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Bill Analysis

Version: As Introduced

Primary Sponsors: Reps. Keller and Antani

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SUMMARY

- Requires every law enforcement agency in Ohio to take certain actions to cooperate with federal officials in the enforcement of federal immigration law.
- Requires a law enforcement agency to participate in federal programs to share information about arrestees with federal immigration authorities.
- Requires a law enforcement agency to honor federal detainer requests regarding persons who are unlawfully present in the U.S. and otherwise to cooperate and comply with federal officials in the enforcement of federal immigration law.
- Adds a provision to Ohio law that mirrors a provision of federal law that makes certain aliens ineligible for state or local public benefits.
- Requires a state or local governmental entity that administers a state or local public benefit to use the federal Systematic Alien Verification for Entitlements Program (SAVE) to verify aliens' eligibility for those benefits.
- Prohibits any state or local governmental agency or political subdivision from adopting an ordinance, policy, directive, rule, or resolution that prohibits or restricts a public official or employee from taking certain actions with respect to immigration enforcement.
- Specifies that a political subdivision or local law enforcement agency that is not in compliance with the bill is ineligible to receive homeland security funding and any Local Government Fund (LGF) distributions from the state.
- Creates a process to remove from office a public official in the legislative or executive branch of a county, township, or municipal government if the official supported, issued, or enforced a policy that caused the local government to be in violation of the bill's requirements concerning immigration.

- States that the General Assembly makes several findings and declarations concerning state and local cooperation with federal immigration enforcement efforts.
- Declares an emergency, meaning that the bill takes effect immediately and is not subject to the referendum.
- Includes a severability clause.

TABLE OF CONTENTS

Federal immigration enforcement – state and local assistance.....	2
Background and current law	2
Law enforcement requirements under the bill.....	4
Public benefits.....	4
Eligibility for benefits under federal law	4
Benefits for which an alien must be qualified.....	5
Benefits available to anyone	5
Use of SAVE	5
Other government policies	6
Local government funding penalties	6
Removal of public official.....	7
Officials subject to removal.....	8
Who may file complaint	8
Removal procedure	9
Legislative declarations.....	10
Effective date	11
Severability clause	11

DETAILED ANALYSIS

Federal immigration enforcement – state and local assistance

Background and current law

The U.S. Constitution reserves to the federal government the power to make and enforce immigration laws. State or local law enforcement agencies cannot independently determine whether a person is unlawfully present in the U.S. and cannot arrest or detain a person solely on that basis. Instead, federal authorities are responsible for enforcing immigration laws. Federal immigration authorities may request assistance from state and local officials, but cannot force them to help. Federal law and Ohio law require state and local government entities to allow their employees to exchange citizenship or immigration status

information with federal immigration officials, but the federal government cannot otherwise require state or local officials to assist federal immigration authorities.¹

One of the primary ways in which state and local law enforcement agencies come into contact with federal immigration authorities is through the federal Secure Communities Program. Under the program, when a state or local law enforcement agency arrests a person and submits the person's fingerprints to the Federal Bureau of Investigation (FBI) under standard booking procedures, the FBI notifies U.S. Immigration and Customs Enforcement (ICE) of the person's identity. If ICE determines that the person appears to be unlawfully present in the U.S. and decides to pursue the person's removal based on ICE priorities, ICE submits a detainer request to the state or local agency, asking the agency to keep the person in custody for up to 48 hours after the person is scheduled to be released from state or local custody, so that ICE can arrange to take the person into federal custody.² The state or local agency is not required to honor the detainer request, and if a court later finds that a detainer was not constitutionally valid, the state or local officials – not ICE – may be held liable for wrongfully imprisoning the person.³

Current Ohio law does appear to require state and local governmental entities to honor ICE detainer requests in at least some circumstances. The Revised Code specifically requires the Department of Rehabilitation and Correction to comply with ICE detainer requests for persons who are being released from state custody after serving a prison term for a felony. And, the statute requires state and local governments to comply with lawful requests for assistance from federal immigration authorities, "to the extent that the request is consistent with the doctrine of federalism." A local government that violates that requirement is ineligible to receive homeland security funding from the state. It appears that this provision of law has never been enforced or interpreted by a court.⁴

Some local jurisdictions in Ohio have adopted policies that limit their cooperation with federal immigration authorities – often called "sanctuary policies" – such as by prohibiting their employees from requesting or recording citizenship or immigration status information about persons with whom they come into contact (other than arrestees who are automatically processed through Secure Communities) or by declining to honor ICE detainer requests in some or all circumstances.⁵ The bill imposes penalties against government entities that have such policies.

¹ R.C. 9.63. See also 8 United States Code (U.S.C.) 1373; *Arizona v. United States*, 567 U.S. 387, 411 (2012); and *Printz v. United States*, 521 U.S. 898, 935 (1997).

² 8 U.S.C. 1357(d), 1373, and 1644 and 8 Code of Federal Regulations (C.F.R.) 287.7. See also U.S. Immigration and Customs Enforcement, *Secure Communities*, available at ice.gov/secure-communities.

³ See, for example, *Galarza v. Szalczyk*, 745 F.3d 634, 639 (3d Cir. 2014).

⁴ R.C. 9.63. See also R.C. 2909.30, not in the bill.

⁵ See, for example, City of Columbus Mayor's Office, *Executive Order 2017-01* (February 3, 2017), available at columbus.gov/WorkArea/DownloadAsset.aspx?id=2147494395.

Law enforcement requirements under the bill

The bill requires every law enforcement agency in Ohio to take certain actions to cooperate with federal officials in the enforcement of federal immigration law (see **COMMENT**). “Law enforcement agency” means a municipal or township police department, the office of a sheriff, the State Highway Patrol, and any other state or local governmental body that enforces criminal laws and that has employees who have a statutory power of arrest.

First, under the bill, a law enforcement agency must participate in any available program operated by the U.S. Department of Homeland Security or its successor department that allows the law enforcement agency to submit to federal authorities information about an arrestee in order to enable those authorities to determine whether the arrestee is unlawfully present in the U.S. (Currently, this would be the Secure Communities Program discussed above under “**Background and current law.**”) Further, the bill requires a law enforcement agency immediately to report to the appropriate U.S. immigration officials the identity of any arrestee whom a peace officer has reasonable cause to believe is unlawfully present in the U.S.

Upon receiving a lawful federal request or order to do so, the bill requires a law enforcement agency to detain a person who is unlawfully present in the U.S. until the person is transferred into federal custody. And, a law enforcement agency otherwise must cooperate and comply with federal officials in the enforcement of federal immigration law.

Under the bill, each law enforcement agency must notify its officers and employees of the requirements described above.⁶

Public benefits

The bill adds a provision to Ohio law that mirrors the provision of the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) that makes certain aliens ineligible for state or local public benefits. And, the bill requires a state or local governmental entity that administers a state or local public benefit to use the federal Systematic Alien Verification for Entitlements Program (SAVE) to verify aliens’ eligibility for those benefits. The entity must notify its officers and employees of those requirements.

Under the bill, a “state or local governmental entity” is any agency, board, bureau, commission, council, department, division, office, or other organized body established by the state or a political subdivision for the exercise of any function of the state or a political subdivision. “State or local public benefit” has the same meaning as under federal law, which includes benefits for which an alien must be qualified, as discussed below.⁷

Eligibility for benefits under federal law

With certain exceptions, PRWORA provides that any alien (that is, someone who is not a U.S. citizen or national) who is not a “qualified alien” is ineligible for federal, state, or local

⁶ R.C. 9.631(A)(1) and (B) and 9.632(A).

⁷ R.C. 9.631(A) and (C) and 9.632(A).

public benefits. “Qualified alien” includes several categories of persons, including lawful permanent residents and persons who have been granted asylum or refugee status. In general, a person who holds a temporary visa, such as a student or tourist visa, or a person who is unlawfully present in the U.S. is not considered a qualified alien.⁸

Benefits for which an alien must be qualified

On the state or local level, PRWORA generally requires an alien who receives any of the following benefits to be qualified under federal law to receive those benefits:⁹

- Any grant, contract, loan, professional license, or commercial license provided or funded by a state or local government agency, except for certain aliens with temporary employment visas and for foreign nationals who are not physically present in the U.S., and except as otherwise provided under an applicable treaty;
- Any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by a state or local government.

Benefits available to anyone

PRWORA does not prevent a state or local government from providing any of the following benefits to an unqualified alien:

- Assistance for health care items and services that are necessary for the treatment of an emergency medical condition, other than for an organ transplant procedure;
- Short-term, noncash, in-kind emergency disaster relief;
- Public health assistance for immunizations and for testing and treatment of symptoms of communicable diseases;
- Programs, services, or assistance that deliver in-kind services at the community level, do not condition assistance on the recipient’s income or resources, and are necessary for the protection of life or safety, such as soup kitchens, crisis counseling and intervention, and short-term shelter.

Further, under PRWORA, a state may, by statute, affirmatively provide eligibility for unqualified aliens for benefits they otherwise could not receive.¹⁰

Use of SAVE

The bill also requires a state or local governmental entity that administers a public benefit to use SAVE, or its successor program, operated by the U.S. Department of Homeland

⁸ 8 U.S.C. 1621(a) and 1641(b).

⁹ 8 U.S.C. 1621(c).

¹⁰ 8 U.S.C. 1621(b) and (d).

Security or its successor agency. Although continuing law requires state agencies to provide benefits only to qualified aliens, the Revised Code currently does not require the use of SAVE to verify applicants' eligibility. According to U.S. Citizenship and Immigration Services (USCIS), as of January 30, 2019, four Ohio agencies used SAVE – the Department of Job and Family Services, the Department of Medicaid, the Department of Public Safety, and the State Board of Nursing.

SAVE is a free, voluntary service offered by USCIS that allows a government agency to submit information provided by an alien applicant over the internet and to receive a response from USCIS about whether the applicant is eligible to receive the benefit. An agency could make benefit eligibility determinations without using SAVE. However, SAVE provides additional verification tools that otherwise might not be available to an agency, such as the ability to confirm that the number on a person's permanent resident card is associated with the person's name in federal records.¹¹

Other government policies

Additionally, the bill prohibits any state or local government agency or political subdivision from adopting an ordinance, policy, directive, rule, or resolution that prohibits or otherwise restricts a public official or employee from doing any of the following:¹²

- Complying with the bill's requirements described above concerning law enforcement and public benefits;
- Inquiring about a person's name, birthdate, place of birth, or citizenship or immigration status in the course of investigating or prosecuting a violation of any law or ordinance;
- Maintaining information about a person's citizenship or immigration status;
- Sending information to, or requesting or receiving information from, a federal, state, or local government agency or employee concerning a person's citizenship or immigration status or for the purpose of determining a person's citizenship or immigration status;
- Complying with any request by a federal agency engaged in the enforcement of federal immigration law for information, access, or assistance, regardless of whether the federal agency has obtained a warrant to compel the state or local government agency or political subdivision to comply with the request, unless federal law prohibits the state or local government agency or political subdivision from complying with the request.

Local government funding penalties

The bill allows an Ohio resident who believes that a county, township, or municipal corporation or its law enforcement agency is not complying with the bill's requirements to file a complaint with the Director of Public Safety. Upon receiving the complaint, the Director must investigate it and submit a report of the Director's findings to the Treasurer of State, the Tax

¹¹ R.C. 9.631(C). See also U.S. Citizenship and Immigration Services, *SAVE*, available at uscis.gov/save.

¹² R.C. 9.631(D).

Commissioner, the Speaker and Minority Leader of the House of Representatives, and the President and Minority Leader of the Senate.

If the Director determines that the political subdivision or its law enforcement agency is not in compliance with the bill, then the political subdivision is ineligible to receive homeland security funding and any Local Government Fund (LGF) distributions from the state, unless and until the Director certifies in an addendum to the Director's initial report that the political subdivision or law enforcement agency is in compliance with the bill.

Once the Director notifies the Tax Commissioner that a political subdivision has become ineligible for LGF payments, the Commissioner must cease making LGF payments to that political subdivision. The cessation applies to payments made directly to the political subdivision (if it is a municipality receiving direct LGF payments) and indirectly through the appropriate undivided county local government fund. The LGF suspension period continues until the Director certifies that the political subdivision is no longer ineligible and notifies the Commissioner. Each month, any LGF payments withheld under the bill must be transferred to the General Revenue Fund.¹³

Under continuing law, 1.68% of General Revenue Fund tax receipts are credited monthly to the LGF to provide revenue to political subdivisions and other taxing units. (That percentage will reduce to 1.66% starting in FY 2022.) Most of the funds credited to the LGF are distributed to county undivided local government funds (county LGFs), from which the funds are allocated amongst subdivisions within the county using either a statutory or an alternative, county-specific formula. One million dollars of the LGF is set aside each month to make payments to villages with a population of less than 1,000 and to townships, and the remainder (around 5% of the total LGF funds) is used to make direct payments to municipal corporations having a population of 1,000 or more.

Removal of public official

The bill also creates a process to remove from office a public official in the legislative or executive branch of a county, township, or municipal government if the official supported, issued, or enforced a policy that caused the local government to be in violation of the bill's requirements concerning immigration.

Under existing law, a public official may be removed from office by impeachment (applicable only to state officers and judges) or by a statutory process that allows removal upon complaint and hearing if the officer "willfully and flagrantly exercises authority or power not authorized by law, refuses or willfully neglects to enforce the law or to perform any official duty imposed upon [the officer] by law, or is guilty of gross neglect of duty, gross immorality, drunkenness, misfeasance, malfeasance, or nonfeasance." In most cases, the complaint must be accompanied by a petition signed by at least 15% of the electors in the political subdivision. Additionally, a municipal corporation or charter county may provide in its charter for the

¹³ R.C. 9.632 and 5747.502.

removal of officers by recall election. The bill adds a further process for removal that is specific to violations of the bill's immigration requirements.¹⁴

Officials subject to removal

Under the bill, a public official of the legislative or executive branch of government of a county, township, or municipal corporation is subject to removal from office if the official does any of the following:¹⁵

- In the case of a member of a legislative authority (that is, a county commissioner, a township trustee, or a city council member), votes in favor of a resolution, ordinance, order, rule, or policy that caused the county, township, or municipal corporation or its law enforcement agency not to comply with the bill's immigration requirements;
- Issues or adopts an order, rule, or policy that causes the county, township, or municipal corporation or its law enforcement agency not to comply with the bill's immigration requirements;
- Enforces or otherwise implements a resolution, ordinance, order, rule, or policy that causes the county, township, or municipal corporation or its law enforcement agency not to comply with the bill's immigration requirements.

Who may file complaint

The bill allows only a person who has suffered a personal injury, death, or property loss, the person's legal representative, or the administrator of the person's estate to file a complaint seeking a removal of an officer, and only if all of the following apply:¹⁶

- A criminal offense that occurred on or after the bill's effective date was a proximate cause of the person's personal injury, death, or property loss;
- A person who was unlawfully present in the U.S. at the time of the offense has been convicted of the offense;
- The county, township, or municipal corporation or its law enforcement agency was not in compliance with the bill's immigration provisions at the time of the offense;
- At the time of the offense, one of the following was true:
 - The offender resided or worked in the county, township, or municipal corporation. For purposes of that provision, a person resides in the place in which the person's habitation is fixed and to which, whenever the person is absent, the person has the intention of returning.

¹⁴ R.C. 3.08, not in the bill. See also Ohio Constitution, Article II, Sections 24 and 38 and *State ex rel. Hackley v. Edmonds*, 150 Ohio St. 203 (1948).

¹⁵ R.C. 9.633(A)(5).

¹⁶ R.C. 9.633(A).

- The offender spent time in the county, township, or municipal corporation because the offender received an actual or perceived benefit from the failure of the county, township, or municipal corporation or its law enforcement agency to comply with the bill's immigration provisions.

Removal procedure

The bill's removal procedure is similar to the continuing law procedure for removing an officer upon complaint and hearing, and the procedures for civil cases generally apply under the bill. The complainant must file the complaint in the court of common pleas of the county in which the official resides. The county prosecutor must prosecute the removal, except that if the prosecutor is the subject of the complaint, the Attorney General must appoint a special prosecutor.

The court must hold a hearing on the complaint not later than 30 days after it is filed. Not later than ten days before the hearing, the court must have a copy of the complaint and a notice of the hearing served on the official and on the prosecutor. The court may suspend the officer pending the hearing.

The case must be heard as a bench trial (that is, the judge is the trier of fact), unless the official demands a jury trial. In the case of a jury trial, at least nine of 12 jurors must find that all elements of the case have been met in order for the official to be removed.

If the trier of fact determines that all of the elements described above are true – that the person filing the complaint has met all of the qualifications to file the complaint and the official has taken one of the listed actions – the judge must order that the official be removed from office. In the case of a bench trial, the judge also must file a full, detailed statement of the reasons for the removal with the clerk of the court. The proceedings and findings are considered public records.

The court of appeals having jurisdiction over the court of common pleas may review the lower court's decision on questions of law, but may not reconsider the facts of the case. If the official or the complainant wishes to appeal the decision, then not later than 20 days after the lower court enters its decision, the appellant may request a hearing in the court of appeals in order to show good cause why the court should grant leave to appeal. The court of appeals must hold the hearing within ten days of the request and must notify the official and the prosecutor of the hearing. If the court of appeals refuses to grant leave to appeal, its decision is final.

If the court of appeals grants leave to appeal, the appellant must file the transcript of the record and the notice of appeal in the court of appeals not later than ten days after the court of appeals grants leave to appeal. The court of appeals must hear the case not later than 30 days after the filing of the notice of appeal, and its decision in passing upon the merits of the case is final.¹⁷

¹⁷ R.C. 9.633.

Legislative declarations

The bill states that the General Assembly makes the following findings and declarations:¹⁸

- Sanctuary policies that restrict, obstruct, or discourage cooperation with federal immigration authorities are prohibited by such federal laws as Section 642 of the “Omnibus Consolidated Appropriations Act of 1996,” 8 United States Code 1373, which states that “a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.”
- On January 25, 2017, the President of the United States issued an executive order, “Enhancing Public Safety in the Interior of the United States,” that addresses sanctuary jurisdictions. The order states that it is the policy of the executive branch of the federal government to ensure that Section 642 of the “Omnibus Consolidated Appropriations Act of 1996,” 8 United States Code 1373, is enforced to the fullest extent of the law and that the United States Attorney General and Secretary of Homeland Security must ensure that jurisdictions that willfully refuse to comply with that law are ineligible for federal grants, except as the Attorney General or the Secretary deem necessary for law enforcement purposes.
- In *Arizona v. United States*, 567 U.S. 387 (2012), the Supreme Court of the United States ruled that the United States Congress has the exclusive authority to legislate on immigration matters, that states may not augment the penalties for violating federal immigration laws, that “consultation between federal and state officials is an important feature of the immigration system,” and that “Congress has encouraged the sharing of information about possible immigration violations.”
- Given the supremacy of all federal laws pertaining to immigration, including Section 274 of the “Immigration and Nationality Act,” 8 United States Code 1324, as amended, which prohibits knowingly harboring persons who are unlawfully present in the United States, it is inappropriate and contrary to the public safety and welfare of this state for any public official to encourage, endorse, or otherwise support any public or private organization that seeks to offer so-called “sanctuary protection” to persons who are unlawfully present in the United States.
- Policies that direct state or local employees not to cooperate with federal immigration authorities or that protect persons who are unlawfully present in the United States are contrary to federal law, the interests of this state, and the safety and welfare of the people of this state.

¹⁸ Section 4 of the bill.

- The bill is necessary to ensure consistency and fairness in the enforcement of the laws of this state.
- The subject of the bill is a matter of statewide concern.

Effective date

The bill declares an emergency, meaning that it takes effect immediately and is not subject to the referendum.¹⁹

Severability clause

The bill provides that, if any provision of the bill or the application of the bill to any person or circumstance is held invalid, that invalidity does not affect any other provisions or applications of the bill that can be given effect without the invalid provision or application.²⁰ The Revised Code already includes a general severability clause, unchanged by the bill, that provides that this standard applies to every provision of the Revised Code.²¹

COMMENT

The bill might be vulnerable to a challenge on the ground that it violates the home rule provisions of the Ohio Constitution. Under those provisions, municipal corporations have the authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary, and other similar regulations as are not in conflict with general laws. Because federal law allows a municipality to decline to participate in voluntary federal immigration enforcement programs, such as ICE detainer requests, and some municipalities do so decline, a court might find that the bill violates an Ohio municipality's home rule power to make that decision. Although the General Assembly enacted a less specific law in 2006 that requires municipalities to comply with federal requests for assistance and to allow their employees to communicate with federal authorities, it is not clear whether that provision would be upheld under a home rule analysis because it has not been challenged.²²

HISTORY

Action	Date
Introduced	03-26-19

H0169-I-133/ts

¹⁹ Section 5 of the bill.

²⁰ Section 3 of the bill.

²¹ R.C. 1.50, not in the bill.

²² Ohio Const., art. XVIII, sec. 3 and R.C. 9.63.