

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

SB 836 (Wiener)
Version: February 18, 2022
Hearing Date: March 29, 2022
Fiscal: No
Urgency: Yes
TSG

SUBJECT

Evidence: immigration status

DIGEST

This bill reinstates a lapsed prohibition on the disclosure of a person's immigration status in open court unless the judge presiding over the matter first determines, after a closed hearing, that the evidence is admissible.

EXECUTIVE SUMMARY

The fair and effective administration of justice requires that all participants in the process feel free and secure to present their case or provide their testimony before the court. If taking part in the formal legal system might expose their immigration status, some undocumented immigrants may be reluctant to do so. In recognition of this dynamic, California enacted laws in 2018 prohibiting the disclosure of evidence about immigration status in open court unless pre-approved by a judge during a closed hearing on the matter. Due to a collective oversight, these legal protections expired on December 31, 2021. This bill would restore them.

The bill is sponsored by the Los Angeles County District Attorney's Office, the San Francisco District Attorney's Office, the Coalition for Humane Immigrant Rights, the California Employment Lawyers Association, and Legal Aid at Work, who assert that the bill is needed to prevent immigration status from being abused to chill participation in the legal system. Support comes from worker, immigrant, and civil rights organizations. There is no opposition on file. This bill contains an urgency clause. It passed out of the Senate Public Safety Committee by a vote of 4-0.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) States that only relevant evidence is admissible, and except as otherwise provided by statute, all relevant evidence is admissible. (Evid. Code §§ 350, 351.)
- 2) Provides that relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post-conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court, subject to the existing statutory rule of evidence relating to privilege or hearsay, or inadmissibility. (Cal. Const., art. I, § 28.)
- 4) Defines “relevant evidence” as evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action. (Evid. Code § 210.)
- 5) Authorizes a court in its discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (Evid. Code § 352.)
- 6) Allows the credibility of a witness to be attacked or supported by any party including the party calling the witness. (Evid. Code § 785.)
- 7) Establishes that in determining the credibility of a witness and except as otherwise provided by law, the court or jury may consider any matter that has any tendency to prove or disprove the truthfulness of the witness’ testimony, including but not limited to:
 - a) the witness’ demeanor while testifying and the manner in which the witness testifies;
 - b) the character of the witness’ testimony;
 - c) the extent of the witness’ capacity to perceive, to recollect, or to communicate any matter about which the witness testifies;
 - d) the extent of the witness’ opportunity to perceive any matter about which the witness testifies;
 - e) the witness’ character for honesty or veracity or their opposites;
 - f) the existence or nonexistence of a bias, interest, or other motive;
 - g) any statement previously made by the witness that is consistent with the witness’ testimony at the hearing;
 - h) any statement made by the witness that is inconsistent with any part of the witness’ testimony at the hearing;
 - i) the existence or nonexistence of any fact testified to by the witness;

- j) the witness' attitude toward the action in which the witness testifies or toward the giving of testimony; or
 - k) the witness' admission of untruthfulness. (Evid. Code § 780.)
- 8) Provides that in a civil action for personal injury or wrongful death, evidence of a person's immigration status shall not be admitted into evidence, nor shall discovery into a person's immigration status be permitted. (Evid. Code § 351.2.)
- 9) Provides that for purposes of enforcing state labor, employment, civil rights, and employee housing laws, a person's immigration status is irrelevant to the issue of liability, and in proceedings or discovery undertaken to enforce those state laws no inquiry shall be permitted into a person's immigration status except where the person seeking to make this inquiry has shown by clear and convincing evidence that this inquiry is necessary in order to comply with federal immigration law. (Civ. Code § 3339(b); Gov. Code § 7285(b); Health & Saf. Code § 24000(b); Lab. Code § 1171.5(b).)

This bill:

- 1) Restores lapsed statutes providing that in a criminal case, evidence of a person's immigration status shall not be disclosed in open court by a party or that party's attorney unless the judge presiding over the matter first determines that the evidence is admissible in an in camera hearing requested by the party seeking the disclosure.
- 2) Emphasizes that in criminal matters, the provisions of the bill do not do any of the following:
 - a) apply to cases in which a person's immigration status is necessary to prove an element of a claim or an affirmative defense;
 - b) limit discovery in a criminal action; or
 - c) prohibit a person or the person's attorney from voluntarily revealing the person's immigration status to the court.
- 3) Restores lapsed statutes providing that in a civil case other than a case of personal injury or wrongful death (where evidence of immigration status is never admissible), evidence of a person's immigration status shall not be disclosed in open court by a party or that party's attorney unless the judge presiding over the matter first determines that the evidence is admissible in an in camera hearing requested by the party seeking disclosure.
- 4) Emphasizes that the provisions of the bill related to civil actions do not do any of the following:
 - a) apply to cases in which a person's immigration status is necessary to prove an element of an offense or an affirmative defense;

- b) impact otherwise applicable laws governing the relevance of immigration status to liability or the standards applicable to inquiries regarding immigration status in discovery or proceedings in a civil action; or,
 - c) prohibit a person or the person's attorney from voluntarily revealing the person's immigration status to the court.
- 5) Underscores that the provisions of this bill do not alter a prosecutor's existing obligation to disclose exculpatory evidence.
- 6) Contains an urgency clause.

COMMENTS

1. The problem the bill is intended to address

Though in many instances they have lived in the United States for decades and have deep roots here, undocumented immigrants reside in this country at perpetual risk of detention and expulsion from the country. Detention and expulsion from the country frequently tear families apart, disrupt community ties, cut dependents off from financial support, and displace people to countries where their health and safety may be at risk, they may not know anyone, and they may not even speak the local language. Because of this risk, many undocumented individuals tend to avoid situations that could expose their immigration status, especially in official, public proceedings. For that reason, undocumented immigrants are sometimes reluctant to serve as witnesses in trials or vindicate their legal rights by participating in a lawsuit. Bad actors exploit this reluctance to prey on undocumented people. The dynamic can also enable criminals to avoid accountability by undermining prosecutors' ability to marshal the necessary evidence for a conviction.

Long a concern for the rule of law and access to justice, this problem became even more pronounced in early 2017 when federal immigration enforcement policies shifted. Previously, federal immigration officers had focused on detaining serious criminals. New Trump Administration policies cast a much broader, less discerning net.¹ To make matters worse, in spite of pleas from California's Chief Justice, Tani Cantil-Sakauye, for them not to, federal immigration officials made it clear that they would conduct some of these immigration enforcement actions at California courthouses.² The result was a

¹ Compare Johnson, *Policies for the Apprehension, Detention and Removal of Undocumented Immigrants* (Nov. 20, 2014) U.S. Department of Homeland Security https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf (as of Mar. 17, 2022), with Kelly, *Enforcement of the Immigration Laws to Serve the National Interest* (Feb. 20, 2017) U.S. Department of Homeland Security, p.2 https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf (as of Mar. 17, 2022).

² Kopan, *Trump Administration Says ICE Courthouse Arrests Will Continue* (Mar. 31, 2017) CNN <http://www.cnn.com/2017/03/31/politics/ice-arrests-courthouses-sessions-kelly/> (as of Mar. 17, 2022).

dramatic increase in undocumented immigrants' fear of exposure, making them even less likely than ever to participate in the state's legal system.

The Biden Administration has pulled back somewhat from these extremes. In April 2021, it issued new guidelines restricting immigration enforcement at courthouses. Nonetheless, the new policy still allows ICE to conduct arrests at courthouses when: (1) it involves a national security matter; (2) there is an imminent risk of death, violence, or physical harm to any person; (3) it involves hot pursuit of an individual who poses a threat to public safety; (4) there is an imminent risk of destruction of evidence material to a criminal case; or (5) where necessary and with prior approval if there is public safety threat.³

2. California's response

In the face of this dynamic, California has enacted a number of measures designed to ensure that all of its residents feel as secure possible participating in the legal system.

For example, California has imposed strict limitations on the use of evidence regarding people's immigration status. AB 2159 (Gonzalez, Ch. 132, Stats. 2016) prohibited the use of immigration status evidence in personal injury and wrongful death lawsuits. AB 291 (Chiu, Ch. 489, Stats. 2017) declared, among other things, that the immigration or citizenship status of any person is irrelevant to any issue of liability or remedy in a legal dispute between a landlord and tenant over housing rights. The bill also included a bar on inquiries into a tenant's immigration or citizenship status in discovery or proceedings related to such housing disputes. AB 1690 (Assembly Judiciary Committee, Ch. 160, Stats. 2017) further clamped down on the use of immigration status evidence as a method for intimidating people from exercising their legal rights by codifying case law which affirmed that evidence of immigration status is irrelevant for the purposes of establishing liability when enforcing all consumer protection, labor, employment, civil rights, and housing laws. The bill prohibited inquiry into a person's immigration status in such cases, except if necessary to comply with federal immigration laws.

To further ensure that all Californians feel as secure as possible when accessing the state's courthouses, California also codified the longstanding common law privilege against civil arrest of people coming and going from court and explicitly empowered judicial officers to enforce the privilege. (AB 668, Gonzalez, Ch. 787, Stats. 2019.)

Of particular relevance to this bill, in 2018, California enacted SB 785 (Wiener, Ch. 12, Stats. 2018). SB 758 established a system for avoiding the exposure of immigration status information in court unless and until a judge determines that the information is

³ DHS Announces New Guidance to Limit ICE and CBP Civil Enforcement Actions In or Near Courthouse (Apr. 17, 2021) U.S. Department of Homeland Security <https://www.dhs.gov/news/2021/04/27/dhs-announces-new-guidance-limit-ice-and-cbp-civil-enforcement-actions-or-near> (as of Mar. 17, 2022).

relevant and admissible. Specifically, rather than permitting parties to begin questioning or discussing the immigration status of any other party or witness in open court, SB 785 required the party seeking to introduce the evidence to request a confidential, in camera hearing during which the judge makes a determination as to whether or not the evidence is relevant and admissible. If the judge rules the immigration status evidence to be relevant and admissible, the case proceeds accordingly. If the judge rules that the immigration status evidence is not relevant, both the evidence itself, and the discussion about whether to admit it remains confidential.

3. Why the pre-existing statute was allowed to sunset

SB 785 contained a sunset clause that caused it to expire as of January 1, 2022. There does not appear to be any reason, other than a collective oversight, for why the sunset clause was not removed or extended before the bill expired. Committee staff is not aware of any problems that occurred while SB 785 was in effect and there is no known opposition to the reinstatement of the statute proposed by this bill.

4. What the bill does

The bill reinstates the evidentiary procedures that lapsed on January 1, 2022 when SB 758 expired.

5. What the bill does not do

As previously mentioned, in order to ensure equal access to justice for all in California and to prevent bad actors from taking advantage of their victims' immigration status in order to evade accountability for legal violations, California has enacted a series of measures firmly establishing that evidence of immigration status is irrelevant for the purposes of determining liability when enforcing consumer protection, labor, employment, civil rights, and housing laws. Accordingly, those laws do not permit inquiry into a person's immigration status at any point in such cases, unless it is necessary in order to comply with federal immigration laws.

This bill contains a provision expressly disavowing any impact on those laws. The inclusion of that provision is meant to underscore that the bill does not alter, modify, or otherwise effect the application or intent of those laws. This includes Evidence Code Section 351.2, which simply bars the admission of evidence regarding immigration status in personal injury or wrongful death cases altogether.

6. Arguments in support of the bill

In summary, proponents of the bill assert that the bill will help deter crime and exploitation by ensuring immigrants feel more secure testifying in court.

According to the author:

Senate Bill 785 (Wiener, Chapter 12, Statutes of 2018) was enacted to keep immigration status private in public court records, but it expired on January 1, 2022. SB 836 ensures that public courts continue to protect a person's immigration status. [...] Prior to SB 785 becoming law, there were numerous documented examples of defense attorneys exposing the immigration status of witnesses and victims of crimes in California courthouses. In addition, there were reports of immigration agents throughout the country monitoring and detaining individuals at courthouses. The protections guaranteed by SB 785 ended on January 1, 2022. Many immigrants continue to feel apprehension in court settings for fear of being targeted and arrested by Immigration and Customs Enforcement (ICE) agents. Every day that passes without these protections puts immigrants at risk.

As one of the sponsors of the bill, the Los Angeles County District Attorney's Office writes:

The protections in SB 836 are crucial to protecting public safety. Numerous studies show that undocumented immigrants are less likely to report crime and cooperate with law enforcement if they believe working with police and prosecutors will lead to deportation. In addition, research has also shown that a community's failure to report crime leads to more victimization of that community. The involuntary disclosure of a person's immigration status in an open courtroom results in less cooperation with law enforcement, lower defendant accountability, and ultimately more crime.

As one of the sponsors of the bill, Legal Aid at Work writes:

Many immigrants continue to feel apprehension in court settings for fear of being targeted and arrested by Immigration and Customs Enforcement (ICE) agents. SB 836 is essential to prevent immigration status from being wielded as a tool of intimidation. Every day that passes without these protections puts immigrants and their broader communities at risk. SB 836 will ensure that California workers, regardless of their immigration status, are protected and able to seek remedy through the courts if their rights are violated. Immigrants are at a particularly high risk of employment discrimination and wage theft because of potential language barriers and immigration-related threats.

SUPPORT

California Employment Lawyers Association (sponsor)
Coalition for Humane Immigrant Rights (sponsor)
Legal Aid at Work (sponsor)
Los Angeles County District Attorney's Office (sponsor)
San Francisco District Attorney's Office (sponsor)
Asian Americans Advancing Justice - California
California Partnership to End Domestic Violence
California Rural Legal Assistance Foundation
Californians for Safety and Justice
Center for Workers Rights
Centro Legal de la Raza
Disability Rights California
Ella Baker Center for Human Rights
Equal Rights Advocates
Friends Committee on Legislation of California
La Raza Centro Legal
Oakland Privacy
Prosecutors Alliance of California
Tides Advocacy
University of California Hastings Community Justice Clinics
Warehouse Worker Resource Center

OPPOSITION

None known

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation:

AB 668 (Gonzalez, Ch. 787, Stats. 2019) codified the longstanding common law privilege against civil arrest of people coming and going from court and empowered judicial officers to enforce the privilege.

SB 785 (Wiener, Ch. 12, Stats. 2018) was nearly identical to this bill. SB 785 contained a sunset clause which expired on December 31, 2021.

AB 1690 (Assembly Committee on the Judiciary, Ch. 160, Stats. 2017) codified case law indicating that evidence of immigration status is irrelevant for the purposes of establishing liability when enforcing state labor, employment, civil rights, consumer protection, and housing laws, and that no inquiry shall be permitted into a person's

immigration status, unless it is necessary in order to comply with federal immigration laws.

AB 291 (Chiu, Ch. 489, Stats. 2017) enacted the Immigrant Tenant Protection Act of 2017, which, among other things, declared that the immigration or citizenship status of any person is irrelevant to any issue of liability or remedy in a legal dispute between a landlord and tenant over housing rights. The bill barred inquiry into a tenant's immigration or citizenship status in discovery or proceedings related to such a dispute, with specified exceptions.

AB 2159 (Gonzalez, Ch. 132, Stats. 2016) established that, in civil actions for personal injury or wrongful death, evidence of a person's immigration status is not admissible and discovery of a person's immigration status is not permitted.

AB 560 (Gomez, Ch. 151, Stats. 2015) provided that the immigration status of a minor child seeking recovery under any applicable law is irrelevant to the issues of liability or remedy and prohibited discovery or other inquiry in a civil action or proceeding into a minor child's immigration status.

PRIOR VOTE

Senate Public Safety Committee (Ayes 4, Noes 0)
