



**NMDOJ Guidance for Law
Enforcement Agencies Concerning
Civil Immigration Enforcement Action**

NMDOJ GUIDANCE FOR LAW ENFORCEMENT AGENCIES CONCERNING CIVIL IMMIGRATION ENFORCEMENT ACTIONS

Public safety is a priority for the New Mexico Department of Justice and all law enforcement agencies throughout New Mexico. With limited resources, however, state and local law enforcement must work together to combat crime and keep our communities safe. On occasion, this pooling of resources and coordinated law enforcement response in fighting crime can involve federal law enforcement partners, with which New Mexico’s law enforcement agencies maintain a positive and productive working relationship.

Peace officers in New Mexico have a duty “to investigate all violations of the criminal laws of the state which are called to the attention of any such officer or of which he is aware.”¹ New Mexico law, however, imposes no duty on state and local law enforcement to participate in civil immigration enforcement actions initiated by the Federal Government. In light of anticipated increased civil enforcement, the NMDOJ issues this Guidance to describe the potential consequences and liabilities for state and local law enforcement participation in such operations. The Guidance is not legal advice. Law enforcement agencies should consult with their counsel about any questions related to the issues discussed in this Guidance.

Anti-Commandeering under the Tenth Amendment

State and local law enforcement agencies cooperate with and act in concert with federal law enforcement in investigating violations of state and federal criminal laws and are authorized to receive federal funding.² However, federal immigration authorities cannot force state or local law enforcement to assist in enforcing federal immigration law. Under the Tenth Amendment to the United States Constitution, the federal government cannot “compel the States to enact or administer a federal regulatory program,”³ or force state employees to enforce federal law.⁴ Federal immigration authorities frequently issue detainers directing state and local law enforcement to detain individuals suspected of immigration-related offenses. However, detainers are merely “request[s]” for cooperation and do not carry the force of law.⁵

¹ NMSA 1978, § 29-1-1 (1979).

² See NMSA 1978, § 29-1-10.1 (1986).

³ *New York v. United States*, 505 U.S. 144, 188 (1992).

⁴ *Printz v. United States*, 521 U.S. 898, 935 (1997)

⁵ 8 C.F.R. § 287.7(a); see *Galarza v. Szalczyk*, 745 F.3d 634, 643 (3d Cir. 2014) (“Even if there were any doubt about whether immigration detainers are requests and not mandatory orders to local law enforcement officials, settled constitutional law clearly establishes that they must be deemed requests.”).

Cooperation Agreements

Federal law permits localities to voluntarily enter into agreements to perform the functions of an immigration officer in the investigation, apprehension, and detention of aliens in the United States. See 8 U.S.C. § 1357(g) (commonly referred to as § 287(g)). These cooperation agreements are not prohibited by state law.⁶ Choosing to take on the functions of an immigration officer carries with it certain consequences and risks that should be considered before entering into § 287(g) agreements in New Mexico.

Practical Consequences when Functioning as Federal Immigration Authorities

A. Diversion of Resources

Although there are federal immigration-related crimes, simple unlawful presence in the country is a civil offense, not a crime.⁷ Law enforcement agencies have limited resources. When a local agency enters into agreements with the federal government to enforce immigration laws, it must bear its own costs.⁸ An agreement to enforce federal civil law reduces the resources that the agency can spend accomplishing its primary mission of enforcing state criminal laws and protecting its community from crime. Because officers detailed to assist on immigration enforcement are placed at the direction and supervision of the federal government,⁹ there will be fewer officer hours devoted to regular policing duties.

B. Potential Loss of Witnesses

To investigate and prosecute crime, law enforcement must rely on and foster the cooperation and trust of crime victims and witnesses. When law enforcement cooperates with the federal government to enforce federal immigration law, victims and witnesses may be less likely to report crime or cooperate with law enforcement because of their immigration status or the immigration status of a relative or household member.¹⁰ Although U and T Visas can provide

⁶ Apart from agreements to function as immigration officers, federal law addresses an exchange of information by providing that a state or local agency cannot prohibit or restrict a government agency or official from sharing immigration status information with the Immigration and Naturalization Service. 8 U.S.C. § 1373(a). Some courts have ruled that this provision violates the Tenth Amendment. *E.g.*, *City of Ocean v. Grewal*, 475 F. Supp. 3d 355, 377-78 (D.N.J. 2020).

⁷ *Melendres v. Arpaio*, 695 F.3d 990, 1000 (9th Cir. 2012) (“The Supreme Court recently affirmed that, “[a]s a general rule, it is not a crime for a removable alien to remain present in the United States.”).

⁸ See *id.* (providing that state and local law enforcement may perform certain functions “at the expense of the State or political subdivision and to the extent consistent with State and local law.”).

⁹ 8 U.S.C. § 1357(g)(3).

¹⁰ See *Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement*, Celinda Lake et. al, University of Illinois at Chicago (available online at https://greatcities.uic.edu/wp-content/uploads/2014/05/Insecure_Communities_Report_FINAL.pdf) (“The findings presented here indicate that the greater involvement of police in immigration enforcement has significantly heightened the fears many

limited relief from deportation to victims of certain crimes, their scope is limited and the application process is demanding.

Civil Liability

Choosing to enforce federal law can expose local law enforcement departments and officers to civil liability. Civil claims could take various forms and be brought against individual officers as well as municipalities.¹¹ Civil claims against federal officers under 42 U.S.C. § 1983 are protected by qualified immunity.¹² Under the New Mexico Civil Rights Act, however, public bodies and their employees are prohibited from “enjoy[ing] the defense of qualified immunity for causing the deprivation of any rights, privileges or immunities secured by the bill of rights of the constitution of New Mexico.”¹³ Although § 1357(g)(8) provides that state and local officers act under color of Federal law for purposes of “immunity from suit,” the relationship between this provision and the New Mexico Civil Rights Act is unclear because the New Mexico Legislature, not Congress, determines state and local liability under New Mexico law. The federal government’s memoranda of agreement with local law enforcement generally provide that, although the Department of Justice might represent officers who are sued, that “[r]epresentation is granted at the discretion of DOJ; it is not an entitlement.”¹⁴

Generally, “state and local law enforcement officers may not detain or arrest an individual solely based on known or suspected civil violations of federal immigration law.”¹⁵ This includes continued detention in a county jail based on a detainer after a defendant has been released on state charges.¹⁶ In the absence of a § 287(g) agreement, arresting or holding individuals based only on a federal immigration detainer could give rise to civil liability.¹⁷

Latinos have of the police, contributing to their social isolation and exacerbating their mistrust of law enforcement authorities. This fear, isolation and mistrust, in turn, has led to a reduction in public safety, a serious negative consequence of the involvement of police in immigration enforcement.”).

¹¹ See *C.F.C. v. Miami-Dade Cnty.*, 349 F. Supp. 3d 1236, 1259–60 (S.D. Fla. 2018) (finding that plaintiffs asserted a claim that a municipality had a policy or custom of permitting unlawful detention pursuant to detainer requests).

¹² See *City of Tahlequah, Okla. v. Bond*, 595 U.S. 9, 12 (2021) (“The doctrine of qualified immunity shields officers from civil liability so long as their conduct ‘does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’”) (quoted authority omitted).

¹³ NMSA 1978, § 41-4A-4 (2021).

¹⁴ See, e.g. Memorandum of Agreement, 287(g) Jail Enforcement Model, Etowah County Sheriff’s Office, p. 4 (available online at https://www.ice.gov/doclib/287gMOA/287gJEM_%20etowahCoAL_06-09-2020.pdf). See also 28 C.F.R. § 50.15 (outlining approval process).

¹⁵ *Santos v. Frederick Cnty. Bd. of Comm’rs*, 725 F.3d 451, 464–65 (4th Cir. 2013).

¹⁶ See *C.F.C.*, 349 F. Supp. 3d at 1245-46 (addressing immigration detainers issued to county jails and the jails’ continued detention of defendants after they had paid their bail and concluding that the local jail had no interest in continued detention because the state cannot adjudicate deportability).

¹⁷ See *id.* at 1259–60 (“Numerous courts have determined that when local law enforcement agencies hold someone pursuant to a detainer—and without separate probable cause that the person has committed a crime—such detention gives rise to a Fourth Amendment claim against the local law enforcement.”).