

PEP-Comm & the TRUST Act

A Brief Guide to What You Need to Know

On November 20, 2014, the Department of Homeland Security (“DHS”) issued a memorandum announcing that it would replace the Secure Communities Program (“S-Comm”) with the Priority Enforcement Program (“PEP-Comm”).¹ DHS Secretary Jeh Johnson has stated that this change is “effective almost immediately.”² S-Comm relied on fingerprint data taken at the time of an individual’s booking to identify and request local law enforcement agencies to detain deportable individuals for Immigration and Customs Enforcement (“ICE”). The program “received a great deal of criticism” from immigrant rights’ advocates, who argued S-Comm created distrust between local law enforcement and immigrant communities, encouraged racial profiling, and subjected immigrants to harsh double punishments.³ DHS has acknowledged that the program’s “very name has become a symbol for general hostility toward the enforcement of our immigration laws.”⁴

This guide will examine similarities and differences between S-Comm and PEP-Comm. This guide also will explain the effect that PEP-Comm will have on the TRUST Act, California Government Code § 7282.5 *et seq.* The TRUST Act went into effect on January 1, 2014, and sets a minimum standard across the state to limit cruel and costly immigration “hold” requests in local jails. These optional ICE hold requests are often initiated by S-Comm.

Similarities between PEP-Comm and S-Comm

Fingerprints will continue to be checked by ICE upon booking

Like its predecessor S-Comm, PEP-Comm also will rely on fingerprint data submitted when state and local law enforcement agencies book an individual into custody. The fingerprints are sent to DHS for an immigration background check to identify individuals who may be deportable. This immigration check occurs before the individual receives any form of due process in the criminal case—before charges are filed and before s/he is appointed an attorney. The continued checking of fingerprints for immigration status at the point of arrest under PEP-Comm means that ICE still will quickly identify individuals in jail who may be deportable and can initiate deportations based on this information.

PEP-Comm is supposed to prioritize individuals with certain offenses for deportation

Similar to S-Comm, PEP-Comm also is supposed to prioritize for deportation individuals with certain criminal convictions or immigration histories. DHS has laid out several priority categories, including Priority 1, which includes individuals who pose a threat to national security, border security, or

¹ Memorandum on Secure Communities from Jeh Johnson, Sec’y, Dep’t of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration and Customs Enforcement, et al. (Nov. 20, 2014), *available at* http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf.

² Jacob Fischler, *Johnson: Actions include prioritizing security*, VALLEY MORNING STAR, NOV. 21, 2014, http://www.valleymorningstar.com/news/local_news/article_f43a6994-7202-11e4-9781-3b649cabcb18.html.

³ Memorandum on Secure Communities, *supra* note 1, at 1.

⁴ *Id.*

public safety, and Priority 2, which includes individuals who have misdemeanor convictions or are new immigration violators.⁵

Priority 1: “threats to national security, border security, and public safety,” which includes noncitizens who have been:

- engaged in or suspected of terrorism or espionage, or who otherwise pose danger to national security;
- apprehended at the border or ports of entry while attempting to unlawfully enter the United States;
- convicted of an offense involving gang activity or participation;
- convicted of a felony other than a state or local offense for which an essential element was immigration status;
- convicted of an “aggravated felony” as defined by Immigration and Nationality Act § 101(a)(43).

Priority 2: “misdemeanants and new immigration violators,” which includes noncitizens who have been:

- convicted of three or more misdemeanor offenses, other than minor traffic offenses or state or local offenses for which an essential element was the individual's immigration status, provided that the offenses arise out of three separate incidents;
- convicted of a significant misdemeanor, which includes domestic violence, sexual abuse or exploitation, burglary, unlawful possession or use of a firearm, drug distribution or trafficking, DUI, and any offense for which the sentence was more than 90 days in custody;
- apprehended anywhere in the U.S. after unlawfully entering or re-entering the U.S. who cannot establish that they have been physically present in the U.S. continuously since January 1, 2014;
- found to have significantly abused the visa or visa waiver programs.

Although PEP-Comm claims to prioritize individuals with certain convictions for deportation, it should be noted that S-Comm also was supposed to prioritize, but failed to do so in practice. During S-Comm’s operation, several memos released by then-ICE Director John Morton attempted to lay out priorities for deportation.⁶ However, after these memos were issued, studies showed that individuals deported for low-level offenses actually increased, demonstrating that ICE agents did not adhere to these directives.⁷ Advocates should monitor whether PEP-Comm actually adheres to these priorities or if like with S-Comm, ICE agents fail to follow these directives. It should also be noted that Priority 2 includes a broad and vague “significant misdemeanor” category, which is comprised of any offense with a sentence of 90 days or more and likely will cover a number of common low-level, nonviolent offenses.

Additionally, while the November 20, 2014 DHS memo on S-Comm and PEP-Comm states that only Priority 1 or Priority 2 convictions should result in transfer, the memo also states that ICE may seek

⁵ Memorandum on Policies for the Apprehension, Detention and Removal of Undocumented Immigrants from Jeh Johnson, Sec’y, Dep’t of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration and Customs Enforcement, et al. (Nov. 20, 2014), available at http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf.

⁶ See Morton Memo (Dec. 21, 2012), <http://www.ice.gov/doclib/detention-reform/pdf/detainer-policy.pdf>; Morton Memo (June 15, 2012), <http://www.ice.gov/doclib/about/offices/ero/pdf/s1-certain-young-people-morton.pdf>; and Morton Memo (June 17, 2011), <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>.

⁷ See Syracuse TRAC Program, *Secure Communities and ICE Deportation: A Failed Program?*, Apr. 8, 2014, <http://trac.syr.edu/immigration/reports/349/>.

transfer of any individual identified as a priority if local law enforcement agrees to cooperate.⁸ This likely includes individuals who fall into the Priority 3 category, noncitizens who have been issued a final order of removal on or after January 1, 2014.

Differences between PEP-Comm and S-Comm

Notification instead of Detention with “Special Circumstances” Exception

Under S-Comm, after an individual is identified as deportable, ICE sends an immigration hold request to local law enforcement agencies seeking to detain the individual for up to 48 hours after the time s/he would otherwise be released in the criminal matter. This additional detention time was for immigration agents to take the individual into ICE custody. The November 20, 2014 DHS Memo on S-Comm acknowledges that several federal district courts have found ICE holds to be a violation of the Fourth Amendment of the Constitution.⁹ As a result, DHS has decided to stop issuing requests for detention with some exceptions. Under PEP-Comm, ICE will replace requests for *detention* with requests for *notification* of an individual’s release date to local law enforcement agencies.¹⁰

DHS has stated that ICE may still issue requests for detention in “special circumstances.” It did not specify what constitutes special circumstances, but it did state that such detention requests must “specify that the person is subject to a final order of removal or there is other sufficient probable cause to find that the person is a removable alien.”¹¹ However, the memo makes no mention of a requirement that the ICE hold be signed by a judge. Criminal warrants require both probable cause and a judge’s signature, so requests for detention under PEP-Comm still fall far below the requirements of a criminal warrant and do not alleviate the Fourth Amendment concerns.

Post-Conviction instead of Pre-Conviction Transfer

Under S-Comm, once an individual was identified as potentially deportable, ICE issued an immigration hold request asking local law enforcement agencies to hold the individual for up to 48 hours past his or her release date without regard to whether the individual was convicted of or even charged with the offense. DHS has announced that under PEP-Comm, ICE will only take the individual into custody if s/he is convicted of certain “Priority 1” and “Priority 2” crimes, or is believed to pose a threat to national security.¹² However, S-Comm also was supposed to focus on individuals with criminal convictions, but in practice, a significant portion of noncitizens that were deported were never convicted of a crime.¹³

⁸ Memorandum on Secure Communities, *supra* note 1, at 3 (“Nothing in this memorandum shall prevent ICE from seeking the transfer of an alien from a state or local law enforcement agency when ICE has otherwise determined that the alien is a priority . . . and the state or locality agrees to cooperate with such transfer”).

⁹ *Id.* at 2 & n.1 (discussing *Miranda-Olivares v. Clackamas Cnty.*, No. 3:12-CV-02317-ST, 2014 WL 1414305, at *1 (D. Or. Apr. 11, 2014) and related cases, which have found prolonged detention based on an ICE hold to violate individual’s due process rights since ICE holds lack a judicial finding of probable cause).

¹⁰ *Id.* at 2.

¹¹ *Id.*

¹² *Id.*

¹³ See Syracuse TRAC Program, *supra* note 7 (stating that in 2013, 151,833 individuals who were deported had no criminal convictions).

Impact of PEP-Comm on the TRUST Act

Concerns about Notification

Notification to ICE of an individual's release time raises serious concerns, namely the undercutting of community policing through continued entanglement local law enforcement and ICE. By notifying ICE of an individual's release, local law enforcement agencies will be directly facilitating the deportation of individuals that the State of California, by passing the TRUST Act, has already determined should not be handed over to ICE. As the TRUST Act itself explains, immigrants and their communities "are less likely to report crime or cooperate with law enforcement when any contact with law enforcement could result in deportation."¹⁴ This fear will persist if individuals know that local law enforcement will notify ICE of their release dates. The resulting loss of trust will discourage immigrants from seeking police protection and from obtaining the immigration relief available to crime victims.

Moreover, notification to ICE can result in an individual's detention for additional time in local jail custody. In Southern California, non-profit legal organizations have received reports of individuals being detained for extra time during the release process while local sheriff's deputies waited for ICE to arrive. Local law enforcement can be subject to liability if they violate the TRUST Act by holding the individual for additional time or if they notify ICE about an individual who is not actually removable.

Advocate Tip:

1. Find out if the individual was held for extra time beyond when s/he should have been released in the criminal matter to facilitate notification and transfer to ICE:
 - Ask when the individual should have been released in the criminal matter.
 - Ask when the individual was actually released and why there was a gap in time.
2. Find out if the individual was actually released before ICE picked up the individual.
 - Was the individual free to leave the jail?
 - Transfer from one holding cell to another for ICE means the individual was not free to leave.

Cooperation with PEP-Comm is Voluntary, Not Mandatory

Just like ICE holds, notification to ICE of an individual's release date is completely **voluntary**.¹⁵ Under the Tenth Amendment, ICE is prohibited from imposing *any* mandatory duties on local law enforcement agencies to engage in civil immigration enforcement.¹⁶ Because notification runs contrary to the purpose of the TRUST Act and creates distrust within immigrant communities, advocates should ask local law enforcement to opt out of PEP-Comm by adopting policies that refuse notification to ICE.

Advocate Tip:

Remember: ICE holds and notification requests are all **voluntary**. Ask your local law enforcement to adopt a policy of not responding to any ICE holds and any ICE notification requests.

¹⁴ 2013 Cal. Legis. Serv. Ch. 570 (A.B. 4) § 1(d).

¹⁵ See 8 C.F.R. § 287.7.

¹⁶ See, e.g., *Galarza v. Szalczyk*, No. 12-3991, 2014 WL 815127, at *7-*9 (3d. Cir. Mar. 4, 2014); Letter from David Venturella, Assistant Dir. for Secure Communities, U.S. Immigration and Customs Enforcement, to Miguel Marquez, Cnty. Counsel, Cnty. of Santa Clara, at 3-4 (Oct. 4, 2011).