



## **Screening for Civil and Labor Rights Violations in Support of Prosecutorial Discretion**

*August 5, 2021*

On May 27, 2021, ICE Principal Legal Advisor John Trasviña published a memo with guidance on the exercise of prosecutorial discretion for Office of the Principal Legal Advisor (OPLA) attorneys.<sup>1</sup> That memo set forth a list of mitigating and aggravating factors for prosecutorial discretion.<sup>2</sup> One of those mitigating factors that supports a favorable exercise of discretion is “status as a victim, witness, or plaintiff in civil or criminal proceedings.”<sup>3</sup> The memo also provides a general rule that absent serious aggravating factors, any case merits dismissal if the respondent is a noncitizen party in a non-frivolous labor or civil rights action or if the noncitizen is providing assistance to state or federal law enforcement, including in labor and civil rights enforcement cases.<sup>4</sup> This seems to directly implement longstanding [guidance on using ICE discretion for victims, witnesses, and plaintiffs](#)<sup>5</sup> as well as inter-agency agreements with certain federal labor agencies (the U.S. [Department of Labor](#),<sup>6</sup> [National Labor Relations Board](#), and [Equal Employment Opportunity Commission](#)<sup>7</sup>).

This short guide suggests intake questions to screen immigrants seeking prosecutorial discretion for violations of their civil and labor rights and how to discuss those violations in seeking prosecutorial discretion. Civil and labor rights violations are widespread: millions of workers in the U.S. suffer from wage theft alone each year, with over \$15 billion in wages lost to minimum wage violations.<sup>8</sup> This tool is not exhaustive, but rather is intended as a starting point for immigration lawyers, advocates, and organizers to identify civil and labor rights issues for immigrant clients and to advocate to protect immigrant victims and witnesses from deportation.

## Suggested Intake Questions to Screen for Civil and Labor Rights Violations

Attorneys and advocates may want to screen individuals for workplace and civil rights-related violations and proceedings with a few broad questions. Below are suggested intake and follow-up questions:

- *I want to ask you about violations of your civil rights and rights at work. I am asking because if an employer or government official has violated your workplace or civil rights and you reported it to the government, it could help your immigration case and you could benefit from immigration protections. An employer might violate your workplace rights by refusing to pay wages you are owed, for example, or by threatening you. A government official might violate your rights by discriminating against you, for example, because of your race, your gender, or the language you speak. They may also violate your rights by hurting you.*
  1. *Have you ever submitted a complaint to any government agency concerning your conditions at your workplace or any violation of your civil rights?*

*[If yes]*

    - *What did you report in your complaint?*
    - *When and where did you file the complaint?*
    - *Do you know the current status of your complaint?*
  2. *Have you ever filed or been part of any lawsuit involving your rights as a worker or involving your employer? Have you ever been a witness in a lawsuit?*
  3. *Have you ever been involved in any recent or ongoing investigation by a government agency? For example, have you been interviewed by a government official about a violation of your rights or the rights of someone else?*
  4. *Aside from any formal complaints or court cases you've been a part of, do you believe that any of your workplace or civil rights have been violated?*

*[If yes]*

    - *What happened?*
    - *Do you want to report the violation of your labor or civil rights to a government agency in the U.S.?*

If your client is interested in reporting a civil or labor rights violation, you can help them by identifying the appropriate agency. The Trasviña memo lists some of the most common agencies to which immigrants might report:

- Department of Homeland Security Office of Inspector General (fraud and abuse in DHS, including criminal or noncriminal misconduct)

- Department of Homeland Security Office for Civil Rights and Civil Liberties (conditions in immigration detention, civil rights violations in immigration enforcement, including by federal, state, and local officials)
- Department of Justice Immigrant and Employee Rights Section (employment discrimination based on country of origin or immigration status or document abuse, which refers to requiring more or different documents than necessary or requiring specific documents for establishing identity and work authorization as part of the I-9 employment eligibility verification process)
- Department of Labor (occupational safety and health, violations of federal minimum wages, violations of federal family leave, and violations of migrant worker rules)
- National Labor Relations Board (retaliation or discrimination against workers who are organizing collectively)
- Equal Employment Opportunity Commission (employment discrimination based on race, sex, pregnancy, sexual orientation, religion, national origin, disability or age)
- Law enforcement such as the local or state police and FBI (crimes)
- Similar state agencies, such as a state labor agency that might investigate workplace accidents, violations of state minimum wages, or unlawful employer retaliation

This list is not exhaustive and the Trasviña memo explicitly mentions state agencies in addition to the federal agencies listed above.

### **Discussing Civil and Labor Rights Violations and/or Assistance to Law Enforcement in Requesting Prosecutorial Discretion**

Requests for prosecutorial discretion to OPLA should include information about any efforts by the immigrant to assert their workplace or civil rights in court, through a complaint to an administrative agency, or as part of any government agency investigation. You should review any available documentation that shows that a complaint was filed or received, the immigrant provided assistance to state or federal law enforcement in civil or labor rights cases, and/or any further action from the agency. Where possible, you should list a case number, the full formal title of the agency investigating (including regional or divisional office, if relevant), and the date filed.

The Trasviña memo lists immigration cases against individuals in or assisting with civil and labor rights proceedings as “cases that generally will merit dismissal in the absence of serious aggravating factors.”<sup>9</sup> These proceedings are relevant to both the “compelling humanitarian factors” category as well as “significant law enforcement or other governmental interest” category. We recommend that requests for prosecutorial discretion, whether for dismissal or other forms of discretion, mention and discuss both categories. All requests should specify the type of prosecutorial discretion requested, whether dismissal or other forms of discretion.

For the “governmental interest” category of cases, the Trasviña memo directs that it may be appropriate to agree to dismissal where the immigrant is “a cooperating witness or confidential

informant or is otherwise significantly assisting state or federal law enforcement.”<sup>10</sup> The memo further provides that OPLA attorneys should be “guided by the perspectives of the relevant investigating agency.”<sup>11</sup> We recommend emphasizing any open aspect of the civil or labor rights proceedings in such a request, such as ongoing investigation or enforcement or compliance efforts with governmental involvement. Direct involvement of the labor or civil rights agency may not be necessary, and in fact some labor agencies may have policies that prohibit investigators from inquiring into the immigration status of a worker-complainant.

In addition, as noted in the Trasviña memo, immigration attorneys and advocates should consider whether a local, state, or federal law enforcement agency, such as the U.S. Department of Labor, may be able to assist a worker in securing other forms of relief, such as deferred action, stays of removal, or T and U nonimmigrant visas.<sup>12</sup>

The following organizations are available to assist with questions: National Immigration Law Center (hahn@nilc.org); National Employment Law Project (lhuizar@nelp.org); National Domestic Workers’ Alliance (trudy@domesticworkers.org); Jobs with Justice (adam@jwj.org); Tulane Immigrant Rights Clinic (myanik@tulane.edu).

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<sup>1</sup> Memorandum from John D. Trasviña, Principal Legal Advisor, ICE, to OPLA (May 27, 2021) (“May 27, 2021 Trasviña Memo”), [https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement\\_interim-guidance.pdf](https://www.ice.gov/doclib/about/offices/opla/OPLA-immigration-enforcement_interim-guidance.pdf).

<sup>2</sup> For a practice advisory that reviews the memo in its entirety, please see [https://www.nationalimmigrationproject.org/PDFs/practitioners/practice\\_advisories/gen/2021\\_22Jun\\_opla-pd-memo.pdf](https://www.nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/gen/2021_22Jun_opla-pd-memo.pdf). For additional analysis, see <https://www.yalejreg.com/nc/prosecutorial-discretion-in-the-biden-administration-part-3-by-shoba-sivaprasad-wadhia/>.

<sup>3</sup> May 27, 2021 Trasviña Memo at 6.

<sup>4</sup> *Id.* at 8–10.

<sup>5</sup> Memo from John Morton, Director, ICE, to Field Office Directors, Special Agents in Charge, and Chief Counsel (Prosecutorial Discretion: Certain Victims, Witnesses and Plaintiffs) (June 17, 2011), <https://www.ice.gov/doclib/foia/prosecutorial-discretion/certain-victims-witnesses-plaintiffs.pdf>.

<sup>6</sup> Revised Memorandum of Understanding between the Departments of Homeland Security and Labor Concerning Enforcement Activities at Worksites (Dec. 7, 2011), [https://www.dol.gov/sites/dolgov/files/OASP/DHS-DOL-MOU\\_4.19.18.pdf](https://www.dol.gov/sites/dolgov/files/OASP/DHS-DOL-MOU_4.19.18.pdf).

<sup>7</sup> Addendum to the Revised Memorandum of Understanding between the Departments of Homeland Security and Labor Concerning Enforcement Activities at Worksites (May 5, 2016), [https://www.dol.gov/sites/dolgov/files/OASP/MOU-Addendum\\_4.19.18.pdf](https://www.dol.gov/sites/dolgov/files/OASP/MOU-Addendum_4.19.18.pdf).

<sup>8</sup> David Cooper & Teresa Kroeger, Economic Policy Institute, *Employers Steal Billions from Workers’ Paychecks Each Year* (May 10, 2017), <https://www.epi.org/publication/employers-steal-billions-from-workers-paychecks-each-year/>.

<sup>9</sup> May 27, 2021 Trasviña Memo at 9.

<sup>10</sup> *Id.* at 10.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* For more on petition for U visas for victims of workplace crime, please see the practice manual from the National Employment Law Project. Eunice Hyunhye Cho, *U Visas for Victims of Crime in the Workplace: A Practice Manual*, National Employment Law Project (May 2014), <https://www.nelp.org/wp-content/uploads/2015/03/U-Visas-for-Victims-of-Workplace-Crime-Practice-Manual-NELP.pdf>. For USCIS guidance issued in June 2021 concerning employment authorization and deferred action for U visa applicants with pending, bona fide petitions, see U.S. Citizenship and Immigration Services, Policy Alert (Bona Fide Determination Process for Victims of Qualifying Crimes, and Employment Authorization and Deferred Action for Certain Petitioners) (June 14, 2021), <https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20210614-VictimsOfCrimes.pdf>.