



## AT A GLANCE

# FEB 18<sup>TH</sup> INTERIM ICE JOHNSON MEMO

On February 18th ICE Acting Director Tae Johnson issued an interim Memo to ICE regarding how the agency will interpret and carry out the [DHS enforcement priorities](#) set forth by former Acting DHS Secretary David Pekoske in January, hereafter – the [Johnson Memo](#). **The Johnson Memo is temporary guidance to ICE and does not govern CBP, USCIS, or other DHS agencies.** It also does not change any existing state or local laws regarding how local law enforcement may or may not work with ICE.

The new ICE guidance is **effective immediately** and will remain in effect until DHS Secretary Alejandro Mayorkas issues new DHS enforcement guidelines, expected in less than 90 days. To the degree that this memo conflicts with DHS-wide policies issued in January, this new Johnson Memo controls, at least for ICE.

Unfortunately, ICE has taken the opportunity in this operational guidance to seize more power to target people for enforcement.

### Johnson Memo at a Glance:

- 1) Expands the definition of who is an enforcement priority by broadening the “public safety” category.
  - a. Reinstates ICE’s ability to conduct raids by removing the requirement that a person must be released from jail or prison after January 21, 2021 – meaning ICE might go after people with old convictions who have no current charges.
  - b. Adds a new gang-related category to the “public safety” enforcement priority definition to enable ICE to continue excessive targeting of young men of color.
- 2) Enables enforcement actions outside the priorities if the officer gets approval from the Field Office Director (FOD) or Special Agent in Charge (SAC).
- 3) Disavows some collateral arrests – ICE must justify and seek preapproval before arresting people, so they can’t pick up extra people who aren’t their target – unless they fall in the enforcement priorities.
- 4) Requires ICE field offices to report weekly on ICE arrests to the Office of Policy and Planning (OPP).
- 5) Relies on criminalizing framing about immigrants as a threat to ‘public safety’ throughout.

### **What ICE Enforcement Actions Are Covered By This Memo?**

The Johnson Guidance covers nearly all of ICE's civil immigration enforcement actions, including ICE's discretion to: issue detainers; arrest a person based on an existing detainer; to stop, question, or arrest people; issue, file, or cancel a Notice to Appear to commence removal proceedings against a person; detain or release a person from ICE custody; grant deferred action or parole; and decide when and how to deport people who already have final orders of removal. The memo does not appear to apply to any ICE decisions on criminal cases, such as referral to prosecution for illegal entry or reentry.

### **Who is an Enforcement Priority?**

- **“National Security”** – This will be used against people who ICE alleges are involved in terrorism, spying, or other threats to “national security.” This does not apply to general criminal activity.
- **“Border Security”** – This applies to anyone who is attempting to enter the United States unlawfully at a port of entry (e.g. with fake papers) or who entered unlawfully on or after November 1, 2020.
- **“Public Safety”** – This involves a person's criminal history and assessment of current ‘threat’:
  1. People whom DHS thinks poses a threat to public safety, **and**
  2. Has *either* of the following:
    - i. 1) an aggravated felony conviction, **or**
    - ii. 2) Has participated in a criminal street gang or has a gang related conviction.
- Both pieces must be true: there must be a determination of a threat to public safety, **plus** an “aggravated felony” *conviction* (not charge) **or** gang conviction/participation.
- Even if you are currently in criminal custody and do have an aggravated felony conviction or gang conviction/participation, you can still argue that you're not a threat to public safety.
- ***In the weeds...***
  - “Aggravated felony” is a misleading term of art in immigration law that encompasses all kinds of criminal convictions, many of which are not “aggravated” in any way and may not even be felonies. The memo says someone is presumed to have an aggravated felony if the ICE agent “*has good-faith belief based on either a final administrative determination, available conviction records, or the advice of agency legal counsel...*” However, it is a complicated analysis and ICE often gets these wrong.
  - The Memo defines the gang category as someone who has a conviction with an element of criminal street gang participation (as defined in 18 U.S.C. § 521(a)) **or** is 16 years and older and “intentionally participated” in a gang organization to “further the illegal activity of the gang.” These kinds of determinations are often based on racist, unreliable, and secretive gang databases.
  - **How does ICE assess whether a person is a threat to public safety?** Even if someone has an aggravated felony conviction, or is determined to fall into the gang category, ICE must still find the person to be a threat to public safety. The Memo states that ICE is to consider “extensiveness, seriousness, and recency of criminal activity” as well as mitigating factors such as

“personal and family circumstances, health and medical factors, ties to the community, evidence of rehabilitation and (available immigration relief).” ICE agents are directed to take special care with people who are elderly, mentally ill, or have certain pending motions, appeals, or applications. Deporting these individuals also requires special approval.

### **Can ICE Still Target People Outside of These Three Priorities?**

ICE can still target people who do not fall in these enforcement priority categories. But before taking such action, ICE officers are instructed to provide a written justification and seek preapproval from an ICE Field Office Director (FOD) or Special Agent in Charge (SAC).

### **What About the Moratorium on Removals?**

The January Pekoske memo created a 100 day moratorium on deportations, but this is currently blocked in court. As a result, the Johnson Memo doesn't address it. However, the Johnson Memo does apply to ICE's individualized discretion to deport people with final orders of removal.

### **Are There Advocacy Opportunities?**

Remember, these are INTERIM priorities, giving us a chance to **advocate for stronger longer-term policy** changes with DHS and organize around individual cases.

1. The Johnson Memo requires ICE weekly written reports of all enforcement actions and removals taken, with narrative justifications, to DHS HQ. The memo does not require these reports to be made public, but advocates should try to get DHS to publish them, as well as coordinate on FOIA requests.
2. The Johnson Memo promises that ICE will create and maintain a system for receiving and evaluating prosecutorial discretion requests but does not provide a timeline or further detail. We must demand immediate action on this.
3. As the Johnson Memo goes into effect, please share how the priorities are being implemented on the ground, and what strategies have been effective for raising complaints of violations to DHS.

As we advocate for stronger policies, we demand that none of our community members be summarily discarded because of contact with a racist criminal system. We reject the Trumpist policymaking of Acting ICE Director Tae Johnson in expanding ICE's definitions of the enforcement priorities. We also denounce the memo's use of misleading “public safety” and “national security” language to demonize immigrants, and the use of the racist criminal system to identify, detain, and deport Black and Brown communities.

The positive portions of ICE's Memo, however, are a testament to what can be accomplished through community power and organizing, and we applaud the community first and foremost. **This is the time to protect our people and push the Biden administration as hard as we can.**

Advisories aimed at community members, immigration attorneys, and criminal defenders are forthcoming.