



Practice Advisory: Immigration Law and Considerations for Serving Health Center Patients (May 2017)

*Please note that the answers to the questions below may change with developments in state and federal laws, administrative policies, executive actions and/or court decisions. Determinations about the legality of a stop or arrest will also depend significantly on the specific facts of each case. For these reasons, we recommend that you consult a local attorney about applicable laws and practices in your state. **This practice advisory is intended to provide general information - it does not constitute legal advice.***

I. Introduction

In early 2017, President Trump issued a series of executive orders related to immigration, touching upon a broad range of topics including immigration enforcement and border security. While the implementation of these orders is currently underway and their full impact is still unclear, there have been reports of increased immigration enforcement in many areas of the country. Health clinics and other organizations that serve farmworkers, their families and community members are concerned about the impact of this enforcement on the communities they serve, as well as on their own organizations. This practice advisory addresses common questions regarding the legality of certain law enforcement activities as well as potential concerns for health center staff.

What recent changes in immigration policy may affect the communities that health centers serve?

Among various recent changes in immigration policy, two of the most significant are the broadening of enforcement priorities and a push for local law enforcement to cooperate with or even participate in immigration enforcement actions. Under policy guidance issued by the Obama Administration in 2014, immigration enforcement priorities were limited to certain groups of individuals, including recent entrants and those with criminal convictions. However, a January 2017 executive order¹ issued by President Trump changed the priorities for immigration enforcement and removal. These priorities now encompass a broad category of people, including those who have violated immigration laws but have no criminal record and have been in the country for a significant amount of time. Immigration and Customs Enforcement (ICE) has stated that it will no longer exempt any classes or categories of undocumented immigrants. We do not yet know how ICE will

¹ Executive Order: "Enhancing Public Safety in the Interior of the United States", Section 5 (January 25, 2017).

implement this broad mandate, but we have already seen enforcement actions taking place across the country. For example, although the Department of Homeland Security (DHS) has clarified that Deferred Action for Childhood Arrivals (DACA) recipients will not be targeted;² there have been some recent detentions of DACA recipients.

In addition, the federal Secure Communities Program has been re-activated. Under this program, local law enforcement is directed to run the fingerprints of arrestees through an ICE database to determine whether they are in the country unlawfully. If a fingerprint match occurs, ICE may put in place a detainer so that when the local jail releases the individual, s/he can be transferred to ICE detention. ICE implemented Secure Communities in all 50 states and D.C. in early 2013. However, it was suspended in November 2014 after concerns regarding racial profiling, unlawful detentions, and community distrust of law enforcement led various state and local authorities to renounce the program. In January 2017, the program was re-instated via executive order.³

Who has the authority to conduct immigration enforcement operations?

The authority to conduct immigration enforcement operations is mainly held by two federal agencies: Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE). CBP is charged with enforcement of customs and immigration laws at U.S. ports of entry, including airports and international land borders. The Border Patrol is part of CBP and is responsible for patrolling the land areas within 100 miles of the U.S. borders with Mexico and Canada. ICE is responsible for enforcing immigration laws within the U.S. Local law enforcement⁴ is generally not involved in enforcing immigration laws. However, under a program known as the 287(g) program, local law enforcement may enter into voluntary partnerships with ICE that allow law enforcement officers to be trained and deputized by ICE to enforce immigration law within their jurisdictions. There are a number of concerns about the impact of the program on community relationships with local law enforcement.⁵

What could be the implications for immigrant communities of local law enforcement entering into a 287(g) agreement?

² DHS Q&A on Executive Order on Interior Enforcement, Question 22 (February 21, 2017), available at: <https://www.dhs.gov/news/2017/02/21/qa-dhs-implementation-executive-order-enhancing-public-safety-interior-united-states>.

³ For more information about Secure Communities, visit www.ice.gov/secure_communities. For a summary of the program and its flaws, please see this American Immigration Council “Fact Sheet.” <https://www.americanimmigrationcouncil.org/research/secure-communities-fact-sheet>

⁴ “Local law enforcement” is used to refer collectively to local police or sheriff’s offices and state police.

⁵ For more information on 287(g), including a list of participating localities and how to file a complaint, visit www.ice.gov/287g/. For a summary of the history and problems surrounding the 287(g) program, please visit this AIC overview at: <https://www.americanimmigrationcouncil.org/research/287g-program-immigration>.

Local law enforcement officers will generally not be enforcing immigration law, however the 287(g) program provides local jurisdictions with explicit authority to take on this federal role. Given that the federal government has established and encourages this type of arrangement between the federal government and local law enforcement, local law enforcement officers participating in the 287(g) program may be more likely to inquire about an individual's immigration status.

II. Potential Criminal Liability for Serving Undocumented Patients

Can health center staff be criminally liable under federal law for “harboring” undocumented patients?

It is unlikely that a health center could be prosecuted for harboring undocumented patients. Federal law prohibits individuals from knowingly concealing, shielding or harboring undocumented individuals who come into or remain in the U.S.⁶ A challenge with determining potential liability under this statute is that there is no uniform definition of what constitutes “harboring.” Instead, different judicial circuits have come up with varying interpretations of the term and a mix of factors to consider. The main factor considered is usually whether the conduct “substantially facilitates” the immigrant's remaining in the country. Other factors include whether the person is providing shelter, whether the conduct is clandestine, and whether the conduct hinders or prevents government authorities from finding the person, among others.

Providing medical services openly, during the regular course of business, is likely not to fit these definitions of harboring. However, these interpretations are very fact-specific and the varying definitions by different courts make it difficult to make any general statements about prosecution under this statute. Additionally, knowledge of a person's immigration status is an element of the crime, so it is important to note that health centers need not inquire about the immigration status of applicants seeking benefits.

Can health center staff be criminally liable under federal law for transporting undocumented patients to a health center?

It is unlikely that a driver transporting undocumented patients to a health center could be prosecuted federally for doing so. Federal law prohibits anyone from transporting someone who they know is in violation of immigration law, if such transportation “furthers” their violation of the law.⁷ While various courts have interpreted this law slightly differently, they agree that simply transporting someone who the driver knows or suspects to be an undocumented immigrant is not enough for a conviction. The purpose of the transportation must be to advance or assist the person's unlawful presence or entry into the country in a way that is not merely incidental. To determine liability, courts have looked at factors such as the distance and purpose of the transportation, the relationship between the parties, whether fees were charged by the driver and other behaviors like

⁶ 8 U.S.C. 1324(a)(1)(A)(iii).

⁷ 8 U.S.C. 1324(a)(1)(A)(ii).

whether the passengers were hidden from plain view. According to most publicly available cases, those convicted of this crime moved persons long distances and profited from their transport. These behaviors are not the type of actions in which health centers are typically engaged. Additionally, one of the key elements of the crime is knowledge of a person's immigration violation, yet health centers typically do not inquire into a patient's immigration status, which may make it difficult to prove this element.

It is very unlikely that transporting an undocumented patient to a health center for medical care would meet these standards and result in a conviction. However, please note that the standard to arrest someone is lower than the standard for a conviction; therefore, someone transporting undocumented patients may face a slightly higher risk of arrest than of a conviction. Also, whether or not immigration agents or local law enforcement actively enforce this provision is determined by state and local laws and enforcement priorities. Similarly, prosecutors have some discretion in deciding which criminal charges to pursue. A local civil liberties or immigrants' rights organization may have more information on local policies on this issue in your state.

Could future changes to federal laws and enforcement priorities under the new Administration affect health centers' potential liability for serving immigrant patients?

An executive order issued in January 2017 directs the Secretary of the Department of Homeland Security (DHS) to consider issuing new guidance and/or regulations regarding penalties for those who "facilitate the presence" of individuals who are in the U.S. unlawfully. In April 2017, the U.S. Attorney General published a memorandum directing federal prosecutors to prioritize certain immigration-related crimes, including "harboring certain aliens and related offenses." It is still unclear how these policies will be implemented and how their implementation might affect either the definition of or penalties for these crimes.

What if the health center is in a *state* that has passed its own law that prohibits the harboring or transportation of undocumented persons within the state?

*If a state has its own law prohibiting the harboring or transportation of undocumented persons that is similar to the federal law, the above analysis of the federal law applies to the interpretation of the state law. Although various states recently attempted to implement their own laws regarding the harboring and transportation of undocumented persons, giving them more authority to regulate this area, these laws were found to be "pre-empted" (in conflict with federal law). The U.S. Supreme Court held in a 2012 decision regarding an Arizona immigration law (*Arizona v. United States*) that the issue of immigration registration is occupied by a comprehensive system of federal regulation and that states cannot impose their own regulations in an area that is already addressed by federal law, regardless of whether they seek to contradict or complement existing law. Various lower courts have used this Supreme Court reasoning to conclude that states cannot impose their own laws on the transportation and harboring of undocumented immigrants, because this issue is already fully addressed by existing federal law. States that currently have their*

own laws regarding the harboring or transportation of undocumented persons could be subject to legal challenges, especially if they impose standards or penalties that are different from federal law.

It is also worth noting that some state harboring laws have contained explicit exemptions for organizations providing public benefits. In February 2017, various social service organizations challenged a Texas statute prohibiting the harboring of undocumented individuals. The U.S. Court of Appeals for the 5th Circuit dismissed the case because it found that the organizations did not have “standing” (a basis) to challenge the statute. According to the Appeals Court, the organizations were not at risk of prosecution because “there is no reasonable interpretation” by which merely providing social services constitutes harboring.

Please consult with a local civil liberties or immigrant rights organization regarding existing or proposed state laws on this issue in your state, as well as any relevant litigation and/or possible exemptions for certain types of organizations.

III. Types of Transportation Enforcement: Traffic Checkpoints and Moving Vehicle Stops

A. Traffic Checkpoints

When can Border Patrol set up a checkpoint?

Border Patrol (CBP) agents may set up permanent checkpoints within 100 miles of the border for brief questioning regarding drivers’ and passengers’ citizenship status. The U.S. Supreme Court has made an exception to the Fourth Amendment’s warrant and probable cause requirements and allowed border patrol to set up checkpoints to enforce immigration, customs and national security laws. At a checkpoint, CBP agents may ask limited questions or request documentation to verify the citizenship of the vehicle’s occupants.

When can local law enforcement set up a checkpoint?

Local law enforcement may only set up checkpoints to look for traffic violations or a fleeing dangerous individual. Under the Fourth Amendment to the U.S. Constitution, which prohibits unreasonable searches and seizures, law enforcement agents normally must have probable cause (a reasonable belief based on evidence that an individual is engaged in an illegal activity) and a warrant to stop someone or search their property. The U.S. Supreme Court has ruled that there are several exceptions to the warrant requirement, including a few for automobiles. These exceptions, however, still provide for certain restrictions as to what law enforcement can do. Local law enforcement can set up a checkpoint to enforce certain traffic violations such as driving without a license or driving while intoxicated.⁸ However, police must either check every vehicle or a random selection of vehicles, in order to guard against targeting individuals for impermissible reasons such as race.

⁸ Please note that specific traffic violations are part of a state’s criminal code.

When can ICE set up a checkpoint?

There have recently been various rumors of possible ICE checkpoints in certain locations. Spokespeople for ICE have stated that reports of ICE checkpoints or sweeps are false, and that ICE does not conduct sweeps, checkpoints or raids that target individuals indiscriminately. It is important to note, however, that reports from the ground indicate that enforcement actions are taking place in a variety of formats.

What should health centers do if local law enforcement sets up checkpoints near their clinics and patients are deterred from coming in?

If law enforcement officers are operating within the framework discussed above, such checkpoints are legal. However, health centers can work with other community organizations to help educate local law enforcement on the importance of ensuring access to health centers for the safety and health of patients and the community at-large.

B. Moving Vehicle Stops

When can Border Patrol (CBP) stop a moving vehicle?

Unlike at checkpoints, CBP agents must have a reasonable suspicion that a driver or passenger is violating immigration and/or customs laws in order to stop a moving vehicle. CBP agents may engage in enforcement actions near the border and may pull over vehicles to question occupants about their immigration status. However, CBP agents must have a “reasonable suspicion” of an immigration violation or crime to stop the vehicle. Agents may take into consideration the relative proximity to the border, information about recent criminal activity, and the behavior of the driver and passengers, among various factors.

When can ICE stop a moving vehicle?

ICE agents must have reasonable suspicion of an immigration violation in order to stop a moving vehicle. Federal immigration law permits immigration officers to make brief, investigatory stops if the officer has a reasonable suspicion that an immigration violation has occurred. ICE may also stop a vehicle if they have an arrest warrant for a specific individual as well as a reasonable belief that the individual is in the vehicle.

When can local law enforcement officers stop a moving vehicle?

Local law enforcement officers must have reasonable suspicion of a traffic violation or other criminal activity to stop a moving vehicle. Unlike at checkpoints, for law enforcement officers to stop a moving vehicle, they must have a reasonable suspicion that a person has violated a specific

law. Reasonable suspicion is defined as “specific and articulable facts.” Because unlawful presence is not in-and-of-itself a crime, local law enforcement should not generally stop vehicles on suspicion that persons are unlawfully present in the U.S. In the 2012 *Arizona* case, the U.S. Supreme Court upheld a provision in the state law that allowed police officers to check the immigration status of people who had been stopped or detained *on other grounds*. The Supreme Court noted that the provision could be subject to additional judicial review once implemented. Shortly after the law’s implementation, various civil rights groups brought a class-action lawsuit alleging that local law enforcement officers were impermissibly using race as a basis for traffic stops. As a result of the litigation, the state of Arizona entered into a settlement in 2016 prohibiting racial profiling, among other provisions.

Can immigration agents or local law enforcement stop a vehicle because the driver or passengers appear to belong to a particular race or ethnic group?

*No. Passengers’ or drivers’ race or ethnicity is not a permissible basis for establishing reasonable suspicion that they are in violation of immigration laws or engaged in criminal activity.*⁹

IV. Drivers’ and Passengers’ Rights and Obligations

What should a driver do if s/he is stopped by local law enforcement while transporting workers to a health center?

Answer any questions related to registration, handling and operation of the vehicle. Generally, if local law enforcement officers stop a driver and the driver has a valid license and registration and there is no indication of wrongdoing, there should be no reason to further detain the driver or vehicle. If an individual is unsure about whether or not s/he is being detained, s/he may ask, “Am I free to go?” to get clarification from the law enforcement officer. This question also makes clear that the individual is not voluntarily waiving his or her rights, and is remaining there under the belief that it is mandatory. If the driver is being detained, s/he and all passengers have the right to stop answering questions (or continue to remain silent) and ask for an attorney in order to preserve their rights.

Can a vehicle be searched by immigration agents or local law enforcement?

Once a vehicle is stopped, immigration agents or law enforcement officers must have either a warrant or probable cause for searching the vehicle or for searching drivers’ or passengers’ belongings. If an officer starts to search your car, your belongings or your person, you are not obligated to give permission; you have the right to state that you do not consent to the search. This applies to all stops of persons or vehicles, even if they are brief.

What will happen to an undocumented person who is stopped and found to be driving without a license?

⁹ An exception is when race or ethnicity is used as an identifier (part of the description of a suspect).

Generally, it is a violation of state law to drive a vehicle without a valid driver's license, and the driver may be arrested. If arrested, the undocumented driver may be detained and subsequently turned over to ICE. Please note that some states provide driver's licenses to individuals regardless of their immigration status.

If CBP or ICE agents stop a driver with a valid license, what can happen to any passengers in the car?

Once CBP or ICE stops a vehicle based on reasonable suspicion of an immigration violation, immigration agents may ask for immigration documentation from passengers as well as drivers. Failure to produce proof of lawful status may result in detention; however, everyone, regardless of immigration status, has the right to remain silent, refuse to answer questions and/or ask for an attorney. Because immigration agents have the authority to enforce both civil and criminal violations of immigration law, they are authorized to ask both drivers and passengers about their citizenship and immigration status. However, individuals have the right to remain silent when questioned by immigration agents. There is no obligation to answer questions from immigration agents, including questions about where you were born or how you arrived in the U.S. Any information you provide on these topics could later be used against you in an immigration case. It is illegal to lie to an immigration or law enforcement officer, including about immigration status. It is also best not to show any foreign identification documents, as these may lead the officer to assume that you are here illegally (unless the foreign document demonstrates your legal authority to be present in the United States, such as an H-2A visa. Please note that, as discussed below, individuals with certain immigration statuses are legally required to carry their documents with them.) Finally, individuals should never carry or show false documents, as this may lead to separate criminal charges.

If local law enforcement officers stop a driver with a valid license, what can happen to any passengers in the car?

Generally, at traffic checkpoints and in routine traffic stops, local law enforcement will not be enforcing immigration law (unless they are participating in the 287(g) program described above). However, there are immigration crimes such as smuggling people across the border, which local law enforcement officers actively enforce in some places in the country. If stopped or questioned by local law enforcement, everyone, regardless of immigration status, has the right to remain silent, stop answering questions and/or ask for an attorney. Some states have "stop and identify" statutes that require people to give local law enforcement officers their name. However, you do not have to provide any information about where you were born or how you arrived in the U.S. (Please also note that providing one's name is generally a good idea for anyone being taken into custody so that friends or family can locate them.) If a law enforcement officer asks for passenger identification, passengers may ask if they are being ordered to provide it and why.

Do noncitizens have to carry identification?

Yes. Federal immigration law specifically requires noncitizens over the age of 18 to carry with them at all times their alien registration receipt or card that they received when they entered the country. Such documentation may vary depending on the visa category, but might include a passport with valid visa, an I-94 card, or valid work authorization. Legal Permanent Residents should carry their residency cards with them at all times. Noncitizens should have these documents in their possession, and could be fined or charged with a misdemeanor if they are not able to show proof of their lawful presence.

What if my state law has specific provisions allowing police to inquire about immigration status?

States may pass laws allowing police to inquire about immigration status; however, these laws may be subject to legal challenges once implemented. Past legal challenges to state laws of this nature have led some states to establish that traffic stops cannot be extended in order to verify a person's immigration status. As noted above, in the 2012 *Arizona* case, the U.S. Supreme Court upheld a provision in the law requiring state officers to "make a reasonable attempt" to determine the immigration status of someone they stop *on other legitimate grounds*, if reasonable suspicion exists that the person is unlawfully present in the U.S. As a result of later litigation, the state of Arizona entered into a settlement with civil rights groups that limited the application of this provision and put in place guidelines for traffic stops by local law enforcement. The states of South Carolina, Alabama and Utah also faced litigation around similar provisions (often referred to as "show me your papers" laws) and eventually entered into settlements establishing that traffic stops may not be prolonged in order to confirm a person's immigration status, essentially rendering these provisions moot. These outcomes have not deterred some other states from enacting similar "show me your papers" laws. The most recent such law, Texas' SB-4, was just signed into law on May 7, 2017 and allows law enforcement officers to inquire into the immigration status of people they have detained. A local civil liberties or immigrants' rights organization may have more information on immigration enforcement policies and practices in your state, as well as any current or proposed legislation on this issue.

V. Law Enforcement Presence at or Near Your Center

Can CBP or ICE conduct immigration enforcement at or near a health center?

Although generally rare (see question below about sensitive locations), immigration agents may choose to conduct immigration enforcement at or near a health center. However, neither federal immigration agents nor local law enforcement may enter private property without a valid search warrant or consent from an authorized person. The Fourth Amendment protects all people in the U.S. (whether they are citizens or noncitizens) against intrusions on their reasonable expectation of privacy. Immigration agents and/or law enforcement may enter public areas; however, they must have either a valid warrant or consent in order to enter or search private areas. In order to strengthen protections for your center, it is advisable to have written and visible guidance regarding which

areas of the center are public and which are private, as well as specific policies about who can access specific areas.

What is a “sensitive location”? What special guidance applies to sensitive locations?

“Sensitive locations” are special sites, including medical facilities, educational institutions and places of worship, among others, in which immigration agents must exercise caution and avoid enforcement actions unless there are exigent circumstances. This policy was established through internal memoranda and it covers enforcement actions such as arrests, interviews, searches and surveillance. ICE adopted this policy in 2011 and CBP adopted it in 2013. DHS has recently stated that this policy remains in place, however, it is only internal guidance and not legally binding.

VI. Action Plans

In response to the policies and practices described above, health centers can take the following proactive steps:

Improve access to services

- A patient’s immigration status is irrelevant to the health center’s treatment of his or her medical needs. There is no obligation to inquire about a patient’s immigration status.
- Increase services in off-site locations closer to immigrant communities or through mobile clinics to reduce the need for workers to drive or be driven to the center.

Be prepared

- Establish and disseminate clear policies regarding which areas of the center are public and which are private. Develop safety and access protocols detailing who may enter these areas.
- Develop a plan and train staff on what to do and who to contact if law enforcement or immigration agents enter your facility. Designate a staff member or members to act as the contact person who will coordinate the center’s response.
- Create a plan for what to do in case an outreach worker and/or patient is detained. The plan should include notifying and consulting with an attorney as soon as possible.
- Understand and implement your basic rights: Attend trainings and provide information to staff and clients regarding applicable rights and best practices when encountering local law enforcement or federal immigration agents.
- Retain and consult with a local attorney who is familiar with immigration laws in your state, and have their contact information easily available or even memorized if possible.
- Ensure essential information recorded: It is very important to record key information, including time and location of the stop or visit, officers’ names and badge numbers, descriptions of uniforms and vehicles, and the names and dates of birth of anyone who is detained.

- Remember that you have the right to record law enforcement (except on government property) whether it's a traffic stop or center visit, but do not do so if you feel it is unsafe.

Educate your community about the value of your services and your center about developments that can impact your services

- Work with local leaders, law enforcement and policy makers to educate them about the importance of patient access to health centers and the need to avoid discouraging people from visiting health centers.
- Partner with community organizations and stay informed on local developments regarding law enforcement priorities and proposed immigration-related legislation in your city and state, including whether health service providers would be exempt from any provisions.

Resources:

For more information on civil legal services, there are resources available online.

- The Immigration Advocates Network (IAN) “immi” tool can help you determine immigration eligibility as well as find legal help (<https://www.immi.org/home/index>).
- The ACLU’s Immigrant Services Directory is a compendium of legal services providers for immigrants in the U.S. (www.aclu.org/immigrants-rights/immigrant-services-directory-public-resource-intake-referrals).
- The National Immigration Legal Services Directory is an online directory of legal services providers. (www.immigrationlawhelp.org).

For information about state-specific laws, the Interfaith Immigration Coalition provides a state-by-state directory of immigration-related legislation:

<http://www.interfaithimmigration.org/state-by-state-legislation/>

Farmworker Justice has also put together a “Know Your Rights Toolkit” listing available resources for preparing for and responding to immigration enforcement, available under “2017 Immigration Resources”: <http://www.farmworkerjustice.org/resources/labor-and-immigrations-resources>.

For more information regarding immigration enforcement or available resources, please contact Iris Figueroa at ifigueroa@farmworkerjustice.org.