

GOVERNMENT OF THE DISTRICT OF COLUMBIA

Office of the Attorney General



ATTORNEY GENERAL
KARL A. RACINE

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A MESSAGE FROM THE ATTORNEY GENERAL

In the District of Columbia, we value our diversity as an asset and recognize the contributions of all our residents. One of our top priorities is to uphold and defend our values, especially those of diversity and inclusion. This holds especially true in the context of the workplace: Workers who hail from many countries make invaluable contributions to the economy and the well-being of our city.

Recent shifts in federal immigration policy have raised community concerns with respect to the treatment of immigrant workers. Our office has received numerous questions about how immigration enforcement might take place on worksites, and what responsibilities and rights employers and employees have with respect to immigration enforcement actions.

We hope that this guidance will provide information and clarity for both employers and employees in navigating immigration enforcement in the workplace.

Sincerely,

A handwritten signature in blue ink, appearing to be 'KARL A. RACINE', written in a cursive style.

Karl A. Racine
Attorney General, District of Columbia

**ANSWERS TO FREQUENTLY ASKED QUESTIONS FOR EMPLOYERS AND
EMPLOYEES REGARDING IMMIGRATION ENFORCEMENT IN THE
WORKPLACE**

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I. General Information

This guidance seeks to provide employers and employees with information and answers to frequently asked questions regarding immigration enforcement in the workplace. Information provided in this booklet is for informational purposes and does not constitute legal advice or legal representation. If you have specific questions regarding the law, you should consult with an attorney. A non-exhaustive list of organizations that may be able to provide legal assistance to immigrants is included as an appendix to this guidance.

As a general matter, several United States governmental agencies have the authority to enforce the nation's immigration laws in the workplace, including the Department of Homeland Security (DHS), the Department of Justice (DOJ), and the Department of Labor (DOL). Worksite enforcement is often handled by Immigration and Customs Enforcement (ICE), a federal law enforcement agency that is part of DHS and is responsible for enforcing federal immigration laws. In the workplace context, ICE has the authority to identify, arrest, and initiate removal proceedings against individuals who are not authorized to work in the United States.

An ICE investigation may involve: (1) Form I-9 audits and (2) worksite investigations that involve ICE agents coming to the worksite with or without warning. The list below summarizes critical items for employers and employees to understand; each is explained in additional detail in the remainder of this document.

- Employers have an obligation under federal law to verify the identity and employment authorization of individuals hired for employment in the United States. Employers provide this verification through Form I-9.
- ICE is authorized to audit an employer's Form I-9 records, which the employer must provide upon request. If ICE finds that any records are non-compliant with the immigration laws, ICE can issue orders to cease employing individuals who are not authorized to work in the United States; ICE may also impose monetary fines.
- Law enforcement officials, including ICE, may conduct worksite investigations by arriving at a worksite unannounced. In this context, it is important for employers to understand:
 - Employers and employees have the right to remain silent if questioned by law enforcement officials during a worksite investigation. They also may request to speak with an attorney.
 - Law enforcement officials may enter public areas during a worksite investigation. However, a valid judicial warrant (a warrant signed by a judge) **or** the employer's consent is required to enter private areas during a worksite investigation.
 - An "administrative warrant" is not sufficient for law enforcement to enter a private area of a business. Administrative warrants are not issued by a court, but instead come from an executive branch agency.

- Employers and employees should take care to ask for the identification of law enforcement officials and document actions of law enforcement officials during a worksite investigation, especially if they have reason to believe that the officials are acting unlawfully.
- Following a Form I-9 audit or a worksite investigation, an employee who has been found to be unauthorized to work in the United States may be unable to return to work. Employers seeking to assist such affected employees can ensure that owed wages and benefits are paid on time and distribute severance pay for affected employees.

II. Form I-9 Requirements

Federal law requires that every employer verify the identity and employment eligibility of every new employee¹ through the completion of a Form I-9 (Employment Eligibility Verification). As part of the Form I-9, an employee will need to provide an employer with documents that establish their identity and authorization to work in the United States.

1. Who must complete Form I-9?

Both the employer and the employee must complete Form I-9.² Form I-9, Section 1 requires the employee to complete and attest to their identity and work authorization. Form I-9, Section 2 requires the employer to review and verify the information and documents provided by the employee.

2. When must an employee complete Form I-9?

After an employee accepts the employer's offer for employment, the employer must provide the employee with Form I-9. The employee must complete Section 1 of Form I-9 no later than the first day of work for pay. The employer must complete Section 2 of Form I-9 no later than the third business day after the employee starts work for pay.³

An employer may not ask to see a prospective employee's employment authorization documents before hiring the employee or before the employee completes the Form I-9.⁴

¹ An employee is defined as a person who performs labor or services in return for wages or other remuneration.

² United States Citizenship & Immigration Services (USCIS), *Handbook for Employers M-274*, Section 2.0 (Jan. 11, 2018), available at <https://www.uscis.gov/book/export/html/59502/en> (hereinafter, "USCIS Handbook").

³ *Id.*

⁴ USCIS, *Employee Rights*, available at <https://www.uscis.gov/i-9-central/employee-rights-discrimination/employee-rights>.

3. Is Form I-9 required for all employees?

Generally, an employer must complete and retain a Form I-9 for every employee as long as the employee works for wages or other type of payment.⁵

There are some exceptions. A Form I-9 is not required for: (i) individuals hired on or before November 6, 1986 who are continuing in their employment; (ii) individuals employed for casual domestic work in a private home on a sporadic, irregular, or intermittent basis; (iii) independent contractors; (iv) individuals who are employed by a contractor providing contract services (for example, employee leasing or temporary agencies) and are providing labor to the employer; and (v) individuals not physically working in the United States.⁶

4. What rights do employees have when completing Form I-9?

Employees have the right to establish their identity and work authorization with any of the documents listed in Form I-9's "List of Acceptable Documents." An employer may not demand specific documents from an employee based only on an employee's protected characteristics, such as an employee's national origin, ethnicity, immigration or citizenship status, race, color, religion, age, gender, or disability. Employers must accept an employee's documentation if it reasonably appears to be genuine and related to the employee.⁷

5. What responsibilities do employers have to store Form I-9 records?

Employers must have a completed Form I-9 on file for each of their employees. Form I-9 records must be retained and stored by the employer for three years after the date of the employee's hire, or for one year after the employee's employment is terminated, whichever is later.⁸

Employers may store Form I-9 records either on-site or at an off-site storage facility; employers may also store Form I-9 records in one or more formats, including paper or electronic format. If requested by United States government officials from DHS, DOL, or DOJ, employers must be able to present their Form I-9 records within three business days of the date of the request.⁹

⁵ USCIS, *Retaining Form I-9*, available at <https://www.uscis.gov/i-9-central/retain-store-form-i-9/retaining-form-i-9>.

⁶ USCIS Handbook, Section 2.0.

⁷ USCIS, *Employee Rights*, available at <https://www.uscis.gov/i-9-central/employee-rights-discrimination/employee-rights>.

⁸ USCIS, *Retaining Form I-9*, available at <https://www.uscis.gov/i-9-central/retain-store-form-i-9/retaining-form-i-9>.

⁹ USCIS, *Storing Form I-9*, available at <https://www.uscis.gov/i-9-central/retain-store-form-i-9/storing-form-i-9>.

6. What happens if an employee fails to complete Form I-9?

If an employee does not complete Form I-9 or cannot produce acceptable documentation that establishes his or her identity and work authorization, the employee cannot work for pay.¹⁰

III. Form I-9 Audits

1. What is a Form I-9 audit?

ICE is authorized to audit an employer's Form I-9 records. To conduct an audit, ICE will first serve a Notice of Inspection upon an employer requiring the production of Form I-9 records. By law, ICE should provide an employer at least three business days to produce the records. If ICE shows up with less than three business days' notice, the employer can ask for ICE to return once three days' notice has been provided. Often, ICE will also request supporting documentation such as a copy of the payroll, a list of current employees, Articles of Incorporation, and business licenses.¹¹

2. What are possible outcomes of a Form I-9 audit?

ICE will notify the employer in writing of the results of the audit once it is completed. The following are the most common notices that are issued to employers as a result of the audits:¹²

- i. **Notice of Inspection Results.** This is also known as a "compliance letter," and notifies the employer that they are found to be in compliance.
- ii. **Notice of Suspect Documents.** This advises the employer that ICE has determined an employee is unauthorized to work in the United States 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 the employer believes the finding is in error.
- iii. **Notice of Discrepancies.** This advises the employer that ICE has been unable to determine an employee's work eligibility from the documentation provided. The employer should provide the employee with a copy of the notice, and give the employee an opportunity to present additional documentation to establish their employment eligibility.
- iv. **Notice of Technical or Procedural Failures.** This notes technical violations identified during the inspection and gives the employer 10 business days to

¹⁰ USCIS, *I-9 Central*, available at <https://www.uscis.gov/faq-page/i-9-central-self-audits#t17081n47852>.

¹¹ United States Immigration & Customs Enforcement (ICE), *Form I-9 Inspection Overview*, available at <https://www.ice.gov/factsheets/i9-inspection#wcm-survey-target-id>.

¹² *Id.*

correct the forms. After 10 business days, uncorrected technical and procedural failures will become substantive violations.

- v. **Warning Notice.** This is issued in circumstances where substantive violations are identified, but the circumstances do not warrant a monetary penalty and there is the expectation of future compliance by the employer.
- vi. **Notice of Intent to Fine.** This is issued for uncorrected technical violations, or for substantive violations, such as knowingly hiring and continuing to employ employees who are unauthorized to work in the United States. A Notice of Intent to Fine will be accompanied with charging documents specifying the violations committed by the employer.

3. What happens if ICE issues a Notice of Intent to Fine?

As part of a Notice of Intent to Fine, the employer may be asked to terminate workers who are not authorized to work in the United States or cease hiring such workers. The employer may also be subject to civil and criminal fines or penalties.

If an employer receives a Notice of Intent to Fine, the employer can either negotiate a settlement with ICE or request a hearing before the Office of the Chief Administrative Hearing Officer. Employers must generally request such hearings within 30 days of receiving the Notice of Intent to Fine. At a hearing, the employer and ICE will present evidence, and an Administrative Law Judge will make a decision. If an employer takes no action after receiving a Notice of Intent to Fine, ICE will issue a Final Order to the employer.¹³

IV. Law Enforcement Investigations at Worksites

1. Can law enforcement officials enforcing federal immigration laws investigate an employer's worksite?

Yes. Worksite investigations are often handled by ICE agents, who may go to a worksite with or without warning as part of an inspection of an employer or an attempt to locate and detain particular individuals in the workplace whom ICE suspects have violated immigration law. These are sometimes referred to as "ICE Raids."

For example, when an employer submits a petition to sponsor a foreign worker for an H-1B or other visa, U.S. Citizenship and Immigration Services (USCIS) has the right to verify the information supporting the petition and may do so by conducting on-site visits. USCIS also refers many cases of suspected visa fraud and abuse to ICE, which may go to a worksite to investigate. Failing to cooperate could undermine an employer's efforts to sponsor an employee. Sometimes other federal law enforcement officials and/or local police officers will accompany ICE agents. Other federal agencies, such as the DOL and DOJ, may also conduct worksite investigations.

¹³ *Id.*

2. When can law enforcement officials, including ICE, enter an employer's property?

Law enforcement officials are permitted to enter *public* areas of an employer's property without permission. However, for *private* areas of an employer's business, absent exigent circumstances, law enforcement officials need either the employer's permission or a valid judicial warrant to enter the area. Employers may ask law enforcement officials if the officials have a warrant to conduct the worksite investigation. Employers can deny entry to private areas unless the law enforcement officials have a valid warrant signed by a judge.

Public areas of an employer's business are areas that anyone can access. Examples may include a parking lot, a lobby or waiting area, or the dining area of a restaurant.

Private areas of an employer's business are areas where entry is restricted. Law enforcement officials generally can access private areas only if they have the employer's consent or a valid judicial warrant.

A valid judicial warrant must be (i) signed by a judge and (ii) indicate that it was issued by a "United States District Court" or a state court (such as the District of Columbia Superior Court). There are two types of judicial warrants that may be used:

- i. An *arrest warrant* must state the name of the person to be arrested and describe them. It must also have a valid date. If the person named in the arrest warrant is at the worksite, that person may leave the private work area to meet the officials outside or in a public area. If the person named in the warrant is not there, the employer may tell the officials that the person is not there. However, an employer should never lie to law enforcement officials. NOTE: A "Warrant of Removal/Deportation" is *not* a valid arrest warrant.
- ii. A *search warrant* must state the address to be searched, and must describe in detail the area(s) to be searched and the persons or things to be seized, and must be served on or before the warrant expires.

NOTE: An "administrative warrant" is not enough to enter a private area of a business, because it is not a *judicial* warrant. Administrative warrants are not from a court, but rather come from an executive branch agency. Such warrants will often indicate at the top of the page that they are from the "Department of Homeland Security." These warrants do not provide the officials the authority to enter the private areas of the worksite.

Nevertheless, in certain emergency situations, known as "exigent circumstances," law enforcement may enter non-public areas without a warrant. Exigent circumstances may occur when a law enforcement officer reasonably believes that there is no time to get a warrant because he or she must act quickly to prevent imminent danger to life or serious damage to property, to prevent the imminent escape of a suspect or destruction of evidence, or in an emergency situation involving national security or terrorism. For example, exigent circumstances may exist when the police are in hot pursuit of a suspect

who is possibly involved in criminal activities and in the process of fleeing. Exigent circumstances would not ordinarily occur in investigations of civil or criminal immigration violations.

3. What can employers do to prepare for potential worksite investigations conducted by law enforcement officials, including ICE?

Steps that employers may take to ensure that they and their employees are prepared for worksite investigations include, but are not limited to:

- i. **Hire a lawyer.** Retaining a qualified immigration lawyer can make a business better prepared for worksite investigations. A lawyer can assist in developing policies for investigations, provide legal advice, and correspond with law enforcement officials should any investigation occur.
- ii. **Develop a written policy.** An employer may develop written policies describing how managers and employees should handle law enforcement investigations and requests to enter private areas or meet with specific employees. The policy can be provided and explained to each employee so they will understand how to handle encounters with law enforcement officials during a worksite investigation.
- iii. **Designate and train one or more managers or employees (known as “designated employees”) to be the point of contact for law enforcement officials.** This can streamline communication and mitigate confusion in the event of a worksite investigation. All employees should know who each designated employee is.
- iv. **Train employees.** Employers may also train employees on what to do in the event of a worksite investigation. Employees may be trained on their rights, such as their right to remain silent and their right to request to speak with a lawyer if confronted by law enforcement officials during a worksite investigation. Employees may also be trained on the employer’s policy for handling investigations. For instance, an employer may train its employees to limit their interactions with law enforcement officials who come to a worksite by immediately contacting a designated employee.
- v. **Practice.** Employers and employees may practice how to act and respond to a worksite investigation through role-plays and simulations. For example, employers and employees could practice how to execute the employer’s policies on worksite investigations.

4. How can an employer inform law enforcement officials, including ICE, about policies governing their entry onto private business property?

An employer may communicate their policies to law enforcement officials in whatever manner they choose. These manners may include, but are not limited to:

- i. Providing law enforcement officials with copies of their policies;

- ii. Posting signs on business property informing law enforcement officials of applicable policies and procedures; and
- iii. Providing employees with policy summaries or fact sheets that they can give to law enforcement officials who seek to enter business property.

5. What rights do employees have during a worksite investigation conducted by ICE or other law enforcement officials?

Employees have the right to remain silent if questioned by law enforcement officials. In particular, employees do not have to answer questions about their immigration status, where they were born, or how they entered the United States. If an employee chooses not to answer such questions, the employee should verbalize his/her decision to the law enforcement authority.

If an employee is detained or taken into custody by law enforcement, the employee may make a request to contact their lawyer. Even if an employee does not have a lawyer, an employee may tell law enforcement officials that they would like to speak to a lawyer. An employee should make the request to contact a lawyer by saying so out loud. A non-exhaustive list of organizations that provide legal assistance to immigrants in the Washington, D.C. area is included in the appendix below.

Once in custody, employees have the right to refuse to discuss their immigration information or criminal history with anyone, including others who are in detention.

Employees should not run away from law enforcement. Employees may calmly walk toward a worksite exit. If an employee is stopped by law enforcement, the employee may ask if they are free to leave; if law enforcement's response is no, the employee should not attempt to exit the worksite.

Employees have the right to refuse to sign anything before speaking with an attorney.

6. What can employers do to protect their rights during a worksite investigation by law enforcement officials, including ICE?

Employers may take the following actions to protect their rights during a worksite investigation by law enforcement officials (these actions may be taken by the employer's designated employee or by any representative of the employer):

- i. **Direct employees to contact a designated employee.** All employees should know that if law enforcement officials arrive and request to interview an employee or conduct an investigation, they should immediately contact a designated employee and ask law enforcement officials to wait in a public area until the designated employee arrives. Note that any employee may take the actions provided in this section; however, an employer can promote organization and limit confusion by streamlining communication through trained, designated employees.

- ii. **Request that the employer’s attorney be present for the site visit.** In the event of a worksite investigation, the employer’s lawyer should be contacted immediately. The designated employee may request that the lawyer be present physically or by phone for the investigation.
- iii. **Examine the law enforcement officer’s identification and inquire about the purpose of the visit.** The designated employee may ask the officer to show a badge or other identification and request a business card. If none is available, the identity and contact information of the officer can be noted in writing. The designated employee may ask the purpose of the visit and to review any supporting paperwork.
- iv. **Examine the judicial warrant, if applicable.** If the law enforcement officials have a judicial warrant, the designated employee should examine it to ensure that it is valid. A judicial warrant will be signed and dated by a judge, include a timeframe within which the search must be conducted, and describe the premises to be searched and the items and/or persons to be seized. The designated employee may ask to make a copy of the warrant and record details if it appears that it may be invalid or if law enforcement officials are taking actions not authorized by the judicial warrant.
- v. **Decline Permission to Enter.** If the law enforcement officials do not have a valid judicial warrant to search the premises and ask permission or attempt to enter a private area, the designated employee may tell the law enforcement officials that they are not giving them permission to enter the private areas of the worksite without a valid judicial warrant.
- vi. **Document law enforcement actions.** The designated employee may document law enforcement actions in writing. Details to note include, but are not limited to: (i) the name of the supervising law enforcement official; (ii) the number of law enforcement officials who were present; (iii) whether law enforcement officials mistreated anyone; (iv) the scope of any judicial warrant presented by the law enforcement officials and whether the officials’ actions were within the scope of the judicial warrant; and (v) items seized by law enforcement officials, if any. If a law enforcement official takes photographs within the employer’s workspace, the employer may request a copy of those photographs.
- vii. **Protecting privileged materials.** If law enforcement officials wish to examine documents designated as attorney-client privileged (*e.g.*, memoranda from legal counsel), the designated employee may tell the law enforcement officials that they are privileged and request the opportunity to speak with a lawyer before the documents are examined. If law enforcement officials insist on seizing such documents, the designated employee should not obstruct their actions, but should record what documents were seized.

7. What can an employer do if an employee is arrested during the worksite investigation?

If law enforcement officials arrest an employee, an employer may ask the officials where the employee is being taken. This information will be useful to help the employee's family and attorney locate the employee.

8. May employers advise or require that employees refuse directives from law enforcement officials, including ICE?

No. Employers and employees should not obstruct the actions of federal law enforcement officials. In taking action with respect to the policies, procedures, and rights discussed in these FAQs, employers and employees should not put themselves, or those around them, in danger or at risk.

9. What should an employer or employee do if law enforcement officials are acting in a manner they believe is unlawful or improper?

The legality of law enforcement action is a matter for the courts to determine, and employers and employees should not obstruct the actions of law enforcement officials. However, employers and employees may take the following steps if they believe law enforcement officials are acting unlawfully or improperly:

- i. **Object to the action.** In making an objection to an action, an employer should make a verbal objection to the law enforcement official and make a written note of the objection and the action objected to. Employers may simply make the objection, and not engage in arguments regarding the action.
- ii. **Document the actions.** An employer or company representative is permitted to document the actions of law enforcement officials by, e.g., taking written notes. These actions can also be documented using the ordinary surveillance systems businesses have in place, including video surveillance.
- iii. **Consult with a lawyer.** Employers may contact their lawyer as soon as law enforcement arrives at their worksite. Lawyers may be able to personally come to the worksite or speak with law enforcement officials by phone. Employers may also share their objections and records of the worksite investigation with their lawyer to determine whether subsequent legal action is appropriate.

10. Is it legal to make a video recording of interactions with ICE or other law enforcement?

Generally, it is legal to record interactions with law enforcement in a public place. However, there are exceptions to this rule. For example, law enforcement officers are permitted to order individuals to cease activities that interfere with law enforcement operations. Whether a recording interferes with law enforcement operations can often be a fact-specific question. In any event, you should be aware that disobeying an officer's order could lead to your arrest. In addition, if the interaction is taking place on private

property, employers and employees should be aware of whether the property owner has set any rules that apply to videotaping on the property and if so, take care to abide by them.

Often employers have surveillance cameras on their property. If ICE or other law enforcement officials do not have a valid judicial search warrant, you may decline to give them access to the recording. If law enforcement officials provide only an administrative warrant that is issued by an executive branch agency, rather than by a judge, you may decline to provide them the footage.

V. Considerations Following Form I-9 Audits and Worksite Investigations

After a Form I-9 audit or a worksite investigation, it is possible that one or more of an employer's employees is unable to return to work. In this event, there are several actions an employer may take to support their employees and the community at large. These include, but are not limited to:

- i. **Pay owed wages and benefits.** An employer should know the requirements of the relevant federal and state labor laws and pay any wages and accrued benefits to which affected employees are entitled. Employees unable to return to work face both basic living costs and potential legal costs, and prompt payment of owed wages and benefits will support them going forward.
- ii. **Provide separation pay.** If an employer has a separation pay policy, consider applying that policy to affected workers who are unable to return to work.

APPENDIX

The following organizations assist immigrants in need of legal help and other services in the Washington, D.C. area. This list is non-exhaustive and is provided for guidance purposes only.

1. AYUDA

Washington, DC and Maryland Office

6925B Willow Street NW, Washington, DC 20012

Phone: (202) 387-4848

Website: <http://www.ayuda.com>

Virginia Office

2755 Hartland Road, Suite 100, Falls Church, VA 22043

Phone: (703) 444-7009

2. Capital Area Immigrants' Rights Coalition (CAIR)

1612 K Street NW, Suite 204, Washington, DC 20006

Website: <https://www.caircoalition.org>

3. Central American Resource Center (CARECEN)

1460 Columbia Road NW, Suite C-1, Washington, DC 20009

Phone: (202) 328-9799

Email: info@carecencdc.org

Website: <http://www.carecencdc.org>

4. Catholic Charities of the Archdiocese of DC – Immigration Legal Services

Washington, DC Offices

924 G Street NW, Washington, DC 20001

Phone: (202) 772-4352

Website: <https://www.catholiccharitiesdc.org/ils/>

1618 Monroe Street NW, Washington, DC 20010

Phone: (202) 939-2420

Maryland Office

12247 Georgia Ave., Silver Spring, MD 20902

Phone: (301) 942-1790

5. Catholic Charities of the Diocese of Arlington – Hogar Immigrant Services

6301 Little River Turnpike, Suite 300, Alexandria, VA 22312

Phone: (703) 534-9805

Website: <https://www.hogarimmigrantservices.org>

- 6. Just Neighbors (Immigration Legal Services)**
7630 Little River Turnpike, Suite 900, Annandale, VA 22003
Phone: (703) 979-1240
Email: info@justneighbors.org
Website: <https://www.justneighbors.org>
- 7. Kids in Need of Defense (KIND)**
1300 L Street NW, Suite 1100, Washington, DC 20005
Phone: (202) 824-8680
Email: info@supportkind.org
Website: <https://supportkind.org>
- 8. Legal Aid Justice Center**
6066 Leesburg Pike, Suite 250, Falls Church, VA 22041
Phone: (703) 778-3450
Website: <https://www.justice4all.org>
- 9. Northern Virginia Family Services**
6400 Arlington Blvd., Suite 110, Falls Church, VA 22042
Phone: (571) 748-2806
Website: <https://www.nvfs.org/our-services/immigration-legal-services>