

Date of Hearing: March 23, 2021
Counsel: David Billingsley

ASSEMBLY COMMITTEE ON PUBLIC SAFETY

Reginald Byron Jones-Sawyer, Sr., Chair

AB 263 (Bonta) – As Amended March 17, 2021

SUMMARY: Requires a private detention facility operator to comply with all local and state public health orders and occupational safety and health regulations. Specifically, **this bill:**

- 1) Specifies that a private detention facility operator shall comply with, and adhere to, all local and state public health orders and occupational safety and health regulations.
- 2) Defines “private detention facility operator” and “private detention facility” for purposes of this bill.
- 3) States that this bill shall not be construed to limit or otherwise modify the authority, powers, or duties of state or local public health officers or other officials with regard to state prisons, county jails, or other state or local correctional facilities.

EXISTING LAW:

- 1) Specifies that after January 1, 2020, California Department of Corrections and Rehabilitations (CDCR) shall not enter into a contract with a private, for-profit prison facility located in or outside of the state to provide housing for state prison inmates. (Pen. Code, § 5003. 1, subd. (a).)
- 2) States that after January 1, 2020, CDCR shall not renew an existing contract with a private, for-profit prison facility located in or outside of the state to incarcerate state prison inmates.
- 3) Specifies that after January 1, 2028, a state prison inmate or other person under the jurisdiction of CDCR shall not be incarcerated in a private, for-profit prison facility. (Pen. Code, § 5003. 1, subd. (b).)
- 4) Provides that notwithstanding the limitations on contracting with private prisons, CDCR may renew or extend a contract with a private, for-profit prison facility to provide housing for state prison inmates in order to comply with the requirements of any court-ordered population cap. (Pen. Code, § 5003. 1, subd. (d).)
- 5) Excludes a facility that is privately owned, but is leased and operated by CDCR from the definition of “private, for-profit prison facility” for purposes of the provisions described above. (Pen. Code, § 5003. 1, subd. (c).)
- 6) Prohibits a person from operating a private detention facility within California, with specified exceptions. (Pen. Code, §§ 9001-9005.)

- 7) Authorizes the Secretary of CDCR to enter into agreements with private entities to obtain secure housing capacity in another state. (Pen. Code, § 2915, subds. (b) & (d).)
- 8) Prohibits CDCR from operating its own facility outside of California. (Pen. Code, § 2915, subd. (b).)
- 9) Requires CDCR, to the extent that the adult offender population continues to decline, to begin reducing private in-state male contract correctional facilities in a manner that maintains sufficient flexibility to comply with the federal court order to maintain the prison population at or below 137.5 percent of design capacity. The private in-state male contract correctional facilities that are primarily staffed by non-Department of Corrections and Rehabilitation personnel shall be prioritized for reduction over other in-state contract correctional facilities. (Pen. Code, § 2067, subd. (a).)
- 10) Requires CDCR to consider the following factors in reducing the capacity of state-owned and operated prisons or in-state leased or contract correctional facilities:
 - a) The cost to operate at the capacity;
 - b) Workforce impacts;
 - c) Subpopulation and gender-specific housing needs;
 - d) Long-term investment in state-owned and operated correctional facilities, including previous investments;
 - e) Public safety and rehabilitation; and,
 - f) The durability of the state's solution to prison overcrowding. (Pen. Code, § 2067, subd. (b).)
- 11) Specifies that a city, county, or local law enforcement agency that does not, as of June 15, 2017, have a contract with the federal government to detain adult noncitizens for purposes of civil immigration custody, is prohibited from entering into a contract with the federal government, detain in a locked detention facility, noncitizens for purposes of civil immigration custody. (Gov. Code, § 7310, subd. (a).)
- 12) States that until July 1, 2027, the Attorney General, shall engage in reviews of county, local, or private locked detention facilities in which noncitizens are being housed or detained for purposes of civil immigration proceedings in California, including any county, local, or private locked detention facility in which an accompanied or unaccompanied minor is housed or detained.. (Gov. Code, § 12532, subd. (a).)
- 13) Requires any private detention facility operator to comply with, and adhere to, the detention standards of care and confinement agreed upon in the facility's contract for operations. (Gov. Code, § 7320, subd. (a).)

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Author's Statement:** According to the author, "The humanitarian crisis posed by the spread of COVID-19 in private immigration detention facilities in California is having disastrous consequences for those detained in those facilities, and should be of grave concern given the significant challenges this potential outbreak has for California as a whole. Civil detention facilities which house immigrants have requirements in their federal contracts with respect to health and safety, but it appears that these private corporations routinely violate the health and safety requirements for these facilities in their daily operations and have not followed public health orders or protocols. AB 263 ensures that California takes steps to clarify and state that all private detention facilities in the state must comply with and adhere to state and local public health orders. The bill empowers local and state public health officials to issue public health orders for private facilities, informed by the latest information on COVID-19."
- 2) **Private Detention Facilities:** The federal government contracts with private detention facilities throughout the country to house immigration detainees and federal criminal pretrial detainees. There are a variety of concerns regarding the use of private detention facilities.

In 2016, the U.S. Department of Justice's Office of the Inspector General conducted an investigation of private prisons and issued a report. The investigation found that private prisons were less safe than federal prisons, poorly administered, and provided limited long-term savings for the federal government. For example, the contract prisons confiscated eight times as many contraband cell phones annually on average as the federal institutions. Private prisons also had higher rates of assaults, both by inmates on other inmates and by inmates on staff. Additionally, two of the three contract prisons inspected by the Inspector General's Office discovered they were improperly housing new inmates in Special Housing Units (SHU), which are normally used for disciplinary or administrative segregation, until beds became available in general population housing. (See Review of the Federal Bureau of Prisons' Monitoring of Contract Prisons, August 2016, (<https://oig.justice.gov/reports/2016/e1606.pdf#page=2>.)

There are also concerns with the transparency of private detention facilities. Private, for-profit detention facilities are accountable to their shareholders and not the people of the State of California. For example, these facilities claim exemptions to the public disclosure requirements under the Freedom of Information Act (FOIA) (5 U.S.C. § 552) because they are private corporations, which makes the potentially unlawful conduct occurring within the facility hidden from discovery. These facilities similarly claim an exemption to California's State counterpart, the California Public Records Act (CPRA) (Gov. Code, § 6250 et seq).

AB 32 (Bonta), Chapter 739, Statutes of 2019, prohibited CDCR from entering into, or renewing contracts with private for-profit prisons after January 1, 2020, and eliminates their use by January 1, 2028. AB 32 also prohibits the operation of a private detention facility (including those housing immigration detainees) within the state, except as specified. AB 32 provides limited exemptions to the prohibition on private prisons.

- 3) **The Trump Administration Sued California Over AB 32:** The Trump administration filed a lawsuit against the state of California on January 24, 2020, asserting that AB 32's ban on private prison contracts unconstitutionally interferes with the federal prison and immigration detention systems. The case, filed in U.S. District Court in San Diego, asked a

judge to ban the enforcement of the law against the federal government.

The lawsuit stated, “California, of course, is free to decide that it will no longer use private detention facilities for its state prisoners and detainees, but it cannot dictate that choice for the federal government, especially in a manner that discriminates against the federal government and those with whom it contracts.”

<https://www.latimes.com/california/story/2020-01-25/trump-administration-sues-california-over-private-prison-ban>

In October, 2020, AB 32 was mostly upheld by a federal district court judge, with the court denying a Trump administration request to block the law, but exempting the use of some private prisons. *Geo Grp., Inc. v. Newsom*, (Southern Dist. Cal.) 2020 U.S. Dist. LEXIS 187261.) The judge did conclude the AB 32 is an obstacle as applied to the U.S. Marshal Services contracts with private detention centers, but not an obstacle to the Bureau of Prisons’ halfway houses and ICE’s contracts with private prison centers. The judge stated, “Congress clearly authorized USMS to use private detention facilities in limited circumstances, such as where the number of USMS detainees in a given district exceeds the available capacity of federal, state, and local facilities” and “A.B. 32 therefore forecloses USMS from contracting with private detention facilities in those districts in which there does not exist sufficient availability in federal, state, or local facilities, in contravention of Congress’ clear and manifest objective that the option be available,” (*Id.* at 56.)

As part of its holding, the court found that “AB 32 does not regulate federal contracting, but rather the operation of private detention facilities within California, and any incidental effect on the Federal Government’s contracting interests does not suffice to establish field preemption. Accordingly, the Court concludes that the United States’ interest in federal contracting does not preempt AB 32. (*Id.* at 88-89.)

The district court judge did preliminarily enjoin enforcement of California’s ban against USMS’s private detention facilities because they may face “disrupted operations and the incurrence of uncompensable damages, respectively.”

<https://www.courthousenews.com/judge-largely-upholds-california-law-banning-private-prisons/>

An appeal was filed from the District Court’s judgment.

- 4) **Immigration Detention Facilities and Covid-19:** Private detention centers, like jails and prisons, are epicenters for infectious diseases because of the higher prevalence of infection, the higher levels of risk factors for infection, the close contact in often overcrowded, poorly ventilated facilities, and the poor access to health-care services relative to that in community settings.

According to ICE, In March, they convened a working group between medical professionals, disease control specialists, detention experts, and field operators to identify additional enhanced steps to minimize the spread of the virus. ICE states that they have evaluated its detained population based upon the CDC’s guidance for people who might be at higher risk for severe illness as a result of COVID-19 to determine whether continued detention was appropriate. Of this medical risk population, ICE has released over 900 individuals after evaluating their immigration history, criminal record, potential threat to public safety, flight

risk, and national security concerns. ICE says that this same methodology is currently being applied to other potentially vulnerable populations currently in custody and while making custody determinations for all new arrestees. (<https://www.ice.gov/coronavirus> (detention - updated 5/4/2020).)

There is confusion as to which entities should be administering vaccines to individuals held in immigration detention centers. Because detainees are in federal custody, state health officials have said that they aren't sure who is responsible for vaccination at the detention centers. "I will tell you very transparently right now, the answer is I don't know," California Surgeon General Nadine Burke Harris, who chairs the state's vaccine advisory committee, told committee members in February, 2021. "There are some real complex jurisdictional issues that are at play." (<https://calmatters.org/health/coronavirus/2021/02/immigrants-detention-centers-vaccine/>)

So far, 571 people have tested positive for the coronavirus in California's seven immigration detention centers, including 270 at the Adelanto facility in San Bernardino County. California's detention centers can house about 7,000 people, although attorneys estimate that they are now housing fewer than 2,000.

U.S. Immigration and Customs Enforcement officials say that while its medical staff may help administer the vaccinations, it's up to states and local health departments to come up with the doses and a plan for vaccinating detainees. Six of California's seven centers are operated by private companies. (*Id.*)

- 5) Private Detention Centers and State and Local Health Orders:** The federal court case (*Geo Grp., Inc. v. Newsom, supra*) which upheld the ban on private detention facilities in California discussed the fact that the fact that regulation and oversight of health matters is generally an issue for state and local governments.

The 9th District Court of Appeals noted that "The [U.S.] Supreme Court has long recognized that "the regulation of health and safety matters is primarily, and historically, a matter of local concern" and pointed out that "the Ninth Circuit recently recognized that "California possesses the general authority to ensure the health and welfare of inmates and detainees in facilities within its borders." *Geo Grp., Inc. v. Newsom*, at 45-46 (citing *Hillsborough City. v. Automated Med. Labs., Inc.* (1985), 471 U.S. 707, and *United States v. California* (9th Cir. 2019), 921 F.3d 865, 885-86 (9th Cir. 2019))

To the extent that that this bill seeks to clarify that private detention facilities must comply with state and local public health orders, that clarification seems consistent with the scope of California's existing authority to do so.

- 6) Argument in Support:** According to the *Immigrant Legal Defense*, "During a pandemic in which the actions of a few can impact the wellbeing of so many, accountability for private prison operators is paramount. While the consequences of COVID- 19 in private detention are dire for those detained, it should be of grave concern given the significant challenges this potential outbreak has for California as a whole. Outbreaks in these facilities can quickly overwhelm local hospitals and drain medical resources, threatening community health and public safety.

“Civil detention facilities that house immigrants have requirements in their federal contracts with respect to health and safety. This includes language requiring each facility to “comply with current and future plans implemented by federal, state or local authorities addressing specific public health issues including communicable disease reporting requirements.” In addition to the mandatory requirements related to public health, the federal government has issued broad requirements related to the day to day operations of these facilities, including requirements related to health and safety in these facilities.

“Based on reports in the press and by those detained inside these facilities, it appears that these private corporations routinely violate the health and safety requirements for these facilities in their daily operations, and have not followed public health orders or protocols. California must take steps to clarify that all private detention facilities in the state must abide by state and local public health orders. This would ensure the statewide coordination that will be needed to secure our state during the COVID-19 pandemic. California must also ensure that all of these facilities are following occupational health and safety regulations in their operations.”

7) Related Legislation:

- a) AB 937 (Carrillo), would eliminate the existing ability under the Values Act for law enforcement agencies to cooperate with federal immigration authorities by giving them notification of release for inmates or facilitating inmate transfers.

8) Prior Legislation:

- a) AB 3228 (Bonta), Chapter 190, Statutes of 2020, required any private detention facility operator to comply with, and adhere to, the detention standards of care and confinement agreed upon in the facility’s contract for operations.
- b) AB 2598 (Bonta), of the 2019-2020 Legislative Session, would have required, before a California law enforcement agency enters into or amends a Memorandum of Understanding (MOU) regarding the agency’s participation on the Federal Joint Terrorism Task Force, that the agency submit the proposed MOU and any procedures relevant to the subject matter of the MOU to its governing body, or the Attorney General as appropriate, for approval. AB 2598 was never heard in the Assembly Public Safety Committee.
- c) AB 3181 (Bonta), of the 2019-2020 Legislative Session, would have required any facility in the state that detains, confines, or holds an individual in custody to develop written policies and procedures to ensure persons detained have access to basic minimum standards with respect to due process and access to the court and to legal counsel and the minimum standards specified in state regulations. AB 3181 was never heard in Assembly Public Safety Committee.
- d) AB 32 (Bonta), Chapter 739, Statutes of 2019, prohibits CDCR from entering into, or renewing contracts with private for-profit prisons after January 1, 2020, and eliminates their use by January 1, 2028. AB 32 also prohibits the operation of a private detention facility within the state, except as specified.

- e) AB 103 (Committee on Budget), Chapter 17, Statutes of 2017, requires that until July 1, 2027, the Attorney General, to engage in reviews of county, local, or private locked detention facilities in which noncitizens are being housed or detained for purposes of civil immigration proceedings in California, including any county, local, or private locked detention facility in which an accompanied or unaccompanied minor is housed or detained.
- f) AB 1320 (Bonta), of the 2017-2018 Legislative Session, would have prohibited CDCR from entering into, or renewing contracts with private prisons after January 1, 2018, and eliminates their use by January 1, 2028. AB 1320 was vetoed.

REGISTERED SUPPORT / OPPOSITION:

Support

ACLU of California
Alianza Sacramento
American Academy of Pediatrics, California
California Attorneys for Criminal Justice
California Collaborative for Immigrant Justice
California Immigrant Policy Center
California Pan - Ethnic Health Network
California Public Defenders Association (CPDA)
Campaign for Immigrant Detention Reform
Central Valley Immigrant Integration Collaborative
Centro Legal De LA Raza
Clergy and Laity United for Economic Justice
Coastside Immigrant Action Group
Community Legal Services in East Palo Alto
County Health Executives Association of California (CHEAC)
Dolores Street Community Services
Ella Baker Center for Human Rights
Hand in Hand: the Domestic Employers Network
Health Officers Association of California
Human Rights Watch
Ice Out of Marin
Immigrant Defenders Law Center
Immigrant Defense Advocates
Immigrant Legal Defense
Inland Equity Partnership
Justice LA
Law Office of Helen Lawrence
N
National Association of Social Workers, California Chapter
Nextgen California

Norcal Resist
Oakland Privacy
Oasis Legal Services
Phi Delta Epsilon of UCLA
Physicians for Human Rights
Public Law Center
Rei
Riverside Sheriff's Association
Riverside Sheriffs' Association
San Francisco Public Defender
San Joaquin College of Law - New American Legal Clinic
Secure Justice
Siren: Services Immigrant Rights and Education Network
Southeast Asia Resource Action Center
Step Up Sacramento
UCLA David Geffen School of Medicine
Unitarian Universalist Legislative Ministry, California
University of San Francisco
Worksafe

Oppose

None

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