

DHS ENFORCEMENT PRIORITIES UPDATE

SEPTEMBER 30TH 2021

On September 30, 2021 DHS issued new enforcement priorities that affect immigration enforcement across the country: [Guidelines for the Enforcement of Civil Immigration Law](#).

WHAT YOU NEED TO KNOW:

This new policy does not take effect until November 29, 2021. Until then, DHS will continue following the interim priorities as constrained by the Fifth Circuit's September 15th ruling. See our resource for more information on the interim priorities: <https://www.ilrc.org/enforcement-priorities-litigation-update-september-2021>.

ENFORCEMENT PRIORITIES:

There are three general priority categories (substantially the same as before) that DHS will target for enforcement actions:

1. **National Security** - people the agency alleges are involved in terrorism or espionage, or related activities, or who otherwise poses a danger to national security.
2. **Border Security** - people apprehended trying to enter unlawfully and people apprehended who entered unlawfully after Nov. 1, 2020.
3. **Public Safety** - people who pose a current threat to public safety, "typically because of serious criminal conduct."

DETAILS FOR "PUBLIC SAFETY" CATEGORY:

Assessing whether someone is a public safety threat is now entirely in the discretion of DHS officers. This means that no particular behavior, criminal conviction, or other conduct automatically makes someone a public safety threat or a priority for enforcement action.

Instead, DHS offers the following undefined aggravating and mitigating factors to make this determination (this list is provided, but agents may consider other factors, including the "broader public interest"):

- Aggravating factors that weigh toward taking enforcement action:
 - The gravity of the offense and sentence imposed;
 - Nature and degree of harm caused by the offense;
 - Sophistication of the criminal offense;
 - Use or threatened use of a firearm or dangerous weapon;
 - A serious prior criminal record.
- Mitigating factors that weigh in favor of the immigrant, and against taking enforcement action:
 - Advanced or tender age;
 - Lengthy presence in the United States;
 - Mental condition that may have contributed to the conduct, physical or mental condition requiring care or treatment;
 - Status as a victim of crime or a witness/victim or party in legal proceedings;

- Impact of the removal on family in the US, such as loss of caregiver or provider;
- Whether they are eligible for humanitarian protection or other immigration relief;
- Military or public service of the noncitizen or their immediate family;
- Time since an offense and evidence of rehabilitation;
- Conviction was vacated **or expunged**;
- A person's exercise of workplace or tenant rights, or service as a witness in a labor or housing dispute.

The memo directs officers to "obtain and review the entire criminal and administrative record and other investigative information" to assess the case and states that agents should not rely on the fact of a conviction or a database search alone. In practice, however, ICE doesn't identify mitigating factors on their own, and is unlikely to look carefully. Advocates should be prepared to monitor carefully and present their own evidence. The guidance also refers to respecting civil rights and guarding against the use of immigration enforcement as a tool of retaliation, but provides very little detail of how these principles apply.

TAKEAWAYS:

- This new policy does not take effect until **November 29, 2021**.
- These new enforcement priorities leave a LOT of room for ICE agents to make their own decisions. Not only are there no strict brightline rules as were outlined in previous memos, the new priority guidelines do not even provide a definition of 'serious criminal conduct'. ICE officers can take actions without any supervisor input or approval.
- Several states have challenged the DHS priorities policies - this litigation is ongoing and it remains to be seen how these new enforcement priorities will interact with the litigation.

DIFFERENCES FROM THE INITIAL POLICIES ANNOUNCED BY THE BIDEN ADMINISTRATION IN JANUARY 2021:

- These are 'permanent priorities' that will remain policy indefinitely, although the administration technically has power to change them again at any time. In contrast, the first set of priorities announced in January were specifically an interim policy, eventually to be replaced.
- There is no longer any pre-approval process for ICE agents to get authorization from supervisors before taking enforcement actions.
- The new enforcement priorities no longer identify people with aggravated felonies or gang-related convictions as specific priorities. However in practice ICE may continue to take enforcement action in those cases under this guidance.

WHAT ELSE?

This memo lays out some guidance, but there are a lot of questions and details left unknown. Secretary Mayorkas has said that more details will be fleshed out in future trainings.

For 90 days after this policy is implemented (starting Nov. 29, 2021), DHS will be reviewing enforcement decisions to monitor implementation. During this period it will be important for advocates to monitor ICE and CBP implementations as well.

Please share what you're seeing on the ground and how the priorities are being implemented. Report immigration enforcement activity in your community here: <https://bit.ly/ICETracker>.

