

The Difference between an ICE Audit and an ICE Raid: Are You Prepared?

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Immigration compliance issues frequently make front-page news. In the spring and summer of 2017, the US Bureau of Immigration and Customs Enforcement (ICE) conducted audits at several dairies in Texas. In late 2006, ICE raids occurred at six slaughter plants in six states. Since early 2017, there have been reports of ICE detaining people on their way to work and at convenience stores. Whether an ICE audit (also called an inspection) or raid (also called a targeted enforcement operation) occurs at a traditional agriculture business such as a dairy or produce farm or at an urban business such as a restaurant, landscape company, or motel, the impacts can cripple a business.

In animal agriculture, if employees are lost or quit out of fear, it might be difficult in the short-term to take proper care of the animals. For produce farms and fruit orchards, crops might rot in the field when insufficient numbers of workers are available. The long-term viability of the business may be impacted by the loss in revenues from losing employees, and if the business is found to have hired illegal workers, legal fees, fines, and prison time could threaten its survival.

Understanding federal immigration laws, the difference between an audit and a raid, and the rights of employers facing these issues is critical for all businesses.

HSI Audits

In Homeland Security Investigation (HSI) audits, HSI serves a subpoena on an employer, requesting all

Employment Eligibility Verification
 Department of Homeland Security
 U.S. Citizenship and Immigration Services

USCIS
 Form I-9
 (OMB No. 1615-0047)
 Expires 06/30/2019

START HERE: Read instructions carefully before completing this form. The instructions must be available, either in paper or electronically, during completion of this form. Employers are liable for errors in the completion of this form.

ANTI-DISCRIMINATION NOTICE: It is illegal to discriminate against work-authorized individuals. Employers CANNOT specify which document(s) an employee may present to establish employment authorization and identity. The refusal to hire or continue to employ an individual because the documentation presented has a future expiration date may also constitute illegal discrimination.

Section 1: Employee Information and Attestation (Employers must complete and sign Section 1 of Form I-9 no later than the first day of employment, but not before accepting a job offer.)

Last Name (Family Name) First Name (Given Name) Middle Initial Other Last Names Used (if any)

Address (Street Number and Name) Apt. Number City or Town State ZIP Code

Date of Birth (mm/dd/yyyy) U.S. Social Security Number Employee's E-mail Address Employee's Telephone Number

I am aware that federal law provides for imprisonment and/or fines for false statements or use of false documents in connection with the completion of this form.

I attest, under penalty of perjury, that I am (check one of the following boxes):

1. A citizen of the United States

2. A noncitizen national of the United States (See instructions)

3. A lawful permanent resident (Alien Registration Number/USCIS Number)

4. An alien authorized to work until expiration date, if applicable, mm/dd/yyyy. Some aliens may write "NA" in the expiration date field. (See instructions)

Aliens authorized to work must provide only one of the following document numbers to complete Form I-9:
 1. Alien Registration Number/USCIS Number: _____
 OR
 2. Form I-94 Admission Number: _____
 OR
 3. Foreign Passport Number: _____
 Country of Issuance: _____

Signature of Employee Today's Date (mm/dd/yyyy)

Preparer and/or Translator Certification (check one):

I did not use a preparer or translator. I, preparer(s) and/or translator(s) assisted the employee in completing Section 1.
 (Fields below must be completed and signed when preparers and/or translators assist an employee in completing Section 1.)

I attest, under penalty of perjury, that I have assisted in the completion of Section 1 of this form and that to the best of my knowledge the information is true and correct.

Signature of Preparer or Translator Today's Date (mm/dd/yyyy)

Last Name (Family Name) First Name (Given Name)

Address (Street Number and Name) City or Town State ZIP Code

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Photo: US Citizenship and Immigration Services

Form I-9s. Since November 6, 1986, US employers must complete a Form I-9 (Employment Eligibility Verification) for each employee hired or rehired. This form verifies the identity and employment eligibility of the individual hired.

Employers must keep the original, completed Form I-9 for *all* current employees and retain these forms for at least 3 years from the date of hire or for 1 year after the employment relationship ends, whichever is longer. If the employee submits work authorization documents with expiration dates, the employer must re-verify the employee's work eligibility based on the expiration date.

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Photo: Courtesy of ICE.

An audit often begins when a business receives a Notice of Inspection (NOI), which states that the employer must produce its Form I-9s to an ICE auditor. A search warrant is not typically involved in this stage of an audit. Usually, an ICE agent or US Marshal along with an HSI auditor, arrive at the business unannounced and deliver the NOI. Upon receiving an NOI, the employer should contact an attorney for help in navigating the audit process.

Businesses should include instructions in their general policies and procedures manuals that address circumstances such as visits from ICE agents. Such protocol should cover:

- Information designating the representative the employer has authorized to speak with HSI or ICE (The employer may also appoint one or two backup individuals.)
- Training *before* a potential visit from HSI and ICE to inform all employees about how to react to enforcement agents and to designate the farm spokesperson
- Instructions to obtain the agents' and auditors' names and contact information (specifically noting that other than a formal greeting, getting this information must be the only communication or exchange)

By law, unless a search warrant allows immediate seizure of documents, an employer must be given 3 business days to produce the documents requested by the subpoena. However, an overly helpful, uninformed employee may unknowingly waive the time to produce the documents or consent to a search without a warrant—another reason for an employer to have one designated point of contact for speaking with HSI and ICE. To prevent agents from roaming around the premises, employees should not only contact the designated employee immediately upon ICE's arrival, but also ask

the ICE agents to stay in a designated area while waiting for the spokesperson.

Employers may also be asked to provide additional documents such as a copy of payroll, list of current employees, and business licenses. Employers should be polite to the agents, but not volunteer information, providing only the information requested in the NOI. Additionally, employers should be careful not to voluntarily waive the 3-day requirement by immediately producing some of the documents. Instead, they should take the allotted time to compile all requested documents.

ICE auditors have the right to inspect Form I-9s at the business but may ask the employer to make copies of documents to take with them for review at the ICE office. Before allowing documents to be copied and taken off-site, employers should consult with an attorney and have the ICE agent sign an acknowledgment listing the documents received.

Once the employer provides the documents, an ICE agent or auditor inspects the Form I-9s to determine whether they comply with the law. In addition to checking for glaring issues such as incomplete or missing forms, auditors also check for more technical compliance issues such as whether the current version of the form was used when it was completed. Employers should not discount the seriousness of "paperwork violations" such as failing to obtain the required employer signature within 3 days of hire; these violations can add up.

When the audit is complete, a business can receive various notices ranging from a Notice of Inspection Results to a Notice of Intent to Fine. The former notifies the business that they comply; the latter indicates



Photo: Courtesy of ICE.

substantive, uncorrected issues. Between these two extremes, there are additional notices: Notice of Suspect Documents, Notice of Discrepancies, Notice of Technical or Procedural Failures, and Warning Notice.

Depending on which type of notice the business receives, the employer and employee may be allowed to provide additional documentation. If the audit identifies technical or procedural violations, the employer has 10 business days to correct the forms. Remember, only the employee can correct Section 1 of Form I-9. If the employer addresses these issues and achieves compliance, fines may be reduced or waived. If not resolved quickly, employers could face significant fines for substantive violations:

- An employer who knowingly hires and continues to employ noneligible employees can be fined from \$375 to \$16,000 per violation.
- Fines for substantive violations can range from \$110 to \$1,100 per violation.

These penalties are on a sliding scale. The five factors that determine the level of fine include:

- Size of the business
- Good-faith effort to comply
- Seriousness of the violation
- Involvement of unauthorized workers
- History of previous violations

If substantive violations occur and ICE issues a Notice of Intent to Fine, employers can negotiate a settlement or request a hearing. When an employer requests a hearing, the case is assigned to an administrative law judge. A Notice of Hearing is then sent to all parties, setting the process in motion. If the employer takes no action within 30 days, ICE issues a Final Order.

Raids

How does a raid differ from an audit?

- An employer is not notified of a raid—there is an element of surprise, which can catch employers and employees off guard.
- Raids usually occur because of a lead that illegal employees are working at a business, which then begins an investigation. These leads can come from confidential informants, cooperating witnesses, former or current employee statements, or data from other government agencies.
- ICE raids may follow ICE audits if an audit identifies many workers as having false documents.
- ICE must have a search warrant to raid a business.

When ICE arrives, they might surround the business premises and prevent anyone from leaving. An employer should obtain names and badge numbers of all officers on the property.

The supervising ICE agent should serve a search warrant, which is required if agents are demanding documents or access to private business areas not open to the public. The employer can and should request to review the warrant and may photograph or copy it and send it to his or her attorney. Employers should carefully read the warrant to 1) understand its scope, including the information sought and the physical areas covered, and 2) verify that the warrant is signed by the court, the raid is conducted within the permitted timeframe identified in the warrant, and what information and areas the warrant covers.

The warrant will have a detailed description of what and where agents are going to search and what they may seize. This list may include:

- Payroll
- Form I-9s and any documents to support them
- Bank records showing payroll
- Social Security Administration documents
- IRS Form 940 and 940 employment tax documents
- Other financial or employee records

During a raid, owners and all employees should be polite to the officers and not obstruct them from doing their jobs. The officers may ask that all machinery be shut down. They may also prohibit employees from leaving the premises and gather all employees in a central location.

Employers are not required to answer ICE questions during a worksite raid, and they should not consent to ICE agents speaking to the employees on the premises. If, during a worksite raid, ICE discovers unauthorized workers at the site, they may arrest and detain them.

At the conclusion of a raid, ICE agents should leave an inventory of the property they seized and a list of employees arrested. If an employee cannot prove that he or she is legally in the United States, the ICE agents may take them to a detention center and detain them. The employer should obtain from the ICE agents



Photo: Pixabay, CC0 license.

the contact information of the ICE detention center where the employees will be held and request contact information for other detention centers where the employees may be transferred. The employer should consult with an attorney and decide whether to help arrange for counsel to represent an employee or assist with posting bail. If an employer wishes to assist with an attorney, separate counsel is best since a conflict of interest between employee and employer can arise. The employer should contact the employee's family regarding their detention and pay the employee any wages owed.

If media representatives appear during a raid, an employer is *not* obligated to allow them to enter the premises. Employers should have a public relations/media plan for such events and consider media training for the spokesperson in case this situation arises. Frequently, owners designate their attorney as the spokesperson for the business.

The business should have already consulted legal counsel and prepared a plan. Receptionists or front desk staff should know who to contact immediately if ICE agents arrive. An employer certainly may request their attorney to go to the business, but should not expect ICE to wait for the attorney's arrival.

Conclusion

Again, being prepared before an incident occurs is the best course of action for all employers and employees. One way to prepare for either an audit or a raid is to conduct an internal audit through an outside human resource consultant or an attorney. These internal audits review information and check compliance just as an ICE audit would do. Employers can take corrective action for any irregularities found during the internal audit. The E-Verify system is a useful tool for conducting an internal audit.

When making corrections, remember that Section 1 of Form I-9 can be corrected *only* by the employee. Thus, an employer must notify the employee of the discrepancy and allow them to correct the Form I-9. Whenever an employer learns that an employee cannot legally work in this country, the law requires that the employment relationship must cease.



Photo: iStock

Whether facing an audit or a raid, it is essential for an employer to

- Understand his or her rights
- Never alter or destroy any documents
- Never be disrespectful to the agents
- Immediately contact counsel
- Provide only information requested by the subpoena or search warrant
- Provide employees training regarding business protocols to follow if an audit or raid occurs

This information is for educational purposes and should not be considered as legal advice. If you have any questions about employment issues, consult an attorney licensed in your state regarding your specific situation.

More Information

The Handbook for Employers: Instructions for Completing Form I-9, prepared by USCIS is available online at <http://www.uscis.gov/sites/default/files/files/form/m-274.pdf>.

A webinar that explains the I-9 verification process is available at <https://vimeo.com/131480716>.

Department of Homeland Security "Instructions for Form I-9, Employment Eligibility Verification" is available at <https://secure.i9.talx.com/Popups/Documents/I-9InstructionsNew.pdf>.

Information about the E-Verify system, how to sign up for it, and user support is available at <https://www.uscis.gov/e-verify>.

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