

IMMIGRATION AND LABOR ENFORCEMENT IN THE WORKPLACE

The Revised Labor Agency–DHS Memorandum of Understanding

The Department of Labor and the Department of Homeland Security have updated their 2011 Memorandum of Understanding to include the Equal Employment Opportunity Commission and the National Labor Relations Board in the agreement.

The Updated Memorandum of Understanding

In 2011, the U.S. Department of Labor (DOL)¹ and Department of Homeland Security (DHS)² entered into a revised Memorandum of Understanding (MOU) to ensure that the two agencies' worksite-based enforcement activities do not conflict. The 2011 MOU updated a 1998 MOU that was entered into between DOL and the then-Immigration and Naturalization Service.³ In 2016, the Equal Employment Opportunity Commission (EEOC) and the National Labor Relations Board (NLRB) joined the agreement in an addendum to the original MOU.⁴ Under the Revised MOU, DHS agrees to refrain from engaging in civil worksite enforcement at worksites that are the subject of investigations by not only the DOL but also the EEOC and the NLRB (collectively, the "labor agencies").

What is the purpose of the MOU?

The 2011 MOU between DOL and DHS (DOL-DHS MOU) and the 2016 addendum adding EEOC and NLRB (Labor Agency-DHS MOU) reiterate the national policy goal that immigration enforcement will not interfere with employment and labor rights enforcement in the workplace. To achieve this goal, the MOU establishes a process for the named agencies to coordinate their workplace enforcement activities with one another. First, the MOU limits the worksite enforcement power of DHS's Immigration and Customs Enforcement agency (ICE) when an investigation by DOL, EEOC, or NLRB is pending, and requires the relevant labor agency to provide ICE with sufficient information to allow for the identification of overlapping enforcement activity. Second, it outlines the agencies' shared commitment to protecting workers against retaliation and intimidation by employers and other parties who use threats of immigration enforcement.

What workplace activities are protected by the MOU?

The MOU is designed to protect against immigration interference during ongoing *labor disputes* at a workplace. The MOU defines *labor disputes* as a labor-related dispute between employees and management or ownership regarding any of the following employee rights:

- The right to be paid the correct wages and overtime pay;
- The right to work under safe conditions;
- The right to workers' compensation, family and medical leave, and employee benefits;
- The right to be free from unlawful discrimination;
- The right to form, join or assist a labor organization, to participate in collective bargaining or negotiation, and to engage in protected concerted activities for mutual aid or protection;
- The rights of members of labor unions to union democracy, and to information about employee rights and the finances of unions, employers, and labor relations consultants; and
- The right to protection from retaliation for seeking enforcement of any of these rights.

What are the obligations of ICE under the MOU?

ICE agrees to not conduct worksite enforcement activities, including DHS Form I-9 audits, during an investigation or any subsequent proceedings under the jurisdiction of one of the relevant labor agencies, subject to some exceptions.⁵ ICE also agrees to permit the labor agencies to interview any person detained because of ICE worksite enforcement activities. ICE agrees that its personnel will not impersonate DOL/EEOC/NLRB agents or act for one of the labor agencies without that agency's approval.

What about retaliation by non-employers?

ICE agrees to "be alert to and thwart attempts by other parties to manipulate its worksite enforcement activities for illicit or improper purposes." ICE will evaluate whether tips and leads it gets concerning worksite enforcement involve a labor dispute or are meant to retaliate, "manipulate a pending labor dispute," or "otherwise frustrate the enforcement of labor laws." This language may mean that retaliation carried out by an employer's surrogate (such as an attorney, local police, or insurers) could trigger the MOU.

How is the MOU triggered?

ICE and the relevant labor agencies meet regularly to review ICE enforcement activities. ICE will rely on information from the labor agencies to determine that a labor dispute exists at a particular worksite or that an investigation by a labor agency is underway, triggering the MOU. The labor agencies agree to inform ICE of attempts made by employers and others to retaliate against workers for exercising their workplace rights or to manipulate in other ways pending labor disputes. Advocates should clarify with the relevant labor agency whether particular worker complaints or investigations are in the database that could trigger the conflict notice at ICE.

What remedies are available to workers who are witnesses in labor agency investigations?

ICE agrees to consider labor agency requests to grant immigration relief (such as parole or deferred action) for witnesses needed for a labor agency investigation or related proceeding. The labor agencies agree to develop a mechanism to refer information to ICE regarding human smuggling and trafficking, child exploitation, and extortion or forced labor. The labor agencies and ICE retain their ability to seek visas for labor agency witnesses—for example, their authority to certify worker victims of crime for U visas. In addition, victims of labor abuse may also be eligible for the exercise of prosecutorial discretion under memoranda issued by ICE on June 17, 2011.

How will the MOU be implemented?

The MOU calls for the formation of a Worksite Enforcement Coordination Committee, and a means of exchanging information between the agencies. Each agency commits to dissemination of the MOU through “appropriate implementation instructions, employee notification and training.” Because the MOU was issued without a specific plan, advocates have a critical role in working with the labor agencies and ICE on effective implementation of the MOU at the national, regional, and local levels.

Conclusion and Recommendations

What steps should worker advocates take to protect workers in individual cases?

To protect workers from immigration enforcement while they are asserting their workplace rights, workers should file a complaint with the appropriate labor agency about unpaid wages or other violations of their labor rights if they have a claim, and make sure that the complaint is accepted and logged in the agency’s database. In cases where threats of retaliation have been made, or if it appears that an ICE enforcement action is imminent, the worker or advocate should immediately inform the appropriate labor agency of the threat.

How should advocates engage with local labor agency and ICE offices?

Workers and advocates should consider working closely with the relevant labor agencies and ICE offices to provide the information the agencies need to best carry out the purpose of the MOU, ensure its smooth implementation, and help monitor decisions made under the MOU. This will help ensure that its interpretation and practical benefits are as expansive as possible, and serve the purpose and spirit of the MOU.

This could include:

1. Meeting with national, regional, and district labor agencies and ICE offices to discuss implementation of the MOU and local preferences for labor dispute notification, and to assist in facilitating information-sharing.⁶
2. Advocating that ICE make detainees available to labor agencies, unions, and workers centers for interviews, regardless of whether a labor agency investigation was ongoing

at the time of the worksite enforcement. This is especially important when labor violations are discovered during or after an immigration enforcement investigation.

3. Working with labor agency and ICE offices to develop procedures for responding to tips to ICE from employers and their agents, or from others acting on behalf of the employer, such as attorneys, local police, or insurance companies. Discuss preferred methods of requesting deferred action, parole, or other immigration relief for workers who cooperate with a labor agency investigation or who are material witnesses in a prosecution against an employer.
4. In cases where ICE has made arrests that limit a worker's ability to make workplace complaints, evaluate the worker's eligibility for prosecutorial discretion.©

Endnotes

1. Specific DOL offices implicated are the Wage & Hour Division (WHD), the Office of Federal Contract Compliance Programs (OFCCP), the Occupational Safety and Health Administration (OSHA), and the Office of Labor-Management Standards (OLMS).
2. The Immigration and Customs Enforcement (ICE) component of DHS is responsible for implementation of this MOU.
3. The MOU was initially published in March 2011. Technical revisions were made on December 7, 2011. The December 2011 version is available at: http://www.nelp.org/page/-/Justice/2011/Revised_DHS_DOL_MOU.pdf?nocdn=1.
4. The addendum adding the EEOC and the NLRB was published in May 2016. The addendum is available at <https://www.dol.gov/sites/default/files/documents/MOU-Addendum.pdf>.
5. The exceptions can apply if the Director or Deputy Director of ICE or the Secretary of Homeland Security finds that enforcement activity is warranted for purposes of national security or protection of infrastructure such as ports and defense facilities, or if the enforcement activity concerns a federal crime other than an unauthorized employment violation. We read this provision to mean that ICE will not invoke the exception in routine cases where a worker may have used a false Social Security Number or a borrowed Employment Authorization Document (EAD) to get a job. In the event the Director or Deputy Director of ICE or the Secretary of Homeland Security determines that enforcement activity during a DOL/EEOC/NLRB investigation is necessary, ICE "agrees to provide notice to the relevant labor agency" unless providing notice would compromise ICE's investigation.
6. For a listing of district and regional DOL offices around the country, see *Collaborating with the US Department of Labor to Recover Unpaid Wages*, <http://www.nelp.org/page/-/Justice/2010/USDOLToolkit2010.pdf?nocdn=1>. EEOC field offices are listed at <https://www1.eeoc.gov/field/index.cfm?renderforprint=1>. A map of regional NLRB offices across the country can be found at <https://www.nlr.gov/who-we-are/regional-offices>.

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