

**Practice Alert: ICE Interim Enforcement Priorities
February 1, 2021**

This alert provides a brief summary of President Biden's [Executive Order on the Revision of Civil Immigration Enforcement Policies and Priorities](#) and Acting DHS Secretary David Pekoske's January 20, 2021, memorandum entitled [Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities](#).

Interim Enforcement Policies: Effective on February 1, 2021

President Biden's Executive Order revokes the 2017 Executive Order, Enhancing Public Safety in the Interior. Thereafter, the Pekoske Memorandum rescinded and superseded all related prior memos issued by DHS and component agencies (ICE, USCIS, and CBP) that implemented the 2017 Executive Order, and created interim enforcement policies, effective February 1, 2021. The enforcement focus included the following:

1. **National Security.** Individuals who have engaged in or are suspected of terrorism or espionage, or whose apprehension, arrest and/or custody is otherwise necessary to protect national security;
2. **Border Security.** Individuals apprehended at the border or ports of entry while attempting to unlawfully enter on or after **November 1, 2020**, or those who were not physically present in the U.S. before that date (*emphasis added*);
3. **Public Safety.** Individuals incarcerated within federal, state and local prisons and jails released on or after January 20, 2021, who have been convicted of an "aggravated felony," **and** are determined to pose a threat to public safety (*emphasis added*).

The application of the enforcement policies and priorities would include instances in which DHS must make a decision on the following:

- **Notices to Appear:** Whether to issue, serve, file, or cancel an NTA;
- **Arrests, Detention, and Release:** Discretionary enforcement decisions, including deciding whom to stop, question, and arrest; whom to detain or release;
- **ICE Engagement in Removal Proceedings:** Whether to settle, dismiss, appeal, or join in a motion on a case; and
- **Deferred Action or Parole:** Whether to grant deferred action or parole.

All enforcement and detention decisions must be guided by DHS' ability to conduct operations and maintain custody consistent with applicable COVID-19 protocols. However, the memo also does not prevent the apprehension or detention of individuals who are not identified as priorities and may be suspected of being deportable.

100-Day Pause on Removals: Currently Subject to A Temporary Restraining Order

The Administration placed a moratorium on nearly all removals for 100 days, effective no later than January 22, 2021. However, on January 22, Texas sued the U.S. government to stop the January 20 memorandum from taking effect, and on January 26, a judge then issued a [temporary restraining order](#) against the moratorium. **As such, there is no pause on deportations at this time. The TRO is in effect for 14 days. Therefore, please be aware that briefing, a hearing, and/or new action will occur in the coming days on this matter.**

The 100-day pause included the following limited **exceptions**:

1. **National Security:** Cases in which there is a written finding by the ICE director that the foreign national has engaged in or is suspected of terrorism or espionage or poses danger to national security;
2. **Arrival After November 1, 2020:** Cases in which the foreign national arrived in the U.S. on or after November 1, 2020;

3. **Voluntary Waiver of Right to Remain:** Cases in which the foreign national chooses to complete the removal through a voluntary waiver of rights to remain in the U.S.;
4. **Other:** Cases in which the Acting ICE Director, following consultation with the General Counsel, makes an individualized determination that removal is required by law.

The memorandum required that the Acting ICE Director issue written instructions with additional operational guidance by **February 1, 2021**. This forthcoming guidance will include the following:

- **Post-order 90-day review:** Process for individualized review and consideration of the appropriate disposition for individuals who have been ordered removed for 90 days or more, to the extent necessary to implement this pause;
- **Alternatives to Removal:** Assessments of alternatives to removal including, but not limited to, staying or reopening cases, alternative forms of detention, custodial detention, whether to grant temporary deferred action, or other appropriate action.

ICE, USCIS, and CBP to Release New Guidance by April 30, 2021

The memo requires components agencies, ICE, USCIS, and CBP, to conduct review of immigration enforcement priorities during the 100-day period and issue revised policies no later than **April 30, 2021**.

Practice Considerations

- DHS, and component entities, ICE, USCIS and CBP, could issue guidance prior to April 30, 2021. Announcements may occur at any time during the next weeks or months.
- ICE guidance on the implementation of the 100-day moratorium on removals should be released on February 1, 2021. However, the temporary restraining order permits deportations to continue **at this time**. Please monitor the progress of the Texas litigation. Consider filing stays of removal for those clients who are vulnerable to deportation because they are detained or subject to post-order ICE supervision reporting requirements.
- Though the 100-day pause on removals is currently not in effect, new ICE arrests should be reduced and only apply to instances where a citizen is a national security risk; a recent arrival after November 1, 2020; or released from criminal custody after January 20, 2021, after having been convicted of an aggravated felony under 8 U.S.C. § 1101(a)(43), **and** posing a threat to public safety.
- ICE should not take into custody individuals who are released from criminal custody, pre-trial, or after serving non-aggravated felony sentences.
- ICE will not necessarily arrest individuals with aggravated felonies released after January 20, 2021, as the memorandum specifically states that one must also pose a threat to public safety.
- The NTA memo, U.S. Citizenship and Immigration Services, Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens, Policy Memorandum of June 28, 2018, is no longer in effect.
- In the event a client is detained or an NTA is issued, attorneys should consider negotiating release and raise individual factors that would promote DHS' positive exercise of prosecutorial discretion, including release from custody and/or withdrawal or cancellation of the NTA.
- Attorneys should consider actively engaging with the Office of the Principal Legal Advisor to request that it settle, dismiss, or join in a motion on any matters in removal proceedings, or decline from appealing an Immigration Judge grant of relief from removal.

**Special thanks to Sui Chung, Chair, EOIR/ICE Joint Liaison Committee, and the EOIR/ICE Joint Liaison Committee.*