



## **FAQs on ICE's New "Enforcement Partnerships" in Florida<sup>1</sup>**

### ***What is ICE's new "enforcement partnership" scheme?***

The scheme announced on January 17, 2018, adds two pieces of paperwork to ICE's existing detainer practices.<sup>2</sup> ICE will now sign agreements called Basic Ordering Agreements (BOAs) with local jails, under which ICE agrees to pay the jail \$50 per detainer.<sup>3</sup> Later, alongside each detainer it sends to a jurisdiction that has signed a BOA, ICE will now send Form I-203, which is used to keep track of ICE detainees as they are booked into and out of rented local jail space.

### ***What does the Basic Ordering Agreement say?***

A BOA is not an enforceable contract and does not obligate the jail to honor any particular detainer. Instead, it provides that if the jail does hold someone for ICE, the jail will be reimbursed \$50 for up to 48 hours of detention. Under a BOA, local signatories also agree to keep detainer information secret, and to give ICE free access to their jails to interrogate inmates.

### ***Under the new scheme, when a jail holds someone for ICE, does its detention constitute a "seizure" for Fourth Amendment purposes?***

Yes. A local jail makes a Fourth Amendment seizure whenever it holds a person for ICE after the person's criminal custody ends. *See, e.g., Morales v. Chadbourne*, 793 F.3d 208, 217 & n.3 (1st Cir. 2015); *Lunn v. Commonwealth*, 477 Mass. 517, 527 (2017). This is true regardless of what paperwork ICE uses to ask for the seizure, and regardless of whether ICE pays the jail. The jail remains liable for honoring detainees that lack probable cause.

### ***ICE claims that local officials are afforded liability protection from potential litigation when honoring detainees under this new scheme. Is that true?***

No. ICE has not offered to indemnify local officials, who remain on the hook for their own actions. When there is no probable cause for an arrest, the jail must refuse to make the arrest, or face liability for violating the Constitution. The BOA agreement does not change this: police cannot agree in advance to arrest without probable cause. The \$50 payment does not change this: getting paid is no defense. The I-203 does not change this: a custody request cannot excuse an arrest without probable cause. Furthermore, there is no statute that makes local officials immune from lawsuits when they honor a detainer—as years of expensive court cases and settlements attest. In fact, ICE officers themselves, acting under color of federal law, are subject to financial liability when they cause an arrest without probable cause. *See Morales*, 793 F.3d at 218.

### ***Does it matter that, under the new scheme, ICE is the one deciding whether to hold someone?***

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<sup>1</sup> <https://www.ice.gov/news/releases/ice-17-fl-sheriffs-announce-new-enforcement-partnership>.

<sup>2</sup> <https://www.ice.gov/detainer-policy>.

<sup>3</sup> Copy of BOA template on file with the ACLU.

No. The same thing has always been true of detainers. ICE decides whether to issue an I-247A detainer, just as it will decide whether to issue an I-203. Local officials remain liable under the Fourth Amendment because they are the ones carrying out the seizure.

***Does a Basic Ordering Agreement or I-203 give local law enforcement the legal authority to make a new arrest?***

No. ICE has not claimed that the BOA process delegates immigration arrest authority to local officers. Similarly, an I-203 does not provide any arrest authority, but simply asks a jail to house a person who has already been arrested by federal officers. And nothing in ICE's contracting statute or procurement regulations purports to delegate authority for local officials to make immigration arrests. See 8 U.S.C. § 1103(a)(11) (authority to rent jail space); 48 C.F.R. § 16.703 (procurement regulations).

***Do I-200 and I-205 forms give local law enforcement the legal authority to make an arrest?***

No. The forms themselves say that they can only be executed by a federal "immigration officer."<sup>4</sup> And federal regulations provide that only a specified list of trained federal officers can execute immigration warrants. See 8 C.F.R. § 287.5(e)(3).

***ICE says that it started asserting probable cause for detainees in 2017 for the first time. Is that true?***

No. ICE has asserted that it had probable cause since at least 2012.<sup>5</sup> And since 2015, detainees have used the phrase "probable cause" explicitly. These assertions, which are never reviewed by a judge (or even an immigration judge), have never absolved local officials of liability for honoring detainers.

***So what does the new scheme change about local officials' exposure to liability?***

Nothing. The new scheme is simply a change in paperwork, with no relevant legal changes. Over the years, ICE has repeatedly made claims about its detainer scheme that turned out to be wrong—that detainers were mandatory, that Secure Communities was optional—and which exposed local officials to enormous liability. The new BOA scheme is more of the same.

***ICE claims that detainees only target immigrants convicted of serious crimes. Is that true?***

No. The vast majority of detainees target people with little to no criminal record—for instance, in 2013, half had no criminal conviction at all, and at least two-thirds had only been convicted of traffic or other non-violent offenses.<sup>6</sup> Preliminary ICE data from the current administration suggests more of the same.<sup>7</sup> In the last several years, ICE has also mistakenly placed hundreds of detainees on U.S. citizens.<sup>8</sup>

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<sup>4</sup> Forms I-200 and I-205 are linked here: <https://www.ice.gov/detainer-policy>.

<sup>5</sup> <https://www.ice.gov/doclib/secure-communities/pdf/immigration-detainer-form.pdf>. The detainer form used the phrase "reason to believe," which is equivalent to probable cause in immigration. *Morales*, 703 F.3d at 216 (citing cases).

<sup>6</sup> Transactional Records Access Clearinghouse, Syr. Univ. ("TRAC"), *Few ICE Detainers Target Serious Criminals*, Sept. 17, 2013, <http://trac.syr.edu/immigration/reports/330/>.

<sup>7</sup> ICE, *Fiscal Year 2017 ICE Enforcement and Removal Operations Report*, Tbl. 1 & 2 (showing 26% of arrestees have no crimes and 56% of the remainder with minor offenses) (last updated Dec. 13, 2017), <https://www.ice.gov/sites/default/files/documents/Report/2017/iceEndOfYearFY2017.pdf>.

<sup>8</sup> TRAC, *ICE Detainers Placed on U.S. Citizens and Legal Permanent Residents*, Feb. 20, 2013, <http://trac.syr.edu/immigration/reports/311/>; Eyder Peralta, *You Say You're an American, but What if You Had to Prove It or Be Deported?*, NPR (Dec. 22, 2016), <http://www.npr.org/sections/thetwo-way/2016/12/22/504031635/you-say-you-re-an-american-but-what-if-you-had-to-prove-it-or-be-deported>.