

FACTSHEET: The Department of Homeland Security's “Protected Areas” Memorandum

November 17, 2021

INTRODUCTION

On October 27, 2021, the U.S. Department of Homeland Security (DHS) issued a new memorandum (“Memo”), entitled “Guidelines for Enforcement Actions in or Near Protected Areas.”¹ The Memo replaces DHS’ previous “sensitive locations” policies² and creates updated guidance for U.S. Immigration and Customs Enforcement (ICE) and U.S. Customs and Border Protection (CBP) limiting immigration enforcement actions at or near “protected areas.” In renaming areas previously referred to as “sensitive locations,” the Protected Areas Memo is a long-awaited acknowledgment that immigration enforcement chills access to critical community spaces and services—like medical care, education, disaster relief, and expression of religion—that are so fundamental to advance collective well-being that they should be proactively protected. This factsheet provides an overview of the new Protected Areas Memo, its key provisions, and—*where asterisked*—notable additions and expansions of the previous iterations of the sensitive locations policies.³

OVERVIEW

Under the Protected Areas Memo, to the fullest extent possible, immigration agents should not carry out immigration enforcement actions in or near “a location that would restrain people’s access to essential services or engagement in essential activities.”⁴

Such “protected areas” include but are not limited to the following:

- Schools—including private and public schools, preschools and early learning programs through higher education (pre-K – post-secondary), and vocational and trade schools;
- Medical or mental* health care facilities—such as hospitals, clinics, vaccination and testing sites, urgent and emergency care, and community health centers;⁵
- Places of worship or religious study—including temporary facilities, such as churches, mosques, and temples;
- Places where children gather*—such as playgrounds, recreation centers, bus stops, childcare centers, and group homes for children;

¹ See Memorandum from Alejandro N. Mayorkas, Secretary, Department of Homeland Security, on “Guidelines for Enforcement Actions in or Near Protected Areas,” to Tae D. Johnson et al. (Oct. 27, 2021), https://www.dhs.gov/sites/default/files/publications/21_1027_opa_guidelines-enforcement-actions-in-near-protected-areas.pdf [hereinafter called “Protected Areas Memo”].

² See Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, on “Enforcement Actions at or Focused on Sensitive Locations,” to Field Office Directors et al. (Oct. 24, 2011), <https://www.ice.gov/doclib/ero-outreach/pdf/10029.2-policy.pdf>; Memorandum from David V. Aguilar, Deputy Commissioner, U.S. Customs and Border Protection, on “U.S. Customs and Border Protection Enforcement Actions at or Near Certain Community Locations.” (Jan. 18, 2013).

³ This factsheet, where appropriate and asterisked, indicates notable expansions of DHS’ previous agency-specific sensitive locations memoranda, see *supra* n. 2, and accompanying guidance in the once-regularly updated “Frequently Asked Questions” (FAQ) webpage. An archived version of the last iteration of FAQ webpage can be found at <https://web.archive.org/web/202111005122526/https://www.ice.gov/about-ice/ero/sensitive-loc>.

⁴ Protected Areas Memo, at 2.

⁵ Medical treatment and healthcare facilities have long been included in the Frequently Asked Questions webpage accompanying previous sensitive locations policies. The addition of mental healthcare, however, is new.

- Social services establishments*—such as crisis centers and shelters, drug/alcohol treatment centers, food banks, community-based organizations, child advocacy centers, and any “other establishment distributing food or other essentials of life to people in need;”
- Disaster and emergency response sites*—such as along evacuation routes; shelter and emergency supply centers; where food, water, or disaster-related aid is being distributed; and where family reunification is underway;
- Places where religious or civil ceremonies are taking place—such as funerals, graveside ceremonies, rosaries, and weddings; and,
- Sites of public demonstration and celebration—such as a parade, demonstration, march, or rally.

Importantly, enforcement at areas “near” a protected area is also discouraged under the new Memo. Although the Memo does not define what constitutes “near,”⁶ it recognizes that enforcement activity in the vicinity of a protected area can have the same chilling effect on access to essential services and activities.

DHS expanded and clarified its list of enforcement actions that are generally prohibited at or near these protected areas. Specifically, under the new Memo, immigration agents cannot conduct immigration enforcement activity, including, but not limited to: arrests, civil apprehensions, searches, inspections,* seizures,* service of charging documents or subpoenas,* interviews, and immigration enforcement surveillance.⁷

EXCEPTIONS: EXIGENT CIRCUMSTANCES, AGENCY DISCRETION, AND PRIOR APPROVAL

Like its predecessors, **the Protected Areas Memo allows immigration agents to conduct enforcement actions at or near a protected area under certain limited circumstances.** Like the prior memo, it also allows immigration agents to exercise judgment and carry out immigration enforcement actions without prior approval when the enforcement action involves an exigent circumstance. These circumstances include but are not limited to:⁸

- A national security threat;
- Imminent risk of physical harm or death to a person;
- Hot pursuit of an individual who poses a public safety threat;
- Hot pursuit of a “personally observed border-crosser”*;
- Imminent risk of destruction of evidence “material to” a criminal case; or
- A situation where a “safe alternative location does not exist.”*

The Protected Areas Memo clarifies that the list of exigent circumstances exceptions is “not complete” and therefore not exhaustive.⁹ Agents are required to notify agency headquarters

⁶ Protected Areas Memo, at 3 (explaining that in defining “near,” a variety of factors should be considered, including proximity to the protected area, visibility from the protected area, and people’s behavioral patterns in or near the protected area).

⁷ *Id.* at 4.

⁸ While some of these changes are welcome, the exception for “hot pursuit of a personally observed border-crosser” reinforces the deeply troubling enforcement-heavy and criminalization approach to the humanitarian issues experienced at the southern border.

⁹ Protected Areas Memo, at 4.

after an enforcement action is taken due to an exigent circumstance. **Even absent an exigent circumstance, the Memo allows agents to conduct enforcement actions at or near a protected area if they have prior approval.**

While the broad discretion granted to individual agents is an area of concern, **the Protected Areas Memo adds an important new reporting requirement for all enforcement actions taken in or near protected areas.** The addition of the reporting requirement is a welcome change that will help advocates hold DHS accountable for failures to abide by the Memo’s new guidance. Under the requirement, immigration agents must fully document such enforcement actions in Privacy Act–compliant electronic systems of records and other databases.¹⁰ All reports must include what the protected area was and why the enforcement action was taken there; whether prior approval was obtained (and if not, why not) and whether headquarters was notified post-action; a situational report of what occurred during and after the action; and any other relevant information.

REMAINING CONCERNS

Similar to its predecessors, the Protected Areas Memo does not confer any private rights or benefits, substantive or procedural, for violations of the policy. This makes it difficult for individuals who have been harmed by a violation of the policy to hold DHS, ICE, and CBP accountable. The ambiguities within the Protected Areas Memo—such as what constitutes “near”—as well as the dangerously broad latitude bestowed to individual immigration agents also raise significant concerns. When training all relevant ICE and CBP employees, DHS should ensure that immigration enforcement agencies do not abuse their discretion, as documented and publicized under the previous sensitive locations policies. Instead, consistent with the Memo’s stated principles, DHS should prioritize access to the protected areas.

Given these concerns, NILC is monitoring incidents or developments that may be relevant to the Protected Areas Memo. Please contact safespacesalerts@nilc.org to report any incidents or concerns or with any questions. *This factsheet was written by Sarah Kim Pak and Mayra Joachin. It provides general information only and does not constitute or offer legal advice.*

¹⁰ For more information on the requirements governing records maintained pursuant to the Privacy Act of 1974, see 5 U.S.C. § 552(a).