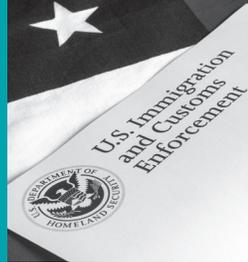


ICE Site Visit Q&A



September 20, 2019

It is no secret the current administration has made immigration its number one focus. As part of the administration's focus on immigration, Immigration and Customs Enforcement (ICE) has increased pressure on employers to an unprecedented level. ICE has more than quintupled its I-9 audits. It has also brought back high-profile worksite raids where ICE will arrest employees and pursue criminal penalties against employers. The restaurant industry is one of ICE's focus areas for enforcement. Here are common Questions & Answers which provide guidance on how to manage worksite enforcement actions from ICE.

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

A: The Department of Homeland Security is the primary agency that enforces federal immigration laws. US Citizenship and Immigration Services (USCIS) and Immigration and Customs Enforcement (ICE) deal with employers in different situations, but the primary enforcement agency for employers is ICE. ICE is responsible for enforcing an employer's obligations to complete the I-9, verify, and re-verify, the work authorization of all employees.

Q 2: How does ICE enforce federal immigration laws?

A: ICE enforces the immigration laws through random I-9 compliance audits, or through a narrower investigation 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, that indicate an employer is not complying with the I-9 regulations or employing undocumented workers.

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

A: Yes, an ICE officer may come unannounced to the workplace with a Notice of Inspection ("NOI") requesting an employer's I-9s. After receiving a (Notice of Inspection) NOI, an employer must provide its I-9s within three business days. If ICE serves an NOI, the employer should ask for a copy of the NOI, the contact information for the agent serving the NOI, and if ICE is requesting any other documents such as payroll records. Employers should never waive the three-day period to produce I-9s. If ICE is serving only a NOI, ICE is only allowed into the public areas of a work site. ICE must gain consent to enter non-public areas if ICE does not have a warrant.

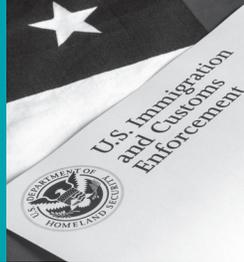
Q 4: May ICE request more than the I-9 and supporting documents?

A: Yes, it is common to receive a notice to produce documents or a subpoena for ancillary documents outside the scope of the I-9 itself, i.e., payroll records, financial information or corporate structure data

Q 5: When can ICE enter non-public areas of the workplace?

A: In order for ICE to enter non-public areas of a workplace, ICE must have the employer's consent or a 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 work place. For example, an ICE agent could only enter the dining area of a restaurant where customers sit. Without consent or a warrant, ICE agents could not go into a kitchen or server areas. It is a best practice to have the employees who are stationed at the front of a restaurant well-versed in how to respond to an ICE visit. For example, hosts should ask ICE agent to wait while the host contacts a supervisor. If the ICE agents do not have a warrant, they are not entitled to roam freely through a restaurant.

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Q 6 What if ICE is at the worksite to arrest employees?

A: Under the current administration, ICE is conducting raids (defined as unannounced enforcement actions outside the I-9 context) to arrest unauthorized workers or lawful workers who have otherwise violated immigration or criminal laws. If ICE is at the worksite to arrest employees for potential immigration violations, request to view ICE's warrant. If ICE has an administrative arrest warrant, ICE must still 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 work site visit.

Q 7: Can a supervisor 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. However, ICE is not allowed to enter non-public areas of the work site without a warrant.

Q 8: 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. ICE only needs to provide the employer with an NOI three days' notice prior to the investigation.

Q 9: Is the employer required to produce I-9 forms during ICE's Notice of Investigation?

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 three days time.

Q 10: Can ICE extend the three-day I-9 production time period?

A: Yes, they may approved a request to extend. Note it is not mandatory.

Q 11: Can ICE request to interview employees without prior notice? Is the employer entitled to have a representative present for those 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. Employees who are the designated contacts to speak with ICE during an ICE visit should keep interactions with ICE to a minimum.

Q 12: At what point should legal counsel be contacted?

A: 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.

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Q 13: What actions should the employer take to prepare for a worksite visit from ICE?

A: With the assistance of legal counsel, employers should develop a policy addressing what managers should do if an ICE agent makes an unannounced. In particular, the policy should address: (1) how to respond to a NOI; (2) the company's policy whether consent will be given to ICE agents to enter the work site 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 the upcoming ICE audit. Employers should also develop contingency plans for work site raids.

Employers should also create a Crisis Management Team. This team will answer questions like: Who will contact the legal team? Have we set up files for terminated employee's 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 PR/communications issues to be addressed internally?

Q 14: 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 three 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 lead ICE agent; and prepare memorandum setting out what happened. The employer should also instruct employees other than the designated contacts who are supposed to speak to ICE to continue working and to notify a supervisor if ICE asks to speak to the employee.

Q 15: What actions should the employer take after the investigation?

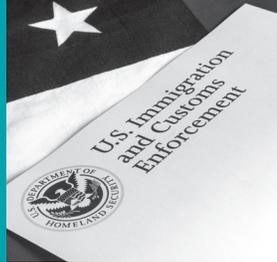
A: In California, employers need to notify employees an ICE audit occurred. In other states, employers should decide what type of information to provide to employees. For example, it may be a good idea to tell employees that ICE is only conducting a routine investigation of I-9s if ICE is only performing an I-9 audit.

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 documents after giving the identified employees an opportunity to rebut.

Q 16: How should the employer address public relations concerns with their employees?

A: The employer should address all employee and humanitarian issues. This may be done by contacting affected families; informing employees that the employer supports them and is dedicated to protecting its employee's 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>.

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Q 17: How should the employer address public relations concerns with the general public?

A: The employer should publicly address the enforcement taken by ICE. Note that the employer is willing to cooperate with ICE in 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 a Form I-9 and/or participates in E-Verify and has not knowingly employed individuals who lack work authorization.

Q 18: What are the penalties for I-9 violations?

A: ICE has discretion to assess a range of money penalties for I-9 violations. The dollar amount imposed will be a factor of the employer's size, demonstrated efforts at good faith compliance and violations committed, as well as any prior history of immigration-related violations. Penalties for errors made on I-9 forms, or "paperwork" violations, can range from \$230 to \$2,292 per form. Older errors may be penalized at a lower rate. If the ICE audit reveals the employer knowingly hired or continued to employ an unauthorized worker, possible fines range from \$573 to \$22,297 per unauthorized worker depending upon the employer's prior history of similar violations and the circumstances of the particular case.

Q 19: Can there be criminal penalties for immigration violations?

A: Yes, where ICE finds an employer knowingly employed individuals who lack work authorization, ICE may pursue criminal charges which could result in imprisonment of individuals involved for up to six months under the INA. Further penalties may be imposed under the US Code.

This information provided by the Restaurant Law Center and 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.