



## **Practice Advisory** ***SB 54 and the California Values Act: A Guide for Criminal Defenders*** **February 2018**

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This Guide discusses the provisions of SB 54 (De Leon) and the California Values Act, relevant to criminal defense counsel who represent noncitizen clients. This Guide covers:

- I.** Overview of the California Values Act
- II.** Specific Provisions of the California Values Act
- III.** Defending Your Client in light of the California Values Act

- Appendix I.** Enumerated Offenses Permitting Limited Cooperation (Govt C §7282.5)
- Appendix II.** Enumerated Offenses Reduced by Proposition 47 and Proposition 64 That No Longer Permit Cooperation
- Appendix III.** Enumerated Offenses Describing Straight Misdemeanor Offenses
- Appendix IV.** Criminal Defender “Cheat Sheet” on the California Values Act

### **I. OVERVIEW**

California SB 54 became law in January 2018. This sweeping legislation, is intended to curtail the role of state and local police agencies in federal immigration enforcement. With some exceptions, SB 54 limits these local agencies and others, such as school police and security departments, from using money or personnel “to investigate, interrogate, detain, detect or arrest individuals” for immigration enforcement purposes. To that end, the bill amends the TRUST Act to entirely bar state and local law enforcement’s cooperation with immigration holds, and to restrict their responses to immigration notification and transfer requests (Govt C §§7282, 7282.5)); codifies the California Values Act, prohibiting other activities by these and other state agencies in connection with immigration enforcement (Govt C §§7284- 7284.10)); and repeals Health & S C §11369, which required notice to federal agencies of the arrest of suspected noncitizens in drug-related offenses. Nationally, the California Values Act is the most comprehensive state law of its kind to date.

In December 2017, the legal organizations who supported the drafting and passage of the Act sent out a detailed legal letter to Sheriffs’ and County Counsel offices throughout the state, regarding interpretation and implementation of the Act. That letter, as well as other implementation resources, are available under the Implementation Resources subheading at [www.iceoutofca.org/ca-values-act-sb54.html](http://www.iceoutofca.org/ca-values-act-sb54.html).

#### **Criminal defense-related provisions of the Act in a nutshell:**

- State and local law enforcement agencies<sup>1</sup> are prohibited, without exception, from honoring immigration “hold” or detainer requests. This means local law enforcement may no longer detain a defendant 48 hours

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<sup>1</sup> “California law enforcement agency” means a state or local law enforcement agency, including school police or security departments. Govt C §7284.4. It does not include the California Department of Corrections and Rehabilitation. *Ibid.*

beyond the termination of criminal custody in order to better enable immigration authorities to apprehend that person.<sup>2</sup> There are no longer any TRUST Act exceptions for holds.

- Law enforcement agencies are prohibited from responding to immigration notification requests, meaning requests to supply information about a defendant's release date<sup>3</sup> -- unless that person comes within a TRUST Act exception<sup>4</sup>.
- Local Law enforcement agencies may not facilitate the transfer of an individual<sup>5</sup> to immigration custody-- unless that person comes within a TRUST Act exception.
- Law enforcement agencies are prohibited from inquiring into an individual's immigration status.
- Law enforcement agencies are prohibited from sharing personal information about individuals (*e.g.*, work and home addresses) with immigration -- unless the information is publicly available.
- TRUTH Act protections, which require law enforcement to obtain written consent from a person in custody before an ICE interview, have been extended to the California Department of Corrections and Rehabilitation (CDCR).
- Law enforcement agencies are prohibited from using immigration agents as translators
- Law enforcement agencies are prohibited from performing the functions of an immigration officer (whether through a 287(g) agreement or otherwise). Local law enforcement agencies are prohibited from making arrests on civil immigration warrants.
- Local law enforcement agencies are prohibited from arresting people for the federal criminal offense of unlawful reentry under 8 U.S.C. § 1326(a), unless reentry is detected during an unrelated law enforcement activity *and* the person was previously convicted of a state or federal offense that meets the immigration definition of an aggravated felony.<sup>6</sup>
- Law enforcement agencies are prohibited from providing immigration agents exclusive office space.

The Attorney General is required by October 1, 2018 to publish model policies for public schools, public libraries, state health facilities, and courthouses, among others, limiting to the fullest extent of the law, their assistance with immigration enforcement. All public schools, state health facilities, and courthouses are required to implement the model policies and other agencies are encouraged to adopt the policies. For any databases operated by state and local law enforcement agencies, the Attorney General is required by October 1, 2018, to publish guidance, audit criteria, and training recommendations aimed at ensuring that those databases limit the availability of information for the purpose of immigration enforcement. State and local law enforcement agencies are encouraged to adopt this guidance.

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<sup>2</sup> Immigration holds also known as ICE detainers, are requests to a law enforcement agency, to voluntarily detain a person additional time beyond criminal custody. ICE uses the same form (I-247A) to make detainer requests (always prohibited under the Act) as Notification requests (sometimes prohibited under the Act). However, to the degree that ICE requests extra detention, this is now unlawful under California law. For an annotated review of the Form I-247A, see *Annotated Detainer Form 2017* at [www.ilrc.org/enforcement](http://www.ilrc.org/enforcement).

<sup>3</sup> A notification request is a request from ICE to a law enforcement agency asking the jail to voluntarily provide the individual's release date such that ICE has sufficient notice to arrest the individual at release from criminal custody. These requests are made using the DHS Form I-247A.

<sup>4</sup> The TRUST Act exceptions have been amended (see *e.g.*, new washout provisions) so counsel and advocates who were familiar with the 2014 Act when it governed immigration detainers should familiarize themselves with its new limitations.

<sup>5</sup> A transfer request is a request from immigration authorities asking that a law enforcement agency facilitate the transfer of an individual in its custody to ICE or CBP.

<sup>6</sup> "Aggravated felony" is a term of art in immigration law, defined at 8 U.S.C. § 1101(a)(43). See *Practice Advisory: Aggravated Felonies* at [www.ilrc.org/practice-advisory-aggravated-felonies](http://www.ilrc.org/practice-advisory-aggravated-felonies). For guidance on whether a California offense may be an aggravated felony, see the *California Quick Reference Chart* at [www.ilrc.org/chart](http://www.ilrc.org/chart).

## II. SPECIFICS OF THE BILL

### A) What does the Values Act do?

With some exceptions, SB 54 specifically prohibits state and local law enforcement agencies from investigating, interrogating, detaining, detecting, or arresting persons for immigration enforcement purposes. SB 54 accomplishes this through creating or amending multiple state laws. SB 54 amends TRUST Act provisions in the Government Code, incorporates Proposition 47 protections into the Government Code, codifies the newly enacted California Values Act in the Government Code, extends TRUTH Act provisions to the CDCR, and repeals Health & Safety Code §11369. SB 54 also permits local jurisdictions to enact more stringent policies to further protect noncitizens.

### B) How was the TRUST Act amended?

The TRUST Act of 2014 prohibited local jailors from cooperating with requests from Immigration and Customs Enforcement (ICE) to “hold,” or detain, a noncitizen beyond the time that person would otherwise have been released from criminal custody so that ICE could apprehend that individual. This protection against ICE holds applied to all incarcerated noncitizens, except those whose criminal record brought them within a TRUST Act exception. If an exception applied, then the jailor had discretion to honor the ICE hold request or not. The TRUST Act of 2014 provided no protection against ICE requests for either notification of release date or facilitation of transfer to ICE.

SB 54 made three key changes. First, no jailor is permitted to cooperate with an ICE hold request under any circumstances. Second, the TRUST Act now protects incarcerated noncitizens against ICE requests for notification and/or transfer. Third, exceptions to the TRUST Act still exist to permit discretionary cooperation with notification and transfer requests, but the list of exceptions has been slightly amended.

Specifically, the following amendments were made to the TRUST Act (Govt C §§7282, 7282.5):

- The definition of immigration hold, notification, and transfer request is now found in Govt C §7283 and applies to ICE, U.S. Customs and Border Protection and other immigration authorities (Govt C §7282).
- Local law enforcement agencies no longer have discretion to detain anyone on the basis of an immigration hold. Local cooperation with immigration holds is prohibited in every case. (Govt C §7282.5(a)).
- Local law enforcement agencies have discretion (but are never required) to cooperate with immigration authorities **only** when 1) doing so will not violate any Federal, State, local law or policy<sup>7</sup> and 2) when permitted by the California Values Act (Govt C §7282.5 (a)).
- Local law enforcement agencies are permitted to notify immigration authorities of release dates or to facilitate transfers of individuals to immigration authorities, **only** when the individual comes within an exception. (See Govt C §7282.5(a)(1)-(5), (b).) Exceptions apply to persons:
  - a. *arrested and held to answer* for a serious (Pen C §1192.7(c)), violent (Pen C §667.7(c)), or state prison felony; or
  - b. *convicted* of a serious or violent or state prison felony; or
  - c. *convicted within the past 5 years* of a misdemeanor for certain enumerated wobbler offenses or *convicted within 15 years* of certain enumerated felony offenses (See Govt C §7282.5(a)(3)(A)-(Q)).<sup>8</sup>

**NOTE:** The list of enumerated wobbler and felony convictions in Govt C §7282.5(a)(3)(A)-(AE) is identical to the list previously used to permit discretionary holds under the TRUST Act of 2014. See

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<sup>7</sup> This provides an opportunity for advocates to push for stronger policies which prohibit notification and transfers in more circumstances than the Values Act, or altogether.

<sup>8</sup> The Act specifies that the washout periods are from the date of conviction not from the date of release.

**Appendix I.** The 15-year washout period for the enumerated felonies is new. Further, note that unlike with serious, violent or state prison felonies, merely being held to answer for the enumerated felonies under §7282.5(a)(3)(A)-(AE) will not suffice to trigger discretion to cooperate with ICE notice and transfer requests. Only a conviction will suffice.

**ALERT:** The list of enumerated felony and wobbler offenses (Govt C §7282.5(a)(3)(A)-(AE)) wrongly includes some straight misdemeanors. See **Appendix III**. This was a drafting error carried over from the codification of the TRUST Act in 2014. The statute is clear, however, that only misdemeanor convictions from “wobbler” offenses should trigger this exception.

**Example:** Client Sara has a misdemeanor domestic violence Cal. PC §273.5 conviction from 6 years ago. She has now been arrested on a misdemeanor battery Cal PC. §242. ICE issues a notification request. Is Sara protected from a request for notification of her release date?

**Answer:** Yes. The jail *cannot* respond to ICE’s notification request. The Cal. PC §273.5 misdemeanor is an enumerated wobbler appearing in Govt C §7282.5(a)(3)(B). However, for this misdemeanor to allow discretion to cooperate with ICE, the conviction must have occurred within the last 5 years and Sara’s conviction was 6 years ago. The misdemeanor battery charge also does not give law enforcement a basis to cooperate. A misdemeanor *charge* may not be the basis of cooperation; only a misdemeanor *conviction* will suffice. Even if the 242 results in a conviction, the offense erroneously appears in the list of TRUST Act exceptions; it is a straight misdemeanor and not a wobbler and thus should be “protected” from cooperation. Because of the potential for misapplication, however, you may want to confirm with the jail that they will not honor the notification request.

- d. currently registering as a California sex or arson offender;
- e. convicted of a *federal crime* that meets the definition of an aggravated felony, or is identified by ICE or Homeland Security as the subject of a federal felony arrest warrant.

Under no circumstances can local law enforcement cooperate with immigration authorities on individuals arrested, detained, or convicted of offenses that are misdemeanors under the code but were felonies or wobblers before the enactment of Proposition 47. In other words, in no case can local law enforcement cooperate with notice and transfer requests for people convicted of Proposition 47 offenses (Govt C §7282.5(a)(6)). It’s clear that no conviction that is classed as a misdemeanor under Proposition 47 can be the basis for cooperation with immigration. If a person is entitled to reduce a past felony conviction to a misdemeanor under Proposition 47 but has not yet done so, the better view is that the felony still cannot serve as a basis for cooperation with immigration authorities. However, because of the potential for mixed application on the ground, counsel should make every effort to reduce prior felonies to misdemeanors under Proposition 47. If the conviction is from another county, counsel should contact the public defender or other defense counsel in that county to ask them to reduce the felony under Proposition 47.

**ALERT:** Only *felony* DUI or drug-offense convictions may be the basis for cooperating with notice and transfer requests (see Govt C §7282.5(a)(3)(G), (M)).

**Example:** Client Henry is convicted of misdemeanor Cal. H&S Code § 11358. ICE has issued a notification request on his case. Can the jail notify ICE of Henry’s release date?

**Answer:** No. Per Govt C § 7282.5(a)(3)(M), only felony offenses may be the basis to cooperate with a notification request. However, note that Henry may face other serious consequences to his immigration status as the result of this offense. Also, because ICE may still try to arrest Henry, inform Henry of his right to remain silent in front of ICE agents and to not open his home door to ICE agents (they are required to have judicial warrants and very rarely do).

**Example:** Client Tony has a prior conviction for receiving stolen property, Cal. PC §496, from three years ago. In that case, Tony stole a bottle of juice and was convicted of a misdemeanor. In the current case, he's received a conviction for a misdemeanor DUI, Cal Vel. C §23152. ICE issues a transfer request. Is Tony protected from transfer request?

**Answer:** Yes. The jail *cannot* respond to ICE's transfer request. Even though PC §496 is an enumerated offense in §7282.5(a)(3)(F) and Tony's conviction occurred within the last five years, §496(a) for property valued under \$950 was redefined as a misdemeanor offense under Proposition 47, and Tony was convicted of a misdemeanor. Thus he is "safe" under the California Values Act. See Govt C §7282.5(a)(6). Tony's misdemeanor DUI also may not be the basis for cooperation because only *felony* DUI convictions may trigger discretion to cooperate. Govt C 7282.5(a)(3)(G). Because of the potential for confusion about the §496 conviction, you may want to confirm with the jail that they will not honor a transfer request.

**Example:** What if Tony had a 2013 felony conviction for possessing a controlled substance, Cal. H&S C § 11377?

**Answer:** First, Tony's counsel would make every effort to get the conviction reduced to a misdemeanor under Proposition 47. That way the conviction would not permit cooperation. Failing that, counsel would argue that the felony still did not provide discretion to local law enforcement to cooperate because Proposition 47 offenses are protected from notice and transfer requests.

### C) What is the California Values Act?

The California Values Act is the heart of SB 54. It governs what local law enforcement is and is not permitted to do with respect to immigration enforcement. The Values Act is codified in Govt C §§7284-7284.12.

#### 1. What does the California Value Act prohibit?

Under the Act, California law enforcement agencies, including school police or security departments, **shall not** (Govt C §7284.6(a)):

Use agency or department money or personnel to investigate, interrogate, detain, detect, or arrest persons for immigration enforcement purposes, including to:

- Inquire into an individual's immigration status
- Detain an individual pursuant to a hold request
- Provide information regarding a person's release date or respond to requests for notification of release dates, *unless* either of the following applies:
  - (1) that information is "available to the public," or
  - (2) the individual comes within an exception to the TRUST Act set out in Govt C §7282.5(a)(1)-(5), (b)) and discussed in part B, above. This would then permit, but not require, the jailor to cooperate unless a more stringent local policy regarding cooperation exists in the jurisdiction.
- Transfer an individual to immigration authorities, unless

(1) this is authorized by a judicial warrant or a judicial probable cause determination, or

(2) the person comes within an exception to the TRUST Act set out in Govt C §7282.5(a)(1)-(5), (b)) and discussed in Part B, above. If the person does come within an exception, this would permit, but not require, the jailor to cooperate with the transfer unless a more stringent local policy regarding cooperation exists in the jurisdiction.

- Provide personal information (defined in Civ C §1798.3) about an individual, including but not limited to the individual's home address or work address, unless that information is available to the public.
- Make or intentionally participate in arrests based on civil immigration warrants
- Assist immigration authorities with “board and searches” of vessels, vehicles or land
- Perform the functions of an immigration officer, whether through the 287(g) program or any other law, regulation, or policy, whether formal or informal.
- Place peace officers under the supervision of federal agencies or employ peace officers deputized as special federal officers or special federal deputies for purposes of immigration enforcement
- Use immigration authorities as interpreters for law enforcement matters relating to individuals in custody
- Provide office space within a city or county law enforcement facility exclusively dedicated for immigration authorities' use
- Contract with the federal government to house federal detainees in California law enforcement agency facilities except under Govt C §7310 et seq.

## 2. What is permissible under the California Values Act?

The California Values Act does **not** prevent any of the following that “does not violate any policy of the law enforcement agency or any local law or policy of the jurisdiction in which the agency is operating:” including (Gov C § 7284.6(b)):

- Responding to release date or transfer requests if the information is *available to the public* or in the exercise of discretion for individuals who come within a TRUST Act exception (see Govt C §7282.5(a)(1)-(5), (b)). Defenders should watch out for law enforcement agencies who try to use this publicly available exception to cooperate with ICE in every case.
- Giving immigration authorities access, in compliance with TRUTH Act protections, to interview individuals in agency or department custody.
- Responding to requests from immigration officials for information about a specific individual's criminal history, including prior criminal arrests, convictions, or similar criminal history information accessed through CLETS, where otherwise permitted by state law.
- Investigating, enforcing, detaining on reasonable suspicion, or arresting an individual, for the federal offense of reentry into the United States after deportation –if this is detected during *unrelated* law enforcement activity *and* the person was previously convicted of a state or federal aggravated felony<sup>9</sup>

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<sup>9</sup> “Aggravated felony” is a term of art in immigration law, defined at 8 U.S.C. § 1101(a)(43).

(Govt C § 7284.6(b)(1). **However, local law enforcement may only respond to a transfer request if the individual comes within an exception in the TRUST Act** set out in Govt C §7282.5(a)(1)-(5), (b) and discussed in Part B, above.

- Conducting enforcement or investigative duties associated with a joint law enforcement task force, including sharing confidential information with other law enforcement agencies for purposes of task force investigations, as long as (1) the primary purpose is not immigration enforcement; (2) local law enforcement’s duties are primarily related to a violation of state or federal law unrelated to immigration enforcement; and (3) participation in the task force does not violate any local law or policy. (Govt C §7284.6(b)(3).
- Making inquiries into information necessary to certify an individual identified as a potential crime or trafficking victim for a T or U visa, or to comply with 18 USC 922(d)(5) (prohibition on providing firearms to anyone illegally or unlawfully in the U.S.).
- Prohibiting or limiting a *government* entity or official from sharing an individual’s immigration status or citizenship information with federal immigration authorities.

**NOTE:** “Government entity” or “official” is not defined within the Values Act, though “California law enforcement agency” is (See Govt C §7284.4 and footnote 1).

### **3. How does the California Values Act Affect the CDCR?**

The California Department of Corrections and Rehabilitation (CDCR) is exempt from the prohibitions on cooperation with immigration placed on California law enforcement agencies.<sup>10</sup> However, the California Values Act extends provisions of the TRUTH Act (Govt C §7283 et seq.) to the CDCR, if the CDCR chooses to permit interviews between CDCR inmates and immigration authorities, or respond to immigration notice and transfer requests.

- In advance of any interview by ICE, individuals must be presented with a written consent form (mandated to be available in many languages), that explains that the interview is voluntary, the purpose of the interview, and the fact that the interview can be declined or conducted only with the individual’s attorney present (Govt C §7284.10(a)(1)). Under the TRUTH Act, this is law in all county jails as well.
- The CDCR must provide a copy of any ICE request for a hold, notification or transfer to the individual and tell the individual whether the CDCR intends to comply with the request (Govt C §7284.10(a)(2)).

In addition, under the Act, the CDCR is prohibited from:

- Restricting access for individuals to in-prison educational or rehabilitative programming or other credit-earning opportunities on the sole basis of citizen or immigration status, including but not limited to, whether the person is in removal proceedings, or subject to a hold, transfer, or notification request or civil immigration warrant (Govt C §7284.10(b)(1)).
- Considering citizenship or immigration status including but not limited to, whether the person is in removal proceedings, or subject to a hold, transfer, or notification request or civil immigration warrant, as a factor in determining a person’s custodial status (Govt C §7284.10(b)(2)).

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<sup>10</sup> In Govt C §7284.4, the statute reads, for purposes of the Act, “ ‘California law enforcement agency’ does not include the Department of Corrections and Rehabilitation.”

#### **4. Does falling within California Values Act protections guarantee that a noncitizen will avoid immigration custody?**

Not necessarily. Although the Value Act is extremely comprehensive in that it limits many forms of ICE collaboration, local law enforcement agencies retain discretion to cooperate with ICE on notification and transfer requests under certain circumstances. Furthermore, nothing prevents immigration authorities from learning of a noncitizen's presence, whereabouts, and criminal proceedings through their own channels.

**Appendix I.**, provides a full list of the offenses that can result in discretionary cooperation with notification or transfer requests. These offenses notwithstanding, there are offenses that are *protected* from notification and transfer requests. Specifically, straight misdemeanors (including drug possession and DUI) and those felony convictions and misdemeanor convictions for wobblers which are *not* listed in SB 54 at Govt C §7282.5(a)(3)(A)-(AE).

#### **5. Does the California Values Act apply to juvenile adjudications?**

In some counties, juveniles simply are not reported to ICE as a matter of practice and policy. Defense counsel can advocate for similar policies on the ground that reporting juveniles to ICE violates confidentiality provisions under Welf & I C §§827 and 828, and undermines the policy goals of Welf & I C §202 to provide treatment in the youth's best interest, and to promote rehabilitation and family reunification. Local law enforcement is free to not report any noncitizen youth. Visit ILRC's website for a memo discussing these and other legal issues at the intersection of the California juvenile justice system and immigration enforcement.

Otherwise, the Act's baseline prohibition on responding to notification and transfer requests applies to juvenile detainees, because its definition of "law enforcement official" includes juvenile detention facilities. *See* Cal. Gov't Code § 7282(d) ("Law enforcement official" means . . . any person or local agency authorized to operate juvenile detention facilities or to maintain custody of individuals in juvenile detention facilities."). However, some of the Act's exceptions apply more narrowly to juveniles than adults. In most cases, juveniles are "adjudicated" and not "convicted" under state law, and most of the Act's exceptions apply only to "convictions," not "adjudications."<sup>11</sup> Only a small number of juvenile adjudications constitute convictions under California law. Under section 667(d)(3) of the Penal Code, the only juvenile adjudications that are considered convictions are adjudications for offenses that were committed when the juvenile was 16 or older and that are listed in section 707(b) of the Welfare and Institutions Code. The adjudications described in section 667(d)(3) are therefore the only situations in which state and local law enforcement may, under the Act, cooperate with notification and transfer requests based on a juvenile adjudication.

A juvenile convicted as an adult is likely to be treated as an adult for California Values Act purposes. Defenders representing noncitizen juveniles should make every effort to keep them out of adult court.

#### **6. Can a local jurisdiction decide to grant more protection than SB 54 affords?**

Yes. SB 54 does not mandate cooperation with ICE under any circumstance. Moreover, even when SB 54 delineates the types of cooperation which remain lawful, it states that those activities are subject to any "local law or policy." (Govt C §7284.6(b)). Thus, in jurisdictions that grant stronger protection such as Santa Clara, San Francisco, and others, those policies control. Advocates remain free to push their law enforcement agency to adopt the strongest policy possible. The ILRC is available to support these efforts.

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<sup>11</sup> *See* Cal. Welfare & Inst. Code § 602 (establishing juvenile court jurisdiction to "adjudge" a juvenile younger than eighteen years old "to be a ward of the court"); *id.* §§ 602.3, 603.5(a) (using "adjudicate," not "convict").



### III. DEFENDING YOUR CLIENT

To summarize, California law enforcement cooperation with immigration holds is off the table; local law enforcement agencies are prohibited from detaining individuals on the basis of an immigration hold, period. Local law enforcement is also prohibited from gathering or sharing information about suspected noncitizens for immigration officials. Neither can they act as immigration agents, use immigration agents as translators or dedicate office or desk space in county law enforcement facilities solely for immigration's use. There are some exceptions where law enforcement officials may exercise discretion to respond to immigration requests for (a) notification of release dates or (b) assistance with transfers, *but only* for individuals who meet specific criteria in amended Govt C §7282.5. Information concerning an individual's release date can also be shared when that information is available to the public, and transfer requests can be honored when there is a judicial warrant or judicial determination of probable cause.

It is important to distinguish between the prohibition on cooperation with immigration enforcement and the immigration consequences of criminal cases. The California Values Act (and local policy) may prevent local jails from responding to notification and transfer requests, but it does not protect against the immigration consequences of criminal conduct or conviction. In other words, qualifying for protection under the Values Act may delay or avoid ICE arrest, but it does not confer any lawful immigration status on a person. "Immigration consequences" refers to how a criminal disposition will affect the noncitizen's immigration status, *e.g.*, whether it will cause him or her to lose a green card, or prevent eligibility to apply for lawful status in the future. Defense counsel continues to have a duty to investigate and affirmatively defend against the immigration consequences of a criminal case, in accordance with the priorities of the defendant, in addition to the duty to defend the criminal case, itself. The ILRC has a number of useful resources available online for analyzing the immigration consequences of criminal conduct and/or conviction as well as attorneys to help answer questions. See [www.ilrc.org/crimes](http://www.ilrc.org/crimes) and [www.ilrc.org/chart](http://www.ilrc.org/chart).

Defense attorneys can play a critical role in keeping their clients out of ICE's purview by holding local law enforcement accountable to the provisions of the California Values Act, securing their clients' release from custody, and resolving cases in such a way as to best preserve their client's immigration options.

#### A) Effect on Defense Goals and Strategy

It's important to understand SB 54 and be familiar with it in order to inform clients and their families of their rights, to speak up if the court and/or sheriff is in violation of the law, to gather information regarding law enforcement practices in violation of the law in order to lay the ground work for civil action, or to weigh the opportunities and risks of O.R. release or bail possibilities.

Beyond these considerations, SB 54 may be a factor in determining the best resolution for a specific client. And the determination is not always simple. In many cases the client's first priority will be to protect his or her lawful immigration status-or hope of gaining lawful status – even if a conviction will bring the client within a TRUST Act exception and effectively destroy SB 54 protection. In other cases, where a client is undocumented and without any hope of relief, he or she may most want to avoid immigration authorities and prioritize getting a disposition that preserves protection under SB 54, even if it has a bad effect on his or her future immigration options. Sometimes the resolution of a case will meet both goals, sometimes it will not. This may add another layer of complexity on what is already a complex decision. When in doubt, conferring with an expert in "crim/imm" may be the safest and most time saving option.

Consider the following in incorporating the California Values Act into your immigration case assessment.

## B) Approaching your case:

1. Generally, keep your eye on the immigration priorities of your client. Do not settle the case for an SB 54 “safe” disposition that in the long run will harm clients by rendering them deportable, inadmissible, or ineligible for relief and subject to mandatory immigration detention. For example, misdemeanor possession of narcotics may be SB 54 safe, but is very destructive to your client’s immigration options and ability to remain out of ICE custody. (The exception may be if after consulting with an immigration expert, you determine that the client has no possible path to lawful status, and their biggest goal is to avoid ICE now.)
  - a. Review ILRC criminal immigration materials online (e.g., Immigrant Questionnaire, California Chart & Notes, Relief toolkit) and consult with an expert in immigration and crimes (“crim/imm”) about possible dispositions of the case. See [www.ilrc.org/chart](http://www.ilrc.org/chart) and [www.ilrc.org/crimes](http://www.ilrc.org/crimes).
2. Learn the exceptions permitting cooperation with notice and transfer requests. If local law enforcement indicates it will honor a notification or transfer request, discuss the posting of bail with your client.
  - a. **Note:** Your client should receive notice after ICE submits such a request and you *and* your client should receive written notice if law enforcement intends to comply with the request.
  - b. Remember that an assessment of whether your client is protected by the California Values Act requires a review of the current charges **and** your client’s prior criminal history (keep in mind washout periods). See Appendix I for a list of offenses permitting cooperation with notification and transfer requests.
  - c. The exceptions to noncooperation with immigration are many and complex, and a Sheriff’s office or deputy could make a mistake. It is advisable to confirm with the Sheriff that he or she will not cooperate with a notification or transfer request that is protected under the Act.
3. Learn about any local policy further restricting law enforcement’s cooperation with immigration.
  - a. A growing list of counties including San Francisco, Santa Clara, and Monterey County are adopting stronger policies than the Values Act. For an interactive map showing local policies, go to [www.ilrc.org/local-enforcement-map](http://www.ilrc.org/local-enforcement-map)
4. Discuss your client’s rights. This will be helpful in the event that your client or his or her friends and family are confronted by ICE.
  - a. In particular, advise on the Fifth Amendment right to remain silent in front of ICE officials, the Fourth Amendment right against search and seizure if ICE agents come to a person’s home without a judicial warrant (they virtually never have a judicial warrant, only an administrative one), and other rights. See *Know Your Rights: A Guide for Immigrants in the California Criminal Justice System*, at [www.ilrc.org/enforcement](http://www.ilrc.org/enforcement) . Some defender offices distribute “red cards” (cards that assert these rights), to help the client assert their rights if it becomes necessary. To order red cards in bulk, <https://www.ilrc.org/red-cards>.

## C) Bail Considerations

Since ICE holds are prohibited in every case, notification and transfers are now the primary way that individuals are arrested by ICE at local jails. While the existence of a notification or transfer request shouldn’t affect the *granting* of bail by the judge, advising the client on whether to *post* bail may depend on whether or not the client will be protected from notification or transfer under the California Values Act or otherwise remain free from ICE custody. In other words, if a client is likely to be turned over to ICE, it may not be advisable to pay the bail since ICE may arrest the client and not transfer the individual back to criminal custody to resolve the criminal case. The money a client might spend on bail may be better spent on an immigration attorney or immigration

bond. Conversely, if the person is protected by the California Values Act, or a more stringent local policy, it may be advisable to pay the bail. To that end, it is important to familiarize yourself with the exceptions to notification and transfer requests, remembering that prior criminal history is considered as well (keep in mind washout periods) and to learn the local practices (*i.e.*, the frequency with which ICE comes to the jail to pick up noncitizens or the likelihood of ICE showing up at someone's home). In many cases, it is preferable to remain in criminal custody at the jail than to be taken into immigration custody in the middle of a court case.

**Example:** Client John's family would like to post his bail. John has a misdemeanor child endangerment Cal PC §273a(a) conviction from four years ago. He is currently in custody for a misdemeanor Cal. PC §273a(b) charge. ICE has issued a notification request in John's case. Should John's family post his bail?

**Answer:** John should consider the risks before his family posts bail. The current charge for §273a(b) is not a basis for cooperation. At this point it is only a charge, not a conviction.<sup>12</sup> However, the prior misdemeanor conviction for Cal PC §273a(a), is a wobbler offense listed in § 7282.5(a)(3)(C). Here, unless the local jail has its own policy which is stronger than the Act, the jail may notify ICE of John's release date. John should be notified of this risk and any other local trends (e.g. the frequency to which ICE agents come to jail to pick people up), before his family posts bail.

To avoid notification and transfer request problems, criminal defense counsel should try to get the client released from criminal custody on his or her own recognizance or bail *before* immigration enforcement agents have a chance to identify and locate the client (by using their own resources, public information, or an exception to the prohibition on cooperation by local law enforcement). This will not be possible in all cases as ICE will identify certain individuals shortly after they are booked into criminal custody.

**How do I know that my client has a notification or transfer request?** Under the TRUTH Act, upon receiving a notification or transfer request, law enforcement is required to provide a copy of the notice to the individual. Further, if law enforcement does notify ICE of the person's release date, law enforcement must promptly provide **notification in writing to the individual and their attorney** or to one other person the client designates.<sup>13</sup> Defenders, however, have reported receiving delayed notice. Consider reaching out to your Sheriff's Department to establish a streamlined process for this state-mandated notice.

**NOTE:** Given the complexities of the criminal exceptions to noncooperation with ICE, it is advisable to confirm that the Sheriff will not cooperate with a notification or transfer request that is protected under the Act. In particular, straight misdemeanors, Proposition 47 offenses, and felony convictions and misdemeanor convictions for wobblers that are **not** enumerated in Govt C §7282.5 are protected against cooperation by law enforcement with notice and transfer requests from immigration agencies.

#### **D) Proposition 47 considerations**

In no case are Proposition 47 offenses subject to notice or transfer requests. The ILRC's interpretation is that *all* Prop 47 offenses should be protected, including those felonies that are eligible to be reduced or reclassified, but have not yet been. However, defenders should be prepared for mixed application on the ground. To put your client in the best position, reduce felonies to misdemeanors (through a number of vehicles; see free online materials<sup>14</sup>). This is useful not only in ensuring that your client is not incorrectly transferred to ICE, but also in avoiding certain immigration consequences that can arise with an actual or potential sentence of a year or more.<sup>15</sup>

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<sup>12</sup> A misdemeanor charge of any sort may never be the basis for ICE cooperation. See Govt C §7282.5(b).

<sup>13</sup> Govt C § 7283.1(b).

<sup>14</sup> See materials at [www.ilrc.org/post-conviction-relief](http://www.ilrc.org/post-conviction-relief).

<sup>15</sup> See, e.g., *California Criminal Sentences and Eligibility for Relief*, available at [www.ilrc.org/crimes](http://www.ilrc.org/crimes).

## E) Proposition 64 Considerations

Misdemeanor Proposition 64 offenses, including drug trafficking, should receive protection against notification and transfer under the Act because they are “straight” misdemeanors. Only *felony* drug convictions are exceptions in the Act. Govt C § 7282.5(a)(3)(M).<sup>16</sup> Advocates are arguing that protection should extend as well to those felony convictions that have yet to be reduced or reclassified under Proposition 64.

**However**, defense counsel should be aware that **controlled substance offenses**- whether misdemeanor or felony -- **are very damaging to noncitizens**. Even admitting to drug-related conduct that does not result in a criminal conviction after successful completion of a drug program, or pleading guilty to a drug related offense where the plea is later withdrawn and the criminal case dismissed is considered a conviction for immigration purposes. This is true even for even minor offenses involving marijuana (even if legal under state law), with the exception of a first conviction for possession of 28.5 grams or less. Drug offenses can render a noncitizen inadmissible, deportable, ineligible for relief, and subject to mandatory immigration detention. In other words, while a misdemeanor drug trafficking offense may result in protection from cooperation with notice and transfer requests and thus delay or avoid ICE apprehension, it will nearly always prove fatal for immigration status.

**NOTE:** Beginning January 1, 2018, California deferred entry of judgment (DEJ) is ended and is replaced by a true pretrial diversion program. See AB 208 (Eggman), amending Pen C §1000. In contrast to DEJ, pretrial diversion does not require a guilty plea before the case is diverted and so is **not** a “conviction” for immigration purposes. If your noncitizen client is capable of successfully completing a diversion program and 12-18 months of monitoring, pretrial diversion is an excellent option. If your client is deeply addicted or otherwise not capable, you must look for another option, because failure at diversion will almost surely result in a damaging drug conviction. To eliminate a DEJ “conviction” for immigration purposes for pleas entered prior to January 1, 2018, the person must have the charges dismissed under Penal C §1000.3 *and further* must withdraw the plea under Pen C § 1203.43. Although § 1203.43 is a vacatur for cause, procedurally it is very easy to obtain, similar to an expungement under Pen C § 1203.4. See discussion in *Practice Advisory: New California Pretrial Diversion* at [www.ilrc.org/crimes](http://www.ilrc.org/crimes).

## F) Remedies

A sample letter is available to act in advance of potential violations titled “Letter to Local Law Enforcement Identifying Potential Violations of SB 54,” available under the Implementation Resources subheading at [www.iceoutofca.org/ca-values-act-sb54.html](http://www.iceoutofca.org/ca-values-act-sb54.html). If a violation of SB 54 has occurred, there are several steps that a defender can take. First, a violation should be reported to the legal organizations who helped draft and pass SB 54. These organizations are tracking violations trend and have escalation plans in place. A violation may be reported via the ILRC.<sup>17</sup> Violations may also be reported to the State Attorney General’s office. If the violation resulted in extra detention in criminal custody, this may additionally be the basis for a civil lawsuit.

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<sup>16</sup> Section 7282.5(a)(3)(M) of the Act creates an exception for “[a]n offense involving the felony possession, sale, distribution, manufacture, or trafficking of controlled substances.” The word “felony” modifies the entire clause. Accordingly, only convictions for *felony* possession, felony sale, felony distribution, felony manufacture, or felony trafficking of controlled substances are included.

<sup>17</sup> Please e-mail Grisel Ruiz at [gruiz@ilrc.org](mailto:gruiz@ilrc.org) with potential violations.

## APPENDIX I. Enumerated Offenses Permitting Limited Cooperation (TRUST Act; Govt C §7282.5)

The Values Act permits discretionary cooperation with immigration officials (for notification and transfer requests) when this cooperation would not be in violation of any federal, state, local law, local policy or the California Values Act. The Values Act allows cooperation for individuals convicted or held to answer for serious, violent or state prison offenses. Additionally, the Act allows cooperation for certain *enumerated wobbler offenses* found at Govt C § 7282.5(a)(3)(A)-(Q). Here, the Act allows cooperation for those convicted within 5 years of an enumerated misdemeanor or convicted within the last 15 years of an enumerated felony. Note that for these enumerated offenses, being held to answer will **not** suffice and washout periods apply.

**NOTE:** Watch out for potential misapplication! For an offense triggering the below issues, it may be particularly important to confirm that the Sheriff is accurately following the law and will not honor a notification or transfer request.

**Straight Misdemeanors:** Many offense statutes listed in Govt C §7282.5(a)(3) contain subsections describing straight misdemeanor offenses. The TRUST Act<sup>18</sup> is clear however, that for an exception to apply to misdemeanors, the individual must have been convicted “for a crime that is *punishable as either a misdemeanor or a felony*”—in other words, the charged offense must have been a wobbler resolved as a misdemeanor. Straight misdemeanors are SB 54 “safe” in that they do not permit responses to notice or transfer requests. See **APPENDIX III**.

**Proposition 47 Offenses:** Proposition 47 offenses are expressly protected from notice and transfer requests.<sup>19</sup> However, law enforcement agencies on the ground might incorrectly respond to notice and transfer requests since certain Prop 47 offenses are listed in the enumerated offenses at Govt C §7282.5(a)(3). See **APPENDIX II**.

The enumerated offenses are:

### Crimes Against a Person, Criminal Threats & Sex Offenses

Assault (G.C. § 7282.5(a)(3)(A))

*As specified, but not limited to, P.C. §§ 217.1, 220, 240, 241.1, 241.4, 241.7, 244, 244.5, 245, 245.2, 245.3, 245.5, 4500, and 4501.*

Battery (G.C. § 7282.5(a)(3)(B)).

*As specified, but not limited to P.C. §§ 242, 243.1, 243.3, 243.4, 243.6, 243.7, 243.9, 273.5, 347, 4501.1, & 4501.5.*

Use of threats (G.C. § 7282.5(a)(3)(C)).

*As specified, but not limited to P.C. §§ 71, 76, 139, 140, 422, 601, and 11418.5.*

Sexual abuse, sexual exploitation, or crimes endangering children (G.C. § 7282.5(a)(3)(D)).

*As specified in, but not limited to, P.C. §§ 266, 266a, 266b, 266c, 266d, 266f, 266g, 266h, 266i, 266j, 267, 269, 288, 288.5, 311.1, 311.3, 311.4, 311.10, 311.11, and 647.6.*

Child abuse or endangerment (G.C. § 7282.5(a)(3)(C)).

*As specified in, but not limited to, P.C. §§ 270, 271, 271a, 273a, 273ab, 273d, 273.4, and 278.*

Crime resulting in death, or involving the personal infliction of great bodily injury (G.C. § 7282.5(a)(3)(Q)).

*As specified in, but not limited to, P.C. §§ 245.6(d), 187, 191.5, 192, 192.5, 12022.7, 12022.8, and 12022.9.*

False imprisonment, slavery, and human trafficking (G.C. § 7282.5(a)(3)(T)).

*As specified in, but not limited to, P.C. §§ 181, 210.5, 236, 236.1, and 4503.*

Offense requiring sex offender registration under P.C. §§ 290, 290.002, or 290.006 (G.C. § 7282.5(a)(3)(S)).

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<sup>18</sup> Govt C §7282.5.

<sup>19</sup> Gov't Code § 7282.5(a)(6).

Torture and mayhem (G.C. § 7282.5(a)(3)(V)).

*As specified in, but not limited to, P.C. § 203.*

Elder and dependent adult abuse (G.C. § 7282.5(a)(3)(X)).

*As specified in, but not limited to, P.C. § 368.*

Hate crime (G.C. § 7282.5(a)(3)(Y)).

*As specified in, but not limited to, P.C. § 422.55.*

Crime threatening the public safety (G.C. § 7282.5(a)(3)(W)).

*As specified in, but not limited to, P.C. §§ 219, 219.1, 219.2, 247.5, 404, 404.6, 405a, 451, and 11413.*

Stalking (G.C. § 7282.5(a)(3)(Z)).

*As specified in, but not limited to, P.C. § 646.9.*

Rape, sodomy, oral copulation, or sexual penetration (G.C. § 7282.5(a)(3)(AC)).

*As specified in, but not limited to, P.C. §§ 261(a)(2) & (6), 262(a)(1)&(4), 264.1, 286(c)&(d), 288a(c)&(d), 289(a)&(j).*

Kidnapping (G.C. § 7282.5(a)(3)(AD)).

*As specified in, but not limited to, P.C. §§ 207, 209, and 209.5.*

### **Crimes Against Property**

Burglary, robbery, theft, fraud, forgery, or embezzlement (G.C. § 7282.5(a)(3)(F)).

*As specified in, but not limited to, P.C. §§ 211, 215, 459, 463, 470, 476, 487, 496, 503, 518, 530.5, 532, and 550.*

Vandalism with prior convictions (G.C. § 7282.5(a)(3)(N)).

*As specified in, but not limited to, P.C. § 594.7.*

A crime threatening the public safety (G.C. § 7282.5(a)(3)(W)).

*As specified in, but not limited to, P.C. §§ 219, 219.1, 219.2, 247.5, 404, 404.6, 405a, 451, and 11413.*

### **Crimes Against Public Justice**

Obstruction of justice (G.C. § 7282.5(a)(3)(H)).

*As specified in, but not limited to, P.C. §§ 69, 95, 95.1, 136.1, and 148.10.*

Bribery (G.C. § 7282.5(a)(3)(I)).

*As specified in, but not limited to, P.C. §§ 67, 67.5, 68, 74, 85, 86, 92, 93, 137, 138, and 165.*

Escape, (G.C. § 7282.5(a)(3)(J)).

*As specified in, but not limited to, P.C. §§ 107, 109, 110, 4530, 4530.5, 4532, 4533, 4534, 4535, and 4536.*

### **Firearms and other weapons**

Unlawful possession or use of a weapon, firearm, explosive device, or weapon of mass destruction. (G.C. § 7282.5(a)(3)(K))

*As specified in, but not limited to, P.C. §§ 171b, 171c, 171d, 246, 246.3, 247, 417, 417.3, 417.6, 417.8, 4574, 11418, 11418.1, 12021.5, 12022, 12022.2, 12022.3, 12022.4, 12022.5, 12022.53, 12022.55, 18745, 18750, 18755, and 26100 (c) and (d).*

Possession of an unlawful deadly weapon under Part 6 of the Penal Code (P.C. § 16000 et seq.) (G.C. § 7282.5(a)(3)(L)).

Possession or use of a firearm in the commission of an offense (G.C. § 7282.5(a)(3)(R)).

### **Felony Drug Offenses**

Offense involving the felony possession, sale, distribution, manufacture, or trafficking of controlled substances (G.C. § 7282.5(a)(3)(M)).

Felony DUI of alcohol or drugs (G.C. § 7282.5(a)(3)(G)).

### **Gang-related Offenses**

Gang-related offenses (G.C. § 7282.5(a)(3)(O)).

*As specified in, but not limited to, P.C. §§ 186.22, 186.26, and 186.28.*

### **Inchoate Offenses**

An attempt or a conspiracy as defined in P.C. §§ 664 or 182 to commit any of the enumerated offenses on this list (G.C. § 7282.5(a)(3)(P)).

Soliciting the commission of a crime (G.C. § 7282.5(a)(3)(AA))

*As specified in, but not limited to, P.C. §§ 286(c), 653j, and 653.23.*

**Criminal Profiteering**

Criminal profiteering and money laundering (G.C. § 7282.5(a)(3)(U))

*As specified in, but not limited to, P.C. §§ 186.2, 186.9, and 186.10.*

**Offense Committed while Out on Bail**

Offense committed while on bail or released on O.R. (G.C. § 7282.5(a)(3)(AB))

*As specified in, but not limited to, P.C. § 12022.1.*

**Vehicle Code**

Vehicle Code § 20001(c). (G.C. § 7282.5(a)(3)(AE))

Felony DUI of alcohol or drugs (G.C. § 7282.5(a)(3)(G))

**APPENDIX II. Enumerated Offenses in Govt C §7282.5 that were Reduced by Propositions and No Longer Permit Cooperation with Immigration**

**NOTE:** Government Code §7282.5, names broad offense categories such as “assault”, “battery”, “theft”, “burglary”) followed by the language, “as specified in, but not limited to sections...” and then lists offense statutes. A couple of the offenses in the chart below are not explicitly enumerated offenses listed in Govt C §7282.5, but nonetheless fall within a broadly named category in the statute. They are provided here as Proposition 47 misdemeanors that expressly *protect* individuals from notice and transfer requests (see Govt C §7282.5(a)(6)). Note that other offenses (*e.g.*, 459, 487) are listed in Govt C §7282.5(a)(3) and thus a conviction is exempted from the ban on noncooperation with immigration officials (in other words law enforcement may choose to cooperate with notice and transfer requests) despite the fact that the underlying conduct may have been akin to misdemeanor shoplifting before Proposition 47 was codified. While it is our interpretation that *all* Prop 47 offenses should be protected (see P.C. §1170.18), including *felonies* which have yet to be reduced or reclassified, defenders should be prepared for mixed application on the ground. To put your client in the best position, reduce felonies to misdemeanors where ever you can.

Offense	Code	Trust Act (Govt C §7282.5) Category	Proposition
Shoplifting under 950\$	Pen C §459.5	(a)(3)(F)	Prop 47
Forgery for < \$950	Pen C §473(b)	(a)(3)(F)	Prop 47
Insufficient Funds where underlying amount is < \$950	Pen C §476a(b)	(a)(3)(F)	Prop 47
Receiving stolen property of < \$950 value	Pen C §496(a)	(a)(3)(F)	Prop 47

**WARNING:** Proposition 47 and Proposition 64 reduced some felony drug offenses to misdemeanors (see Health & S C §§11350, 11358, 11359(c), 11377) and misdemeanor drug offenses are “safe” from cooperation with notice and transfer requests. The exceptions that permit cooperation are only for “*felony* possession, sale, distribution, manufacture or trafficking” and felony DUI drugs/alcohol. See Govt C §§7282.5(a)(3)(M), (G). Although a misdemeanor drug offense may afford some protection against notice and transfer requests, drug-related conduct and convictions are very damaging to noncitizens and result in deportation, inadmissibility and the denial of relief.



**APPENDIX III. Enumerated Offenses Describing Straight Misdemeanors Instead of Felonies or Wobblers as Required by Govt C §7282.5 in order to Cooperate with Immigration**

**NOTE:** As straight misdemeanors, these offenses *do not* fall within the exception to noncooperation with immigration as misdemeanor convictions as “a crime punishable as either a misdemeanor or a felony” (wobbler). In other words, these convictions should *not* trigger discretion to cooperate with notice and transfer requests.

<b>Offense</b>	<b>Penal Code</b>	<b>TRUST Act (Govt C §7282.5) subsection</b>
Assault	§240	(a)(3)(A)
Battery	§242	(a)(3)(B)
Annoying or molesting a child	§647.6(a)(1)-(2)	(a)(3)(D)
Child endangerment	§273a(b)	(a)(3)(E)
Petty theft during an emergency	§463(c)	(a)(3)(F)
Accepting bribe for appointment to public office	§74	(a)(3)(I)
Brandishing deadly weapon	§§417(a), (d)	(a)(3)(K)
Knowingly permitting another to carry a firearm in a vehicle	§26100(a)	(a)(3)(K)
Incitement to riot	§404.6	(a)(3)(W)
Elder abuse	§368(c)	(a)(3)(X)
Supervising or aiding prostitution-related offense	§653.23	(a)(3)(AA)

## APPENDIX IV. Criminal Defender “Cheat Sheet” on the California Values Act

### The Act in a Nutshell:

- Law enforcement agencies (LEA) cannot honor any immigration “hold” requests, meaning requests to detain a person for additional time beyond the end of criminal custody.
- LEA cannot respond to immigration requests for notification of release dates<sup>20</sup> or facilitation of transfer to immigration custody<sup>21</sup> -- unless a TRUST Act exception applies (see Chart, below).
- TRUTH Act protections, which require LEA to obtain written consent from a person in custody before an ICE interview, have been extended to the CDCR.
- LEA cannot inquire into a person’s immigration status.
- LEA cannot share personal information (*e.g.*, work or home addresses) about a person with immigration authorities -- unless the information is publicly available.
- LEA cannot use immigration agents as translators.
- LEA cannot perform the functions of an immigration officer (whether through a § 287(g) agreement or otherwise). LEA cannot make arrests on civil immigration warrants.
- In most cases, LEA are prohibited from arresting people for the federal criminal offense of unlawful reentry under 8 U.S.C. § 1326(a).<sup>22</sup>
- LEA cannot provide immigration agents with exclusive office space.

### How Do I Defend Noncitizens in Light of the California Values Act?

1. **In most cases, the highest immigration priority for the client still is getting or keeping lawful immigration status, rather than avoiding a TRUST Act exception.** The Values Act provides a specific list of offenses that are “TRUST Act exceptions,” which permit an LEA to provide release-date notification or transfer assistance to immigration authorities. See Chart, below. For many immigrant defendants, however, avoiding this list is *not* their top defense priority. Their priority is to preserve or obtain lawful immigration status. A plea that can both support lawful immigration status and avoid triggering a TRUST Act exception is optimal, but if a choice must be made, it often should be to save immigration status. An exception to this rule may be if the defendant is undocumented, has no immediate hope of immigration relief, and would suffer severe consequences if taken by ICE. Remember that both the TRUST Act and the regular immigration analyses require considering all prior convictions as well as current charges.
2. **Learn the TRUST Act exceptions and help clients get protection.** If your client has a notification or transfer request but does not come within a TRUST Act exception, you may want to make sure that the jail understands the law and will not cooperate with ICE. If the client comes within an exception and is likely to be transferred to ICE, discuss with your client the option of not posting bail, so that he or she will remain in criminal, rather than immigration, detention. Your client should receive notice after ICE submits a notice or transfer request, and you *and* your client should receive written notice if law enforcement intends to comply with the request.

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<sup>20</sup> A notification request is a voluntary request from ICE to a law enforcement agency asking for the individual’s release date such that ICE has sufficient notice to arrest the individual at release from criminal custody. These requests are made using the DHS Form I-247A.

<sup>21</sup> A transfer request is a request from immigration authorities asking that a law enforcement agency facilitate the transfer of an individual in its custody to ICE or CBP.

<sup>22</sup> These arrests may only occur if reentry is detected during an unrelated law enforcement activity *and* the person was previously convicted of an aggravated felony, defined at 8 U.S.C. § 1101(a)(43).

3. **Learn about any local policy** limiting law enforcement’s cooperation with immigration. A growing list of counties, including San Francisco, Santa Clara, and Monterey County, are adopting stronger policies than the Values Act.
4. **Advise your client on his or her Fifth Amendment** right to remain silent in front of ICE officials, the **Fourth Amendment** right against search and seizure if ICE agents come to a person’s home without a judicial warrant (and ICE virtually never has a judicial warrant).<sup>23</sup>

**CHART: TRUST Act Exceptions That Destroy Some Protections**

If a defendant comes within a TRUST Act exception, then LEA potentially have the discretion to cooperate with ICE in two, and only two, ways: they can choose to answer requests for notification and for assistance with transfer. LEA have discretion (but are never required) to cooperate with these requests **only** when 1) doing so will not violate any Federal, State, or local law or policy *and* 2) when permitted by the California Values Act.<sup>24</sup>

<b>Conviction triggers TRUST Act exception</b>	<b>Held to answer will suffice?<sup>25</sup></b>	<b>Other conditions</b>
Serious (Pen C §1192.7(c)) or violent (Pen C §667.7(c)) Felony	Yes	
Felony punishable by state prison	Yes	
Other felonies enumerated in Act <sup>26</sup>	No	Only includes convictions within the last 15 years
Misdemeanor convictions for wobblers enumerated in the Act <sup>27</sup>	No	Only includes convictions within the last 5 years
Federal offense that is an “aggravated felony”	No	See definition at 8 USC §1101(a)(43)
Currently required to register as a sex or arson offender	N/A	
No conviction, but federal felony arrest warrant. <sup>28</sup>	N/A	ICE or Homeland Security identifies the person as subject to such a warrant.

**NOTE:**

- **Only felony drug convictions or DUIs** are a basis for cooperation with notice and transfer requests; misdemeanor convictions are protected.
- **Proposition 47** offenses should be protected from cooperation with notice and transfer requests. See the discussion in *Defending Your Client*, Section D) Proposition 47 considerations in Practice Advisory *SB 54 and the California Values Act: A Guide for Criminal Defenders* (February 2018).
- Only enumerated wobbler offenses that resolved for misdemeanors can trigger an exception to protection under SB 54. Some of the offenses enumerated are **straight misdemeanors**. This is a drafting error from the 2015 TRUST Act.

<sup>23</sup> See *Know Your Rights: A Guide for Immigrants in the California Criminal Justice System*, at [www.ilrc.org/enforcement](http://www.ilrc.org/enforcement)

<sup>24</sup> (Govt C §7282.5(a)(1)-(5), (b)):

<sup>25</sup> This requires a probable cause determination per Govt C § 872.

<sup>26</sup> Govt C §7282.5(a)(3)(A)-(Q).

<sup>27</sup> Govt C §7282.5(a)(3)(A)-(Q).

<sup>28</sup> Govt C §7282.5(a)(5)