

# HEALTH CARE PROVIDERS AND IMMIGRATION ENFORCEMENT

## Know Your Rights, Know Your Patients' Rights

APRIL 2017

**T**he threat of increased federal immigration enforcement has raised concerns among immigrant families, some of whom may decide to forego necessary medical services out of fear that they could be putting themselves and their family members at risk. This factsheet provides advice to hospitals, medical centers, community health centers, other health care facilities, and advocates on how to prepare for and respond to (a) enforcement actions by immigration officials and (b) interactions with law enforcement that could result in immigration consequences for their patients.<sup>1</sup>

### Immigration enforcement power limited by the Fourth Amendment

U.S. Immigration and Customs Enforcement (ICE) is the interior enforcement agency within the U.S. Department of Homeland Security (DHS). U.S. Customs and Border Protection (CBP), another agency within DHS, is responsible for enforcement at or near the nation's borders.

ICE and CBP's power to enforce immigration law is limited by our constitutional protection against *unreasonable search and seizure*. Under the Fourth Amendment to the U.S. Constitution, the reasonableness of a search depends on whether a person has a *reasonable expectation of privacy* in the area searched.<sup>2</sup> The test is: At the time of the search, was it the person's subjective, actual expectation that the place or things searched were private, and was that expectation objectively reasonable, i.e., would it be generally recognized by society?<sup>3</sup> Your patients thus may be more vulnerable to immigration enforcement actions when they are in areas of your facility that are open to the public than when they're in areas that are considered private.

Federal and state privacy laws provide protections that further limit the disclosure of patient information—including immigration status—related information—to law enforcement officials.

### Health care providers and their patients have legal rights

- **Sensitive locations.** Both ICE and CBP consider hospitals and other health care facilities to be "sensitive locations."<sup>4</sup> Both agencies have issued memoranda that state

<sup>1</sup> The information in this document does not constitute legal advice. You should consult your attorney to obtain advice with respect to any particular issue or problem.

<sup>2</sup> *Katz v. United States*, 389 U.S. 347 (1967).

<sup>3</sup> See, e.g., *id.*

<sup>4</sup> See Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, to Field Office Directors, et al., subject: *Enforcement Actions at or Focused on Sensitive Locations*, Oct. 24, 2011, <https://www.ice.gov/doclib/ero-outreach/pdf/10029.2-policy.pdf>; and Memorandum from David V. Aguilar, Deputy Commissioner, U.S. Customs and Border Protection, subject: *U.S. Customs and Border Protection*

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current and longstanding practice with respect to immigration enforcement in the health care setting.<sup>5</sup> The memoranda say that immigration enforcement actions are to be avoided at sensitive locations, including at hospitals and other health care facilities, unless exigent circumstances exist or the officers conducting the actions have prior approval from certain officials within the enforcement agencies. ICE defines “enforcement actions” as including arrests, interviews, searches, and surveillance done for purposes of immigration enforcement only.<sup>6</sup> Both memos are subject to change, depending on the enforcement priorities of ICE and CBP.

- **Disclosure of information.** Health care providers have no affirmative legal obligation to inquire into or report to federal immigration authorities about a patient’s immigration status. In fact, the Health Insurance Portability and Accountability Act (HIPAA) privacy rule generally prohibits the use or disclosure of patient information<sup>7</sup> without the patient’s consent,<sup>8</sup> except when required by law.<sup>9</sup> Under other exceptions, including when information is requested by law enforcement officials for law enforcement purposes, personal health information *may* be shared, but its release is generally *not required*.<sup>10</sup>
- **Warrants and consent.** Health care providers *may refuse* to provide information about patients to law enforcement officials *unless* the request for information is pursuant to a warrant or other court order for a specifically identified individual.<sup>11</sup>
- **Right to remain silent.** While immigration enforcement at health care facilities is limited by the “sensitive locations” guidance described previously, immigration agents may enter a public area of a health care facility without a warrant or the facility’s consent and may question any person present.<sup>12</sup> These people have a right to remain silent.<sup>13</sup>
- **“Plain view.”** Officers may also look at anything that is in “plain view” in a public area. An object is in “plain view” if it is obvious to the senses. For example, an immigration official may visually inspect anything—including papers and files—that are clearly visible from the visitors’ side of the reception desk. Unless they have a warrant, however, they may not move an object in plain view to expose other portions of it or what is under it.<sup>14</sup> The plain view doctrine extends to sounds within “plain hearing” as well.<sup>15</sup> Therefore,

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*Enforcement Actions at or Near Certain Community Locations*, Jan. 18, 2013, <https://foiarr.cbp.gov/streamingWord.asp?i=1251>.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> While immigration status or evidence of foreign birth are not, by themselves, considered *personal health information* (PHI) protected under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), federal guidance includes a catch-all category for “any characteristic that could uniquely identify the individual.” 45 C.F.R. § 160.103. Moreover, Social Security numbers and patients’ addresses are considered PHI.

<sup>8</sup> See 45 C.F.R. § 164.502(a).

<sup>9</sup> See 45 C.F.R. § 164.512(f)(1).

<sup>10</sup> See 45 C.F.R. § 164.512(f). State laws vary, however, as to whether health care facilities are required to report undocumented status. See, e.g., Arizona’s HB 2008. Arizona Revised Statutes §§1-501, 1-502.

<sup>11</sup> See 45 C.F.R. §§ 164.512(e), 164.512(f)(1)(ii)(A).

<sup>12</sup> See *Katz*, 389 U.S. at 351.

<sup>13</sup> U.S. CONST. amend. V. In some states you are required to give your real name if asked to identify yourself.

<sup>14</sup> See generally *Arizona v. Hicks*, 480 U.S. 321 (1987).

<sup>15</sup> See, e.g., *United States v. Baranek*, 903 F.2d 1068 (6th Cir. 1990).

speech officers overhear with their unassisted ears while standing in a public area—even if what they overhear comes from a private area—is also considered to be in plain view.

- **Authorized person.** To enter a private area (an area not open to the public) of a health care facility, enforcement officers must have either a warrant or consent from an authorized person, i.e., from a predesignated staff member of the health facility.<sup>16</sup>
- **Warrant—what to check for.** If immigration authorities or other law enforcement officials present a warrant or other court order, the authorized person—a predesignated health center staff member—should *review the warrant* to ensure that:
  - ✓ it is a valid judicial warrant
  - ✓ it is signed by a judge or magistrate judge
  - ✓ it states the address of the specific premises to be searched
  - ✓ it is being executed during the time period specified on the warrant, if any
- **Scope of the warrant.** The designated staff member *should pay close attention and object* if officials go beyond the scope of their authority to search or seize objects as specified in the warrant. For example, if the warrant states that officials may search the emergency room, they may not use this warrant to then search private patient examination rooms.
- **“Probable cause.”** Health care providers *may refuse to consent to a warrantless search of the facility’s private areas*. Nevertheless, officers may search private areas and seize items found there if they have “probable cause” to believe that the search may reveal that unlawful activity is occurring, has occurred, or will occur. An officer has “probable cause” if the facts and circumstances justify a reasonable person’s conclusion that people or things connected with unlawful activity will likely be found in a particular place.<sup>17</sup>

## Protect your patients’ rights and your rights as a health care provider

- **Establish a written policy designating private areas.** Establish a written policy identifying which areas of the clinic are closed to the public. Limit access to certain areas only to those who are receiving or providing care, or who are otherwise necessary. To the extent possible, access to private areas intended for patients and their family members should be restricted to essential medical personnel (e.g., doctors and nurses), excluding all other staff and visitors during business hours. For example, the clinic’s waiting room may be open to the public, but individuals must be invited to enter examining rooms, offices, and records areas. Alternatively, the waiting room may be open only to patients and people accompanying them, while the public must remain in areas outside the building. Consider cordoning off areas where patients receive treatment from public waiting rooms.
- **Beware of what’s in “public view.”** Be cautious of what information is in open view of the public, such as files visible from the visitors’ side of the reception desk.
- **Avoid collecting immigration status information.** Avoid asking for patients’ immigration status and, if you must collect such information for a patient, avoid

<sup>16</sup> See Katz, 389 U.S. at 351.

<sup>17</sup> See, e.g., *Brinegar v. United States*, 338 U.S. 160 (1949); *Carroll v. United States*, 267 U.S. 132 (1925).

including that information in the patient's medical and billing records.

- **Provide educational materials.** Provide posters and educational materials advising patients that they have the right (a) to refuse to answer questions from immigration agents and other law enforcement and (b) to insist that their lawyer be present if they are questioned. Make available in your reception area know-your-rights cards that patients can hand to officers while remaining silent.<sup>18</sup> These cards help people assert their rights and defend themselves against constitutional violations. Patients have the right to have a lawyer be present during any interview while in custody of law enforcement. Also, advise patients never to run from immigration officers, because this can give an officer probable cause to arrest them.
- **Be ready to consult a lawyer.** Establish a relationship with a local immigration lawyer or with, for example, a member of your board of directors who is an attorney, who can be available if an enforcement officer comes to the clinic.
- **Designate an authorized staffer.** Designate a specific staffer (or staffers) as authorized and responsible for handling contacts with law enforcement officers. Train all other staff to inform immigration or other law enforcement officers that only the designated individual is authorized to review a warrant or to consent to their entry into private areas. Train staff to decline to answer questions about a patient unless they are authorized to do so by the designated staff member.
- **Don't consent; document.** If immigration officers ask permission, or attempt, to enter a private area, the designated person should state explicitly that they do not consent to the officer(s) entering without a warrant. If the officers say that they will get a warrant, contact a lawyer and try to have the lawyer present before the warrant is served or before the search begins. During the search, document the officers' conduct with detailed notes and photographs.
- **Review the warrant carefully.** When presented with a warrant, the designated staff member should review the warrant for validity. If the immigration agents have a valid warrant, they may enter the private areas indicated in the warrant and question anyone present. Remind all patients and other individuals present that they have the right not to answer any questions, other than providing their real name.
- **Practice.** Have staff roleplay their responses to an immigration raid on the health care facility so they are prepared to respond confidently to a stressful situation.
- **Reassure your patients.** Educate and reassure patients that their health care information is protected by federal and state laws.

Ultimately, immigration enforcement policies and practices under the current administration are evolving, and there's little precedent for the current level of widespread enforcement activity. This document reflects our understanding based on what we know now; we'll update it as we learn more about how immigration officials and officers are treating health care facilities. In the meantime, the best strategy is to arm your staff and your patients with the knowledge they need to protect everyone's right to obtain health care.

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<sup>18</sup> See [www.ilrc.org/red-cards](http://www.ilrc.org/red-cards).