

Sheppard Mullin Guidance Responding to ICE Enforcement Actions

Immigration Customs and Enforcement (ICE) is charged with the arrest, detention and removal of certain non-citizens. In certain situations, ICE may come to your worksite to arrest such a non-citizen. Below is guidance on the issues.



ICE Priorities: The Enforcement & Removal Operations (ERO) division of ICE has announced that it will target non-citizens with serious criminal convictions and those who were ordered removed by an Immigration Judge but failed to depart the U.S.



Civil Arrests with an Administrative Warrant from the Agency: Most immigration status violations are a civil matter, not criminal. ICE has authority to issue civil administrative warrants to take custody of individuals that it has probable cause to believe are removable from the U.S. These are signed by ICE immigration officers.



Federal Criminal Arrests with a Warrant from a Federal Judge: Individuals are subject to criminal arrest by ICE if they have:

- Been ordered removed but never departed the U.S.;
- Re-entered the U.S. after being removed;
- Used false documents to obtain employment in the U.S.;
- Knowingly hired an individual who is not work authorized (this is reserved for a pattern/practice);
- Retained an employee on the payroll after ICE informed them that they are not work authorized; or
- Any federal crime that happens to come under the jurisdiction of ICE.



ICE Raids: As discussed further below, we do not anticipate many mass raids by ICE. Rather, ERO will conduct targeted enforcement actions.



Resources and Logistics: ICE has a limited number of agents, detention space, airplanes, and funds with which to conduct removal operations. In addition, most individuals who are arrested by ICE are entitled to a hearing before an Immigration Judge before they can be removed. Therefore, ICE has to conduct targeted operations, not mass raids. That said, DHS on January 21, 2025, announced a new policy to make it easier to apply expedited removal to individuals who have been in the U.S. less than two years and cannot prove credible fear to an ICE Officer if they are returned to their home country. Note, however, that this action has been challenged in court and may be enjoined.



Private Property: ICE may not enter private property including the private portions of commercial establishments without permission, absent the rare circumstance where there is a criminal warrant issued by a Judge.



Hospitals: Even though it has recently reversed a policy prohibiting this, it is very unlikely that ICE will enter a hospital to make a civil administrative arrest. ICE understands that patients are undergoing medical treatment, and the agents do not want to take custody of a patient who requires medical treatment. Moreover, hospitals understandably will not release confidential data due to HIPPA requirements.



Schools and Churches: Unless a school or church is believed to be promoting illegal immigration and/or harboring large numbers of migrants from ICE, it is unlikely ICE would seek to enter these facilities. That said, if ICE wants to arrest a non-citizen with a criminal conviction which makes them removable from the U.S., and they happen to be at a school or church, ICE may decide to serve the warrant there.



Homes: With civil administrative warrants, absent exigent circumstances, ICE must knock on the door and cannot enter without permission. However if there is no cooperation, ICE will consider asking a Judge for a criminal arrest warrant if there are grounds to do so. In addition, if ICE encounters challenges to completing the arrest, they may be more likely to want to arrest other non-citizens in the home that lack legal status in the U.S.



Right to Remain Silent: Individuals, including non-citizens, may invoke their right to remain silent when questioned by ICE. Any statements they make may be used against them. That said, employers may choose to cooperate with ICE so as to avoid complications with the agency. Consult with legal counsel prior to admitting any liability.



ICE Request for Immigration Papers: When in public, immigration officers may ask a non-citizen for their immigration papers. The non-citizen is required to have such papers with them and to provide them to the officer. Failure to do so can lead to a \$100 fine and/or up to 30 days in jail.



Data Analytics: To assist in their investigations, ICE has access to a host of data including state and federal arrests and convictions, employer quarterly federal payroll reports, Social Security information, U.S. passport databases, lawful permanent resident (green card) databases, Employment Authorization Document (EAD, or work permit) databases, I-94 databases and birth certificate information from some states.



I-9 Notice of Inspection vs. I-9 Raid: Most I-9 audits involve Homeland Security Investigations (HSI, a different division of ICE from ERO), which drops off a Notice of Inspection and then collects the company's I-9s. In some states, like California, once a federal I-9 audit has commenced, the state requires that the employer post the Notice of Inspection and notify any union. An employer is liable for missing I-9s or I-9s that have substantive errors. However, they are not liable if an employee's documents looked real at the time of hire but turn out to be fake. Toward the end of the audit, if ICE determines that some of the workers may not be work authorized, it traditionally has issued a Notice of Suspect Documents advising the employer to terminate individuals on that list. However, going forward it's possible ICE may sometimes bypass issuance of the Notice of Suspect Documents and simply arrive at the worksite with a civil warrant for the arrest of those employees. However, we believe this will not be the norm, due to limited agency resources.



Cooperation with ICE: While an employer does not have to cooperate with a civil administrative warrant, there is a risk that the agency could commence an I-9 audit if they felt an employer was obstructing their need to arrest a non-citizen employee, or in some cases obtain a criminal warrant from a judge if there is conduct to support it.



Avoid Discrimination in Hiring: Do not ask an applicant for employment about their immigration status. You may ask if they require visa sponsorship to work for you now or in the future. After a job offer has been extended, you may give them an I-9 form to complete, in order to confirm that they are authorized to work. If you are not sure if someone is work authorized, consult with counsel. Denying initial or continued employment to someone who is work authorized can create substantial liability for the company.



Navigating the Maze: Sheppard Mullin stands ready to assist you and your company to ensure compliance and avoid liability. We have dedicated teams across several practice groups ready to advise and protect you.

On the following page, please find a decision tree, which may be used if immigration officers visit your facility.

Note: This information is for general informational purposes and should not be construed as individual legal advice.

If you would like additional guidance please contact your Sheppard Mullin attorney and Jonathan Meyer or Greg Berk. Jonathan Meyer oversees the National Security Practice at Sheppard Mullin and can be reached at JMeyer@sheppardmullin.com and Greg Berk oversees the immigration practice and can be reached at gberk@sheppardmullin.com.

ICE Enforcement Decision Tree

