

7.3 Immigration Detainer

- A. Purpose of Detainer
 - B. Definition
 - C. Detention During and Beyond the 48-Hour Hold
 - D. Bond Considerations for a Client with an Immigration Detainer
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7.3 Immigration Detainer

A. Purpose of Detainer

An ICE detainer—or “immigration hold”—is one of the key tools ICE uses to apprehend individuals who come in contact with local and state law enforcement agencies and to place them in removal proceedings.

B. Definition

An immigration detainer is a written request to a local law enforcement agency to detain a named individual for up to 48 hours after that person would otherwise be released (excluding Saturdays, Sundays, and holidays), in order to provide ICE an opportunity to assume custody of that individual for removal purposes. *See* 8 C.F.R. § 287.7. The 48-hour period begins to run when the named individual is no longer subject to detention by the local law enforcement agency—that is, after the individual has posted bond or completed a jail or prison sentence. Law enforcement agencies include jails and prisons that have custody of the named individual.

The detainer is neither a warrant nor an order by a judge. It is a request and is not mandatory, *see, e.g., Galarza v. Szalczyk*, 745 F.3d 634 (3rd Cir. 2014), though most law enforcement agencies in North Carolina honor ICE detainers. Hundreds of jurisdictions across the country—including many in Washington, Illinois, California, Oregon, and Vermont—no longer comply with ICE detainer requests, or they comply with them in limited circumstances only. Further, several federal courts have held that holding an individual on an ICE detainer is an illegal arrest in violation of the Fourth Amendment where it is not based on a judicial determination of probable cause. *See, e.g., Morales v. Chadbourne*, 793 F.3d 208, 217 (1st Cir. 2015). Thus, a court could find that where a local jail holds an individual on a detainer that is not based on probable cause, when the individual has posted bail or is otherwise entitled to release, the jail may be liable for money damages based on an unconstitutional detention. *See, e.g., Miranda-Olivares v. Clackamas County*, 2014 WL 1414305, No. 3:12-cv-02317-ST (D. Or. Apr. 11, 2014).

In addition, the highest court in Massachusetts has ruled that Massachusetts courts and law enforcement officials—including sheriffs and police officers—are not authorized to hold people based solely on immigration detainers. *Lunn v. Commonwealth*, 78 N.E.3d 1143 (Mass. 2017). Specifically, the Court found that detention based on an immigration detainer constitutes an arrest, which must be authorized under state law. *Id.* at 1153–54. It

further found that there was no authority under state law—either statutory or common law—for an arrest for civil immigration purposes. *Id.* at 1154–56.

ICE no longer uses Form I-247 (Immigration Detainer-Notice of Action), which has been deemed problematic by courts for the reasons mentioned above. It uses the following new form:

- *Form I-247A, Notice of Action:* Form I-247A requests that the law enforcement agency (LEA) notify ICE as early as practicable (at least 48 hours, if possible) of the pending release from custody of the named individual and maintain custody of the named individual for a period not to exceed 48 hours *beyond* the time when he or she would have otherwise been released from custody. On this form, ICE must identify the basis for ICE’s determination of probable cause. (The form does *not* represent a judge’s determination of probable cause.) The LEA must serve a copy of the request on the individual for it to take effect.

Effective April 2, 2017, ICE issued a new policy directing that all ICE detainees be accompanied by an immigration warrant signed by an authorized ICE officer. *See* Immigration and Customs Enforcement Policy Number 10074.2, [Issuance of Immigration Detainers by ICE Immigration Officers](#) (Mar. 24, 2017). ICE warrants direct authorized federal immigration officers to arrest an individual for civil violations of immigration law, not criminal charges. *See* 8 C.F.R. § 287.5. Because these warrants are not reviewed by a judge or any neutral party, they do not appear to satisfy the probable cause requirement. *See e.g., El Badrawi v. Dep’t of Homeland Security*, 579 F. Supp. 2d. 249, 275 (D. Conn. 2008) (finding that an arrest based on an immigration warrant is considered “warrantless” for federal constitutional law purposes) Immigration warrants also do not provide authority for local law enforcement to arrest or detain someone for a crime.

C. Detention During and Beyond the 48-Hour Hold

If a detainer is lodged pretrial against an individual and he or she posts bail, the cases discussed in B., above, indicate that the local jail or correctional facility may not have the authority to detain an individual during the 48-hour period without a judicial finding of probable cause. The law is certainly clear that if the jail holds the person for the 48-hour period and ICE fails to assume custody of the individual during that period, the individual should be immediately released. Even assuming the initial 48-hour detention is permissible, the local jail or correctional facility has no authority to detain an individual once the detainer has expired. Any additional detention is unlawful and in violation of state pretrial release laws and could subject the facility to suit for false imprisonment. Similarly, the state lacks authority to hold someone who has served his or her maximum sentence for the offense. In practice, however, jails and correctional facilities may be reluctant to release the detained individual.

When clients have been detained pursuant to an ICE hold without a judicial finding of probable cause or beyond the 48-hour hold, some defense attorneys have contacted

counsel for the sheriff or the jail and pressed them to release their clients. If the client is not released, a writ of habeas corpus can be filed to secure release under G.S. 17-1 et seq. The filing of a writ of habeas corpus could prompt ICE to pick up the detained individual, making the action moot.

D. Bond Considerations for a Client with an Immigration Detainer

An immigration detainer is often lodged against a client before he or she has an opportunity to post bond. In those circumstances, if the client posts bond, the jail may transfer immediate custody of him or her to ICE. If ICE takes your client into custody and detains him or her, he or she will likely be sent to an out-of-state immigration detention facility for the institution of removal proceedings. To date, immigration authorities generally have not transported clients so that they can attend state court proceedings, but it is unclear whether prosecutors have made that request. As a result, the client may be called and failed in the state criminal case, be the subject of an order for arrest, and have the bond forfeited (though defense counsel should argue against the issuance of a failure to appear). *See* 1 NORTH CAROLINA DEFENDER MANUAL § 1.9H, Post-Release Issues Affecting Noncitizen Clients (2d ed. 2013). The time spent in a detention center will not count toward jail credit if your client is later convicted and sentenced in the criminal case.

Another possibility is that ICE will deport your client before resolution of the criminal case.