North Carolina Criminal Law Blog

Immigration Detainers

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An immigration detainer is one of the key tools that Immigration and Customs Enforcement (ICE) uses to apprehend individuals who come in contact with local and state law enforcement agencies. Sometimes, after a defendant has been arrested for a crime, an ICE officer will file an immigration detainer (**Department of Homeland Security form I-247A** <https://www.ice.gov/sites/default/files/documents/Document/2017/I-247A.pdf>) with the agency that has custody of the defendant. The detainer asks the agency to notify ICE when the defendant would otherwise be eligible for release and to hold the defendant for up to 48 hours thereafter to enable ICE to take custody of the defendant.

My colleague Jeff Welty **blogged about immigration detainers** <https://nccriminallaw.sog.unc.edu/immigration-detainers/> several years ago. Recently, my colleagues and I have received a lot of questions about the scope of judicial officials' authority when navigating immigration detainers. This post answers some of those questions.

Who issues the immigration detainer?

In general, an ICE agent may issue a detainer only when the agent believes that there is "probable cause" to believe that the subject of the detainer is a removable alien. The detainer must be accompanied by an administrative "warrant for arrest" or "warrant for removal" (**Department of Homeland Security form I-200** <https://www.ice.gov/sites/default/files/documents/Document/2017/I-200_SAMPLE.PDF>). Although designated as warrants, these documents are issued by an ICE officer, not by a judicial official.

Is cooperation with detainers required?

Yes. It has been widely held that detainers request that the custodial agency hold the subject after he or she would otherwise be released; they don't order the agency to do so. *See Galarza v. Szalczyk*, 745 F.3d 634 (3rd Cir. 2014).

However, the North Carolina General Assembly passed **House Bill 10** <https://www.ncleg.gov/Sessions/2023/Bills/House/PDF/H10v6.pdf> last year, which amended G.S. 162-62 to require cooperation with ICE detainers and provide more guidance on procedure regarding the custody of noncitizens. Effective for offenses committed on or after December 1, 2024, once a law enforcement agency has been notified that a detainer and administrative warrant have been issued for a person confined in their facility, the agency is required to take the person before a judicial official prior to the person's release. The agency must provide the judicial official with a copy of the detainer and administrative warrant.

If the person appearing before the judicial official is determined to be the person subject to the detainer and administrative warrant, the judicial official must issue an order directing the person to be held in custody until either: (i) 48 hours passes from the time of receipt of the detainer and administrative warrant; (ii) ICE takes custody of the person; or (iii) ICE rescinds the detainer. The judicial official will issue that order via the **AOC-CR-662** <https://www.nccourts.gov/assets/documents/forms/AOC-CR-662ff%2011-22-2024.pdf?VersionId=Fk3cVnjYei6v3bIVPSHgZMY4W_g25pqg> form, (Order After Receipt of ICE Detainer and Administrative Warrant).

Are both the detainer and administrative warrant necessary?

Yes. G.S. 162-62 explicitly requires that the judicial official be provided with both a detainer and an administrative warrant. Since receipt of both is a requirement to enter the order, it appears that a judicial official would not have the authority to enter an order in the absence of one of the required documents.

How do I determine if the person before me is the subject of the detainer?

G.S. 162-62(b1)(2) requires a judicial official to issue an order directing the prisoner be held in custody if the prisoner appearing before the judicial official is the same person subject to the detainer and administrative warrant. There are no procedural guidelines to follow in assessing whether the person who is brought before the judicial official is the same person as the one referred to in the detainer. The judicial official may accept a valid passport or state driver's license but may not consider documents such as a matricula consular or a locally issued identification card. **G.S. 15A-311(a)** <https://www.ncleg.gov/EnactedLegislation/Statutes/PDF/BySection/Chapter_15a/GS_15A-311.pdf> . Identification of the individual by another reliable person, including a law enforcement officer, may also be sufficient.

When does the 48-hour detention period begin?

The newly amended statute mandates that the 48-hour period starts from the time of receipt of the detainer and administrative warrant. This is different than the generally held start time under federal law, which indicates that the 48-hour period begins at the time the person would otherwise be released (*e.g.* the person satisfies pretrial release conditions). *See* **8 CFR 287.7(d)** <https://www.law.cornell.edu/cfr/text/8/287.7> .

As previously mentioned, an immigration detainer is typically treated as a request rather than a requirement. However, the amendment to North Carolina law mandates cooperation, though with a shorter window of applicability. Where the 48-hour period would usually start after a defendant satisfies conditions of release, under North Carolina law, the clock runs when the paperwork is received, regardless of whether the person is yet eligible for release. Note that **House Bill 318** <https://www.ncleg.gov/BillLookup/2025/H318> has been introduced in the legislature this session, which may reconcile the mismatch between these provisions.

Does the 48-hour period exclude weekends and holidays under state law?

Maybe. Under federal law, the 48-hour detention period excludes Saturdays, Sundays, and holidays in order to permit assumption of custody by ICE. **8 CFR 287.7(d)** <https://www.law.cornell.edu/cfr/text/8/287.7> . The North Carolina statute G.S. 162-62 does not describe a similar exclusion, stating plainly that release of the person should occur after 48 hours from receipt of the detainer and administrative warrant.

There are North Carolina statutes that contain specific exclusionary language or refer to "business days" or "working days" when setting out timelines, suggesting that the General Assembly has a clear way to exclude certain days when it intends to. *See, e.g.*, G.S. 14-409.43 (48-hour window for reporting certain disqualifiers to the NCIS "exclud[es] Saturdays, Sundays, and holidays"); G.S. 15A-1345(c) (hold of "seven working days" for alleged probation violators before preliminary hearing). Thus, there is an argument that the absence of such language from G.S. 162-62 may signal legislative intent for the 48-hour period to include weekends and holidays.

Even so, given that the purpose of the law is to compel cooperation with and honor detention requests, an appellate court may be inclined to interpret the 48-hour period as excluding weekends and holidays to ensure a reasonable time for ICE to take custody of the person.

What if 48 hours have already passed before the person is brought to a judicial official?

Once the detainer and administrative warrant are issued and received by the detention facility, the statute requires the facility to bring the person before a judicial official without unnecessary delay. If there is a delay, the judicial official should nonetheless complete the **AOC-CR-662** <https://www.nccourts.gov/assets/documents/forms/AOC-CR-662ff%2011-22-2024.pdf?VersionId=Fk3cVnjYei6v3bIVPSHgZMY4W_g25pqg> form, noting in the appropriate spot the time and date that the detainer and administrative warrant were received by the detention facility. The jail administrator then determines whether time remains on the 48-hour detention period.

Can a person remain in detention after criminal charges are no longer pending?

Unclear. Case law from other jurisdictions suggests that detention of a person based solely on an immigration detainer is unlawful. In *Lunn v. Commonwealth*, 78 N.E.3d 1143 (Mass. 2017), the petitioner was held pursuant to an immigration detainer after the single pending criminal charge against him was dismissed. On appeal, the highest court in Massachusetts ruled that the trial courts and law enforcement officials were not authorized to hold people based solely on immigration detainers. Specifically, the Court found that detention based on an immigration detainer constitutes an arrest, which must be authorized under state law. The Court explained that a detainer is not an arrest warrant, that officers may make warrantless arrests only for criminal offenses, and that a detainer—at most—alleges a civil violation, not a crime. A New York appellate court came to a similar conclusion in *People ex rel. Wells v. DeMarco*, 168 A.D.3d 31 (2018), where the defendant was not released after pleading guilty to criminal charges and was instead retained in custody pursuant to the immigration detainer.

The Fifth Circuit decided differently in *City of El Cenizo, Texas v. Texas*, 890 F.3d 164 (5th Cir. 2018), upholding the Texas statute directing state and local law enforcement to cooperate with ICE detainers. The plaintiffs argued that the detainers violate the Fourth Amendment because they allow police to, in effect, arrest and detain people without probable cause to believe that they have committed a crime. The Fifth Circuit noted that "[c]ourts have upheld many statutes that allow seizures absent probable cause that a crime has been committed," including involuntary commitments and runaway juveniles. The plaintiffs further contended that there was "no state law authorizing local officers to conduct seizures based on probable cause of removability," citing *Lunn*. The Fifth Circuit determined, however, that the Texas statute mandating compliance with detainers was itself the necessary authority.

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