



FARMWORKER JUSTICE

Department of Homeland Security Issues Revised Standards for Consideration of Immigrant Workers' Rights in Immigration Enforcement Actions

The Secretary of Homeland Security Alejandro Mayorkas recently issued two guidance memos that have important implications for immigrant workers involved in labor disputes. The first memo provides new standards for Immigration and Customs Enforcement (ICE) to use when deciding whether to arrest/detain immigrants or place them in removal proceedings. It requires agency officials to treat a worker's involvement in a labor dispute as a mitigating factor in enforcement decisions. The second memo orders an immediate halt to mass worksite raids, as well as a broad review of Department of Homeland Security (DHS) policies affecting immigrant workers in labor disputes.

I. Enforcement Guidelines Memo

On September 30, Secretary Mayorkas sent a memo entitled [Guidelines for the Enforcement of Civil Immigration Law](#) (the "Enforcement Guidelines Memo") to the Acting Director of ICE. The guidelines set forth in the memo will take effect on November 29 and they replace policies in two earlier interim enforcement memos from January and February 2021.

The Enforcement Guidelines memo begins by recognizing the need for ICE to exercise its prosecutorial discretion. It acknowledges that over 11 million undocumented immigrants live and work in the United States and that many of those "have been contributing members of our communities for years" including those "who do back-breaking farm work to deliver food to our tables." It then sets forth three categories of individuals as priorities for enforcement actions:

- *National Security*: DHS will prioritize arrest or deportation of any undocumented immigrant engaged in or suspected of terrorism, spying, or related activities or who "otherwise poses a danger to national security."
- *Public Safety*: DHS will prioritize enforcement actions against anyone who is "a current threat to public safety, typically because of serious criminal conduct." Unlike previous DHS enforcement guidelines, there are no categorical bars based on criminal conduct. Instead, the memo provides a list of positive and negative factors to be assessed in determining whether an individual poses a threat to public safety. These factors include whether the immigrant is a victim, witness, or a part of other legal proceedings.
- *Border Security*: DHS will target enforcement against immigrants whom CBP or ICE arrests as they are attempting to enter the United States anywhere but a port of entry, as well as people who entered the United States without permission after November 1, 2020.

The memo also requires DHS to ensure that its enforcement actions protect individuals' civil rights and civil liberties and are not used as a tool of retaliation against workers. It prohibits DHS from arresting, detaining, and deporting people based on protected First Amendment activity or from discriminating based on certain protected grounds. It also recognizes that deportation can be a tool for unscrupulous employers and establishes that "a noncitizen's exercise of workplace or tenant rights, or service as a witness in a labor or housing dispute, should be considered a mitigating factor in the exercise of prosecutorial discretion."

II. Labor Memo

Secretary Mayorkas followed up with a memo entitled [Worksite Enforcement: The Strategy to Protect the American Labor Market, the Conditions of the American Worksite, and the Dignity of the Individual](#) (the "Labor Memo"), which was issued on October 12, 2021. The Labor Memo marks a major step forward in DHS's recognition of the ways that unscrupulous employers exploit undocumented workers and our broken immigration system. It sets forth three main goals for the Department: delivering more severe consequences to exploitative employers, increasing willingness of workers to report employers and cooperate in investigations, and improving coordination with labor agencies.

To further these goals, the Labor Memo orders all DHS agencies to immediately halt mass worksite raids. It also requires officials to carefully consider any requests from the Department of Labor for prosecutorial discretion for workers involved in workplace standards investigations. In addition, the memo orders a 60-day review of agency policies. The review seeks to identify DHS policies that have an impact on the enforcement of labor and employment standards, as well as assess how E-Verify (to check immigration status) may be used against workers who report unlawful labor practices. As part of the review, Secretary Mayorkas ordered the agencies to develop plans "for the consideration of deferred action, continued presence, parole, and other available relief for noncitizens who are witnesses to, or victims of, abusive and exploitative labor practices."

The two recent memoranda do not immediately create any new processes for immigration relief, but together, they represent a significant shift in DHS's approach to immigrant workers. They explicitly acknowledge the ways that unscrupulous employers use immigration enforcement, such as the threat of deportation, to exploit undocumented workers and break the law. Secretary Mayorkas now must ensure that this shift in approach becomes part of the culture of the immigration enforcement officials. As DHS moves forward with its review, Farmworker Justice will continue to advocate for solutions that enable immigrant workers to defend their rights and the rights of others in their workplace without fear of detrimental immigration consequences.