



Immigration Detainers: An Overview

Federal immigration enforcement often overlaps with interactions between local law enforcement and communities. When federal immigration agents want to assume custody of an individual apprehended by local law enforcement, a formal request called a detainer plays a key role in the exchange. Detainers are a heavily relied upon immigration enforcement tool yet are often misunderstood. This fact sheet explains detainers, how they are used by federal and local enforcement, and the impact they have on immigrants.

What Is an Immigration Detainer?

An immigration detainer is a tool used by U.S. Immigration and Customs Enforcement (ICE) and other Department of Homeland Security (DHS) officials when the agency identifies potentially deportable individuals who are held in jails or prisons nationwide.¹ Typically, detainers are issued by an authorized immigration official or local police officer designated to act as an immigration official under [section 287\(g\)](#) of the Immigration and Nationality Act (INA).²

Detainers instruct federal, state, or local law enforcement agencies (LEA) to hold individuals for up to 48 **business** hours beyond the time they otherwise would have been released (*i.e.*, when charges have been disposed of through a finding of guilt or innocence; when charges have been dropped; when bail has been secured; or when convicted individuals have served out their sentence).³

- Detainers are only **requests** made by ICE; compliance is voluntary. An LEA has discretion to decide which detainers to honor and under what circumstances.⁴
- In order to issue a detainer, ICE is supposed to have probable cause that the individual is deportable. For example, a detainer could be issued if the person has a final order of deportation or is in removal proceedings, or if ICE has other evidence or confirmation that the person is deportable.⁵
- The presence of a detainer is not indicative of an individual's immigration status. Further, detainers do not initiate deportation proceedings and do not signify whether or not a person will be deported.
- Detainers are different than a Notice to Appear (NTA), which is an official document that commences a removal proceeding in immigration court. The [immigration detainer](#) merely states that DHS has taken action to determine whether "there is reason to believe the individual [...] is subject to removal from the United States."⁶

How Does ICE Identify Noncitizens that May Be Subject to Detainers?

Through the mandatory [Secure Communities](#) program, ICE automatically receives the fingerprints of those taken into LEA custody.⁷ ICE then uses that information to determine the immigration status of individuals and identify those they have cause to arrest.

- In jails where ICE agents are present,⁸ they may use the booking information to make decisions about whom to interview and whether to issue a detainer.
- In cases where ICE is not physically present, local officials may contact ICE with information about persons they believe to be foreign-born, based on booking information or other criteria.
- If the jail has a [287\(g\) agreement](#) with ICE,⁹ deputized local law enforcement officers work with ICE to interview arrestees and issue detainers.

Why Do Some Jurisdictions Limit Their Compliance with Detainers?

Hundreds of [local jurisdictions](#) have passed policies limiting their cooperation with ICE and their responses to detainers.¹⁰ These policies resulted from a variety of concerns, including impediments to trust-building between LEAs and their communities as a result of honoring detainers¹¹ and ICE's practice of issuing detainers to individuals without serious criminal convictions or who were not threats to public safety or national security.¹²

Following lawsuits filed by individuals held in local jails under detainers, several federal courts found that compliance with detainers is not mandatory¹³ and that key aspects of detainers are unconstitutional.¹⁴ As a result, many local jurisdictions became concerned about their liability if they were to honor detainers.¹⁵

Is Everyone with an Immigration Detainer a “Criminal” or Undocumented?

Not everyone with a detainer is a “criminal.”

Detainers may be issued when a person is merely booked into jail following an arrest for suspected criminal activity, regardless of whether the person is eventually convicted of a crime. The charges may be dropped, or the person may not be found guilty.

- Immigrants can be subject to a detainer regardless of the severity of the crime for which they are arrested or convicted. Even a person simply arrested for a misdemeanor or traffic violation can be subject to a detainer.
- The police may arrest victims of, or witnesses to, certain crimes when the perpetrator is not clearly

identified, such as domestic violence cases in which a victim fights back in self-defense.¹⁶ This happens with some frequency when one or both parties are not fluent in English and the officer does not understand their accounts. Once taken into custody, these witnesses and victims may then find themselves subjected to immigration detainers and at risk of deportation.

Not everyone with a detainer is an undocumented immigrant.

Lawful permanent residents (LPRs, or green card holders) may also be subject to immigration detainers if ICE determines they may be deportable under immigration law.¹⁷

- Yet ICE has issued detainers erroneously. Even [U.S. citizens](#) have experienced this when, for example, there was an error in ICE's database, the person's claims to citizenship were disregarded or difficult to prove, or the individual's name was similar to someone else in their database.¹⁸

What Happens if ICE Does Not Take Custody after 48 Hours?

If ICE issues a detainer request to a LEA and ICE does not take custody of the individual within the 48 hour window of time (excluding weekends and holidays) requested, the detainer automatically lapses and the LEA is required to release the individual. However, some law enforcement officers who do not understand the law, or otherwise disregard it, keep the individual in custody for longer than the permitted 48 business hours, even when ICE does not assume custody.

- Some detained individuals have filed habeas petitions to challenge their continued detention. A habeas petition calls upon a state or federal court to intervene when the government has unlawfully deprived an individual of liberty.¹⁹
- In addition, some individuals held longer than 48 hours have successfully obtained civil damages from the detaining authority. A deported immigrant received a \$145,000 settlement with the City of New York after being held longer than 48 hours on two separate occasions.²⁰
- While remedies to unlawful detention exist, many people held on detainers are not aware of their options. They may not have access to a lawyer or to the courts. In some cases, they may not be aware that they are being held on a detainer, or for longer than the time period permitted by law.

Do Detainers Impact a Person's Release on Bail?

A detainer often affects a person's release on bail pending criminal charges. Generally, people who are jailed are released on bail while awaiting trial. In other cases, they may be released on their own recognizance without having to pay any money to the court. However, when ICE issues a detainer, the court sometimes considers the detainer an adverse factor when determining a bail amount or whether to set bail at all.²¹

Do Detainers Impact the Length of Detention?

Immigrants placed under detainer may have substantially longer jail stays than people without detainers.

- In addition to detainers extending a person's jail stay up to 48 business hours, they reduce the likelihood that a person will receive bail while awaiting trial. This means that immigrants held on detainers often stay in jail for the duration of the pre-trial period, while similarly situated U.S. citizens would be released on bond.
- A [study](#) of Travis County, Texas, for example, found that immigrants under detainer have consistently stayed in jail three times longer than other inmates.²²

Longer detention periods mean that more local tax dollars are spent detaining immigrants.

- The federal government reimburses local jails for some of the costs of holding certain noncitizens through local contracts with DHS and the Department of Justice's [State Criminal Alien Assistance Program](#) (SCAAP), but these payments are insufficient to cover all costs.²³
- Furthermore, the federal government has proposed with some regularity eliminating SCAAP funding.²⁴

Do Detainers Impact a Person's Access to Treatment Programs?

Researchers have documented how individuals subject to a detainer are less likely to have access to drug or alcohol treatment programs, or other rehabilitation services.

- According to a [report](#) by the New York City Bar, many judges, prosecutors, and defense attorneys assume that a detainer disqualifies the individual from participating in these types of programs.²⁵
- "Alternative-to-incarceration" (ATI) programs often provide defendants an opportunity to enter treatment instead of prison. Successful completion of such programs may result in a reduction or dismissal of the initial criminal charges, or may lead to non-incarceratory sentences such as probation.²⁶
- ATI programs have also successfully reduced recidivism and lowered the costs to the criminal justice system. Participation in ATI programs may help establish evidence of rehabilitation, which could be a positive factor for noncitizens seeking immigration relief and may provide defense for lawful permanent residents with certain deportation charges.²⁷

Endnotes

1. 8 CFR 287.7(a) and 8 CFR 287.7(d).
2. “Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act,” *U.S. Immigration and Customs Enforcement*, accessed March 20, 2017, <https://www.ice.gov/factsheets/287g>.
3. 8 C.F.R. § 287.7(a).
4. *Galarza v. Szalczyk*, No. 10-cv-06815, 2012 WL 1080020 (E.D. Pa. Mar. 30, 2012), rev’d in part on other grounds, 745 F.3d 634 (3d Cir. 2013).
5. Memorandum from Matthew J. Piers et al., Hughes Socol Piers Resnick & Dym, Ltd., to Tom Cochran, U.S. Conference of Mayors, and Darrel W. Stephens, Major Cities Chiefs Association, Re: Legal Issues Regarding Local Policies Limiting Local Enforcement of Immigration Laws and Potential Federal Responses, January 13, 2017, <http://www.usmayors.org/wp-content/uploads/2017/02/HSPRD-Memo-on-Local-Enforcement-of-Immigration-Laws-and-Federal-Responses-00732386x9D9DD.pdf>.
6. Dept. of Homeland Security, “Immigration Detainer – Notice of Action” Form I-247, December 2012, <https://www.ice.gov/doclib/secure-communities/pdf/immigration-detainer-form.pdf>. An immigration detainer must also be distinguished from an interstate detainer, which governs the transfer of incarcerated prisoners from one jurisdiction to another. An interstate detainer is part of criminal law, not immigration law.
7. The Secure Communities program is another partnership between DHS and localities. Upon booking, the fingerprints of everyone detained in a participating jail are sent to the FBI, which then automatically sends them to DHS to check against immigration databases. DHS takes enforcement action against immigrants they identify as removable. “Secure Communities,” *U.S. Immigration and Customs Enforcement*, accessed March 20, 2017, <https://www.ice.gov/secure-communities>.
8. ICE has three major local collaboration programs: the Criminal Alien Program (CAP) through which local law-enforcement agencies collaborate with ICE to identify deportable noncitizens in county jails; Secure Communities, which is a technologically intensive version of CAP; and the 287(g) program, which cross-designates local police officers to act as immigration agents. See Guillermo Cantor, Mark Noferi, and Daniel E. Martinez, *Enforcement Overdrive: A Comprehensive Assessment of ICE’s Criminal Alien Program* (Washington, DC: American Immigration Council, 2015), <https://www.americanimmigrationcouncil.org/research/enforcement-overdrive-comprehensive-assessment-ice%E2%80%99s-criminal-alien-program>; American Immigration Council, “Secure Communities: A Fact Sheet,” November 29, 2011, <https://www.americanimmigrationcouncil.org/research/secure-communities-fact-sheet>; American Immigration Council, “The 287(g) Program: An Overview,” March 15, 2017, <https://www.americanimmigrationcouncil.org/research/287g-program-immigration>.
9. The 287(g) program is a partnership between DHS and local law enforcement agencies in which local law enforcement officers are deputized to enforce federal immigration laws. In the detention or “jail model,” deputized officers are located in jails/correctional facilities to perform immigration enforcement functions after individuals are detained by police. “Updated Facts on ICE’s 287(g) Program,” *U.S. Immigration and Customs Enforcement*, accessed March 20, 2017, <https://www.ice.gov/factsheets/287g-reform>.
10. National Immigrant Legal Resource Center, “National Map of Local Entanglement with ICE,” December 19, 2016, <https://www.ilrc.org/local-enforcement-map>.
11. American Immigration Council, “Understanding TRUST Acts, Community Policing, and ‘Sanctuary Cities,’” October 10, 2015, <https://www.americanimmigrationcouncil.org/research/sanctuary-cities-trust-acts-and-community-policing-explained>.
12. Transactional Records Access Clearinghouse, “Reforms of ICE Detainer Program Largely Ignored by Field Officers,” August 9, 2016, <http://trac.syr.edu/immigration/reports/432/>.
13. *Galarza v. Szalczyk*, No. 10-cv-06815, 2012 WL 1080020 (E.D. Pa. Mar. 30, 2012), rev’d in part on other grounds, 745 F.3d 634 (3d Cir. 2013).
14. *Morales v. Chadbourne*, 996 F. Supp. 2d 19 (D. R.I.), aff’d on appeal, 2015 WL4385945 (1st Cir. 2015). See also Immigrant Legal Resource Center, “Immigration Detainers Legal Update,” October 2016, https://www.ilrc.org/sites/default/files/resources/detainers_legal_update_october_2016.pdf; Christopher Lasch, *The Faulty Legal Arguments Behind Immigration Detainers* (Washington, DC: American Immigration Council, 2013), <https://www.americanimmigrationcouncil.org/research/faulty-legal-arguments-behind-immigration-detainers>.
15. *Miranda-Olivares v. Clackamas Cnty.*, No. 12-02317, 2014 WL 1414305, at *11 (D. Ore. Apr. 11, 2014).
16. See American Civil Liberties Union of Maryland, *Restoring Trust: How Immigration Detainers In Maryland Undermine Public Safety Through Unnecessary Enforcement* (Baltimore, MD, 2013), 18, <https://immigrantjustice.org/sites/immigrantjustice.org/files/ACLU%20Maryland--Detainer%20Report.pdf>.
17. Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. 104-208 (1996), 110 Stat. 3009-546 § 348.
18. See Andy East, “U.S. Citizen Jailed in Immigration Status Mistake,” *The Texas Tribune*, February 27, 2017, <https://www.texastribune.org/2016/02/27/us-citizen-held-immigration-question/>.
19. The case law remains unsettled regarding whether a court has jurisdiction to grant a habeas petition in such cases.

20. *Harvey v. City of New York*, No. 07-0343 (E.D.N.Y. June 12, 2009).
21. See *State v. Fajardo-Santos*, A-82-08 (N.J. July 8, 2009).
22. Andrea Guttin, *The Criminal Alien Program: Immigration Enforcement in Travis County, Texas* (Washington, DC: American Immigration Council, 2010), https://www.americanimmigrationcouncil.org/sites/default/files/research/Criminal_Alien_Program_021710.pdf; see also Katherine Beckett and Heather Evans, *Immigration Detainer Requests in King County, Washington: Costs and Consequences* (Seattle, WA: University of Washington Law, Societies & Justice, 2013), <https://lsj.washington.edu/publications/beckett-evans-2013-immigration-detainer-requests-king-county-wa>.
23. A county or state must meet several requirements to be eligible for SCAAP funding. The institution must have incarcerated a person in the country without authorization who has been convicted of a felony or two or more misdemeanors for "at least 4 consecutive days during the reporting period." The costs for incarcerating other individuals are not reimbursed. SCAAP reimburses both the pre-trial and post-conviction incarceration costs for eligible cases. Further, SCAAP does not necessarily cover the full salary costs of incarcerating undocumented immigrants. "State Criminal Alien Assistance Program (SCAAP)," *U.S. Dept. of Justice Bureau of Justice Assistance*, updated October 6, 2016, https://www.bja.gov/ProgramDetails.aspx?Program_ID=86.
24. "The State Criminal Alien Assistance Program (SCAAP)," *National Conference of State Legislatures*, April 13, 2013, <http://www.ncsl.org/research/immigration/state-criminal-alien-assistance-program.aspx>.
25. Committee on Criminal Justice Operations, New York City Bar, "Immigration Detainers Need Not Bar Access to Jail Diversion Programs," June 2009, http://www.nycbar.org/pdf/report/NYCBA_Immigration%20Detainers_Report_Final.pdf.
26. *Ibid.*
27. *Ibid.*