IMMIGRATION

LOCAL REFORM, REGULATION, AND RESPONSE

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Immigration laws or the lack thereof are likely a hotbed of discussion to the citizens in your community, and are an integral part of the political platform of many elected officials, both local and national. Laws on this topic are complex, and the consequences that follow from local enactments may be severe. This paper covers two areas of law. First, it includes the key legal principles that come into play when local entities enact regulations that affect the non-legal alien and those who provide services to them. It also includes examples of contrasting approaches of cities to this sensitive and complex topic. Finally, it provides an overview of the law that limits and/or requires local government in their distribution of public resources to the non-legal alien. It is by no means exhaustive of all of the issues within those areas but is a guide for the local practitioner to consider as you respond to inquiries on what role local government is allowed to perform in this arena and the limits of that authority.

LAWS AFFECTING LOCAL REGULATIONS

While immigration regulations have traditionally been the purview of the Federal government, the lack of comprehensive reform in Washington has resulted in state and local governments taking a more significant role in addressing legal issues related to undocumented workers. State legislatures from across the United States introduced more than 1,000 immigration measures in 2007 and passed 150 of these items, three times more than in 2006.[1] Additionally, more than 100 municipalities across the country are regulating the issue of unauthorized immigration at a local level.[2] Local solutions have resulted in both pro-immigration policies that attempt to embrace and integrate immigrants into the community and anti-immigration policies that often bring unintended consequences such as court challenges, local opposition, and loss of citizenry and business revenue.

ANTI-IMMIGRATION POLICY

There is a common theme found in the provisions of anti-immigration ordinances. Generally, these regulations crack down on unauthorized immigrants and push for comprehensive reform by addressing a variety of issues including day laborers, employers/workers, landlord/tenant, identification/driver's license, local law enforcement, education, and English as the official language. These

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[1] Rodriguez, C., Chishti, M., Nortman, K. (2007) - Testing *the Limits: A Framework for Assessing the Legality of State and Local Immigration Measures.* Washington D.C.: Migration Policy Institute.

[2] Id.

ordinances often penalize not only the undocumented workers, but their families, business owners and others who interact with the unauthorized immigrants.

There are several legal obstacles to local regulation of the immigration issue. Municipal ordinances that target immigrants raise a number of Constitutional issues including federal pre-emption, due process, and equal protection questions.

There are several issues to evaluate in determining if a proposed ordinance is consistent with Constitutional principles. Additionally, an examination of court decisions regarding municipal regulations targeting undocumented workers provides insight into the legality of anti-immigration initiatives.

The United States Constitution makes clear that ordinances or statutes that conflict with or duplicate provisions found in the federal law are preempted.[3] However, not all state and local laws related to immigrants are pre-empted by federal law. The following is an analysis of preemption as it applies to immigration regulations.

PREEMPTION DOCTRINE

1. **Local Attempt to Regulate Immigration** - The courts have consistently held that the federal government is vested with the right to regulate immigration.[4] Ordinances that attempt to confer this power on state or local governments often run afoul of the Constitution.[5] Examples of local laws that would most likely be found unconstitutional because they "regulate immigration" are ordinances that try to define who is a lawful immigrant because of the complexity of identifying immigration status.[6] These provisions frequently are overly vague in their attempt to classify undocumented immigrants and they sometimes inadvertently exclude certain categories of lawfully protected immigrants from their definitions. Any attempts by a local government that have the effect of denying housing to lawful immigrants because it denied housing to their undocumented relatives would likely be found unconstitutional. The Supreme Court has held that state laws that burden the residence of lawfully

[3] U.S. Const. art. VI, cl. 2

[4] *See* DeCanas v. Bica, 424 U.S. 351, 354–55 (1976); *see also* Kleindienst v. Mandel, 408 U.S. 753 (1972); Fiallo v. Bell, 430 U.S. 787 (1977).

[5] *See* Lozano v. City of Hazleton, No. 07-3531 (3rd Cir. Filed Aug. 30, 2007); Villas at Parkside Partners v. City of Farmers Branch, No. 3:06-CV-2371L, 2007 U.S. Dist. LEXIS 44234 (N.D. Tex.2007). *See also*
DeCanas, 424 U.S. at 355–56; *see also* Graham v. Richardson, 403 U.S. 365 (1971) (state statute restricting benefits toLPRs held unconstitutional); Florida Lime & Avocado Growers v. Paul, 373 U.S.S 132, 142 (1963); Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419 (1948).

[6] *See* League of United Latin American Citizens v. Wilson, 908 F. Supp. 755 (C.D. Cal. 1995).

present immigrants are attempts to regulate immigration and preempted by federal law.[7]

2. **Express Preemption** - Express preemption occurs when a federal law has a provision that plainly prohibits states and municipalities from legislating in that area. For example, the Immigration and Reform Control Act (IRCA) expressly specifies that the IRCA preempts any state or local law that attempts to impose civil or criminal sanctions upon those who employ, or recruit or refer for a fee for employment, unauthorized immigrants.[8] Therefore, any attempt to create a local ordinance that penalizes those who employ undocumented immigrants would probably be found unconstitutional. However, if the regulation simply prohibited employers from knowingly hiring undocumented workers or affirming the same, there probably would not be a preemption obstacle because the provisions would merely reinforce IRCA.

3. **Implied Preemption** - Local ordinances can also be challenged by implied pre-emption which can occur in two ways.

   a) **Field Preemption** - Field preemption applies if a regulation is so comprehensive that it is clear that the federal government intended to fully occupy the field.[9] The U.S. Constitution gives Congress and the federal government exclusive power over immigration, naturalization, and deportation.[10] "Congress has fully occupied the field of immigration regulation through enactment and implementation of the" Immigration and Nationality Act.[11]

   b) **Conflict Preemption** – A law can be preempted because it conflicts with federal law so that it is physically impossible to comply with either regulation or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[12] For instance, if a local regulation created different timelines or penalties than federal laws there would be a conflict and the local law would probably be preempted.

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[7] Torao Takahashi v. Fish and Game Commission, 334 U.S. 410, 68 S.Ct. 1138, 1142 (1948).

[8] 8 U.S.C. 1324a(h)(2) expressly preempts any state or local law from imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or refer or recruit for a fee for employment, unauthorized aliens.

[9] DeCanas, 424 U.S. at 356-57.

[10] Hines v. Davidowitz, 312 U.S. 52, 62 (1941); *see also* DeCanas, 424 U.S. at 354, 356.

[11] League of United Latin American Citizens, 908 F. Supp. 755, 775–76, *citing* Gonzales v. City of Peoria, 722 F.2d 468 (9th Cir. 1983).

[12] LULAC, 908 F.Supp. at 768, *citing* Michigan Canners & Freezers v. Agricultural Marketing and Bargaining Board, 467 U.S. 461, 469 (1984); Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 142-43 (1963).

INDIVIDUAL RIGHTS

In reviewing municipal ordinances, courts also analyze individual rights issues such as whether a law provides due process and/or equal protection.

1. **Due Process** - The Fourteenth Amendment of the Constitution forbids deprivation to any person of life, liberty, or property without due process.[13] Therefore, a local government cannot deprive people of a property interest without adequate notice and an opportunity to be heard on any charge. Courts have found that both landlords and tenants have protected property interests under constitutional principles and both employers and employees have protected constitutional liberty interests.[14] It is important to note that the constitutional protections contained in the Fourteenth Amendment extend to all persons and not just persons that are legally in the country.[15] In determining if a specific law complies with due process, there are several factors to examine.

a) The regulation should be clear and straightforward so that a reasonable person would understand what is expected under the law. For example, if a law requires proof of documentation, it should be precise as to what forms of identification are satisfactory.
b) There should be a fair hearing process with notice of any alleged violation of the law and an opportunity for the violators to present their side of the case to an impartial decision-maker within a specified, reasonable time frame.

2. **Equal Protection** - Equal protection concerns are another area where anti-immigration ordinances falter under legal challenge. The equal protection clause basically directs that all people similarly situated will be treated alike.[16] Ordinances that provide different treatment to different classes of people are suspect under constitutional review if they restrict fundamental rights, such as voting or interstate travel.[17] Laws can also be found unconstitutional under an equal protection claim if they discriminate based on suspect classifications, such as race or national origin.[18] A regulation may appear to be neutral on its face but may be challenged because it reflects intent to discriminate.

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[13] U.S. Const., amend. XIV
[14] Lindsey v. Normet, 405 U.S. 56 (1972). *See also* Lozano v. City of Hazelton, 496 F. Supp. 2d 477 (2007).
[15] Zadvydas v. Davis, 533 U.S. 678, 693 (2001).
[16] U.S. Const. amend XIV; *See also* Plyler v. Doe, 457U.S. 202 (1982).
[17] Kramer v. Union Free School District No. 15, 379 U.S. 184 (1964); Shapiro v. Thompson, 394 U.S. 618 (1969); Skinner v. Oklahoma ex. rel. Williamson, 316 U.S. 535 (1942).
[18] McLaughlin v. Florida, 379 U.S. 184 (1864); Graham v. Richardson, 403 U.S. 365 (1971).

CASE STUDIES

Many ordinances passed by local governments are currently under court review and have not been enforced. In some cases, the laws have already been successfully challenged in the courts based on constitutional arguments.

1. **Hazleton, Pennsylvania** - In Hazleton, Pennsylvania, the Mayor crusaded against undocumented immigrants in his city by claiming an increase in crime and burden on social services in Hazleton after an influx of Hispanic immigrants moved into the area. In 2006 City officials passed a local ordinance that established an anti-immigration policy known as the Illegal Immigration Relief Act which was amended several times.[19] The Act proposed to deny business permits to any company hiring illegal immigrants and impose fines against landlords who rented to them.[20] A suit was filed to block enactment of the ordinance charging that the Act deprived residents of constitutional rights to equal protection and due process, as well as violating state and federal housing laws[21]. Additionally, the plaintiffs argued the law usurped the federal government's exclusive power to regulate immigration and that allowing every city to set local regulations would create a dysfunctional set of dueling rules and regulations.[22] In July 2007, a federal judge ruled against the city and struck down the tough anti-immigration law finding that the act was pre-empted by federal law and violated due process.[23] The case is currently on appeal and oral arguments were presented to the court in late October 2008 and a ruling is still pending. The Hazelton case is the only lawsuit challenging a state or local anti-immigrant law to have been decided after a full trial and the outcome will be important to cities seeking to regulate in this area.

2. **Farmers Branch, Texas** - Farmers Branch, Texas embarked upon immigration reform several years ago. The City Council unanimously passed a 2006 ordinance requiring tenants to provide proof of citizenship or eligible immigration status to landlords as a prerequisite to entering into a lease.[24] In response to legal challenges, the rule was later revised to include exemptions for minors, seniors and some mixed-immigration status families.[25] Citizens endorsed the law in 2007 during the nation's first public vote on a local government ordinance designed to challenge unauthorized immigration.[26] A federal judge blocked Farmers Branch from enforcing its ordinance after finding that the city

[19] Hazelton, Pa. Ordinance 2006-18, amended by Ordinance 2007-6 available at http://www.aclu.org/pdfs/immigrants/hazleton_secondordinance.pdf
[20] Id.
[21] Lozano v. City of Hazelton, 496 F. Supp. 2d 477 (2007).
[22] Id.
[23] Id.
[24] The Associated Press, May 28, 2008, *Judge Strikes Down Farmer's Branch Immigration Rule – Farmers Branch*, available at http://cbs11tv.com/local/farmers.branch.immigration.2.734923.html
[25] Id.
[26] Id.

ordinance was a regulation of immigration that differed from federal provisions and, therefore, preempted by federal law.[27]

The city then hired a law firm and consulted with a University of Missouri law professor to redraft the ordinance and address the legal concerns.[28] The result was a new proposal adopted by Council in January 2008 that requires prospective tenants to get a city license to rent houses and apartments.[29] This version of the ordinance would require the city as opposed to the landlords to verify residency requirements. Farmers Branch officials want the building inspector to use the Systematic Alien Verification for Entitlements Program (SAVE) program administered by the federal government to check the immigration status of renters although there seems to be disagreement over whether the system can confirm if a person is living legally in the U.S. [30] The city continues to face court challenges over its legislation. Three apartment complexes filed suit against the city in challenging the licensing requirement as unconstitutional.[31] The judge in the case has ruled that the city can't implement its ordinance until the case is resolved.[32]

Legal challenges to local regulation of immigration can be expensive. As of the end of 2008, an estimated $2 million dollars had been spent for legal fees by the City of Farmers Branch on this issue.[33]

3. **Riverside, New Jersey**[34] - Some cities have abandoned their regulations in the face of costly legal challenges. The "Riverside Township Illegal Immigration Relief Act," attempted to ban undocumented immigrants from renting, residing, using property or being employed in the New Jersey town. The town decided to repeal its anti-immigration ordinance in the face of costly litigation. It is significant to note that the costs associated with anti-immigration measures are not limited to the expense of legal proceedings. The Riverside ordinance had a profound impact on the town: one-third of their immigrant population moved away, causing some businesses to close, while other businesses saw a sales decline by as much as 50 percent.

The inadvertent consequences of these types of ordinances should be carefully considered because they create public policy concerns for local officials.

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[27] Id. *See also,* Villas at Parkside Partners v. City of Farmers Branch, No. 3:06-CV-2371L, 2007 U.S. Dist. LEXIS 44234 (N.D. Tex.2007).
[28] Id.
[29] Id.
[30] The Associated Press, November 6, 2008, *Database Doesn't Say Who is Illegally in the Country*.
[31] Sandoval, *Farmers Branch Complexes are Strict on Renters,* Dallas Morning News, November 1, 2008.
[32] Id.
[33] Dallas Morning News, December 26, 2008, *For Whom the Bill Tolls, Farmers Branch has Some Explaining to Do.*
[34] The information in this section was obtained from The Associated Press, September 17, 2007, *ACLU Makes Town Drop Anti-Illegals Law*, available at http://sweetness-light.com/archive/nj-town-quietly-drops-anti-illegals-ordinance.

Many cities that have passed anti-immigration legislation have experienced large numbers of residents moving, economic losses, tax revenue failing, and companies avoiding the area because of the difficulty of complying with the laws. Enforcement of local regulations is costly and not as easy as one might assume. It seems like a straightforward concept, either someone is here legally or not, but there are multiple types of immigration status with various forms of proof that complicate the ability to readily determine if someone is violating the law. Lastly, anti-immigration sentiment and legislation can compromise community relations.

For a more detailed analysis of issues associated with immigration regulation, visit http://www.migrationinformation.org/DataHub/ and reference the National Center on Immigrant Integration Policy which is a crossroads for elected officials, researchers, state and local agency managers, grassroots leaders and activists, local service providers, and others who seek to understand and respond to the challenges and opportunities today's high rates of immigration create in local communities.

PRO-IMMIGRATION POLICY

Not all cities are passing legislation that discourages immigrants from assimilating locally. Some local governments are finding new and innovative ways to integrate undocumented residents into the local community and facilitate relationships with the long-time citizenry. Several municipalities have passed pro or at least neutral immigration legislation. Some of these provisions include prohibiting local law enforcement agencies from enforcing federal immigration laws and declaring that people will be treated equally regardless of immigration status. Other local resolutions include supporting English as a second language programs and laws encouraging the federal government to pass comprehensive reform.

Model City Proposal[35]

In New Haven, Connecticut, Yale Law School's Community Lawyering Clinic in collaboration with JUNTA, a nonprofit serving the Latino and immigrant communities in New Haven, and ULA a Latina action group that advocates for immigrant rights, prepared a report entitled "A City to Model – Six Proposals for Protecting Public Safety and Improving Relationships Between Immigrant Communities and the City of New Haven" (The proposal) that they presented to the New Haven City Council in March of 2005.

[35] The concepts in this section are summarized from *A City to Model Six Proposals for Protecting Public Safety and Improving Relationships Between Immigrant Communities and the City of New Haven* (2005), New Haven, Co. Junta for Progressive Action, Inc. and Unidad Latina en Acción.

Latinos account for 50.3% of all Fair Haven's residents. Fair Haven is a port community in New Haven. The report was a proposal to address the unique needs of the Latino immigrant population in an attempt to achieve improvements in the conditions of life for New Haven immigrants. The organizations that worked on this report recognized a need to create an atmosphere of respect and civil treatment for all immigrants including undocumented individuals.

The following comprises their suggestions for local ordinances that would attempt to address the security concerns of the immigrant population, improve the effectiveness of local government, and create opportunities for new types of city-community relationships.

1. **Communicate with Local Banks**[36]- The proposal recommended that the city open up channels of communication and educate banks and other types of financial institutions that customers can open bank accounts without social security numbers. The effort would include helping the banks understand that the law does not require social security numbers to open accounts and to help create reasonable guidelines for acceptable and alternative forms of identification.

2. **City Identification Cards**[37]- The proposal suggested a mechanism to assist residents who cannot participate in community affairs because of identification barriers. It pointed out that the law does not prohibit cities from creating and issuing identification cards. Identification cards for immigrants would help them in engaging in local commerce such as opening bank accounts. It is not unusual for city governments to issue identification cards for a wide variety of reasons. The National League of Cities has pointed to the example of Washington D.C. in issuing its own identification cards for residents who can prove that they are over 15 years of age and residents of the district.

3. **Police Policy of Non-Enforcement of Federal Immigration Laws**[38]- The proposal advocated for the city to implement a police department policy that would recognize that immigration is a matter that is best handled by the federal government. The U.S. Constitution gives Congress the power to set immigration policies. Federal and local authorities have traditionally worked cooperatively on criminal issues but civil matters on immigration have historically been solely a federal concern. After September 11, 2001, the Department of Justice issued a memo that local law enforcement does have the ability to make civil immigration arrests. However, it is up to the city government to decide if they want to enforce these matters locally. A non-enforcement policy would allow police resources to be spent on local

[36] Id.
[37] Id.
[38] Id.

crime and may help to build trust between local authorities and the immigrant population.

4. **Police Department Enforcement of Criminal Wage Law**[39]– The proposal advised that cities can develop policies to protect undocumented workers from being exploited on the job and in wage payment. This type of program would create a mechanism for police enforcement of criminal laws that protect workers. The Central Texas Immigrant Workers Rights Center (CTIWoRC) in Austin, Texas developed a program that is the model for the rest of the country in this area. CTIWoRC worked with the city police and county attorney to enforce the Texas Penal Code criminal provision for theft of service. Under this law, it is a crime to agree to compensate someone for a service and, then after the service is performed, fail to make payment after receiving notice for demand of that payment. Austin advocates were successful in getting the definition of services interpreted to include wages. Therefore, failing to pay wages to immigrant workers is a crime under the statute. The following elements are required for a successful theft of services program: 1) an applicable state or municipal law; 2) relationships with local police and prosecutors; 3) a police department non-enforcement policy regarding immigration laws; 4) a formal procedure for police and prosecutors to process the cases; and 5) a good system for coordinating the management of the complaint and the follow-up process. The Austin program has all of the stated elements and has been successful but this type of program does take considerable time and resources.

5. **Looking to Best Practices Nationwide**[40] - The proposal encouraged the city to look to best practices nationwide for improving police-community relations. This can be achieved by reviewing initiatives taken by other cities in the country to improve police department relationships with immigrant communities which may help to build trust and diminish fear so that citizens will cooperate with law enforcement in reporting crime. Police Departments that have effectively instituted best practice multi-faceted programs are Charlotte-Mecklenburg, North Carolina; Las Vegas, Nevada; and Clearwater, Florida. One initiative that has been particularly successful is the establishment of a bilingual and multi-cultural team of officers designated to Latino/Immigrant matters. This program has increased crime reporting, increased accessibility of services, expanded or created information flows, and made response and information gathering more efficient. Other programs include citizen programs such as a Spanish language citizen police academy; administrative solutions such as Spanish language signs and

[39] Id.
[40] Id.

pamphlets, employee cultural awareness training, and police station visit programs for immigrants; and Mayor sponsored outreaches such as establishment of liaison offices or commissions that focus on integrating immigrants into the local government and community.

6. **Creating an Office of Immigrant Affairs**[41] – The proposal encouraged establishment of a city office to assist new immigrant residents and help them to familiarize themselves with city services and programs. The department could also provide an opportunity for the city to interact with and learn more about its citizens. The director of this office would act as a liaison to the immigrant community, the Mayor and community based organizations representing immigrants. The department would also create and manage program areas for immigrants. Cities that have already established this type of office are New York, Boston, and Philadelphia.

For a more detailed analysis of pro-immigration policy recommendations, view *A City to Model, Six Proposals for Protecting Public Safety and Improving Relationships Between Immigrant Communities and the City of New Haven*, http://newhavenindependent.org/archives/2005/10/A_City_to_Model.pdf .

SUMMARY

Immigration reform generates much discussion and debate in the United States. Despite the cost and unfavorable court rulings for local governments engaged in anti-immigration reform, many cities and states continue to pass legislation that is hostile towards unauthorized immigrants in their communities. Communities across the nation are experiencing hardship in the form of economic loss, bad publicity, and loss of population as a result of city ordinances targeting immigrants, their families, and their employers. Municipalities need to find new ways to address immigration reform. Some cities are already putting into practice pro-immigration policies to favorable results. These programs are strengthening relationships in the community and improving the effectiveness of local government. Cities need to consider the goals of the community and weigh the potential legal restrictions when deciding what, if any, immigration reforms they want to implement.

[41] Id.

LIMITATIONS ON PUBLIC RESOURCES AND THE NON-LEGAL ALIEN

The federal policy for immigrants and their access to public resources contains the following three principles:

> *-immigrants should strive for self sufficiency as their primary goal;*
> *-immigrants within our borders should not depend on public resources but on their own capabilities, sponsors, and private organizations; and,*
> *-public benefits should not be an incentive for immigration*[42]

With that in mind, there are many public programs that are available to immigrants legally within our borders even though they are not citizens. The fact that non-citizens are provided any public services or benefits may be repugnant to some people; however, there are instances where immigrants*, including non-legal aliens, are entitled to services and benefits. This topic focuses primarily on the obligations or restrictions for providing public services and benefits to non-qualified aliens, which includes "non-legal aliens" - those who have entered this country unlawfully.
*The term "immigrants" are referred to as "aliens" in this portion of the article.

FEDERAL RESTRICTIONS ON PUBLIC SUBSIDIES FOR ALIENS

Title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996[43] "PRWORA" prohibits a state or local government from providing public subsidies/benefits to *non-qualified aliens*.[44] Although there is no definition for a "non-qualified alien", the law defines a qualified alien as: one who is admitted into the United States for permanent residence under Immigration and Nationality Act "INA"; those granted asylum under 208 of the INA; a refugee under 207 of the INA; one paroled into the United States; one detained pending deportation; one granted conditional entry; a Cuban or Haitian refugee; and, certain battered aliens and their children.

Non-qualified aliens include some classes of aliens who entered the country lawfully as well as illegal aliens. The following public benefits may **not** be provided to non-qualified aliens:

1. Grants, contracts, loans, professional or commercial licenses provided by local government; and,

[42] 8 U.S.C.A. §1601 (Westlaw 2009).
[43] 8 U.S.C.A. §1621 (Westlaw 2009).
[44] 8 U.S.C.A. §1641 (Westlaw 2009).

2. Retirement, welfare, health, disability, public or assisted housing, post secondary education, food assistance, unemployment benefit or other similar benefit for which **payments** are provided to an individual or family by a state or local government agency or by appropriated funds of the same.

PRWORA has several exceptions to the restriction on public assistance. Those exceptions include assistance for health care items and services for emergency medical conditions except organ transplant procedures; public health assistance for immunization, and testing and treatment of communicable diseases. Another exception that allows programs for non-legal aliens are those that are authorized by the United States Attorney General as long as those programs are:

> **In kind** services provided at the community level, including those offered by public or private non-profit agencies that do not condition the assistance or amount on the individual's income or resources; and, are necessary to protect life or safety.[45]

Attorney General Reno implemented that authority and issued AG Order No. 2353-2001 which set forth the types of program that are authorized to non-qualified aliens. Programs covered by this Order are:

1 General government services widely available to the public such as police, fire, ambulance, transportation, sanitation, and other widely available services.

2, Crisis counseling and intervention programs; services related to child and adult protection services, violence and abuse prevention, victims of domestic violence or other criminal activity; or, treatment of mental illness or substance abuse.

3. Short term shelter or housing assistance for the homeless, for victims of domestic violence, or for runaway, abused or abandoned children.

4. Programs, services, or assistance to help individuals during adverse weather conditions.

5. Soup kitchens, community food banks, senior nutrition programs and other nutritional programs for persons requiring special assistance.

6. Activities designed to protect the life or safety of workers, children, or community residents.

[45] 8 U.S.C.A. §1621(b) (Westlaw 2009).

7. Any other program service or assistance necessary for the protection of life or safety.

Caution: The Attorney General exceptions are not permissive; providers may not rely on the PRWORA to deny services covered by this Order. One example of where the local entity must provide those services would include sheltering and food for those impacted by a hurricane or other natural disaster but probably should not include financial subsidies to those victims.

VIOLATIONS OF PRWORA

PRWORA does not provide any specific criminal or civil penalty for violations and there are no reported cases of any enforcement efforts; thus, it would seem that violations may be limited to obtaining injunctive relief. A word of caution, entities should review whether there are any references to PRWORA compliance in a federal grant program to which they are a recipient. Federal subsidy programs often contain commitments for the recipient to comply with an array of federal laws unrelated to the grant's purpose. Violations of those requirements may result in forfeiture and/or repayment of the grant funds.

Even though PRWORA has restrictions, Congress has authorized states to allow non-legal aliens to be eligible for their state or local benefit if the state law was enacted after 1996.[46] This explains why some states have provided financial or other assistance broader than what is described above.

IS YOUR ENTITY IN COMPLIANCE WITH PRWORA?

Does your city ask for proof of legal status before providing a license, service or benefit? A community can require verification of alien status for the distribution of its public benefits.[47] If so, is the information sought uniformly for all or only certain applicants? If it is the latter, a city may be faced with a race or national origin discrimination claim for that practice.

Even for the well intended and those that wish to be proactive, there are a number of hurdles to show compliance with PRWORA, particularly if you are trying to distinguish between qualified and non-qualified aliens. From a practical perspective, discerning who is eligible under PRWORA to receive a benefit/service/license is not a minor undertaking. Many people in this country are here on various visas including foreign government officials, their families and personal employees, visitors, those under a visa waiver program, aliens in transit, academic students and their spouse and children, temporary workers who

[46] 8 U.S.C.A. §1621(d) (Westlaw 2009).
[47] 8 U.S.C.A. §1625 (Westlaw 2009).

may include nurses, fashion models, agricultural workers and their spouses and children, a fiancé of a United States citizen, including the minor children, employees who are part of an intra company transferee, etc. Given the range of classes of legal aliens, will most city employees who administer programs know the visas that are associated with these classes to determine eligibility? It may give most of us pause to make such a determination.

OTHER EXCEPTIONS/PRACTICES

Aliens are eligible for post secondary education benefits if the same benefit is offered to citizens and nationals without regard to residency in the State.[48] Many states offer in-state tuition to non-qualified aliens if the student files an affidavit that he has applied to legalize their status or will do so as soon as eligible (California) and those who have attended high school in their state for three or more years.[49] Those states may rely on the fact that in-state tuition is not a "monetary payment" that would otherwise violate PROWORA, but instead in-state tuition is a status benefit.

Children may attend public schools without proof of documentation and participate in all programs.[50] Further an individual who is eligible for free public education benefits is also eligible for free breakfast and/or lunch at school without regard to citizenship, alien or immigration status pursuant to the Russell National School Lunch Act and Child Nutrition Acts.[51]

A hospital with emergency care facilities is required to comply with the Federal Emergency Medical Treatment and Active Labor Act and assess and stabilize any individual needing such assistance.[52] This obligation to provide emergency treatment extends to anyone, regardless of their status or ability to pay. A violation can incur a penalty up to $50,000 per offense.

OBLIGATION TO PROVIDE INFORMATION OR SERVICES IN A LANGUAGE OTHER THAN ENGLISH?

There are occasions where translation needs must be met. One example is jurisdictions covered by the Voting Rights Act must print their election materials in the language applicable to the minority group.[53] Another example is state law

[48] 8 U.S.C. A. §1623 (Westlaw 2009).
[49] Kan.Stat. Ann. §76-731a (Westlaw 2009 Current through 2008); Tex. Educ. Code Ann. §54.052 (Thomson/West 2008).
[50] *Plyer v. Doe*, 457 U.S. 202 (1982).
[51] 8 U.S.C.A. §1615(a)(Westlaw 2009).
[52] 42 U.S.C.A. §1395dd (Westlaw 2009 .
[53] 42 U.S.C.A. §1973aa-1a(c)(Westlaw 2009).

that may obligate the court to provide translation services for a defendant or a witness.[54]

Cities that receive federal assistance must also comply with Executive Order 13166. The purpose of this order is to ensure applicants with limited English proficiency "LEP" have meaningful access to programs, employment, and benefits and activities that are funded in whole or part (including loans) by the federal government. This extends to federal programs that are passed through local governments to administer. To comply with the Order, the following factors are considered to determine whether meaningful access has been provided:

> *The number/proportion of LEP persons in the eligible service population;*
> *The frequency with which LEP individuals come into contact with the program;*
> *The importance of the service provided by the program; and,*
> *The resources available to the recipient.*

In sum, entities will need to evaluate their services, eligible population, and resources to determine the extent to which they must offer translation services to comply with this executive order.

E-VERIFY AND OBLIGATIONS FOR LOCAL GOVERNMENT

E-Verify allows an employer to subscribe to an online service to verify employment eligibility for new hires. This system is operated jointly by the Departments of Homeland Security and Social Security Administration. E-Verify is a substitute for the I-9 procedures, but there are distinctions in the law for the E-Verify and I-9 process so the user should familiarize themselves with those distinctions.

In order to use E-Verify, the employer enrolls by going to www.dhs.gov/e-verify. As a condition of participating in this system, the employer must enter into a memorandum of understanding "MOU" with the Department of Homeland Security "DHS." Although the online service is free, by entering into that MOU, the employer agrees to allow I-9 compliance inspections and other enforcement activity including the right of DHS and the Social Security Administration "SSA" to review the records gained in the E-Verify process, the right to interview employees, and to inspect employment records without a subpoena or prior notice. An employer may not use E-Verify as a screening tool in the employment process. It is only authorized upon hiring of the applicant, and is limited to new hires.

[54] Tex.Gov't Code Ann. §57.002 (Thomson/West 2008); Cal. Const. Art.I, §14 (Westlaw 2009); Wash.Rev.Code §2.43.010 (Westlaw 2009).

E-Verify system uses the employee's name, birth date, and social security number to determine eligibility. This information must be entered into the system within three days of hire date. The system then gathers information from Social Security Records, "Numerical Information File" (Numident), and the Department of Homeland Security for non-citizens. If the employee is confirmed, nothing further is required except to maintain that confirmation record. If eligibility cannot be confirmed, a "tentative non-confirmation" is issued, and the employer must notify the employee. This non-confirmation notice is similar to the no-match letter that is used in the I-9 process. The employee has eight business days to contest this determination. If it is contested, DHS or SSA has ten federal working days to determine eligibility. If eligibility cannot be confirmed, then a final non-confirmation letter is issued. This is the event that allows the employer to terminate the employee for non-eligibility. This differs from the I-9 process, where an employer must terminate an employee only after the employer cannot resolve any discrepancies arising from a no-match letter until after that review process.

Can you delay an employee's work while you are awaiting verification? No. An employer cannot prescreen applicants for eligibility before hiring. Obtaining social security numbers, whether it is because of the E-Verify process or for the purpose of tax reporting reasons, must only be done after hiring.

Concerns about the use of the E-Verify system include inaccurate databases, backlog and potential for more overwhelming the system, and the fact that E-Verify cannot protect against fraud. Once the system is mandatory for federal contractors, overwhelming the system is a significant potential. There were an estimated 6.6 million inquiries in 2008. When the system becomes mandatory for federal contractors, Secretary Janet Napolitano of the Department of Homeland Security, estimates the inquiries to exceed 63 million a year. See "Cheers and Fears over E-Verify Immigration program" on the webpage "SFGATE" of the San Francisco Chronicle March 10, 2009.[55]

Contractors who do business with the federal government will be required to use E-Verify starting September 8, 2009.[56] The Federal Acquisition Regulation exempts contracts that are:

- Entered into before September 8, 2009;
- Under $100,000;
- Performed within one-hundred and twenty days;
- Performed wholly outside the United States;
- For commercially available off the shelf items (not real property);

[55] www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2003/03/10/MNC316AKSH.DTL

[56] This Executive Order No 13465 has been delayed on a number of occasions since it was signed on June 6, 2008. As of the date of the preparation of these materials this was the latest effective date but that may change. Federal Administrative Rule 1.108(d).

- ❖ Subcontractors providing supplies only; or
- ❖ Under the "micro-purchase" threshold

STATE LAWS THAT ADDRESS ELIGIBILITY FOR HIRING, CONTRACTING, AND PUBLIC BENEFITS BASED UPON ALIEN STATUS

Many states have enacted laws that require verification of employment eligibility, contracting, and for the receipt of certain public benefits such as economic incentives. These rules may apply to both the public and private sectors. It is important to note that E-Verify is not required under federal law for receipt of stimulus monies.

Below is a sampling of jurisdictions and their practices.

Arizona: All businesses must use E-Verify. A business intentionally or knowingly hiring an illegal alien risks having its business license suspended, and potential revocation.

California-City of Mission Viejo. All contractors for city goods or services in excess of $15,000 must enroll in E-Verify.

Colorado: Prohibits contractors for state and political subdivisions and related entities from hiring illegal aliens; requires them to participate in E-Verify; and, if a subcontractor is hiring illegal aliens, to take specific action. Violations of these duties constitute a breach of contract.

Businesses that receive economic incentives must show compliance with immigration laws, and allow inspection of I-9 forms.

Each employer verifies the legal status of employees hired after 1/1/07 and maintains records of the verification, and these records may be reviewed by the State Labor Department. Random audits of employer records are authorized. Violations range from $5,000 to $25,000.

Georgia: Verification is required for all public employees and contractors with the state.

Hawaii: Employment applicants for the state or county must be citizens, nationals, or permanent resident aliens or not otherwise restricted from employment under federal law.

Illinois: The state law prohibiting the use of E-Verify was overturned. Businesses use the system voluntarily.

Minnesota: Public employers and contractors required to use E-Verify.

Mississippi: Requires all employers with 100 or more employees to use E-Verify. Smaller employers will be phased in by 2011.

Missouri: State offices and agencies must use E-Verify for employment. Private companies that receive more than $5,000 in loans, tax credits or in contracts must also use E-Verify.

North Carolina: Requires state offices, agencies and universities to participate in E-Verify.

Oklahoma: Requires state and local agencies and those that contract with them to participate in E-Verify. Law currently challenged and enjoined.

Rhode Island: State's executive branch, and all state contractors and subcontractors are required to use E-Verify.

Tennessee: Provides a safe harbor from sanctions if an employer uses E-Verify.

Texas: Applicants for public subsidies such as economic development grants must agree to not knowingly employ undocumented workers, and violations will result in a return of monies.

Utah: Public entities must use E-Verify or other verification system. Contractors must use E-Verify or similar system to do business with public entities.

PUBLIC INQUIRIES ABOUT CITY CONTRACTORS' COMPLIANCE WITH EMPLOYMENT ELIGIBILITY

Have you ever taken a call from the public or one of your officials who questions whether the city takes any steps to ensure that the contractors the city hires follow the immigration laws for their employees or subcontractors?

This line of inquiry can create tension in a community where work is scarce and is perceived to be done by non-legal aliens. It may also inspire a person to ask you whether you can require inspection of hiring documents. A city can, by contract, require proof and the right to inspect eligibility for employment documents. However, the time, resources, and expertise needed of what materials to review and determine compliance may be limited. Further the right to inspect social security numbers, which are generally confidential, is not likely permitted. More important, an entity should assess whether it truly wants the responsibility to act like a pseudo employer to insure that all workers are legal. If you dispute

the employee's eligibility, what actions will your entity take? Or, what do your citizens expect you to do?

Also, entities that have access rights to hiring information possessed by third parties may have potential liability under a "constructive knowledge" theory if there is improper hiring. With a right to access hiring records you may create an obligation to adequately scrutinize and ensure compliance, at least this perception may arise in the eyes of an enforcement agency. A city that takes a proactive role in reviewing records of contractor's hires and determine eligibility may find itself in the same role and responsibility of an employer for hiring compliance. If you provide the right to review and reject persons on your site, are you inviting claims of USCIS compliance or another type?

An alternative approach is to include in your contract terms that that the contractor represents that it will comply with the law and is responsible for verification and compliance with immigration laws, and will include this same provision in its subcontractors' contracts. Including a right to terminate the contract for failure to follow this provision may satisfy these concerns.