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LAW: Immigration Enforcement in the Construction Industry

In May 2006, U.S. Department of Homeland Security enforcement officers raided construction sites of one of the country's top residential home construction companies and found 76 undocumented workers working as subcontractors. As a result, four supervisors are facing federal charges of harboring illegal immigrants with penalties of up to 10 years in prison and \$250,000. Further, in recent crackdowns, Homeland Security officers arrested seven managers of a Houston pallet supply company. These actions represent aggressive moves to show Homeland Security is serious about employer compliance of workforce hiring laws. Companies should recognize that immigration issues continue to pose hot-button topics for the construction industry, and should focus on three measures:

1. Know your workforce.
2. Know your obligations for complying with the law.
3. Know your rights.

How to deal with immigration investigations Immigration investigations can appear to be low key at the outset. The Homeland Security enforcement arm, Immigration and Customs Enforcement ("ICE"), might ask to "visit" and "interview" employees. In fact, ICE might be initiating Worksite Enforcement Operations to gather documents or arrest illegal aliens or company representatives. No matter what the purpose of the visit, there are essentially only three ways that ICE agents can legally enter onto the nonpublic areas of an employer's property: (1) with a valid search warrant; (2) with the employer's consent; or (3) in hot pursuit of a fleeing suspect or under emergency situations, such as when there is probable cause to believe a crime was committed and there is concern about destruction of evidence.

1. Know your workforce through documents. The Form I-9, Employment Eligibility Verification Form, is the form companies complete to show they have reviewed a person's work authorization and identity. Immigration investigations can involve I-9 audits. There are penalties for hiring undocumented workers and also for not completing the form correctly. **Tip:** Generally, ICE gives at least three days' notice before an I-9 audit. Investigations are disruptive, but you can request an extension of time in which to produce the I-9s.

2. Know your obligations in an immigration investigation. An ICE agent who presents a valid search warrant or arrest warrant can demand access to a company's premises. To be valid, the warrant must be signed by a Federal Magistrate or Judge within ten (10) days prior to the search or arrest. It must also specify the places or persons to be searched or arrested. ICE agents may arrest those people identified in a valid arrest warrant. In addition, they are legally entitled to arrest persons whom the officers have probable cause

to believe have violated the law. The following present probable cause for arrest: • Persons who run or seek to hide. • Permanent residents who do not have their "green cards" with them. • Aliens who admit they are not U.S. citizens and cannot establish legal authority to be in the United States or work here. **Tip:** When ICE agents are seeking access to the premises, you should always ask whether or not they have a warrant, even if you ultimately might consent to giving access. Check the warrant for its validity and scope. Once access is granted, see that the officers remain within the scope of the visit, unless there is a valid reason for extending it or consent is granted to extend the scope.

3. Know your rights. Without a warrant, the agents generally need permission from a company official to legally access the premises. The first encounter between ICE agents conducting a workplace enforcement action and employees is often a consensual encounter. **Tip:** Before giving permission for access, be sure to ask about the purpose and scope, including the following questions: • Why do they want to have access? • Is this a random search, or was the company or an employee targeted? • Do they believe that the company or any employee is in violation of any immigration laws? • Do they believe there are unauthorized aliens working on the premises? • Who are they coming on board to see? • Do they plan on arresting anyone?

If the scope of the visit changes, permission is required to legally make the change. If the officers suggest cooperation will make it easier on the employer, ask specifically what they mean. **Tip:** If the ICE agents have gained access due to a warrant, make a copy of it. If permission was given to enter, repeat your understanding of the scope of the consent and make a note of it.

Specifically, keep these guidelines in mind:

1. Determine who is the lead agent and ask to speak with him or her. Obtain the agent's name and phone number. Request the name of the prosecutor who authorized the warrant and inquire as to the nature of the suspected wrongful activity.
2. If counsel is not present at the search site, ask the agent to read the warrant over the phone to counsel.
3. Contact the company's top-level supervisor or manager and direct full cooperation in showing agents the location of documents, assisting with computers searched, and identifying files, disks and other material that are listed in the warrant.
4. Make a copy of the warrant—including the list of items to be seized—and (later) a receipt for property seized. Ask for the affidavit supporting the warrant; ordinarily it will have been filed under seal and not produced.
5. Request that agents not interview employees, but if they do, unless criminal defense counsel is present and properly intervenes, do not interfere. Make notes.
6. Advise agents, respectfully, that employees do not have the authority to consent to any search or seizure; and ask the agents not to seek consent from employees.
7. Warn employees not to interfere in any way with the search.
8. Explain to employees that they have a right to remain silent if agents ask any questions, including questions about status, and that they also have the right to request an attorney. If an attorney is requested, all questioning must stop.
9. Urge employees to stay calm; reassure them that the company will be doing everything possible to resolve the situation; ask them to respectfully decline to make any comments or statements to agents. Advise employees that they have no obligation to answer any questions; however, emphasize that this is a decision only they can make. Advise that they have the right to an attorney if an agent begins to focus questions on a specific employee.
10. Do not destroy any documents left behind after the search, and suspend any regularly scheduled shredding, removal or destruction procedures.

11. Counsel or management accompanying the agents should take notes of questions and responses, as well as items or files seized.

12. Request to make copies of documents seized that are essential for running the business. As this may be 90 percent or more of the documents seized, make this request early, and if allowed, make copies as the documents are being logged.

13. Make sure that the agents submit an inventory for signature by the provider, following the search and seizure. Counsel or an employee who has observed the search should sign it. Review it carefully, to ensure that the inventory lists the property seized as specifically as possible, to avoid subsequent disputes.

14. After the search, but as soon as practicable, debrief all employees who had interaction with the agents. A summary of any conversations or interviews should be transcribed for criminal defense counsel without delay.

Homeland Security Headquarters has instructed its officers that they should conduct themselves in a professional manner and address questions to individuals in a way that promotes cooperation. The professional demeanor should not lull the employer or employee into unknowingly waiving rights.

Diane M. Butler is a shareholder at Lane Powell and chair of the Firm's immigration practice group. She chairs the national American Immigration Lawyers Association ("AILA") liaison committee for Customs Border Protection issues, and is a former member of the Executive Committee of the AILA Washington Chapter. She serves on the Advisory Council of the Trade Development Alliance of Greater Seattle, and has been designated as one of five Top Lawyers in Immigration Law in Seattle by her peers. Diane is a frequent speaker on immigration topics. She can be reached at butlerd@lanepowell.com or 206-223-7715.