



IMMIGRATION ENFORCEMENT

Q 1: What government agencies are responsible for enforcing federal immigration laws?

A: The Department of Homeland Security (DHS) is the primary agency that enforces federal immigration laws. Within the DHS, U.S. Citizenship and Immigration Services (USCIS) and Homeland Security Investigations (HSI), the investigatory arm of Immigration and Customs Enforcement (ICE), deal with employers in different situations. However, the primary enforcement division within DHS for employers is ICE. ICE is responsible for enforcing an employer's obligations to complete the I-9 form, verify, and re-verify the work authorization of all employees. State agencies may also be involved to the extent that there may be state laws that require employers to notify employees of ICE actions or other state mandated employer obligations.

Q 2: How does ICE enforce federal immigration laws?

A: ICE enforces the immigration laws through random I-9 compliance audits or through narrower investigations based on a lead. The lead can be a complaint or tip that an employer employs unauthorized workers or the tip may come from ICE learning information from other sources, such as the Department of Labor (DOL), that indicate an employer is not complying with the I-9 regulations or employing undocumented workers. These tips can lead to an ICE raid (referred to as a "targeted enforcement operation" by ICE) at the employer's facility.

Q 3: Does an ICE officer have the right to appear unannounced at an employer's worksite?

A: Yes, an ICE officer may come unannounced to the workplace with a Notice of Inspection (NOI) requesting an employer's I-9s. Almost all NOIs are accompanied by an administrative subpoena issued by DHS. After receiving an NOI, an employer must provide its I-9 forms and any supporting documentation (such as U.S. passports, green cards, driver's licenses) and Social Security cards for current employees and usually terminated employees for the last 1-2 years within a minimum of 3 business days. When ICE serves an NOI, it will provide the employer with the NOI. The employer should ask for the contact information for the agent serving the NOI. Employers should never waive the 3-day period to produce I-9s. Often, the NOI will allow the employer more than 3 business days to supply the I-9 forms and other records. Even if only 3 business days are listed on the NOI, most ICE offices will allow additional time, anywhere from 3-10 extra days.

Q 4: When can ICE enter non-public areas of the workplace?

A: For ICE to enter non-public areas of a workplace, ICE must have the employer's consent or a search warrant signed by a federal judge. If the ICE officer presents an administrative warrant, issued by DHS, for the arrest of an employee, then the officer is still only allowed into public areas of the workplace.

Q 5: Does ICE have the right to interview employees and/or supervisors without prior notice? Can a company have their representative present for interviews?

A: Yes, ICE may try to speak with employees, but the employer can refuse to make employees available and refer ICE to legal counsel. However, employers generally have no control on what ICE does outside of the workplace (or even in a public area such as a parking lot). An employer should not be an obstacle to ICE agents outside the workplace or in public areas. Although an employer can request to have a representative present if ICE insists on interviewing an employee, ICE may not grant this request for non-supervisory employees.

Q 6: Does the ICE agent have the right to review and/or take any records from the workplace on the spot? Does an employer have the right to demand that requests for documents be made in writing?

A: If it is an I-9 audit, the investigator cannot take the records from the workplace. If there is an ICE or other agency action that is not an I-9 audit, such as an actual arrest/investigation, the employer should insist on seeing the warrant and subpoena for any documents. A subpoena issued by a federal judge may allow ICE access to documents immediately. Request a copy for your records.

Q 7: At what point should legal counsel be contacted?

A: Employers are encouraged to contact legal counsel at the earliest possible time. Employers should contact legal counsel when preparing for a possible worksite visit from ICE so they can create a policy and plan of action. If ICE is conducting an investigation, ensure the relevant points of contact are notified immediately. It is best if all conversations and communications are coordinated through legal counsel as those conversations are privileged.

Q 8: What actions should the employer take to prepare for a worksite visit from ICE?

A: With the assistance of legal counsel, employers may want to develop a policy addressing what managers should do if an ICE agent shows up unannounced. In particular, the policy should address: (1) how to respond to an NOI; (2) the company's policy on whether consent will be given to ICE agents to enter the worksite without a warrant; and (3) the need to immediately inform a designated point of contact about the visit. Having this standard policy in place will ensure managers know what to do in the event of an ICE visit and that appropriate company officials are notified of the NOI and/or the upcoming ICE audit.

Employers should also develop contingency plans for worksite raids. As part of this process, it is recommended to create a Crisis Management Team. This team will answer questions such as: Who will contact the legal team? Have we set up files for terminated employees' I-9? Who is the main point of contact for coordination with ICE? How will the company address notifying family members of employees? Will outside counsel have direct or indirect access to ICE? (If outside counsel will coordinate communications with ICE, have a Form G-28 Notice of Appearance ready to provide to ICE). How are the public relations (PR) and communications issues to be addressed internally?

Q 9: What actions should the employer take during an ICE investigation?

A: During an investigation, it is imperative that the employer determine the type of investigation being conducted. If ICE is performing an I-9 audit, insist on the 3 days' notice. If ICE is there to arrest employees, request to view the warrant. The employer should make and keep copies of ALL documents given to ICE; obtain a receipt for any records taken; get the name, telephone number, and card of the lead ICE agent; and prepare a memorandum setting out what happened.

I-9 AUDITS

Q 10: Is ICE required to provide a subpoena or warrant prior to an I-9 audit?

A: No subpoena or warrant is required prior to an I-9 audit, although a subpoena/production notice usually accompanies an NOI.

Q 11: In an I-9 audit, will ICE request more than the I-9 and supporting documentation?

A: Yes, the NOI/subpoena will request the production of the following additional records: a list of current employees with certain biographical information; payroll records filed with the state and federal government; and corporate data, such as names of owners and/or officers, their contact information, Articles of Incorporation, and business licenses, names of staffing companies and/or contractors used, and whether the company is a participant in E-Verify.

Q 12: Is the employer required to produce I-9 forms during ICE's visit?

A: No, an ICE agent may deliver the NOI, but unless the government has already secured a subpoena or a warrant, there is no need to make the requested information immediately available. Employers have a statutory right to provide ICE with the I-9s after 3 business days' time.

Q 13: Can ICE extend the 3-day I-9 production time period?

A: Yes, ICE may approve a request to extend. While it is discretionary, most ICE offices have historically been willing to do so.

Q 14: When an NOI is proceeding, what are the most important actions for a manager to do or not do?

A: Managers need to insist on the 3 days of notice before submission of documents in an NOI/I-9 audit. For other types of worksite enforcement actions, the manager should insist on seeing ICE's subpoena/production notice. A manager should also ensure that the relevant points of contact within the company are notified immediately.

Q 15: Can a manager request an ICE I-9 inspection be delayed until a corporate representative can be present?

A: ICE does not have to delay their inspection even if a request is made to wait for a corporate representative. However, ICE is not allowed to enter non-public areas of the worksite without a federal search warrant signed by a federal judge.

ICE RAIDS & AUDITS

Q 16: What is the difference between an ICE I-9 audit and an ICE raid?

A: An ICE raid is where ICE agents and other federal/state officials arrive unannounced at the employer's premises and its agents surround the premises with the possibility of aerial presence supported by a helicopter or airplane. The ICE agents enter the business with a federal criminal search warrant. The search warrant will have a detailed description of what and where agents are going to search and what they may seize.

An ICE audit is much less confrontational. Instead, ICE agents hand-deliver an NOI/subpoena/production notice to the employer demanding the employer produce I-9 forms and other records within 3 (or the time period set forth in the notice) business days.

Q 17: What should the employer do and not do during an ICE raid?

A: An employer representative is not required to answer ICE questions during a worksite raid; thus, typically it is best not to answer questions. Employer representatives may not, however, obstruct the raid or provide false or misleading information. An employer representative should immediately call legal counsel.

During an ICE raid, employers should also:

- record the names of the ICE supervising agents assigned to the case;
- assign company representatives to accompany each ICE agent as they move around the workplace;
- provide ICE agents access to the facility in accordance with the federal search warrant;
- object to any searches outside the scope of the warrant and ask the ICE agent to make note of the objection;
- protect privileged documents to the extent possible; and
- obtain a list of items seized during the search.

Q 18: What causes lead ICE to conduct a raid?

A: Raids often occur after an ongoing investigation shows a number of undocumented workers are employed with the knowledge and/or assistance of the employer. Additionally, ICE may receive tips of unlawful activity by various individuals or get an undocumented worker arrested for a criminal offense, such as a DUI, to flip on their employer and agree to wear a wire in exchange for an Employment Authorization Document (EAD). Raids may occur in conjunction with an investigation by another federal agency.

After ICE receives such information, it may use a confidential informant to infiltrate the workforce and gather further information. The confidential informant may clandestinely record audio and/or video with potentially incriminating evidence. Once ICE has gathered sufficient evidence of unlawful activity, it will file a request for a federal search warrant with a federal judge. Once approved, an ICE raid will commence.

Q 19: What if ICE is at the worksite to arrest employees?

A: During the first Trump administration, ICE conducted raids/targeted enforcement operation to confiscate employer's business records, including computers, and detained or arrested unauthorized workers and/or lawful workers who were otherwise alleged to have violated immigration or criminal laws. If ICE is at the worksite to arrest employees for potential immigration violations, request to view ICE's arrest warrant.

If ICE has an arrest warrant, it must gain consent to enter non-public areas of the worksite. Do not consent to ICE speaking to employees on premises; instead, politely ask them to stop. However, do not physically interfere with an ICE agent who is conducting a worksite visit.

Q 20: Are some industries more prone to receiving an ICE I-9 audit or ICE raid?

A: Certain industries, such as critical infrastructure, hospitality, construction, and manufacturing/food processing, agriculture are more likely to receive NOIs and/or ICE raids. Additionally, often a federal investigation by one agency, such as the Occupational Safety and Health Administration (OSHA), the Wage & Hour Division within the DOL, or the Drug Enforcement Agency (DEA), will lead to an NOI or an ICE raid based upon information discovered in the initial federal agency investigation.

Q 21: How can an employer prepare for an ICE audit/raid?

A: Employers may prepare for an ICE I-9 audit or ICE raid by conducting an internal I-9 audit. In this manner, employers may correct any substantive errors found and avoid or mitigate the penalties for those errors prior to being the target of a raid or audit. Other ways to prepare include:

- ensure the employer's staff are properly trained and supervised on the preparation and maintenance of I-9 forms to reduce the risk of making common I-9 mistakes;
- ensure all employees hired have a completed I-9;
- develop internal proper procedures;
- consider if enrolling in E-Verify is an option, which may streamline employment eligibility verification;
- create a chart of individuals responsible for HR, legal, PR and other compliance standards; and
- prepare to address any PR issues that may result, especially if ICE conducts a raid.

FOLLOWING THE SITE VISIT

Q 22: How should the employer address PR concerns with their employees?

A: The employer may want to address employee/humanitarian issues by contacting affected families; informing employees that the employer supports them and is dedicated to protecting its employees' privacy to the extent allowed by law; and informing employees of approved pro bono legal providers available at <https://www.justice.gov/eoir/list-pro-bono-legal-service-providers>.

Q 23: How should the employer address PR concerns with the general public?

A: The employer may want to publicly address the ICE enforcement action and include that the employer willingly cooperated with the ICE investigation to ensure all laws are followed. Also, the employer should emphasize that the employer complied with the law by requiring its employees to complete an I-9 form and/or participates in E-Verify and has not knowingly employed individuals who lack work authorization.

Q 24: What actions should the employer take after the investigation?

A: After an investigation, an employer should comply with all instructions provided by ICE including correcting I-9s with deficiencies and terminating employees who ICE identify as lacking work authorization through a Notice of Suspect document after giving the identified employees an opportunity to rebut.

Q 25: Can there be criminal penalties for immigration violations?

A: Yes, in addition to a range of civil money penalties for I-9 violations, ICE may also pursue criminal charges. Specifically, if ICE finds an employer knowingly employed individuals who lack work authorization, it may initiate criminal charges that could result in imprisonment of individuals involved for up to six months under the Immigration and Nationality Act (INA). Further penalties may be imposed under the U.S. Code.

This information provided by Littler is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute. Although this information attempts to cover some major recent developments, it is not all-inclusive, and the current status of any decision or principle of law should be verified by counsel.