

U.S. Department of Labor's New Frequently Asked Questions Regarding Immigration-Related Prosecutorial Discretion: What You Need to Know

On July 6, 2022, the U.S. Department of Labor (DOL) issued [guidance](#) in the form of a Frequently Asked Questions (FAQ) document titled "Process for Requesting Department of Labor Support for Requests to the Department of Homeland Security for Immigration-Related Prosecutorial Discretion During Labor Disputes." The FAQ clarifies the process by which workers involved in labor disputes can request DOL's support for the Department of Homeland Security (DHS) to exercise prosecutorial discretion in their favor. Such immigration-related prosecutorial discretion may take various forms, including a decision by DHS to end or to not initiate enforcement proceedings against a worker on a case-by-case basis. DHS also possesses discretionary authority to grant deferred action and immigration parole, which can provide a basis for workers to access employment authorization.

Immigrant workers have long campaigned for DHS and DOL to clarify and streamline the process for obtaining these protections. These temporary protections make it safer for workers to speak up about harmful treatment in the workplace, such as unpaid wages and unsafe conditions, without fear of employer retaliation. Immigrant workers, as the FAQ recognizes, must be able to make complaints to DOL and participate in its worksite investigations without fear of immigration-based retaliation for DOL to carry out its mission and effectively enforce the laws within its jurisdiction. These protections are particularly important given the elevated levels of exploitation, labor violations, and retaliation faced by immigrant workers.

While the DOL's FAQ is a major step toward more effective enforcement of our nation's core labor and employment standards and comes after years of courageous organizing by immigrant workers, it is not enough. *DHS must now release its guidance* to clarify the process by which workers can seek prosecutorial discretion based on their involvement in a labor dispute.

How Will the Process to Request DOL Support Work?

- ▶ Workers should send requests to statementrequests@dol.gov with the subject line "Request for Statement of DOL Interest."
- ▶ The request should include a description of:
 - The worksite at issue (so the DOL can identify the worksite);
 - The labor dispute and how it relates to laws enforced by DOL;
 - Any retaliation or threats of retaliation the worker(s) witnessed or experienced;
 - How workers' fear of potential immigration-based retaliation or immigration enforcement is likely to scare workers from reporting violations or cooperating with DOL. The more specific this information can be, the better; and
 - Contact information for the requester or their representative.
- ▶ Requests should NOT include:
 - Any information about the workers' immigration history or immigration needs; or
 - Sensitive personally identifiable information, including birthdates, Social Security Numbers, or Alien Registration Numbers.
- ▶ Requests can be made by a worker or by an advocate and can be made on behalf of a group of workers.
- ▶ Workers can submit questions to DOL on their specific case at the email address listed above before submitting a formal request for support.

- ▶ DOL may contact the requester with questions regarding additional information needed to evaluate the request.

What Factors Will DOL Consider in Deciding Whether to Provide a Statement of DOL Interest?

- ▶ DOL will evaluate requests to determine whether immigration-related prosecutorial discretion would help DOL carry out its enforcement mission and priorities and will assess each request on a case-by-case basis and in consideration of DOL's specific enforcement needs.
- ▶ The factors DOL will use in making its determination include, but are not limited to:
 - DOL's need for witnesses for its investigation;
 - Whether DHS granting immigration-based prosecutorial discretion would support DOL's interest in holding employers accountable for violating labor laws;
 - Whether workers fear or are experiencing retaliation or threats of retaliation;
 - Whether immigration enforcement against workers who may be witnesses or victims of labor law violations could undermine DOL's ability to enforce labor laws or provide all available remedies;
 - The likelihood that immigration enforcement could undermine DOL's enforcement of labor laws in a geographic area or within a particular industry; and
 - The likelihood that immigration enforcement could lead to further immigration-based retaliation against workers.

What Happens After You Submit Your Request to DOL for a Statement of Interest?

- ▶ If DOL decides to issue a Statement of DOL Interest, DOL will send it to the requester and to DHS directly.
- ▶ DOL's Statement of DOL Interest does not, by itself, provide any immigration protection. The decision to grant prosecutorial discretion belongs solely to DHS, so a Statement of DOL Interest does not guarantee that DHS will grant prosecutorial discretion in any individual case.
- ▶ An individual worker or her representative must request immigration-related prosecutorial discretion directly from DHS and may include the Statement of DOL Interest as part of that request.
- ▶ The DOL will keep requests for a Statement of DOL Interest confidential to the maximum extent allowed by law. While DOL will share Statements of DOL Interest with DHS, those Statements will not typically contain any personally identifiable information without the requestor's permission.
- ▶ DOL will try to respond to any request for a DOL Statement of Interest within 30 days and will try to provide status updates every 30 days if a request takes longer to decide.
- ▶ If DOL decides NOT to provide a DOL Statement of Interest, DOL will NOT share information about that request with DHS.

This resource is not meant to serve as legal advice. Workers thinking about whether they should request a Statement of DOL Interest, or a DHS grant of immigration-related prosecutorial discretion, should consult with a reputable legal service provider before doing so. A list of pro bono immigration legal services providers can be found [here](#) or you can reach out to NILC directly.

If you have questions about DOL's FAQ, please contact Jessie Hahn, NILC Senior Labor and Employment Policy Attorney, at hahn@nilc.org.