

Irene Bueno

01/18/2001 04:48:19 PM

Record Type: Record

To: Maria Echaveste/WHO/EOP

cc:

Subject: Re[6]: Whistleblower program

Per Barbara here's the final update:

Use Immunity Pilot Program on Practitioners Fraud - they are focusing this on LA. They hope to get it up and running soon because there is a lot of practitioner fraud out there related to implementation of LIFE. If this works, they plan to expand to other cities and in the labor context,

Operating Instructions - Still committed to doing this and plan to do it.

----- Forwarded by Irene Bueno/WHO/EOP on 01/18/2001 04:48 PM -----



Barbara.L.Strack@usdoj.gov

11/27/2000 10:38:00 AM

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Subject: Re[6]: Whistleblower program

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Date: 11/27/2000 9:48 AM

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PIC23735.PCX)

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To: Irene Bueno/WHO/EOP

cc: Dawn M. Chirwa/WHO/EOP

Subject: Re[4]: Whistleblower program

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Subject: Re: Whistleblower program

Author: Irene_Bueno@who.eop.gov at inetgw

Date: 11/20/2000 4:05 PM

Any update?

Irene Bueno

11/10/2000 05:44:24 PM

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To: Barbara.L.Strack@usdoj.gov

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Here's where INS is on the whistleblower program. The details are listed below. I pressed Barbara on the timeframe but she feels this is the best they can do. Let me know if you have questions.

- **Operating guidelines** are scheduled to be completed by the week of 12/8. They will send me a draft.

- **Use Immunity** - they are finalizing this and hope to have resolved so they can discuss the final details and implementation dates at a meeting in early January w/the DAG's office and the LA US Attorney's office.

- **EEOC/Use Immunity Pilot** - INS has taken initial steps to explore setting up a use immunity pilot w/EEOC. The then-Deputy Commissioner discussed this w/Ida Castro, and Barbara has traded follow-up messages w/the Chairwoman's attorney advisor.

- **Wage & House/Use Immunity Pilot** - INS is also planning to contact John Fraser to explore a possible pilot with Wage and Hour.

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9/22/00 meeting

- 3 prong approach

① • Operating Instruction Revision Timeline

10/20	INS revised draft	DOJ consultations have begun
10/27	DOJ review	- share w/ W.H.
11/10	complete consultations with other agencies	
12/1	complete consultations with interested groups	
1/1	complete revisions and INS/DOJ clearance	— Finish by mid Dec.

Other tasks

Establish local POCs for INS and other enforcement agencies — OK
Explore options for agency data sharing with INS — be very careful
Finalize revised INS form for recording "tips" — time, last draft complete
Review and revise, if necessary, district office SOPs for handling union letters — b/c none exists
Create database of these letters.

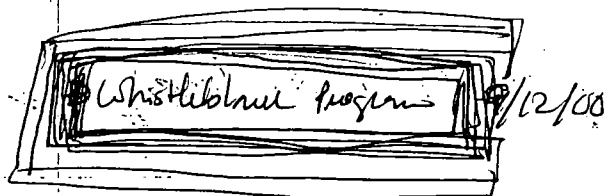
~~Use immunity vs. deferred action~~
Use immunity vs. deferred action — no final decisions but thinking it as a continuum — not either/or.

- ② • Use immunity is the minimum could be interim step for a certain period of time
③ • Timeline — want a schedule plan
— Education will be an integral part.
— How to deal with the problem of aggravated felons.

Talked to John F. — Houston

— Chicago

- ③ • Deferred Action — Case by case.



Use - Notorious
Immunity - USA by concerned that we would impair the witness - b/c ^{credibility}
INS given in a way. benefit the ~~credibility~~ ^{credibility} question
- Pilot Program
- Are interested in that.
Would not give them work authorization

DO/INS
- Molt - w/ other agencies
- Operating Instructions
District & Sector Directors must approve

D.A. ^{eligible to apply for EAD}
Refused Action - DO make recommendations -
Law Enforcement & Criminal - immigration & humanitarian

Whistleblower Program (WBP) - Why not WBP to encourage them to come forward?
WBP - puts them in a ~~at~~ better position.
- Remedies are built in - to wage & hour + ~~and~~ civil rights
- Use Immunity - puts them ~~at~~ in some position
(INS) - try to harmonize conflicting mission
- Operating Instructions sufficient - but need to be revised - Barbara S
is mty w/ unass. mty advocates, agencies.

ME ~~ME~~ Limbo is OK - don't want to revise the
- Want to send a message to EH that we will defend labor &
civil rights laws.
- Need to give some incentive to ~~employees~~ ^{employees}
- Do a ~~pilot~~ pilot.
- Need to ~~change~~ ^{change} the climate

INS - wants to ~~institute~~ institutionalize - operating instructions & manuals

ME
End of the week. ① How many cases - how many from D.A.
② Divided up union

Why are immunity better — INS would go some place else

- Balance mission

- USAH - screening

→ What about cases that don't get to prosecution?

- INS is willing to use it in non-prosec.

- Don't tell INS cases. If you tell INS, INS will not

issue NTA's that begin the process (Notice to Appear).

INS ^{Want} ~~On~~ a more routine basis, we want that through the operating instruction & use immunity

— DA + EAD is an arsenal for INS important efforts

DA - accuracy unlawful status time

ME - Some bridging the 2 extremes

① Operating instruction — want revised before we leave.
(timeline how it would work) PPH

② Use Immunity Pilot

③ Set of guidelines ~~to~~ to expand DA — Study in a few districts could be expanded.

Next mty Middle led ~~to~~ or FI

D.A. — Prosecutorial review ~~to~~ ~~and~~ avoid national review.

= Fay & AMM 514-3242 ~~4232~~ = FKH

MEMORANDUM

TO: MARIA ECHAVESTE
FROM: IRENE BUENO
RE: MEETING ON WHISTLEBLOWER PROGRAM – Tuesday, September 12, 2000 at 11:00 am in your office

PURPOSE: You are meeting to discuss with INS a proposal put forth by the AFL-CIO to institute of the practice of granting DED to individuals who bring employment or civil rights complaints.

INS is resistant so I recommend that you press them about the reason that they oppose instituting a whistleblower program based on deferred action. Furthermore, if they continue to oppose deferred action, you should press them to finalize their “use immunity program” and ask them to review it with AFL.

BACKGROUND: You requested this meeting to discuss the AFL-CIO proposal to institute a whistleblower program that protects immigrant workers from immigration consequences when bring report or bring any labor or discrimination complaints by granting these individuals deferred action (see attached memo from Gerry Shea). They are proposing that the INS institute a whistleblower program similar to the one that the INS Director used in the Minneapolis Holiday Inn Express case. In that case, the INS Commissioner exercised her prosecutorial discretion and granted deferred action status to seven workers who were fired after they filed labor claims and the employer called the INS to report them. Under deferred action, they were granted two years and work authorization.

INS has standard operating procedures, in place for several years, that require field personnel to seek to determine if union organizing activities are being conducted at a business that allegedly has hired undocumented workers. In those circumstances, these procedures call for evaluating the extent of the alleged immigration violations and coordinating with other federal agencies before the decision is made to conduct worksite enforcement operations. INS is reviewing certain cases to determine if these procedures have been appropriately followed (See attached).

INS has met with AFL-CIO and have been looking at this issue but do not believe it is appropriate to institute a whistleblower program to grant deferred for several reasons. It appears that INS is giving an award of a immigrant benefit to individuals who bring labor or

discrimination complaints. Deferred action is only granted in very extraordinary cases and district directors must approve it. Deferred action is only temporary and does not lead to permanent residency and the individual cannot travel. It is more difficult to deport an individual after they have been granted deferred action because they have more equities. INS thinks that a legislative fix may be appropriate similar to T-visa proposal for trafficking victims or the "use immunity" proposal described below.

To address this situation, INS is working on concept of "use immunity" for immigrants who bring labor or discrimination complaints. Under "use immunity", a practice that is used in the criminal context, the INS would not use the fact that you stepped forward to bring a complaint as the basis for an immigration action. However, this may not work in some cases because other law enforcement agencies is interested in knowing more about the immigrant which could trigger an immigration action. This proposal is still being reviewed

ATTENDEES:

Barbara Strack
Bo Cooper
Dawn Chirwa
Barbara Chow – invited
Irene

American Federation of Labor and Congress of Industrial Organizations



815 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 637-5000
<http://www.aflcio.org>



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Capt. Duane Woerth

John T. Joyce
Jay Mazur
James J. Norton
Douglas H. Dority
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Andrew L. Stern
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Terence O'Sullivan

Morton Bahr
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Michael Sacco
George F. Becker
Patricia Friend
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Leon Lynch
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Edward L. Fire
R. Thomas Buffenbarger
Stuart Appelbaum
Michael J. Sullivan

MEMORANDUM

To: Maria Echaveste

From: Gerry Shea

Subject: Whistleblower Protection for Undocumented Workers

Date: August 14, 2000

In many workplaces across the country – particularly in those with a significant immigrant population – labor standards violations increasingly are going unreported because a growing number of workers are afraid to file complaints, or otherwise assert their legal rights, for fear of being reported to the INS by their employer in retaliation, or being denied the protection of reinstatement and other remedies that are contingent on the worker's authorization to work in the U.S. This unfortunate development, in turn, is contributing to the widespread exploitation of workers, both documented and undocumented, by unscrupulous employers.

Recently, the AFL-CIO hosted regional immigration forums in New York, Atlanta, Chicago and Los Angeles, where immigrant workers described in moving detail how their employers often subject them to unlawful discrimination, exploitation and abuse, confident that the workers, because of their immigration status, will not report the incidents to the appropriate authorities. In those rare instances where the workers summoned the courage to assert their workplace rights, many employers responded by notifying the INS. (See enclosed report, Building Understanding, Creating Change: A Report on the AFL-CIO Forums on Immigrant Workers' Rights, August 2000, pp. 5-9).

Since 1984, there have been several legal decisions that have established the principle that undocumented workers are "employees" for the purposes of labor standards enforcement. In the leading case of Sure-Tan v. NLRB, 467 U.S. 883 (1984), the U.S. Supreme Court addressed the coverage of undocumented workers under the National Labor Relations Act, and explained that providing undocumented workers the protection of our nation's labor laws promotes the purposes of both our labor and immigration laws, and actually serves to strengthen the rights of duly authorized workers.

On the other hand, the current system of “employer sanctions” embodied in the Immigration Reform and Control Act of 1986 (IRCA), has failed to deter employers from hiring workers who lack the proper documentation. Indeed, many unethical employers brazenly violate IRCA’s employer sanctions provisions, and knowingly hire undocumented workers at substandard wages and subject them to deplorable working conditions. On those occasions when an undocumented worker stands up and seeks to vindicate the public rights embodied in our labor and employment laws, his or her ultimate prize is deportation. It is chiefly because of this that this past February, the AFL-CIO Executive Council unanimously passed an immigration policy statement calling for, among other things, whistleblower protection for undocumented workers who report violations of worker protection laws or cooperate in labor standards investigations. There is clearly a need for such protections.

In the recent case involving the Minneapolis Holiday Inn Express, the Immigration and Naturalization Service exercised its prosecutorial discretion and granted “deferred action” status to seven workers who, after filing labor standards claims, were subjected to retaliatory referrals to the INS by their employer. Under the “deferred action” procedure applied in that case, the INS permitted the workers to remain in the United States for two years and granted them work authorization. Unless this remedy is routinized, undocumented workers will continue to be silent victims of labor standards abuses, resulting in the suppression of the wages and working conditions of all workers.

As the Holiday Inn case demonstrates – and as our own research suggests – the INS has ample discretion to defer removing undocumented workers from the country as a means of helping to ensure that important worker protection laws are not subverted by opportunistic employers. We therefore propose that the INS grant “deferred action” status, *with work authorization*, to those workers who are referred to the INS in the course of or furthering their efforts to assert their workplace rights. Moreover, the INS should also grant “deferred action” status to workers who are discharged – in the absence of INS intervention – in violation of federal labor laws, where such adjustment to the workers’ immigration status is required to give full effect to the remedy for such violation.

Providing whistleblower protection to undocumented workers would serve to enhance employer compliance with basic labor and employment standards, thereby protecting the rights of all workers to pursue their workplace rights without fear of repercussions, regardless of their immigration status. We urge the Administration to move expeditiously to address this important issue and to establish through administrative action this vital protection for our nation’s most vulnerable workers.

We look forward to working with you to develop an effective solution to this very serious problem.

INS

O.I. 287.3a QUESTIONING PERSONS DURING LABOR DISPUTES

[When information is received] concerning the employment of undocumented or unauthorized aliens, consideration should be given to whether the information is being provided to interfere with the rights of employees to form, join or assist labor organizations or to exercise their rights not to do so; to be paid minimum wages and overtime; to have safe work places; to receive compensation for work related injuries; to be free from discrimination based on race, gender, age, national origin, religion, handicap; or to retaliate against employees for seeking to vindicate these rights.

[Whenever information received from any source creates a suspicion] that an INS enforcement action might involve the Service in a labor dispute, a reasonable attempt should be made by Service enforcement officers to determine whether a labor dispute is in progress. The Information Officer at the Regional Office of the National Labor Relations Board can supply status information on unfair labor practice charges or union election or decertification petitions that are pending involving most private sector, non-agricultural employers. Wage and hour information can be obtained from the United States Department of Labor (Wage and Hour Division) or the state labor department.

In order to protect the Service from unknowingly becoming involved in a labor dispute, persons who provide information to the Service about the employer or employees involved in the dispute should be asked the following: 1) their names; 2) whether there is a labor dispute in progress at the worksite; 3) whether they are or were employed at the worksite in question (or by a union representing workers at the worksite); and 4) if applicable, whether they are or were employed in a supervisory or managerial capacity or related to anyone who is. Information should be obtained concerning how they came to know that the subjects lacked legal authorization to work, as well as the source and reliability of their information concerning the aliens' status.

It is also appropriate to inquire whether the persons who provide the information had or have a dispute with the employer of the subjects of the information. Likewise, the person providing the information about the aliens should be asked if the subjects of the information have raised complaints or grievances about hours or working conditions, discriminatory practices or about union representation or actions, or whether they have filed workers' compensation claims.

Whistleblower 9/11/12

- INS Operating Instructions - will fax
- 1996 - 1997 - ^{updated} all have our mission ~~to~~ so we work together

~~thinking~~ thinking about in wake of MK, can INS be smarter
& not be used - implementation

- Barbara met w/ John Chaff of AFL ~~June 30~~ June 30
define time frames

Have ~~not~~ had success in specific instances but learned
there was a policy NLRB can - so INS stayed
out - Ok when it but not consistent

may be ~~hard~~ hard if INS is focused
to pull back.

- Cnb Call

- AG starting 2 years ago - immigration practitioner found
Notorious - no ~~defining~~ witnesses

Concept ^{the} "use immunity" - the fact you stopped
paper forward could not ~~trigger~~ trigger immigration

action. But ~~tricking~~ tricking b/c law enforcement
don't want to know the info about the indiv.

not one that transaction

Brother to Labor (Law) cases but don't want to give

Some ~~immigration~~ ~~prize~~ prize - ~~get~~ get off
✓ relief - ie wage & hour -

basic
public law.

extraordinary relief

District Director must approve

- Deferred Action is only limbo - but can apply OAD

but need docs not lead anywhere.
can't travel

- Institutionalize could undermine the exploitation problem

- Harder to remove them - like trafficking - T-visa - like

• Informants or victims

• Humanitarian - elderly, ill

• Domestic violence victims - gun and at
the end.

- Legislation ~~is~~ hoped ~~to~~ for set