

New DHS Guidance on Prosecutorial Discretion for Labor Disputes

January 2023

On January 13, 2023, the Department of Homeland Security (DHS) released [guidance](#) that outlines a new, streamlined process for immigrant workers to obtain temporary protection from deportation and work authorization if they are involved in a labor dispute.¹ Specifically, this new guidance clarifies that immigrant workers may receive deferred action or parole in place if they are victims of, or witnesses to, labor exploitation under investigation by a federal or state labor agency and the labor agency supports their request.

This guidance follows the [Worksite Enforcement Memo](#) released by DHS on October 12, 2021, in which Secretary Mayorkas announced pivotal changes to DHS worksite immigration enforcement practices designed to “facilitate the important work of the Department of Labor” and “increase the willingness of workers to report violations.”² Consistent with the directives in that memo, this new guidance authorizes U.S. Citizenship and Immigration Services (USCIS) and U.S. Immigration and Customs Enforcement (ICE) to exercise their discretion, on a case-by-case basis, in support of the enforcement interests of labor and employment law enforcement agencies.

This announcement comes after years of organizing by immigrant workers demanding protections when they seek to improve their workplaces, form unions, combat wage theft, defend civil rights, challenge harassment, and report unsafe working conditions. Their vulnerability to deportation has impeded their ability to speak out about labor violations and build power on the job, which in turn has driven down wages and working conditions and undermined the enforcement of our country’s core labor standards – to the detriment of all workers. Together with the policies announced by the [U.S. Department of Labor](#) and [National Labor Relations Board](#) in the last two years, these new protections represent a momentous victory that demonstrate the powerful wins workers can achieve when they organize.

The following FAQ explains both the January 13, 2023, DHS guidance as well as the processes outlined by labor agencies for workers to request their support in seeking prosecutorial discretion from DHS.

Overview

1. What is the rationale behind the new guidance?

This new streamlined process facilitates more robust enforcement of U.S. labor laws by protecting immigrant workers from retaliation and immigration enforcement while labor agencies investigate or

¹ “DHS Announces Process Enhancements for Supporting Labor Enforcement Investigations”, January 13, 2023, <https://www.dhs.gov/news/2023/01/13/dhs-announces-process-enhancements-supporting-labor-enforcement-investigations>.

² Homeland Security Secretary Alejandro N. Mayorkas Memorandum to Immigration and Customs Enforcement Acting Director Tae D. Johnson, “*Worksite Enforcement: The Strategy to Protect the American Labor Market, the Conditions of the American Worksite, and the Dignity of the Individual*,” October 12, 2021, https://www.dhs.gov/sites/default/files/publications/memo_from_secretary_mayorkas_on_worksite_enforcement.pdf. For additional background, see the NILC fact sheet “*Department of Homeland Security’s Worksite Enforcement Memorandum: What You Need to Know*”, November 3, 2021, <https://www.nilc.org/wp-content/uploads/2021/11/Website-Summary-of-Oct-2021-DHS-Worksite-Enforcement-Memo-2021-11-03.pdf>.

prosecute a labor dispute. It further promotes fairness, safety, and a level playing field for all workers in the U.S. by strengthening labor agencies' ability to enforce labor and employment standards. While the guidance is new, the policy behind it is rooted in longstanding inter-agency cooperation between labor agencies and DHS and draws on existing DHS authority to exercise prosecutorial discretion.³

2. What is prosecutorial discretion in this context?

Prosecutorial discretion refers to DHS' longstanding authority to choose whether or not to take enforcement actions against individuals under the laws it enforces, based on the priorities DHS has established for administering our immigration laws.⁴ DHS has long exercised prosecutorial discretion to defer or decline to pursue different forms of enforcement against individuals in the U.S. for specific reasons and on an individualized basis.⁵ For this process, a worker's involvement in a labor dispute — and the federal government's corresponding interest in labor law enforcement — are the primary basis for discretion, with DHS also considering other positive and negative equities on a case-by-case basis.

3. What types of prosecutorial discretion are workers eligible for? How long do they last?

The DHS guidance specifically references two forms of prosecutorial discretion in this process — deferred action and parole in place — and states that these grants “will typically last for a period of two years.”⁶ Workers should be advised that this process only confers temporary protection from deportation with no direct path to long-term status.

4. What is deferred action?

The new guidance defines deferred action as follows: “Deferred action is a form of prosecutorial discretion to defer removal action (deportation) against a noncitizen for a certain period of time. Although deferred action does not confer lawful status or excuse any past or future periods of unlawful presence, a noncitizen granted deferred action is considered lawfully present in the United States for certain limited purposes, while the deferred action is in effect. If granted deferred action, a noncitizen may be eligible for employment authorization. DHS can terminate deferred action at any time, at its discretion. Under existing regulations, a noncitizen granted deferred action may apply for and obtain employment authorization for

³ See, e.g., Revised Memorandum of Understanding between the Departments of Homeland Security and Labor Concerning Enforcement Activities at Worksites, March 31, 2011, <https://www.dol.gov/sites/dolgov/files/ofccp/regs/compliance/directives/files/DHSICE-DOLMOU-Final3-31-2011ESQA508c.pdf>; Memorandum of USCIS Director John Morton to All Field Officers, “Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs,” July 17, 2011, <https://www.ice.gov/doclib/foia/prosecutorial-discretion/certain-victims-witnesses-plaintiffs.pdf>; Memorandum from Doris Meissner, Commissioner, Immigration and Naturalization Service, “Exercising Prosecutorial Discretion,” Nov. 17, 2000, available at <https://www.aila.org/infonet/ins-memo-on-prosecutorialdiscretion>; See also NILC fact sheet “Immigration and Labor Enforcement in the Workplace: The Revised Labor Agency–DHS Memorandum of Understanding,” May 2016, <https://www.nilc.org/issues/workersrights/revised-labor-agency-dhs-mou/>, and NILC fact sheet “Prosecutorial Discretion & Immigrant Workers, Recommendations For Implementation,” March 2012, <https://www.nilc.org/wp-content/uploads/2015/11/PD-imm-workers-recommendations-2012-03-22.pdf>.

⁴ See generally, Shoba Sivaprasad Wadhia, “Understanding Prosecutorial Discretion in Immigration Policy and Recommendations for Moving Forward”, April 19, 2021, <https://www.acslaw.org/expertforum/understanding-prosecutorial-discretion-in-immigration-policy-and-recommendations-for-moving-forward/>.

⁵ See generally, *Heckler v. Chaney*, 470 U.S. 821, 831 (1985); *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1906 (2020).

⁶ See *supra* FN1.

the period of deferred action if they demonstrate “an economic necessity for employment.”⁷

5. What is parole in place?

Parole in place is another form of prosecutorial discretion that DHS can grant for public benefit or humanitarian reasons to individuals physically present in the U.S. on a case-by-case basis.⁸ Individuals granted parole-in-place are eligible to apply for employment authorization.⁹

6. Who is eligible to apply?

Immigrant workers who “fall within the scope of a labor agency investigation” where the labor agency has requested support for prosecutorial discretion from USCIS are eligible to request prosecutorial discretion under the new guidance.¹⁰ This inclusive standard is meant to address the broad chilling effect of immigration enforcement on labor standards investigations and includes workers who have not personally been subject to direct threats of retaliation. While this guidance explicitly requires support from a labor agency for an individual’s request for prosecutorial discretion, there may be instances where an individual is engaged in a labor dispute but has not filed a claim with a labor agency. Workers in this situation are encouraged to contact NILC to strategize how best to articulate the government’s labor law enforcement interests in their case to DHS.

7. What are the steps for a worker to receive this benefit?

In a typical case, there will be five steps for a worker to receive this benefit: 1) a worker becomes involved in a labor dispute that is reported to a labor agency; 2) the worker or her advocate submits a request to the labor agency for a letter supporting prosecutorial discretion (known as a “Statement of Interest”); 3) the labor agency agrees to support the request for prosecutorial discretion and sends a Statement of Interest to USCIS with a copy to the requester; 4) the worker or her advocate submits requests for deferred action or parole in place and work authorization to USCIS concurrently, and 5) if DHS approves the request, the worker receives a letter granting deferred action or parole in place for a two year period along with a work authorization card.

Labor Agency Process

8. Which labor agencies may issue Statements of Interest? Does this process include state and local labor agencies?

All federal, state, and local labor and employment law enforcement agencies may issue statements of interest (i.e., letters of support) to DHS as part of this process. This includes the federal labor agencies of the U.S. Department of Labor (DOL), the National Labor Relations Board (NLRB), and the Equal Employment Opportunity Commission (EEOC) as well as state and local labor enforcement agencies, state Attorneys General, and municipal-level labor and enforcement agencies.

⁷ “DHS Support of the Enforcement of Labor and Employment Laws,” January 13, 2023, <https://www.dhs.gov/enforcement-labor-and-employment-laws>. For further background, see *Reno v. Amer.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484 (1999); 8 U.S.C. § 1154(a)(1)(D)(i)(II).

⁸ 8 U.S.C. § 1182(d)(5)(A).

⁹ 8 CFR § 274a.12(c)(11), (14).

¹⁰ See *supra* FN7, DHS guidance from January 13, 2023.

9. How does a worker obtain a Letter of Support/Statement of Interest from a labor agency?

Workers and advocates may send a request for a letter of support to the labor agency where the labor dispute is pending. The DOL has provided an email and specific instructions for these requests in the [FAQs](#) on its website, and the NLRB has issued a [memo](#) regarding its support for this process.¹¹ NILC has also published an [explainer](#) on filing these requests with DOL.¹²

10. What should be included in the workers' request to the labor agency?

- ▶ The worksite at issue (so the labor agency can identify the worksite);
- ▶ The labor dispute and how it relates to laws enforced by the labor agency;
- ▶ Any coercion, 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 the labor agency; and
- ▶ Contact information for the requester or their representative.

11. What should NOT be included in the labor agency request?

The identifying information of individual workers should not be included in these requests for letters of support, as labor agency letters are typically issued worksite-wide for the timeframe that corresponds to the labor dispute and do not include the names of individual workers. DOL has specifically cautioned **not** to include the following information:

- ▶ Individual workers' particular immigration histories or needs;
- ▶ Sensitive personally identifiable information, including dates of birth, Social Security Numbers, or Alien Registration Numbers.

12. What factors will the labor agency consider in granting the request?

The DOL has provided the following factors to include (other labor agencies will likely consider similar factors):

- ▶ The labor agency's need for witnesses to participate in its investigation and/or possible enforcement;
- ▶ Whether DHS's use of immigration-related prosecutorial discretion would support the law enforcement interest in holding labor law violators accountable for such violations;
- ▶ Whether workers are experiencing retaliation or threats of retaliation, or fear retaliation and/or may be "chilled" from reporting violations of the law or participating in labor agency enforcement;
- ▶ Whether immigration enforcement concerning workers who may be witnesses to or victims of a violation of laws within the agency's jurisdiction could impede the agency's ability to enforce the labor laws or provide all available remedies within its jurisdiction; and

¹¹ "US Department of Labor posts process for seeking its support for immigration-related prosecutorial discretion during labor disputes," July 6, 2022. <https://www.dol.gov/newsroom/releases/sol/sol20220706>; "General Counsel Jennifer Abruzzo Releases Memo on Ensuring Rights and Remedies for Immigrant Workers," November 8, 2021, <https://www.nlr.gov/news-outreach/news-story/general-counsel-jennifer-abruzzo-releases-memo-on-ensuring-rights-and>.

¹² "U.S. Department of Labor's New Frequently Asked Questions Regarding Immigration-Related Prosecutorial Discretion: What You Need to Know," <https://www.nilc.org/wp-content/uploads/2022/07/Factsheet-on-DOL-FAQs-Deferred-Action-2022-07-07.pdf>.

- ▶ Likelihood that immigration enforcement could be an instrument used to undermine the labor agency's enforcement of laws in the geographic area or industry and/or give rise to further immigration-based retaliation.

Note that the DHS guidance instructs labor agencies seeking "DHS support in an ongoing investigation or enforcement action" to address the following factors in their statement of interest:

- ▶ The nature of their investigation and the need for DHS support;
- ▶ The agency's enforcement interests that provide the basis for their request; and
- ▶ The worksite and the class of workers who may be helpful with the agency investigation.¹³

13. Where should the workers' request to the labor agency be sent?

DOL has created a special email for submitting these requests: statementrequests@dol.gov and has indicated requests should use the subject line: "Request for Statement of DOL Interest." For other labor agencies, the requests should be submitted to the leadership of the regional office where the labor dispute is pending, with copies to the designated point people within each labor agency for immigration-related concerns.¹⁴

14. How long does it take to get a response from the labor agency?

There has been wide variation in the response time, with some cases receiving letters in a matter of days while others wait for months. DOL has included language in their FAQs about who to contact if you have not received a response after 30 days.

15. What happens when the labor agency decides to support a workers' request for prosecutorial discretion?

The labor agency will send a "Statement of Interest" directly to USCIS requesting prosecutorial discretion for workers involved in a particular labor dispute with specific reasons why prosecutorial discretion is warranted. A copy of the statement will also be sent to the requester, and workers must include that copy in their deferred action or parole in place requests. The DHS guidance gives labor agencies specific instructions on what to include in the statement and how they can request expedited processing.

16. What happens if the labor agency decides to deny a worker's request for prosecutorial discretion?

As a purely discretionary process, there are no formal rights to appeal a labor agency decision to deny a letter of support. DOL has stated that it will not communicate with DHS about requests it decides not to support.¹⁵ As an advocacy matter, it may be worth engaging the labor agency in a larger conversation to understand how the agency views its enforcement interests in this context and attempt to persuade the agency that a particular case warrants support based on the factors described in Q12 above.

¹³ See *supra* FN7, DHS guidance from January 13, 2023.

¹⁴ For further assistance in identifying the individuals to whom the request should be submitted, contact NILC.

¹⁵ See "Process for Requesting Department of Labor Support for Requests to the Department of Homeland Security for Immigration-Related Prosecutorial Discretion During Labor Disputes," July 6, 2022, <https://www.dol.gov/sites/dolgov/files/OASP/files/Process-For-Requesting-Department-Of-Labor-Support-FAQ.pdf> ("If the Department decides not to provide a Statement of DOL Interest in a labor dispute, DOL will not communicate with DHS about the request.")

17. What if there is no active investigation pending before a labor agency?

If a worker reports labor abuses that have not yet been raised to a labor agency, advocates may assist the worker in filing a complaint or charge with the appropriate agency. For immigration practitioners or other advocates who may be unfamiliar with advocacy before labor agencies, consider partnering with a local worker center or labor rights organization. Once the workers have filed with a labor agency, they may follow the above steps to request a letter of support. See also Q6 (re eligibility) and Q29 (re: private litigation).

DHS Process

18. What is the first step for workers seeking prosecutorial discretion before DHS?

Like with any immigration benefit, workers should be screened, ideally by an experienced immigration practitioner, who can advise on eligibility, risks, and any other potential forms of immigration relief that may be available. FOIA and/or other record requests may be necessary to ascertain a worker's immigration and/or criminal history.

19. When can a worker submit a request for prosecutorial discretion to USCIS?

Once a letter is received from a labor agency supporting prosecutorial discretion for a worksite, any worker covered by the terms of that letter may request prosecutorial discretion from USCIS.

20. What type of prosecutorial discretion should the worker request?

While the DHS guidance specifically names both deferred action and parole in place as appropriate forms of prosecutorial discretion for individuals involved in labor disputes, deferred action will usually be the most appropriate form of prosecutorial discretion to request. In some cases, however, workers may benefit from requesting parole in place instead. Requesting parole in place may require a heightened showing of positive equities, and workers should consult an experienced immigration practitioner to determine if they may benefit from applying for parole in place instead of deferred action.

21. Should the worker apply for work authorization at the same time as prosecutorial discretion?

YES. To expedite this process, the DHS guidance instructs applicants to apply concurrently for both. Note that for cases filed prior to January 13, 2023, workers were required to first receive a grant of deferred action before USCIS would accept requests for employment authorization – but this aspect of the process changed with the new, streamlined process announced in the guidance of January 13, 2023.

22. What should a request packet to USCIS contain?

The guidance sets forth a detailed list of items to include in the USCIS submission. Please note that if the worker is represented before USCIS, the advocate should also include a Form G-28 (Notice of Entry of Appearance as Attorney or Accredited Representative):

- ▶ A written request signed by the noncitizen stating the basis for the deferred action request;
- ▶ A letter or statement of interest from a labor or employment agency supporting the request;
- ▶ Evidence to establish that the worker falls within the scope of workers identified in the labor or employment agency letter, such as W-2s, pay stubs, time cards, or other documentary evidence

to demonstrate that the worker was employed during the period identified in the labor or employment agency statement;

- ▶ Evidence of any additional factors supporting a favorable exercise of discretion;
- ▶ Proof of the noncitizen's identity and nationality;
- ▶ If applicable, any document used to lawfully enter the United States or other evidence relating to the noncitizen's immigration history or status;
- ▶ [Form G-325A](#), Biographic Information (for Deferred Action);
- ▶ Form I-765, Application for Employment Authorization, with the appropriate fee or request for a fee waiver; and
- ▶ Form I-765WS, Worksheet.

23. Where should the request be submitted?

DHS has created a "single intake point" with a "centralized intake process" for these requests.¹⁶ Requests under this new process — for deferred action or any other type of relief AND applications for work authorization — should be submitted to the following address:

USCIS

Attn: Deferred Action

10 Application Way

Montclair, CA 91763-1350

If a worker wants to request deferred action but does not want to request employment authorization, they should send their request to their local USCIS Field Office.

Note that prior to January 13, 2023, workers who were in removal proceedings or had a final order of removal were required to initiate their requests for prosecutorial discretion with ICE. But this aspect of the process changed with the new, streamlined process announced in the guidance of January 13, 2023, and now all initial requests should be sent to USCIS.

24. Is there anything else I need to submit to receive work authorization?

For Deferred Action, the appropriate subcategory on Form I-765 is (c)(14). Although there is no filing fee for a deferred action request, the filing fee for the I-765 is \$410. There is no filing fee for the deferred action request. The I-765WS also requires a showing of financial need, though this can typically just be stated on the form since supporting documents are not required.

25. What is the timeline after submitting the applications to USCIS?

Currently, no filing receipts are being issued for these requests, but a worker should expect to receive a biometrics appointment within a few weeks of filing. Even before the January 13, 2023, guidance, these applications were being processed on an expedited basis.¹⁷ Cases were processed within a few months or even weeks, depending on whether USCIS issued any Requests for Evidence (RFEs). Under the new streamlined process, USCIS has created a "centralized intake process" designed to "efficiently review

¹⁶ See *supra* FN1.

¹⁷ See "Requests to Expedite Applications or Petitions" in USCIS Policy Manual, at <https://www.uscis.gov/policy-manual/volume-1-part-a-chapter-5>.

these time-sensitive requests” with dedicated staffing.¹⁸ The DHS announcement further highlights that “given the often time-sensitive labor agency enforcement interests, efficient processing of deferred action and related applications for employment authorization will reduce potential risks to workers and retaliation by their employers under investigation.”¹⁹

Special Considerations

26. What if a worker is in removal proceedings or has an order of removal?

USCIS will accept all complete applications under this process regardless of an individual's current immigration status. However, if USCIS determines the applicant is currently in removal proceedings or has a prior order of removal, it will “forward” their request to ICE. Then, “USCIS and ICE, as appropriate, will consider and make a case-by-case determination of the deferred action request and USCIS will consider all related Forms I-765, if submitted.”

27. What if a worker has had prior contact with the criminal legal system?

DHS has not provided specific guidance on how it will consider criminal history in this process. Advocates should request records from the relevant state and federal agencies to determine the extent of an individual's criminal history so that the advocate — ideally an experienced immigration attorney or DOJ-accredited representative — can advise the worker on whether to proceed with applying for deferred action and what documentation to submit.

28. What happens if USCIS denies the request?

The answer to this question will depend on the particular facts of an individual's background, and individual workers considering whether to request prosecutorial discretion should discuss with specificity the potential risks of a denial with a qualified immigration practitioner. The guidance published January 13, 2023, notes that the filing fee required to request employment authorization will not be returned to the requester in the event of a denial (as is generally the case with all USCIS benefit requests that are denied).

29. What if a worker has a civil action pending in court against an employer for labor violations?

The DHS announcement states that “requests for deferred action submitted through this centralized process must include a letter (a Statement of Interest) from a federal, state, or local labor agency.”²⁰ Workers pursuing private litigation in state or federal courts are encouraged to contact NILC to strategize how best to articulate the government's labor law enforcement interests in their case to DHS.

30. Does this process apply in the context of other types of violations, such as civil rights or housing rights violations?

Yes. While the guidance published by DHS does not specifically reference these investigations, DHS will consider requests to use its discretionary authority in situations where fear of immigration enforcement inhibits the participation of victims or witnesses in the legal process.

¹⁸ See *supra* FN1.

¹⁹ *Id.*

²⁰ See *supra* FN1.

31. What if a worker has returned to their home country but the labor dispute is ongoing?

The DHS guidance specifically references parole-in-place and deferred action, two forms of prosecutorial discretion that do not provide an individual currently outside the U.S. with a mechanism to lawfully re-enter the country. The guidance is silent as to whether workers who have departed the U.S. could still receive prosecutorial discretion under this process.

32. Can workers apply for renewals?

Yes. DHS states that renewals may be available "if a labor agency has a continuing investigative or enforcement interest in the matter identified in their original letter supporting DHS use of prosecutorial discretion."²¹

33. What if a worker is also eligible for other relief such as a T or U Visa?

The DHS FAQ acknowledges that workers who are victims of labor abuse involving trafficking or certain crimes may be eligible to apply for a T or U visa.²² Workers who are eligible for these other forms of relief may still wish to request deferred action under this process in order to have short-term immigration protections as they await adjudication of their U or T petition. Trafficking victims may also be eligible for Continued Presence designation,²³ and U-Visa applicants may be able to request expedited Bona Fide Determinations/deferred action based on the labor dispute and agency support letter.²⁴

...

If you have questions about this process, please contact Jessie Hahn, NILC Senior Labor and Employment Policy Attorney, at hahn@nilc.org. Special thanks to Lynn Damiano Pearson, Consulting Attorney, for assistance in creating this FAQ.

Published January 17, 2023.

²¹ See *supra* FN1.

²² For more information on T visas, see "*T visas and Human Trafficking*", <https://asistahelp.org/resource-library/t-visas/>. For more information on U visas, see "*U Visas in the Employment Context*" at <https://asistahelp.org/u-visa-2-copy/> and "*Workplace U Visa Resources*" at <https://www.nationalimmigrationproject.org/UVisa.html>.

²³ Continued Presence also provides a 2-years status and work authorization but has the further benefit of providing evidence of law enforcement cooperation in support of a T-visa and entitles designees to the same federal benefits as refugees. See Continued Presence Resource Guide, available at: <https://www.ice.gov/doclib/human-trafficking/ccht/continuedPresenceToolkit.pdf>.

²⁴ U-based deferred action based on a bona fide determination provides a 4-year work authorization, but typically have much longer processing delays. See https://www.ilrc.org/sites/default/files/resources/u_nonimmigrant_status_bona_fide_determination-nov.2021-dq.ak_.pdf.