ALERT
EMPLOYMENT & LABOR

Employer Guidance for Workplace Interactions with ICE

July 11, 2025

Pittsburgh, PA

Employment and Labor Alert (update from February 4, 2025)

(by **Steve Antonelli** and **Alex Farone**)

The Trump administration's efforts to prioritize immigration law enforcement has resulted in increased activity by U.S. Immigration and Customs Enforcement ("ICE") and an uptick of questions from employers about how to handle ICE investigations. This article provides guidance to employers for potential interactions with or inspections by ICE at the workplace, including preliminary actions, suggested steps during an ICE visit (whether announced or unannounced), and follow-up recommendations.

There is a common misconception that only employers that specifically seek or intentionally hire unauthorized workers are at risk of a visit from ICE. However, there are multiple avenues by which a generally law-abiding employer may find itself unknowingly employing an unauthorized worker. For example, an individual may have presented the employer with fraudulent documentation for the Form I-9 employment eligibility verification, and the employer may not have realized the document was inauthentic. Or an employer may have lawfully hired a noncitizen with proper employment paperwork but later may forget to reverify the worker's Form I-9; in this instance, the individual's work authorization could lapse or expire without the employer noticing.

To the extent an employer's office or work facility is private property, employers have certain legal rights when faced with an ICE arrival. Employers should become familiar with their rights and best practices in the event of an ICE visit to minimize the risk of inordinate disruption to the workforce or operations, or the unauthorized seizure of company property and information. Employers should seek to balance (1) lawful compliance and cooperation with (2) private property rights and a general duty of care for employees.

Babst Calland recognizes that the topics of immigration enforcement and undocumented persons have been politicized. We therefore offer this guidance objectively, without advocating for any particular position beyond what is legally required.

Recommended Precautionary Actions Before ICE Arrives

1. **Designate Public and Private Spaces**

   ICE agents can only be present in areas open to the public (such as parking lots, reception areas, lobbies, etc.) without a judicial warrant or specific employer consent. Therefore, employers should clearly identify the boundaries of non-public areas with signs such as "Private" or "Non-Public Area" to avoid ambiguity. Once signs are posted, management should explain these "new" boundaries or designations to the workforce, with special emphasis on its explanation to security guards, receptionists, and other public-facing employees.

2. **Understand the Types of Documents ICE Could Present**

   With a few exceptions, ICE generally cannot lawfully search persons or private spaces, or seize persons or private property, without certain documentation.[1] As explained below, employers should ensure that key personnel are trained to identify and/or differentiate these documents.

   A **judicial warrant** provides the broadest search and/or seizure rights. A judicial warrant can be either a search warrant or an arrest warrant. A judicial warrant must be signed and dated by a judge or magistrate, and it must describe with particularity the place to be searched and/or the person or items to be seized. A judicial warrant will

have the name of a court at the top of the document. Only a valid judicial warrant permits an ICE agent to enter private/non-public spaces at the workplace, and only a valid judicial warrant *requires* the employer's cooperation. An employer must strictly comply with a judicial warrant, but it is not required to take any action to assist ICE beyond what is reasonably required by the judicial warrant. For example, an employer can be required to move an employee identified in the warrant into a contained area for questioning, but it cannot be required to sort employees into groups by citizenship status or nationality for an inspection by ICE.

An **administrative warrant** is much more limited than a judicial warrant. An administrative warrant is signed by an immigration officer, and it allows ICE to arrest a non-citizen suspected of committing immigration violations. An administrative warrant is usually identified as a document "issued by the Department of Homeland Security" and is typically on a Form I-200 or I-205. Notably, an administrative warrant does not give an ICE agent the right to enter private/non-public spaces at the facility unless the employer consents.[2] Additionally, when faced with an administrative warrant, an employer is not required to tell ICE whether the employee named in the warrant is currently working or to bring the employee to the agent (or vice versa).

Alternatively, ICE could present an employer with a **subpoena,** a **notice of inspection**, or a **notice to appear.** A **subpoena** is a written request for information or documents that provides a certain time limit to respond and does not require immediate compliance. Like a subpoena, a **notice of inspection** is a document informing an employer that it must produce employees' I-9 Forms for an audit[3] within 3 business days. A **notice to appear** is a document directed to an individual instructing them to appear before an immigration judge.

3. **Assign An On-Site Response Coordinator**

   Employers should assign a particular managerial or supervisory employee at each facility to be the on-site response coordinator who can serve as a single point of contact with ICE in the event that ICE arrives, as well as a back-up coordinator if the designated worker is absent or unavailable. These personnel should be trained to differentiate between the above-described documents, and to understand and be aligned with the employer's policy for lawful compliance with visits from ICE.

4. **Review Applicable Collective Bargaining Agreements**

   For any locations that have a unionized workforce, employers should review the applicable collective bargaining agreements (CBAs) proactively to determine whether they require any additional conduct by the employer in the event of an ICE visit. For example, some CBAs might include provisions that give the union the right to be present during any ICE inspections or on-site employee interviews, or require that the employer notify all union employees when ICE agents arrive. Any additional CBA requirements should be implemented with the below recommended actions for facilities with unionized employees.

Recommended Actions If ICE Arrives

All recommended actions below should be conducted in a calm, professional, and polite manner to prevent escalation of the interaction.

1. **Notify key personnel** – The first step is to immediately notify the facility supervisor, the on-site response coordinator(s), and the employer's legal counsel. Ask the agents to wait in a specific space or designated location until either a supervisor, on-site response coordinator, or legal counsel arrives to prevent disruption.

2. **Verify agent identify** – The response coordinator should clarify whether the agents are police officers or ICE agents and request their names and badge numbers.

- Department of Homeland Security (DHS) regulations require ICE agents to, at the time of an arrest, identify themselves as immigration officers with arresting authority if it is "practical and safe to do so." However, agents are not currently required to provide their name or badge number.
- Recently, there has been an increase in reported instances of ICE agents concealing their faces, wearing plainclothes, and/or arriving in unmarked vehicles when making arrests. The DHS Assistant Secretary for Public Affairs has stated to news outlets that ICE agents are utilizing masks and face coverings to protect themselves from increasing threats and online doxing. Employers should be aware of this trend and train the on-site response

coordinator to anticipate this possibility.

3. **Verify agent purpose** – The response coordinator should ask the agents about the nature of their visit. Common purposes include:

- Initiation of Form I-9 Audit – If ICE intends to audit a company's Form I-9 compliance, ICE must first provide the employer with a Notice of Inspection. This notice document gives the employer at least 3 business days to produce the requested I-9 Forms.[5] Additional productions and procedures will ensue if ICE determines that there are any Form I-9 errors, suspicious documents, or discrepancies, and employers should consult with an immigration attorney for further guidance if this occurs.
- Facility Search or "Raid" – ICE can arrive without warning to investigate an employer.
- Detention of specific person(s) – ICE can arrive without warning to detain specific person(s).
- Fraud Detection and National Security (FDNS) visit – this is an unannounced visit related to an employer's recent immigration petition(s) where ICE agents conduct compliance reviews to ensure the employer is complying with the terms and conditions of the petition(s). This article does not address such visits, as FDNS visits are only relevant for employers who have had an H-1B or L-1 intracompany transfer petition(s) adjudicated.

4. **Verify documentation** – The response coordinator should ask to see a warrant.

- If a judicial warrant is provided, the employer should analyze it to determine its scope and ask for a copy of it. Employers are not required to provide access to any area not specified in a judicial warrant.
  - If there is an issue with the judicial warrant (i.e. it is not signed, not dated, is missing the correct workplace address, or does not sufficiently describe the premises to be searched or items to be searched for), an employer can accept the warrant but should note its objection so that counsel can challenge the search or seizure later if sufficient grounds exist. To be clear, in this instance, the search or seizure will still occur.
- If an administrative warrant is provided, the response coordinator can (but is not required to) state: "*I'm sorry, but this is private property. It is company policy not to provide consent or permission to enter private or non-public areas of the facility or to access our information or records without a valid warrant signed by a judge*."
- If no warrant of any kind is provided, the response coordinator can (but is not required to) make the same statement.

5. **Use independent judgment if considering voluntary consent.**

- Employers can decide to voluntarily consent to a search or seizure of employer property by ICE without a sufficient warrant. Moreover, ICE agents are permitted to make statements intended to encourage voluntary consent or to imply that giving consent is required even in circumstances where it is not (such as when the agents do not possess a judicial warrant).
- If considering consenting to a search or seizure without a sufficient warrant, employers should use independent judgment to evaluate the totality of the circumstances in addition to any statements made by the agents.
- Please note that non-management and non-supervisory employees do not have the authority to act on behalf of an employer to give such consent.

6. **Be respectful, but clear, if exercising the company's rights.**

- Never attempt to block an ICE agent's movements. If an employer believes ICE is exceeding its authority, the response coordinator can voice the employer's objection and state that the company does not consent, but they should not argue and never physically interfere with the agent's actions.
- If a search is to occur (whether pursuant to a valid warrant, voluntary consent, or over the employer's objections in the absence of both), ask to be provided with a list of any items seized.
- If agents attempt to seize something that is critical to company operations (such as a computer, proprietary information, or an important file), explain why the item is critical to the company's operations, request a more limited or targeted seizure, and/or ask to make a copy of the information before it is seized.
- Employers can notify employees that they have the right to remain silent, but employers *cannot* instruct employees not to respond to questions. Company representatives should not be confrontational, obstructive, or evasive.
- Though ICE agents are not currently required to wear body cameras, employers and employees alike have the right to record an encounter with ICE. Consider recording interactions with ICE agents to clearly document all statements and actions. Efforts to record an encounter should never interfere with the agents' activities.

Recommended Actions After ICE Visit

1. **Document as much as possible** – The response coordinator should interview employees and make a record of the details of the event in an incident report. The report should include details such as the number of agents, a description of what they were wearing, whether the agents kept anyone from moving around the workplace freely, a detailed list of the locations of any search (including smaller spaces such as closed drawers), a detailed description of any property seized, a detailed list of statements made by the employer declining consent or asserting legal rights, and any statements made by the agents.

2. **Follow-up notifications** – The employer should call its legal counsel immediately to discuss next steps. If the workplace is unionized, the employer should notify the union steward that ICE visited the workplace.
3. **Engage and encourage open communication with and among the workforce** – Employers should be open and honest with the workforce about what occurred. In addition to individual instances of absenteeism, fear of action by ICE may lead to employees discussing their concerns or voicing disagreement with the employer's response (or potential response) to ICE. Employers must be aware that certain employee collective action (discussions, protests, other concerted activity, etc.) may be protected under the National Labor Relations Act if it relates to the terms and conditions of employment, even for non-union workers or those who may not be authorized to work in the U.S.

4. **Provide reasonable leave** – If ICE detains a worker, consider providing the worker with an unpaid leave of absence during and in the immediate aftermath of the detention. While not legally required, an employer could consider handling the matter in a manner similar to how it might provide or allow leave in the event of a sudden medical issue or other unexpected absence. Failure to provide such comparable leave could give rise to a claim for national origin discrimination. Employers are never, however, required to provide an indefinite leave of absence.

If you have any questions about additional employer guidance concerning workplace investigations by ICE or any other federal or state agency, please contact Alexandra G. Farone at (412) 394-6521 or afarone@babstcalland.com or Stephen A. Antonelli at (412) 394-5668 or santonelli@babstcalland.com.

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[1] While police officers are allowed to search and arrest without a warrant in the event of different types of emergencies such as while in "hot pursuit" of a criminal suspect, ICE agents are not police officers (regardless of whether their uniforms say "Police"). ICE agents may not search and seize without a warrant if they are merely in "hot pursuit" of a suspected undocumented person. Under applicable law, this type of warrantless search or seizure by ICE is only permitted if the agent is in "hot pursuit" of an individual who "poses a public safety threat" or who the agent personally observed crossing the border.

[2] One key exception is the "in plain view" principle. With or without a warrant, ICE agents are always allowed to look at anything in "plain view," including computer screens or papers sitting out on desks, or listen to audible conversations that can be overheard without a listening device. If what the agent sees or hears in "plain view" gives them probable cause that unlawful activity is, has, or will occur, they can search the relevant private area and seize relevant items without a warrant.

[3] The Form I-9 is a document used to verify the identity and employment eligibility of individuals within the United States. Federal law requires employers to create and maintain I-9 Forms and supporting documentation for all employees.

[4] As of the date of this publication, federal legislation has been introduced to require ICE agents to wear a legible identification that displays the employing agency name/acronym and either the agent's last name or badge number. This proposed bill also would prohibit non-medical face coverings that obscure identity unless the agents are faced with environmental hazards or are engaged in covert operations.

[5] Employers are cautioned against voluntarily consenting to a search or seizure of Forms I-9 if ICE agents do not have a judicial warrant for this information or if the 3-day period after receiving a Notice of Inspection has not yet expired. The Form I-9 rules are nuanced and strict, and it is very common for employers to unknowingly violate a rule due to an unintended error on the forms or in record-keeping. Employers can be subject to monetary fines for substantive violations and any uncorrected technical violations regardless of whether the violation was intentional.