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'Take it Up With My Manager:' Consider Privacy, Other Restrictions When Interacting With ICE

By Nina Youngstrom

When frontline employees at hospitals are faced with Immigration and Customs Enforcement (ICE) agents in search of undocumented immigrants, their response should be some variation of “take it up with my manager,” attorneys say. Referring ICE agents to a manager or other point person is part of a protocol that hospitals may want to develop as the Trump administration ramps up plans to arrest and deport undocumented immigrants en masse. A protocol will help hospitals conform their ICE interactions to the limits on disclosure of protected health information (PHI) and access to patients under HIPAA, the Confidentiality of Substance Use Disorder Patient Records regulation (42 C.F.R. Part 2) and state confidentiality laws.

“This is a big topic,” said attorney Larry Vernaglia, with Foley & Lardner LLP. “The tee-up is that Trump revoked 2021 guidance from the Biden administration to avoid sensitive areas,” including schools, churches and health care facilities, and now they’re more vulnerable to ICE demands.^[1] But hospitals should keep in mind that their responses to ICE agents will more or less be the same as their responses to other law enforcement agencies, said attorney John Litchfield, with Foley & Lardner LLP. “It’s maybe scarier because it’s a federal agency, and there’s so much hype about it now. However, it’s similar to engaging with local law enforcement; ICE agents just wear different uniforms.”

Vernaglia and Litchfield suggest hospitals draft user-friendly documents for front-desk employees who may deal with ICE agents. But hospitals must pull double duty, making sure they’re complying with federal and state privacy laws when dealing with ICE agents while protecting themselves from liability if the federal government believes the hospital illegally denied it access to undocumented immigrants, Litchfield said.

“Our clients are advising their staff who most likely will interact with ICE agents about their obligations,” Vernaglia said. This will come up when ICE agents appear at the hospital in search of patients who are undocumented immigrants and may be arrested and deported. “We also suggest they move agents out of waiting areas. Move them to private spaces,” he said. That’s partly to avoid spooking people in the waiting room.

Judicial Warrants vs. ICE Administrative Warrants

Hospitals potentially will face an unfamiliar type of court order. Federal district courts may grant ICE agents a search warrant that allows them entry to a private facility, such as a hospital, if they have reasonable suspicion there’s criminal activity at the location, Litchfield said. Federal courts also may approve arrest warrants that authorize ICE agents to arrest a person who is suspected of a crime or committed a crime. “Those are two actions ICE can undertake in relation to a hospital” in areas beyond the waiting room, Litchfield said. “Generally, what has to happen is ICE has to present evidence to the court saying, ‘We have information and believe that there’s evidence showing Suspect A is located in this hospital in this city and we need access to the hospital to make an arrest.’” Warrants approved by a court are known as judicial warrants.

There are also administrative warrants from ICE or the Department of Homeland Security, “but they don’t carry

the same force of law” as judicial warrants, Litchfield explained. While administrative warrants allow ICE agents to search people or public areas, they don’t give ICE authority to cross the threshold into private spaces, such as hospital rooms. If ICE agents show up at a hospital with an administrative warrant, they’re limited to spaces the general public can access.

Saying No to ICE Under Certain Circumstances

Against this backdrop, hospitals should consider the privacy and confidentiality implications. They aren’t necessarily required to turn over PHI to ICE agents. The HIPAA Privacy Rule permits, but doesn’t require, PHI disclosures to law enforcement. For example, covered entities may respond to a law enforcement request that comes with a court order, warrant, subpoena or summons, but they’re not obliged to except in certain circumstances.

Part 2 flat out forbids even acknowledging the patient’s presence in facilities that fall under the Confidentiality of Substance Use Disorder Patient Records regulation, Vernaglia said. “They shouldn’t tell ICE someone is there” because that alone reveals the patient is being treated for a substance use disorder.

State laws also factor in, Vernaglia said. For example, Massachusetts has a privacy law that states, “A person shall have a right against unreasonable, substantial or serious interference with his privacy. The superior court shall have jurisdiction in equity to enforce such right and in connection therewith to award damages.”^[2] The state has a separate confidentiality law that affords patients many rights, including “to confidentiality of all records and communications to the extent provided by law.”^[3]

The state laws matter in the calculus, Vernaglia said. “I could see state attorneys general saying these state laws are not pre-empted by whatever rights the federal government has.” That would be adopting the same argument that succeeded in the U.S. Court of Appeals for the Fifth Circuit with respect to the Texas abortion ban and the Emergency Medical Treatment and Labor Act (EMTALA).^[4] Although EMTALA is a federal law, the circuit court ruled that “EMTALA does not mandate medical treatments, let alone abortion care, nor does it preempt Texas law.” Vernaglia sees an argument here for state privacy and confidentiality laws besting immigration arrests.

‘Act in Good Faith in Following the Protocol’

If ICE agents appear at their hospital, staffers should “act in good faith in following the protocol” established by the hospital, Litchfield said. “In the best of all possible worlds, ICE shows the front desk a warrant and asks to speak with the individual charged with helping ICE carry out the warrant.” Then the front desk calls that person, who sends the warrant to legal counsel “and the process plays out in an orderly fashion from there. But the only way this is possible is for hospitals to have clear protocols and good training for its staff,” he noted.

So far, hospitals don’t seem to be in ICE’s crosshairs. “My conjecture is if ICE engaged in a raid at a health care facility, the PR nightmare would be awful,” Litchfield said. “I can’t imagine ICE agents going into a hospital where [undocumented immigrants] are lying in a bed or potentially arresting their family as collateral arrests without significant public blowback. It doesn’t mean they aren’t going to, but a lot goes along with enforcement action at a place like a hospital.”

Litchfield noted that ICE is focused on undocumented immigrants who committed violent crimes. But even if they merely committed a crime by violating the Immigration Control and Enforcement Act—for example, they came to the United States illegally or overstayed their visa—ICE agents may not hesitate to apprehend them too, he explained.

FAQs on immigration enforcement have been released by the Greater New York Hospital Association.^[5]

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1 U.S. Department of Homeland Security, “Guidelines for Enforcement Actions in or Near Protected Areas,” memorandum, October 27, 2021, <https://bit.ly/3CFNrGn>.

2 Mass. Gen. Laws ch. 214, § 1B, <https://bit.ly/4ovalYU>.

3 Mass. Gen. Laws ch. 111, § 70E, <https://bit.ly/4hfyutS>.

4 Texas v. Becerra, No. 23-10246 (5th Cir. 2024), <https://bit.ly/3WDUjuR>.

5 Greater New York Hospital Association, “Q&A On Immigration Enforcement For Hospitals,” fact sheet, <https://bit.ly/3PYcV4U>.

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