
ADVISORY

Are Victim Services Programs Liable for Criminal “Harboring” When they Work with Immigrant Survivors of Crime?

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July 2017

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Community-based crime victim advocacy programs that provide services to undocumented immigrant survivors of crimes can minimize risks to their program, funding, employees and clients by adopting and following policies that take the laws on harboring undocumented immigrants into account.

This Advisory answers common questions about providing shelter and other program services to undocumented victims, describes the law and federal policy (as of the Advisory's publication date), and proposes best practices for programs, but **it is not legal advice**. Immigration and criminal laws vary from region to region, and federal immigration enforcement policies are constantly changing. Programs should analyze their program-specific risks, their community's particular needs, and the laws in their jurisdiction—including legal duties associated with an agency's funding sources—as they design or update program policies. Consulting a local immigration attorney with criminal law experience is highly advisable.

INTRODUCTION TO FEDERAL HARBORING LAW

1. Could victim advocacy programs or their employees face legal consequences for providing services to undocumented immigrants?

In theory, yes, program employees could be charged with the federal crime of “bringing in and harboring certain immigrants.”¹ The primary purpose of the federal harboring law is to prosecute people for facilitating immigrants' illegal entry into the United States, for exploiting their labor, and for hiding them from Immigration and Customs Enforcement (ICE), but some of the statute's language is broad enough that it could potentially be interpreted to include some common program services.

As of the date of publication of this Advisory, there does not appear to be any evidence that a victim services program employee has ever been charged with harboring, and there are very few cases in which **any** person has been convicted of harboring in the absence of a profit motive. Additionally, many federal and state laws prohibit programs they fund from discriminating on the basis of national origin and require programs to maintain client confidentiality, which creates competing legal obligations for programs receiving that funding.² Therefore, while the harboring statute does create a theoretical legal risk that is impossible for most programs to eliminate entirely, the risk is acceptably minimal as long as programs have reasonable protective policies in place.

Under federal criminal statutes, the penalty for a felony harboring conviction (with no intent to profit) could range from probation to five years imprisonment for each undocumented immigrant.³ Program assets used to harbor the undocumented immigrant could also be seized and forfeited.⁴

2. What does it mean to harbor an undocumented immigrant?

The federal law that prohibits transporting or harboring an undocumented immigrant would require a federal prosecutor to prove:

- A program employee knew or recklessly ignored the fact that a client was an undocumented immigrant, and
- The employee:
 - Encouraged or assisted the immigrant's illegal entry, and/or
 - Provided transportation to facilitate the immigrant's continued illegal presence, and/or
 - Concealed, harbored, or shielded the client from detection by immigration authorities.⁵

It is this last part of the statute, criminalizing sheltering undocumented immigrants, that raises the most questions for victim advocacy programs.

3. What are the legal obligations of programs serving undocumented immigrants?

Programs have a legal obligation not to discriminate and thereby provide meaningful access to all victims. There is no law, regulation, policy, list, comprehensive guideline, or clear-cut test that definitively identifies what kind of assistance will be considered evidence of harboring by individual prosecutors, and jurisdictions vary in how they interpret the law. While this makes it virtually impossible for programs to eliminate all risk of liability, it also gives programs the flexibility to decide for themselves what levels of risk and what types of services will best meet victims' needs in their particular communities.

In adopting program policies on providing services to immigrant victims, including those who might be undocumented, programs should take a comprehensive approach. Best practices require that programs review a wide variety of program policies—such as information gathering, record keeping, confidentiality, marketing, security, legal representation, etc.—in light of the issues raised in this Advisory. The last section of this Advisory includes suggestions about where to start.

4. What services are most likely to be construed as evidence of harboring?

Federal prosecutors considering a harboring charge would evaluate a potential defendant's actions on a case-by-case basis, considering the full range of assistance provided to the undocumented immigrant. Examples of for-profit assistance that clearly violate the federal harboring law include:

- Transporting, helping (physically, financially, or otherwise), or encouraging an immigrant to cross the border illegally.⁶
- Transporting an undocumented immigrant within the United States in order to help them evade immigration agents.⁷
- Offering a package of clandestine services to undocumented employees, such as safe housing, employment, transportation, and coaching on how to avoid detection.⁸
- Sex trafficking.⁹

- Falsifying tax or employment records to conceal the employment of undocumented immigrants.¹⁰
- Helping undocumented immigrants escape immigration enforcement agents by tipping the immigrants off about an agent's presence or by physically obstructing or lying to an agent while an immigrant flees.¹¹

These examples illustrate that the riskiest services provided by typical community-based victim advocacy programs are housing, transportation assistance, and employment of clients by programs. However, because nonprofit victim advocacy programs provide non-income tested services, particularly those services necessary for the protection of life and safety, such as short term shelter, housing assistance, and other in-kind services, other federal legal restrictions based on immigration status do not apply to most of the services victim services programs provide. Therefore, it would be more difficult to construe authorized nonprofit services that are available to everyone regardless of immigration status as evidence of illegal harboring (in the absence of other indicators of harboring), than in cases of individuals providing analogous services for profit.¹²

Therefore, programs should not simply cease providing shelter or transportation for undocumented clients, but when a program reviews their shelter or transportation policies, staff should take the issues raised in this Advisory into account, and ideally, they should consult with a local immigration attorney. In contrast, programs who employ immigrants who lack legal work authorization would face a higher risk of prosecution for harboring, because doing so could violate multiple sections of the harboring law and often results in a variety of other fraudulent and illegal actions that further increase the risk of a harboring charge and other legal consequences.¹³

5. What services are least likely to be construed as evidence of harboring?

Due to the complexity of this area of law, and regional variations in courts' and prosecutors' interpretation of the law, this Advisory cannot provide any guarantees about how an individual prosecutor or judge would view particular services. However, two categories of services that appear to pose virtually no risk appear to be:

1. Immigration services: Helping an immigrant seek legal status cannot be construed as harboring, because an application for immigration relief notifies the government of the immigrant's presence and residence, making it impossible for the undocumented immigrant to remain in the U.S. undetected. Therefore, program employees should not hesitate to assist clients with obtaining U Visa certifications, gathering documents to submit as evidence in support of VAWA or asylum petitions, sharing information about the process of seeking legal status, or facilitating referrals to immigration attorneys or programs, for example.
2. Emergency services: Assistance necessary for the protection of the client's life and safety, such as emergency medical aid, emergency shelter, transitional housing, disaster relief, food pantries, and other 'in-kind' services.¹⁴ Although some jurisdictions interpret harboring broadly, to include any assistance that makes the immigrant's life easier, federal law and policy explicitly authorizing the provision of these emergency services to undocumented immigrants makes prosecution for doing so overwhelmingly unlikely in the absence of other evidence of harboring (such as obstructing an ICE agent with a lawful warrant from entering a domestic violence shelter to find and detain an undocumented client).

6. How does the law vary from state to state?

Two major regional variations to keep in mind are state/local law and differences in the interpretation of the federal harboring law by different circuit courts of appeal. States that have passed immigration laws on harboring that are stricter than federal immigration law include Arizona, Utah, Georgia, Indiana and Alabama. Additionally, some localities have passed ordinances broadening the definition of harboring. Federal court review of these laws has produced mixed results, and litigation in some cases is ongoing.

Federal case law interpreting the harboring statute varies from circuit to circuit in multiple ways. The variation most relevant to programs is whether or not the program's jurisdiction interprets the term harboring narrowly—requiring proof that a defendant's assistance made it easier for the immigrant to evade detection by immigration enforcement—or more broadly—requiring only that the defendant provided assistance that made the immigrant's life easier in some way. Even programs in the latter category (or in states with their own harboring laws) can manage their risk by taking reasonable precautions, but they would benefit from seeking advice from a local immigration law expert.

7. In which federal court circuits do programs face the lowest risk of prosecution for providing typical program services?

In some circuits, employees of programs providing services to undocumented immigrants are safe from harboring charges as long as they do not help those clients avoid detection by immigration officials. For example, according to the Seventh Circuit¹⁵ Court of Appeals, the term harboring:

has a connotation... of deliberately safeguarding members of a specified group from the authorities, whether through concealment, movement to a safe location, or physical protection. This connotation enables one to see that the emergency staff at the hospital may not be 'harboring' an alien when it renders emergency treatment even if he stays in the emergency room overnight, that giving a lift to a gas station to an alien with a flat tire may not be harboring, that driving an alien to the local office of the Department of Homeland Security to apply for an adjustment of status to that of lawful resident may not be harboring, that inviting an alien for a 'one night stand' may not be attempted harboring, that placing an illegal alien in a school may not be harboring, and finally that allowing your boyfriend to live with you may not be harboring, even if you know he shouldn't be in the United States.¹⁶

In the Seventh Circuit, and others like it, the reason for providing the assistance is key, and "the individual's alien status must be the driving purpose for the provision of shelter such that there also exists the intent by the defendant to help the alien avoid detection by the authorities."¹⁷ Other jurisdictions that have found concealment from immigration authorities to be an essential element of harboring include the Second¹⁸ and Third¹⁹ Circuit.²⁰

8. In which circuits are typical crime victim program services less clearly lawful?

In some circuits, the courts have stated or implied that concealment from immigration authorities is not required for a harboring conviction. For example:

- In the Eighth Circuit,²¹ overtly employing, housing and assisting an undocumented immigrant with obtaining medical care and banking services was deemed "more than enough to support a conviction for harboring an illegal alien."²²

- A 2010 decision from the Eleventh Circuit²³ clearly indicated that evidence that a defendant deliberately hid undocumented immigrants from federal authorities is not necessary to uphold a harboring conviction (although this analysis did not create a binding precedent, because the defendant not only employed undocumented immigrants, he also provided them false identities and paid them in cash to help them avoid detection).²⁴ The Eleventh Circuit also found that a Georgia immigration attorney had standing to challenge a state anti-harboring law based on a credible risk of prosecution for transporting undocumented immigrants to and from meetings.²⁵

In other circuits, tension between the holdings in different harboring cases makes it unclear how they will view future harboring cases that do not involve evidence that the defendant deliberately helped the immigrant hide from immigration authorities:

- A broad 2007 decision in the Fifth Circuit²⁶ found that that the conduct prohibited by the federal harboring law could include any effort “to make an alien's illegal presence in the United States substantially ‘easier or less difficult.’”²⁷ However, two more recent cases in the Fifth Circuit, involving challenges to state and local harboring laws, appear to conflict with that interpretation. These newer cases distinguish between providing a service like housing to a group of people that includes some undocumented immigrants and intentionally hiding undocumented immigrants from federal immigration enforcement, concluding that the former alone does not constitute harboring.²⁸
- In 2004 the Ninth Circuit²⁹ appeared to adopt the narrower interpretation of harboring when it held that a jury was properly instructed that harboring required proof the defendant acted for “*the purpose of avoiding* [the aliens'] detection by immigration authorities,” but in reaching that decision the court did not explicitly address the previous precedential Ninth Circuit case, which held that merely providing housing to an undocumented immigrant was sufficient for a conviction.³⁰ Additionally, in considering a challenge to Arizona’s anti-harboring law, the Ninth Circuit held that a pastor who provided shelter and transportation for undocumented parishioners did have standing to challenge the law because she did face a reasonable risk of prosecution for harboring.³¹

Although this case law means that programs in these federal court circuits face somewhat higher risks of a harboring conviction being upheld on appeal, bear in mind that as of the date of publication, there is no evidence that prosecutors in these jurisdictions have ever relied on these decisions to justify charging any nonprofit employees with harboring.

NONPROFITS, FAITH-BASED PROGRAMS, AND SANCTUARIES

9. How does a program’s nonprofit status affect the likelihood of a program’s services being construed as harboring?

Nonprofit employees do not face a realistic risk of prosecution that is even remotely comparable to the risk of prosecution for individuals who profit from undocumented immigrant trafficking. Typical harboring cases involve smugglers or employers of undocumented immigrants who profit from their presence here. Although almost every harboring case in appellate court records involve

defendants who profited from their dealings with undocumented immigrants, the harboring statute does not require proof of profit for conviction; it merely sets a lower maximum sentence if profit is not the motive.

In recent years, at least one person's guilty plea to transporting undocumented aliens without financial gain appears in the appellate record.³² A few earlier examples of prosecutions involved people who allowed their undocumented family members to live with them, such as a 1976 case in the Ninth Circuit, which upheld the conviction of a woman who allowed undocumented immigrants to live in her apartment with no substantial financial motivation (though this case may not be good law now due to more recent cases in the Ninth Circuit).³³ Additionally, in the late 1980s the Reverend John Fife and others working with him in the sanctuary movement were prosecuted for smuggling immigrants into the United States, coaching them to avoid and lie to immigration agents, and sheltering them, for which they were convicted and sentenced to probation.³⁴ While these cases illustrate that the harboring law could be applied to nonprofit employees, their rarity is strong evidence of how minimal that risk is.

10. Are a program's legal risks different if it is located in a "sanctuary" community?

Not substantially. A sanctuary city (or county, or state) has formal or informal community policing policies that limit local police cooperation with federal immigration authorities, and may commit to providing emergency, life-saving services to all residents, including immigrants. A sanctuary city does not have the power to stop the enforcement of federal immigration law, including the law criminalizing harboring. In practice, a program operating in a sanctuary city may face lower risks due to reduced cooperation between local government agencies and federal immigration enforcement agencies. However, even in self-described sanctuary cities, and even within police departments with explicit noncooperation policies, some individual officers may violate those policies and cooperate with ICE.³⁵ Therefore, programs in sanctuary cities should be no less vigilant than other programs in reviewing their program policies on dealing with law enforcement, training their employees, and protecting their clients' rights.

11. Are a program's legal risks different if it is affiliated with a church?

Not substantially. There is no general legal exemption from the harboring law for employees of churches or faith based programs.³⁶ Historically, sanctuary has been a form of civil disobedience by churches, not a legal right. Federal policy guidance on "sensitive areas" was issued to minimize immigration enforcement actions at places of worship, among other locations.³⁷ However, the policy guidance includes a variety of exceptions, and it does not create any enforceable right allowing churches to sue or otherwise compel ICE officers to follow the guidance. Bad publicity is a factor that may help deter immigration officials from taking action against victim service providers, particularly faith-based programs, but like the policy guidance, it is no guarantee of legal immunity.

12. Are confidential domestic violence shelters or other program sites considered "sensitive locations" that are off-limits to ICE?

Shelters and other program locations cannot legally provide sanctuary from immigration enforcement, though there are stricter guidelines limiting ICE's enforcement activities at victim services facilities. Although ICE agents do have the discretion to undertake enforcement actions at

these locations, in order to obtain a warrant to engage in enforcement action at such a victim service agency, they must prove they have taken additional precautions regarding the immigrant's identity and status, and confirm and that they did not discover the victim's presence at that location based on an uncorroborated tip from the victim's abuser.³⁸ In addition, ICE agents are prohibited, with some exceptions, from conducting immigration enforcement activities at or near "sensitive locations," including hospitals, schools, churches, and public demonstrations, for example, but courthouses, domestic violence shelters, and rape crisis centers are not specifically listed as examples of sensitive locations.³⁹ An ICE agent with a court-issued arrest warrant has the legal authority to take an undocumented client into custody at a victim advocacy program location such as a shelter.

However, even if a client or program employee believes an abuser was responsible for informing ICE of the victim's location, to avoid increased risk of prosecution for harboring or other substantial consequences, the employee should not attempt to assist clients in fleeing from ICE.⁴⁰ If the ICE agent's method for obtaining authority for a search or arrest was an abuse of the agent's discretion, that issue should be addressed later in court, not contemporaneously by a program employee.

PROTECTING PROGRAMS' AND CLIENTS' RIGHTS

13. Are program employees legally obligated to cooperate with federal immigration agents?

Program employees can and should assert their own (and their clients') constitutional and other legal rights by declining to cooperate with ICE beyond what is explicitly legally required. Employees should never obstruct or provide false information to ICE agents, but should decline to speak with or assist ICE in the absence of a clear legal mandate.

In fact, the Violence Against Women Act (VAWA), Family Violence Prevention and Services Act (FVPSA), Victims of Crime Act (VOCA), Office of Violence Against Women (OVW), and many similar state-level laws require programs to have policies in place to protect the confidentiality of client information.⁴¹ Failing to protect client confidentiality—for example by sharing client information with ICE without an express confidentiality release from the survivor or being legally mandated to do so, even just confirming that the client has received services from the program—can result in the loss of program funding. In general, programs with these funding streams must decline to voluntarily share information with ICE about clients unless the program is legally mandated to release the information by state law or court order. Additionally, if programs are forced to release client information, the program must make reasonable efforts to notify the client and protect the client's privacy and safety.

14. What sorts of requests for assistance by ICE might program employees be faced with?

When ICE or CBP (Border Patrol) agents (or law enforcement agents working with ICE) request assistance, in the absence of a law or court order mandating that assistance, the best practice is for programs to decline the request. For example, program employees should typically:

- Decline to speak with ICE agents or provide them any client information without consulting an attorney, other than to comply with a warrant.
- Assert a Fifth Amendment right against self-incrimination in response to any questions that could relate to a charge of harboring.
- File motions to quash subpoenas requesting copies of client records and subpoenas for program employees to testify or be deposed.
- Refuse to grant ICE agents access to program property that is not available to the public, other than to comply with a court-issued warrant.

In addition to ensuring that the program does not violate its funding-related legal obligations, as well as liability to the client, this policy avoids the risk of turning over information that could be used to pursue a harboring charge against the employee.

However, program policies should make it clear to employees that while they should decline to cooperate with ICE in the absence of a clear legal mandate, they should never interfere with an ICE agent by physically obstructing the agent, lying to the agent, or affirmatively helping a client evade an agent.⁴² In April 2017, the Attorney General emphasized that “[a]ssaulting, resisting, or impeding” officers is a priority for federal prosecutors, and case law confirms that helping undocumented immigrants flee is strong evidence of harboring.⁴³ Employees, particularly front-line staff most likely to be approached by ICE agents, should be trained to ensure they understand the distinction between noncooperation and obstruction.

15. What steps should program directors/employees take when responding to a law enforcement or ICE agent who shows up at the program requesting assistance?

In general, the following precautions will minimize the legal risks to the program, employee, and client. Although training front desk staff about these distinctions is critical to ensuring that they act appropriately in the heat of the moment, it is a best practice to minimize their role in interacting with ICE by training them to immediately contact a supervisor, program director, and/or the program’s attorney if served with a subpoena, order, or warrant.

1. An employee should immediately inform a supervisor or the program director that an agent is on the premises seeking assistance, access, or information.
2. The program director should insist that any requests for assistance be made in writing, not orally. In the absence of legal paperwork requiring the program’s assistance, no assistance should be provided.
3. If paperwork is provided, the program director should read the paperwork to confirm that it properly identifies the program’s name and address, and to determine if it is a court-issued warrant requiring immediate compliance, or some other sort of document (which likely allows time for the program to consult legal counsel before complying or objecting).
4. The program director should request essential information that an attorney might need to assist the program or client. Specifically, the program director should obtain a complete copy of any paperwork claiming to authorize the ICE activity or request, and make note of the time and date of its receipt. Additionally, a program director can ask for and document the agent’s name, badge number, and department/employer. If a client is arrested at the

shelter, ask the agents where the client is being taken, so that information can be provided to the client's immigration attorney.

5. The program director should comply with court orders mandating immediate compliance, but should not consent to provide any information or access beyond what is clearly and immediately required by the legal document. For example, if the court-issued warrant only authorizes the officer to search common areas in a shelter on a particular date, employees should not give the officer access to private rooms, or allow the officer to search on a later date based on an old warrant.
6. The program director and employees should not interfere with any search authorized by a court-issued warrant, but may be able to observe the search without interfering, and either record footage of the search or make notes, taking particular care to document any improper behavior by the agents (such as attempts to search in areas outside the scope of the search warrant, or to detain people not listed in the arrest warrant).

16. What types of common legal documents should program employees be trained to identify and address?

Being served with legal paperwork can be stressful and confusing for any employee, particularly when a non-attorney employee is pressured by an ICE or law enforcement officer to comply with oral instructions that may or may not be consistent with the paperwork being served. The best way to avoid legal problems later is to ensure that all employees, but particularly front desk staff, are trained on how to identify and properly comply with four common legal documents that may be served on the agency and to **alert the program director immediately**.

1. Subpoena: A document signed by an attorney requiring a person to appear at a particular time and place (such as for a deposition or trial) or requiring the production of documents (sometimes called a subpoena *duces tecum*). Subpoenas typically give a substantial time period for compliance (often 30 days). This means it is important not to panic and to have an attorney review the subpoena issued to the agency and/or the person named in the subpoena. Note that in some jurisdictions attorneys commonly sign unlawful subpoenas that exceed their authority, so programs should promptly consult with a local attorney before assuming they must comply with any subpoena.
2. Court order: A document signed by a judge, for a wide variety of purposes, and with varying deadlines for compliance. Failure to comply with a court order risks contempt of court and a variety of sanctions. However, sometimes a document entitled 'Subpoena' may actually be a court order signed by a judge, and conversely some attorneys serve unsigned copies of proposed court orders (which are not legally effective), so it is important to read any subpoena or court order served on your program carefully to determine how to respond. If possible, programs should consult with a local attorney to determine if there is a way to get the order revoked prior to the date specified for compliance.
3. Search warrant: An order signed by a judge authorizing officers to enter a specific private location to look for a specific object. Warrants typically require immediate compliance, so after confirming that the warrant lists the correct address, program employees should allow the search to occur specifically as described in the warrant (and no further), and then seek legal counsel to address any consequences of the search. Employees should not answer

officers' questions during a search, because they could inadvertently incriminate themselves, the program, or the client.

4. **Arrest warrant:** A document authorizing law enforcement officers to find, remove, and detain a person. It is important to determine whether a warrant presented by an ICE agent is an "ICE warrant" (administrative warrant) or a "judicial warrant" (signed by a federal judge), because they differ substantially in terms of the authority they give ICE. An ICE warrant will typically say "U.S. Department of Homeland Security" at the top, whereas a judicial warrant will typically start by naming the court that issued the warrant.⁴⁴ Both ICE warrants and judicial warrants give ICE agents the power to arrest an undocumented immigrant. However, only a judicial warrant can authorize ICE to enter a private location like a house or shelter (including a domestic violence shelter) without consent to find the person.⁴⁵ An employee served with a judicial arrest warrant should confirm that the warrant lists the correct address and then allow ICE to enter the property to find the client whose arrest is authorized.

17. Should programs notify clients about ICE or law enforcement requests for information about the clients?

In order to comply with funding-related confidentiality laws, programs must inform clients if information about them is released to anyone without their consent (e.g., pursuant to a search warrant). Programs must also notify clients of any pending requests for client information (e.g., pursuant to a subpoena *duces tecum* for client records). However, program employees must also avoid assisting an undocumented client in concealing themselves from or evading immigration enforcement. This tension can make communicating this information to the client challenging. For example, if a program learns that ICE is looking for an undocumented client, the program notifies the client, and then the client flees, that could conceivably be construed as assisting the client in evading federal authorities and therefore a violation of the harboring law, although the confidentiality laws requiring that notification should minimize this risk.

If possible, the notification should be in writing, ideally using a standardized form, to prove that the notification did not in any way encourage the client to flee. Additionally, this communication should include offers (or document past offers by the program) to facilitate a referral to an immigration lawyer, to assist with obtaining U Visa certifications, etc. In the event that the program or employee is accused of harboring, including this information may help prove that the program actively encourages clients to disclose their presence and seek legal status, not to evade discovery by ICE.

CHANGES IN 2017

18. How do recent federal policy changes affect a program's risks related to the crime of harboring?

Attorney General Jeff Sessions, in an April 2017 policy memorandum, advocated a ramping up of prosecutions for certain forms of harboring.⁴⁶ Specifically, the memorandum calls for prioritizing

cases of smuggling at least three immigrants, and cases involving injury or death (to the immigrant or anyone else). The stated goal of this policy is to more effectively fight human trafficking and transnational gangs, so it does not justify an increased focus on combatting nonprofit programs. At this time, there is no evidence that this call for increased prosecution of high-priority harboring defendants will result in unprecedented new efforts to target nonprofit employees of crime victim advocacy programs.

19. How could other federal policy changes in 2017 affect a program?

Recent executive orders and federal policy memoranda have altered immigration law in many ways.⁴⁷ Some of these changes may affect programs directly, while others will result in greater numbers of potential clients being detained or deported. For example:

- Instead of prioritizing undocumented immigrants convicted of serious crimes, under the new administration's immigration agenda, anyone who has violated immigration law will be subject to arrest, detention, and deportation. Mere allegations of minor nonviolent crimes, such as driving without a license or abuse of any public benefit program, may draw immigration enforcement attention toward an undocumented client, with severe consequences.
- Parents who arrange for their children to enter the U.S. as unaccompanied minors, and those who assist them, could be prosecuted for smuggling or human trafficking and become subject to deportation or prosecution.
- The current administration is strengthening and seeking to increase participation in the 287(g) program, which encourages increased partnerships between federal immigration authorities and local law enforcement agencies, allowing local law enforcement to detain undocumented immigrants on ICE's behalf. It is important for every program to be aware of any law enforcement agencies in their jurisdiction that are (or have applied to be) participants in the 287(g) program, and draft program policies that take this into account.
- In the past, certain categories of immigrants, such as those waiting for a final decision on their visas, were generally allowed to live outside immigration detention. Now, however, parole (letting people live in their homes, rather than in detention, while their cases are processed) will be restricted to cases involving "urgent humanitarian reasons or significant public benefit" and determined on a case-by-case basis.
- Asylum officers are now directed to proceed with greater attention to the possibility of fraudulent asylum applications. Officers conducting interviews of asylum applicants are encouraged to seek out information that could be interpreted as undermining the credibility of the applicants' claimed risk of persecution if the applicants return to their home countries.

Given the rate of policy change, and the seriousness of these issues for programs, employees, and clients, one of the best protective measures a program can take is to develop a relationship with a local immigration attorney whose job is, in part, to pay attention to these developing issues, explain them clearly, and advise the program about how the changes impact the program's risk management approach.

BEST PRACTICES, PROGRAM POLICIES, AND NEXT STEPS

20. Should programs minimize their liability by requiring proof of legal immigration status (and consent to disclose that status) as a condition of eligibility for services?

No, rationing access to services based on immigration status or willingness to sign a confidentiality waiver is not a best practice for several reasons:

- Denying essential, safety-related services to undocumented immigrants would be cruel, unsafe, and contrary to programs' missions.
- Many victims of abuse, regardless of their immigration status, do not have access to the documents that prove their immigration status, so in practice this overbroad requirement would result in many citizens and lawful immigrants being denied services, in addition to undocumented immigrants being intentionally excluded.
- Federal policy exempts nonprofits that provide public benefits from requiring verification of immigration status as proof of eligibility for services.⁴⁸
- Policies discriminating on the basis of national origin or requiring consent to disclose personal client information violate VAWA, FVPSA, and other federal and state laws, which could result in the loss of program funding or other consequences.

A theoretical risk of a novel application of the harboring law by an overeager and malicious federal prosecutor should not deter programs from providing essential services to victims in need, irrespective of their immigration status.

21. Should programs minimize their liability using a 'Don't Ask Don't Tell' approach when it comes to clients' immigration status?

Not necessarily. It is true that in order to prove a program employee violated the anti-harboring law, the government must prove that the employee knew or recklessly disregarded the fact that the client was undocumented.⁴⁹ Therefore, if a program follows a policy of avoiding the subject of immigration status altogether, it would be difficult to prove harboring beyond a reasonable doubt. If a highly risk-averse program (e.g., one in a state with its own anti-harboring law) feels it necessary to take this approach, the program should also adopt a policy of providing referrals for outside immigration assistance to every program client.

However, for most programs, and their clients, there are compelling reasons for determining a client's immigration status that outweigh the risk. For example, a caseworker may need to know a client's immigration status to determine what public benefits the client is eligible for, a counselor may need to discuss trauma related to a client's border crossing, and a legal advocate may need to determine if the filing deadline for an asylum case has passed. Given the lack of harboring prosecutions of program employees (or even any analogous people), adopting reasonable program policies will lower most programs' risk to an acceptable level.

22. Should programs minimize their liability by providing immigration advocacy and legal assistance?

Yes, giving clients referrals or direct assistance with seeking legal immigration status is a win-win. Offering these services will benefit many clients. It will also reduce the program's legal risks, because when an undocumented client is actively seeking legal status their application affirmatively informs the federal government of their presence and residence.

Individual clients may have their own reasons for not seeking legal status at any given time, and ultimately it is the client's decision, so it is not appropriate for programs to condition services on a client submitting an immigration application. However, a policy of encouraging and supporting the pursuit of legal status will reflect positively on the program, creating a record that the program and its employees do not encourage undocumented immigrants to conceal themselves from immigration authorities, even if individual clients decline or delay the offered immigration assistance.

23. What policies and strategies other than those specifically related to service eligibility should programs review with undocumented clients in mind?

Policies not directly related to service provision that programs should review include:

- Record keeping: When working with undocumented clients, as with any other client, avoid documenting sensitive information in writing unless doing so is necessary, to minimize the risk of the information becoming discoverable without the client's consent. For example, if a client discloses her undocumented status during a counseling session, in some states the counselor's written notes could be subpoenaed, but the counselor could not be compelled to testify in a deposition or court, so including information about the client's status in written counseling records might increase the risk to the program, the counselor, and the client.
- Confidentiality: Ensure program policies are compliant with VAWA, FVPSA, VOCA, and other funding-related confidentiality rules, including obtaining consents to release information from clients, and that employees understand and follow them. Policies requiring programs to protect client privacy to the maximum extent possible, such as by objecting to and seeking to quash all subpoenas for client records or testimony by program employees, will protect undocumented clients along with other program clients.
- Security: Consider what areas of your program are accessible to the public (and therefore accessible to immigration enforcement) as opposed to being more easily characterized as private spaces.
- Staff Training: Ensure program staff are trained and familiar with these policies, so that in a stressful and chaotic moment they will act in compliance with the policies. Front desk staff in particular, but also other employees, should be trained to properly respond to service of subpoenas, court orders, and warrants, as well as on the distinction between obstructing vs. minimally cooperating with an ICE or law enforcement agent.
- Legal Counsel: Develop guidelines making it clear under what circumstances the program will pay for legal counsel (if *pro bono* representation is unavailable), either for consultation purposes or to represent the program or program employees.

- **Marketing and Publications:** Adjust the language in program documents (both internal and publicly available), if needed, to represent the program's commitment to providing assistance to encourage undocumented immigrants to seek lawful immigration status.
- **Networking:** Build relationships with other programs in your state and region, to ensure you are promptly notified of changes in local immigration enforcement tactics. For example, if ICE officers arrested a victim at a shelter or courthouse somewhere in your state, are there communication channels in place to promptly alert other programs in your state? Likewise, build connections with local legal aid programs, volunteer lawyer programs, and bar associations to strengthen the network of legal assistance supporting the program and its clients.

24. When should programs seek the advice of local immigration attorneys?

As early and often as possible. Programs should seek out options for local legal assistance proactively, before a problem arises. If *pro bono* assistance is not available, some private attorneys may offer reduced hourly rates to a nonprofit program. Your program may also consider collaborating with other programs to share cost of consulting with an immigration attorney regarding common policy-related questions that affect multiple local programs.

This is especially critical for programs at elevated risk, such as:

- Programs in states with stricter state harboring laws, jurisdictions with stricter interpretations of federal law, or law enforcement agencies participating in the 287(g) program,
- Programs that provide services exclusively for (or specifically targeted at) undocumented immigrants, or
- Programs that provide services that differ substantially from those provided by a typical program (such as a domestic violence shelter or sexual assault victim advocacy program), particularly services directly related to activities considered harboring (such as arranging sponsorships for child immigrants to enter the United States to reunify with their families⁵⁰).

Working with a local immigration attorney can benefit programs in two ways. First, the attorney can review program policies to confirm that they are in compliance with federal law (as interpreted in the program's jurisdiction), as well state and local harboring laws. Second, having pre-identified local counsel available to call on an emergency basis (e.g., if ICE agents serve a subpoena or warrant) can substantially minimize legal risks to a program resulting from delays or noncompliance with the complex array of relevant federal and state laws and court rules. Timeframes for objecting to these situations can be short, so having a relationship and agreement with an attorney in advance can ensure your program receives timely counsel should the need arise.

Arranging for local counsel, reviewing program policies, and fully training staff, should enable programs to serve undocumented clients with confidence that those clients—as well as the program and program's employees—face no substantial legal risks related to the federal harboring law.

¹ INA §274; 8 U.S.C. §1324.

² For example, Family Violence Prevention and Services Act (FVPSA) funding includes no restrictions on serving immigrants, FVPSA is not designated as a federal public benefit requiring legal immigration status, and FVPSA prohibits discrimination on the basis of national origin. 42 U.S.C. §10406(c)(2). See also 42 U.S.C. 2000d et seq., 45 CFR Part 80.

³ INA §274(a)(1)(B); 8 U.S.C. §1324(a)(1)(B).

⁴ INA §274(b); 8 U.S.C. §1324(b).

⁵ INA §274(a)(1)(A); 8 U.S.C. §1324(a)(1)(A).

⁶ INA 274A(a)(1)(A)(i), (iv); e.g., *United States v. Aguilar*, 871 F.2d 1436 (9th Cir. 1989). This could also result in charges of alien smuggling. INA § 212(a)(6)(E)(i); INA §237(a)(1)(E)(i).

⁷ Transporting immigrants after they are inside the country is within the scope of the harboring law, but typically is prosecuted when provided for the purpose of evading ICE or border control, or in combination with other acts of harboring, smuggling, fraud, etc. See e.g., *United States v. Xiang Hui Ye*, 588 F.3d 411 (7th Cir. 2009); *United States v. Mireles*, 442 Fed. Appx. 988 (5th Cir. 2011); *United States v. Khalil*, 15-3819-cr (2nd Cir. 2017). Appellate courts' perspectives on how directly the transportation must be tied to the continued illegal presence vary. See *United States v. Barajas-Chaves*, 162 F.3d 1285 (10th Cir. 1999) (comparing decisions on harboring by providing post-entry transportation in cases in various circuits). Intra-U.S. transportation can also, in rare cases, result in smuggling charges. *Dimova v. Holder*, 783 F.3d 30 (1st Cir. 2015) (holding that a defendant who is tricked into becoming involved in a border crossing plan, backs out, but returns to the pick-up spot on the U.S. side of the border purely out of humanitarian concern, was guilty of knowingly assisting, abetting or aiding an illegal entry).

⁸ See e.g., *United States v. Xiang Hui Ye*, 588 F.3d 411 (7th Cir. 2009); *United States v. George*, 779 F.3d 113 (2nd Cir. 2015); *United States v. Kim*, 193 F.3d 567 (2nd Cir. 1999); *United States v. Shum*, 496 F.3d 390, 392 (5th Cir. 2007).

⁹ See e.g., *United States v. Campbell*, 636 Fed. Appx. 692 (7th Cir. 2016).

¹⁰ See e.g., *United States v. Kahanani*, 502 F.3d 1281 (11th Cir. 2007).

¹¹ See e.g., *United States v. Rubio-Gonzalez*, 674 F.2d 1067 (5th Cir. 1982); *United States v. Cantu*, 557 F.2d 1173 (5th Cir. 1977); *United States v. Varkonyi*, 645 F.2d 453 (5th Cir. 1981).

¹² Office for Civil Rights, *HHS Domestic Violence Fact Sheet*, August 22, 2012, available at <https://www.hhs.gov/civil-rights/for-individuals/special-topics/national-origin/domestic-violence/index.html#2>

¹³ INA §274(a)(3); 8 U.S.C. §1324(a)(3); *United States v. Winnie Mae Mfg. Co.* 451 F.Supp. 642 (C.D.Cal. 1978).

¹⁴ See supra note 12. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (hereinafter, PRWORA) and Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (hereinafter, IIRIRA) prohibited undocumented immigrants from receiving most government benefits, but made specific exceptions allowing them to receive state and locally funded services for these kinds of emergency services. Division C of the Omnibus Appropriations Act of 1996 (H.R. 3610), Pub. L. No. 104-208, 110 Stat. 3009; Pub.L. No. 104-193, 110 Stat. 2105, Section 411, 8 USC 1621; AG Order No. 2353-2001, 66 Fed. Reg. 3613 (Jan 16, 2001).

¹⁵ The Seventh Circuit includes the states of Illinois, Indiana, and Wisconsin.

¹⁶ *United States v. Costello*, 666 F.3d 1040 (7th Cir. 2012).

¹⁷ *United States v. McClellan*, 794 F.3d 743, 750-51 (7th Cir. 2015) (“[W]e hold that, when the basis for the defendant’s conviction under §1324(a)(1)(A)(iii) is providing housing to a known illegal alien, there must be evidence from which a jury could conclude, beyond a reasonable doubt, that the defendant intended to safeguard that alien from the authorities. Such intent can be established by showing that the defendant has taken actions to conceal an alien by moving the alien to a hidden location or providing physical protection to the alien”).

¹⁸ The Second Circuit includes Connecticut, New York, and Vermont.

¹⁹ The Third Circuit includes Delaware, New Jersey and Pennsylvania, and the U.S. Virgin Islands.

²⁰ *United States v. Vargas-Cordon*, 733 F.3d 366 (2nd Cir. 2013) (“To ‘harbor’ under §1324, a defendant must engage in conduct that is intended both to substantially help an unlawfully present alien remain in the United States—such as by providing him with shelter, money, or other material comfort—and also is intended to help prevent the detection of the alien by the authorities.”); *United States v. Ozelik*, 527 F.3d 88, 100 (3^d Cir. 2008); *DelRio-Mocci v. Connolly Properties Inc.*, 672 F.3d 241 (3rd Cir. 2012) (holding that actions like cohabitation, providing rental housing, or telling an immigrant to “lay low” do not constitute harboring, which requires more substantial assistance as well as conduct preventing immigration authorities from detecting the immigrant’s presence).

²¹ The Eighth Circuit includes Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota.

²² *United States v. Rushing*, 313 F.3d 428 (8th Cir. 2002).

²³ The Eleventh Circuit consists of Alabama, Florida, and Georgia.

²⁴ *Edwards v. Prime, Inc.*, 602 F.3d 1278 (11th Cir. 2010).

²⁵ *Georgia Latino Alliance for Human Rights v. Governor of Georgia*, 691 F.3d 1250 (11th Cir. 2012).

²⁶ The Fifth Circuit includes Louisiana, Mississippi, and Texas.

²⁷ *United States v. Shum*, 496 F.3d 390 (5th Cir. 2007); accord *United States v. Louisiana Home Elevations, LLC*, CRIM.A. 11-274, 2012 WL 1033619 (E.D. La. Mar 27, 2012) (“Here, considering the breadth of this standard, the Court cannot hold that knowingly employing illegal aliens is insufficient as a matter of law to constitute the substantial facilitation element.”)

²⁸ *Cruz v. Abbott*, 849 F.3d 594 (5th Cir. 2017) (holding that a homeless shelter and a landlord lacked standing to challenge a Texas law against harboring because “they have not hampered authorities from finding any of the illegal aliens they rent to or serve, nor have they taken steps to help the aliens evade ‘detection’ by the authorities” and therefore they faced no credible risk of prosecution); *Villas at Parkside Partners v. City of Farmers Branch*, 726 F.3d 524 (5th Cir. 2013) (holding that a local ordinance conflicted with and was preempted by federal law due to it “criminalizing conduct that does not have the effect of evading federal detection”).

²⁹ The Ninth Circuit includes Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington, and Guam and the Northern Mariana Islands.

³⁰ Compare *United States v. You*, 382 F.3d 958, 966 (9th Cir 2004) (emphasis and brackets in original) with *United States v. Acosta De Evans*, 531 F.2d 428 (9th Cir. 1976). A footnote in a recent Ninth Circuit case suggested that the *You* court’s narrowing of the definition may not be entirely reliable, but a recent unpublished case explicitly relied on *You*. Compare *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, fn9 (9th Cir. 2013) (“Nor is the federal interpretation adopted in *You* entirely stable.”) with *United States v. Castaneda-Mechor*, 387 Fed. Appx. 767 (9th Cir. 2010) (“*You* controls in this case....”).

³¹ *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006 (9th Cir. 2013).

³² *United States v. Galindo-Caballero*, 14-50126 (5th Cir. 2015).

³³ See supra note 23.

³⁴ *United States v. Aguilar*, 883 F.2d 662 (9th Cir. 1989).

³⁵ Corey Pein, *Report: More Sheriff’s Deputies Cooperated with ICE*, Willamette Week, February 23, 2017, available at <http://www.wweek.com/news/2017/02/23/report-more-sheriffs-deputies-cooperated-with-ice/>

³⁶ The statute does contain one limited religiously-based exception, “It is not a violation of clauses (ii) or (iii) of subparagraph (A), or of clause (iv) of subparagraph (A) except where a person encourages or induces an alien to come to or enter the United States, for a religious denomination having a bona fide nonprofit, religious organization in the United States, or the agents or officers of such denomination or organization, to encourage, invite, call, allow, or enable an alien who is present in the United States to perform the vocation of a minister or missionary for the denomination or organization in the United States as a volunteer who is not compensated as an employee, notwithstanding the provision of room, board, travel, medical assistance, and other basic living expenses, provided the minister or missionary has been a member of the denomination for at least one year.” INA §274(a)(1)(C); 8 U.S.C. §1324(a)(1)(C).

³⁷ John Morton, *U.S. Immigration and Customs Enforcement Memorandum on Enforcement Actions at or Focused on Sensitive Locations*, Oct 24, 2011, available at <https://www.ice.gov/doclib/ero-outreach/pdf/10029.2-policy.pdf>

³⁸ John P. Torres, *U.S. Immigration and Customs Enforcement Memorandum on Interim Guidance Relating to Officer Procedure Following Enactment of VAWA 2005*, Jan 22, 2007, available at <https://www.ice.gov/doclib/foia/prosecutorial-discretion/vawa2005.pdf>. Each violation of the VAWA Confidentiality or Victim Safety Protections is punishable by a \$5,000 fine as well as disciplinary action. VAWA 2005, supra note 8 at § 817; VAWA 2005, supra note 8 at § 825(c); 8 U.S.C. 1229; INA Section 239(e).

³⁹ *Id.*

⁴⁰ See, e.g., *United States v. Rubio-Gonzalez*, 674 F.2d 1067 (5th Cir. 1982) (upholding a harboring conviction based on the defendant warning undocumented employees that immigration agents were at the office asking about them and encouraging the immigrants to flee); *United States v. Cantu*, 557 F.2d 1173 (5th Cir. 1977); *United States v. Varkonyi*, 645 F.2d 453 (5th Cir. 1981).

⁴¹ VAWA: The Violence Against Women Act of 1994, Pub. L. No. 103-222, Title IV, 108 Stat. 1902-55 (codified in scattered sections of 8 U.S.C. and 42 U.S.C.) (hereinafter, VAWA); Victims of Trafficking and Violence Protection Act of 2000 (“VAWA 2000”), Pub. L. No. 106-386, Div B, Title V, §1513(d) (2000); Violence Against Women and Department of Justice Reauthorization Act of 2005 (“VAWA 2005”), Pub. L. No. 109-162, Title VIII, Subtitle B, §817 (2006). EVPSA: The Family Violence Prevention and Services Act of 1984, Pub. L. No. 98-457 (codified in 42 U.S.C. Section 10401, et seq.); Child Abuse Prevention and Treatment Act of 2010, Pub. L. No. 111-320 (codified in 42 U.S.C. 5101, et seq.) (amending and reauthorizing FVPSA). VOCA: Victims of Crime Act, 42 USC 10601 et seq. (grantees must certify that they will comply with regulations set forth by 28 CFR Part 22 which prohibits the disclosure of personal identifying information of crime victims).

⁴² See supra note 33.

⁴³ Jeffrey Sessions, *Office of the Attorney General Memorandum on Renewed Commitment to Criminal Immigration Enforcement*, Apr 11, 2017, available at <https://www.justice.gov/opa/speech/file/956856/download>.

⁴⁴ U.S. Department of Homeland Security, *Sample Warrant for Arrest of Alien*, Sept 2016, available at https://www.ice.gov/sites/default/files/documents/Document/2017/I-200_SAMPLE.PDF.

⁴⁵ American Civil Liberties Union of Southern California, *ICE Agents At Your Door*, available at <https://www.aclusocal.org/en/know-your-rights/ice-agents-your-door>

⁴⁶ See supra note 35.

⁴⁷ Department of Homeland Security, *Q&A: DHS Implementation of the Executive Order on Border Security and Immigration Enforcement*, Feb 21, 2017, available at <https://www.dhs.gov/news/2017/02/21/qa-dhs-implementation-executive-order-border-security-and-immigration-enforcement>.

⁴⁸ See Administration for Children & Families, *Verification of Citizenship and Immigration Status by Non-Profit Organizations and Head Start*, May 2, 2008, available at <https://www.acf.hhs.gov/occ/resource/pi-2008-01>

⁴⁹ Knowledge of or reckless disregard for an immigrant's undocumented status can be proven by circumstantial evidence. *United States v. De Jesus-Batres*, 410 F.3d 154 (5th Cir. 2005). Reckless disregard means deliberate indifference to facts indicating a high probability of undocumented status. *United States v. Perez*, 443 F.3d 772 (11th Cir. 2006).

⁵⁰ A variety of online resources address these more specific needs. See e.g., Catholic Legal Immigration Network, *Working with Child Clients and their Family Members in Light of the Trump Administration's Focus on "Smugglers" Practice Advisory*, Jul 2017, available at <https://cliniclegal.org/sites/default/files/resources/defending-vulnerable-populations/Working-with-Child-Clients-and-Their-Family-Members-in-Light-of-the-Trump-Administrations-Focus-on-Smugglers.pdf>