

# Management Alert



## Quick Guidance: What To Do In The Event of a Visit By The DHS-ICE Agents

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**Seyfarth Synopsis:** As the Department of Homeland Security, as well as the administration generally, signals increases in immigration enforcement activity, businesses are advised to implement clear protocols for the conduct of key personnel in the event of a visit by a federal officer, particularly Special Agents of the Department of Homeland Security, Immigration and Customs Enforcement ("ICE"). This guidance identifies the likely purposes of an ICE visit and sets forth critical steps for key personnel should such a visit occur. Businesses are advised to work with legal counsel to tailor this general guidance to their specific industry and business processes.

In light of the Trump Administration's promises of increased immigration enforcement, employers and employees are growing more concerned about the prospect of government worksite visits either to effectuate arrests or to conduct investigations and audits. To be clear, the Department of Homeland Security's ("DHS") Immigration and Customs Enforcement ("ICE") agency has clarified that there has been no directive to initiate worksite enforcement (aka raids) against employers. Notwithstanding, it does appear that recent ICE arrests have swept not only individuals either alleged to have committed a crime or for whom an immigration warrant is outstanding, but also others accompanying the intended arrestee who are found to lack legal status in the U.S.

In addition to arrests, other investigative and audit activity looms on the horizon. Chatter continues about a possible increase in Form I-9 audits by ICE's Homeland Security Investigations Unit (HSI), and similar activity by the U.S. Citizenship and Immigration Services Fraud Detection National Security Unit<sup>1</sup> as well as its E-Verify Monitoring and Compliance branch<sup>2</sup>. Additionally, the Department of Justice's newly named Employee and Immigrant Rights Office (legacy Office of Special Counsel), will continue to pursue investigations into citizenship, national origin discrimination and document abuse matters. This Alert focuses on a visit by the folks at HSI, a separate Alert will be focused on USCIS site visits and investigative visits by other agencies.

### Be Prepared

Employers must develop and implement strong compliance policies, renew their current policies, assess immigration exposure, consider outside counsel audits of Form I-9, E-Verify and H-1B public access files, if applicable and most relevant to today's climate, plan in advance how to respond when immigration agents visit the company. All personnel, from the those in the reception area to HR managers must be prepared and know what to say and what not to say when DHS agents visit.

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<sup>1</sup> US Citizenship and Immigration Services conducts site visits where employers have petitioned for work visas on behalf of their employees. These site visits are also likely to rise as the administration focuses on usage of the H-1B and L-1 visa categories but are not the topic of today's article

<sup>2</sup> According to the USCIS website, Monitoring and Compliance "observes system use to help users comply with the E-Verify...E-Verify does not fine employers but may refer cases of suspected misuse, abuse, and/or fraud to appropriate agencies" M&C conducts desk reviews and site visits.

Training alone will not prepare the business, but rather a targeted step-by-step process, known to all relevant managers and employees, that can be easily followed in the event of a visit will likely yield enhanced results.

It is important to understand the possible purposes of a DHS visit and how to respond when a DHS Special Agent knocks on your door. The following is a general guide for addressing a visit from an immigration Special Agent. We recommend developing specific process documents to describe the various types of encounters with government agents that a worksite may face. It is also important to consider delineating roles and responsibilities, as well as a global response to investigations and audits.

**Keep in mind there will be three main reasons by ICE may visit a worksite:**

1. To look for, or take into custody, a particular individual;
2. To issue a Notice of Inspection of a company's Form I-9 document; ICE continues to focus its worksite inspection efforts on employers conducting business in critical infrastructure and national security interest industries/sectors. For example commercial facilities, communications, critical manufacturing, dams, emergency services, government facilities, information technology, nuclear reactors materials and waste and transportation systems remain favorites. Other focus is on employers for whom ICE has received a credible tip or lead. A full overview of the Form I-9 Inspection is discussed in a separate Alert; or
3. To conduct a Worksite Enforcement Action: During these worksite "raids", large numbers of Special Agents may descend upon a location, without notice. ICE will obtain indictments, arrest or search warrants, or a commitment from a U.S. Attorney's Office to prosecute a targeted employer *before* arresting employees for civil immigration violations at a worksite. The last such "Action" occurred in Bellingham, Washington in February of 2009 however, it is unknown whether such activity will resume.<sup>3</sup>

## Designate and Prepare Representative Responders

When the government knocks it will serve a company well to have prepared those on site to greet the government visitor. Providing that "greeter" with a specific list of exactly who needs to be contacted, both immediately at the affected location and/or elsewhere in the company, will minimize confusion. This guidance will be welcomed by your employees. Defining roles, and even providing scripts to greeters and representative responders, may further minimize unnecessary disruption and distress. Responder roles include, but are not limited to, the following individuals:

- 1.) Receptionist /Front Desk Greeter
- 2.) Manager(s)
- 3.) Human Resources Representative
- 4.) General Counsel, if applicable
- 5.) Outside Immigration Counsel

## Provide Instructions to the Field

Employees likely to be approached by government Special Agents, including reception staff and relevant security personnel, should be briefed on the company's protocol for handling a visit targeting an individual, the service of a Notice of Inspection,

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<sup>3</sup> Separately employers should consciously decide whether and to what degree they will provide guidance and assistance to employees who may be affected directly or who may have concerns about the government's enforcement policies. This will depend on the location and nature of your business, as well as the composition of your workforce. Companies ought to be considering the need if any, for messaging regarding the administration's immigration policies. Discussions of immigration status and government enforcement, are breakroom fodder and the implications should be understood. Also companies need to consider, what resources if any are being provided to employees and what the impact of certain information, including learning of employee's actual status could have if left unaddressed.

or another enforcement action. It is critical that companies first discuss the specifics of such a protocol with their immigration counsel in order to address individual considerations and customize a particular response. Advice will be based on a variety of factors including a risk assessment and even a review of your physical plant.

Regardless of the type of investigation, all responders must be as cooperative as possible with the government Special Agents. You generally want to provide the government with only that which is necessary to meet their request as outlined in detail below. The initial contact should ascertain the name of the agency visiting and whether or not they have documents to present, as well as the purpose of their visit. You also want to ensure the visit itself does not exceed the scope of the warrant, subpoena, or other written request.

The **Receptionist/Greeter** should be instructed that upon the arrival of government Special Agents, s/he should *immediately contact the designated Manager* and any other Responders. The receptionist's role could end there or could continue to the next steps depending upon the direction of the company.

1. The Greeter should not allow the Special Agents out of the waiting area, but rather make them comfortable while waiting for the Manager or appropriate lead person.
2. Limited questions and answers noting she/he is not authorized to give consent to enter the premises or respond to questions. Special Agents are trained professionals and being overly talkative is not recommended. In some cases the Special Agents may seem threatening, aggressive, or difficult, however there is no need to panic. In other cases, the pair of agents could begin a game of "good cop/bad cop" right there in the lobby. The Greeter should keep calm and continue to try to reach the manager.
3. If the Special Agent is still aggressive, inform him/her that the company has protocols in place to make sure government inquiries are addressed and request that you be allowed to follow them. On the other hand if the agent is very chatty, keep in mind he/she is really not a friend and there is no need to sit down and engage in conversation. Keep the answers short and direct until a Manager arrives.
4. A direct call to legal counsel should be considered as part of this process for the Greeter.
5. AGAIN, the Greeter should not provide any consent to allow the Special Agents access to anywhere outside of the public entry way space.

The **Manager** (or his designee) should ensure legal counsel, headquarters and outside immigration counsel, as designated in your company's individual protocol has been contacted prior to walking out to meet the Special Agents. Mobile phone numbers and specific contact information should be readily accessible. The manager should then greet and escort the Special Agents to a predetermined room/location, which should be as private as possible. The location should be close to an exit of the building where their departure, possibly with an employee, will not cause disruption. Specifically the Manager should then take the following steps:

1. Confirm and/or identify the government agency that dispatched the agent/visitor. Ask the Special Agents for identification and note each person's name, title, agency, and obtain contact information as well a business card.
2. Ask the Special Agents about the purpose of the visit and request subpoena and/or warrant, under which they are acting. The agents **MUST** present a warrant in order to gain access to the items or individuals they are seeking.
3. Inquire on the nature of the inquiry and ascertain to the extent possible if an individual employee is being or if the agents are investigating the company.
4. Communicate to the government agents that the company will cooperate with the request but that they have/will contact legal counsel to assist them in complying.
5. Determine if the agent is presenting official documents by reading them or scanning to in-house counsel or outside Counsel. If time is short the Manager can take a photo on their phone and text message. If the investigator presents

any official documents, they must be read carefully to determine if the document is a Judicial Subpoena (which must be honored) or an Administrative Subpoena (which may be challenged) . Generally, Form I-9 audit requests are administrative and elements of the request may be subject to challenge.

6. An arrest warrant will not authorize its holders to simply wander otherwise private premises. The warrant must describe with specificity the location to be entered and those specifics will limit where an agent can go. Even if the warrant authorizes the arrest of an individual, it must explicitly authorize entry into specific private premises including individual offices, the production floor etc. for such entry to occur.

7. Employees should be reminded not to waive any rights, and provide consent to any activity beyond that described in the warrant.

8. Remember ICE agents must have a valid search warrant or the company's consent to enter non-public areas of the workplace even if the company itself is under investigation.

9. Make contact with the lawyers. Before answering any of the agent's questions, the Manager should first speak with inside counsel or experienced immigration counsel. Counsel may want to come to the location, if possible, or speak by telephone with the investigator.

10. Remember you have three days to turn over your Form I-9s and related documents, even when presented with a subpoena and related Notice of Inspection. Do not EVER waive this time period. Immigration counsel will assist directly and organize the submission to ICE or the requesting agency (sharing of Form I-9 data is limited for privacy purposes, but allowed to be provided to agencies outside of DHS and DOL where there is a criminal investigation involved). Documents will be turned over in an orderly fashion with ICE acknowledging receipt and providing a "Chain of Custody".

In summary:

- Do not turn over any documents unless a search warrant mandates such action. Again, this will not be the case in the context of an Form I-9 audit.
- Do not provide any information other than what is exactly asked.
- Make copies, if possible of anything being taken.
- Ensure legal counsel is available in real time to consult on any immediate requests.

Companies in specific industries may face additional challenges when responding to government visits. Outside immigration counsel should be consulted to establish customized protocols and practical procedures for your employees, supervisors and managers, and possibly your customers, to follow when faced with visits from ICE, USCIS DOJ or the DOL.

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