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## Immigration Enforcement Activity at Hospitals and Other Health-Care Facilities: How Much Protection Does the DHS Sensitive Locations Policy Offer?



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### The Scene

In North Brownsville, Tex., Border Patrol apprehended a couple as they took their infant son to a local hospital for emergency surgery, a National Public Radio All Things Considered correspondent recently reported. Border Patrol emphasized that no arrest took place on hospital premises, but instead at a Border Patrol checkpoint that the couple had to pass to get to the hospital. The arrest has underscored anxiety both among health-care facilities and immigrant advocates that hospitals could become the site of immigration enforcement activity. Indeed, an urban hospital near the country's capital recently reported politely denying enforcement agents access to a patient care area when they attempted to interview hospital visitors. This article encourages health-care providers to prepare for possible enforcement activity and outlines best practices.

### New Regime

Ever since a new set of decision-makers took the helm of immigration enforcement earlier this year, promising increased enforcement amid the chaos generated by the first travel ban, managers of health-care providers, particularly hospitals, began to worry about the prospect of enforcement activity in their facilities. Until then, Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP) had a standing policy that, in most circumstances, prohibited enforcement activity in health-care facilities.

Despite incidents like those described above, the Department of Homeland Security (DHS), including its former Secretary (now White House Chief of Staff) John Kelly, expressly and quite publicly stated that the policy restricting hospital-based enforcement activity remains in full force.

Former Immigration and Customs Enforcement Director John Morton first issued that policy on Oct. 24, 2011. The policy states that “certain enforcement actions” by ICE officers and agents were to “not occur at nor [be] focused on sensitive locations,” which include schools and churches, unless (a) exigent circumstances exist, (b) other law enforcement actions have led officers to a sensitive location as described in the “Exceptions to the General Rule” section of [the same] policy memorandum, or (c) prior approval is obtained.” Subsequent DHS guidance further includes in the definition of “sensitive locations” medical treatment and health-care facilities, such as hospitals, doctors’ offices, accredited health clinics, and emergent or urgent care facilities.

The policy states that covered enforcement actions include: (1) arrests; (2) interviews; (3) searches; and (4) for purposes of immigration enforcement only, surveillance. Specifically excluded from the policy’s prohibitions are actions “such as obtaining records, documents and similar materials from officials or employees, providing notice to officials or employees, serving subpoenas, engaging in Student and Exchange Visitor Program (SEVP) compliance and certification visits or participating in official functions or community meetings.

The memorandum further states:

“This is not an exclusive list, and ICE officers and agents shall consult with their supervisors if the location of a planned enforcement operation could reasonably be viewed as being at or near a sensitive location. Supervisors should take extra care when assessing whether a planned enforcement action could reasonably be viewed as causing significant disruption to the normal operations of the sensitive location.” (emphasis added).

Enforcement actions planned at or focused on a covered sensitive location must have prior approval of designated headquarters level managers, including where the action is part of a joint case led by another law enforcement agency.

The memorandum recognizes exceptions to the enforcement restrictions in the policy where:

- the enforcement action involves a national security or terrorism matter;
- there is an imminent risk of death, violence, or physical harm to any person or property;
- the enforcement action involves the immediate arrest or pursuit of a dangerous felon, terrorist suspect, or any other individual(s) who present an imminent danger to public safety; or
- there is an imminent risk of destruction of evidence material to an ongoing criminal case.

In many enforcement scenarios, therefore, these exceptions diminish the protections afforded to certain individuals who seek or are involved in treatment within the health-care industry’s “sensitive locations.”

For health-care facilities close to the southwestern land border where CBP may conduct enforcement activities consistent with its responsibility for enforcement at and near the land and maritime borders, it is especially important to note that CBP issued a virtually identical policy. The CBP policy specifically excludes from its protection “operations that are conducted within the immediate vicinity of the international border, including the functional equivalent of the border.” Accordingly, sensitive locations within the southwestern land border are particularly vulnerable to exceptions and diminished protection.

### **So What if It Happens Anyway?**

In the seemingly still unlikely event of ICE or CBP enforcement activity at hospitals and other health-care facilities, every health-care provider will benefit from establishing and distributing protocols that instruct relevant staff on how to respond should inevitably stressful encounters with enforcement agents occur.

While the nuances of each facility's policy will vary, there are several important, universal legal and practical considerations. With the exception of publicly owned health-care sites where local law and/or policy may regulate interaction with law enforcement authorities, provider facilities are private property and enjoy the same protections as any other private building. As such, hospital management has significant latitude over who can enter particular portions of a hospital, for specific purposes. Moreover, hospitals are ethically and legally bound to protect the health, safety and confidentiality of their patients, and are required under HIPAA to use and disclose patients' protected health information only in the circumstances that HIPAA permits.

Accordingly, hospitals should consider policies that regulate entry and movement by law enforcement within the hospital, making conscious decisions about who can move where, when, and for what purposes. Hospitals also should instruct staff on the appropriate level of immigration agent access to employees, including the level of cooperation with immigration agents that will be expected from a hospital's internal security force. Policies can differ depending on the law enforcement agency involved, and the nature of intended enforcement action. If arrests do occur on hospital premises, hospitals should set procedures to minimize disruption of the care environment. If such decisions are established and employees are trained on them ahead of time, hospitals will be best poised to predictably manage interactions with enforcement agents.

### **Key Elements of a Law Enforcement Policy**

Organize the elements of a law enforcement policy according to the roles to be played by staff members most likely to encounter a visiting law enforcement officer.

**Receptionists, desk attendants, security guards** and others in positions likely to have the initial encounter with an officer should be instructed that upon the arrival of ICE special agents, or any other law enforcement officer, they must immediately contact a designated senior on-site manager. The only further steps they should take is to make the agents comfortable in a quiet waiting area. They should not consent to further entry into the facility unless directed to do so by a senior manager. Their role should end there. The designated manager will handle the interaction with the agents.

**A senior manager on-duty** in the facility should come to speak to the agents as soon as possible. The senior manager should speak with the agent to ascertain the purpose of the visit. If the ICE agent has a warrant, the senior manager should obtain a copy of the warrant and a copy of the ICE agent's identification. The official visit should then proceed in strict accordance with the hospital's procedures, which can either outline steps for cooperation with the agent in the manner least disruptive to the care environment or require denial of access in the absence of a proper arrest or search warrant.

If the agent refuses to wait while these steps are taken and/or claims there are extenuating circumstances that require their immediate admission, such as an emergency or active pursuit of a suspect, no action should be taken by the employee to interfere with the agent's entrance. However, no affirmative consent need be given and no assistance need be provided, except by suggesting ways to effectuate the arrest in the manner least likely to disrupt the facility's other activities.

Even if an agent arrives with a search warrant for the purpose of an arrest, he is not authorized to wander around otherwise nonpublic areas of a health-care facility. Staff should not be authorized to afford agents access to nonpublic areas except in the event of an emergency, active pursuit of a suspect, or if the agents possess a warrant specifically authorizing such access.

For a sample of possible guidance, see Seyfarth Shaw Quick Guidance: What to Do In The Event of a Visit by DHS-ICE Agents: <http://www.seyfarth.com/publications/MA033017-LE> .

### **Responding to Violations of the Sensitive Locations Policy**

Complaints can be lodged to challenge a DHS enforcement action that may have violated the Sensitive Locations Policy. Information about how to file a complaint is available on the DHS, CBP, and ICE websites.

ICE Enforcement and Removal Operations (ERO) may be contacted through the Detention Reporting and Information Line at (888) 351-4024 or through the ERO information email address at [ERO.INFO@ice.dhs.gov](mailto:ERO.INFO@ice.dhs.gov) , also available at <https://www.ice.gov/webform/ero-contact-form> . The Civil Liberties Division of the ICE Office of Diversity and Civil Rights may be contacted at (202) 732-0092 or [ICE.Civil.Liberties@ice.dhs.gov](mailto:ICE.Civil.Liberties@ice.dhs.gov) . The CBP Information Center will receive complaints or compliments via phone at (877) 227-5511, or email through the website at <https://help.cbp.gov> .

### **Addressing Patient Anxiety About Enforcement?**

Some health-care facilities also consider public-facing statements about their immigration enforcement policies—as well as other areas of immigration-related concerns for the benefit of their patients and patients' families. These may be posted on websites or incorporated in nondiscrimination policies. Some facilities make these statements of policy available upon request by visitors and patients.

### **The Wind-Up**

While the Department of Homeland Security has stated clearly that it stands by its policies limiting enforcement activity at hospitals and other health-care facilities, those policies do not mean that enforcement will never occur there. Given this reality and the current immigration enforcement landscape, hospitals and health-care facilities are well advised to prepare policies addressing law enforcement visits and to provide clear, unambiguous instructions to staff members who may need to interact with immigration enforcement officers and other law enforcement officials.