

U.S. Customs and Border Protection (CBP) COVID-19 Policies and Protocols at the Southwest Border

Updated September 20, 2021

In recent months, an increase in the number of apprehensions of unauthorized migrants at the Southwest border by the Department of Homeland Security (DHS) Customs and Border Protection (CBP) is causing concern in [border states](#) and [communities](#) about [the presence of migrants](#) who are COVID-19 positive. Pandemic-related [public health and travel restrictions](#) were established on March 21, 2020, by the Centers for Disease Control and Prevention (CDC) and [CBP](#). Limited capacity in CBP holding facilities presents logistical and health safety challenges for migrant processing as CBP implements protocols to reduce the spread of COVID-19.

Current Trends in Encounters at the Border

CBP's U.S. Border Patrol (USBP) [encountered 1,472,655 migrants between ports of entry \(POEs\)](#) at the Southwest border in FY2021 (through August). (Another [68,996 were determined to be inadmissible](#) at a POE during this period by CBP's Office of Field Operations.) CBP reports that [25% of the 208,887 encounters in August](#) involved persons who made more than one attempt to cross the border, decreasing the number of unique encounters to 156,641. In August, [less than half \(49%\) were single adults](#), [41% were people in family units](#), and [9% were unaccompanied children](#).

Immigration Processing: Title 8 and Title 42

Pre-pandemic, migrants apprehended by USBP were processed through Title 8 of the U.S. Code (immigration) and screened for asylum claims. Single adults were typically held in CBP custody before being referred to Immigration and Customs Enforcement (ICE). Except for unauthorized migrants subject to mandatory detention, ICE has the discretion to release migrants, pending either [expedited removal](#) or longer "formal" removal in immigration court proceedings.

The 1997 Flores Settlement Agreement limits how long families can be detained (generally not beyond the initial asylum screening process). Under the [Migrant Protection Protocols \(MPP\)](#), which were implemented by the Trump Administration in 2019, terminated by the Biden Administration in 2021, and

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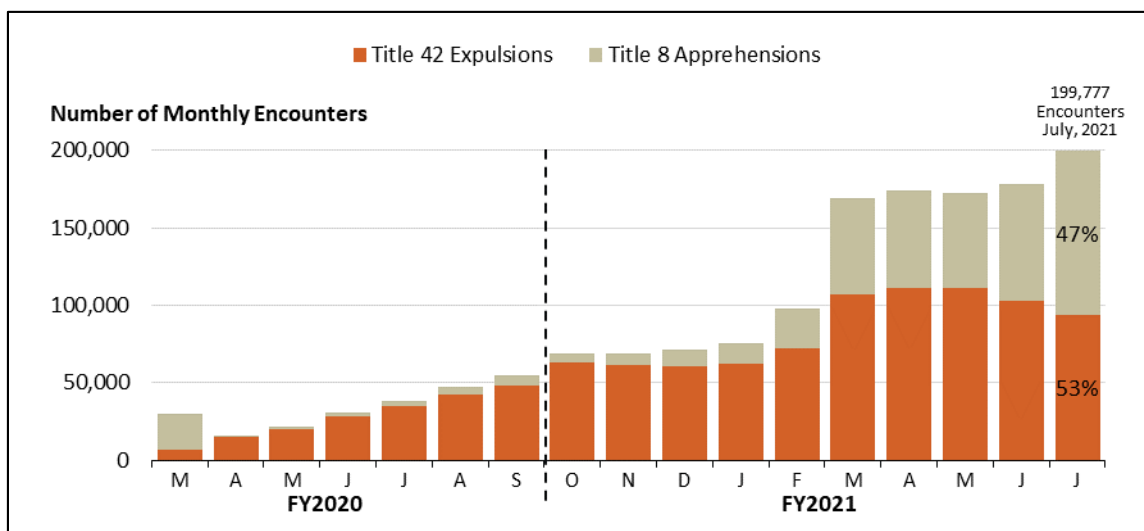
recently reinstated by a federal judge, DHS requires some migrant families and adults to wait in Mexico during their formal removal proceedings. Under Title 8, most **unaccompanied children** must be transferred to the Department of Health and Human Services (HHS) Office of Refugee Resettlement (ORR) for care until they are released to sponsoring relatives or legal guardians residing in the United States.

CDC policy has altered this framework during the pandemic. CDC issued an **order** under Title 42 (public health code) on August 5, 2021 (replacing earlier orders from **October 2020** and **March 2020**) that suspends the right to “introduce certain persons from countries where a quarantinable communicable disease exists.” The order applies to certain noncitizens (e.g., **unlawful entrants and inadmissibles**) who would otherwise be held in DHS facilities for immigration processing, and where risk of COVID-19 transmission is exacerbated by inadequate space for distancing, isolation, and required protocols for separating certain migrants (e.g., men from women). The August Title 42 order **does not apply to unaccompanied children**.

Under the Title 42 order, CBP is to **process migrants promptly** (15 minutes in an outdoor setting), **without asylum screening**, and expel them back to Mexico through the closest POE. Those unable to be expelled because of restrictions imposed by Mexico (**certain nationals and family groups**), or due to other discretionary exceptions, are processed under Title 8. **This increases migrants’ time in CBP custody** (averaging 50 hours for adults and 62 hours for families). Even with these procedures, CBP **routinely exceeds** COVID-19 holding capacity.

With both Title 42 and Title 8 operating at the border, procedures can differ for adults and families depending on USBP holding capacity. In practice, CBP expels most single adults to Mexico under Title 42 (**88% through July of FY2021**). Most families are processed under Title 8 (**70% through July of FY2021**). However, the ratio of Title 42 expulsions to Title 8 apprehensions has been narrowing (see **Figure 1**). **More recently, greater numbers of families have been apprehended**, and they are largely processed under Title 8. A U.S. district judge **blocked the expulsion of all unauthorized migrant families** on September 16, 2021. This court order is set to go into effect 14 days from the ruling, barring any further court orders to the contrary.

Figure 1. U.S. Border Patrol Monthly Enforcement Encounters at the Southwest Border: FY2020 and FY2021 YTD (July)



Source: U.S. Department of Homeland Security, Customs and Border Enforcement, <https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics>.

When capacity is limited, CBP often releases screened families into the United States with one of two documents. The Notice to Appear (NTA), which takes CBP approximately two hours to process, places migrants into immigration court proceedings with the Department of Justice (DOJ) Executive Office of Immigration Review (EOIR). The [Notice to Report \(NTR\)](#) requires released migrants to report to ICE within 60 days of arriving at their U.S. destination (typically where they have family or a community). ICE then provides further reporting requirements that, for some, involve enrollment in an [alternatives to detention program \(ATD\)](#). The NTR takes less time to process, but may make it more difficult for ICE to monitor migrants if they fail to make initial contact. Recent [reports](#) indicate that some migrants expelled under Title 42 are flown to Mexico's southern border instead of sent back at a land POE to deter repeat migration. It remains unclear how renewed implementation of the MPP will alter current practice at the border, because DHS retains [discretion](#) over MPP policy administration.

COVID-19 Mitigation in CBP and ICE Custody

[CDC maintains](#) that Title 42 remains necessary at this time. [Currently, CBP provides masks to individuals in CBP custody; COVID-19 testing is limited.](#) How many migrants arrive COVID-19 positive is unknown. Testing, diagnosis, isolation, and treatment of migrants released into U.S. communities is conducted by [state and local health agencies, and facilitated by local NGOs](#) who also provide shelter, food, and other basic services including assisting with transportation to migrants' destinations. Migrant care-related expenses may be reimbursed by DHS's Federal Emergency Management Agency's (FEMA's) [Emergency Food and Shelter Program](#).

By contrast, [ICE detention facilities must](#) screen and test new admissions and those being deported, monitor detainees, isolate COVID-19-positive detainees, provide medical care for the sick, and hospitalize those needing higher-level care. ICE is [required to evaluate admissions](#) for at-risk conditions for possible custody determination. ICE is required to [offer the COVID-19 vaccine](#) to detainees according to state guidelines.

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