

MEMO

To: **NMPF**

From: Glen D. Wasserstein, Esq.

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RE: **Immigration Raids:
Be Prepared and Know Your Rights**

Part 1: Be Prepared for a Raid

Being prepared for an immigration raid is critical. Creating a plan and understanding your rights can minimize the devastating impact of a raid. The following steps should be taken in order to properly prepare for a raid:

1. Assign coordinators who can organize and direct a response to minimize any confusion that may occur during and after a raid. The coordinators can help with delegating and verifying information.
2. Collect contact information for foreign consulates in your area.
3. Create a response team of attorneys and community leaders. You should have the contact information of a competent local criminal defense attorney for the owners and managers, and a competent immigration lawyer for the workers and their families. Charitable organizations such as Catholic Charities or La Raza can be very helpful as well.
4. Develop a “raid fund”-Set aside easily accessible funds for a raid. These funds may be needed to post bond, pay attorneys, arrange transportation, etc.
5. Create a document authorizing another adult to take care of minor children in order to avoid issues of childcare responsibility during a raid.
6. Have families develop a preparedness plan in case of a raid, including contact information for family members, friends and others that could help in addition to keeping an emergency phone with prepaid minutes and emergency money, copies of relevant documents (immigration, criminal records, tax returns, etc.).

Part 2: Inform your employees of their rights during a raid

1. Most immigrants do not know that they also have the right to remain silent. Both employer and employee should be aware of their right to remain silent. Remaining silent restricts the employee and the employer from giving any information to the authorities which may later work against you.
2. Foreign nationals should stay calm. **THEY MUST NOT RUN**, as this can be construed as an admission of guilt. This type of suspicious act is enough evidence for ICE to detain the individual.
3. Foreign nationals are often frightened and panicked during a raid. It is important that they do not lie or carry false documents. The possession of false documents is incriminating and is grounds for detention.
4. If immigration authorities come to their home, they should ask for a signed warrant. They have a right to view the warrant; ask them to pass it under the door. If they open the door it could be considered permitting them to enter. Make sure it is signed by a judge and says in detail the places the agent(s) are authorized to enter. If it is signed by an officer you cannot stop them from entering the home, but you can state you do not consent to the search, which limits it to the areas listed on the warrant. If they are looking for a person listed on the warrant, they must go with the agents and others in the home have a right to remain silent. Never interfere physically with the agents.
5. If the employee is stopped on the street, they cannot be arrested unless there is evidence that they are an unauthorized non-citizen. If the agents approach the foreigner with questions, they should ask if they may go. If they say yes, the foreign national should walk away slowly. If they say no, they must not attempt to leave. One is only required to give one's name and nothing else. *Remain* silent and ask to speak with a lawyer. Police and Immigration have the right to search you to make sure you are not carrying weapons or illegal materials, including false documents. Do not resist this inspection.
6. If the employee gets arrested, inform them not to sign anything, especially if it's in a language they cannot read. Present their (genuine) work permit or green card, if they have one. Instruct them specifically not to sign a "voluntary departure" or "stipulated orders of removal" without first talking to a lawyer. Signing a voluntary departure agreement means that they won't get a hearing, they will have to leave the U.S., and they may never be allowed to enter the U.S. again or get legal immigration status. Signing a stipulated order means that you waive your rights to a hearing before a judge and serves as a final order of removal (deportation) signed by the judge.
7. Have the employee call a (legal) family member and an attorney. Have them memorize a number of an attorney or carry a 'Know Your Rights' card with their immigration attorney's name and contact information. They have the right to contact an attorney and their consulate.

Part 3: The Anatomy of a RAID

A. Warning signs that your firm is being investigated by ICE

Employers are often provided with clues that a work-site raid is imminent. Employers should be aware of warning signs that indicate it may have become a target for a worksite enforcement investigation. Note the following possible indicators:

- Employer may have directly witnessed evidence that it is under ICE surveillance.
- Employer may have employees who have been arrested for criminal activity. This can often lead to scrutiny of the employer by local authorities and ICE.
- Employer may have employees who are being detained by the immigration authorities.
- Employer has received SSA no-match letters covering large portions of its workforce.
- Employer operates in a high-risk industry (the dairy industry is known to have a workforce of 60-80% undocumented workers). However, raids on dairies have been relatively rare.
- Employer may have been visited by ICE ostensibly for a routine I-9 inspection but in reality pursuant to an on-going criminal investigation
- Employer may have been visited by the DOL and inspectors may have uncovered workplace wage violations.
- Employer may have been visited by state regulators who have uncovered tax or labor violations.

Employers are urged to immediately contact counsel for purposes of conducting an in-house audit of its I-9 compliance program if it suspects that an enforcement action is imminent. In this environment of increasing government raids at work-sites, it is clear that the government views the employment verification process as a key part of its larger enforcement efforts. Dairies should review their business practices to ensure compliance with the law and to minimize exposure in the event of an investigation. Once the warrant is issued, the employer will have little or no control over the location of the search, the interrogation of its employees, or the seizure of documents or electronic equipment containing its business records.

B. ICE Raids Based on a Warrant

ICE raids are typically initiated by a lead that a company is employing undocumented workers. ICE must obtain a warrant to conduct these raids based on a reasonable suspicion that unauthorized employment is occurring. The warrants are obtained after the government receives a lead that a company is employing undocumented workers. The lead often comes from current or former employees, from the public, or from local law enforcement agencies. Quite often the criminal arrest of an undocumented employee leads to information which then leads to an investigation. The lead is substantiated during the initial stage of the investigation. A warrant is issued based on a level of suspicion or belief that the employer has engaged in the hire or continued to hire undocumented workers, has harbored illegal aliens (e.g., dairies which provide

housing), or has engaged in money laundering (a separate payroll system for undocumented workers). ICE must be able to produce information about possible violations with enough substance to convince the issuer of the warrant that a violation may have occurred. The application for the search warrant is made before a federal magistrate or judge.

The warrant typically permits ICE agents to question employees and arrest undocumented workers at the site and seize computers and company records, including payroll records and I-9 forms. The warrant typically authorizes the search of the business premises within a few days of the application. The warrant must include a detailed description of the business premises to be searched, and a description of the items to be searched and seized by ICE agents. The documents to be seized may include, but are not limited to: (1) I-9 forms and copies of documents submitted by employees during work verification, (2) payroll records, (3) SSA no-match letters received by the employer, (4) identification documents possessed by employees (to support fraud or identity theft charges against the employees), (5) bank and accounting records (to establish existence of separate payroll systems for undocumented workers and support money laundering charges against the employer), and (6) any other financial records that may support the existence of separate payroll system (e.g., money orders, cashier check, bank checks, etc.). If the records are retained electronically, the warrant will allow the seizure of computer equipment, storage devices, etc.

Typically, the most damaging evidence collected by agents is the testimony of the arrested employees who may corroborate claims of an employer's involvement in the illegal employment, the smuggling of workers, the harboring of undocumented persons, or money laundering.

The employer must produce the business records listed in the warrant and allow the survey of its employees. The employer should contact its attorneys (both criminal and immigration) as quickly as possible to come to its premises and communicate directly with the agents. However, the employer cannot obstruct the agents from gaining access to the listed the records or from questioning its employees. It is strongly recommended that the employer should make no statements to ICE agents without their attorneys present.

The worksite raid does not end the investigation. ICE agents will likely conduct further review of documents, interview more witnesses, and analyze all of the seized evidence to determine whether the employer and its executives are criminally liable. The government will often seek the cooperation of the arrested employees in pursuing criminal cases against the employer. This stage of the investigation may continue for weeks, months and even years following the worksite search. Upon completing the review of the seized records and obtaining the testimony from the employees, ICE presents the case to the local federal prosecutor for lodging of formal criminal charges against the employer if criminal activity is revealed.

C. ICE Raids Without a Warrant

Since 2007, it has become quite common for ICE agents to simply appear at the premises of the employer without giving prior notice or without a subpoena or a warrant, requesting the employer's consent for an immediate review of records and premises. Often, employers are so intimidated by the approach of government agents that they permit the ICE agents to conduct an immediate review of I-9 and payroll records. Frequently, ICE agents will also request to interview employees on the premises in order to determine their immigration status.

ICE is not entitled to review records or interview employees unless they give three days' notice (in the case of an I-9 investigation-see below) or present a warrant (e.g., for search and seizure of business records and/or interview of employees).

Employers should follow this list of guidelines:

- Never consent to an immediate review of the I-9 or any other records; invoke the three-day rule for production of the I-9s and the warrant requirement for other business records or a company survey. The employer can tell the agents: "Our counsel has advised us not to provide immediate consent to your review of our records or survey of our employees."
- Call the employer's attorney immediately, and let the attorney speak with the agents if the employer prefers this course of action.
- Never let the agents remove original documents from the employer's premises; always have photocopies prepared for the agents to take.
- Be sure to get the name, telephone number, and business card of the lead agent so that he or she can be contacted later to discuss the time and place of the investigation, and the scope of the document request.
- Write down what happened during the encounter with the agent.
- Never give consent for the agents to speak with any of the employees on the premises. If the agents start speaking with employees without requesting consent, stop them from doing so.

Employers often fear that taking these steps will arouse the agents' suspicions when in fact the employer has nothing to hide. ICE agents commonly play on these fears in their conversation with the employer. They will often attempt to intimidate the employer to comply. While the denial of consent may appear uncooperative, by invoking the three-day rule or the warrant requirement, the employer and its attorney have time to review the I-9 records and take corrective action as appropriate.

D. I-9 Inspection Audits by DOL and ICE

Another typical form of immigration raid is the worksite inspection of I-9 records by DOL and ICE.

The employer sanctions law requires that the employer receive at least three (3) days' notice of the government's intention to conduct an inspection of verification records. If an employer consents to inspection on less than three days' notice, the government inspectors can review those records based on that consent without violating the law. ICE is only allowed to bypass this notice requirement in a lead-driven investigation if it has probable cause evidence of a violation and obtains a civil or criminal search warrant.

Occasionally, DHS will issue its own agency subpoena for the records without providing the 3 day notice. As a practical matter, however, in cases where there is probable cause to believe that the employer has violated the law, and that evidence will be lost if warning is given, ICE is more likely to seek a warrant authorizing immediate entry and seizure of the records than to rely on an administrative subpoena. In criminal worksite enforcement actions against employers undertaken in recent years, ICE has sought warrants in lieu of issuing their own subpoenas for documents.

Responding to an I-9 Inspection Notice

Surprisingly, the employer has some control over the location of the inspection. The law gives the employer the option of bringing the records to the ICE office. Also, if the verification records are not kept at the establishment where the inspection is to occur, the employer can arrange for the records to be brought to an ICE office near where the records are in fact maintained, or can arrange for ICE agents to come instead to the location where those records are maintained.

However, requesting that the inspection occur at the ICE office may raise strategic considerations. The Notice of Inspection always requests that the inspection be at the central business premises of the employer. An employer request to bring the records to the ICE office may well raise the level of suspicion of the agents conducting the investigation.

Since such inspections are often just a part of an ongoing criminal investigation against the company, the employer should not face this situation without the assistance of competent counsel knowledgeable of the requirements of the employer sanctions law and the limitations on government authority.

Employer Response During Raid

When a warrant is served on the employer, it must produce the business records listed in the warrant and allow the survey of its employees. There are some steps, however, that may be taken to minimize exposure. Note the following suggested approach:

(1) Review the warrant to ensure to ascertain its legality and scope

The warrant should be signed by a magistrate or judge and the actual search must be conducted within the time period and within the business hours (if any) set forth in the warrant. While warrants may be quite broad, the employer should also note the items listed in the warrant. The employer cannot interfere with the seizure of documents or equipment or the interrogation of employees.

(2) Accompany agents at all times while they are on the premises

The employer's representative(s) should remain with the agents at all times while they are on the premises. The representatives should note the items seized by the agents and request that they be allowed to make copies before the seizure. The agents may refuse this request.

(3) Contact the company attorney immediately

The employer should certainly contact its attorney as quickly as possible to come to its premises and deal directly with the ICE agents. While awaiting the attorney, however, the employer cannot obstruct the agents from gaining access to the listed the records or from questioning its employees. Any locked offices, storage cabinets, or drawers should be opened at the agent's request. Locks will be broken if the employer declines to cooperate.

(4) Refuse to discuss company policies or practices or particular employees with ICE agents

To avoid potential criminal liability, the employer should make no statements to ICE agents without their attorney(s) present. The employer should not provide any information with regard to specific employees or discuss general hiring policies or practices. The employer should inform the agents that they should wait until the employer's attorney can be reached by telephone and let the attorney speak with the agents. All corporate officers, owners, and human resources personnel should be aware of the potential criminal consequences if the government finds during an investigation that they had actual knowledge of an employee's undocumented status, they harbored undocumented persons, or assisted in maintaining a separate (often cash-based) payroll system for certain employees.

(5) Do not hide employees, assist in their exit, or advise employees on their response to the survey

Concealing employees in the business premises, assisting an employee in fleeing the premises before interrogation, informing employees that they should not answer any questions, or advising employees to give specific responses may expose the employer to criminal liability (e.g., harboring illegal aliens, suborning perjury, interfering with investigation, etc.).