



Immigration and Labor Enforcement in the Workplace: The Revised DOL-DHS Memorandum of Understanding (2011)

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. This 2011 MOU updates a 1998 MOU that was entered into between DOL and the then-Immigration and Naturalization Service.³

What is the purpose of the MOU?

The 2011 DOL-DHS MOU reiterates 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 both agencies to coordinate their workplace enforcement activities. First, the MOU limits the worksite enforcement power of DHS's Immigration and Customs Enforcement agency (ICE) when a DOL investigation is pending, and requires DOL to communicate with ICE concerning DOL's worksite investigations. Second, it outlines the agencies' 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 any assertion of workplace rights enforced by the DOL. These include:

- 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 by federal contractors;
- 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;

¹ Specific DOL offices implicated are the Wage & Hour Division (WHD), the Office of Federal Contract Compliance Programs (OFCCP), and the Occupational Safety and Health Administration (OSHA).

² The Immigration and Customs Enforcement (ICE) component of DHS is responsible for implementation of this MOU.

³ The new MOU was initially published in March 2011. Technical revisions were made on December 7, 2011. The updated version is available at: http://www.nelp.org/page/-/Justice/2011/Revised_DHS_DOL_MOU.pdf?nocdn=1.

- the rights of members of labor unions to union democracy, and to information about employee rights and 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 a DOL investigation, subject to some exceptions,⁴ and agrees to permit DOL to interview any person detained because of ICE worksite enforcement activities. ICE agrees that its personnel will not impersonate DOL agents or act for DOL without DOL 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 are meant to “manipulate a pending labor dispute.” This language may mean that retaliation carried out by an employer’s surrogate (such as local police or insurers) could trigger the MOU.

How is the MOU triggered?

ICE and DOL meet regularly to review ICE enforcement activities. ICE will rely on information from DOL to determine that a labor dispute exists at a particular worksite or that an investigation is underway, triggering the MOU. DOL agrees 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 DOL 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 victims of abuses under the MOU?

ICE agrees to consider DOL requests to grant immigration relief (such as parole or deferred action) for witnesses needed for a DOL investigation or related proceeding while it is pending. DOL agrees to develop a mechanism to share information with ICE upon detection of human smuggling and trafficking, child exploitation, and extortion or forced labor. Both agencies retain their ability to seek visas for DOL witnesses—for example, DOL’s 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.

³ The exceptions can apply if the Director or Deputy Director of ICE 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.

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 DOL and ICE on effective implementation of the MOU at the national, regional and local levels.

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 DOL 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 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 DOL of the threat.

How should advocates engage with local DOL and ICE offices?

Workers and advocates should consider working closely with DOL and ICE offices to provide the information they 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 DOL and ICE offices to discuss implementation of the MOU and local preferences for labor dispute notification, and to assist in facilitating information-sharing.⁵
2. Advocating that ICE make detainees available to DOL, unions and workers centers for interviews, regardless of whether a DOL 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 DOL 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 local police or insurance companies. Discuss preferred methods of requesting deferred action, parole, or other immigration relief for workers who cooperate with a DOL investigation or who are material witnesses in a prosecution against an employer.
4. In cases where ICE has made arrests that violate worker’s ability to make workplace complaints, evaluate for workers’ eligibility for prosecutorial discretion.

⁵ 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>