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DOJ Says All USVI Agencies Must Report People Known to Lack Lawful Immigration Status

Justice Department reverses a 28-year policy, extending the immigration-reporting duty across the V.I. government and warning that jurisdictions receiving federal welfare funds could face serious consequences, including loss of funding, for noncompliance.

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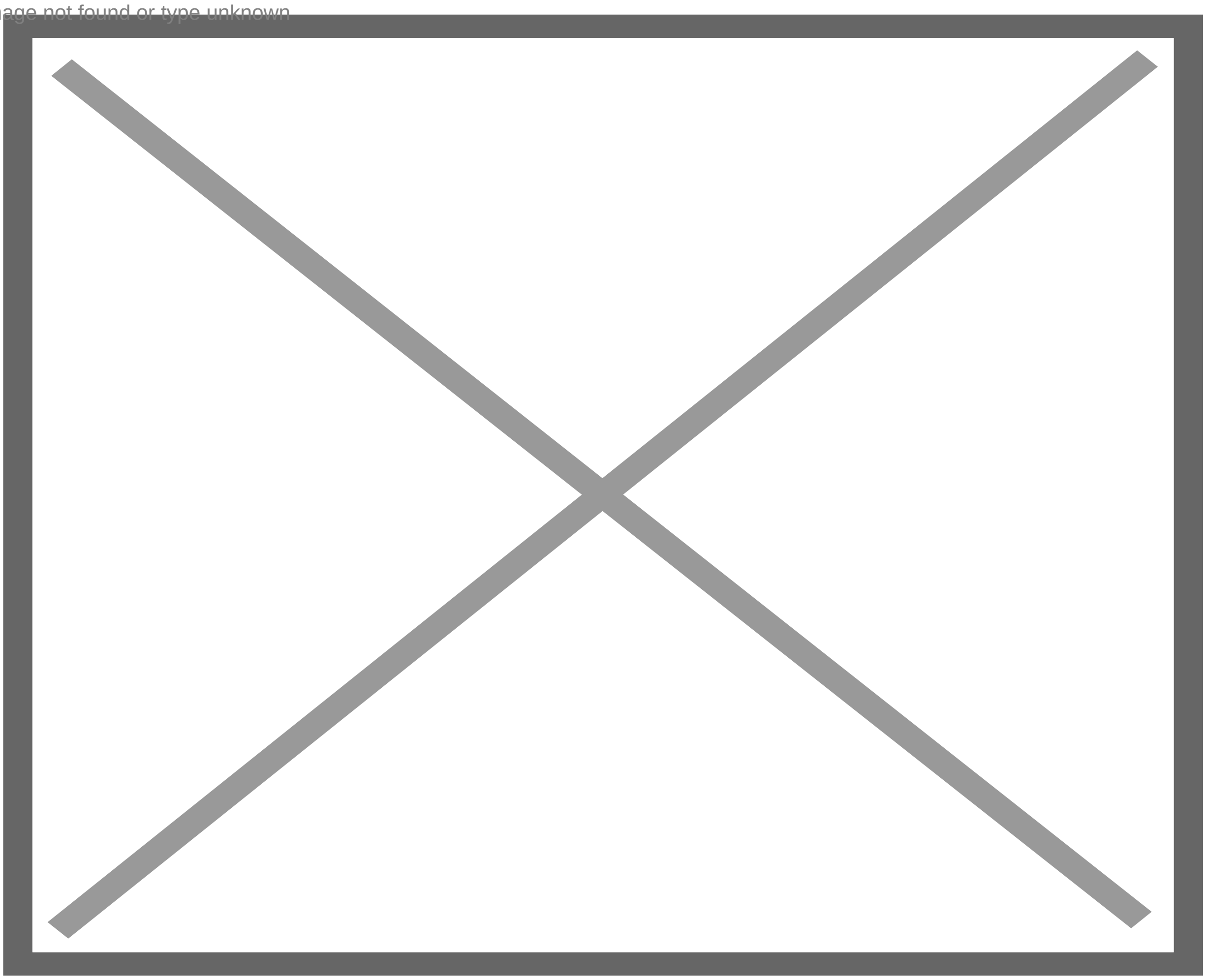

The U.S. Department of Justice headquarters in Washington, D.C., where officials issued a new legal interpretation requiring USVI agencies to report people known to lack lawful immigration status.

A sweeping new legal interpretation from the U.S. Department of Justice says the Government of the Virgin Islands' participation in the federal Temporary Assistance for Needy Families program subjects all component government agencies — not simply the Department of Human Services — to an immigration-status reporting requirement contained in federal welfare law.

The opinion, issued Sept. 1 by the Justice Department's Office of Legal Counsel and announced publicly Wednesday, reverses a 28-year-old federal interpretation that had confined the reporting obligation principally to the state or territorial agencies administering the affected benefits programs.

The U.S. Virgin Islands is not merely covered by implication. The federal law at issue expressly defines "State" to include the 50 states, District of Columbia, Puerto Rico, the United States Virgin Islands, Guam and American Samoa. DOJ now says that term refers to the entire sovereign government, including its component agencies.

The underlying requirement comes from Section 404 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, the law that created TANF. For jurisdictions receiving TANF grants, federal law requires the government, at least four times annually and upon request, to provide federal immigration authorities with the name, address and other identifying information of any person the government knows is unlawfully in the United States.

For nearly three decades, however, the federal government interpreted that language more narrowly.

A 1998 Office of Legal Counsel opinion concluded that "State" in this context effectively meant the state agency administering the particular federally funded program. Under that approach, an agency outside the welfare system was not brought within the mandatory reporting provision merely because the jurisdiction as a whole participated in TANF.

The Justice Department has now withdrawn that opinion.

In its new analysis, OLC concluded that Congress deliberately used the broader word "State," rather than "State agency," and that the statute's own definition controls. "State," DOJ determined, refers to the sovereign entity and therefore encompasses its component agencies. The opinion specifically uses the U.S. Virgin Islands while explaining the territories covered by that definition.

That distinction has significant consequences locally because the Virgin Islands currently participates in TANF through the V.I. Department of Human Services' Division of Family Assistance. TANF provides assistance to qualifying families with dependent children, and the territory continues to operate the federally supported program.

Under DOJ's new interpretation, participation in TANF means the federal reporting condition reaches beyond Human Services and attaches to the territorial government more broadly. The Justice Department's public announcement says explicitly that all agencies within a participating state or territory, rather than only agencies administering TANF or Supplemental Security Income, fall within the requirement.

The Supplemental Security Income portion of the opinion is largely inapplicable to the Virgin Islands because residents of the territory are not eligible for SSI. The Social Security Administration says people living in the U.S. Virgin Islands, Puerto Rico, Guam and American Samoa cannot receive SSI. That leaves the territory's participation in TANF as the principal local trigger for the newly expanded interpretation.

The Justice Department is also warning of financial consequences for governments that do not comply.

“States that accept TANF funding must abide by federal law, and failure to comply may lead to serious consequences, including loss of program funding,” Deputy Assistant Attorney General Joshua Craddock, who authored the opinion, said Wednesday.

The 19-page opinion goes further in explaining the funding leverage. OLC reasons that because the reporting requirement is a condition attached to TANF participation, the federal government may enforce that condition through the program's funding. The opinion says the existence of the reporting requirement across several federal programs allows federal agencies to withdraw funding associated with a program when a participating jurisdiction fails to satisfy the applicable reporting obligation.

Another potentially significant element concerns what it means for an agency to “know” that someone is unlawfully present.

A federal regulation adopted in 2000 established a relatively high threshold, generally tying knowledge to a formal determination supported by immigration authorities or an immigration court. The new OLC opinion sharply criticizes that standard, saying it set the threshold higher than the statute requires.

OLC contends that a government agency could possess sufficient knowledge even without a final removal order. The opinion gives examples including situations in which the Department of Homeland Security has notified an agency that someone lacks lawful status; a person acknowledges entering unlawfully and having no lawful basis to remain; immigration records establish that lawful status has expired or been terminated; or documents submitted to an agency establish the absence of lawful status.

The opinion also says an agency cannot deliberately avoid considering readily available information in order to prevent itself from acquiring knowledge of someone's status. How federal agencies reconcile that new interpretation with the existing 2000 regulation is likely to be an important part of subsequent implementation guidance.

DOJ nevertheless characterizes the broader reporting regime not as a newly created obligation but as enforcement of the law Congress enacted in 1996. OLC acknowledges that governments will face increased reporting burdens compared with the previous system but maintains that the change results from correcting what it now considers an erroneous 1998 interpretation.

The change will operate prospectively. DOJ said governments will not be punished retroactively for having followed the federal government's previous interpretation, and OLC said federal agencies cannot claw back TANF or SSI funds from jurisdictions that complied with the former policy. Participating jurisdictions remain free to reconsider whether they want to continue participating in the programs going forward.

The opinion also raises potentially consequential privacy questions. OLC points to another provision of the 1996 law stating that no state or local government entity may be prohibited or restricted from exchanging immigration-status information with federal authorities. DOJ reasons that the provision can override state or local restrictions, including privacy rules that might otherwise prevent information from being shared where federal law requires it.

The new position is an Office of Legal Counsel opinion, not a ruling by a federal court. OLC provides authoritative legal advice to the federal Executive Branch, and its formal opinions generally control how Executive Branch agencies interpret legal questions unless displaced by higher authority. Federal agencies can now use the Sept. 1 opinion to revise TANF grant terms, compliance procedures and reporting requirements.

For the Virgin Islands government, the practical consequence is potentially significant: a reporting responsibility that for decades was understood as principally belonging to the agency administering federal welfare benefits is now being interpreted by the Justice Department as extending throughout the government's component agencies.

The next critical question is how the incoming administration will implement that requirement, including which territorial agencies will be directed to report, what information must be transmitted, how officials will determine that the federal “knowledge” threshold has been met, and what procedures will be established to ensure compliance without incorrectly reporting people whose immigration status is uncertain or lawful.