No. 17030831

On 1/20/17, Senator Chuck Grassley (R-IA) introduced the **H-1B and L-1 Visa Reform Act of 2017** (S.180) to amend the Immigration and Nationality Act. Among other things, this bill would require H-1B workers to be paid at least a Level 2 wage; strengthen the US worker displacement rules of existing law; severely limit the use of H-1B workers for outsourcing; give preference to H-1B petitions filed by holders of advanced STEM degrees from U.S. universities and those paid at a Level 3 wage or higher; impose a filing fee for the Labor Condition Application the proceeds of which would support H-1B fraud investigations; limit off-site placement of L-1B workers; and provides for enhanced investigative authority against L-1 employers. The bill was cosponsored by three Democratic senators. AILA Doc. No. 17030330

On 2/9/17, Senator Kamala Harris of California, along with six fellow Democratic senators, introduced a bill to guarantee access to counsel to those held or detained at a port of entry or detention facility overseen by CBP or ICE. AILA Doc. No. 17021430.

On 2/13/17, Congresswoman Jayapal Pramila (D-WA) introduced a similar bill, the **Access to Counsel Act** (H.R. 1006), to clarify the rights of all persons held or detained at a port of entry or at any detention facility overseen by CBP or ICE. The bill provides for a right to counsel at government expense for all individuals in removal, exclusion, deportation or inspection proceedings and would invalidate any Record of Abandonment of LPR or Withdrawal of Application for Admission signed by a person denied their right to counsel. Forty-eight Democratic members co-sponsored the bill. AILA Doc. No. 17030360

On 1/12/17, Senators Lindsey Graham (R-SC), Dick Durbin (D-IL), Lisa Murkowski (R-AK), Dianne Feinstein (D-CA), Jeff Flake (R-AZ), Chuck Schumer (D-NY), and Kamala Harris (D-CA) introduced the "**Bar Removal of Immigrants Who Dream and Grow the Economy,**" or **BRIDGE Act**. This bill would provide for a provisional protection for removal from qualifying DACA recipients for a three year period. AILA Doc. No. 17021434. A companion bill was also introduced in the House by Mike Coffman (R-CO), Luis Gutierrez (D-IL), Carlos Curberlo (R-FL), Lucille Roybal-Allard (R-FL), Jeff Denham (R-CA), Zoe Lofgren (D-CA), Ileana Ros-Lehtinen (R-FL), and Judy Chu (D-CA). AILA Doc. No. 17021433.

On 1/24/17, Representative Zoe Lofgren (D-CA) introduced the "**High-Skilled Integrity and Fairness Act,**" to amend the Immigration and Nationality Act (INA) to reform the H-1B visa program, and for other purposes. This bill would alter the manner in which immigrant visas as allocated and increase the per country limitations from 7% to 25%.; would require H-1B workers to be paid 35 percentile points more than the median wage for the occupation; and would require the Department of Labor to calculate prevailing wages based on three levels rather than the current four level system; and that sets aside certain numbers of H-1B visas for small and start up employers. AILA Doc. No. 17021432

On 1/3/17, Representative Darrell Issa (R-CA) introduced the "**Protect and Grow American Jobs Act,**" which amends the INA to revise the definition of "exempt H-1B

nonimmigrant" to eliminate the masters or higher degree requirement and raise the annual salary threshold requirement. AILA Doc. No. 17012464

On 1/5/17, Senator Cory Booker (D-NJ) introduced the “**Protect American Families Act,**” which would prohibit the creation of an immigration-related registry program that classifies people on the basis of religion, race, age, gender, ethnicity, national origin, nationality, or citizenship. AILA Doc. No. 17012463

In addition to the potential for Congressional action, the Trump administration may be poised to engage in regulatory reform, as signaled by some of the language in leaked (but as yet unsigned) draft Executive Orders. One such order, for example, hints at possible changes to the Optional Practical Training program for F-1 students and for the issuance of Employment Authorization Documents (EADs) to various classes of applicants; as well as to various advance parole policies and regulations. And, as of April 3, 2017, the Department of Homeland Security (DHS) asked the DC Circuit Court of Appeals for a 180 days stay of the proceedings challenging the Obama administration’s rule permitting certain H-4 visa holders to apply for EADs while DHS considers whether to engage in new notice-and-comment rulemaking on the subject, presumably with the aim of restricting or eliminating the current regulation.

There can be no doubt that both the legislative and the executive branch are interested in making significant changes to statutes and regulations governing immigration law. We must be vigilant in monitoring developments and in advocating for fair and reasonable reform that will advance the practice of immigration law and protect our clients’ interests.

Significant Texas Legislation: Sanctuary Cities

There are also a number of states passing restrictive immigration legislation in the wake of the presidential election results. For example, Texas Senate Bill 4 – the “Sanctuary Cities” law – passed March 27, 2017. What follows is a summary and brief analysis of that statute.

Short summary:

- Fines any law enforcement agency that fails to honor ICE holds;
- Allows ICE to place a hold orally;

- Places no limit to period of detention by person subject to ICE hold but does not require the detaining agency to notify ICE of a detention
- Prohibits a policy or a policy “implied by practice” of “discouraging officers from fully enforcing all U.S. immigration laws”;
- Provides for complex fines for agencies that “discourage full enforcement” and for criminal misdemeanor for elected and appointed officials of those agencies;
- Provides a seven-day “end of sentence” period during which an inmate can be transferred early to ICE to complete the sentence in ICE custody;
- Applies to all law enforcement agencies or employers of commissioned peace officers in Texas except those in public schools, charter schools, and hospital districts;
- Includes all higher education institutions with commissioned police employees.

Section by section summary:

Section 1

- Penalizes local, county or city agency if they release someone with an ICE hold;
- Allows ICE hold to be requested through oral notification;
- Makes the agency liable for damages arising from any felony the alien commits in the next 10 years in Texas. The procedural requirements to collect such damages are extraordinary and complex;
- Detained person can avoid this requirement only by providing “proof of U.S. citizenship”;
- LPRs and those in any valid nonimmigrant status are treated the same as the undocumented for purposes of this law.

Section 2

- Defines new obligations of all state and local agencies;
- CCP Article 2.251 prohibits a law enforcement stop or search SOLELY to enforce immigration law UNLESS the particular state entity has entered into an enforcement agreement with ICE. NOTE: There are already 13 Texas counties that have such agreements (all located in the coastal bend area, which historically has not attracted many farm, food service, hotel or construction workers).

- CCP Article 2.25: Requires compliance with oral or written ICE holds by all agencies having custody of someone based on a lawful detention or arrest; Also requires compliance with ANY additional request made by ICE if in writing. This appears to invite requests by ICE to deliver the person into ICE custody. There are NO limits on the period of extra detention by the agency for the ICE hold.

Section 3

- Facilitates end-of-sentence turnovers to ICE;
- Adds CCP 42.039: Requires judgments with a period of incarceration, to include instructions in the sentence to allow 7 days at the end of the sentence during which ICE or another federal custodian can pick up the defendant to serve the remaining days of the sentence in their custody;

Section 4

- Establishes a special 3-man court for determining a 752.053 violation (the crime of having implied policies by consistent actions which discourage enforcement of federal immigration laws)

Section 5

- Section 752.053: Defines the “discouraging enforcement” crime that may be committed by police agencies; Prohibits actual policy that "discourages enforcement of immigration laws" and **prohibits policies implied "by consistent actions [which] ... discourage" enforcement of federal immigration laws.**
- Defines what police entities are subject to the act to include virtually all agencies with commissioned police except hospitals and public and charter schools;
- Exempts hospital districts but allows hospitals to have the option by hiring "commissioned police officers". [A hospital seeking to discourage undocumented patients may find this useful];
- Provides that a religious organization may hire a commissioned police officer and NOT be subject to the requirements of this act;
- Prohibits a range of police supervisory practices.
- Prohibits a law enforcement entity "by consistent actions" to be in violation of Section 2 by not honoring ICE holds. The requirement of "consistent actions" draws a fuzzy line regarding when criminal penalties might attach for failure to honor all ICE holds. It would appear that random failures are OK, but a consistent failure to continue to detain

under certain circumstances – say for example when all criminal charges are dropped, or when the detainee has been held for 20 days - would violate the statute.

- Prohibits a law enforcement entity from DISCOURAGING an officer from:
 - checking status of a person "under lawful detention or arrest" including "place of birth"
 - Sending "the information" to USCIS, ICE or other federal agency
 - Maintaining "the information" or exchanging "the information" with other local or state criminal agencies
 - assisting or cooperating with DHS officers
 - **permitting DHS officers to conduct enforcement at a jail**

- Section 752.054: Prohibits illegal discrimination on basis of race, color, religion, language, or national origin;

- Section 752.055: A complaint against a law enforcement entity may be filed by any person or entity (complainee), including ICE by making complaint to the Attorney General;

- The complainee entity must comply with a "document request" from the Attorney General which must be submitted within 30 days and must include:
 - its written policies related to immigration enforcement actions.
 - each DHS detainer request received by the entity, and
 - each response sent by the entity "for a detainer request" (record keeping obligations of the complainee will immediately impact all law enforcement entities)

The Attorney General then determines if the complaint "is valid" and notifies the respondent entity. There is no time limit within which the Attorney General is required to respond. If the complaint is deemed valid, the notice will warn the entity it will be denied state grant funds for the following fiscal year **IF THERE IS a final judicial determination**. Beyond the funding denial, there are also substantial civil fines against the entity and criminal exposure to the officials of the entity.

Complainee entity has 90 days to "come into compliance". IF complainee entity has not "come into compliance" within the 90 day period, the Attorney General can file a mandamus action to compel compliance by any of the defined criminal agencies. IF THE Attorney General prevails, there are large civil fines, and loss of state grant funds for following fiscal year or more.

- Section 752.0556: Creates a Class A misdemeanor for elected or appointed local officials, city, county or special districts that "intentionally or knowingly" violate the Section 752.053 discussed above (which, again, can consist of an implied violation based on "consistent actions").
- Section 752.058: Allows entities to publicize that they may not inquire into immigration status if a detained person is detained **SOLELY** because that person is the victim or a witness or reports the crime, and if the law enforcement entity has not signed on to an ICE enforcement assistance program.

Commentary/Practice Pointer:

A Texas county or municipality or university could minimally comply by having no policy, written or oral, and revoking any and all previous instructions or policies, written or oral, related to enforcement of immigration laws. Commissioned peace officers wanting to spend their time enforcing immigration law cannot be "discouraged" from doing so. As a result, this statute may make assignment and supervision of such officers quite difficult for police management. Sheriffs and those responsible for detention facilities will have to honor ICE holds. Municipalities with holding cells limited to overnight detentions probably will not receive many ICE holds before release or transfer of the detainee so this may not be as much of a problem for JP courts and municipalities as some have suggested.

Pending Litigation

The arrival of a new administration in Washington, DC also brought new legal challenges to unfair, unreasonable and unlawful governmental conduct. Some of the most important currently pending litigation includes:

Hawaii v. Trump (D. Haw. Case No. 1:17:cv-00050). This suit was originally filed on February 3, 2017 and challenged Executive Order titled "Protecting the Nation From Foreign Terrorist Entry Into the United States" that banned persons from Iraq, Iran, Libya, Somalia, Sudan, Syria and Yemen from entering the United States for 90 days.

The case was stayed pending the appeal in *Washington v. Trump*, (W.D. Wash, Case No. 2:17-cv-00141). In *Washington v. Trump*, the federal court in Seattle enjoined the Executive Order and the Ninth Circuit affirmed. The Trump Administration then issued a revised Executive Order that superseded the January 27, 2017 order. The State of Hawaii then filed an amended complaint challenging the revised Executive Order. On March 15, 2017, the federal court in Hawaii issued a nationwide TRO enjoining the new Executive Order because it was unconstitutional religious discrimination. On March 29, the federal court converted the TRO into a preliminary injunction. The Administration appealed to the Ninth Circuit. A briefing schedule has issued and oral arguments are set for May 15.

***International Refugee Assistance Project v. Trump* (D. Md. Case No. 8:17:cv-003610).** This suit was originally filed on February 7, 2017 and challenged Executive Order titled "Protecting the Nation From Foreign Terrorist Entry Into the United States". The case was stayed pending the appeal in *Washington v. Trump*, (W.D. Wash, Case No. 2:17-cv-00141). On March 6, 2017, the Trump Administration issued a revised Executive Order that superseded the January 27, 2017 order. The plaintiffs then filed an amended complaint challenging the revised Executive Order. On March 16, 2017, the federal court in Maryland enjoined § 2(c) of the new Executive Order as unconstitutional. The Administration has appealed to the Fourth Circuit. A briefing schedule has issued and oral arguments are set for May 8. The plaintiffs are represented by IRAP, HIAS, Inc., ACLU of Maryland and the National Immigration Law Center.

***Wagafe v. Trump* (D. Haw. Case No. 1:17:cv-00050).** This suit challenges the Executive Order titled "Protecting the Nation From Foreign Terrorist Entry Into the United States" as well as U.S. Citizenship and Immigration Service (USCIS) program called the Controlled Application Review and Resolution Program (CARRP). In effect, this is a challenge to the secret and unlawful government vetting program that targets thousands applicants who are Muslim or from certain Muslim-majority countries for delay or denial of immigration benefits. The plaintiffs have moved for class certification and the motion for class certification has been fully briefed. The class motion remains pending. The lawsuit was filed by the ACLU, National Immigration Project of the National Lawyers Guild, the Law Offices of Stacy Tolchin, and Perkins Coie LLP).

***AILA v. DHS et. al.* (D.D.C. Case No. 1:16-cv-02470).** On December 19, 2016, AILA filed a lawsuit under the Freedom of Information Act (FOIA) against U.S. Customs and Border Patrol (CBP) seeking the public release of the CBP Officers' Resource Tool (ORT), which provides guidance regarding the inspection and admission of individuals into the United States at U.S. ports of entry. AILA filed its initial FOIA request on July 10, 2013 and CBP failed to respond, even after AILA filed an administrative appeal in June 10, 2015. In particular, AILA seeks records relating to the issuance and implementation of the ORT and how it has come to replace CBP's prior guidance, the Inspector's Field Manual (IFM). Over the past three years, CBP has repeatedly refused to

disclose any information regarding the ORT. AILA now seeks to compel CBP to disclose all portions of the ORT with are covered by the FOIA. AILA is represented by the American Immigration Council and Foley & Lardner LLP.

***Mendez-Rojas v. Johnson* (W.D.Wash. Case No. 2:16-cv-01024-RSM).** On June 30, 2016, AILA filed a class action lawsuit against the Department of Homeland Security (DHS) and the Executive Office for Immigration Review (EOIR) challenging the statutory requirement that asylum seekers apply for asylum within one year of entering the United States. At the time the suit was filed, immigration courts required all applications to be filed before an immigration judge in open court. Because of the increasingly backlogged immigration court docket, the open court requirement presented a serious obstacle for asylum seekers. After the lawsuit was filed, the immigration courts rescinded the open court policy and allows for filing at a court window at any time. While helpful, this new policy does not resolve all the issues brought forth in the lawsuit. On January 10, 2017, despite the government's opposition to class certification, the District Court granted Plaintiff's motion and certified a nationwide class. The newly certified classes consist of thousands of asylum-seekers, including those who enter the United States, express a fear of return to their home countries, and then are released from immigration custody without notice from DHS of the one year filing requirement. The government then moved to dismiss the case. That motion was denied on March 28, 2017. The plaintiffs are represented by the American Immigration Council, National Immigration Project of the National Lawyers Guild, and Dobrin & Han, PC.

***City of Seattle v. Trump* (W.D. Wash. Case No. 2:17-cv-00497).** This suit challenges Executive Order titled "Enhancing Public Safety in the Interior of the United States" and specifically the threat of stripping federal funding from cities that refuse to assist the federal government in immigration enforcement. The lawsuit was filed on March 29, 2017 and no other action has been taken.

Last year's presidential election, and the rhetoric leading up to the election, signaled that 2017 was going to be an important year for immigrant communities. The actions taken by the new Administration have prompted the American Immigration Council and other advocates to hold the administration accountable and prevent the further erosion of immigrant rights.