
ICE Detention and Public Health

Summary

U.S. Immigration and Customs Enforcement (“ICE”) recently issued a set of [mandatory requirements](#) for *all* detention facilities nationwide in response to COVID-19. These requirements include detailed instructions for operations inside facilities and mandate coordination with local and state health agencies. Thus, ICE’s own requirements include a role for state and local officials in ensuring proper health standards in its facilities.

The guidelines are also particularly important in regulating the conduct of for-profit corporations operating ICE detention facilities. These contractors must strictly adhere to the terms of their contracts as well as ICE’s new mandatory standards. Private operators who act in violation of their contracts or mandatory requirements are violating the law and should be subject to liability by state and local authorities.¹

Background

California is home to five immigrant detention facilities that combined hold up to 5,600 immigrants at any given time, with future plans to expand to 7,200 beds.² These facilities also receive transfers from state prisons and jails, and as such are part of a larger challenge posed by facilities vulnerable to COVID-19 outbreaks. The potential spread of COVID-19 in immigrant detention facilities in California could have disastrous consequences for those detained in these facilities, as well as neighboring communities.

While the consequences of a COVID-19 outbreak in immigrant detention would be dire for those detained, the likelihood of an outbreak should also be of grave concern due to the significant challenges it would pose for California as a whole. The Governor, in his six-point plan to lift shelter-in-place, included the need to formulate plans to address the threat of COVID-19 in vulnerable detention facilities. However, to date, no such plan has been developed by the administration.

The lack of accountability with respect to conditions in ICE detention facilities is the result of [an inadequate inspection](#) and [compliance scheme](#), particularly when a private operator is involved. Despite the fact that ICE sets specific conditions standards in their detention contracts, violations of these standards are routinely met with indifference, even when they result in death.

Faced with the current COVID-19 pandemic, California must take immediate steps to prevent the unnecessary loss of human lives in immigrant detention facilities and surrounding communities, particularly in light of the federal government’s perilous refusal to take action on the matter. California has the legal authority and moral responsibility to protect the health and welfare of immigrants detained in our state.

¹ Private prison corporations acting as federal contractors have enjoyed immunity from liability by claiming derivative sovereign immunity, however the Supreme Court has ruled that sovereign immunity does not apply to federal contractors who violate the express terms of a government contract or directive. "When a contractor violates both federal law and the government’s express instructions... there is no immunity". *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 193 L. Ed. 2d 571 (2016), as revised (Feb. 9, 2016).

² Current population as of July 2020 under COVID-19 is lower than 5,600.

Mandatory Guidelines³

All ICE detention facility operators must:

- Comply with the provisions of their relevant ICE contract or service agreement.
- Comply with the ICE national detention standards applicable to the facility, generally [Performance-Based National Detention Standards \(PBNDS\) 2011](#).
- Comply with the CDC's [Interim Guidance on Management of Coronavirus Disease 2019 \(COVID-19\) in Correctional and Detention Facilities](#)
- Follow ICE's [March 27, 2020 Memorandum to Detention Wardens and Superintendents on COVID-19 Action Plan Revision 1](#), and subsequent updates.
- Immediately report all confirmed and suspected COVID-19 cases to the local ICE Enforcement and Removal Operations (“ERO”) Field Office Director (or designee), Field Medical Coordinator, and local health department.
- Evaluate all new intakes within five days of entering ICE custody to determine whether the detainee falls within the populations identified by the CDC as potentially being at higher risk for serious illness from COVID-19, and/or the subclasses certified in [Fraihat v. ICE](#).

Public Health Guidelines

1. ICE detention standards **require** facilities to collaborate and comply with federal, **state, and/or local authorities** addressing public health issues, including communicable diseases.⁴
2. ICE detention facilities must actively engage with local health departments to understand in advance which entity has jurisdiction to implement public health measures for COVID-19 in the facility.⁵
3. ICE detention facilities must report all confirmed and suspected COVID-19 cases to the local ERO Field Office Director (or designee), Field Medical Coordinator, and local health department immediately.⁶
4. Each facility must develop a COVID-19 mitigation plan. Administrators should plan and prepare for COVID-19 by “[c]oordinating with public health and correctional partners.” As well as “[i]dentify points of contact in relevant state, local, tribal, and/or territorial public health departments before cases develop.”⁷
5. Facilities are encouraged to limit or entirely eliminate transfers. “Where possible, put plans in place with other jurisdictions to prevent confirmed and suspected COVID-19 cases and their close contacts from being transferred between jurisdictions and facilities unless necessary for medical evaluation, medical isolation/quarantine, clinical care, extenuating security concerns, or to prevent overcrowding.”⁸

³ [ICE's Enforcement and Removal Operations COVID-19 Pandemic Response Requirements](#).

⁴ The Performance-Based National Detention Standards (PBNDS) 2008 and 2011 both require facilities to “comply with current and future plans implemented by federal, state or local authorities addressing specific public health issues including communicable disease reporting requirements.” The 2019 National Detention Standards (NDS) similarly require “collaboration with local or state health departments in accordance with state and local laws and recommendations. *Id.* at pg 6

⁵ CDC Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities pg 5

⁶ ICE Pandemic Response Requirements at pg 10

⁷ *Id.* at pg 6

⁸ CDC at pg 6