

Prosecutorial Discretion & Immigrant Workers

RECOMMENDATIONS FOR IMPLEMENTATION

MARCH 2012

■ Background

On June 17, 2011, U.S. Immigration and Customs Enforcement (ICE) released two memos intended to guide ICE agents, attorneys, and officers regarding the exercise of discretion in immigration enforcement decisions.¹ The June memos provide ICE personnel with guidance about when to exercise prosecutorial discretion and include criteria that specifically take into account immigrant workers, both victims of workplace abuse and those attempting to enforce their labor rights.

According to the June memos, certain immigrant workers may qualify for prosecutorial discretion, including individuals cooperating with “federal, state or local law enforcement authorities”² such as the U.S. Department of Labor (DOL), the National Labor Relations Board (NLRB), the Equal Employment Opportunity Commission (EEOC), or individuals who are “plaintiffs in non-frivolous lawsuits regarding civil rights or liberties violations.”³ Additionally, individuals engaging in a “protected activity related to civil or other rights”⁴ and certain victims of serious workplace abuse may qualify as well.⁵

Since November 17, 2011, ICE reports that it has conducted training for agency personnel on appropriate use of prosecutorial discretion, focusing on one or both of the June memos.⁶ In late November and early December of last year, ICE personnel began an initial review of incoming immigration cases and a review of docketed cases in two pilots, conducted in the Baltimore and Denver immigration courts.⁷ This initial review concluded on January 13, 2012, and ICE is currently evaluating the implementation of the June memos.

¹ See Memorandum from John Morton, Director, ICE, “Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens” (June 17, 2011; hereinafter “Apprehension, Detention, and Removal memo”), <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>, and Memorandum from John Morton, Director, ICE, “Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs” (June 17, 2011; hereinafter “Victims, Witnesses, and Plaintiffs memo”), www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf, herein referred to collectively as “the June memos.”

² Apprehension, Detention, and Removal memo, at 4.

³ Victims, Witnesses, and Plaintiffs memo, at 2.

⁴ *Id.*

⁵ *Id.*

⁶ Unattributed memorandum, “Next Steps in the Implementation of the Prosecutorial Discretion Memorandum and the August 18th Announcement on Immigration Enforcement Priorities” (undated), www.ice.gov/doclib/about/offices/ero/pdf/pros-discretion-next-steps.pdf.

⁷ *Id.*



LOS ANGELES (Headquarters)
3435 Wilshire Boulevard
Suite 2850
Los Angeles, CA 90010
213 639-3900
213 639-3911 fax

WASHINGTON, DC
1444 Eye Street, NW
Suite 1110
Washington, DC 20005
202 216-0261
202 216-0266 fax

■ Recommendations for Implementation of Prosecutorial Discretion

The June memos clearly state that some immigrant workers qualify for prosecutorial discretion. As ICE evaluates its implementation, NILC proposes several recommendations to ensure that prosecutorial discretion is a meaningful remedy for this population.

Ensure that reviews of incoming cases and existing dockets adequately identify immigrant workers.

In the initial phase of implementation, there has been little evidence that ICE has effectively identified workers who qualify to be considered for prosecutorial discretion. Whether evaluating incoming cases or existing dockets, ICE trial attorneys may rely exclusively on individuals' immigration case files—commonly referred to as their “A-file”—when determining whether to exercise prosecutorial discretion. For workers who qualify under the June criteria, this narrow review is insufficient. Employment-related facts relevant to an evaluation of prosecutorial discretion—such as a worker's participation in ongoing workplace rights litigation—will rarely, if ever, be included in the worker's A-file, leaving no way for ICE trial attorneys to identify that the worker's case may be appropriate for the exercise of discretion. Even when workers have the opportunity to raise these criteria during the course of immigration proceedings, they rarely will be aware that their efforts to vindicate their workplace rights might be tied to the possibility of being granted an immigration remedy.

When conducting reviews of incoming cases and current dockets, ICE should create a standardized process by which trial attorneys can obtain additional information from individuals regarding the workplace criteria. ICE personnel should receive basic training on the enforcement of labor rights to ensure that they are well versed in the ways in which violations of labor rights occur, giving rise to the possible exercise of prosecutorial discretion.

Even with trained personnel, oversights can occur. Therefore, ICE should create a process that allows immigrant workers and their advocates to self-identify as qualifying to be considered for prosecutorial discretion. This self-identification should then prompt a closer review by ICE personnel.

Undertake significant outreach targeted at immigrant worker communities, advocates, and service providers.

Although implementation of ICE's prosecutorial discretion policy has begun, immigrant workers and their advocates continue to have little information about the process. ICE should undertake a bold outreach effort aimed at educating immigrant workers and others who provide services to them—including worker center advocates, legal services attorneys, private employment attorneys, migrant health service providers, and others—about the availability of prosecutorial discretion.

This outreach effort need not be expensive. National appearances or public service announcements in Spanish-language and other non-English-language media are necessary first steps towards engaging this community on the implications of prosecutorial discretion for workers. Additionally, ICE should start an aggressive national outreach effort to the labor and employment bars. For example, it may often be the case that a worker who is represented by an employment attorney on a workplace matter does not also have an immigration attorney, making it critical that attorneys with either specialty, employment or immigration, know the basics of

prosecutorial discretion and thus can alert their clients to its availability.

Consider group requests for prosecutorial discretion.

In the June memos, ICE indicated that individuals' claims for prosecutorial discretion should be considered "on a case-by-case basis," with the goal of "conforming to ICE's enforcement priorities."⁸ In some contexts, a purely case-by-case review of an individual's eligibility is appropriate. However, strict adherence to individualized review can threaten the effective enforcement of labor law.

According to the June memo, an individual may qualify for prosecutorial discretion if he or she is engaging in "protected activity related to civil or other rights"⁹ or cooperating with local law enforcement agencies, including the NLRB.¹⁰ In the labor law context, these criteria apply to workers engaging in protected activity as defined by the National Labor Relations Act (NLRA). However, to ensure that they are protected under the NLRA, workers must act in a *united* way, pursuing a common goal. An individual must engage in action *together* or *with the authority of other workers*, not on behalf of *his or her own* self, to receive the NLRA's protection.¹¹

The June memos emphasize the "case-by-case analysis," but this is antithetical to the vigorous enforcement of labor law. If a worker's claim for prosecutorial discretion arises from participation in concerted activity or cooperation with an NLRB investigation, then ICE should incentivize—not thwart—this participation by evaluating *group requests* for prosecutorial discretion.

Ensure that workplace agencies can effectively support a worker's request for prosecutorial discretion.

ICE has recognized that effective "enforcement of labor law is essential to ensure proper wages and working conditions for all covered workers regardless of immigration status."¹² The agency should create a streamlined process for labor enforcement agencies—including DOL, NLRB, and EEOC—to submit letters in support of a worker's affirmative request for prosecutorial discretion. This process is consistent with DHS's pledge in the worksite enforcement context. According to the memorandum of understanding between the departments, ICE agrees to consider DOL requests for the granting of temporary immigration relief to witnesses involved in a DOL investigation.¹³ Creating a process for labor and employment agency support of prosecutorial discretion requests is a logical extension of this commitment.

FOR MORE INFORMATION, CONTACT

Emily Tulli, Policy Attorney | 202.216.0261 | tulli@nilc.org

⁸ Apprehension, Detention, and Removal of Aliens memo, at 4.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Meyers Industries*, 281 NLRB 882 (1986).

¹² Revised Memorandum of Understanding between the Departments of Homeland Security and Labor Concerning Enforcement Activities at Worksites (Dec. 7, 2011), www.dol.gov/asp/media/reports/DHS-DOL-MOU.pdf, at 1.

¹³ *Id.*