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THE *DON(ALD)* OF A NEW ERA: ARE WORKPLACE IMMIGRATION RAIDS ON THE HORIZON?

By [Janie Schulman](#)

The Place: A car wash in Los Angeles

The Time: The 1970s

The Scene: A busy afternoon at the car wash. Immigration agents burst onto the property in search of undocumented workers. The cashier—wife of the manager—yells frantically into the public address mic, “*iLa migra!* Immigration!” Soapy cars stand abandoned on the chain as employees scatter. Some get away. Others are not so lucky. They are detained and promptly deported. Even the deported employees, however, return to work within a week, easily reentering the U.S. through its porous southern border.¹

[*The curtain drops.*]

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Like many good dramas, the car wash story leaves some questions unanswered. What happened to the car wash management and the aiding and abetting wife? Were they arrested? Prosecuted? Fined? No. Why not? Because the raid took place several years before enactment of the Immigration Reform and Control Act (IRCA). Before IRCA's enactment in 1986, it was not illegal to employ undocumented workers. Control over the government has since ping-ponged between Republicans and Democrats, resulting in periodic changes in philosophy as to how to best discourage and control illegal immigration. These changes have yielded different approaches to enforcement actions, with some leaders targeting the undocumented aliens, others their employers, or both, or neither.

A BRIEF HISTORY OF WORKPLACE IMMIGRATION RAIDS

Towards the end of the George W. Bush administration, “headline-grabbing workplace raids that rounded up thousands of workers suspected of immigration violations,” were not unusual.² In December 2008, we reported on what was then the largest workplace raid by Immigration and Customs Enforcement (ICE)—the raid on Agriprocessors, Inc. in Postville, Iowa.³ That military-style raid of the country's largest kosher meat processing company spawned a documentary,⁴ and resulted in 389 arrests of immigrant workers, criminal charges against the founder and his son, massive fines, the bankruptcy of the plant,⁵ and, ironically, legal status for many of the previously undocumented workers, who were able to obtain U visas that allowed them to remain in the U.S. to testify against the company owners.⁶

The Obama administration also had a robust immigration enforcement program, deporting more than 2.5 million people between 2009 and 2015.⁷ In the workplace, however, President Obama focused on the conduct of the employers and refrained from targeting the workers. The primary enforcement tool consisted of fining employers and, in egregious cases, criminal prosecutions for paperwork violations discovered during audits of I-9 forms.⁸ “What ICE did not do during the Obama era was detain people who were in the wrong place at the wrong time. ICE was instructed to arrest only people who were targeted in advance and not just anybody swept up in a raid, so-called collateral arrests.”⁹

WHAT TO EXPECT WHEN YOU ARE EXPECTING (A RAID)

What can employers expect from the Trump administration with regard to immigration workplace enforcement? One of the cornerstones of President Trump's campaign was beefed up immigration enforcement. Although opponents have thus far stymied President Trump's plans for a travel ban and a Mexican-financed border wall, the Department of Homeland

Security (DHS) has undeniably stepped up efforts to detain and remove undocumented aliens in a manner that portends ongoing workplace raids.

Five days after his inauguration, President Trump signed a broad executive order which, among other things, instructs DHS to terminate “the practice commonly known as ‘catch and release,’ whereby aliens are routinely released in the United States shortly after their apprehension for violations of immigration law.”¹⁰ The following month, DHS announced it was expanding its policy of expedited removal (*i.e.*, immediate deportation with no hearing) of undocumented aliens detained anywhere in the country who cannot prove they have been continuously present in the U.S. for two years.¹¹ This policy departs sharply from the Obama era policy of allowing expedited removal only of individuals captured within 100 miles of the border and within 14 days of arrival.

Although Mr. Trump averred on the stump that he intended only to go after “bad *hombres*,” the news is rife with reports and cell phone video of people who have been in the country for decades now hiding from ICE in church basements or being deported, sometimes to countries they left before they were old enough to learn the local language. During the week ending February 11, 2017, ICE launched a series of raids in more than a dozen states that harken back to the Postville raid of 2008. Approximately 25% of individuals detained were “collateral arrests” of non-targets with no criminal record.¹² One can infer that ICE intended the mass raids to send a message that President Trump is serious about immigration enforcement anywhere, at any time.

ADVICE FOR EMPLOYERS

The advice we provided in 2008 remains sound today:

- Establish a policy for dealing with a visit by ICE, including designation of a point person to interact with ICE agents and retention of an attorney to contact for immediate advice.
- Conduct regular audits of I-9s. Establish and maintain a tickler system to reverify work authorization of employees with time-limited authorization. The tickler system should include reminders of when to destroy I-9s of former employees that the company is no longer required to keep.
- Consider enrolling in E-Verify, the Internet-based system operated by DHS in cooperation with the Social Security Administration and United States Citizenship and Immigration Services (USCIS). The program enables employers to determine electronically

whether newly hired employees are eligible to work. E-Verify provides a safe harbor for users who receive confirmation of work authorization, but employers must enter into a memorandum of understanding (MOU) with the government in which they give up certain rights. Employers should weigh the pros and cons before enrolling, although some employers, such as government contractors, do not have a choice. The USCIS website boasts increased accuracy in the data base since inception and an 87% satisfaction rate among users as of December 2016.

- Absent a warrant, ICE must provide three days' notice of intent to inspect I-9s. Never waive those three days! You will need the time to perform a quick audit and to consult with counsel. Do not be lulled into complacency because your workforce is not comprised of people who *look* like they could be undocumented. While an estimated 75% of undocumented aliens are Hispanic, 25% of the estimated 11 million undocumented aliens—2.75 million people—are not, including many Asians and approximately 50,000 Irish.¹³
- In case of a raid, you do not have to permit ICE agents into any non-public areas of the premises without a warrant. The company's point person should promptly identify the agent in charge, confirm his or her identity, and ask to see a warrant. Read any warrant to confirm

its scope and proper signature. Do not allow greater access than necessary to comply with the warrant. If time permits, call your attorney first for immediate advice.

- Do not conceal information that is the subject of a warrant or obstruct the ICE agents' work, even if you think they are overstepping their authority. The heat of a raid by heavily armed agents is not the best time to test your rights.
- Consider educating your employees about their rights in case of an ICE encounter. Education can be as simple as providing employees with a "Know Your Rights" card available online,¹⁴ or it can include bringing in an outside speaker from a non-profit organization that offers training.

CONCLUSION

If President Trump keeps his campaign promises, employers should expect to see more immigration enforcement in the workplace and elsewhere. Now is the time to prepare for what could be a bumpy ride.

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To view prior issues of the ELC, click [here](#).

1 As told to the author by her parents, a car wash manager and his wife, the cashier.

2 "Illinois Businesses Prepare for Possibility of Dramatic Immigration Raids," *Chicago Tribune*, March 9, 2017, <http://www.chicagotribune.com/business/ct-workplace-raids-primer-0309-biz-20170308-story.html>.

3 "Illegal Immigration Worksite Enforcement: How to Safeguard Your Company in an Era of Unprecedented Raids and Regulations," Vol. 20, No. 12, Dec. 2008, <https://media2.mofa.com/documents/elc120816.pdf>.

4 "abUSed," a documentary by Louis Argueta (2010).

5 *Id.*

6 "Impact of Postville raid lingers for Guatemalan town," *Des Moines Register*, July 6, 2014, <http://www.desmoinesregister.com/story/news/2014/07/07/effect-postville-raid-lingers-guatemalan-town/12279567/>.

7 "Comparing Immigration Raids under Trump, Obama," 2/16/17, Voice of America News, <http://www.voanews.com/a/comparing-immigration-raids-under-trump-and-obama/3727706.html>.

8 *Id.*; "Illinois Businesses Prepare for Possibility of Dramatic Immigration Raids," *Chicago Tribune*, March 9, 2017, <http://www.chicagotribune.com/business/ct-workplace-raids-primer-0309-biz-20170308-story.html>.

9 "Comparing Immigration Raids under Trump, Obama," 2/16/17, Voice of America News, <http://www.voanews.com/a/comparing-immigration-raids-under-trump-and-obama/3727706.html>.

10 Executive Order: Border Security and Immigration Enforcement Improvements, Section 6, January 25, 2017.

11 "Fact Sheet: Border Security and Immigration Enforcement Improvements," Feb. 21, 2017, <https://www.dhs.gov/news/2017/02/21/fact-sheet-executive-order-border-security-and-immigration-enforcement-improvements>.

12 "Federal agents conduct immigration enforcement raids in at least six states," *Washington Post*, February 11, 2017, https://www.washingtonpost.com/national/federal-agents-conduct-sweeping-immigration-enforcement-raids-in-at-least-6-states/2017/02/10/4b9f443a-efc8-11e6-b4ff-ac2cf509efe5_story.html?utm_term=.900f8c58d7a0; "The first immigration raids of the Trump era, explained," *Vox*, Feb. 14, 2017, <http://www.vox.com/policy-and-politics/2017/2/14/14596640/immigration-ice-raids>.

13 "Demographics of Immigrants in the United States Illegally," ProCon.org, Aug. 19, 2014, <http://immigration.procon.org/view.resource.php?resourceID=000845>; <http://immigration.procon.org/view.resource.php?resourceID=000845>.

14 National Immigration Law Center, <https://www.nilc.org/get-involved/community-education-resources/know-your-rights/>.

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