

Implementing the DHS New Deferred Action Guidance for Immigrant Workers Engaged in Labor Disputes: An Important Tool for Advancing Workers' Rights

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### About Our Panelists + Organizations



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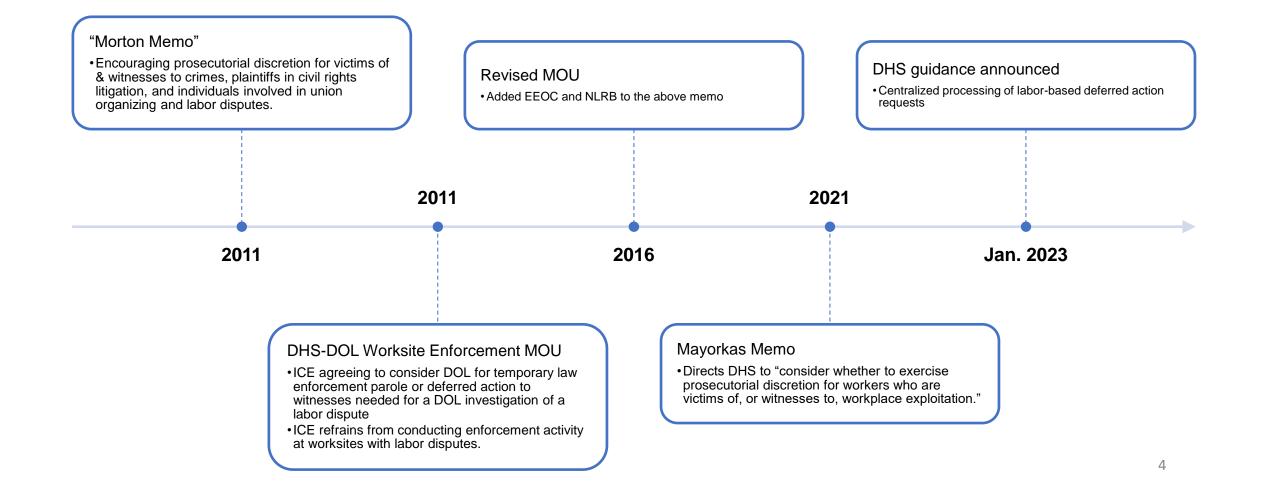
# Overview of DHS Announcement on Deferred Action (DA)

- DHS has long exercised discretionary authority to extend prosecutorial discretion
- 2021 DHS Worksite Enforcement Memo called for development of immigration policies to facilitate DOL's enforcement efforts and alleviate workers' fears, including DA, parole and other relief for workers
- On January 13th, 2023, DHS outlined a new streamlined process for applying for DA on behalf of immigrant workers involved in labor disputes
- Workers receive DA and work authorization for two years with the possibility of renewal

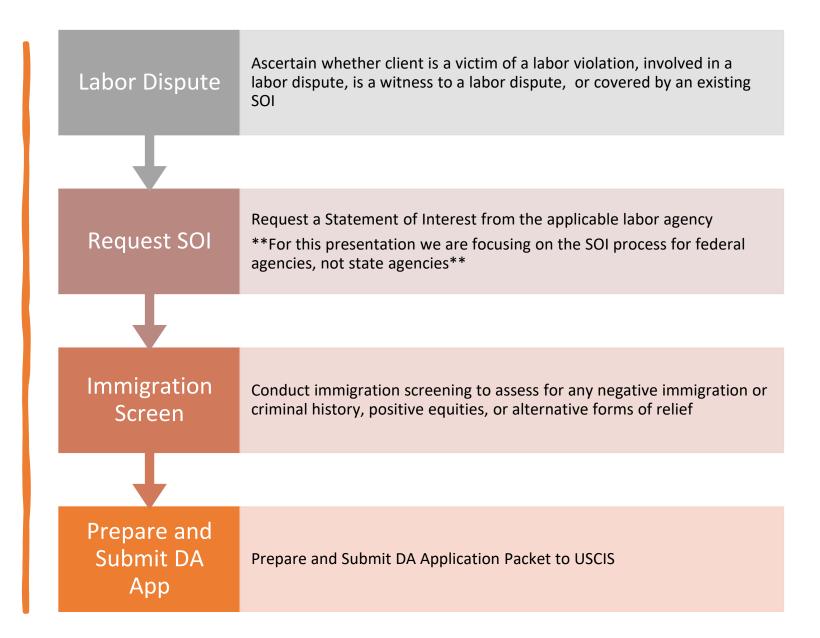


## Where did this new policy come from?

### YEARS OF ORGANIZING & ADVOCACY!



Deferred Action on Behalf of Immigrant Workers: An **Overview** 



### Step 1.A.: Ascertaining Whether Immigrant is a Victim of Labor Abuse

- Very basic labor abuse screening questions:
  - Are you owed back wages/have you been paid minimum wage and/or overtime?
  - Do you have any safety and health concerns in the workplace/have you or others gotten hurt/fear getting hurt?
  - Have you experienced or witnessed discrimination or harassment based on sex, race, national origin, etc.?
  - Have you and/or your coworkers been threatened or retaliated against for talking about/trying to improve working conditions, such as pay, hours, etc.?
  - Big caveat: independent contractors may not fall under the purview of DOL, NLRB or EEOC. See resources at the end of this presentation for more on this topic.



### Step 1.B. If the Worker has Suffered Labor Abuse, Determine if They Have Filed a Labor Complaint With Appropriate Agency/Suggest or Assist Them in doing so.

Labor Agency & Where to Find Info About Complaint Process	Enforces/Protects	SOL
Equal Employment Opportunity Commission (EEOC) <u>https://www.eeoc.gov/filing-charge-</u> <u>discrimination</u>	Federal Anti-Discrimination Laws, such as Title VII & ADA; Intended to prevent discrimination based on race, color, religion, national origin, sex, gender identity, sexual orientation, age, disability	180 days
National Labor Relations Board (NLRB) https://www.nlrb.gov/guidance/fillable- forms	National Labor Relations Act; Protects the right to unionize & organize within your workplace for better working conditions	180 days
U.S. DOL Occupational Safety & Health Administration (OSHA) <u>https://www.osha.gov/workers/file-</u> <u>complaint</u>	Occupational Safety & Health Act; Protects the right to a safe & healthy workplace	Health & safety violations: 6 months Whistleblower violations: generally, 30 days

### Step 1.B. Where to File, Continued

Labor Agency & Where to Find Info About Complaint Process	Enforces/Protects	SOL
U.S. DOL Office of Federal Contract Compliance Programs (OFCCP) <u>https://www.dol.gov/agencies/ofccp/contact/file-complaint</u>	Executive Order 11246 & Anti-Discrimination Laws/Regulations Applicable to Federal Contractors & Sub-Contractors; Intended to prevent retaliation for inquiring about/disclosing compensation and discrimination based on race, color, religion, national origin, sex, gender identity, sexual orientation, or veteran status	Discrimination based on race, color, religion, national origin, sex, gender identity, sexual orientation, or veteran status: 180 days Discrimination based on disability or veteran status: 300 days
U.S. DOL Wage & Hour Division (WHD) https://www.dol.gov/agencies/whd/co ntact/complaints	Federal Labor Standards Act (FLSA)- minimum wage, overtime, child labor, retaliation Family Medical Leave Act (FMLA)- right to have unpaid, protected leave for certain family/medical needs H-2A, H-2B, & H-1B visa standards	FLSA: 2 years (or 3 years for willful violations) FMLA: 2 years (or 3 years for willful violations) H-2A, H-2B, & H-1B: 2-5 years, ideal to file within 2 years

### **Additional Agencies**

State and local agencies may also investigate wage violations, discrimination, safety violations, and interference with workplace organizing!

Consider contacting state agencies to gauge their willingness to explore deferred action to aid their investigations

Step 2: **Requesting** a Statement of Interest from a Labor Agency

- Statements can be requested from any Federal, State or Local Labor Agency
- A statement of interest is REQUIRED for any application for labor based deferred action. Applications without a statement of interest will be rejected as incomplete.
- Statements will be sent directly to DHS, and to the requester.
- DHS will compare SOI included with applications to those they have received directly from agencies
- Only one SOI is required per investigation. Requests should be for expansive letters inclusive of current and former employees or witnesses, and where appropriate family members.
- Never include individually identifying information about workers, including information about their immigration status in request letters



# Step 2: Requesting a Statement of Interest from a Labor Agency Cont.

#### • Generally requests should include:

- Information to identify the workplace involved in the dispute
- Details of the dispute/how it implicates laws the agency enforces
- Any threats or retaliation experienced, witnessed or feared
- Description of how fears of immigration consequences are chilling worker reporting or cooperation, and potential impact on investigation and enforcement of applicable labor law

Enforcing Agency	Where to direct request
Department of Labor (DOL) -OSHA -WHD -OFCCP	Email requests to <u>statementrequests@dol.gov</u> with the subject line "Request for Statement of DOL Interest."
<u>National Labor</u> <u>Relations Board</u> (NLRB)	Contact Regional Office investigating case and send a written request to the Board Agent assigned to the case, the Regional Director, and the Immigration Coordinator, if known
Equal Employment Opportunity Commission (EEOC)	Contact the District Director and Regional Attorney at the local <u>EEOC Field Office</u> . To email the field office's District Director and Regional Attorney, insert their first and last name into the following email format: <u>firstname.lastname@eeoc.gov</u> .

# Step 3: Assess/screen for any negative immigration or criminal history & equities

- All potential DA applicants should have a detailed immigration screening done and should be assessed for any criminal history/law enforcement contact. While there are no overt bars based on immigration or criminal history, the applicant should understand the risks of applying for DA in their specific circumstances.
- If there is any adverse immigration history (ex. prior removal orders) or any adverse criminal history (whether arrests or convictions), these <u>will need to be disclosed on the DA</u> <u>application</u>, and counterbalanced with positive equities (such as community letters of support, connections to the U.S.), etc.
- <u>Practice Pointer</u>: If there is <u>ANY</u> doubt about immigration/criminal history, we <u>HIGHLY</u> recommend you do a FOIA/background check. If the applicant insists on proceeding without these (it is faster not to do them), have them sign an informed consent agreement that they wish to proceed and understand that there are potential risks to doing so.

## Preparing & Filing the Application Packet

- G-28 (if represented)
- G-325a Biographical Information
- Signed Statement Requesting DA
- Labor Agency Statement of Interest
- Proof worker is within scope of SOI
- Proof of identity and nationality
- G-765 Employment Authorization Application
- G-765WS EAD worksheet
- \$410 EAD filing fee or I-912 Fee Waiver and evidence
- Evidence of positive equities (limited)
- Evidence of criminal dispositions if any
- Prior immigration records if any, including documents used in any prior legal entries

#### DHS DA FAQs

See:

https://www.dhs.gov/enforce ment-labor-and-employmentlaws

All applications should be sent to:

USCIS Attn: Deferred Action 10 Application Way Montclair, CA 91763-1350

### Nuts & Bolts: The Cover Letter

- Cover letters should be kept to less than 5pgs
- Cover letters should address the significant government interest served in granting DA, referencing the SOI and labor agency enforcement interests
- Letters should demonstrate worker falls within the scope of the SOI
- Should discuss any additional positive equities, including worker participation/cooperation in investigation if any
  - NOTE: There is no requirement that a worker has cooperated with investigation, or suffered harm, abuse or hardship as long as they fall within the statement of interest
- Letters should discuss worker immigration history, and relevance for adjudication by either USCIS or ICE
- If applicable, discuss factors for EAD fee waiver, and/or expedite criteria for application

### Nuts & Bolts: The Worker's Statement

- Application packets require a "A written request signed by the noncitizen stating the basis for the deferred action request."
- This can be achieved by having client sign the cover letter, or by submitting a short signed statement authorizing submission of the application for deferred action on their behalf
- We also recommend that this signed statement include details of all prior entries into the U.S., as others have received RFEs requesting this information

### The Worker's Statement

• EXAMPLE WORKER'S STATEMENT:

"I, \_\_\_\_\_\_request deferred action as a witness to a labor investigation with support from the [Agency] and this application is submitted on my behalf by [Attorney] . I authorize [Attorney] to represent me in this matter. " Nuts & Bolts: Showing Worker is Within Scope of SOI

- To show worker is within scope of the labor agency SOI, show worker worked for the identified employer, during the specified time period and/or at the specified work site.
- Examples of acceptable forms of proof:
  - W-2s
  - Pay stubs
  - Timecards
  - Contracts
  - Labor agency records that list affected workers
  - Short declaration describing employment terms (dates, position, work site)
  - Confirmation from labor agency that worker cooperated with investigation

Nuts & Bolts: Addressing Negative Equities

For all applicants:

- include birth certificates/marriage certificates for any USC family members
- Include any evidence of correspondence or cooperation with labor agency investigation

- For workers with more complicated criminal or immigration histories:
- Include any criminal dispositions and disclose and frame any criminal history
- Include any documentation related to immigration history (NTAs, etc)
- Include additional equities evidence:
  - Including letters of support from family and community members,
  - Evidence of USC or LPR family members, any hardship that would arise from their removal
  - Medical records indicating need to stay in US for treatment

**Practice Tips:** Considerations and Working With Organizers

- Engage and collaborate with groups that have established trust in worker communities
- Understand the process at labor/employment agency where case is pending if you are not working with a labor/employment lawyer.
  Communicate about events in both cases.
- Large group cases vs. Individual Cases
  Confidentiality
- - Communication with group vs. individual client
- Duration of labor/employment case
  How long will case take to be resolved?
- Selection of agency for filing labor/employment case

### Deferred Action Case Studies: Chicago



NLRB SOI Issued in mid-2022 for workers in food manufacturing through Arise Chicago Worker Center



Test case involving five workers central to organizing in October



Intake clinics for 200+ workers covered by SOI over 6 months



Application prep for ~15 workers per week



SOIs issued since by USDOL (janitorial work; wage theft); OSHA (food prep; witness tampering); Chicago Office of Labor Standards (janitorial work; wage theft) Deferred Action Case Studies: Gainesville, Georgia January 28, 2021, nitrogen leak that killed 6 poultry workers

Second toxic leak took place only 6 weeks later

Requested SOI in April 2021

First SOI issued in the country by OSHA for both leaks in June 2021

Challenges with worker population: literacy and complicated immigration histories

Secured DA for 15 workers so far

### Challenges

Pending cases/RFEs/Hiccups in the Transition to Centralized Processing DA Renewals: Labor investigations/litigation can take years: Educating DHS and proactively requesting expansive SOI letters

Moving quickly vs. making sure your client is fully apprised of risks: To FOIA or not to FOIA? Workers with prior removal orders or with pending cases before EOIR (Immigration Court): These DA apps are adjudicated by ICE, consider requesting PD from OPLA in conjunction with DA

### Worker Organizing and Empowerment

Increased willingness to speak out about abuses among workers with decreased fear of immigration-based retaliation

Improved efficacy of agency-led investigations because of increased witness availability

Strengthened communities of worker advocates based on meaningful relief gained from investigation cooperation

Durable campaign impact as workers become longterm participants in organizing efforts and share their experiences

### Maximizing the Impact

Technical assistance daforworkers@nilc.org

Pro bono opportunities representing low-wage workers

# **Contact Information + Resources**

#### NILC

- <u>Practice Manual: Labor-Based Deferred Action</u> (March 2023)
- <u>daforworkers@nilc.org</u>

#### **Raise the Floor Alliance**

- Follow on Facebook and Twitter @RaisetheFloorAlliance
- <u>RTFLegal@raisetheflooralliance.org</u>

Sur Legal Collaborative

- Follow us on IG, Twitter, TikTok @surlegal\_atl
- info@surlegal.org

