

Employer Risk Alert: Immigration and Customs Enforcement in the Workplace

The federal government's immigration enforcement ramp-up has led to much fear and many questions. There are employers with basic concerns such as whether their record-keeping is in order. There are others who are afraid that they are going to lose their workforce.

Here are some legal highlights every employer should understand:

ICE in NYC

Several months ago, a retail client called in a panic. A neighboring business had been "raided by ICE" taking half his staff. The client said that he thought the new administration was "only going after criminals." He said he employs a worker who has been with him for 30 years and has raised a family here, but who has never secured permanent status. In fact, this client said he felt that his business could not survive without this employee. And he was scared.

There are two dramatic policy changes that have led to a shift in the way ICE is handling its job. First, whereas ICE used to work with people who had overstayed their visa, they are now being put in the same category as people who commit violent crimes. This means that they are being arrested and deported rather than getting an opportunity to renew their visa. Second, ICE is specifically targeting sanctuary cities which is leading to aggressive enforcement here. In fact, on April 28th, the White House issued an executive order that by May 28 requires the justice department to publish a list of all "sanctuary jurisdictions" to notify the cities of their status and violations, identify all federal money received by those cities, and

to then implement "all necessary legal remedies and enforcement measures to end these violations and bring such jurisdictions into compliance."

In short, it is no longer safe for employers to hire whomever they need and look the other way on work authorization.

ICE shows up... what now?

ICE will generally come to conduct an I-9 audit, investigate a particular person, or "conduct a raid" as part of an investigation into the employer. There should be a designated executive or management contact for such a situation, and all staff should be trained to be cooperative, immediately contact that designated person, and inform agents that they are not authorized to speak on the company's behalf.

ICE does not need a warrant to enter public areas, but otherwise consent or a warrant is required. Do not consent and demand to see paperwork. ICE should have a warrant signed by a judge or magistrate — a "judicial warrant", or an "administrative warrant" which has more limited authority and is signed by an agency employee. A judicial warrant allows agents to enter private areas, detain people, and take documents. An administrative warrant does not, and training should include knowing the difference. Do not interfere but document everything. You have the right to record ICE agents. Get names, badge numbers, and copies of any documents they present. If anyone is taken into custody, ask where they will be taken.

If workers are approached by an ICE agent, they need to know that just like if they were under arrest, they have the right to remain silent, the right to an interpreter, to refuse to consent to a search, and to demand to speak to an attorney before signing documents or answering questions.

I-9 Audits

Employers must complete an I-9 for each employee prior to hiring, and ICE has the right to audit them.

Employers have 3 days to produce the documents. Take the time and make sure everything is in order before it is turned over.

Some Best Practices

While how this will all play out remains to be seen, there are a few things employers should do to protect themselves and their workforce.

For starters, mark and lock private areas so there is no question as to where law enforcement can enter without a warrant.

Train employees. In the workplace that means developing a written plan with designated point people, and making sure employees know how to respond if agents show up, including their rights.

For those for whom this is a concern at home, make sure they have a family plan in the event that they are separated or detained. They should also be advised not to carry documentation or offer information on their country of origin or immigration status.

Resources

Local and state agencies, as well as many reputable private organizations, offer help for employers and employees facing these issues. Resources available include free legal services from the Mayor's Office of Immigrant Affairs, and guidance published by the New York Immigration Coalition, National Immigration Law Center, and Immigration Legal Resource Center, to name a few. The most important advice, however, is to memorize your lawyer's number and make sure they are contacted as soon as possible.

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