

June 3, 2014

The Honorable Jeh Johnson
Secretary
U.S. Department of Homeland Security

Dear Secretary Johnson:

As unions and organizations with significant experience and commitment to civil and labor rights, we offer the attached priorities as part of the Department of Homeland Security (DHS) enforcement and deportation review.

We have long advocated for a broad list of reforms that are needed to prevent immigration enforcement from undermining the wages and working conditions of immigrant and citizen workers. We urge you to continue with those reforms, as well as ones that affect enforcement beyond the workplace. The attached document provides a more limited list of recommendations focused solely on the workplace. We believe these reforms are particularly urgent and consistent with existing DHS policy.

We urge DHS to quickly adopt these recommendations. Also, we would appreciate the opportunity to meet with your staff to discuss our hands-on experience that informs these recommendations.

Sincerely,

Farmworker Justice
Florida Legal Services, Inc.
National Employment Law Project
National Guestworker Alliance
National Immigration Law Center
New Orleans Workers' Center for Racial Justice
Service Employees International Union
United Farm Workers
United Food and Commercial Workers

cc: Cecilia Munoz, Assistant to the President and Director, Domestic Policy Council
Alejandro Mayorkas, Deputy Secretary, U.S. Department of Homeland Security
Thomas Perez, Secretary, U.S. Department of Labor
Jacqueline Berrian, Chair, U.S. Equal Employment Opportunity Commission
Richard Griffin, General Counsel, National Labor Relations Board

Recommendation 1: Strengthen Prosecutorial Discretion for Immigrants Protecting Civil and Labor Rights

The Problem:

Workers and immigrants facing civil and labor rights violations are chilled from acting to protect and enforce their rights for fear that they or their co-workers will face immigration consequences. In some cases employers and contractors threaten workers with immigration enforcement to maintain below-market or illegally low workplace standards.

DHS has recognized that “effective enforcement of labor law is essential to ensure proper wages and working conditions for all covered workers.”¹ For this reason, DHS has developed policies intended to ensure that immigration enforcement does not deter individuals from reporting violations and engaging in protected activity to enforce and protect labor and civil rights. But these policies are far from adequate. As a result, individuals who should be eligible for protections frequently face enforcement actions and deportations. When that happens, it can have a devastating impact on worker efforts to right workplace wrongs.

The Immigration and Customs Enforcement (ICE) “Victims Memo,” which is designed to protect individuals engaged in civil rights and worker rights struggles,² is one of the most potentially helpful policies that could ameliorate the problem. Under the memo, “[a]bsent special circumstances, it is . . . against ICE policy to remove individuals in the midst of a legitimate effort to protect” their rights, including their labor rights. But this memo is rarely applied. Based on anecdotal information, few if any ICE officials and trial attorneys are even aware of this memo, much less prepared to exercise discretion proactively when warranted. In some cases, immigrants who have been instrumental in raising the standards at their workplace are granted prosecutorial discretion only after they face arrest and significant detention. In other cases, immigrants are deported even though they should have been eligible for discretion under ICE’s existing memoranda.

Even if ICE conscientiously applied the Victims Memo, obstacles would still exist that and make implementation very difficult. Once ICE has been called and makes arrests in the middle of a dispute, it often becomes difficult to sort out charges and counter-charges between workers and employers. It is very common for arrests to result from employers who accuse workers of wrongdoing that complicate efforts to obtain relief. Ideally, DHS

¹ See Revised Memorandum of Understanding between the Departments of Homeland Security and Labor Concerning Enforcement Activities at Worksites (Dec. 7, 2011).

² *Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs*, promulgated by Director Morton on June 17th, 2011. DHS shows a similar intention in relation to labor disputes within the U.S. Department of Labor jurisdiction in its Memorandum of Understanding with the Department of Labor. See Revised Memorandum of Understanding between the Departments of Homeland Security and Labor Concerning Enforcement Activities at Worksites (Dec. 7, 2011).

should act pro-actively in an appropriate case to take immigration enforcement off of the table during a workplace dispute *before* any arrests are made.

The United States Customs and Immigration Service (USCIS) already has a deferred action process in place, but the process is not well known and there is no specific guidance on evaluating requests based on protections for workers acting to protect and enforce labor and civil rights.³

To illustrate these problems, see the following examples:

- Example 1: JS was active in a bitterly-fought union organizing campaign and was the lead plaintiff in a lawsuit against his low-wage employer. He was arrested when his employer called the police and falsely accused him of a felony on charges that were eventually dropped. ICE then took custody and detained JS for nearly a month. He undisputedly came to ICE's attention as a result of his efforts to better his working conditions. His arrest, detention, and continuing immigration problems have sent a clear message his co-workers about the consequences of trying to better their working conditions. Yet his request for prosecutorial discretion was denied and ICE continues to expend resources seeking his removal. His next court date is in June.
- Example 2: CG, a construction worker, was arrested in an ICE raid in Louisiana when he and other workers attempted to obtain their weekly pay from their employer. He and other workers were involved in a labor dispute with their employer and filed a complaint with the U.S. Department of Labor (USDOL) and the DHS Office of Civil Rights and Civil Liberties (DHS-CRCL). ICE denied CG's stay of removal and prosecutorial discretion request and he was deported.
- Example 3: A dairy worker had been suspended for 3 days without cause and filed through his union. Before the grievance hearing, but after the suspension occurred, the worker was seriously injured on the job. He filed a workers' compensation claim and stopped working due to his injury. When the worker went to the pharmacy to fill the prescription, he was picked up by ICE agents and was put into removal proceedings that led to his deportation. The employer is believed to have been involved in the deportation of this worker.

After his deportation, the worker re-entered the country. Before the grievance hearing, the employer attempted to raise the worker's immigration status as grounds to deny the grievance. However, the arbitrator excluded this evidence as irrelevant. The union held the grievance hearing, but requested that the worker not attend. Once the hearing concluded the employer directed ICE agents to follow the union representative in order to find the grievant. ICE did so and the worker was again detained and deported.

³ See USCIS, *Standard Operating Procedures for Handling Deferred Action Requests at USCIS Field Offices*, Version 1.0. (Mar. 7, 2012) at 6.

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Example 4: Counsel for former employees of PW, Inc. filed a class action complaint for unfair business practices and violations of the state labor code. Counsel for the employer asked them to dismiss their lawsuit stating, “Since the date of my last correspondence, Mr. L [the owner of PW, Inc.] has reported your clients for using stolen social security cards and fraudulent information to I.C.E., [PW, Inc.] is cooperating with that investigation as well as that by EDD [Employment Development Department] as the use of stolen social security cards is criminal as well.” When counsel for the workers requested documentation of the employer’s allegations and its communications with ICE, counsel for the employer refused to provide any such documentation, claiming that it was “confidential.”

- Example 5: A worker brought a wage complaint against a contractor, which revealed a company-wide practice of wrongful payment of hours, overtime, and fringe benefits. As a result of this worker’s brave actions, his union brought an action against the contractor to recover wages and benefits. The contractor had previously threatened workers with deportation. ICE was called on the worker and went to his home while he was not there. The worker and his union reasonably believe that the employer contacted ICE. This transpired approximately one month ago.
- Example 6: Three former employees filed a lawsuit against a contractor for wage and hour violations. After the filing of the lawsuit, the employer began coercing current employees to sign waivers (opting out of the lawsuit) and threatened workers with contacting immigration authorities. Counsel for the plaintiffs recently received reports from current workers that the foreman on the job was threatening the putative class members with deportation. The foreman stated that he was going to have immigration authorities go to the workers’ homes because they would not sign the waivers and opt out of the lawsuit.

Cases like these demonstrate the rational fear that immigrant workers have regarding the assertion of their labor rights. As a result, immigrants facing labor and civil rights violations often choose not to come forward because they do not want to put themselves or their coworkers at risk of being arrested and placed in detention and/or deportation proceedings. In addition, as a practical matter, these examples demonstrate that effective enforcement of one’s civil and labor rights often requires continued presence in the United States to participate in depositions, attend hearings, submit to medical exams etc.

The Solution:

- (1) Take the fear of immigration retaliation and intimidation off of the table in workplace and civil rights disputes:
 - Clarify the process under which immigrants who stand up to protect their civil and labor rights and who are not yet in proceedings, can apply for Deferred Action before USCIS (or Parole in Place if outside the country or otherwise appropriate).

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- Clarify that the Victims Memo standards apply to USCIS, ICE, and Customs and Border Patrol (CBP) adjudication of Deferred Action requests.⁴
- Clarify that “protected activity” referred to in the Victims Memo includes efforts to protect rights in labor disputes as defined by the USDOL-DHS Memorandum of Understanding,⁵ and that it also includes, but is not limited to actions to defend those rights.⁶
- Affirmatively state that information derived from a workplace or civil rights dispute, including any deferred action application made by affected workers or civil rights defenders, shall not be usable against affected workers or civil rights defenders in enforcement operations against them (including in removal proceedings).

(2) Provide new more detailed guidance, training, and case review on implementing the Victims Memo.

The Victims Memo is virtually unknown to ICE line staff who are responsible for its day-to-day implementation. Therefore, ICE should issue further guidance and provide additional training. Additionally, ICE should implement regular case review to ensure effective and consistent implementation of this existing policy.

⁴ ICE’s Victims Memo applies to “individuals engaging in a protected activity related to civil or other rights (for example, union organizing or complaining to authorities about employment discrimination or housing conditions) who may be in a non-frivolous dispute with an employer, landlord, or contractor” It provides that in such cases, “[I]n the absence of . . . serious adverse factors, exercising favorable discretion, such as release from detention and deferral or a stay of removal generally, will be appropriate.” Note that this makes clear that the generally appropriate remedy in these cases is deferred action or a stay of removal. This differs from the practice with respect to other prosecutorial discretion requests, where administrative closure is the most commonly applied remedy.

⁵ See Revised Memorandum of Understanding between the Departments of Homeland Security and Labor Concerning Enforcement Activities at Worksites (Dec. 7, 2011) which defines “labor disputes” to include: the right to be paid the minimum legal wage, a promised or contracted wage, and overtime; the right to receive family medical leave and employee benefits to which one is legally entitled; the right to have a safe workplace and to receive compensation for work-related injuries; the right to be free from unlawful discrimination; the right to form, join or assist a labor organization, to participate in collective bargaining or negotiation, the grievance process, and to engage in concerted activities for mutual aid or protection; the rights of members of labor unions to union democracy, to form unions free of financial improprieties, and to access to information concerning employee rights and the financial activities of unions, employers and labor relation consultants, and the right to be free from retaliation for seeking to enforce the above rights.

⁶ This definition includes workers who have: filed a non-frivolous workplace or civil rights claim with any local, state, or federal agency, court, or union grievance procedure including a non-frivolous dispute with an employer or contractor over wage; are engaged in a non-frivolous dispute with a landlord; are engaged in protected activity related to civil or other rights through collective action including union organizing; have been subjected to retaliation (including threats) for exercising their rights related to a workplace or civil rights dispute; have filed a bona fide application immigration relief related to workplace or civil rights violations, including a T or U visa; or are made vulnerable because they are in the same workplace or involved in the same dispute or civil rights action as any of the above workers or disputants. Note that similarly situated workers must all be eligible for these protections. Limiting relief to those who are named plaintiffs or can prove direct retaliation can threaten the effective enforcement of civil rights and labor laws. If individuals fear that they or their coworkers might not get protections their willingness and ability to come forward and cooperate with law enforcement will be hampered.

Recommendation 2: Strengthen Workers' Right to Information During I-9 Audits

The Problem:

ICE currently conceives of I-9 audits and other workplace enforcement activity as actions that exclusively target the employer whose compliance with immigration laws and regulations is at issue. Because the employer is the target, the employer has due process rights that are protected as the action proceeds. Workers are considered to be third parties, essentially without rights. They are not entitled to information about the action, even though ICE shares the workers' information, obtained from government databases, with employers. This information may or may not be accurate. Yet, ICE directs employers to take specific adverse actions against particular named workers. The affected workers are not entitled to know what information ICE has provided to the employer about them or even whether any information has been provided. Moreover, the workers are not entitled to know what ICE instructed the employer to do (if anything) and are given no opportunity to correct errors in the information provided.

This puts workers at a severe disadvantage vis-à-vis their employers. When an employer takes action, purportedly at ICE's direction, the workers have little or no opportunity to verify independently whether the employer is telling the whole truth. As a result, a worker has no way to determine whether ICE or the employer is at fault for an unreasonable action such as providing inadequate time to verify documents, or demanding particular documents that are not readily available, or even precipitously terminating a worker. Some egregious employers falsely claim they are being hounded by ICE, or distort the nature of actual communications with ICE, as an excuse for taking retaliatory action during a workplace dispute. In practice, some ICE offices and individuals are more forthcoming than others in response to worker inquiries. However, the general rule is that workers have no right to this critical information that can affect their livelihood and their ability to defend their rights.

Even without direct ICE intervention, increasing numbers of employers are using I-9 self-audits as a tool to ensure immigration law compliance. In some instances, employers conduct these audits in accordance with immigration law, including the INA's anti-discrimination protections. Other times, employers conduct audits as an explicit means to undermine workers' labor rights and chill organizing activities. In either instance, workers remain third parties to the action and lack basic information about the process. They often receive no information about what is occurring in the workplace and too often are summarily terminated without a real understanding of the situation or an opportunity to remedy an employer's error or oversight. Additionally, although most retaliatory audits are prohibited under labor law, there is no employer guidance on this topic in the context of I-9 self-audits.

The Solution:

- (1) Revise confidentiality restrictions associated with worksite enforcement efforts to

ensure that workers who are affected by an immigration enforcement action, such as an I-9 audit, are able to obtain information they need to protect their rights directly from ICE rather than having to rely on their employer for that information.

Specifically, clarify that:

- On request by a worker or the worker's representative, ICE shall provide a copy of any correspondence from ICE to the worker's employer that puts the worker's job at risk or otherwise identifies the worker(s).
- If asked, ICE shall confirm to a worker or her representative whether her employer has been notified of an audit and the status of any audit. Put differently, on request, the worker or her representative shall be given the same information about any audit requirements that has been given to the employer.

In general, ICE should cooperate with requests for information about workplace enforcement actions from workers and their representatives to the maximum extent possible consistent with protecting the rights of employers and the integrity of the enforcement action.

- (2) Direct employers conducting audits to give workers information about the process and an opportunity to contest an employer's erroneous assessment of the worker's immigration status.