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GOV-LAW CONNECTION

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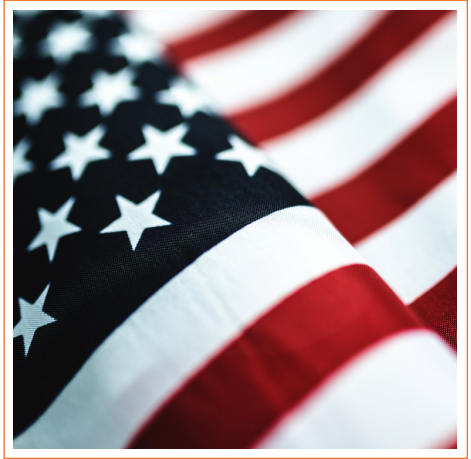
SANCTUARY CITIES:
The "What", the "How" and the "When" of an Executive Order

THE PHRASES "Sanctuary City" or "Sanctuary Jurisdiction" has, developed into a highly politically charged phrase. Questions swirl around what actually can happen given President Trump's January 25, 2017 Executive Order "Enhancing Public Safety in the Interior of the United States."

Section 9 of that Order – "Sanctuary Jurisdictions" – garnered the most attention for local governments around the country (including those in Washington and Oregon). That section directs the U.S. Attorney General and Secretary of Homeland Security to "…ensure that jurisdictions [willfully refusing] to comply with 8 USC §1373 …" become ineligible to receive most federal grants as well as subjecting those jurisdictions violating that federal statute to federal enforcement action.



8 USC §1373 is a 1996 addition to Title 8 of the United States Code and prohibits federal, state and local government entities and officials from restricting the maintenance and exchange of "… information regarding the citizenship or immigration status, lawful or unlawful of any individual…" to, by and between other federal, state or local government entities and officials.

That statute imposes no affirmative mandate on local or state governments to do anything relative to immigration status or citizenship; in fact there are no federal statutes requiring state and/or local jurisdictions do anything affirmatively assisting federal immigration officials in any way. If there were such a mandate – that a state or local jurisdiction is required to assist the federal government on federal immigration matters – that provision would likely run afoul of the Tenth Amendment to the United States Constitution.

So, with the above in mind and the hub-bub about them, what are "Sanctuary Jurisdictions"?

Generally speaking, sanctuary jurisdictions in the United States are typically entities that have made some type of public declaration regarding limitations on how it and its employees will cooperate with federal immigration authorities. There is not one common definition for the term "sanctuary jurisdiction" and as such, it is up to each entity - state or local – to define the scope of its "sanctuary" status.

Oregon is a "Sanctuary Jurisdiction" as ORS 181A.820 prohibits law enforcement agencies in Oregon from using money, equipment or personnel for detecting or apprehending persons whose only violation of law is that they are persons of foreign citizenship present in the United States in violation of federal immigration laws. Because ORS 181A.820 applies statewide and that statute declares how all Oregon law enforcement agencies will interact with federal immigration authorities, the statute effectively makes every Oregon municipal entity having law enforcement personnel "sanctuary jurisdictions" even in the absence of a separate declaration by any of

from Chad's desk…

Chris Crean and I teach a class on Oregon local government law at the Lewis and Clark law school. For me, teaching this class is not only intellectually stimulating but it also is an important reminder of the complexities and nuances of the legal issues we deal with on a daily basis here at BEH.

You're probably thinking to yourself, that's nice Chad, but why are you writing about this in the BEH newsletter? The answer is simple – teaching this class always reminds me of the hard work and dedication you provide to your communities on a daily basis. You see, as I've participated in discussions with these aspiring attorneys this spring about what we do (believe it or not, not everyone goes to law school understanding what it is a local government attorney does), I find myself explaining, with probably a little more enthusiasm than required, how important local governments are to our daily lives.

As you are well aware, local governments provide a myriad of services – roads, sanitary/sewer, water, fire, police, planning – just to name a few. Often, in times of greatest need, the public will call a local government

those entities. Furthermore, ORS 181A.820 also makes clear that the voluntary exchange of information by and between all local and state agencies with relevant federal agencies dealing with immigration issues is permitted and as such, makes ORS 181A.820 entirely consistent with federal law.

That isn't the whole story: as we all know, the federal government also has the "power of the purse and most, if not all local jurisdictions in Oregon and Washington receive some federal aid and so a question remains whether that aid – for roads, housing, health care, etc. – could now be made contingent on whether local jurisdictions actively cooperate with federal immigration authorities in the enforcement of federal immigration law.

The federal courts have provided answers in this area and generally speaking, the Executive Branch may only limit federal funding in situations where Congress has specifically provided discretionary spending authority to the Executive Branch. To the extent Congress enacts a formula for grant funding, the Executive Branch may not then alter that formula and decrease or prohibit funding to an otherwise compliant jurisdiction.

Furthermore, neither Congress nor the Executive Branch can limit funding based on requirements unrelated to the underlying funding program. As we all learned in Civics class, the U. S. Constitution is a power limiting document not a power granting one: within the Constitution is the "Spending Clause" (Art. I, Sec. 8, Cl. 1) which the Supreme Court has held affects the federal government's use the "power of the purse" so as not to coerce a state or local government into taking an action unrelated to the federal interests underpinning the spending program. Although the relatedness requirement may be l broad, it is not without its limits.

So … the "what", the "how" and the "when" will all have to play out on this Executive Order. As you can see, we believe there are hurdles to its implementation and potentially its utility. But regardless of those issues, we'll all be here to watch.

Paul Elsner

WORKPLACE INVESTIGATIONS:
A Practical Guide to Success

LET'S SAY YOU receive a complaint about religious jokes in the breakroom, or hear an allegation that employees are using workplace equipment for personal use against policy, or an anonymous note comes to you about a supervisor constantly belittling the women working under his supervision. What should you do next? The first step is to check your organization's policies regarding investigating complaints as well as any applicable collective bargaining agreements. Most policies require an employer to immediately investigate all complaints—especially those regarding harassment and discrimination.

The "who, what, where, when, and why" of workplace investigations can be a minefield for employers. If not done correctly, an investigation can lead to expensive litigation, increased liability, and unwanted exposure. Furthermore, how an employer begins an investigation can determine how successful it will be. Although far from comprehensive, an employer should take the following into consideration when preparing to begin an investigation:

SHOULD THE EMPLOYER INVESTIGATE? One of the biggest mistakes employers make is not investigating complaints at all. Not investigating complaints could result in escalating problems, increased liability and employees feeling as though the employer is not taking their complaints seriously. If an employer receives a complaint regarding potential policy violations, the employer should be sure to follow its established policies for investigation.

WHO SHOULD INVESTIGATE? Most organizations have their Human Resources (HR) Department handle complaints and investigations. If your organization does not have an HR Department, it might be necessary to have an outside third party conduct the investigation. The key—whether it is an internal or external investigation—is that the individual investigating should (1) have experience conducting work-

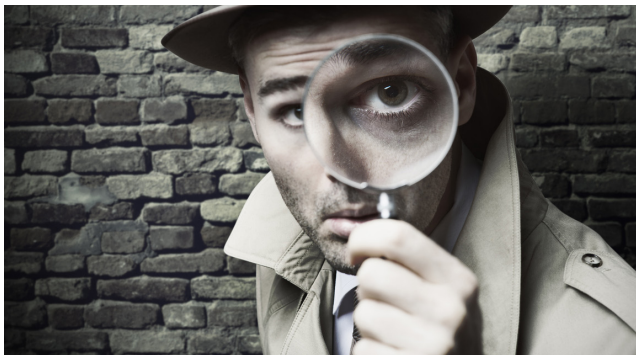
for assistance. We have worked with you on and heard your stories about countless of these types of encounters. This knowledge of what you do and the fact that you do it with such care and commitment really makes a difference – not only to the public who we serve but to each of us individually when we think about our career satisfaction or when we need to find that extra push to keep going after a stressful week.

This section of the newsletter is intended to share with you what might be going on in a partner's head at a certain point in time – more precisely when we are assigned the task of writing the article. As I sat down to write this article, the thoughts above were in my head. Why, you ask??

Well, it seems that every time I read a newspaper or watch the news, all I find is animosity and division when folks talk about the government – especially the federal government. It goes without saying that the federal government is dealing with issues of great importance, but these are also issues about which people have passionate points of view. This has resulted in a distrust of government – in fact, many people even express anger at government. This has also created strong divisions between neighbors and family members. To me, these feelings make those services

place investigations; (2) be familiar with your organization's policies,rules, and applicable state and federal laws, and (3) not be involved (as a witness or potential respondent) with the underlying complaint issues.

WHEN SHOULD HR NOT INVESTIGATE? There are certain circumstances when an organization should consider hiring a third party investigator instead of using the HR Department. One of the most important factors in selecting an investigator is ensuring the person (or persons) conducting the investigation are unbiased and objective. If allegations include, for example, complaints against the HR Department for failure to reasonably accommodate a disability or discrimination in hiring or firing, or when the allegations are against the individuals supervising HR (i.e. the city manager or administrator), the HR Department may not be well suited to investigate the complaint. If you do need to look outside your organization for an investigator, keep in mind the principles mentioned above: you want to find someone with experience in these types of investigations who does not have any conflicts.



WHAT SHOULD BE THE SCOPE OF THE INVESTIGATION? It is important to identify up front what issues andor potential policy violations are being investigated. If other potential policy violations come to light during the investigation they typically will require their own separate investigation, unless they are related to the initial inquiry. It is also critical that the employee(s)being investigated are notified of the potential violations. This is imperative particularly when dealing with employees who are represented by unions with specific collective bargaining contract provisions requiring notification of new violations, etc.

WHO SHOULD BE INTERVIEWED? An investigation usually starts with interviewing the complaining party and anyone else who may have information about the complaint. Once the investigator has completed those interviews, he or she should prepare to interview the subject of the investigation.

WHO ELSE SHOULD BE INTERVIEWED? If an employee indicates that the investigator should talk to other employees who were possible witnesses or who might have pertinent information, follow-up! Neglecting to follow up with these individuals could lead to a challenge to the thoroughness of the investigation.

WHAT TYPES OF QUESTIONS SHOULD BE PREPARED? It is helpful to ask open-ended questions first and to let the interviewee "set the stage." Once you have the interviewee's full version of the story, the interviewer will need to follow up with specific questions in order to clarify important points. For example, if an employee states "my supervisor was angry" the interviewer should ask why the interviewee thought the supervisor was angry (his voice was raised, he was shaking his fist, his face got very red…). In other words, have questions prepared ahead of time, but be flexible during the actual interview – be sure to listen to the answers and respond based on what you are hearing.

Also, when preparing questions keep in mind that this is an employment, and not a criminal, investigation. Treating an employee like a criminal during an investigation will likely thwart your efforts to get the information you need and may discourage employees from participating in future investigations. Furthermore, being overly aggressive or harsh could shut employees down and lead to an incomplete investigation.

ARE THESE DOCUMENTS PUBLIC RECORDS? Investigators should be cognizant of the fact that investigations of public employees and all associated documents are public records. While some investigations or parts of investigations might be exempt from disclosure, an investigator should never state the records will remain confidential. Rather, an investigator should clearly indicate he or she will keep the records confidential to the extent possible to conduct a thorough investigation and comply with the Oregon Public Records Laws.

HOW SHOULD EACH INTERVIEW BEGIN? We recommend an interview start with the interviewer reviewing the purpose of the interview and the role of the investigator; disclosing that records created may be public records subject to disclosure; and admonishing against retaliation.

we provide at the local government level that much more important. Regardless of one's political affiliation or views on these important matters, everyone can agree that it's of great consequence to our collected quality of life that local governments continue to provide the vital services that they do. I believe this is one small step towards healing our current divide – for if people can recognize that local governments can get so much done – often with few resources – perhaps they will have a little bit of their faith restored in government.

So, my thoughts for this article are of thanks. Thank you for all that you do on behalf of your communities. Thank you for continuing to build the public's faith in government, and thank you for letting us assist you with these endeavors. It is truly an honor for us to do so.

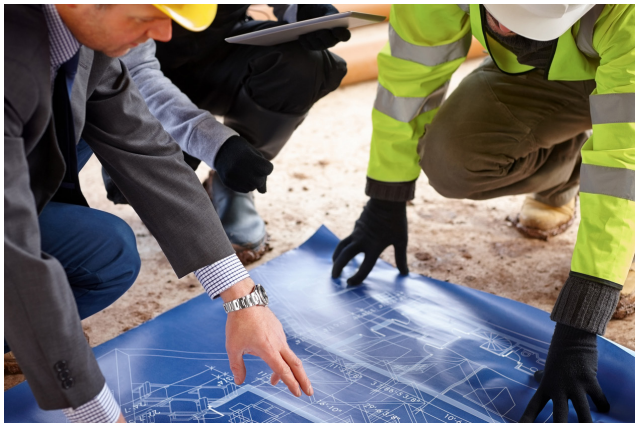
Conducting a thorough and impartial investigation can be tough. Being prepared at the beginning will avoid complicated issues down the road. Please keep in mind your City Attorney's Office can help! We can assist with setting out the investigation by preparing proper notice letters, identifying potential policy violations, locating an independent investigator if needed, preparing questions, and answering any other questions that may arise.

Heather Martin and Ashley Driscoll

Developers, Utility Poles and the Law of Agency

IN NOVEMBER OF last year, the Oregon Court of Appeals (the "Court") issued its opinion in *Bull Mountain Meadows, LLC v. Frontier Communications Northwest, Inc*. This case will be of particular interest to planners, public works directors and engineers for public bodies.

The facts of the case are familiar. Bull Mountain Meadows applied for a subdivision in Washington County and the county approved it, with conditions. One of the conditions was to improve right-of-way to the county's relevant standards for "collector" streets. Neither the approval nor the conditions directed or required Bull Mountain Meadows to relocate utility poles in the affected right-of-way. However, in order to complete the improvements to the right-of-way, it was necessary for Frontier's utility poles in the right-of-way to be moved. Bull Mountain Meadows requested Frontier relocate the poles and Frontier demanded advance payment for the cost of doing so.



Under Oregon law, the entire cost of relocating utility poles must be borne by the party making the request, unless the request is made by a "Public Body" as defined in state law. In challenging Frontier's demand, Bull Mountain argued to the Oregon Public Utilities Commission that it was an "agent" of Washington County and therefore Frontier was required to absorb the cost of relocating the poles. The OPUC disagreed and ruled that Frontier had the right to demand the entire relocation cost from Bull Mountain.

The Court affirmed the PUC's rejection of Bull Mountain's claims. In order to qualify as an "agent" of Washington County, the Court identified two requirements that Bull Mountain must meet: (1) a manifestation by the principle to the agent that the agent may act on his account and consent by the agent to so act; and (2) the agent must be subject to the principle's control. In this case, the Court held that the evidence failed to establish that Washington County intended for Bull Mountain to act as the county's agent, nor did any evidence demonstrate that Bull Mountain consented to act as an agent of the county.

To the extent local governments are interested in assisting a developer to avoid utility relocation costs, an agreement expressly designating a developer as an agent for these purposes may suffice. As always, it is wise to consult with legal counsel prior to doing so to ensure that the agreement, and related language in an order approving a development, sufficiently establishes the agency relationship.

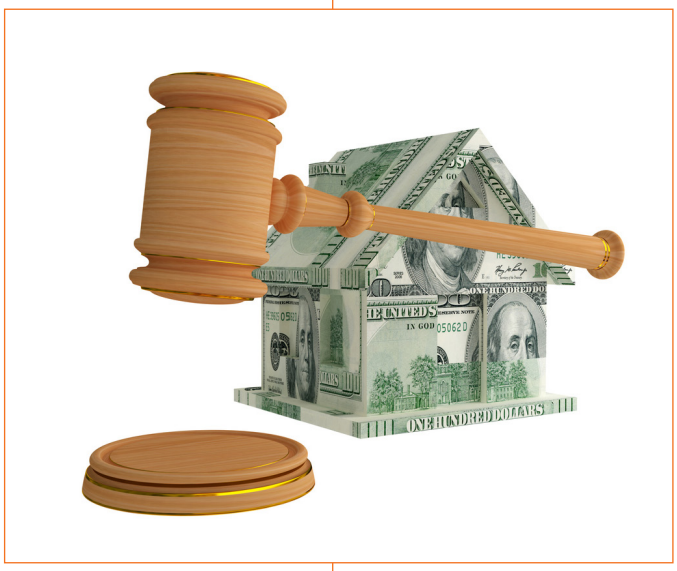
David Doughman

Lien Recording Basics

Let us know about any interesting projects happening in or planned for your community! We'd love to feature you in our next Client Corner segment.

IF YOUR CITY records liens against property for unpaid bills, fines, nuisance abatement costs, or other similar costs, it is important to take all the appropriate lien recording steps to perfect the lien and provide constructive notice to ensure collection as some point in the future.

First, the lien should be authorized under the city's code. The code should clearly state that after a certain time period and appropriate notices, an outstanding fine and/or costs will be become a lien against the associated property.



Second, the city must either list this lien in its own city lien docket (online electronic medium) OR it must be recorded with the county recorder. If the city maintains its own city lien docket, certain steps must be taken to ensure the lien docket meets state requirements. Namely, a notice must be recorded with the county clerk stating that a city has created an electronic lien record as of the recording date which takes priority over any county lien record. It must also include information on how the city's lien records are accessible to the public. ORS 93.643(5).
If it is not clear whether the city has done this, contact your county recorder and ask for a copy of the recording.

The city electronic lien record must also contain the following information:

- the effective date of the recording;
- a reference to the location of source documents or files;
- a description of real property in the manner prescribed in ORS 93.600;
- a site address,
- if appropriate, a state property identification number or county property tax identification number;
- alien account number or other account identifier;
- the amount of the estimated assessment or system development charge installment payment contract;
- the final assessment in the case of a local improvement assessment district; and
- the current amount of principal balance.

Finally, the city lien record should be accessible online to any individual or organization by mutual agreement with the city. Users of the online electronic medium shall be authorized to access the lien records from equipment maintained at sites of their choosing. Most cities contract with firms like Net Assets to provide this service for them. In turn Net Asset provides the appropriate information to title companies, buyers, real property professionals, etc.

Taking these steps and making certain the lien is enforceable will protect the city from challenges down the road.

Please call our office if you have any additional questions.

Heather Martin

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