Immigration and Customs Enforcement Work-site Raids and Inspections

Immigrations and Customs Enforcement (ICE) is an investigative branch of the Department of Homeland Security (DHS) charged with enforcing U.S. immigration and customs laws. ICE was created in 2003 and took over the responsibility of enforcing the immigration laws from the Immigration Naturalization Service, commonly known as INS. During its first two years, ICE limited its work-site enforcement efforts to sensitive facilities, such as military bases, airports, shipyards, chemical plants and power plants. In 2006, however, ICE shifted its focus toward those workplaces and industries that had been associated with employing large numbers of unauthorized workers. The construction industry was one of the industries expressly made a part of ICE’s focus. Given the increased enforcement efforts of ICE, particularly within the construction industry, it is important that roofing contractors know and understand their rights and make preparations for how their companies will respond to a work-site raid or if ICE issues a notice of inspection and conducts an audit of I-9 forms.

The I-9 Audit

ICE has the authority, without the necessity of a subpoena, to inspect any employer’s I-9 forms to verify compliance and check its accuracy. Unless ICE has a warrant or subpoena, it is required by law to provide an employer with three days notice to produce the I-9s for inspection.
and copying (ICE should never be allowed to remove original documents from an employer’s premises). If ICE does have a warrant or subpoena, no advance notice is required and an employer must allow ICE to conduct its search in accordance with the scope set forth in the warrant itself. Should an ICE investigator appear at a work site without a warrant or subpoena, the investigator cannot demand an immediate production of an employer’s I-9 forms.

Although an investigator may appear at a company’s offices to give notice of the intent to audit, it has been the practice of ICE to cooperate with employers in scheduling I-9 audits beyond three days after a notice of an intent to audit. In the time period between receipt of the notice and the actual audit, an employer should conduct its own internal audit of I-9 forms and correct any mistakes. Mistakes should be initialed and dated and never backdated. Correcting mistakes in this manner can avoid a large fine.

When ICE’s audit is being conducted pursuant to a subpoena or warrant, ICE may demand immediate production of the documents identified in the subpoena or warrant. If the employer refuses to comply, ICE can seek judicial enforcement of the subpoena or warrant.

In the event of an audit, an employer should keep its I-9 forms separate from other employment related documents that are kept within an employee’s personnel file. This is because in the event ICE discovers a possible violation of the law within the Department of Labor’s (DOL) jurisdiction during the course of the I-9 audit, ICE must contact the appropriate DOL field office.

When an I-9 audit is complete, ICE will notify the employer of any deficiency or violation of the law by issuing a Notice of Intent to Fine. An employer has 30 days to contest the intended fine by requesting a hearing before an administrative law judge. If the employer requests a hearing, DHS files a formal complaint with the Office of the Chief Administrative
Hearing Officer and the case is assigned to an administrative law judge. The Office of the Chief Administrative Hearing Officer then sends all parties a copy of a Notice of Hearing and the complaint.

If the matter is not resolved in settlement or not dismissed by the judge in response to a dispositive motion, the matter proceeds to a hearing. Following the hearing, a final agency order is issued by the administrative law judge. If the employer disagrees with the decision of the administrative law judge, the employer has 45 days to file an appeal with the appropriate federal circuit court of appeals.

**ICE Work-site Raids**

A work-site raid is much different than an I-9 audit. Although the number of work-site raids has increased in recent years, the total number of raids represents only a small fraction of 1 percent of the companies in any given industry. ICE work-site raids are not random. Unless an employer consents to the search, ICE is prohibited by law from raiding a work site or project site without a warrant. If ICE has a warrant, the warrant was obtained from a judge after the judge was presented with evidence showing there was probable cause a violation of the law was being committed. Probable cause is defined as a reasonable belief that a crime has been committed. Employers that are the subject of work-site raids have done something to attract ICE’s attention. For example, those companies that exploit unauthorized workers for financial gain or act with impunity are likely to be the subject of a work-site raid. Where there is evidence an employer recruits, houses and transports unauthorized workers, an employer is likely to be the subject of a work place raid.
Employers that are subjects of work-site raids should carefully review the warrant provided by ICE. The scope of ICE’s search is limited to the scope as set forth in a warrant, and employers have a right to review a warrant. Employers are not required to answer ICE questions during a work-site raid. Employers should also never give consent for ICE agents to speak with any of the employees on the premises. In the event of a work-site raid, a company’s legal counsel should be contacted immediately.

If during a work-site raid, ICE discovers or learns of unauthorized workers at the work site, those workers are subject to being arrested and detained by ICE. Employers facing this situation should be sure to obtain from ICE the contact information, including telephone number, of the local ICE detention center. Employers should also find out where to obtain contact information for other detention centers in case detained employees are transferred out of the local area. An employer can assist the employees with obtaining immigration counsel, but it is not advised that the company’s attorneys also represent the employees that may be subject to deportation as unauthorized workers.

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