SENATE COMMITTEE ON PUBLIC SAFETY

Senator Steven Bradford, Chair
2021 - 2022 Regular

Bill No:	AB 263	**Hearing Date:**	June 15, 2021
Author:	Arambula		
Version:	April 15, 2021		
Urgency:	Yes	**Fiscal:**	No
Consultant:	SJ		

Subject: ***Private detention facilities***

HISTORY

Source: California Collaborative for Immigrant Justice
Immigrant Defense Advocates
NextGen California
Physicians for Human Rights

Prior Legislation: AB 3228 (Bonta), Ch. 190, Stats. 2020
AB 32 (Bonta), Ch. 739, Stats. 2019
AB 103 (Comm. on Budget), Ch. 17, Stats. 2017

Support: California Attorneys for Criminal Justice; California Medical Association; California Public Defenders Association; County Health Executives Association of California; Ella Baker Center for Human Rights; Health Officers Association of California; National Association of Social Workers, California Chapter; Oakland Privacy; Riverside Sheriffs' Association; San Francisco Public Defender

Opposition: None known

Assembly Floor Vote: 71 - 0

PURPOSE

The purpose of this bill is to require a private detention facility operator to comply with, and adhere to, all local and state public health orders and occupational safety and health regulations.

Existing law prohibits the California Department of Corrections and Rehabilitations (CDCR) from entering into a contract with a private, for-profit prison facility located in or outside of the state to provide housing for state prison inmates on or after January 1, 2020. (Pen. Code, § 5003.1, subd. (a).)

Existing law prohibits CDCR from renewing an existing contract with a private, for-profit prison facility located in or outside of the state to incarcerate state prison inmates on or after January 1, 2020. (Pen. Code, § 5003.1, subd. (b).)

Existing law prohibits a state prison inmate or other person under the jurisdiction of CDCR from being incarcerated in a private, for-profit prison facility after January 1, 2028. (Pen. Code, § 5003.1, subd. (c).)

Existing law 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. (e).)

Existing law specifies that "private, for-profit prison facility" does not include a facility that is privately owned, but is leased and operated by CDCR. (Pen. Code, § 5003.1, subd. (d).)

Existing law prohibits a person from operating a private detention facility within California, with specified exceptions. (Pen. Code, §§ 9501-9505.)

Existing law defines "private detention facility" to mean a detention facility that is operated by a private, nongovernmental, for-profit entity, and operating pursuant to a contract or agreement with a governmental entity. (Pen. Code, § 9500.)

Existing law 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. Requires the private in-state male contract correctional facilities that are primarily staffed by non-CDCR personnel to be prioritized for reduction over other in-state contract correctional facilities. (Pen. Code, § 2067, subd. (a).)

Existing law 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:

- The cost to operate at the capacity;
- Workforce impacts;
- Subpopulation and gender-specific housing needs;
- Long-term investment in state-owned and operated correctional facilities, including previous investments;
- Public safety and rehabilitation; and,
- The durability of the state's solution to prison overcrowding. (Pen. Code, § 2067, subd. (b).)

Existing law prohibits 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, from entering into a contract with the federal government, to house or detain in a locked detention facility, noncitizens for purposes of civil immigration custody. Prohibits a city, county, or local law enforcement agency that has such a contract from renewing or modifying that contract in such a way as to expand the maximum number of contract beds that may be used to house or detain in a locked detention facility noncitizens for purposes of civil immigration custody. (Gov. Code, § 7310, subds. (a) & (b).)

Existing law 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).)

Existing law defines "private detention facility" to mean a detention facility that is operated by a private, nongovernmental, for-profit entity pursuant to a contract or agreement with a governmental entity. Defines "private detention facility operator" to mean any private person, corporation, or business entity that operates a private detention facility. (Gov. Code, § 7320, subd. (b)(2) & (3).)

Existing law requires 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 until July 1, 2027. (Gov. Code, § 12532, subd. (a).)

This bill requires a private detention facility operator to comply with, and adhere to, all local and state public health orders and occupational safety and health regulations.

This bill provides that "private detention facility operator" and "private detention facility" have the same meaning as found in existing state law.

This bill provides that it 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.

This bill contains an urgency clause.

COMMENTS

1. Need for This Bill

According to the author:

> Civil detention facilities which 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."
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> 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.
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> The federal court case (*Geo Grp., Inc. v. Newsom, supra*) which upheld the ban on private detention facilities in California discussed the fact that regulation and oversight of health matters is generally an issue for state and local governments.

> The District Court 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).)

2. Private Detention Facilities

The federal government contracts with private detention facilities throughout the country to house immigration detainees as well as federal inmates and pretrial detainees. The use of privately owned and operated prisons to house individuals by the federal and state governments began in the 1980s, and the private prison industry is estimated to be a $4 billion-per-year industry. (New York Times, *For Private Prisons, Detaining Immigrants Is Big Business*, available at <https://www.nytimes.com/2018/10/01/us/prisons-immigration-detention.html>.) There are a number of concerns regarding the use of private detention facilities, including safety and security deficiencies, lack of transparency, and lack of accountability for staff misconduct.

AB 32 (Bonta), Chapter 739, Statutes of 2019, prohibited CDCR from entering into, or renewing contracts with private for-profit prisons on or after January 1, 2020, and eliminates their use by January 1, 2028 except as may be required to comply with a court-ordered population cap. AB 32 also prohibits the operation of a private detention facility within the state, including those housing immigration detainees, except as specified. Among the exceptions are privately owned facilities leased and operated by CDCR or a county sheriff or other law enforcement agency, or a private detention facility operating under a contract that was in effect or renewed prior to January 1, 2020. In late 2019, Immigration and Customs Enforcement (ICE) signed four contracts with three private prison companies to continue operating existing detention facilities across the state over the next five years, with the possibility of two five-year renewals. (San Francisco Chronicle, *Private Prison Group Sues California Over New Law Banning Privately Run Detention Centers*, available at <https://www.sfchronicle.com/news/article/Private-prison-group-sues-California-over-new-law-14940890.php>.)

3. Legal Challenge to AB 32

Following the passage of AB 32, GEO Group, a private prison company operating facilities in the state, filed a lawsuit in the U.S. District Court in the Southern District of California alleging that the law's objective is to "undermine and eliminate the congressionally funded and approved enforcement of federal criminal and immigration law by U.S. Immigration and Customs Enforcement, the U.S. Marshals Service, and the U.S. Bureau of Prisons within the State of California" and arguing that the closure of its facilities in California would result in the company losing over $4 billion in capital investment and revenue over the next fifteen years. (*Id*.) The Trump administration subsequently filed a lawsuit against the state of California in January 2020 in the same district court alleging that AB 32 violates the supremacy clause of the U.S. Constitution and the federal government's intergovernmental immunity. (Los Angeles Times, *Trump Administration Sues California Over Private Prison Ban*, available at <https://www.latimes.com/california/story/2020-01-25/trump-administration-sues-california-over-private-prison-ban>.) The cases were later consolidated.

In October 2020, AB 32 was mostly upheld but the court did exempt the use of some private prisons. (*Geo Grp., Inc. v. Newsom* (S.D.Cal. 2020) 493 F.Supp. 905.) In its analysis of the claim of conflict preemption, the court concluded that 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 or ICE's contracts with private detention centers. (*Id*. at pp. 937-939.) The court 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. Although Congress plainly required private detention facilities to "comply with all applicable State and local laws and regulations" to be "eligible" for a contract with USMS in such districts, A.B. 32 would render no private detention facilities eligible to contract with USMS. 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. Accordingly, the Court concludes that A.B. 32 is obstacle preempted as applied to GEO's contracts with USMS.
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> (*Id*. at p. 939.)

As part of its holding, the court found:

> In the absence of clear and manifest congressional intent that BOP or ICE contract with private detention facilities, A.B. 32 does not unconstitutionally impede the United States' contracting ability. Further, the Court agrees with Defendants that the federal contract procurement regulations—which nowhere require contracts with private detention facilities to house BOP or ICE detainees or extensions of such contracts—do not conflict preempt A.B. 32.
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> (*Id*. at p. 942.)

With respect to field preemption, the court concluded that the federal interests in housing its prisoners and detainees, foreign relations and immigrant, and federal contracting do not preempt AB 32. (*Id*. at pp. 944-945.) The court additionally concluded that AB 32 "is not field preempted by existing statutes and regulations concerning the housing of ICE's immigration detainees." (*Id*. at p. 947.) Although the court found that AB 32 was conflict preempted as to USMS's use of private detention facilities, it was not field preempted. (*Id*. at pp. 947-948.) Finally, the court held that AB 32 does not violate intergovernmental immunity. (*Id*. at pp. 952, 956-957, 959.)

The district court preliminarily enjoined enforcement of AB 32's ban against USMS's privately contracted detention facilities within the state. (*Id*. at p. 963.) An appeal from the District Court's judgment was filed. Oral arguments in the case were heard by a panel of the Ninth Circuit on June 7, 2021.

4. Private Detention Centers During the Pandemic

Infectious diseases often spread rapidly in institutional congregate living facilities such as private detention centers and prisons due to overcrowding, poor ventilation, higher prevalence of

infection, and poor access to health care services relative to that in community settings. According to ICE, it convened a working group in March 2020 between medical professionals, disease control specialists, detention experts, and field operators to identify additional enhanced steps to minimize the spread of the virus. ICE's website indicates that it has 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, and has released over 900 higher medical risk individuals after evaluating their immigration history, criminal record, potential threat to public safety, flight risk, and national security concerns. ICE contends that the 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)

According to ICE's statistics, over 1,000 individuals held in California facilities have tested positive for COVID-19 since February 2020. (https://www.ice.gov/coronavirus#detStat) During the vaccine rollout earlier this year, there was confusion regarding whether state or federal officials were responsible for vaccinating detainees. (Cal Matters, *Immigrant Detention Centers Showcase California's Vaccine Chaos*, available at <https://calmatters.org/health/coronavirus/2021/02/immigrants-detention-centers-vaccine/>) As a result, different counties had taken different actions with respect to sending vaccine doses to detention centers.

This bill clarifies that state and county health officials have the authority to enforce health orders in private detention centers contracted by the federal government. In advancing this piece of legislation, proponents of the bill point to the order in *Geo Grp., Inc. v. Newsom, supra*, which reiterated longstanding precedent that "regulation of health and safety matters is primarily, and historically, a matter of local concern" and noted 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 p. 935 (citing *Hillsborough City. v. Automated Med. Labs., Inc.* (1985) 471 U.S. 707, 719 and *U.S. v. California* (9th Cir. 2019*)* 921 F.3d 865, 885-86.)

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