INTERNAL MEMORANDUM

TO: APG Government Policies & Partnerships Committee

FROM: Rob Nash

DATE: August 8, 2018

RE: Update on Federal vs. State Immigration Law for Employers

Note: This is not to be taken as legal advice, but rather information APG has been given by a paid consultant that is being passed on.

BACKGROUND

In response to a perceived crack-down on illegal immigration by the federal government, the California Legislature has passed, and Governor Brown has signed, three major pieces of legislation intended to protect undocumented residents of California that have been challenged by the Trump Administration in federal court.

- **AB 450:** State law that seeks to prohibit employers from allowing immigration enforcement agents to enter nonpublic areas of a worksite or access employee records without a judicial warrant or subpoena, among other obligations.[1]
- **AB 103:** Requires the California Attorney General to inspect ICE detention centers and limits the federal government's ability to contract with local agencies for civil detention of foreign nationals.[2]
- **SB 54:** Bars local governments from detaining individuals solely to transfer them to Immigration & Customs Enforcement custody; also known as the "Sanctuary State" law.[3]

At the last APG Board Meeting the issue of immigration law was brought up during the Government Relations report. Specifically, what action do employers take when there is a conflict between federal and state immigration law?

At the direction of the GPPC, I reached out to our lobbyists in Sacramento and D.C. to get information the committee could use to put together a position paper on the issue. George Soares, APG's contract lobbyist in Sacramento, sent me a recent U.S. District Court opinion and summary. I wanted to share this with you, as the opinion is on point with the information the committee is seeking. Included below is the summary of the opinion of *U.S. v. California*. If you'd like to read the entire opinion, just e-mail me and I will get it to you. The summary is a pretty good explanation of the lengthy opinion.

[1] https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB450
[2] https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB103
[3] https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB54

INTERNAL MEMORANDUM

SUMMARY OF *U.S. v. CALIFORNIA*[4]

At a glance

- A federal court has temporarily blocked the State of California from penalizing any employer who allows an immigration enforcement agent to access nonpublic areas of a worksite or employee records without a judicial warrant or subpoena.
- California may continue to enforce a provision that requires employers to give notice to employees and their labor unions before and after a federal inspection of I-9 forms.

A closer look:

A federal district court has temporarily blocked the State of California from enforcing several key provisions of AB 450, a state law that seeks to prohibit employers from allowing immigration enforcement agents to enter nonpublic areas of a worksite or access employee records without a judicial warrant or subpoena, among other obligations.

The order was issued in *U.S. v. California*, a lawsuit filed by the U.S. Department of Justice earlier this year to challenge the validity of AB 450 and two other California immigration laws. The court determined that most of AB 450 was likely to be preempted by federal law, but it left in place a provision that requires employers to notify employees and their labor unions before and after government I-9 inspections.

The court also declined to enjoin two other state immigration statutes – AB 103, which requires the California Attorney General to inspect ICE detention centers and limits the federal government's ability to contract with local agencies for civil detention of foreign nationals; and SB54, which bars local governments from detaining individuals solely to transfer them to ICE custody.

How the court order affects employers:

- **Giving employees notice of I-9 inspections:** Employers continue to be subject to a requirement to notify employees before and after a government inspection of I-9 forms or other employment records. The notice obligation is discussed in more detail below.
- **Granting worksite access to immigration enforcement agents:** California is temporarily enjoined from enforcing a provision that prohibits employers from allowing enforcement agencies to enter nonpublic worksite areas without a judicial warrant. Until further notice, employers will not violate state law if they grant access to an immigration enforcement agent who does not have a warrant. However, employers may choose to require a warrant before admitting an enforcement agent.
- **Granting immigration enforcement agencies access to employment records:** California is temporarily blocked from enforcing a provision that prohibits

[4] https://www.fragomen.com/insights/alerts/federal-district-court-enjoins-enforcement-portions-california-ab450

employers from allowing immigration enforcement agents to access, obtain or review employee records without a subpoena or judicial warrant. Until further notice, employers will not violate the state law if they allow an enforcement agent to access employee records without a subpoena or warrant. However, employers may choose to require a subpoena or warrant before granting access to records.

- **Reverification of employment eligibility:** Current federal law requires employers to conduct reverification before an employee's existing work authorization expires. California is temporarily blocked from imposing state penalties on employers for reverifying work eligibility at a time or in a manner not required by federal law.

Complying with notice obligations before and after immigration inspections:

As noted above, employers remain subject to the notice provisions of AB 450. In order to comply with the state law, employers must continue to:

- **Notify employees and labor union representatives before an inspection.** Within 72 hours of receiving a government Notice of Inspection of Form I-9 or other employee records, employers must notify employees and labor union representatives of the federal agency conducting the inspection, the date the employer received the notice of inspection, and the nature of the inspection, and must also provide a copy of the government inspection notice. The employer must also provide potentially affected employees with a copy of the notice if reasonably requested.
- **Provide affected employees and their union representatives of the government's inspection results within 72 hours of receipt.** After the inspection, employers have 72 hours to give affected employees written notice of the results of the inspection, the timeframe for correcting deficiencies, the time and date of any meeting with the employer to correct deficiencies, and notice that the employee has a right to representation during any scheduled meeting with the employer.