

## Hotel Business Review

### Hospitality Law

#### Do Not Disturb: What to Do When ICE Knocks on Your Door

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Mr. Wildes

As if hoteliers didn't have enough to worry about, a new concern can be added to their list: U.S. Immigration and Customs Enforcement (ICE) has been ramping up its investigations of foreign-born workers and their employers. If your hotel employs immigrant and nonimmigrant workers or, worse yet, undocumented workers, you should be on high alert. In the 2008 fiscal year alone, ICE made over 5,100 administrative arrests based on immigration violations and over 1,000 additional criminal arrests for charges like harboring or knowingly employing illegal aliens.

The Obama administration has committed to shifting its focus toward employer-side enforcement techniques. To date, the most commonly utilized tools in the toolbox are H-1B site visits, Form I-9 investigations and—the most disruptive of all—worksite raids.

H-1B visas are granted to foreign-born specialty occupation workers. The list of qualifying specialty occupations is somewhat limited in scope and also very strict in its interpretation. In order to reduce and discourage fraud, ICE has been deploying agents to conduct site visits and ensure that H-1B employees are working in the capacity to which their visas were issued. H-1B visas are employment sponsored and if your hotel has petitioned these visas for foreign-born workers, be sure that you have done so within the confines of the law. This means that if an ICE agent were to arrive on-site unannounced, he/she should be able to locate easily your employee and find him/her working in the precise position declared to the U.S. Citizenship and Immigration Services (USCIS). As such, the employee should not be working in any location other than the one named in the petition.

To ensure that an H-1B site visit proceeds smoothly, the following measures should be carefully considered:

- The hotel should designate a contact person for communication with USCIS/ICE in the event of a site visit.
- All foreign nonimmigrant employees, including H-1B status holders, should be encouraged to maintain copies of their passport ID pages, Notices of Action, and Form I-94 in their desks to prove identity if needed.
- H-1B employers should maintain a public access file containing a copy of the certified Labor Condition Attestation, proof of the prevailing wage determination, copies of the employer's compensation system, or pay scale used to determine actual wages being paid to the employee.
- Hotel managers should maintain materials used to satisfy employee/union notification requirements, a summary of benefits offered to U.S. workers in the same occupational classification as H-1B employees, and any other documents for special situations.
- Documentation connected to the H-1B application should be retained for one year beyond the last date on which any H-1B employee was employed.
- Human resource or other personnel should be ready to confirm the employee's date of hire, job title, work location, and salary.

If your hotel is selected for a site visit, with or without advance notification from USCIS, it is strongly recommended that you seek professional legal counsel to guide you through the process and instruct you how to proceed.

Form I-9 investigations seek to confirm that the employer verified the work authorization status of its employees at the time of hire. All employees hired since November 6, 1986 are required to have an I-9 form on record. As with H-1B site visits, audits and investigations are occurring with increasing frequency. In June 2009, ICE served 650 I-9 audit notices in one single week—a practice that has continued since.

The best way for an employer to prepare for an I-9 audit is to be familiar with the form itself and its proper protocol. I-9 forms must be filled out within 3 days of a new worker's day of hire, at which time the new employee proffers documents that demonstrate identity and employment eligibility.

Failure to complete and retain Form I-9 can result in significant civil and criminal penalties; since the spring of last year, more than 1600 businesses nationwide have been suspected of cultivating illegal workplaces by knowingly employing illegal workers and served with Notices of Inspection (NOIs) by ICE. These notices alert business owners that ICE will be inspecting their hiring records to ascertain whether or not they are complying with employment eligibility verification laws and regulations. As recently as March 2010, an additional 180 businesses in Louisiana, Mississippi, Alabama, Arkansas and Tennessee have been served with NOIs.

In the event of an audit, employers will have three days to present their I-9s for inspection. The I-9s will be examined for missing and/or incorrect information and penalties will be assessed accordingly. The penalties can range anywhere from \$110 for each paperwork violation to \$16,000 for each unauthorized worker employed.

On its face the I-9 form seems deceptively simple to fill out correctly and without understanding its importance in proper context, many busy employees, HR reps, and employers give it only a cursory glance before filing it away. As perhaps proof of this one-page form's relative difficulty, USCIS has published on its website a nearly sixty page booklet called the M-274: Handbook for Employers.

As with H-1B site visits, any hotel notified of an impending audit should immediately contact experienced immigration counsel in order to bring about swift and favorable resolution.

Worksite raids are perhaps the most serious and disruptive of all of ICE's enforcement measures. ICE raids are the result of lengthy preliminary investigations and may also result in substantial criminal penalties. The ensuing chaos and negative publicity caused by a raid can no doubt leave a company quivering in their wake.

Don't think it could happen to you? Think again as you mull over these potential scenarios:

- I-9 forms are poorly maintained.
- New hires are mostly family and friends of the existing workforce.
- The hotel adopts a don't ask, don't tell policy toward hires, hoping that they can't be held responsible for what they don't know.
- The hotel is reluctant to question the veracity of employee documents for fear of discrimination claims.
- Hiring decisions are made by people moved by applicants desperate for work, or who think that hiring undocumented workers could result in under-the-table kickbacks.

- Management assumes that a long tenure in the United States means that a legal status is likely to have been acquired, or that permanent residence is easy to procure.
- Management permits employees to present new documentation and change names without inquiring as to their authenticity.
- The business ignores complaints and rumors that undocumented workers are being hired.
- The employer has been ignoring discrepancies reported by state benefits agencies relating to an employee's Social Security card.
- Hotel management doesn't realize that guilt arising from questionable practices at the supervisory or lower-management levels can be imputed to upper-level management.
- The corporate executives of the hotel are too far removed from the actual culture of the workplace and don't know that trouble is brewing.

If following the preliminary investigation ICE has enough information to proceed, the agency will issue a criminal search warrant that will entitle them to examine your personnel records, bank and payroll records, Form I-9s for current and terminated employees as well as any information stored electronically or on hard drives.

Once on site, ICE agents will surround the premises and patrol all points of egress to prevent employees from fleeing. Agents will require that all business be halted and question employees about company practices. The entire process is meant to create confusion in the hope that more incriminating information will be discovered through general disorientation.

Be proactive. Institute a crisis management plan that can be easily put in place the moment you receive notice of the ensuing search warrant. Designate a company representative for the supervision of the visit. Instruct security guards or the front desk to call the representative as soon as agents arrive on site. Insist that the representative accompany the agents at all time while on your property and record the search either through handwritten notes, a tape recorder or video camera. Offer to locate individuals named in the search warrant and advise employees as to their right not to answer questions.

These are by no means the only best practice measures that can be taken throughout the raid to offset some of the damage done. Since conditions vary by situation and cannot necessarily be outlined in sufficient detail here, just as for the other two enforcement techniques, a well-qualified immigration attorney should be consulted to help guide you through the process.

Navigating the immigration system can be difficult even under the best of circumstances and it can be nearly impossible to emerge unscathed following encounters with ICE authorities. If you choose to play fast and loose with the law, don't think these scenarios can't happen to you. Abiding by good housekeeping practices from the beginning will increase the likelihood of a favorable outcome in the event of a visit from these unwelcome guests.

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