

What If Our Business Is Visited By ICE?

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Immigration and Customs Enforcement (ICE) is one of several government agencies that may appear unannounced at your workplace. Homeland Security Investigations (HSI), the Department of Labor (DOL) or the Department of Justice (DOJ) also exercise authority to audit and investigate workplaces. For additional information related to government agencies other than ICE, see **Appendix A**.

ICE can (1) *inspect* employers' Form I-9 records via a **Notice of Inspection**, (2) *conduct a search* (i.e., a "raid") via a **judicial warrant** or (3) *arrest and detain* an individual via an **arrest warrant**.

» ICE: Notice of Inspection

ICE has jurisdiction over employer compliance with federal Form I-9 requirements and to make sure employees are authorized to work. ICE agents may come to a workplace and issue a Notice of Inspection (NOI), which requires the employer to produce certain Forms I-9 and associated documentation within three business days.

The NOI is limited in scope. Therefore, ICE agents should not be permitted to speak to any employees or enter the property if the authority for their visit is solely the NOI. The NOI will include a request for other documentation beyond the I-9s, including employee rosters, quarterly wage reports, payroll records, E-Verify documentation and information about the electronic I-9 system, if applicable.

» ICE: Judicial Warrant

ICE must obtain a search warrant signed by a judge to conduct a "raid" on a workplace. ICE needs to demonstrate to the judge that it has probable cause to enter and conduct a search of a workplace.

With a judicial search warrant, ICE has authority to gain immediate access to the workplace and its records. They are not required to wait for counsel to arrive before conducting their search.

Employers should remain calm and monitor the agents' actions to ensure that the search does not exceed the scope of the warrant. A company representative (typically the senior-most HR manager or legal representative) may stay with the agents and document what the agents do but should not interfere with the search.

Employers should not hide employees or help them leave the work premises. Destroying documents or providing false or misleading information that hinders the investigation may lead to separate criminal charges. Representatives should not give statements to ICE without legal counsel present.

Employers cannot instruct employees to refrain from speaking to ICE agents if questioned. If agents want access to locked facilities, employers should provide access and cooperate within the scope of the investigation.

If any property is seized or employees detained, employers should document what property was taken and disclose this information to legal counsel once ICE has left the premises.

» ICE: Arrest Warrant

ICE may also come to the worksite with an arrest warrant for a specific individual or individuals. An arrest warrant does not give authority for ICE to enter the premises. While the same best practices for an arrest warrant apply to the warrant for a “raid” above, it may be an opportunity for legal counsel to request that ICE agree to meet with the employee at a mutually agreeable, non-combative space away from the business operations to conduct the arrest. ICE agents may also consider agreeing to returning at the end of an employee’s shift to conduct the arrest. Make sure to read the scope of the arrest warrant to determine whether the warrant permits agents to enter the premises to carry out the arrest.

» Labor Relations Issues Related to Unannounced Government Visits

Section 7 of the NLRA protects employees’ rights to engage in concerted activity, including the right to engage in a work stoppage, when the purpose of that concerted activity is to improve the terms and conditions of their employment. This “protection” means that an employer cannot discipline or discharge an employee for engaging in concerted activity. The NLRB has interpreted the NLRA’s protection of concerted activity broadly.

Because the NLRA protects all private sector employees, regardless of immigration status, undocumented employees may be regarded as engaging in a work stoppage in protest of the immigration raids when refusing to report to work, as may other employees who choose to similarly protest in solidarity.

Employers should generally not discharge or discipline employees for participating in a work stoppage in, or even potentially in, protest of these immigration raids. Employers should not engage in conduct designed to discourage or frustrate employees’ participation. Front-line supervisors should be aware of potential absences and take steps to staff their workplaces to account for missing personnel and manage around any operational challenges that such absences may cause. Employers should also advise front-line supervisors (a) not to broach the issue with employees in advance, (b) carefully note any reasons cited for strike-related activities and (c) carefully consider any disciplinary action before dispensing it.

If the workforce is unionized, employers should review their collective bargaining agreement for a no-strike provision, which may provide them with greater recourse in the event of a protected strike. Even if the workers are not represented by a union, employers must remember the company is still potentially liable under the NLRA for violating the standards applied to employee strikes.

» Preparing for Unannounced Government Visits

ICE audits and raids cannot be prevented, but preparing now can mitigate the consequences of such government actions in this era of increased enforcement.

- 1. PREPARE YOUR TEAM.** Determine in advance who should be alerted. Outside counsel can prepare a response to a request and interact with agents to confirm the scope of a request or warrant.
- 2. RESPONDING TO UNANNOUNCED VISITS.** You (your administrative assistant, site manager or onsite “front-of-house” personnel) must review the agent’s authority to conduct an audit, enter your property, or arrest any individuals and contact legal counsel immediately. Be prepared to inform your legal counsel (1) what document(s) were presented (NOI, judicial search warrant, arrest warrant), (2) how many ICE agents are present and (3) the name of the ICE agent-in-charge. You should obtain copies of the agents’ business cards or the agents’ badges.
- 3. REVIEW YOUR FORM I-9 POLICIES AND PROCEDURES.** Are all HR/managers responsible for I-9s well-trained? Do you feel confident in the consistency of review for all newly hired employees?
- 4. AUDIT YOUR I-9S.** Do you have I-9s for every employee? Have you reviewed the copies of documents presented to assess whether they may be any fraudulent/suspect documents? Are there significant substantive errors on the I-9s you do have?

If you have further questions about how to prepare for unannounced government visits, please contact us at Faegre Drinker for support.



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Appendix A

Department	Scope of Investigation	Advance Notice	Your Obligations
EEOC or state equivalent human rights agencies	Discrimination, retaliation, harassment	Charge or complaint filed	<ul style="list-style-type: none"> Produce records Produce witness
Department of Justice (DOJ) - Immigrant Employee Rights Section	Discrimination or retaliation; Document abuse	Charge or complaint filed	<ul style="list-style-type: none"> Produce records Produce witness
Department of Labor (DOL) and state equivalent agencies	Wage and hour violations Child labor investigations	Administrative subpoenas	<ul style="list-style-type: none"> Allow property inspections Produce records Produce witness
U.S. Immigration and Customs Enforcement (ICE)	I-9 audit	Notice of inspection	<ul style="list-style-type: none"> Produce records within 3 business days
U.S. Citizenship and Immigration Services (USCIS) - Fraud Detection and National Security Directorate (FDNS)	H-1B and L-1 workers and employer compliance	Administrative Site Visit	<ul style="list-style-type: none"> Produce records Produce H-1B/L-1 worker Participate in interview
U.S. Immigration and Customs Enforcement (ICE) Homeland Security Investigations (HSI)	Criminal violations of customs and immigration laws; identity fraud	All of the above + Warrants	<ul style="list-style-type: none"> Arrests Property seizures