ICE AUDITS & IMMIGRANT WORKER PROTECTION ACT

Overview & Guide

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With the intense media coverage surrounding the U.S. Immigration & Customs Enforcement's (ICE) increased activities, and with many employers wondering what to do should ICE come knocking, it is important for employers and their employees to know their rights and what to do. First, the law. Effective January 1, 2018, California's Immigrant Worker Protection Act (AB 450), added sections 7285.1, 7285.2, & 7285.3 to the Government Code and sections 90.2 and 1019.2 to the Labor Code. Currently, the directives coming from Washington do not change California law. In short, these laws prohibit employers from voluntarily cooperating with ICE, provide certain notice requirements, and levy stiff penalties for non-compliance. Briefly, these laws state:

1. Employers are prohibited from **voluntarily** allowing immigration enforcement agents into **nonpublic** areas of the workplace without a **judicial warrant**.
2. Employers are prohibited from voluntarily allowing ICE agents to access, review or obtain employee records without a **subpoena or judicial warrant** (There is an exception to this requirement for Notices of Inspection, which are generally letter requests for Form I-9s and are sent to an employer at least 3 days in advance of the inspection.)
3. Employers must provide their employees with certain written notices when the employer is notified that it will be inspected by ICE.

Violation of these laws could subject employers to penalties ranging from $2,000 to $5,000 for first violations, and $5,000 to $10,000 for subsequent violations. A more complete summary of the law is set forth on pages 3 and 4 of this Guide.

The following are a few helpful guidelines provided by the California Department of Industrial Relation regarding the Immigrant Worker Protection Act. See the complete FAQ document for more details.

- **Q:** *What does it mean to provide "**voluntary**" consent to the entry of an immigration enforcement agent?*
  A: In general, for consent to be voluntary, it should not be the result of duress or coercion, either express or implied. This law does not require physically blocking or physically interfering with the entry of an immigration enforcement agent in order to show that voluntary consent was not provided.

- **Q:** *What is a "**nonpublic**" area of a place of labor?*
  A: The statute does not define the meaning of "**nonpublic**" area nor otherwise indicate that the term "nonpublic" should be given anything but its usual or ordinary meaning. A "nonpublic" area is one that the general public is not normally free to enter or access. For example, this could be an office where payroll or personnel records are kept, or an area that an employer designates (for instance, by posting signs or keeping doors closed) as restricted to employees or management of the business.

  Although not listed as an example by the DIR, it could also include a private construction jobsite whose access is controlled by a contractor.

- **Q:** *What is a "**judicial warrant**?"*
  A: A **judicial warrant** is a warrant that has been reviewed and signed by a judge upon a finding of probable cause. The name of the issuing court will appear at the top of the warrant. Documents issued by a government agency but not issued by a court and signed by a judge are not judicial warrants. An immigration enforcement agent may show up with something called an "administrative warrant" or a "warrant of deportation or removal." These documents are not judicial warrants.

- **Q:** *What is a **subpoena**?*
  A: A **subpoena** is a legal demand for the appearance of a witness or the production of documents or other evidence at a specific time and place. It can be issued under the authority of a government agency or an attorney without the need for prior court approval if the agency or attorney is authorized to issue subpoenas under the law. A subpoena must describe the particular information sought.

- **Q:** *As an employer, what should I do if an immigration enforcement agent provides a subpoena or judicial warrant for employee records?*
  A: When confronted with a subpoena or judicial warrant for employee records by an immigration enforcement agent, employers may wish to consult with their own legal counsel about their legal rights and obligations, in order to evaluate the request and to determine how to respond.

What Should Employers Do?

1. **Determine company policy and procedures on handling ICE inspection requests, and train employees accordingly.**
   - Your company needs to determine its position on whether employers should require ICE to present a valid judicial warrant or subpoena before providing access to its non-public premises or employee records. Working with legal counsel on this is advisable. It is also recommended to contact legal counsel if a Notice of Inspection is received.
   - Once your policy has been determined, designate one or more management representatives who will be the interface with any agents from ICE.
   - Educate your managers and any employees likely to encounter an ICE agent initially (such as receptionists, security officers, jobsite foremen, etc.) on the company's position and who the designated representative(s) is/are.
   - Train employees on the following responses:
     - Field employees should be advised to contact a superintendent or management if approached by ICE, and to take a picture of any "official-looking" paperwork presented by ICE to send to a manager (if the manager is not present) or to the main office for review.
     - Managers and foremen should be instructed to contact the designated representative(s) if approached by ICE, and to provide the designated representative(s) with any "official-looking" documents presented by ICE.
     - ICE agents should be politely told to wait in a public area (i.e. lobby, waiting area, or even outside if no public area is available) until the designated representative(s) has been contacted. If on a jobsite, ICE should be asked to wait outside the gate or at the job trailer. NOTE: Employees may be working at a jobsite in which the employer does not have control of the site (i.e., freeway, large warehouse, or where the employer is a subcontractor). In such situations, the employee should still contact a superintendent or management if approached by an ICE agent.

2. **Comply with employee notice requirements.**
   The notice provisions that have been codified in Labor Code Section 90.2 are enforceable. Employers are required to provide their employees with written notice when the employer is notified that it will be inspected by ICE. A template notice is available on the Division of Labor Standards Enforcement (DLSE) website.

3. **Make sure that Form I-9s are properly organized.**
   It is highly recommended to keep all original Form I-9s in a separate file or binder, if you are not doing so already. (You can also put a copy of each employee's Form I-9 in their personnel file as well.)

4. **Conduct an internal I-9 audit.**
   - Make sure you are using the most recent Form I-9 **(revision date 01/20/2025, with an expiration date of 05/31/2027**) for all new hires. You can find the most up-to-date form on the U.S. Citizenship & Immigration Services (USCIS) I-9 Central website, as well as the most recent version of the I-9 Handbook for Employers (m-274).
   - Print out the I-9 Handbook for Employers for your office and/or jobsite use and ensure that all employees who handle I-9 processing (even just giving out the forms) are trained in the proper procedures. (See UCON's Form I-9 Guidelines for the basics.)
   - Review all existing I-9 forms to make sure they were correctly filled out and that proper documentation was provided. If any errors are discovered, review with legal counsel to determine the appropriate amendment.
   - Create a schedule for any necessary reverifications.

Summary of Immigrant Worker Protection Act

- **Labor Code Section 90.2** states that employers must provide a notice to each current employee by posting a notice, in the language the employer normally uses to communicate employment-related information, of any I-9 inspections within 72 hours of receiving notice of the inspection; written notices must also be given within 72 hours to the employee's authorized representative (i.e., exclusive collective bargaining representative such as their labor union), if any.
- Notice must contain: (1) name of immigration agency conducting inspection of I-9 forms or other employment records; (2) date employer received notice of the inspection; (3) nature of the inspection to the extent known; and (4) copy of the Notice of Inspection.
- The Labor Commissioner has developed a template notice and FAQ, available on the DLSE website.
- Employer must provide affected employees with a copy of the Notice of Inspection upon reasonable request.
- Except as otherwise prohibited by federal law, employer must provide to each current affected employee, and to employee's authorized representative (if any), a copy of the written immigration notice that provides the result of the inspection and any notice of the obligations of the employer and the affected employee arising from the results of the inspection within 72 hours of its receipt of the notice.
- "Affected employee" means an employee identified by the immigration agency inspection results to be an employee who may lack work authorization, or an employee whose work authorization documents have been identified by the immigration agency inspection to have deficiencies.
- Employers who fail to provide the required notices are subject to a penalty of $2,000 to $5,000 for a first violation, and $5,000 to $10,000 for subsequent violations.

7285.1.

(a) Except as otherwise required by federal law, an employer, or a person acting on behalf of the employer, shall not provide voluntary consent to an immigration enforcement agent to enter any nonpublic areas of a place of labor. This section does not apply if the immigration enforcement agent provides a judicial warrant.

(b) An employer who violates subdivision (a) shall be subject to a civil penalty of two thousand dollars ($2,000) up to five thousand dollars ($5,000) for a first violation and five thousand dollars ($5,000) up to ten thousand dollars ($10,000) for each subsequent violation. If a court finds that an immigration enforcement agent was permitted to enter a nonpublic area of a place of labor without the consent of the employer or other person in control of the place of labor, the civil penalty shall not apply. "Violation" means each incident when it is found that subdivision (a) was violated without reference to the number of employees, the number of immigration enforcement agents involved in the incident, or the number of locations affected in a day.

(c) This section shall not preclude an employer or person acting on behalf of an employer from taking the immigration enforcement agent to a nonpublic area, where employees are not present, for the purpose of verifying whether the immigration enforcement agent has a judicial warrant, provided no consent to search nonpublic areas is given in the process.

(d) The exclusive authority to enforce this section is granted to the Labor Commissioner or the Attorney General and enforcement shall be through civil action. Any penalty recovered shall be deposited in the Labor Enforcement and Compliance Fund.

(e) This section applies to public and private employers.

7285.2.

(a) (1) Except as otherwise required by federal law, and except as provided in paragraph (2), an employer, or a person acting on behalf of the employer, shall not provide voluntary consent to an immigration enforcement agent to access, review, or obtain the employer's employee records without a subpoena or judicial warrant. This section does not prohibit an employer, or person acting on behalf of an employer, from challenging the validity of a subpoena or judicial warrant in a federal district court.

(2) This subdivision shall not apply to I-9 Employment Eligibility Verification forms and other documents for which a Notice of Inspection has been provided to the employer.

(b) An employer who violates subdivision (a) shall be subject to a civil penalty of two thousand dollars ($2,000) up to five thousand dollars ($5,000) for a first violation and five thousand dollars ($5,000) up to ten thousand dollars ($10,000) for each subsequent violation. If a court finds that an immigration enforcement agent was permitted to

access, review, or obtain the employer's employee records without the consent of the employer or other person in control of the place of labor, the civil penalty shall not apply. "Violation" means each incident when it is found that subdivision (a) was violated without reference to the number of employees, the number of immigration enforcement agents involved in the incident, or the number of employee records accessed, reviewed, or obtained.

(c) The exclusive authority to enforce this section is granted to the Labor Commissioner or the Attorney General and enforcement shall be through civil action. Any penalty recovered shall be deposited in the Labor Enforcement and Compliance Fund.

(d) This section applies to public and private employers.

7285.3.

In accordance with state and federal law, nothing in this chapter shall be interpreted, construed, or applied to restrict or limit an employer's compliance with a memorandum of understanding governing the use of the federal E-Verify system.

For more information please contact:

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