

When ICE Comes Calling

U.S. Immigration &
Customs Enforcement
on the Jobsite

Learn more at
www.ice.gov



The following information is not legal advice, and NAHB strongly encourages members to work with local counsel to establish a compliance protocol that suits their unique needs. To find an attorney in your area that specializes in immigration law, visit <https://www.ailalawyer.com>.

A U.S. Immigration and Customs Enforcement (ICE) agent arrives at your site on a hot, sunny afternoon. She has an audit notice, but pushes to speak with workers and review your files immediately.

What do you do? What should your employees do if you aren't there?

More NAHB members are facing this and other worksite enforcement scenarios as ICE has ramped up oversight of employers' obligations to verify the validity of each employee's identity and employment.

In July 2018, ICE and Homeland Security Investigations (HSI) announced the results of a nationwide operation in which Form I-9 audit notices of inspection had been served to more than 5,200 businesses since that January.

In addition to Form I-9 audits, ICE and HSI conduct worksite raids to create a "culture of compliance" among employers. Worksite raids have escalated dramatically under the Trump administration.

For example, during a June 2018 search warrant execution, authorities identified 146 employees working at an Ohio meat processor who were subject to arrest for immigration violations. And in August 2018, during a multi-state operation led by ICE and HSI, authorities served search warrants for worksite hiring violations at agricultural firms in Nebraska and Minnesota. During the execution of these search warrants, 133 workers were administratively arrested for immigration violations.

Now more than ever, [employers should be aware of their obligation to comply](#) with

the law and know how to handle visits from ICE. Employers who knowingly hire illegal workers or continue to employ unauthorized workers could face criminal prosecution.

NAHB has teamed up with the immigration law experts at Greenberg Traurig, including Laura Foote Reiff, who has worked with builders across the country, to provide NAHB members with information on what to expect during an ICE visit.

THE BASICS

What is the Law?

The Immigration Reform and Control Act of 1986 (IRCA) requires employers to [verify the identity and U.S. employment authorization of all employees](#) hired after Nov. 6, 1986. IRCA imposes civil and criminal penalties for employment-related violations.

To document compliance with this verification requirement, employers must use the [Form I-9: Employment Eligibility Verification Form](#). Employers must maintain the original Form I-9 records for all active employees and certain former employees and make them available for inspection.

How is the Law Enforced?

ICE enforces the employment verification laws using [two different kinds of inspections: Administrative Audits and Raids Authorized by a Judge](#).

The **Administrative Audit** begins when ICE issues a Notice of Inspection (NOI) to compel the production of Forms I-9 and related materials. By law, employers are provided with at least three business days to produce the Forms I-9. A subpoena (a court order to produce documents) may also accompany the NOI.

ICE reviews the records for compliance with the statutory requirements described above. Generally, violations fall into two categories: procedural and substantive. Procedural, or technical, violations are defined as paperwork errors that do not prevent a finding of authorized employment in the U.S. Substantive violations are more serious deficiencies in the Form I-9 that call into question the validity of employment authorization itself.

In a **Raid Authorized by a Judge**, the ICE officer must have a warrant, and will often have a subpoena, that authorizes the immediate inspection and review of the employer's premises and the files. A raid occurs much less frequently than an administrative audit. Nonetheless, an employer should be prepared for either occurrence.

How Does An Employer Prepare for a Visit from ICE?

Employers should consult with immigration counsel and establish a response protocol in case of a raid or audit.

- Document a uniform process for responding to ICE worksite visits, including the receipt of a NOI and any accompanying subpoenas and warrants.

- Train personnel to speak to an ICE officer and where to direct him/her from the time of arrival until the end of the visit.
 - Ask for identification from the ICE officer
 - Ask for authorizing documentation (NOI or warrant)
 - Let ICE agents know the company is represented by outside counsel and/or has a protocol for ICE visits
- Ensure that experienced immigration counsel is on standby to provide guidance during and after an ICE visit.
- Ensure that a senior company leader or the construction site is designated to receive service of the NOI or warrant and escalate the response process through internal channels, as needed.

ADMINISTRATIVE AUDITS

How Does an Employer Respond to an Administrative Audit?

It is key to remember that documents given to ICE cannot be taken back. The same is true for statements made to an ICE officer, including the unintentional sharing of adverse information. And remember, an ICE officer, though seemingly friendly, should not be considered a "friend."

There may be a temptation to accelerate the NOI process. Instead, make full use of the three-business-day response time permitted under the law, and consult with counsel to determine if an extension is possible.

Even if all Form I-9 records appear to be in order, always review them closely with counsel – cross-referencing employment verification records against payroll rosters

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WORKSITE ENFORCEMENT OF EMPLOYERS' FORM I-9 RECORDS

| Characteristics of the Law | Administrative Audit | Authorized Raid |
|--|----------------------|-----------------|
| Notice of Inspection (NOI) issued to compel employers to produce Forms I-9 and related materials | ✓ | |
| Employers provided at least three (3) business days to produce the Forms I-9 | ✓ | |
| Paperwork errors that are uncorrected can lead to more serious employer penalties and charges. | ✓ | |
| Court or administrative order (subpoena) for documents may accompany NOI | ✓ | ✓ |
| Court or administrative order (subpoena) for documents may accompany warrant | ✓ | ✓ |
| Immediate inspection and review of employer's premises and files | | ✓ |
| ICE warrant to search construction/work site | | ✓ |
| Authorized by a Judge | | ✓ |
| Arrests may happen on site | | ✓ |
| ICE may take 3 to 6 months to review documents | ✓ | ✓ |

– to ensure accuracy and prepare a complete and easy-to-follow documentary response.

Carefully review, with outside counsel where possible, the NOI and any accompanying subpoena to clearly understand the scope of ICE’s request. NOIs and subpoenas can come in different versions and may be drafted in different ways.

ICE audits can vary greatly depending on the relevant ICE office, the officer assigned to the case, and local policies, so it is important to pay close attention to what the NOI requests, for what period, and in what format. It is also important to confirm the exact time and date of the ICE officer’s return to pick up the requested items (if picked up in hard copy).

Take down the ICE officer’s contact information or keep a copy of his or her business card when the NOI is served. Because of the variation in how ICE audits are carried out, it is always a good idea to work closely with an attorney to confirm relevant timelines, expectations and next steps.

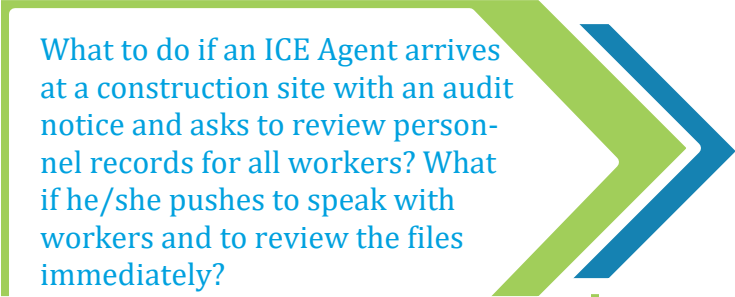
Another item to note: the specific company entity, branch or location that is subject to the NOI. For example, if ICE services a specific location and the NOI does not indicate otherwise, the audit may apply only to the particular site visited by the ICE officer.

What Can Happen After an Administrative Audit?

ICE will notify the audited party, in writing, of the results of the inspection once completed. The following are the most common notices:

Notice of Inspection Results — also known as a "compliance letter," used to notify a business that it was found to be in compliance.

Notice of Suspect Documents — advises the employer that based on a review of the Forms I-9 and documentation submitted by the employee, ICE has determined that an employee is unauthorized to work and advises the employer of the possible criminal and civil penalties for continuing to employ that individual. ICE provides the employer and employee an opportunity to present additional documentation to demonstrate work authorization if either believes the finding is in error.



What to do if an ICE Agent arrives at a construction site with an audit notice and asks to review personnel records for all workers? What if he/she pushes to speak with workers and to review the files immediately?

Contact the construction site manager to discuss the audit notice with the agent. The agent should be informed that the employer will comply with the notice, but that there is no immediate need to do so. The law permits a three-day period and time extensions of this timeframe are often granted upon request. The manager should let the agent know that someone from the employer and/or counsel will contact the ICE agent’s office that day to schedule a follow-up compliance review.

Notice of Discrepancies — advises the employer that based on a review of the Forms I-9 and documentation submitted by the

employee, ICE has been unable to determine his or her work eligibility. The employer should provide the employee with a copy of the notice and give the employee an opportunity to present ICE with additional documentation to establish eligibility.

Notice of Procedural Failures — notes procedural violations identified during the inspection and gives the employer 10 business days to correct the forms or otherwise become substantive violations.

Warning Notice — issued in circumstances where substantive verification violations were identified, but circumstances do not warrant a monetary penalty and the employer is expected to comply going forward.

Notice of Intent to Fine (NIF) — may be issued for substantive, uncorrected procedural violations, or knowingly hiring and continuing to employ unauthorized workers.

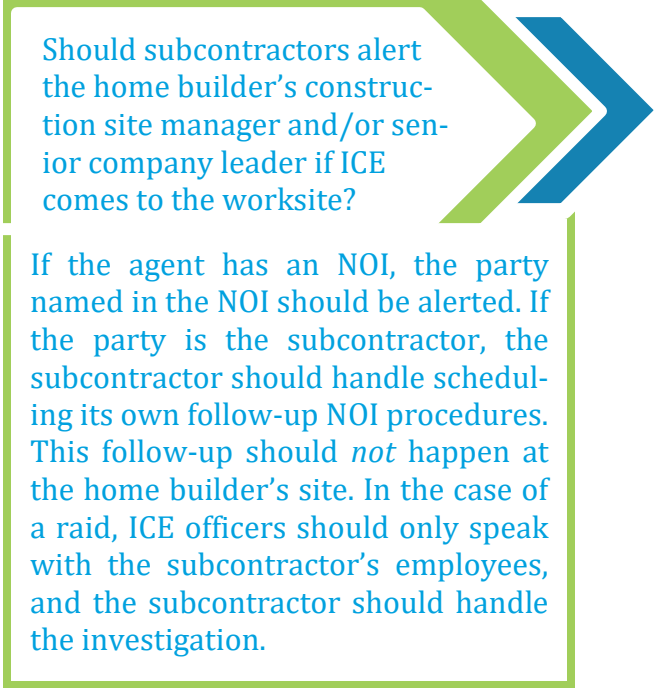
RAIDS AUTHORIZED BY JUDGES

How Does an Employer Respond to a Raid Authorized by a Judge?

Unlike an audit, an ICE officer is permitted to enter the property as long as the ICE officer has a warrant signed by a judge. ICE officers can only go to places described in the warrant. Even if the warrant allows for access to the construction site, try to delay access to any areas that pose safety concerns. Call counsel and instruct employees to follow the company's protocol and call a senior company leader or construction site manager right away.

Employees should be instructed to never

consent to a search on behalf of the company. During the search, legal or factual issues should not be discussed. Instead, raise these issues with counsel later so that the discussions remain protected by attorney-client privilege and confidential.



Should subcontractors alert the home builder's construction site manager and/or senior company leader if ICE comes to the worksite?

If the agent has an NOI, the party named in the NOI should be alerted. If the party is the subcontractor, the subcontractor should handle scheduling its own follow-up NOI procedures. This follow-up should *not* happen at the home builder's site. In the case of a raid, ICE officers should only speak with the subcontractor's employees, and the subcontractor should handle the investigation.

Employees should be instructed to never consent to a search on behalf of the company. During the search, legal or factual issues should not be discussed. Instead, raise these issues with counsel later so that the discussions remain protected by attorney-client privilege and confidential.

Do not destroy or conceal materials. Employees are under no obligation to speak with ICE agents, but the company cannot instruct employees *not* to speak with agents.

During the raid, ICE officers may take possession of Form 1-9 records and other documents. ICE officers may also take individuals into custody for various reasons, such

as criminal allegations or outstanding orders or deportation.

After ICE has left the jobsite, senior company leaders, construction site managers and counsel debrief and reflect. Now is a good time to recreate files that were taken. Employees should be debriefed as well – especially important if senior company leaders or a construction site manager were not onsite during the inspection – to get a fuller picture of what took place.

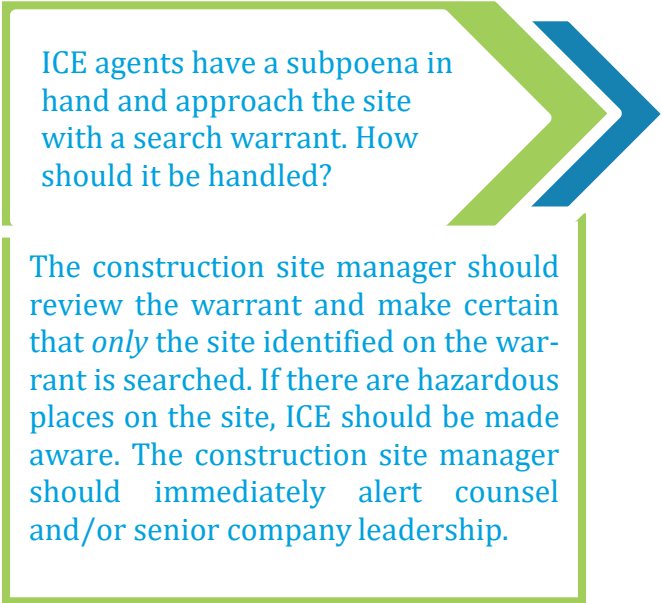
What to Do After an ICE Visit

Take this opportunity to reassure employees that the company is responding appropriately to ICE and following established protocol. If an audit was prompted by a company employee (a “whistleblower”), it is important to remember that the employer cannot retaliate against an employee for bringing potential violations to the attention of the federal officials. Be sure to direct all communications with ICE through outside counsel.

Following the audit or raid, ICE will review the I-9 documents for compliance with both procedural and substantive requirements. This generally takes three to six months. Once complete, ICE will notify the employer of its findings. ICE may request that the employer correct the forms and/or may issue a notice of intent to fine including penalties of procedural and substantive violations. If there is a determination that the employer has hired undocumented workers, there is a potential for criminal prosecution.

Federal government inspections can be intimidating, and ICE visits are no exception. However, planning ahead will facilitate

compliance and place you and your company in a far more confident position.



ICE agents have a subpoena in hand and approach the site with a search warrant. How should it be handled?

The construction site manager should review the warrant and make certain that *only* the site identified on the warrant is searched. If there are hazardous places on the site, ICE should be made aware. The construction site manager should immediately alert counsel and/or senior company leadership.

CHECKLIST

During Search

| | |
|---|---|
| ✓ | Do not consent to search on behalf of company – may bind company. |
| ✓ | Do not discuss legal or factual issues to protect privilege concerns. |
| ✓ | Do not destroy or conceal materials. |
| ✓ | No employee is obligated to speak with agents, but the company cannot instruct employees <i>not</i> to speak with agents. |
| ✓ | Minimize and coordinate public statements to maintain confidentiality. |

CHECKLIST

After Search

| | |
|---|--|
| ✓ | After search, debrief with counsel and employees, and review any agent contacts. |
| ✓ | Provide reassurance to employees |
| ✓ | Direct all communications with ICE through outside counsel |
| ✓ | Beware of whistleblower and retaliation concerns |
| ✓ | Recreate files that were taken |

Additional ICE worksite information can be found at www.ice.gov.

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