



Committee for Public Counsel Services Immigration Impact Unit

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ICE Detainers in State Court December 2023

What is an ICE detainer?

The ICE detainer has become a familiar tool of immigration enforcement. It is lodged against an individual in state custody. An ICE detainer indicates the desire of Immigration and Customs Enforcement (ICE), the enforcement arm of the Department of Homeland Security, to take custody of an individual once that person has been released from state custody. ICE uses detainers when they believe an individual is subject to removal from the United States.

An ICE detainer is not a judicially issued warrant but instead is merely a document signed by an ICE officer requesting cooperation from state law enforcement authorities. As such, it does not authorize state officials to hold an immigrant for ICE. See *Lunn v. Commonwealth*, 477 Mass. 517 (2017). However, the detainer also requests that ICE be notified if the person is being released from criminal custody and most state officials comply with this and notify ICE when someone with a detainer is about to be released. If ICE is present at the time of an individual's release from state custody, it often results in ICE arrest, impeding a client from returning to state court to face the criminal charges against them, and facilitating the client's ultimate removal from the United States, often before the criminal case is resolved.

Who is subject to an ICE detainer?

ICE can issue a detainer for any non-citizen in state custody whom they think is removable. Some examples include:

- An undocumented individual, even if criminal charges are only pending;
- A legal permanent resident (green card) with prior deportable convictions;
- An individual on a temporary visa such as a student visa or work visa, even if charges are pending.

When to check for a detainer

Because ICE detainers can be lodged for a wide range of people, **it is always critical to ask clients at arraignment where they were born. If a client was born outside of the United States, and has not subsequently obtained U.S. citizenship, attorneys should always check for an ICE detainer.**

For clients who are in state custody, you should continue to check for an ICE detainer at any appearance where there is a possibility of release.

How to check for a detainer

An ICE detainer travels with the mittimus and so the most expedient way to find out whether there is an ICE detainer is to ask the court officers. If that proves fruitless, at times, the courtroom clerk will also be aware of the existence of an ICE detainer.

If your client is not released at arraignment but intends to post bail at the jail, you can call the records department at the jail to inquire about an ICE detainer.

With the court officers, clerks, and records departments, our suggestion is to always ask only if there is anything else holding your client, i.e., and other “wants or warrants.” This question almost always produces an ICE detainer, if there is one, but it is also vague enough that attorneys are not inadvertently notifying state officials of immigration issues that they didn’t already know about.

What to do if there is an ICE detainer at arraignment

If you learn that there is an ICE detainer, the next step is to determine whether ICE is at the courthouse. Under the [trial court policy](#), ICE must inform the court officers of their presence. Therefore, again, asking the court officers should reveal whether ICE is in the building.

If ICE is in the building, and there is an ICE detainer, there is a high likelihood that when your client is released from state custody, they will be immediately turned over to ICE. These ICE arrests generally take place in lock-up.

In situations where ICE is likely to make an arrest, you need to discuss this possibility and the potential ramifications with your client before arraignment and the setting of bail.

Individuals who are arrested by ICE are often held in ICE detention facilities outside of Massachusetts. Because they are outside the state, there are not currently mechanisms to bring them back to state court or to appear remotely to resolve their criminal cases. Most often, a default issues and the criminal case remains open. Open criminal cases can have negative effects on immigration court bond decisions as well as on any possible defenses to removal that an individual may try to assert. If an individual is deported with an open criminal case, it may prevent them from ever being able to obtain lawful status in the U.S. Because of the potentially severe consequences of an open case, some clients may prefer to remain in state custody and resolve the criminal case before being released to ICE.

In a situation where a client would otherwise be released on personal recognizance and the client is willing to remain in criminal custody to resolve the criminal case, defense counsel may be in the unusual position of requesting that the court set a small cash bail to hold the client in state custody. In this situation, we suggest explaining to the judge that release on personal recognizance will mean that the client is taken into ICE custody and will be unable to appear

again in state court and therefore the request for bail is to ensure that the criminal case can be resolved.

If you have a client with an ICE detainer at arraignment and need support or have questions, please contact the IIU (781-338-0825)