Committee for Public Counsel Services

Defending the People of Massachusetts

PROTECT ACT HIGHLIGHTS

PROTECTING COMMUNITY SPACES

Immigration enforcement cannot enter the following spaces unless they have a judicial warrant:

- State courthouses, including parking lots and courthouse grounds
- School grounds or childcare facilities
- Non public spaces of healthcare facilities

STOPPING ARRESTS AFTER POSTING BAIL

Massachusetts courts, law enforcement, and carceral facilities are no longer permitted to notify ICE when a defendant posts bail.

LIMITING STATE AND LOCAL INVOLVEMENT IN IMMIGRATION ENFORCEMENT

Law enforcement and courts cannot inquire about or record a person's immigration status or citizenship, except in limited circumstances.

STOPPING INFORMATION SHARING WITH ICE

The Act protects nonpublic personal information and custody status from being knowingly released to federal immigration authorities.

EXPANDING ACCESS TO COUNSEL

Facilities are required to create a "legal counsel phone line" whereby any licensed attorney may call a detained person, either through a confidential phone line or a callback system. Facilities are also required to provide free access to video conferencing between licensed attorneys and detainees.

PREVENTING NEW CONTRACTS WITH ICE

Although the new law preserves the DOC's current 287(g) agreement, it prohibits new or expanded 287(g) agreements.

FOR MORE INFORMATION, REACH OUT TO THE IMMIGRATION IMPACT UNIT AT IIU@PUBLICCOUNSEL.NET

The PROTECT Act: Table of Contents

Find the full text of the statute here:
https://malegislature.gov/Bills/194/H5620

Detainee Rights and Attorney Access
(H5620 Section 6)

Summary

Section 6 takes effect on November 3, 2026. It covers detainee rights and attorney access. Of the provisions in the PROTECT Act, it has the greatest amount of impact outside of the immigration-related realm. Section 6 covers all houses of correction and the Department of Corrections (hereinafter "facilities"). Although immigration detainees at Plymouth County House of Correction are included within Section 6's scope, Section 6 is <u>not</u> limited to immigrant detainees.

Section 6 requires that detainees be provided certain information about their rights upon intake. It also requires facilities to set up systems to allow attorneys to initiate phone calls to detainees and to conduct video conferences with detainees without charge. Additionally, facilities must notify counsel of record when a detainee is transferred.

Further Information

<u>**Detainee Rights:**</u> Upon intake, facilities are required to provide written notices to detainees in their primary language (e.g., right to legal counsel, right to decline interviews by state or federal law enforcement).

Section 6 also addresses court transportation and remote court access *only for immigration matters*. Section 6 specifically states that it does not alter any existing responsibility or ability to provide transportation or functional remote access to court proceedings unrelated to immigration enforcement. Therefore, defense attorneys should continue to rely on IIU's January 2019 Practice Advisory entitled *Habeing Defendants from Immigration Custody to Massachusetts Criminal Courts*, which contains for reference the Trial Court's orders on this subject.

<u>**Attorney Access:**</u> Facilities are required to create a "legal counsel phone line" whereby any licensed attorney (not just the counsel of record) may initiate phone contact with a detained person. It requires facilities to create the capability for a licensed attorney to initiate a confidential call to a detained person once per day. If direct calling is technologically infeasible for a facility, the alternative is for the facility to create a system for the licensed attorney to request a confidential callback from the detained person within 24 hours. Facilities are required to maintain records regarding contact-routing information sufficient for legal counsel to maintain contact with the detained individual.

Facilities are also required to provide <u>free</u>, regular, and reasonable access to video conferencing for meetings between licensed attorneys and detainees.

Additionally, if a detainee is transferred to or from a facility, each facility must notify "legal counsel of record" of the transfer no later than 6 hours after the transfer. Legal counsel of record is defined as an attorney who has entered an appearance on behalf of the detained individual in any court proceeding.

<u>Recourse for Non-Compliance:</u> Section 6 explicitly does <u>not</u> create a private right of action. However, the Attorney General may enforce the section in a civil action brought in the Superior Court to compel compliance or prevent violations. In the event of non-compliance, IIU recommends that defense attorneys inform the Immigration Impact Unit and contact the Attorney General's office to request case-by-case enforcement. In the event that IIU gathers data evidencing systemic non-compliance, IIU may also request that the Attorney General take broader action.

Limits on State and Local Law Enforcement Collaboration and Information Sharing with ICE (H5620 Section 7)

Summary

Section 7 of the PROTECT Act takes effect on September 4, 2026, and has a wide reach. It generally limits the ability of law enforcement entities and courts to: (1) ask about a person's immigration status, (2) use state or local resources to participate in civil immigration enforcement, and (3) share information with ICE. It also codifies *Lunn v. Commonwealth,* 477 Mass. 517 (2017), and effectively prohibits new 287(g) agreements in Massachusetts. Currently, in Massachusetts, only the Department of Corrections has a 287(g) agreement with ICE. This agreement allows DOC to, among other things, question people incarcerated in state prisons for immigration purposes and communicate with ICE in advance of sentence release dates.

Practically speaking, we anticipate the most significant impact of Section 7 will be that Massachusetts courts, law enforcement, and carceral facilities are no longer permitted to notify ICE when a defendant posts bail. As a result, defendants should be released after posting bail at both police stations and jails without fear of immediate detention by ICE at the holding facility. Further, after Section 12 goes into effect on November 3, 2026, defendants should also be released after posting bail at courthouses without fear of immediate ICE detention, as ICE will then be prohibited from making civil arrests at courthouses (unless they have a judicial warrant).

Further Information

Section 7 restricts law enforcement and courts from inquiring about or recording a person's immigration status or citizenship unless there is an articulable, case-specific reason to believe the information is directly material to a Massachusetts felony, sex trafficking, or labor trafficking case, and the reason is documented. A person's status is deemed "directly material" only when necessary to establish an element of a specific criminal offense, not to assess credibility, cooperation, or general information gathering. It is not yet clear whether any Massachusetts felonies will be interpreted to include an element that requires establishing a person's immigration or citizenship status, based on case-specific circumstances.

Section 7 also generally restricts law enforcement agencies from using state or local resources to participate in federal civil immigration enforcement. Unless otherwise authorized, law enforcement may not stop, arrest, search, seize, or detain a person based on their actual or perceived immigration or citizenship status. Officers may not investigate, question, or interrogate a person for the purpose of federal civil immigration enforcement, nor may they transport a person to ICE custody. Further, law enforcement cannot hold a person based solely on an ICE detainer beyond the time they would otherwise be eligible for release. This detainer provision will not change current practice, as it simply codifies the 2017 Supreme Judicial Court's holding in *Lunn*.

In addition, Section 7 generally protects nonpublic personal information and custody status from being knowingly released to federal immigration authorities. However, advance notice of a person's release to ICE is permitted if the person has completed a sentence for certain crimes. This exception includes finishing a criminal sentence for a violent crime causing serious bodily injury, a sex offense, a sexually violent offense, a sex offense involving a child, a "serious drug offense" involving class A or B narcotics (e.g., distribution/possession with intent to distribute and trafficking), a firearms offense listed in ch. 276, § 58A, and an offense involving abuse as defined in ch. 209A, § 1. Additionally, advance notice to ICE of a person's upcoming court appearance is permitted if a written request for a specifically named person is received within the preceding 30 days.

It is important to note that the PROTECT Act preserves the Department of Corrections' existing 287(g) agreement, which authorizes some activities that Section 7 otherwise prohibits. Specifically, ICE-trained DOC officers may continue to participate in civil immigration enforcement, question people incarcerated in state prisons for immigration purposes, and transport people released from state prison to ICE custody. The DOC's existing 287(g) agreement also allows DOC to freely share information with ICE, including nonpublic personal information, custody status, and advance notice of state prisoners' release, regardless of the crime.

Finally, the PROTECT Act effectively prohibits any other Massachusetts law enforcement agency, city, or town from entering into a new 287(g) agreement with ICE. This is because Section 7 only allows new 287(g) agreements without civil immigration enforcement functions, however, civil immigration enforcement assistance is the sole purpose of 287(g) agreements.

Prohibition of Civil Arrests in State Courthouses
(H5620 Section 12)

Summary

Section 12 of the PROTECT Act takes effect on November 3, 2026, and will prohibit state and federal authorities from making civil immigration arrests inside the courthouse or on courthouse grounds without a judicial warrant.

Practically speaking, this means that defendants who are released from custody at the courthouse, or who are appearing in court for any reason, should be able to do so without fear of immediate ICE detention, as ICE will then be prohibited from making arrests in and around state courts.

Further Information

The PROTECT Act adds Chapter 221D to Massachusetts General Laws. It prevents any "law enforcement officer" or "employee or representative of a law enforcement agency" from making a civil arrest at a courthouse unless the person is acting in an official capacity and has a judicial warrant authorizing the civil arrest. Civil arrest is widely defined and includes civil immigration arrests.

The statute defines "courthouse" to include the interior of any facility where a court of the commonwealth conducts business as well as the exterior of those facilities, including, lawns, plazas, courtyards, steps, ramps, walkways, garages and parking lots.

The statute defines "law enforcement officer" and "law enforcement agency" broadly to include a wide variety of state and federal entities, most importantly, including Immigration and Customs Enforcement (ICE).

The statute requires that any violations will be remedied through the Attorney General in a civil action in state Superior Court or Federal Court. Additionally, a violation of the statute will constitute false imprisonment under M.G.L. ch. 263 § 3. It creates no private right of action in state court, though it does not limit individual actions in Federal Court.

It is important to note that state law enforcement, including court officers, are ***not required*** to interfere in any violations of the statute, and that the statute does not create a right of action against the judicial branch.

The statute puts in place reporting requirements for the Trial Courts regarding the presentation of any judicial warrants received annually.

A New Bail Factor in District, Boston Municipal and Juvenile Courts
(H5620 Section 14)

Summary

Section 14 of the PROTECT Act added a new "bail factor" to G.L. c. 276 § 58, the statute governing bail in district, BMC, and juvenile courts. This factor allows judges to consider immigration status when determining bail in an extremely narrow and specific set of circumstances. **This change to the bail statute took effect immediately on August 5, 2026.**

In practice, defense attorneys will need to know what types of information can and cannot be used in a bail argument and will need to be prepared to object if immigration status is relied upon improperly.

Further Information

This addition to § 58 allows a judge or clerk to consider the fact that a person has a final order of removal in their decision of whether to set cash bail, but ***only if*** 1) the charged offense is a Massachusetts felony; and 2) the federal government has commenced the active execution of the order of removal.

In addition, the existence of a final order of removal cannot be considered if any of the following are true:

- Your client's rights to appeal the final order of removal have not been fully exhausted or waived;
- There is a stay of removal; or
- A current order of supervision or other administrative judicial action affecting the execution of the order of removal has been sought or entered.

The presumption of release means that it is the prosecutor's burden to present this specific information when arguing to increase bail based on immigration status. It remains to be seen whether a prosecutor or judge will ever have the necessary information to include this new "removal order" factor in bail hearings. Defendants and defense attorneys are not obligated to share sensitive immigration-related information with the court or the prosecutor unless they decide it is beneficial to the defendant.

Beyond a final order of removal that meets the strict criteria above, immigration should not be discussed or considered during bail hearings. A defendant's immigration status, the presence of an ICE detainer, ICE custody, and/or ongoing removal proceedings should not be mentioned by a prosecutor or judge during a bail hearing. Defense counsel should object if prosecutors or judges mention these other immigration-related factors that clearly are not permitted by the new provision of the bail statute.

You will likely need to educate prosecutors and judges

As defense attorneys, your job will be to prevent the inclusion or consideration of your clients' immigration situation in bail arguments if prosecutors and/or judges misunderstand this provision. The fact that this change to the bail statute is written so narrowly supports the argument that the legislature specifically excluded any other discussion of immigration status and/or an individual's risk of ICE arrest/deportation from bail considerations.

<u>Because § 58 requires specialized immigration knowledge, we want to provide some **key terms:**</u>

Order of removal – An immigration judge's order at the conclusion of removal proceedings that a noncitizen shall be removed from the United States.

(Note: the terms "Allowed" "Administrative close" "terminated" or "dismissed" do NOT refer to orders of removal)

Final order of removal (defined at 8 C.F.R. 1241.1)- An order of removal becomes final:

> (a) Upon dismissal of an appeal by the Board of Immigration Appeals;
>
> (b) Upon waiver of appeal by the respondent;
>
> (c) Upon expiration of the time allotted for an appeal if the respondent does not file an appeal within that time;
>
> (d) If certified to the Board or Attorney General, upon the date of the subsequent decision ordering removal;
>
> (e) If an immigration judge orders an alien removed in the alien's absence, immediately upon entry of such order; or
>
> (f) If an immigration judge issues an alternate order of removal in connection with a grant of voluntary departure, upon overstay of the voluntary departure period, or upon the failure to post a required voluntary departure bond within 5 business days. If the respondent has filed a timely appeal with the Board, the order shall become final upon an order of removal by the Board or the Attorney General, or upon overstay of the voluntary departure period granted or reinstated by the Board or the Attorney General.

Stay of removal – A stay of removal prevents the Department of Homeland Security from removing a person from the United States. The Department of Homeland Security, immigration judges, the Board of Immigration Appeals, and the U.S. Courts of Appeals all have authority to grant stays of removal. Some stays are automatic and tied to certain filings/appeals. Others must be formally requested and granted as a matter of discretion.

Order of supervision (aka "OSUP") – Conditional release from ICE custody during removal proceedings or after a final order of removal enters if a noncitizen cannot be removed to their birth country for one of several reasons, e.g. DHS cannot obtain a travel document for the person.

<u>You might be wondering:</u>

What does "the active execution of an order of removal" look like?

After a final order of removal issues, DHS must take steps to effectuate the removal. If a person is already in ICE detention, DHS will start the process of obtaining the person's travel document and scheduling a deportation flight. If the person is not yet in ICE custody, DHS will issue them a notice ordering them to surrender themselves to ICE on a particular date to be taken into ICE custody and deported. If they do not appear, ICE will seek to arrest them.

If DHS has granted your client deferred action or a stay of removal, those actions would indicate that DHS is <u>not</u> actively executing the order of removal.

What appeal process is available after an order of removal enters?

After an immigration judge issues an order of removal, a noncitizen can file an appeal to the Board of Immigration Appeals (BIA). A noncitizen can also file a motion to reconsider or a motion to reopen in immigration court. 8 U.S.C. 1229(a). In most cases, the deadline to file an appeal is thirty (30) days from the issuance of the removal order.

Assuming a timely notice of appeal is filed, appeals can remain pending for years.

What are examples of administrative judicial actions that would affect the execution of a removal order?

A grant of a stay of removal or a grant of a motion to reopen removal proceedings would be examples of judicial actions that would affect the execution of a removal order.

Do defense attorneys have any obligation to obtain or share information regarding the status of a client's removal case or removal orders from their client and/or the client's immigration attorney?

No. Like any other of your client's personal details, this information is protected by attorney-client privilege. There is no obligation to provide information that could be potentially detrimental to your client, and ethical rules would caution against it (unless you and your client determine that sharing it would be beneficial).

However, you might want to seek this information from your client or their immigration attorney to better understand your client's immigration situation and their risk of ICE arrest and/or deportation while their criminal case is pending. The presence of a final order of removal might impact your client's decisions with respect to the criminal charges as well.