
SENATE COMMITTEE ON INSURANCE

Senator Susan Rubio, Chair

2021 - 2022 Regular

Bill No:	SB 334	Hearing Date:	March 25, 2021
Author:	Durazo		
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Urgency:	No	Fiscal:	Yes
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SUBJECT: Detention facilities: contracts

DIGEST: This bill imposes liability, auto, and umbrella insurance requirements on for-profit, private detention facilities that house criminal and civil detainees, and prohibits them from self-insuring workers' compensation coverage. This bill also provides that an insurer shall require the facility to comply with specified operating standards, to provide the insurer and Insurance Commissioner with an initial compliance report and quarterly updates, and requires the insurer to send a notice to the facility and Commissioner that the contract will be canceled if identified deficiencies are not corrected within 60 days.

ANALYSIS:

Existing law:

- 1) Authorizes a city, county, city and county, or law enforcement agency ("local governmental entity") to contract with a for-profit, private local detention facility holding a local prisoner pursuant to a contract under specified conditions.
 - a) The contract must require compliance with the following specified detention standards:
 - i) All appropriate state and local building, zoning, health, safety, and fire statutes, ordinances, and regulations, and with specified minimum jail standards established by regulations adopted by the Board of State and Community Corrections; and
 - ii) Selection and training requirements adopted by the Board of State and Community Corrections as specified.
 - b) The governmental entity, after discovering that the facility has failed to comply with the specified detention standards, must notify the director of the facility that sanctions shall be applied or that the contract will be cancelled if deficiencies are not corrected within 60 days. (Penal Code § 6031.6.)
- 2) Prohibits local governmental entities from contracting with a facility to house noncitizens for the purposes of civil immigration custody ("civil detainees"), except if those entities had a contract in force as of January 1, 2018, but may not renew or modify that contract in a manner that expands the number of beds to house civil immigration detainees. (Civil Code § 1670.9.)
- 3) Prohibits the California Department of Corrections and Rehabilitation (CDCR) from entering into or renewing a contract with a for-profit, private prison after January 1,

2020, and prohibits CDCR from allowing a person under its jurisdiction to be housed at one of these facilities after January 1, 2028, except that CDCR may renew or extend a contract in order to comply with a court-ordered population cap. (Penal Code § 5003.1.)

- 4) Requires employers to:
 - a) Carry workers' compensation insurance; or
 - b) Self-insure workers' compensation benefits by securing a certificate of consent to self-insure from the Director of the Department of Industrial Relations. (Labor Code § 3700.)

This bill:

- 1) Extends detention standards that apply to a for-profit, private local detention facility when holding a local prisoner (listed in Penal Code § 6031.6.) so that they also apply when a facility holds a civil detainee.
- 2) Requires these facilities to comply with applicable detention standards (Penal Code § 6031.6); state and local building, zoning, health, safety, and fire statutes or ordinances; and minimum jail standards established by the Board of State and Community Corrections when holding a local prisoner or a civil detainee.
- 3) Requires these facilities to maintain the following insurance coverages:
 - a) General liability, including directors' and officers' liability, medical professional liability, and liability for civil rights violations of at least \$5 million per occurrence and \$25 million in aggregate.
 - b) Automobile liability coverage of at least \$5 million per occurrence.
 - c) Umbrella liability coverage of at least \$25 million per occurrence and \$25 million in aggregate.
- 4) Requires liability, auto, umbrella, and workers' compensation insurance policies issued to one of these facilities to include the following:
 - a) Any contracted governmental entity named as an insured on the policy;
 - b) A provision that requires the facility to comply with applicable detention standards as specified;
 - c) A provision that requires the facility to provide an initial compliance report to the insurer and the Insurance Commissioner, and quarterly reports thereafter; and
 - d) A provision that grants the insurer the rights of notice and termination if the facility fails to comply with the applicable standards.
- 5) Prohibits these facilities from complying with the workers' compensation insurance requirement by obtaining a certificate of self-insurance.

- 6) Expressly requires the insurer providing insurance to one of these facilities to require the facility to comply with the applicable standards; requires the facility to provide the compliance report and quarterly updates as specified; and to notify the facility and the Insurance Commissioner that the contract will be canceled if deficiencies are not corrected within 60 days.

Background

According to the author:

“The poor health and safety standards in these facilities is documented in numerous investigations: a 2016 U.S. A.G. report, 2017 U.S. Homeland Security Report, and 2019 USA Today report depicting sexual assault, physical and mental abuse, inadequate medical care, and solitary confinement. In turn, California has taken a definitive stance to address the abusive and inhumane care towards detainees. Despite these efforts, operators’ reluctance to adopt more rigorous standards raises alarms about the health and safety of people detained in these facilities which have been exacerbated by the COVID-19 pandemic with reports of widespread COVID-19 outbreaks.

SB 334 (Durazo) offers a critical piece to the needed oversight of these private, for-profit facilities, ensuring they are adhering to all necessary health and safety standards. Insurance companies want to reduce risk to avoid losses and the control that insurance companies have over the availability and costs of coverage creates a financial incentive for private for-profit prisons and detention facilities to meet these standards if they are to continue to operate in California. The insurance requirements in this proposal ensure that coverage exists to protect and compensate persons who are harmed, while ensuring compliance with health and safety standards through insurance company risk management processes. This provides a powerful financial motivation for private prisons and detention facilities to adhere to local, state, and federal standards.”

For-profit, Private Detention Facilities. A for-profit, private detention facility is owned and operated by a nongovernmental entity that contracts with a governmental entity to house criminal and civil detainees for profit. The State of California has taken several steps to restrict use of these facilities for criminal detainees and protect those who are detained. In addition to criminal detainees housed in local jails or state prisons, federal immigration authorities enter into agreements with California local governments or local law enforcement to hold detainees, including immigrants who have not been convicted or charged with any crime, in their own publicly-run facilities (such as a county jail) or with a private detention facility. (See SB 29 (Lara) which prohibited local governments and local law enforcement from contracting with the federal government or any federal agency or a private corporation to house or detain noncitizens for purposes of civil immigration custody if they did not have a contract as of January 1, 2018. The bill also prohibited expansion of contracts that were in existence before January 1, 2018.)

The author points to several reports of unlawful treatment of detainees and civil rights abuses showing that for-profit, private facilities lack the same level of scrutiny as public facilities.¹

- A 2019 USA Today investigation of numerous facilities revealed more than 400 allegations of sexual assault or abuse, inadequate medical care and the frequent use of solitary confinement. This report also included 800 accounts of physical force against detainees; nearly 20,000 grievances filed by detainees; and at least 29 fatalities, including seven suicides. (*'These people are profitable': Under Trump, private prisons are cashing in on ICE detainees*, Monsy Alvarado, et al., USA Today, (Dec. 20, 2019) available at <https://www.usatoday.com/in-depth/news/nation/2019/12/19/ice-detention-private-prisons-expands-under-trump-administration/4393366002/> (as of March 16, 2021).)
- In 2020, ICE rushed to expand a contract with a 15-year term with the private detention facility in Adelanto, California. That facility had been the subject of a 2017 Department of Homeland security report that included a recommendation that involved immediately transferring "at-risk" detainees to another facility to protect their health and safety. Attorneys and advocates raise concerns that that the problems identified in the report persist. Inspectors from the Department of Homeland Security found that, in several cases, ICE and owner of the facility were either unwilling or unable to fix problems despite repeated warnings. (*Despite Findings of 'Negligent' Care, ICE to Expand Troubled Calif. Detention Center*, Tom Dreisbach, NPR, (January 15, 2020), <https://www.npr.org/2020/01/15/794660949/despite-findings-of-negligent-care-ice-to-expand-troubled-calif-detention-center> (as of March 16, 2021).)

Additionally, the author points to concerns raised by private lawyers and advocacy organizations that have filed several emergency lawsuits on the basis that ICE is not taking the steps necessary to ensure high-risk individuals are protected from the COVID-19 virus. Specifically, these lawsuits identify failures by these facilities to provide reliable access to soap and sanitizer, medical necessities, personal protection medical equipment, and space for social distancing, as well as failing to properly identifying individuals who face a high risk of contracting the virus. One lawsuit specifically described how 70 detainees had to share five bars of soap and how guards were working often without personal protection equipment. The first immigrant to die from COVID-19 died in a for-profit immigrant detention facility in California. (*First ICE detainee dies from COVID-19 after being hospitalized from Otay Mesa Detention Center*, Kate Morrissey, May 6, 2020 <https://www.sandiegouniontribune.com/news/immigration/story/2020-05-06/first-ice-detainee-dies-from-covid-19-after-being-hospitalized-from-otay-mesa-detention-center> (as of March 16, 2021).)

The Obama Administration began phasing out contracts with private prisons because, according to an August 18, 2016 memo from the Federal Bureau of Prisons, they “do not

¹ See Senate Committee on Judiciary analysis of AB 32 (Bonta, 2019), Comment 2, for additional documentation of serious abuses at for-profit detention facilities, including facilities in California.

provide the same level of correctional services, programs, and resources; they do not save substantially on costs; and as noted in a recent report by the Department's Office of Inspector General, they do not maintain the same level of safety and security.” (See <https://www.justice.gov/archives/opa/file/886311/download> (as of March 16, 2021).) Civil and human rights groups have also compiled reports of medical neglect and deaths in custody. However, under the Trump administration, the Bureau of Prisons reversed course and greatly expanded the use of for-profit prisons especially for civil immigration detainees who have not committed, or been charged with, a crime.

The California Legislature responded in 2016 by passing SB 1289 (Lara, 2016) which would have, among other things, prohibited local law enforcement agencies and local governments from contracting with for-profit entities to detain immigrants on behalf of federal immigration authorities. The bill was vetoed by Governor Brown. Governor Brown subsequently signed SB 29 (Lara, Ch. 494, Stats. 2017) which was substantially similar to SB 1289 and prohibited local governments and local law enforcement from contracting with the federal government or any federal agency or a private corporation to house or detain noncitizens for purposes of civil immigration custody if they did not have a contract as of January 1, 2018. The bill also prohibited expansion of contracts that were in existence before January 1, 2018.)

California responded again in 2019 by enacting AB 32 (Bonta) that prohibits the operation of a private detention facility within California and bars the California Department of Corrections and Rehabilitation from entering into or renewing a contract with a private prison company after January 1, 2020, except to comply with a court-ordered population cap. AB 32 equally applies to immigrant detention and criminal detention. According to the author, before AB 32 took effect, the federal government and the four major companies that own the for-profit detention facilities in California rushed to finalize contracts to take effect on December 20, 2019.² The author notes that those contracts are worth more than \$6 billion with some running up to 15 years.

Insurance Requirements. Insurance can have a positive or negative impact on the insured's behavior. It is positive when it allows us to freely engage in everyday activities, like driving a car without fear that even a minor accident could result in tens of thousands of dollars in liabilities and that injured third-parties will have some minimal source of compensation. By imposing insurance requirements, this bill further protects contracting agencies that might be liable for the conduct of a noncompliant facility (especially if the facility has already been notified that it is in violation of health and safety standards).

However, insurers are very careful about providing coverage that encourages risky activities. Some types of activities, like criminal conduct, cannot be insured at all. The contours of an insurer's obligations may be defined by how insurance impacts the motivations of the insured. This principle is codified in Insurance Code Section 533 that excuses an insurer from liability caused by the willful act of the insured, including punitive damages. (See *Peterson v. Superior Court* (1982) 31 Cal.3d 147.) For

² See: *How a private prison giant has continued to thrive in a state that wants it out: As California passes laws aimed at ridding the state of private immigration detention centers, GEO Group continues to expand* by Rebecca Plevin, Palm Springs Desert Sun (January 25, 2020) available at <https://www.desertsun.com/in-depth/news/2020/01/24/private-prison-giant-geo-thrives-california-state-wants-out/2589589001/> [as of 5/12/20].

example, an insurer may be barred as a matter of public policy from paying an order of restitution (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1269 “When the law requires a wrongdoer to disgorge money or property acquired through a violation of the law, to permit the wrongdoer to transfer the cost of disgorgement to an insurer would eliminate the incentive for obeying the law.”

CDI offers an example of how prevention via an insurance arrangement can be used to force improvements. According to the sponsor, in 2013 the California Joint Powers Authority threatened to revoke the City of Irwindale’s liability insurance unless City Hall and its police department took substantive steps to tackle “internal corruption.” The City was given eight items to fix in 18 months which pressured the City to get on a path toward overhauling its dysfunctional department.

For the insurer, this is a form of risk prevention or mitigation, similar to a homeowners insurer refusing to renew a policy unless the homeowner replaces a wood shingle roof with a more fire resistant material. This bill uses insurance as a risk prevention mechanism, as well as applies the public policy against insuring against willfully-caused injuries, by prohibiting insurers from covering facilities that persistently fail to comply with applicable standards. It is also designed to protect the contracting agency by requiring these policies to include the agency as a “named insured”. Additionally, the bill would prohibit these facilities from “self-insuring” its workers’ compensation coverage. Self-insuring means that the employer funds workers compensation liabilities and payments with their own cash. Self-insured employers are not regulated by CDI, but overseen by the Department of Industrial Relations, Office of Self-Insurance. CDI argues that prohibiting self-insurance protects the contracting agencies who may be liable if the facility becomes insolvent and leaves unfunded liabilities.

Related/Prior Legislation

SB 1222 (Durazo, 2020) substantially similar to the current bill, would have imposed liability, auto, and umbrella insurance requirements on for-profit, private detention facilities that house criminal and civil detainees, and prohibits them from self-insuring workers’ compensation coverage.

AB 32 (Bonta), Chapter 739, Statutes of 2019, beginning January 1, 2020, prohibits the Department of Corrections and Rehabilitation from entering into contracts with private, for profit- prisons in or out of state for housing state prison inmates.

SB 29 (Lara), Chapter 494, Statutes of 2017, established contracting restrictions and new notice and public hearing requirements upon local governments and local law enforcement agencies with respect to contracts, building permits, and other official actions involving the federal government, federal agencies, or private corporations seeking to house or detain noncitizens for purposes of civil immigration detention.

SB 1289 (Lara, 2016) would have, among other things, prohibited local law enforcement agencies and local governments from contracting with for-profit entities to detain immigrants on behalf of federal immigration authorities. Vetoed by Governor Brown. Governor Brown subsequently signed SB 29 (Lara, Ch. 494, Stats. 2017).

ARGUMENTS IN SUPPORT:

The Insurance Commissioner, Ricardo Lara, writes in support:

“Despite California’s ban on state and local government contracts with private for-profit prisons and detention facilities through AB 32 (Bonta, Chapter 739, Statutes of 2019) and my previous legislation, SB 29 (Lara, Chapter 494, Statutes of 2017), the federal government continued to circumvent existing state law by signing 15-year contracts before AB 32 took effect on January 1, 2020 with corporations, namely GEO Group, CoreCivic, and Management & Training Corporation, that construct and operate these private for-profit prisons and detention facilities in California.

Consequently, poor medical treatment leading to deaths of people in detention, lack of access to legal services leading to violations of civil rights, and other substandard conditions continue to plague private for-profit facilities because they repeatedly fail to meet minimum health and safety standards. This continued violation of health and safety standards has only been exacerbated by the pandemic, as deaths in immigration detention centers have skyrocketed across the United States due to delays in medical treatment and poor control of infectious diseases.”

SUPPORT:

California Department of Insurance (Sponsor)
California Immigrant Policy Center (Sponsor)
Coalition for Humane Immigrant Rights (Sponsor)
American Civil Liberties Union of California
Clergy and Laity United for Economic Justice
Communities United for Restorative Youth Justice
Disability Rights California
Immigrant Legal Resource Center
Inland Coalition for Immigrant Justice
Inland Equity Partnership
National Immigration Law Center
Norcal Resist
Oakland Privacy
Voices for Progress
Wellstone Democratic Renewal Club

OPPOSITION:

None on File (3-21-21)

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