

# CLIENT NEWS BRIEF

## Attorney General Sessions Defines Federal Funding Subject to Withholding Due to Sanctuary Policies

U.S. Attorney General Jeff Sessions provided clarity on which federal funding would be subject to a withholding for implementing “sanctuary” policies that direct employees to refuse to communicate with, or frustrate communication of immigration status information to, Immigration and Customs Enforcement (ICE) as required by federal law.

On May 22, 2017, the Attorney General issued a memorandum regarding one of President Donald J. Trump’s executive orders that would withhold federal funds from “sanctuary jurisdictions.” The [executive order](#), issued on January 25, 2017, charges the U.S. Attorney General and Secretary of the Department of Homeland Security with ensuring that “sanctuary jurisdictions” are not eligible for federal grants, except as deemed necessary for law enforcement purposes. While the order defines “sanctuary jurisdictions” as those that refuse to comply with 8 U.S.C. § 1373 – which prohibits government entities from restricting or creating policies restricting agencies from communicating immigration status information with ICE – it does not spell out the types of government agencies that will be considered “sanctuary jurisdictions” or the types of grants subject to a potential withholding.

The Attorney General’s memorandum narrows the scope of the executive order to apply only to “federal grants administered by the Department of Justice or the Department of Homeland Security, and not to other sources of federal funding.”

This memorandum follows a recent decision out of the federal district court for the Northern District of California, which had [granted](#) a preliminary injunction halting execution of the executive order’s enforcement provision. In separate lawsuits, both San Francisco and Santa Clara counties challenged the executive order’s enforcement provision as unconstitutional. (*County of Santa Clara v. Trump*, No. 17-cv-0574-WHO; *City and County of San Francisco v. Trump*, 17-cv-0485-WHO.) The order’s lack of specificity, and President Trump and his administration’s statements, sowed fears among cities, counties and school districts that their policies could result in the loss of millions of dollars of federal funding for everything from law enforcement to special education programs and health care subsidies.

The court agreed with the counties’ argument that the executive order was unconstitutionally vague and did not provide any notice or opportunity for local jurisdictions to provide input. The court agreed that the executive order is unconstitutional because the President lacks the authority to place new conditions on federal funds. The court also held agreed that any conditions for receipt of federal funds must be unambiguous and timely made.

The court drew inferences about the scope of the executive order from the public comments made on television and in press briefings and conferences from the President; his press secretary, Sean Spicer; and Sessions. In particular, the court considered a quote from the President saying he would use

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William P. Curley III  
Partner and Co-Chair  
Local Government Practice Group  
Los Angeles Office  
[wcurley@lozanosmith.com](mailto:wcurley@lozanosmith.com)



Joshua Whiteside  
Associate  
Fresno Office  
[jwhiteside@lozanosmith.com](mailto:jwhiteside@lozanosmith.com)



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“defunding” as a “[weapon](#)” so that sanctuary cities would change their policies. In issuing the injunction, the court ruled that these statements erased any doubt that this was a threat of major cuts to federal funding, and that it has caused budget uncertainty within the plaintiff counties. The Attorney General’s memorandum appears to be in direct response to these inferences and significantly limits the risk of implementing these sanctuary laws and policies.

The memorandum and court decision mean that, for now, the federal government may not withhold federal funding from any sanctuary jurisdiction based on the executive order, except for those with federal grants through the Department of Justice or the Department of Homeland Security that had already contained requirements to comply with 8 U.S.C. § 1373. This likely means that many school districts are not intended to and would not be subject to a withholding of federal funding under this executive order.

However, the memorandum states the Department of Justice will continue to point out actions taken by state and local public agencies who are undermining “our lawful system of immigration or to take enforcement action where state or local practices violate federal laws, regulations, or grant conditions.”

The memorandum comes as state legislators consider laws that seek to protect immigrants and limit the state and local role in enforcement and both state and local government agencies seek to reassure immigrant communities. On April 3, 2017, the California Senate [passed](#) and forwarded to the state Assembly a “sanctuary state” bill, Senate Bill (SB) 54, which bars state and local law enforcement agencies from using their resources to conduct immigration enforcement activities. Notably, state and local law enforcement would be prohibited from asking about immigration status and would not be allowed to give ICE access to interview individuals in custody. A related, bill, SB 6, would provide money for legal services for undocumented immigrants.

As we await further guidance, regulations and case law regarding the impact sanctuary policies may have on federal funding, Lozano Smith encourages public agencies to discuss drafting or revising sanctuary or safe haven laws and policies with legal counsel in order to ensure compliance with federal law.

For more information on the executive order, the district court’s decision or adopting compliant policies, please contact the authors of this Client News Brief or an attorney at one of our [nine offices](#) located statewide. You can also visit our [website](#), follow us on [Facebook](#) or [Twitter](#) or download our [Client News Brief App](#).