

I-9 Compliance and ICE Raids: A General Guide for Employers

I-9 Employment Verification

- Employers must maintain I-9 verification of each employee's identity and authorization to work in the United States
- Employers are prohibited from knowingly employing undocumented workers
- Standard contracts require compliance with law

I-9 Audits and Raids

- I-9 Employment verification is conducted utilizing audits and raids
- Audits are generally conducted by Homeland Security Investigations division of ICE or the Immigrant and Employee Rights section of the DOJ

I-9 Audits

- Generally commenced via a Notice of Inspection (“NOI”)
- NOI will request all I-9s and payroll records for the previous three years
- Employer should review and do internal audit prior to releasing records

I-9 Audit—Internal Audit

- Employer should compare payroll records with I-9s to ensure none are missing
- For any active employees with missing information, correct it if able (date and initial edits) and provide summary of error and correction along with records
- Consult with legal counsel during internal audit process

Workplace Raids

- The term for ICE agents going to a workplace without notice as part of an investigation
- How an employer should respond and the ability to restrict access depends on several factors
- Always consult legal counsel if possible

Workplace Raids: Public v. Private Areas

- Public Areas:
 - ICE agents may enter public areas and access documents in public places without a warrant or consent
 - ICE agents may observe conversations and behavior, search items in public, seize documents and information and question individuals in public areas (though they may remain silent)

Workplace Raids: Public v. Private Areas

- Public Areas include:
 - Lobbies
 - Waiting areas
 - Parking lots
 - Outside grounds (unless locked and secured)
 - On a construction site any location that would not be open to the general public should not be considered open to ICE

Workplace Raids: Public v. Private Areas

- Private Areas:
 - ICE Agents must either have consent from the employer OR a *judicial warrant* to enter a non-public area.
 - Private areas must be *clearly* marked as private or secured in such a manner that they are clearly private
 - Employers should instruct employees not to inadvertently provide consent (i.e. invite ICE agents into private spaces)

Workplace Raids: Public v. Private Areas

- Private Areas include:
 - Those areas where there is an *expectation of privacy*
 - Those areas that are clearly locked and/or restricted access (require key, keycard, badge swipe etc.)
 - Those areas fenced, or otherwise secured, or not open to the general public
 - Consider designating a “private” room

Workplace Raids: Consent

- An ICE Agent can access a private space if an employer gives consent.
- Consent waives any requirement to obtain a warrant including any probable cause requirement.
- Consent must be voluntarily given by a person with authority over the site to be searched.
- Employers should train employees to state “I do not consent” or “I cannot consent” to searches of private areas.
- Designate one person or a small number of persons to interact with ICE.
- Owner not likely onsite full time.
- ICE Agents may enter without permission, if this happens do not physically attempt to stop them.
- Do reiterate that you are not giving them permission to enter the private space or consent to search.
- Do ask them to leave immediately.
- Do document or film.

Workplace Raids: Warrants

- What to do if presented with a warrant?
- Ask agent for ID (name, badge number, and identification)
- Review the warrant to determine if it's a judicial or administrative warrant

Workplace Raids: Administrative Warrants

- Administrative warrants are generally signed by an administrative agency and are intended to make an arrest or seizure of a specific person subject to an order of final removal
- Administrative warrants DO NOT grant ICE Agents access to private spaces
- Request ICE Agent's official identification
- Do not allow ICE Agents to search private areas

Workplace Raids: Administrative Warrants

U.S. Department of Justice
Immigration and Naturalization Service

Warrant of Removal/Deportation

File No: _____
Date: _____

To any officer of the United States Immigration and Naturalization Service:

_____ (Full name of alien)

who entered the United States at _____ on _____ (Place of entry) (Date of entry)

is subject to removal/deportation from the United States, based upon a final order by:

an Immigration Judge in exclusion, deportation, or removal proceedings
 a district director or a district director's designated official
 the Board of Immigration Appeals
 a United States District or Magistrate Court Judge

and pursuant to the following provisions of the Immigration and Nationality Act:
Section 241(a)(5) of the Immigration and Nationality Act (Act), as amended.

I, the undersigned officer of the United States, by virtue of the power and authority vested in the Attorney General under the laws of the United States and by his or her direction, command you to take into custody and remove from the United States the above-named alien, pursuant to law, at the expense of the appropriation. "Salaries and Expenses Immigration and Naturalization Service 2002," including the expense of an attendant if necessary.

(Signature of INS officer)

Officer of INS

(Date and office location)

- Example Administrative Warrant
- Will be issued by DOJ or ICE, not a federal or state court.

Workplace Raids: Judicial Warrants

- A judicial warrant is signed by a judge and requires probable cause
- A judicial warrant will generally say the name of a U.S. District Court or State Court at the top of the document
- Judicial warrants DO grant access to private spaces, but those spaces must be clearly and specifically defined in the warrant

Workplace Raids: Judicial Warrants

- What to do if presented with a judicial warrant?
 - Call your attorney or take photo and text/email to attorney
 - Review the warrant to ensure (1) it's a valid *judicial warrant* and (2) it is signed by a judge or magistrate
 - Review the warrant to determine (1) the place to be searched; (2) the time and scope of search
 - If the warrant meets all of the above, ICE Agents must be permitted to access the private (and *only*) the private area specifically identified on the warrant

How to prepare for workplace raids

- Ensure staff knows not to consent to searches, train them to only provide ICE Agents access to public spaces and to use the phrases “I do not consent” or “I cannot consent” if ICE Agents ask for access to different spaces
- Designate a contact person who will be in charge if a raid occurs
- Contact legal counsel if a raid occurs

Restricting Parking Lot Access

- Parking lots likely remain “public areas” for the purposes of executing raids on employer
- Employer likely can take steps to limit ICE use of parking lots for the purpose of parking or staging unrelated to executing a raid on employer premises
- General “no-trespass” restrictions would apply
- If public in general is permitted to park in the lot without restriction, will be more difficult to restrict access

Restricting Parking Lot Access

Best approach is to post general or specific no-trespassing signs like the example on this slide



Employee Messaging

- When or if to make a statement regarding ICE enforcement

Liquidated Damages

- Workplace disruption, i.e., raids
- ICE presence could hinder workforce availability
- Substantial completion dates may be affected

Contract Language - AIA

§ 8.3 Delays and Extensions of Time

§ 8.3.1 If the Contractor is delayed at any time in the commencement or progress of the Work by (1) an act or neglect of the Owner or Architect, of an employee of either, or of a Separate Contractor; (2) by changes ordered in the Work; (3) by labor disputes, fire, unusual delay in deliveries, unavoidable casualties, adverse weather conditions documented in accordance with Section 15.1.6.2, or other causes beyond the Contractor's control; (4) by delay authorized by the Owner pending mediation and binding dispute resolution; or (5) by other causes that the Contractor asserts, and the Architect determines, justify delay, then the Contract Time shall be extended for such reasonable time as the Architect may determine.

Contract Language - AIA

ARTICLE 14 TERMINATION OR SUSPENSION OF THE CONTRACT

§ 14.1 Termination by the Contractor

§ 14.1.1 The Contractor may terminate the Contract if the Work is stopped for a period of 30 consecutive days through no act or fault of the Contractor, a Subcontractor, a Sub-subcontractor, their agents or employees, or any other persons or entities performing portions of the Work, for any of the following reasons:

- .1 Issuance of an order of a court or other public authority having jurisdiction that requires all Work to be stopped;
- .2 An act of government, such as a declaration of national emergency, that requires all Work to be stopped;
- .3 Because the Architect has not issued a Certificate for Payment and has not notified the Contractor of the reason for withholding certification as provided in Section 9.4.1, or because the Owner has not made payment on a Certificate for Payment within the time stated in the Contract Documents; or
- .4 The Owner has failed to furnish to the Contractor reasonable evidence as required by Section 2.2.

Contract Language - AGC

17. **FORCE MAJEURE.** Neither Party will be in default for any failure or delay up to of any duty due to Force Majeure and the Parties agree to work in good faith to equitably adjust the Schedule, Price or other terms for any Force Majeure Event that lasts days or more. Such equitable adjustments may change or continue as the Force Majeure Event may evolve, and will be approved by the Parties timely under Changes and Claims (§8(a)). A Force Majeure Event will be considered an act of God, war or military conflict, embargo, civil disturbance, fire; terrorism; pandemic, epidemic, endemic, outbreak, strike, public emergency, adverse government action or delay including new law, restriction, or tariff; other casualty; other Force Majeure occurrence beyond the Parties' responsibility and control; or disruptions in supply including significant changes materials and labor, delays, or significant change in costs related to the Force Majeure.

Contract Language - AGC

8. **CHANGES AND CLAIMS.** Any change in the Contract Documents, worksite conditions, or understandings of the Parties at the time of bidding that affect the specifications, drawings, Schedule, Price, or other terms, including deviations from industry standards and practices, will be subject to the following Change and Claims process. For Changes and Claims, the Parties will provide timely and adequate notice of the reason for a requested Change or Claim. The agreed Change or Claim will be in writing (including electronic), entitled as a Change or Claim, and signed by each Party (including electronic). The Parties understand that any event may evolve and will stay in good communication as Changes or Claims develop, cooperating on the best remedy from, for example, minor adjustments to suspending work. Each Party will act reasonably to mitigate the delay or cost.

a) Excusable Conditions. A Change Order is appropriate for significant changes in circumstances (including occurrence, extent, or duration of the circumstance) that were not reasonably anticipated at the time of the Effective Date. Such Excusable Conditions include: defects, acts, or omissions of Owner, Design Professional or other Owner agents or subcontractors; impacts from Owner-provided materials or work; delays in date to proceed not caused by Contractor; other delays caused by Owner such as untimely responses; changes in the Work or sequencing ordered by Owner; pre-existing conditions; discovery of Hazardous materials; discovery of different, concealed or unknown site conditions; delay authorized or ordered by Owner including dispute resolution; transportation delays; labor disputes not involving Contractor or not related to the Worksite; changes in law (including significant increased taxes); unknown or unidentified utilities; abnormally adverse weather conditions; or Force Majeure Events (§16). Equitable adjustments may evolve as the condition persists or changes.

b) Incidental Change Order. Owner may request changes that are incidental and consistent with the Contract Documents, not requiring changes in time or price, by providing a written order to Contractor, who will perform the Change. If Contractor believes the Change is not incidental, then the request will follow the Change Order or Interim Directive process.

c) Change Order. The Parties will meet promptly to discuss any request for Change. Contractor is not obligated to perform changes until a Change Order or Interim Directive is executed by Owner. No change or adjustment will be made without both Parties' written and signed approval, which will not be unreasonably or untimely withheld. If Owner issues a Directive Order requiring Contractor to perform work without prior approval of the terms of the change, then Contractor will be entitled to equitable adjustments pursuant to paragraph 14.

Contract Language - ConsensusDocs

6.3 DELAYS AND EXTENSIONS OF TIME

6.3.1 If Prefabricator is delayed at any time in the commencement or progress of the Work by any cause beyond the control of Prefabricator, Prefabricator shall be entitled to an equitable extension of the Contract Time. Examples of causes beyond the control of Prefabricator include, but are not limited to, the following: (a) acts or omissions of Owner, Design Professional, or Others (including but not limited to failure to provide necessary information, approvals, or access to the Worksite); (b) changes in the Work arising from decisions of Owner that impact the time of performance of the Work; (c) encountering Hazardous Materials, or concealed or unknown conditions; (d) delay authorized by Owner pending dispute resolution; (e) transportation delays not reasonably foreseeable; (f) labor disputes not involving Prefabricator; (g) general labor disputes impacting the Project but not specifically related to the Worksite; (h) fire; (i) Terrorism; (j) epidemics; (k) adverse governmental actions; (l) unavoidable accidents or circumstances; (m) adverse weather conditions not reasonably anticipated, including but not limited to extreme temperatures, severe storms, or natural disasters such as hurricanes, tornadoes, floods, or earthquakes; (n) supply chain disruptions affecting the availability of materials or equipment; (o) embargoes or trade restrictions imposed by government entities; (p) acts of God, including but not limited to wild fires, landslides, or tsunamis; (q) cyber-attacks or data breaches that impact critical project management systems or communication. Prefabricator shall submit any requests for equitable extensions of Contract Time in accordance with ARTICLE 8. In addition, if Prefabricator incurs additional costs as a result of a delay that is caused by items (a) through (d), (o), or any force majeure event listed above that materially impacts Prefabricator's cost of performance, Prefabricator shall be entitled to an equitable adjustment in the Contract Price.

6.3.2 NOTICE OF DELAYS If delays to the Work are encountered for any reason, Prefabricator shall provide prompt written notice to Owner of the cause of such delays after Prefabricator first recognizes the delay. The Parties each agree to take reasonable steps to mitigate the effect of such delays.

Practical Considerations

- OAC Meetings: discuss and designate authority, procedures.
- Contract: addendum, exhibit designating authority, review terms.
- Consider paying for: uber, hotel, Air B&B near construction site.

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