



# Ensuring Safe and Secure Healthcare Access for All

Guidance to Assist New Mexico's Healthcare Facilities in  
Responding to Immigration Issues

## ENSURING SAFE AND SECURE HEALTHCARE ACCESS FOR ALL

### Guidance to Assist New Mexico's Healthcare Facilities in Responding to Immigration Issues

#### Introduction

New Mexico's healthcare facilities serve many people in need of help, regardless of circumstances. Immigration enforcement actions at or near healthcare facilities can result in a chilling effect on immigrant residents or their families seeking medical care when it is needed. Such when a chilling effect would negatively impact the collective health of all New Mexicans. Immigrants and non-immigrants alike benefit from a healthcare system that prioritizes broad and non-discriminatory access to all types of healthcare in New Mexico, including public healthcare facilities, community health clinics, hospital systems, and emergency departments. New Mexico cannot control the actions of federal immigration enforcement agencies, but healthcare facilities can take steps to protect the safe and secure access to healthcare for all residents, regardless of immigration status, in a manner consistent with state and federal law.

Facility administrators are encouraged to consult with counsel about the issues contained in this Guidance. This Guidance is not intended to provide legal advice or address the duties of healthcare facilities as employers.

### GOVERNING LAW

#### *Fourth Amendment*

Immigration agents, like law enforcement officers, must comply with the Fourth Amendment. In a public place, the Fourth Amendment permits a law enforcement officer to approach an individual and ask questions without any level of suspicion as long as the officer does not act in a manner that would cause a reasonable person to believe that the person is not free to leave.<sup>1</sup> This includes immigration officers asking questions about a person's citizenship or immigration status.<sup>2</sup> Officers may not detain an individual in the absence of reasonable suspicion.<sup>3</sup> Law enforcement officers may make a warrantless arrest in a public place based on probable cause without violating the Fourth Amendment even in the absence of exigent circumstances.<sup>4</sup> Immigration officers are permitted to make a warrantless arrest if they witness a person entering or trying to enter the United States

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<sup>1</sup> *State v. Williams*, 2006-NMCA-062, ¶ 11, 139 N.M. 578.

<sup>2</sup> *INS v. Delgado*, 466 U.S. 210, 220-21 (1984).

<sup>3</sup> *Terry v. Ohio*, 392 U.S. 1 (1968).

<sup>4</sup> See *Payton v. New York*, 445 U.S. 573, 590-91 (1980). The New Mexico Constitution provides greater protection and requires probable cause and either exigent circumstances or a warrant to make a public arrest, *Campos v. State*, 1994-NMSC-012, ¶ 14, 117 N.M. 155, and the New Mexico Constitution applies to the actions of federal officers for purposes of determining whether evidence is admissible in a state court proceeding. See *State v. Cardenas-Alvarez*, 2001-NMSC-017, ¶ 18, 130 N.M. 386. These heightened constitutional protections, however, do not restrict the ability of federal agents to follow and enforce federal law. *Id.* ¶ 19.

unlawfully or if they have reason to believe the individual has committed a federal felony. Otherwise, they may only arrest someone without court order if they have reason to believe a person entered the country unlawfully and “is likely to escape before a warrant can be obtained.”<sup>5</sup>

Hospitals are not residences that enjoy heightened Fourth Amendment protections. Police officers frequently accompany arrestees to the hospital and place them on a police hold. Under such circumstances, the arrestee has no reasonable expectation of privacy to exclude police from the arrestee’s hospital room.<sup>6</sup> In other situations, however, a patient may retain a limited expectation of privacy at a hospital.<sup>7</sup> Regardless of a patient’s subjective and reasonable expectations of privacy, private hospitals occupy private property and receive Fourth Amendment protection like other business or commercial property.<sup>8</sup> In addition, both private and public hospitals contain areas of limited access, such as operating rooms, that are off-limits for members of the public for purposes of patient privacy, safety, or other medical needs. Hospitals retain discretion to limit access to certain areas of the facility to hospital personnel and patients. A healthcare facility, whether public or private, may choose to extend those limitations to law enforcement such that law enforcement officers would not be able to enter those areas without the hospital’s consent, a warrant, or exigent circumstances. Healthcare facilities may choose to post a “notice to authorities” at facility entrances indicating that access to a particular area is restricted. A healthcare facility’s decision to restrict access would likely need to balance medical needs, patient privacy, and, at least in the context of civil immigration enforcement, the potential chilling effect of permitting immigration officials into all parts of the facility on those seeking medical care against legitimate safety or other reasons for permitting unlimited access.

### ***Healthcare Facilities as Protected Areas***

Hospitals and other healthcare facilities have been designated by the Department of Homeland Security (DHS) as “protected areas” at which immigration enforcement actions should generally not occur.<sup>9</sup> These policies do not preclude enforcement actions at such

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<sup>5</sup> 8 C.F.R. § 287.8(c).

<sup>6</sup> See *United States v. George*, 987 F.2d 1428, 1432 (9<sup>th</sup> Cir. 1993).

<sup>7</sup> See *People v. Jordan*, 468 N.W.2d 294, 300-01 (Mich. Ct. App. 1991) (concluding that a patient retained a privacy interest in the clothing in the possession of hospital personnel, whose possession amounted to a bailment that did not permit giving the clothing to the police). Courts have held that a subjective expectation of privacy in a hospital is not reasonable given access to the room by medical personnel. See, e.g., *Dawson v. Ielacqua*, 2003 WL 27385496, at \*8 (D.N.M. Feb. 28, 2003) (unpublished) (reaching this conclusion for an arrestee subject to a police hold). However, it does not appear that these cases considered situations in which a patient or the hospital limits access to the room by visitors.

<sup>8</sup> See *Florida v. Jardines*, 569 U.S. 1, 5-11 (2013) (discussing residential properties); See *v. City of Seattle*, 387 U.S. 541, 543-46 (1967) (discussing commercial property).

<sup>9</sup> Guidelines for Enforcement Actions in or Near Protected Areas (Oct. 27, 2021), available at [https://www.dhs.gov/sites/default/files/publications/21\\_1027\\_opa\\_guidelines-enforcement-actions-innear-protected-areas.pdf](https://www.dhs.gov/sites/default/files/publications/21_1027_opa_guidelines-enforcement-actions-innear-protected-areas.pdf) (last accessed Jan. 15, 2025); see also Morton, ICE,

locations but seek to avoid them as much as possible, limiting them to situations where authorities obtain consent of the facility or “exigent circumstances” necessitate immediate action. According to ICE memorandum, “exigent circumstances” exist when there is:

- an enforcement action involving a national security or terrorism matter;
- imminent risk of death, violence, or physical harm to a person or property;
- an enforcement action involving the immediate arrest or pursuit of a dangerous felon, terrorist suspect, or other individual posing an imminent danger to public safety; or
- an imminent risk of destruction of evidence material to an ongoing criminal case.

When proceeding with an enforcement action under exigent circumstances, ICE officers and agents must conduct themselves as discretely as possible, consistent with officer and public safety, and make every effort to limit the time at or focused on the protected areas. The protected-area policies cover any actions taken by ICE to apprehend, arrest, interview, or search an individual, or to conduct surveillance for immigration enforcement purposes. These policies do not extend to actions such as obtaining records, documents, and similar materials from officials or employees; providing notice to officials or employees; serving subpoenas; or participating in official functions or community meetings.

Although the protected-area policies remain in effect, they may be modified, superseded, or withdrawn at any time. For this reason, it would be advisable for healthcare facilities to have plans in place to guide employee conduct when a law enforcement or immigration officer requests information about or physical access to a healthcare facility or a patient for immigration enforcement purposes.

### ***Warrants and Subpoenas***

Warrants and subpoenas issued by an officer engaged in immigration enforcement are not the same as judicial warrants, judicial subpoenas, and court orders issued by a federal court. It is advisable for healthcare facilities to have internal protocols that inform facility staff how to address immigration-related warrants both to ensure compliance with the law and to prevent the unnecessary disruption of healthcare operations.

### ***ICE Administrative Warrant***

Immigration officers frequently rely on ICE administrative warrants. These documents authorize an immigration enforcement officer to arrest a person suspected of violating immigration laws when that person is in a public location and are issued by a specifically authorized immigration enforcement official. An ICE administrative warrant is not a warrant within the meaning of the Fourth Amendment like a traditional arrest warrant because it is

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*Enforcement Actions at or Focused on Sensitive Locations* (Oct. 24, 2011), available online at <https://www.ice.gov/doclib/ero-outreach/pdf/10029.2-policy.pdf> (last accessed Jan. 15, 2025).

not issued by a neutral magistrate and is not based on a finding that probable cause exists to believe that someone committed a criminal offense.

ICE warrants do not authorize immigration officers to access nonpublic areas of a healthcare facility or to search medical records. Facility personnel should not interfere with an immigration officer's lawful enforcement duties, but also are not required to assist with the apprehension of a person identified in an ICE administrative warrant. Similarly, public hospital staff cannot be required to help enforce federal immigration law.<sup>10</sup>

### ***Federal Court Warrant***

A judicial warrant issued by a federal district or magistrate judge based on a finding of probable cause satisfies the Fourth Amendment for purposes of authorizing the search or seizure of property, entry into a nonpublic place to arrest a person named in an arrest warrant known to be in that place, and the arrest of a named person. Facility personnel should promptly comply with a federal court warrant, but facility policies may instruct personnel to alert a designated administrator when such a warrant is executed on the premises.

### ***Administrative Subpoena***

An administrative subpoena is a document that requests production of documents or other evidence. In the immigration context, it is typically issued by an immigration enforcement officer. As with most subpoenas, including those issued by a federal court or federal grand jury, immediate compliance with an administrative subpoena is not typically required because subpoenas can be challenged in court. It would be advisable to instruct facility personnel to alert a designated administrator about any administrative subpoena served on the facility.

### ***Notice to Appear***

A Notice to Appear (NTA) is a charging document issued by ICE, CBP, or the United States Citizenship and Immigration Service (USCIS) seeking to commence formal removal proceedings against an individual before an immigration court. An NTA contains allegations about a particular person's immigration status. An NTA notifies an individual that he or she is expected to appear before an immigration judge on a certain date. An NTA does not authorize an individual's arrest by immigration enforcement authorities or local law enforcement authorities.<sup>11</sup>

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<sup>10</sup> See *Printz v. United States*, 521 U.S. 898 (1997).

<sup>11</sup> *Arizona v. United States*, 567 U.S. 387, 407 (2012).

An NTA does not require facility staff to take any action or grant an officer engaged in immigration enforcement any special power to compel the healthcare facility to cooperate with the officer. An NTA does not authorize access to nonpublic areas of the healthcare facility or authorize a search of medical records.

### ***Medical Code of Ethics***

The American Medical Association’s Code of Medical Ethics<sup>12</sup> sets forth a number of principles which relate to a doctor’s obligation to provide care, even in the face of immigration enforcement activities. Hospital policies can assist physicians in understanding how to fulfill their ethical role in these types of situations.

### ***HIPAA***

HIPAA<sup>13</sup> establishes federal standards for the confidentiality, security, and transmissibility of healthcare information. Healthcare facilities should be well-versed in ensuring HIPAA compliance. HIPAA-protected information must be withheld unless limited exceptions apply.

An immigration official may attempt to obtain such information by relying on a HIPAA exception, 45 Code of Federal Regulations section 164.512, subdivision (k)(5)(i). However, this regulatory exception is permissive. Therefore, the healthcare facility is not required to provide the HIPAA-protected information to the requesting immigration enforcement official invoking that exception. Also, the exception is available only when an immigration enforcement official demonstrates that there is “lawful custody” of the patient, and only to the extent that disclosure of the HIPAA-protected information is necessary for the provision of healthcare or specific purposes such as the health and safety of the custodial institution. Therefore, to require that a hospital provide access to protected information, immigration enforcement officials would need to provide evidence of lawful custody or satisfy another exception to HIPAA, such as with a warrant or subpoena.

### ***Substance Abuse Disorder Treatment Facilities***

A facility that is subject to 42 CFR Part 2 cannot release information about a patient, even in response to a subpoena or other lawful order, unless a court order that satisfies 42 C.F.R. 2.61-2.67, as applicable, has been issued. Facility staff should review any request for access with legal counsel and/or a designed administrator in light of Part 2’s specific requirements.

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<sup>12</sup> <https://code-medical-ethics.ama-assn.org/> (last accessed Jan. 16, 2025).

<sup>13</sup> <https://www.hhs.gov/hipaa/for-professionals/index.html> (last accessed Jan. 16, 2025).