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ICE at Healthcare Facilities: What Should You Do

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In 2003, Congress created the Department of Homeland Security (DHS). Within the DHS is the interior enforcement arm, U.S. Immigration and Customs Enforcement (ICE), that enforces federal laws governing border control, customs, trade, and immigration with 400 ICE offices in the U.S. ICE identifies, apprehends, and detains removable foreign nationals and removes them from the United States.

In 2011, and again in 2021, ICE issued a policy guidance memo that generally prohibited ICE agents from engaging in enforcement actions at “sensitive locations,” such as healthcare facilities, schools, and religious institutions. Enforcement actions include interviews, arrests, searches, inspections, and surveillance. Actions also include obtaining protected health information (PHI). However, DHS may allow enforcement actions in these locations if “exigent circumstances” exist. Such circumstances include national security and public safety threats, where there is an imminent risk of death, violence, or physical harm to a person or of destruction of evidence that is material to an ongoing criminal case, and when there is no safe alternative location.

During the first Trump administration, the “sensitive locations” guidance was largely ignored. ICE engaged in the removal, detainment, or apprehension of immigrant patients from medical facilities. Agents detained children needing emergency care, targeted immigrants visiting sick family members, and arrested and deported patients as they exited hospitals. These actions put healthcare employers and their workers in precarious positions. The threat of increased ICE enforcement actions has had a chilling effect – discouraging immigrant families from seeking necessary medical services out of fear that they could be putting themselves and their family members at risk of deportation. During the first Trump administration (and prior to COVID),

hospitals in areas with large immigrant populations saw a 10%-20% drop in visits and experienced a 30%-50% no-show rate. In addition, research found that there was an increase in immigrant children or children of immigrants coming to emergency rooms with emergency conditions that would have been prevented by a visit to their pediatrician.

During the first hours of Trump's second term, the administration rescinded these "sensitive location" protections. Given the Trump administration's swift actions on immigration and statements made by the administration during the first few days in office, we expect ICE to be emboldened when it comes to accessing hospitals, clinics, and other health facilities to carry out their enforcement actions. ICE's presence can be discomfiting and disruptive. Although ICE agents are not police officers, their uniforms may say "Police" or "Federal Agent," and they may even be accompanied by local law enforcement.

While it is prudent for healthcare organizations to not be seen as uncooperative with law enforcement, they must be mindful that ICE and other law enforcement must still go through a judicial process to access a patient or their PHI, and there is no affirmative legal obligation to collect or report information about a patient's immigration status just as there is no legal obligation to report on a patient's drug use. Healthcare organizations should balance respecting the confidentiality of undocumented immigrants as if they were any other patient with maintaining a good rapport with ICE.

1. Make a plan and practice it

Healthcare facilities should have policies and practices on interactions with law enforcement and there should be a unified approach regardless of whether it is local law enforcement, ICE, or another federal agency. There should be an internal communication plan to control the flow of information and lessen any disruption to patient care in these situations. Ideally, there should be a designated representatives or "liaisons" who are knowledgeable about an employer's rights and responsibilities with respect to immigration enforcement activities and any changes to government policy and regulations. The designated representatives serve as the point of contact until legal counsel is contacted, and employees should be trained to notify these authorized representatives when ICE agents are present, including off-hours. Staff should say that they do not have the authority to answer any of the agent's questions and refer them to authorized representative. This will avoid any action on the part of your employees that could be interpreted as consent. If you think your facilities may be targeted, you may consider holding practice drills just as you do fire drills. Your team will be more prepared and confident if they know what to say and do.

Healthcare facilities should contact their legal team as soon as possible to advise on the situation and next steps.

2. Limit cooperation without a warrant

Under the 5th Amendment of the U.S. Constitution, all persons have a right to stay silent. Your staff members do not have to answer an ICE agent's questions, hand over their or a patient's identification documents, or otherwise cooperate without a judicial warrant. Of course, they should not be purposefully evasive or belligerent. Staff should professionally and calmly tell the agent that they are not authorized to provide the agent with information or access to non-public areas, but that, following protocol, a designated representative has been alerted. The employee should then direct the ICE agent to an office or conference room away from the lobby or reception area where their presence might be disruptive and cause concern among patients, staff, and visitors.

If ICE presents a warrant, an authorized representative should review the document to ensure it is valid, signed by a judge or magistrate, bears the address of the premises to be searched, provides a time period in which the warrant may be executed, and describes the scope of a search.

A judicial warrant, signed by a judge or magistrate, allows ICE to conduct any search as authorized in the warrant, including employee files.

An administrative warrant, issued by DHS/ICE and typically on Forms I-200 or I-205, does not require compliance, and employers cannot be punished for refusing to comply.

A subpoena issued by a judge or magistrate may be challenged in court by the employer. If the employer does not intend to challenge, then they should comply with the subpoena.

An administrative subpoena does not require compliance, and employers cannot be punished for refusing to comply.

If presented with an administrative warrant, healthcare organizations do not have to tell the ICE agent if the person named in the warrant is currently a patient or not, nor do they have to take the ICE agents to the patient's room. Staff do not have assist ICE beyond what is required by the warrant.

An ICE agent may state that their action is required to avoid imminent harm or risk. The facility should evaluate the circumstances and balance multiple factors. It can decide to cooperate even without a warrant.

3. Maintain patient privacy

Healthcare providers are legally obligated to protect patient privacy, including immigration status, and should not disclose any information without a judicial warrant, except in the case of an emergency that poses immediate harm. Generally speaking, immigration status should not be included in a patient's Electronic Medical Record (EMR). Even if healthcare organizations ask about

status, either because state law requires it or it is relevant to the patient's healthcare (eligibility for assistance or specific programs), that information should be kept separate from the EMR.

Even without a warrant, ICE agents can look at anything in "plain view." That means that papers and computer screens they can see unaided in public areas can be inspected. Staff should cover patient documents that are in "plain view." In addition, audible information can be used if overheard with "unassisted" ears. Given that sound carries, this means even if there is a conversation in a private area, if ICE agents can hear it with their unassisted ears from a public area, it is considered in "plain view." If what the ICE agent sees or hears in "plain view" gives them "probable cause" that unlawful activity is occurring, has occurred, or will occur, they would be allowed to search the relevant private area and seize items found there.

Unless required by law, it is best practice not to ask a patient about their immigration status. Even when required, facilities should avoid listing immigration status in medial and billing records.

4. Create private areas

Just as with any member of the public, ICE agents can be present in a facility's public areas, such as waiting rooms, cafeterias, and parking lots. Even without a warrant, they can question visitors in a waiting room or awaiting admissions. Your patients and visitors, however, have the right to remain silent, and they can be advised of this right. In addition, if agents are harassing visitors or interfering with patient processing, for example, the facility can ask the agents to leave as it would with any other disruptive individuals.

As a result, healthcare employers should prepare a written policy identifying which areas within their facilities that are closed to the public. Access to these private areas should be limited to patients receiving care and those necessary or requested to be present for such care, such as a parent or partner. Staff should guide the patient and family out of "public spaces" to these private areas. Staff should not allow ICE agents to enter these private spaces unless the authorized staff member allows it in response to a judicial warrant. A staff member can simply say, "I can't give you permission to enter. You must speak with our designated representative."

5. Document everything

Staff should document the details of the interaction, including the names of the ICE agents and their badge numbers. Employees should ask for the ICE agents' business cards or contact information.

During an enforcement action permitted by judicial warrant, watch ICE agents and see if they are complying with what is written in the warrant. Recording all interaction is recommended.

When the ICE agents leave, the event should be memorialized in writing and include such information as how many ICE agents were present (inside and outside), if local law enforcement accompanied them, and how the agents were dressed. It is also important to note if agents tried to skirt the law – if they made your staff or patients believe you could not move or leave, if they mistreated anyone, etc.

Should ICE (or any law enforcement) arrest any of your employees or patients, ask the agents where they are being taken. This information will help their family and attorney find them.

6. Reassure patients

Healthcare employers should be mindful of the fear and anxiety patients may experience in these situations. Educate and reassure patients that the law protects their healthcare information. When moving patients and their families to private areas, communicate to them that they are safe.

7. Stay calm and professional

Employer's staff should remain calm and professional throughout these interactions. Employees should not run from or be confrontational with ICE agents.

Special considerations with I-9 audits

ICE's presence may not be for an enforcement action. It may be a workplace compliance issue. If you get notice of a Form I-9 audit, you will have three business days to produce your I-9 forms. You will need the full three days, so do not provide documents early. As is your right, do not sign anything or answer any questions before speaking with your attorney. Therefore, employers should immediately contact counsel with expertise in handling these audits. Employers should also consider requirements to notify your employees and, if applicable, their union representative of the Form I-9 audit.

If, after reviewing the I-9 forms, ICE determines that some employees are not authorized to work, you will have 10 days to provide valid work authorization for these employees. Notify the affected employees of the audit findings and the deadline to provide valid work authorization documentation or have their employment terminated.

Husch Blackwell's Business Immigration and Global Mobility team offers a Resource Center with insights to help employers navigate the evolving immigration policy landscape.