


Office of the Director

U.S. Department of Homeland Security
500 12th Street, SW
Washington, DC 20536
**U.S. Immigration
and Customs
Enforcement**

January 23, 2023

MEMORANDUM FOR: All ICE Employees

FROM: Tae D. Johnson
Acting Director 

SUBJECT: Prosecutorial Discretion: Victims and Witnesses of
Exploitative Labor Practices

Purpose:

This memorandum sets forth U.S. Immigration and Customs Enforcement (ICE) policy regarding the support of ICE's civil and criminal law enforcement partners¹ through the exercise of prosecutorial discretion for victims and witnesses of exploitative labor practices and/or violations of federal, state, or local labor laws.² This includes those who are in removal proceedings or are subject to final orders of removal, and are cooperating with related investigations and legal proceedings or are or may be necessary witnesses for others engaged in legitimate efforts to assert their workplace civil rights and civil liberties (labor exploitation victims or witnesses).

Background:

On June 17, 2011, the agency issued ICE Policy No. 10076.1, Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs. That memorandum articulated ICE policy regarding the exercise of prosecutorial discretion in removal cases involving the victims and witnesses of crime, including domestic violence, and individuals involved in non-frivolous efforts related to

¹ For purposes of this memorandum, "law enforcement partners" includes local, state, and federal government agencies that enforce workers' rights (e.g., wage protections, workplace safety, labor rights, and other similar laws and standards), such as the U.S. Department of Labor.

² Current and former ICE detainees, including but not limited to those who participated in the Voluntary Work Program, have brought legal challenges against ICE detention contractors in a number of jurisdictions, raising claims of forced labor, violation of state minimum wage laws, violation of the Trafficking Victims Protection Act, and related claims. See, e.g., *Menocal v. GEO Group, Inc.*, No. 14-2887 (D. Colo. filed Oct. 22, 2014); *Owino v. CoreCivic, Inc.*, No. 17-1112 (S.D. Cal. filed May 31, 2017); *Barrientos v. CoreCivic, Inc.*, No. 18-70 (M.D. Ga. filed Apr. 17, 2018).

the protection of their civil rights and liberties. It states that, generally speaking, “[a]bsent special circumstances or aggravating factors, it is against ICE policy to initiate removal proceedings against an individual known to be the immediate victim or witness to a crime.”

On December 2, 2021, the agency issued ICE Directive No. 11005.3, Using a Victim-Centered Approach with Noncitizen Crime Victims, which acknowledged that “Congress created victim-based immigration benefits to encourage noncitizen victims to seek assistance and report crimes committed against them despite their undocumented status” and expressed that applying a victim-centered approach “encourages victim cooperation with law enforcement, engenders trust in ICE agents and officers, and bolsters faith in the entire criminal justice and civil immigration systems.”

On October 12, 2021, Secretary Mayorkas issued Department of Homeland Security (DHS) Policy Statement 065-06, Worksite Enforcement: The Strategy to Protect the American Labor Market, the Conditions of the American Worksite, and the Dignity of the Individual (Oct. 12, 2021). That policy statement recognized the critical role that DHS and its components play in supporting employment and labor standards. It further set out various requirements for DHS, to include developing agency plans and policies that, “among other things, provide 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 memorandum stated that requests for prosecutorial discretion should be considered on a case-by-case basis, weighing all relevant factors and circumstances, to include the need to support any pending labor investigation.

Discussion:

In the context of the labor market, there are businesses and employers who exploit workers, subject them to dangerous and illegal conditions, and retaliate against those who engage in protected labor activities or raise concerns regarding workplace conditions. These exploitative employers profit unjustly when victims do not come forward to seek action against such illegal and immoral practices, and where these conditions are not addressed, it worsens workplace standards and conditions for all workers. The federal, state, and local entities that investigate exploitative labor practices often learn of new claims from victims or witnesses at the workplace and rely on the participation of those victims or witnesses to take successful action against the employer.

ICE’s law enforcement partners have communicated that noncitizens³ who are labor exploitation victims or witnesses may fail to report such violations or cooperate with related investigations and legal actions out of fear that they may be subjected to immigration enforcement if they come forward. Applying a victim-centered approach minimizes any potential chilling effect that civil immigration enforcement actions may have on the willingness and ability of noncitizen labor exploitation victims or witnesses to contact law enforcement, participate in investigations and prosecutions, pursue justice, and seek benefits. When labor exploitation victims or witnesses

³ For purposes of this memorandum, “noncitizen” means any person as defined in section 101(a)(3) of the Immigration and Nationality Act.

have access to protection, regardless of their immigration status, and can therefore feel safe in coming forward, it strengthens the ability of local, state, and federal law enforcement agencies, including ICE, to detect, investigate, and prosecute exploitative employers.

While ICE Policy No. 10076.1 sets out the agency's baseline policy regarding the exercise of prosecutorial discretion with regard to victims or witnesses to a crime and individuals involved in non-frivolous efforts related to the protection of their civil rights and liberties, it is necessary to expand its scope to ensure that labor exploitation victims or witnesses seeking civil recourse or assisting law enforcement partners engaged in civil enforcement actions receive similar consideration. Generally speaking, ICE Policy No. 10076.1 focuses on victims or witnesses to *crimes*, as well as individuals who are engaged in non-frivolous efforts related to the protection of *their own* civil rights and liberties.⁴ However, exploitative labor practices and violations of labor standards may be punishable via civil and/or criminal enforcement depending on the facts and circumstances of the case. Additionally, noncitizens may be necessary witnesses to violations of others' civil rights and liberties in the workplace.

Accordingly, to better support agencies involved in this important work and to encourage noncitizen victims and witnesses to participate in labor exploitation investigations by coming forward and cooperating, ICE officers and agents should exercise all appropriate discretion when making detention and enforcement decisions in cases involving labor exploitation victims or witnesses. ICE personnel should consider, on a case-by-case basis, all relevant facts and circumstances in making a decision based on the totality of the circumstances. Where a labor agency demonstrates a need for the cooperation of a group of labor exploitation victims or witnesses, and an individual noncitizen has established that they fall within the group,⁵ a significant positive equity exists that will generally weigh against taking enforcement action for the period the individual's presence is required, absent the existence of significant adverse factors in the case—such as evidence that an individual is a national security or public safety risk. Additionally, where prosecutorial discretion is appropriate, ICE should grant the relevant noncitizen deferred action or a stay of removal with an order of supervision (as well as

⁴ ICE Policy No. 10076.1 further states that,

[p]articular attention should be paid to:

- victims of domestic violence, human trafficking, or other serious crimes;
- witnesses involved in pending criminal investigations or prosecutions;
- plaintiffs in non-frivolous lawsuits regarding civil rights or liberties violations;
and
- 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.

⁵ Evidence demonstrating such a need may be submitted by either the labor agency or the individual seeking prosecutorial discretion.

appropriate renewals) to facilitate their cooperation with any qualifying civil or criminal investigation, legal proceeding, or related process.⁶

Deferred action or a stay of removal should generally be granted for a period of two years. ICE should also consider properly documented and supported requests for extensions or renewals of deferred action or a stay of removal and should grant such requests, absent significant adverse factors, for up to an additional two-year period. Importantly, deferred action or a stay of removal should not be granted where the noncitizen is and will remain detained in ICE custody.

Labor exploitation victims and witnesses wishing to avail themselves of this process must apply to U.S. Citizenship and Immigration Services (USCIS); however, USCIS will refer individuals in removal proceedings or who are subject to a final order of removal to Homeland Security Investigations' Parole and Law Enforcement Unit (PLEPU) for a decision. PLEPU will serve as the single ICE intake point for all such prosecutorial discretion requests and will coordinate with Enforcement and Removal Operations (ERO) and OPLA at a local level, as appropriate.⁷ PLEPU will be responsible for tracking all decisions on such cases. When a deferred action request is granted, PLEPU must ensure that the relevant field office includes a notation in the A-file and that ERO creates an entry in EARM that the noncitizen was granted deferred action as a labor exploitation victim or witness.

Nothing in this memorandum limits or restricts individual noncitizens who believe they are victims of or witnesses to labor exploitation from pursuing any other benefits or forms of discretion, either individually or working with the applicable law enforcement entity as appropriate, for which they may be eligible, including, but not limited to, prosecutorial discretion for a pending immigration court proceeding, S visas, T visas, U visas, or Continued Presence.

Additionally, ICE personnel are reminded of existing duties to protect and assist noncitizen crime victims, including noncitizens who may fall within the scope of this memorandum.⁸ Specifically, ICE Directive No. 11005.3, Using a Victim-Centered Approach with Noncitizen Crime Victims (Dec. 2, 2021), sets out ICE policy regarding civil immigration enforcement

⁶ Where the noncitizen is in active removal proceedings, ICE officers and special agents should make a deferred action decision in consultation with the Office of the Principal Legal Advisor (OPLA). However, active removal proceedings shall not serve as a basis for officers and special agents to decline to grant deferred action under this memorandum. Following a grant of deferred action, OPLA will make its own determination as to whether it will exercise any measure of prosecutorial discretion with respect to the active removal case, such as dismissal or administrative closure.

Noncitizens granted deferred action or a stay of removal (if released on an order of supervision) are eligible to apply for work authorization. 8 C.F.R. § 274a.12(c)(14), (18) (setting out work authorization eligibility for noncitizens granted deferred action (subsection (c)(14)), or who are granted a stay of removal and placed on an order of supervision (subsection (c)(18))).

⁷ A decision to grant or deny deferred action under this memorandum should generally be made at the Special Agent in Charge or Field Office Director level but may be delegated to the Deputy Special Agent in Charge or Deputy Field Office Director level (but not below).

⁸ This policy does not diminish or expand any existing legal requirements under the Victims' Rights and Restitution Act (VRA), 34 U.S.C. § 20141, and the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771; the requirements set forth in the VRA and CVRA apply only to victims as defined at 34 U.S.C. § 20141(e)(2) and 18 U.S.C. § 3771(e)(2)(A).

actions involving noncitizen crime victims, including applicants for and beneficiaries of victim-based immigration benefits and Continued Presence. Notably, that policy requires ICE officers and agents to look for indicia or evidence that suggests a noncitizen is a victim of a crime for purposes of making discretionary decisions regarding civil immigration enforcement actions, and it states that, “absent exceptional circumstances, ICE will refrain from taking civil immigration enforcement action against known beneficiaries of victim-based immigration benefits and those known to have a pending application for such benefits.”

Finally, the cooperation of victims with law enforcement efforts is vital to bring those who unfairly and illegally take advantage of noncitizen workers to justice. Victims may rightly desire to seek justice against employers that have exploited them. Additionally, people who have been victimized need to feel safe and secure, both in terms of their state of mind and living situation, to be reliable and effective witnesses. Accordingly, ICE personnel should ask identified victims if they wish to be referred to the appropriate civil or criminal law enforcement authority to report instances of labor exploitation and related offenses and make such referrals where appropriate. Those authorities may also be able to provide the individual with victim assistance resources. Finally, where applicable, ICE personnel must provide information regarding how to make a labor enforcement-related deferred action request through USCIS.

No Private Right of Action

These guidelines and priorities are not intended to, do not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.

Any questions regarding this memorandum should be addressed to the Office of Regulatory Affairs and Policy at (b)(7)(E)@ice.dhs.gov.