

Practice Alert for New York Criminal Defense Attorneys: The Laken Riley Act



The first legislation passed by the current administration, the Laken Riley Act (“LRA”) expands the scope of “mandatory detention” during civil immigration proceedings for some non-citizens who have been arrested, charged, convicted, or admit to committing certain crimes. Mandatory detention precludes courts from considering risk of flight or danger to the community to set bond, and non-citizens can be detained for years while immigration courts make a decision. While criminal defense attorneys may be surprised to learn that innocuous-sounding offenses like shoplifting can result in years of pretrial detention, removal proceedings are nominally civil in nature and therefore allow lesser protections than in the criminal proceeding itself.

Most importantly, the **LRA does not change *who can be deported***, only how someone who is *already* deportable can be detained during their removal proceeding.

As a result, many non-citizens are not subject to LRA restrictions at all. Careful analysis is required before alerting your client to the possibility of mandatory detention.

Who does the LRA target for mandatory detention?

The LRA amends the detention provisions of the Immigration and Nationality Act, requiring ICE to mandatorily detain non-citizens who meet *both* of the following requirements:

1 charged with, is arrested for, is convicted of, admits having committed, or admits committing acts which constitute the essential elements of offenses defined under state law as:

- burglary;
- theft;
- larceny;
- shoplifting;
- assault of a law enforcement officer; or
- any crime that results in death or serious bodily injury to another person.

The definitional requirement under state law excludes complaints that may include factual allegations that may seem to make out the named offense.

2 removable and inadmissible because the non-citizen **entered the United States:**

- illegally, without inspection and authorization;
- using fraud or misrepresenting a material fact, including false documents; or
- without proper entry documents to the United States, such as a valid visa or reentry permit.

The LRA does **NOT** apply to:

- lawful permanent residents (green card holders);
- anyone admitted on a visa (e.g. tourist, student, or work visa), even if they overstayed;
- refugees;
- arriving and paroled non-citizens, including CBP One applicants; or
- anyone with final orders of removal.

Defense attorney practice tips

1 Continue to refer your cases to a *Padilla* attorney

As soon as you intake your client and learn that they were not born in the United States, reach out to immigration counsel. Complying with *Padilla v. Kentucky* requires defense attorneys to advise their clients about whether they are at risk of mandatory detention, and should include the likelihood of an ICE arrest.

- ☐ A *Padilla* specialist will consider the client's individual circumstances and immigration history to determine whether they fall within the scope of the LRA.
- ☐ Because mandatory detention can apply solely on the basis of an arrest or charge, a *Padilla* specialist will assist in requesting and reviewing documents that will be closely scrutinized by immigration agencies.

2 Strategize to decrease the risk of ICE enforcement

ICE may try to push the mandatory detention provisions of the LRA to the maximum extent, but you can still decrease the risks that your client is targeted by ICE in the first place.

- ☐ Advocate for sentences that minimize continued contact with the criminal legal system, including foregoing ongoing programming or probation.
- ☐ Waive the pre-sentence investigation report (PSI) to avoid unnecessary contact with New York probation. N.Y.C.P.L. §§ 390.20(4), (5). Probation communicates with ICE to verify immigration status and history.
- ☐ Arrange for the client to be released from the courthouse when possible.
- ☐ Explain to the client that ICE probably knows about their presence in the U.S. based on their arrest, and has access to eJustice records held by DCJS, such as the address they provided police and booking photograph.
- ☐ Provide the client "[Know Your Rights materials](#)" so that they are prepared in case of an encounter with ICE.
- ☐ In New York City, advocate for a plea that is covered by NYC's detainer law (NYC Admin Code § 9-131), which limits communications between the Department of Corrections and ICE and prohibits most direct transfers from criminal to immigration custody.
 - ☐ Detainer laws do not protect your client if they have been convicted within the last five years of a felony designated as a "violent or serious crime" (VSC), defined at A.C. § 9-131(a)(7) and 39 R.C.N.Y. 2-01.
 - ☐ The law only applies in NYC and does not protect clients who are transferred into DOCCS custody. As DOCCS fully cooperates with ICE detainer requests, avoiding upstate time is another way you can protect your client. See IDP's resource, "ICE Knows You're in DOCCS" at : <https://tinyurl.com/2n33dehs>

3 Preserve challenges to LRA that your client can raise in immigration court

Though currently untested, immigration attorneys have identified several challenges to the LRA, and you should try to preserve those challenges when resolving your client's case. For example, you could ensure your client can:

- ☐ Challenge LRA retroactivity. Arrests or charges that predate its 1/29/25 effective date should only subject your client to mandatory detention if the case results in an LRA *conviction*. As a reminder, the federal definition of "conviction" is broader than the state definition so repleaders qualify.
- ☐ Challenge using the LRA for non-LRA convictions, because arrested and charged are in the present tense. LRA arrests or charges could be resolved, for example, with trespass P.L. 140.17, jostling P.L. 165.25, misapplication of property P.L. 165.00, or *attempts* of offenses with a serious physical injury element.