



The Commonwealth of Massachusetts

Committee for Public Counsel Services

Immigration Impact Unit

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Immigration Enforcement Updates Since January 2017 for Massachusetts Criminal Defense Attorneys as of April 30, 2017

In January 2017, President Trump issued three executive orders on immigration regarding interior enforcement, border security and restrictions on admission of noncitizens from predominantly Muslim countries. The executive order on interior enforcement has the greatest impact on immigrants with criminal histories; however, all three orders impact noncitizen clients. The orders, DHS memos, fact sheets and Q&As about them can be found here, <https://www.dhs.gov/executive-orders-protecting-homeland>. Below is a brief summary of the three orders, along with relevant information regarding immigration enforcement efforts since the presidential election.

Interior Enforcement

- **Expanded immigration enforcement priorities:** Prioritizes for removal (deportation) anyone who is *already removable under current immigration laws*, which includes anyone without lawful status no matter how long he/she has been in the US, and
 - has been convicted of any crime (including driving without a license),
 - has been charged with any crime, while that charge is pending,
 - has “committed acts that constitute a chargeable criminal offense,”
 - has a final order of removal but has failed to depart the US as required,
 - “has engaged in fraud or willful misrepresentation in connection with any official matter or application before a governmental agency” (this would presumably include anyone who has used a false Social Security #),
 - has abused any public benefits program, or
 - “[i]n the judgment of an immigration officer, otherwise pose[s] a risk to public safety or national security.”
- 10,000 additional ICE officers will be hired to effectuate the increased removals of noncitizens.

- **Immigration detainers:** The order and memo also call for increased use of immigration detainers and the development of new detainer forms. See more information about this below.
- **Raids:** Although there have been numerous reports and much fear of increased and more aggressive enforcement by ICE in the last few month or two, DHS has publically stated that it has not engaged in immigration raids to date in Massachusetts. The Q&As on DHS’ website state that within six months, ICE will target operations in jurisdictions with violent gang activity; this suggests that if raids occur, they may begin in these jurisdictions which are otherwise unidentified.
- **Sensitive locations:** One of the Q&As states that ICE will continue to honor its policy not to conduct enforcement operations in “sensitive locations,” which include schools, universities, religious institutions and medical facilities, despite some news reports that enforcement has become more aggressive around these locations. Note that the policy does *not* consider courthouses to be sensitive locations, and that the presence of ICE officers in and around courthouses in Massachusetts has increased significantly in recent weeks – see below for more information.
- **Removals to “recalcitrant” countries:** The order and memo encourage increased diplomatic pressure and “visa sanctions” on countries that refuse to repatriate their citizens who have been ordered removed. We have already heard that Cape Verde, who has refused to issue travel documents for several years as a matter of policy, is beginning to effectuate removals of its citizens. Note that some countries, such as Vietnam, have repatriation agreements that do not allow for the removal of certain individuals; therefore, new agreements would need to be negotiated before removals could begin to those countries. However, individuals from such countries can still be detained during removal proceedings and for limited periods of time after having been ordered removed.
- **“Deferred Action for Childhood Arrivals” (DACA):** The executive order does not rescind DACA, which was created by executive action under President Obama. Additional guidance and likely policy changes are anticipated regarding DACA recipients but it remains in place for now; federal legislation is also pending in the House and Senate to protect this group of noncitizens. Note that criminal convictions can either bar DACA or prevent renewal. Noncitizens should not apply for DACA for the first time or apply to renew DACA status without consulting with immigration attorneys.
- **Expedited proceedings:** The memos list various efforts to accelerate deportations. The executive order and DHS memo on enforcement call for increased use of Institutional Removal Hearings (IRH – take place by video while noncitizens are in criminal custody). In addition, the memos seek to increase use of summary removal proceedings (proceedings where immigration officers, not immigration judges, may order removal). The interior enforcement memo calls for more administrative removals (in which those who are not lawful permanent residents (LPRs – green card holders) and have been convicted of aggravated felonies may be ordered removed without immigration court proceedings). The border security memo, discussed below, also calls for expanded use of

expedited removal to include anyone in the US who entered without lawful status and cannot prove that they have been here for at least two years (under the Obama administration, this procedure was limited to those within 100 miles of the border who could not show presence in the US for 14 days).

- **Call for increased state and local law enforcement to enforce immigration laws under 287(g) agreements**, in which state and local officers are deputized to act as ICE agents, allowing them to investigate and initiate removal proceedings.
- **Sanctuary jurisdictions** - threats to withdraw federal grants, except as necessary for law enforcement, from so-called “sanctuary jurisdictions,” defined in the order as jurisdictions that violate 8 U.S.C. § 1373, which prohibits jurisdictions from preventing *communication* with ICE regarding a person’s *immigration status*. Litigation against this policy has been filed in several jurisdictions around the country, including *Cities of Chelsea and Lawrence v. Trump*, #1:17-cv-10214-GAO (D. Mass. 2017). On April 25, the US District Court for the Northern District of California issued a nationwide injunction of this provision in *County of Santa Clara v. Trump*, #3:17-cv-00485-WHO, finding unconstitutional the withholding of federal funds beyond what is currently permitted under 8 U.S.C. §1373.
- Collection of fines and penalties from those without lawful status and those who “facilitate unlawful presence.” No additional guidance has been provided on this provision.
- Multiple provisions mandate the collection and publication of data regarding noncitizens charged and convicted of crimes.

Border Security: This order and DHS memo call for increased immigration enforcement at the southern border, including;

- Construction of a wall
- 5,000 additional border patrol agents and the use of state and local law enforcement under 287(g) to act as border patrol agents
- Increased immigration detention
- Return of those entering from a contiguous country during the pendency of their removal proceedings
- Consider prosecution of parents living in the US who facilitate their children to come here as “unaccompanied minors”
- Significant expansion of “expedited removal,” as discussed above.

Travel Ban: The President has issued two executive orders temporarily suspending entry into the US of nonimmigrants from seven predominantly Muslim countries and temporarily suspending the admission of refugees from any country. Both of these orders have been enjoined by federal district courts in Hawaii and Maryland; the administration has appealed the Maryland decision to the Fourth Circuit Court of Appeals. Despite the injunction of this executive order,

however, noncitizens from Iran, Iraq, Libya, Somalia, Sudan, Syria and Yemen should not travel outside the US without first consulting with an immigration attorney.

Ongoing Executive Order Litigation: For the latest information on litigation against the immigration executive orders, go to the University of Michigan Law School Civil Rights Litigation Clearinghouse website, <https://www.clearinghouse.net/featuredCase.php?id=40>.

Immigration Detainers: On March 24, 2017, the Department of Homeland Security issued a new detainer form (I-247A) replacing all prior iterations of the form (I-247D, I-247X, I-247N), see <https://www.ice.gov/detainer-policy>.

The new form expands the use of detainers to all those individuals who an ICE officer has probable cause to believe are removable, and requires that all detainers be accompanied by administrative warrants (I-200 and I-205) which are meant to provide proof of probable cause of removability. Note however, that these warrants are not judicial warrants and do not authorize arrest by state or local authorities. The I-200 and the I-205 forms are administrative “warrants,” which are issued by ICE supervising officers without any review by neutral magistrates or judges. See Detainer Policy at 2.4 (noting that the I-200 and the I-205 should be signed by “an authorized ICE immigration officer”); 8 C.F.R. 236.1(b) (“A warrant of arrest may be issued only by those immigration officers listed in 287.5(e)(2)”), 8 C.F.R. 287.5(e)(2) (listing a wide range of supervising ICE officers who may issue warrants), 8 C.F.R. 241.2 (“A Form I-205, Warrant of Removal, based on a final administrative removal order in the alien’s case will be issued by any of the following immigration officials . . .”).

On April 4, 2017 the SJC heard arguments in *Commonwealth v. Lunn*, SJC – 12276, in which the Court will decide whether it is lawful for state and local officials to hold individuals on ICE detainers. This is the first state highest appellate court to determine the constitutionality of immigration detainers under state law. All parties in *Lunn* agreed that ICE detainers are voluntary requests and that holding a person on such a detainer is an arrest. CPCS and the Massachusetts Attorney General’s Office both argued that there is no state arrest authority that permits state officers to arrest a person for civil immigration violations. Furthermore, even if state authority existed, ICE detainers raise serious constitutional due process and Article 14/4th Amendment concerns. The Department of Justice (DOJ), which filed an amicus and was permitted to argue, argued that states have inherent authority to arrest for civil immigration violations and that the 4th Amendment does not apply to these arrests. The DOJ did not address the state constitutional concerns.

Increased ICE presence in courthouses: There has been a dramatic increase in ICE presence and arrests in and around courthouses in Massachusetts. In response to letters from several state court chief justices, AG Sessions has stated that ICE believes that immigration enforcement in courthouses is safer for ICE officers and plans to continue this practice. This is a rapidly developing issue for which various options regarding litigation or policy changes are being explored. The IIU is trying to collect data about enforcement actions in Massachusetts, so that we can best advise counsel about current enforcement trends. Please use the attached link to provide us information when your clients are arrested by ICE – the survey is very quick and can be filled out on a smartphone: <https://goo.gl/forms/ZFmROKnegQa5ffmi2>.

ICE Denying Habes? The IIU has heard recently that ICE intends to stop honoring habe requests from state courts for individuals in ICE custody to be brought into court for state criminal proceedings. Defense counsel should continue to request habe and let the IIU know if they are not being honored.

Know Your Rights

Clients not in custody or who may be released soon

The Immigrant Defense Project has a flyer and other handouts in multiple languages that describe your rights as a noncitizen when questioned by ICE, <https://www.immdefense.org/ice-home-and-community-arrests/>, and the Immigrant Legal Resource Center has “red cards” that do the same, <https://www.ilrc.org/red-cards>. These should be given to all noncitizen clients who are not in custody or who may be released soon and widely distributed to noncitizen clients, family and friends to carry with them.

Clients in criminal or immigration custody

Noncitizen clients in immigration or criminal custody should also be advised if questioned by ICE or other officers working with ICE that:

1. Immigration interviews are voluntary interviews. You do not have to speak to any officer about your immigration or criminal history.
2. You have the right to remain silent. Anything that you say to ICE or correctional officers working for ICE (including simple information like where you were born) can and will be used against you in immigration court or criminal court.
3. You do not have to sign any documents that ICE or other officers may give you. Anything you sign at the request of ICE or correctional officers working with ICE can and will be used against you in immigration court or criminal court.

Know Your Rights forms for clients in custody are available in multiple languages on the IIU website at <https://www.publiccounsel.net/iiu/public/>.

Copies of both of custody and non-custody flyers should be carried to court or when meeting with new clients.

Noncitizen clients with any criminal histories should be advised NOT to travel outside the U.S. or fly domestically right now without first consulting with an immigration attorney. For more information, see the IIU website at <https://www.publiccounsel.net/iiu>.