CENTER FOR HUMAN RIGHTS AND CONSTITUTIONAL LAW
256 S. OCCIDENTAL BOULEVARD
LOS ANGELES, CA 90057
Telephone: (213) 388-8693 Facsimile: (213) 386-9484
www.centerforhumanrights.org

January 23, 2023

To: Advocates for the Protection of the Rights of Immigrant Workers

Fm: Peter A. Schey, Executive Director
Steve Nutter, Staff Attorney, Immigrant Whistleblower Project
Sarah Khan, Directing Attorney

Re: Update on Campaign for Protections for Immigrant Whistleblowers engaged in labor disputes or cooperating with enforcement agencies

On January 13, 2023, the Department of Homeland Security (DHS) finally responded to demands to increase the availability of immigration protection for workers engaged in labor disputes by issuing new DHS guidelines that may increase the ability of some workers to obtain temporary protection from arrest and deportation by way of "deferred action status" and temporary work permits. A copy of the announcement is attached and available at this link.

A copy of a detailed letter we and elected officials and several organizations forwarded to the secretaries of DHS and DOL in July 2022 regarding developing stronger policies is attached and available at this link.

Overall, the DHS January announcement is a step in the right direction. It somewhat strengthens existing policies. However, as discussed below, on a close examination, the announcement falls far short of the need for immigrant worker protections. Below we've summarized what workers have gained, and what must still be won. Part of that fight will require the submission of a Freedom of Information Act Request to DHS so we can better understand how the agency has up to now been implementing its existing policies on immigrant worker protections and how it plans to implement guidelines mentioned in its January announcement. A copy of the draft FOIA request is available at this link. If interested in joining the FOIA as a requesting party or co-counsel, use this link.

The key parts of the DHS January 13, 2023, announcement are the following –

1. It provides general guidelines on how state and local labor law enforcement agencies can submit to DHS "Statements of Interest," in essence requesting that DHS consider granting certain workers (i) deferred action status (i.e. temporary hold on arrest or deportation) and (ii) the right to apply for a temporary work permit. For many years the policy has already been that federal agencies, like DOL, NLRB, EEOC, and DOJ, could make such requests, and did not preclude states from doing so. The announcement simply makes clear that states can make such requests, and provides a list of information needed and an email address to submit requests.

2. DHS has for many years also considered requests for deferred action submitted by immigrant workers involved in labor agency investigations or enforcement actions. The January announcement identifies a "central intake point" to which workers can submit their requests

for temporary protection. As was true before, a worker must submit a letter from a government labor agency explaining its mission and how granting a worker protection "relates to the mission of the labor agency," and why DHS's consideration of prosecutorial discretion with respect to these specific workers "supports the labor agency's interest." The announcement sets out what documents a worker must submit to request deferred action status.

3. Expedite requests from a federal, state, or local labor or employment agency may be made by a "senior-level official" of that agency but must demonstrate that the need for a person to get employment-authorization "is mission-critical" and "goes beyond a general need to retain a particular worker …"

Five policy changes the Biden administration should now adopt to provide meaningful and effective labor law protections for immigrant workers

1. Critical importance of confidentiality without which there will be no effective policy

No robust program to provide temporary protection to immigrant workers involved in labor disputes or cooperating with labor law agencies can exist *without clear assurance of confidentiality so that the information workers are required provide about themselves and their immediate family members will not be used to later arrest them, or initiate deportation proceedings, or as evidence in deportation hearings*. It is well-known that for many immigrant workers the fear of arrest and deportation is the *single most important* reason they do not report labor law violations, or crimes, or other forms of illegal mistreatment. The failure of current DHS policy to guarantee confidentiality is one of the primary reasons only an insignificant number of immigrant workers are willing to cooperate with labor law agencies.

2. Prompt adjudication of requests for protection are essential if immigrant workers are expected to cooperate with labor law investigations and prosecutions

When immigrant workers have been fired or risk being fired for engaging in labor disputes or cooperating with enforcement agencies, promptly obtaining at least the temporary right to work is critically important. While in a small number of cases DHS has issued immigrant workers work permits relatively promptly, requests for deferred action may take weeks or months to resolve, and work permits another 6-12 months.[1] The announcement restricts "expedited" processing to the rare circumstance in which a labor law enforcement agency is willing to state that getting prompt employment-authorization for a particular worker "is mission-critical" and "goes beyond a general need to retain a particular worker …" Not only is "mission critical" not defined, but in all likelihood the majority of immigrant workers involved in labor disputes need prompt deferred action and work permits to avoid retaliatory firings or employers contacting ICE, rather than this being a policy exception requiring a showing that it is "mission critical" to an enforcement agency. DHS could permit deferred action status approval notices to serve as temporary employment authorization documents

[1] https://egov.uscis.gov/processing-times/

while the agency takes several more months to adjudicate formal work permit applications.

3. *The DHS must issue clear and reasonable criteria for granting or denying deferred action status and work permits*

   Nowhere has DHS made clear what precise information a worker must provide to be granted deferred action status or the criteria DHS will use to grant or deny such requests. The January announcement's accompany Q&A states that workers must submit a letter of interest from a labor law agency, documents such as W-2s, pay stubs, time cards, proof of "identity and nationality," Form G-325A (Biographic Information), and "[e]vidence of any additional factors supporting a favorable exercise of discretion …" *Most workers will be afraid to provide proof of nationality and the information required by the Biographic Information form about the applicant's and their immediate family members' immigration status*. In addition, DHS should explain what "evidence" it considers will support a "favorable exercise of discretion …" The policy also fails to inform labor law agencies and workers what criteria DHS will use to approve or deny requests for deferred action status. In almost all other areas the criteria used by DHS to approve or deny applications are published and well known.

4. *There will be no effective program without transparent data gathering and publication*

   DHS publishes data on a wide range of its programs including numbers of various types of requests received, approved, denied, reasons for denials, adjudication times, etc. This allows applicants and their representatives, as well as government administrators, to assess the effectiveness of programs. So that workers and those organizing and representing them can understand the effectiveness of DHS policies regarding extending protections to immigrant workers, it is essential that DHS maintain and make public data on the implementation and effectiveness of its immigrant worker protection policy.

5. *DHS should refrain from work site enforcement during labor disputes*

   A Worksite Enforcement "guidance" memo issued by DHS on October 12, 2021 (Policy Statement 065-06) states in part that ICE agents should "no longer conduct mass worksite operations and instead refocus our workplace enforcement efforts to better accomplish the [agency's] goals." DHS should define what it means by "mass worksite operations." For example, does it include mass arrests at a worksite based on an I-9 audit? DHS should also modify Section. III.B of its 2016 Memorandum of Understanding with DOL, NLRB, and EEOC[2] which states that ICE may "continue to engage in worksite enforcement activities at a worksite that is the subject of the investigation of a labor dispute" if it determines the enforcement activity is "necessary to advance an investigation relating to … a federal crime," which could include the misdemeanor crime of illegal entry. This exception to worksite operations during labor disputes should not be used when the only "federal crime" involved is the possible unlawful entry of workers at the site.

[2] May 2016 Addendum to the Revised Memorandum of Understanding between the Departments of Homeland Security and Labor Concerning Enforcement Activities at Worksites available at https://www.dol.gov/sites/dolgov/files/OASP/DHS-DOL-MOU_4.19.18.pdf

Once an effective DHS policy has been adopted, it should be incorporated into formal regulations. Policies not adopted in formal regulations can be easily modified by an existing or new administration. Policies also extend far less rights to those who the policy intends to protect than formal regulations. Once an effective policy has been adopted, its terms should be incorporated into a formal regulation that the administration and subsequent administrations would be obligated to follow unless later overridden by legislation or modified by amendment through formal rule-making procedures.

At bottom, Secretary Mayorkas' October 12, 2021 Worksite Enforcement Memorandum, recognizes that DHS's worksite enforcement efforts "can have a significant impact on the well-being of individuals and the fairness of the labor market."[3] Unscrupulous employers harm "each worker competing for a job," and "unfairly drive down their costs and disadvantage their business competitors who abide by the law."

The policy changes identified above and possibly others must be adopted by the Biden administration in order to seriously challenge the practices of unscrupulous employers targeting immigrant workers that everyone agrees harm "each worker competing for a job," and "unfairly drive down their costs and disadvantage their business competitors who abide by the law."

/ / /

[3] Memorandum, Alejandro N. Mayorkas, Sec'y of DHS, 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), https://www.dhs.gov/sites/default/files/publications/memo_from_secretary_mayorkas_on_worksite_enforcementwhose te.pdf.