

THE DYNAMICS OF AN ICE RAID

By Josie Gonzalez, Gonzalez & Harris

BEFORE A RAID

What happens before a raid?

Immigration and Customs Enforcement (ICE) collect evidence against the company using traditional criminal investigative techniques such as the use of confidential informants (“CI”), cooperating witnesses (“CW”), body wiretaps, statements from former or current employees, data from other governmental agencies such as the Social Security Administration, Department of Labor, Wage and Hour, and the Office of Inspector General. Evidence can also be obtained through a routine I-9 audit. Raids result from “lead” driven investigations and the evidence is normally obtained during many months of investigation.

What are some examples of the type of evidence that ICE collects?

- Employee arrested with company ID gets grilled regarding his immigration status; how he got his job; whether any company representatives assisted in procuring false documents; whether the company has actual or constructive knowledge of undocumented status; how many other undocumented employees work at the facility. Often, in exchange for a work permit, the employee agrees to work as a confidential informant.
- Employee is arrested and it’s discovered that he received a Social Security letter advising that the number he was using didn’t coincide with SSA records. Employee admits that he went to personnel and gave them new identity and work authorization documents and that the company allows such identity changes, knowing that the new documents are not valid or don’t belong to the employee; or the employee is sometimes transferred to another worksite under the new identity, or is paid as an independent contractor.
- ICE gets a subpoena under 26 USC section 6103 (i) (1) to secure from SSA all “No-match letters” that have been sent to the company. The letters will reveal that the company has received these letters over several years and that the same names appear each year, that the list is growing and it constitutes a large percentage of the workforce.
- ICE conducts an I-9 audit and determines that a large number of employees are using false documents. In the past, ICE would provide the employer with a list of these employees and provide a reasonable time to dismiss them if they could not produce valid documents. Now, ICE merely uses this evidence to procure a search warrant so it can arrest and interrogate the employees.

- The current or former H.R. Manager or other personnel doesn't like that the company is failing to abide by its immigration responsibilities. He fears completing I-9s because the documents do not appear valid but his warnings to the company fall on deaf ears. He is pressured by production requirements to employ or continue to employ unauthorized workers. Fearing personal liability, this person becomes a confidential informant.

What does ICE do with the evidence it collects?

ICE makes an application for a search warrant before a federal magistrate or judge for permission to search the employer's worksite for the presence of undocumented employees and property that will be used as evidence that specific crimes have been committed.

What are the components of a criminal search warrant?

- The order from the court authorizes that a search may be conducted within ten days, during daylight hours, before a specific date. The order is signed and dated.
- A description of the premises to be searched. Beforehand ICE agents will have conducted surveillance of the premises, noting all entrances and exits, in order to determine how to secure the premises. Sometimes, in advance of a raid, an agent may ask for a tour of the premises often using various false pretenses, for example wanting a tour to ensure that the company is running a clean operation.
- A description of items to be searched for and seized. The list is quite expansive and may include such items as:
 - employee identification documents;
 - payroll records;
 - documents generated by the SSA indicating irregularities with SSA numbers;
 - I-9 forms and copies of documents in support of the I-9;
 - bank records showing payroll and cash ledgers, and any notes, or other bookkeeping data that may contain information about paying undocumented workers, including sticky notes (such evidence may relate to violations of Title 8 U.S.C. 1324 (a)(1)(A)(iv), Encouraging an unauthorized alien to come to or remain in the U.S., 18 U.S.C. 1028 (a)(7), Aggravated identity theft, and Title 42 U.S.C. 408 (a)(6), Misuse of social security numbers;
 - financial records, tax records, letters of credit, escrow documents, money orders, cashier checks, bank checks (such evidence might indicate the transfer of funds in furtherance of the employment of unauthorized aliens);

- “Records” or “information” includes evidence in whatever form and by whatever means created or stored, including any electrical, electronic, or magnetic form, hard disks, zip disks, CD-ROMs, optical disks, backup tapes, etc
- An affidavit in support of the search warrant drafted by the supervisory ICE agent which describes his background and experience in these investigations and chronicles the evidence collected that supports the agent’s belief that crimes have been committed.

What is the profile of the targeted company?

- Company executives fail to understand the culture at the work site and are the last to know that problems are brewing.
- Hiring decisions are made by foreign-born personnel who might have mixed loyalties – with strong sympathies toward job seekers who are desperate for employment.
- I-9’s are maintained perfectly but there is only attention to detail, not to substance.
- Companies are reluctant to question the authenticity of employee documents for fear of discrimination suits.
- The pool of new hires comes mainly from the existing workforce – their relatives and friends.
- Management assumes that long years of residence in the U.S. and U.S. born children equate to legal status for the employee, or thinks that one can get a green card easily and quickly.
- The company has received Social Security No-Match letters and it believes that it has no responsibility to question employees over discrepancies.
- Management allows employees to change their identities and present new and different documents without questioning their authenticity.
- The company fails to realize that supervisors and lower level managers’ actions can be imputed to management; their sins are your sins.
- The company uses translators for I-9 completion and doesn’t know if the translation is accurate and complete.

- The company ignores complaints and rumors that employees are undocumented or are using the valid documents of another person.
- The company is unaware that there are no secrets in the workplace and some workers will cooperate with ICE when given the choice of a coveted work permit or threatened with jail and deportation.
- The company doesn't check the validity of social security cards through any of the systems available to employers.
- Employees never take any vacations back home and there are rumors about their fears of returning to the U.S.
- Employees have been arrested for failing to have a valid driver's license or in other ways have come in contact with law enforcement and have been questioned about their jobs.

DURING A RAID

What makes a raid one of the most effective tools employed by ICE?

The elements of surprise, intimidation and shock are successfully employed by ICE to catch a company off guard and to create chaos. Companies are unprepared for the hostile and intrusive entry of ICE agents on their premises and are unaware that they have rights that they can assert.

What steps do ICE agents take when they raid a company?

- Armed ICE agents surround the premises, effectively sealing all exits and routes of escape. The supervising agent serves the search warrant on either a receptionist or other company representative and alerts other agents via radio transmitters that entry has been made, thus allowing their entry.
- ICE may demand that all machinery be shut down, that no one leaves the premises without their permission, and that employees be corralled into contained areas such as the cafeteria room for questioning.
- While some ICE agents are questioning employees; others are going through drawers and file cabinets seizing documents and computer-related equipment. Once an employee admits alienage, i.e. admits to not being a U.S. citizen, the burden shifts to the employee to demonstrate legal status in the U.S.
- Sometimes employees do not have their immigration documents with them. Human Resources personnel can retrieve copies of the documents from the I-9 files, or family can be contacted to bring the original documents to the company.

- ICE agents not only interrogate employees, they also attempt to interrogate company representatives regarding immigration policies and practices.
- ICE agents leave an inventory of property seized and people that have been arrested. A copy of this inventory is archived with the court that issued the warrant.
- ICE agents arrest employees who cannot prove legal status and take them to various detention centers.

What rights and responsibilities does a company have during a raid?

- Examine the search warrant to ensure that it is signed by the court, that it is being served within the permitted time frame, and note the scope of the warrant – the area to be searched and the items to be seized. Normally, the scope is quite expansive. Immediately fax it to your attorney.
 - Contact your attorney and see if he can go to the facility while the raid is occurring as the raid usually last several hours or more to complete. The raid will not be postponed to await the arrival of an attorney.
 - Obtain the name of the supervising agent and the name of a U.S. attorney assigned to the case. In larger operations, the U.S. attorney may be present on site.
 - Sometimes ICE is accompanied by members of the press. There is no obligation to admit press representatives on the premises. Statements to the press should only be made by your attorney.
 - Assign one or two company representatives to each agent to follow the agent around the facility. You may record on a note pad all actions and/or videotape the officer. Note any items seized and ask if copies can be made before they are taken. ICE doesn't have to agree, and if they don't, you will be entitled to secure a copy from the government property lockers. Do not block or interfere ICE activities. Remain calm and composed and do not engage in any hostilities toward the agents.
 - Company representatives should not give any statements to ICE agents or allow themselves to be interrogated.
 - The company may inform employees that they have a right to talk with agents if they like, or not talk with them, but don't direct them not to speak to agents when questioned.
 - Do not engage in any activities that could support a harboring charge such as hiding employees, aiding in their escape from the premises, providing false or misleading information, denying the presence of specific named employees, or shredding documents.
 - If agents want access to locked facilities, unlock them – otherwise, agents will forcibly gain entry into locked closets or cabinets.

AFTER A RAID

What happens to employees after a raid?

Employees will be taken to detention centers. A decision should be made with counsel whether you help arrange for counsel to represent them or help pay for bail. You should ensure that family is contacted and any money owed to the employee is paid. The longer an employee remains detained, the greater the likelihood that the employee in custody will be threatened and intimidated in order to provide adverse information against a company in exchange for work permits, or an agreement not to prosecute them for identity theft or other related crimes. A conflict of interest exists between the interest of the employee and the worker and separate counsel is recommended.

Will ICE provide the employer with a list of those employees have been arrested and who lack work authorization. What are an employer's obligations?

Yes, ICE will determine who lacks the right to work and provide a "Do Not Rehire" list of names. Under newly released regulations (72 Fed. Reg. 45611), an employer who receives a notice from ICE that an employee isn't authorized to work may not continue to employ the worker without taking the steps set forth in the regulations. Unless the "safe harbor" steps are followed, an employer risks liability for continuing to employ an unauthorized alien under a "constructive knowledge" standard.

Does the investigation of the company continue after a raid?

Yes, the surveillance and investigation of a company can continue for months or years after a raid.

What are typical post-raid investigative techniques employed by ICE?

- Knowing that a company is desperate because it lost much of its workforce, ICE investigates whether the same employees are returning using different identities, or being placed at different work sites, or are working at graveyard shifts in order to avoid detection.
- Undercover ICE officers may pose as prospective employees to see if they are hired after admitting that they lack work authorization.
- Efforts are made to create dissent among the company targets of the investigation in order to secure testimony from lower level supervisors and managers against the corporate executives.
- Employees are interrogated to see if they will testify against the company in exchange for work permits and civil vs. criminal prosecution.

- Cooperation and collaboration with various government agencies such as the Internal Revenue Service, and Social Security Administration, Wage and Hour will continue.
- ICE and the U.S. Attorney will thoroughly review the items seized during the raid to determine the extent of evidence that exist against a company.

What can a company do after a raid to assess and limit its liability?

- The company should secure separate counsel for each of the “targeted” company representatives and for the corporation.
- The attorney should retain a Spanish speaking private investigator to interview all potential witnesses including the aliens who were apprehended.
- The company should immediately retain immigration counsel to develop and initiate a program of corporate immigration compliance. This will later benefit the company and help in negotiations with the U.S. Attorney and ICE for civil vs. criminal prosecution or for a negotiated plea with a reduced sentence/and or fine. Every effort should be made to hire a legal workforce to replace the employees arrested during the raid.
- Attorneys should counsel management on taking no actions that can be construed as suborning perjury, such as warning people not to speak with ICE investigators or telling them to provide false or misleading statements to investigators. Not only is such activity illegal, but the person you speak to may be wired by ICE.
- If only one or several worksites were raided, an audit must be immediately conducted at other sites and prompt action must be taken to bring the other worksites into compliance.
- Company attorneys should obtain copies of all relevant documents that have been seized in order to determine the existence of any incriminating data.
- After the evidence has been examined and the private investigators have concluded their investigations, the attorneys should meet with the company to determine whether to negotiate a plea pre indictment or to wait and see all the evidence against the company and at that time, determine whether to go to trial or enter a plea.

PRACTICAL POINTERS AND ETHICAL CONSIDERATIONS IN CONDUCTING INVESTIGATIONS AFTER ICE WORKSITE RAIDS

By Josie Gonzalez

In the aftermath of a raid, ICE will be interviewing detainees at length to secure material witnesses and their testimony, reviewing every piece of evidence seized, and making additional plans to further document their case against the employer. Under the direction of legal counsel, the employer should immediately take steps to assess remaining records, ensure current compliance, and discover what evidence ICE has gathered.

- At the first opportunity, a private investigator should interview those who were arrested, as well as supervisors and managers, in order to determine:
 - Where employees were arrested—during raid, at home, etc.
 - What other contact the arrested employees may have previously had with ICE.
 - What questions were asked or assertions made by ICE.
 - What answers were given.
 - Which employees/supervisors were discussed.
 - If there was a pattern of questions asked of detainees—if specific managers or supervisors were targeted.
 - What the employee's history was with the company—who hired him, who completed the I-9, who referred him to the company for hire, what documents were used to complete the I-9, what discussions took place at the time of hire.
 - If there is additional information about other employees, managers, document sources, that was not shared with ICE.
 - If the names of any former employees were included in discussions with ICE.
 - If promises of an Employment Authorization Document or permanent residency were offered in exchange for testimony or undercover work as an informant; or were threats of criminal prosecution made by ICE.
 - How long were employees kept in detention and what were the detention conditions.
- The attorney must analyze the investigator's report, cross referencing information provided by several sources to determine consistencies/inconsistencies, corroboration and the weight of the evidence obtained by ICE, and charges that may be brought against the employer and/or individual managers as a result.
- In order to avoid a possible conflict of interest, the attorney should not be actively involved in questioning arrested employees, or, at a minimum, never question potential witnesses alone.
- Management should not engage in any actions that may later be construed as interfering in the investigation or suborning perjury. (For example, counseling employees on how to answer questions or destroying documents.)
- ICE investigations will continue after the raid with the use of undercover informants in order to solidify their case against an employer.
- Copies of seized records should be requested of ICE immediately. Employers should expect a delay in being granted permission to gain access to these records and should consider the following:

- ICE will not copy these records or incur any associated costs: the employer will have to make arrangements have records copied in the ICE office or the U.S. Attorney's office.
- Records are likely to be in a state of chaos, as boxed when seized. ICE will not want to leave a clear trail as to which documents they have reviewed.
- When copying, employers should copy all I-9s & supporting documents, all personnel files with applications and W-2s, and any additional file documents that may pertain to targeted employees and supervisors/managers, as well as any policies or memorandums pertaining to hiring procedures or practices.
- Records should be returned to their original order so that files targeted for copying by the employer are not highlighted for ICE.
- Determine if the seized records contain copies of SSA no-match letters and any related material.
- Limit discussions with ICE during this process to ensure nothing is said that may later be misrepresented.
- Once items are identified for copying, one may hire professional copy services that may need to spend days taking copying machines on site and making copies. Copies may be scanned for later easy retrieval of data.
- The employer should search existing computer and hardcopy personnel and payroll files not seized that may pertain to the employees arrested or others targeted in the course of the investigation.
- While investigations are underway, the attorney should be proactive in working with management to develop a corporate compliance program that will enable the company to attract, verify, and retain legal workers. This will include an assessment of current practices and procedures, and training of all those involved in the hiring process and completion of I-9s.
- Since I-9s will have been seized and may not be returned or copied for some time, the employer may choose to complete new I-9s for all current employees, ensuring that training has taken place and the new I-9s will be properly completed. These can later be coupled with original I-9s.
- Once the investigation is completed and all available evidence has been examined, the attorney will review the findings with senior management to discuss the company's position, possible actions on the part of ICE, and to consider possible courses of action.