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Limited-Scope Review of the Executive Office
for Immigration Review's Response to the
Coronavirus Disease 2019 Pandemic

EVALUATION AND INSPECTIONS DIVISION



EXECUTIVE SUMMARY

Limited-Scope Review of the Executive Office for Immigration Review's Response to the Coronavirus Disease 2019 Pandemic

Introduction

Objectives

As part of its oversight efforts in response to the coronavirus disease 2019 (COVID-19) pandemic, the U.S. Department of Justice (DOJ) Office of the Inspector General (OIG) initiated a limited-scope review of the Executive Office for Immigration Review's (EOIR) handling of certain challenges presented in conducting operations during the COVID-19 pandemic. We assessed: (1) EOIR's communication to staff, parties to proceedings, and the public about immigration court operations; (2) its ability to mitigate health risks while maintaining operations during the COVID-19 pandemic; (3) its use of worksite flexibilities; and (4) its use of personal protective equipment (PPE).

Methodology

For this limited-scope review, we conducted fieldwork remotely due to Centers for Disease Control and Prevention guidelines and DOJ policy on social distancing. We examined DOJ and EOIR guidance, policies, and practices related to COVID-19, as well as the federal government's guidance and direction to federal agencies during the pandemic. Our fieldwork included telephonic interviews, information requests, data collection and analyses, and document reviews. EOIR also provided written replies to a series of questions from the OIG about EOIR's response to the pandemic.

The DOJ OIG received a series of complaints beginning in March 2020 from a variety of stakeholders—including parties associated with respondents, prosecutors, and the EOIR courts themselves—relating to EOIR's decisions to maintain operations, potential exposure to COVID-19, and communication from EOIR regarding COVID-19. The topics of these complaints informed the focus of this limited-scope review.

Recommendations

The OIG made nine recommendations to assist EOIR in responding further to the COVID-19 pandemic and preparing for any future pandemic.

Results in Brief

EOIR has had to balance difficult, sometimes conflicting challenges presented by the pandemic. We found that EOIR took some actions to help mitigate the risk of COVID-19 for staff and parties to immigration proceedings but various factors limited the efficacy of these efforts. Although some of the factors fell outside EOIR's control, we identified shortcomings in decisions and practices on the part of EOIR that hindered its response.

While EOIR suspended certain dockets to reduce the number of individuals in EOIR office space and immigration courts, it continued to hear detained docket cases and kept filing deadlines in place for many immigration cases. As a result, staff and parties to immigration proceedings had to enter EOIR space for those ongoing matters. Additionally, procedural decisions—such as waiving in-person appearances—fell to each immigration judge and we found that these decisions were inconsistent, were not always successfully communicated, and sometimes contributed to exposure risk for staff and parties to immigration proceedings.

Further, we found that EOIR had limited electronic filing capability, relying primarily on in-person, paper filings. Although it initiated an electronic filing system before the pandemic, electronic filing was an option in only 14 of 69 immigration courts in March 2020. To help mitigate the risks posed by COVID-19, EOIR instituted a series of changes that included allowing temporary email filing, expanding the electronic filing system to 33 additional immigration courts, and making video teleconferencing available for hearings in some immigration courts. In addition, EOIR increased telework, promoted social distancing, and provided PPE to staff. However, we determined that EOIR did not apply these changes evenly and was also hampered in these efforts by a lack of supplies and equipment.

Additionally, we found that EOIR proactively created a team to address COVID-19 concerns and its then Director communicated with the entire agency about the pandemic, including by issuing guidance to immigration judges on using their authorities to mitigate exposure in the courtroom. However, EOIR's initial communication related to the pandemic was sometimes unclear, inconsistent, and untimely, which resulted in confusion and anxiety. We identified issues with EOIR's communication on topics that included remote work options, changes to the operational status of immigration courts, potential COVID-19 exposure

incidents, and cleaning of spaces used by staff and other participants in immigration hearings.

While EOIR follows DOJ direction on reopening immigration courts, it has developed a checklist to assist the courts in preparing for the shift to normal operations while trying to mitigate risks from COVID-19. Additionally, EOIR has been working with DOJ to authorize some EOIR positions in the immigration courts for federally coordinated COVID-19 vaccinations, which should help minimize some risk to staff.

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Introduction

The Executive Office for Immigration Review (EOIR), a component of the U.S. Department of Justice (Department, DOJ), is responsible for adjudicating immigration cases. EOIR interprets and administers federal immigration laws by conducting immigration court proceedings, appellate reviews, and administrative hearings under delegated authority from the Attorney General.

EOIR Structure

EOIR is led by a Director who is a career member of the Senior Executive Service and appointed by the Attorney General. Within EOIR, the Office of the Chief Immigration Judge (OCIJ) provides overall program direction, coordinates the operations of the immigration courts, establishes policies and procedures, and exercises administrative supervision of the immigration judges in immigration courts throughout the country. The OCIJ is headed by a Chief Immigration Judge and includes Deputy Chief Immigration Judges, as well as Assistant Chief Immigration Judges (ACIJ), immigration judges, and other staff. EOIR's immigration judges are responsible for conducting immigration court proceedings and deciding matters before them. When adjudications of immigration judges are appealed, these matters are decided by EOIR's Board of Immigration Appeals (BIA), which consists of Appellate Immigration Judges (previously called Board Members). In June 2020, EOIR had 2,073 employees total, 512 at headquarters and 1,561 in the 69 immigration courts throughout the United States.

EOIR Immigration Proceedings

The U.S. Department of Homeland Security (DHS) initiates removal proceedings by serving the immigrant, referred to as the respondent, with a Notice to Appear (NTA) and filing a charging document with one of the immigration courts run by EOIR. The NTA orders the respondent to appear before an immigration judge for removal proceedings. Respondents can be adults, juveniles, or families, and they may seek an attorney or other authorized representative to represent them in immigration court. Respondents are not entitled to court-appointed or free counsel; but they may represent themselves, pay for counsel, or seek pro bono representation. DHS attorneys from U.S. Immigration and Customs Enforcement (ICE) represent the federal government in the removal proceedings. EOIR adjudicates these immigration cases.

The initial hearing for a respondent before an immigration judge is called a *master calendar hearing* and is scheduled by the immigration court. During the master calendar hearing, the immigration judge explains the alleged immigration law violations, as well as the respondent's rights, including the right to have representation.

If a respondent would like to apply for protection or relief from removal, such as asylum, the immigration judge will schedule an *individual merits hearing*, during which the respondent and the DHS attorney present arguments and evidence related to the respondent's application. The EOIR immigration judge then rules on the respondent's application for relief from removal.

While immigration judges primarily conduct master calendar and individual merits hearings, they also hold other types of hearings, such as bond hearings, during which immigration judges determine whether to grant bond to a respondent and the amount of the bond. Immigration hearings are held in person or through video teleconference (VTC), depending on the immigration court, the type of case, and the docket.

EOIR has a longstanding practice of holding some hearings via VTC, and since 2018 every EOIR courtroom has had a VTC system as part of the standard courtroom equipment.¹ As shown in Table 1 below, EOIR adjudicated immigration cases on five dockets during the scope of this review.

Table 1

EOIR Dockets During Review Scope

Detained	Adult	Respondents are held in DHS custody in detention centers.
	Juvenile	Respondents are held in U.S. Department of Health and Human Services custody in shelters.
Non-detained	Adult	Respondents are monitored and living in the United States throughout proceedings.
	Juvenile	
Migrant Protection Protocols		Respondents remain in Mexico and travel to the U.S. border for their hearings.

Sources: EOIR website and DHS website

Migrant Protection Protocols (MPP) were instituted in January 2019 and directed that “certain foreign individuals entering or seeking admission to the United States from Mexico—illegally or without proper documentation—may be returned to Mexico and wait outside of the United States for the duration of their immigration proceedings, where Mexico will provide them with all appropriate humanitarian protections for the duration of their stay.”² In order to be allowed to enter the United States at the border for their hearings, individuals subject to MPP had to present a DHS-issued document called a “tear sheet,” which included information about the date and time of their immigration hearings, to Mexican authorities.³

Adults on the detained docket are held in detention centers operated by ICE. Unaccompanied Alien Children (UAC) on the juvenile detained docket are held in shelters operated by the Department of Health and Human Services’ (HHS) Office of Refugee Resettlement (ORR). The UACs living in a shelter awaiting

¹ The Office of the Inspector General (OIG) has announced a separate, ongoing review of the use of such technology for certain immigration hearings. DOJ OIG, “Ongoing Work: Inspection and Review of EOIR Immigration Hearings Conducted Via Video Teleconference,” www.oig.justice.gov/ongoing-work.

² DHS, “Migrant Protection Protocols,” January 24, 2019, www.dhs.gov/news/2019/01/24/migrant-protection-protocols (accessed April 14, 2021).

³ DHS issued a press release stating that on February 19, 2021, it would begin phase one of a program to process respondents who were returned to Mexico and have active MPP cases pending with EOIR. DHS said that it would announce a virtual registration process that will be available to MPP respondents anywhere and, once registered, the respondents should wait for further information and should not approach the border until instructed to do so. DHS, “DHS Announces Process to Address Individuals in Mexico with Active MPP Cases,” February 11, 2021, www.dhs.gov/news/2021/02/11/dhs-announces-process-address-individuals-mexico-active-mpp-cases (accessed April 14, 2021).

placement with a sponsor are considered detained because they are under the care and custody of HHS ORR.⁴ Once they are placed with a sponsor—a decision made by HHS, not an immigration judge—the UACs transition to the non-detained docket.

⁴ 8 U.S.C. § 1232(b)(1) states that “the care and custody of all unaccompanied alien children, including responsibility for their detention, where appropriate, shall be the responsibility of the Secretary of Health and Human Services.”

Results of the Limited-Scope Review

EOIR shared many of the general difficulties that the coronavirus disease 2019 (COVID-19) pandemic presented to other federal agencies, though the nature of its mission and operations created certain unique challenges for EOIR. Specifically, EOIR has been responsible for ensuring protection of due process rights for respondents while simultaneously mitigating the risk of infection to those same respondents, other litigants, and EOIR employees. Additionally, DOJ classifies EOIR's adjudication of immigration cases, issuance of stays of removal or deportation, and issuance of administrative subpoenas through the Office of the Chief Administrative Hearing Officer as essential functions. The Office of the Inspector General (OIG) found that EOIR took certain actions to respond to the pandemic and attempt to mitigate the risk of COVID-19 for staff and parties to immigration proceedings. Such actions included creating a task force led by the acting EOIR Deputy Director to address COVID-19 related concerns; sending memoranda and emails from the Director to the entire agency about the pandemic; setting up an "incident" email box where staff could report possible COVID-19 cases or exposure; and instituting a series of temporary changes designed to help minimize in-person transmission. These temporary changes included suspending the non-detained and Migrant Protection Protocols (MPP) dockets, allowing email filing, increasing telework, providing personal protective equipment (PPE) to staff, and employing social distancing in the workplace. EOIR also expanded its electronic filing system to additional immigration courts and developed the use of video conferencing platforms to allow parties to proceedings to attend hearings remotely in some immigration courts. However, we found that EOIR has only partially overcome the challenges presented by the pandemic. While EOIR was limited by some external factors outside its control, we also identified shortcomings in its internal decisions and protocols in response to COVID-19.

We found that EOIR's continued hearing of cases for detained individuals and the timing of filing deadlines for immigration cases required some staff and parties to come to EOIR spaces in person, especially when individual immigration judges did not exercise their authority to postpone hearings or allow the respondent's representative to participate remotely. Additionally, EOIR was limited in its efforts to provide PPE and take other precautions to mitigate the risks for individuals who had to report to EOIR facilities due to factors including supply chain limitations. Finally, we found that EOIR's initial communication about the pandemic was untimely, unclear, and inconsistent, leading to confusion and anxiety for staff and parties to immigration proceedings. As EOIR has begun to reopen its courts for non-detained hearings, it has created a detailed checklist to prepare each location for the return to work in person and the incumbent risk of COVID-19 transmission that brings.

EOIR's Continued Hearing of Detained Cases and Timing of Postponements for Non-Detained Cases Resulted in Filing Requirements That Required Some Staff and Parties to Immigration Proceedings to Come to EOIR Spaces in Person

Early in the COVID-19 pandemic, EOIR issued a blanket postponement of hearings for non-detained and MPP cases in March and April 2020. However, EOIR proceeded with hearings for cases on the detained docket for both adults and juveniles who were held in facilities operated by the U.S. Department of Homeland Security (DHS) and the U.S. Department of Health and Human Services (HHS), respectively. After April 2020, EOIR adopted the approach of postponing non-detained hearings for approximately 2 weeks at a time. Because filing deadlines for these non-detained hearings often were more than 2 weeks before a scheduled hearing date, we found that the timing of these postponements often meant the parties to proceedings still had to adhere to the original filing deadlines for the non-detained cases. This had the

effect that throughout the pandemic many filing deadlines did not change for parties to proceedings in cases other than MPP cases. Further, although EOIR issued guidance in March 2020 that encouraged immigration judges to exercise their discretion to limit in-person court appearances, we found that procedural decisions by judges varied across immigration courts and were often issued very close to the time of the scheduled hearings. These factors required some staff and litigants to appear in person in immigration courts, potentially exposing them to COVID-19. Some litigants and staff also have had to report in person to submit and process, respectively, court filings because EOIR does not have electronic filing in all immigration courts, electronic filing is not mandatory in immigration courts where it is available, and EOIR began phasing out email filings partway through the pandemic. While EOIR implemented a telework plan, only about a third of EOIR staff were able to telework because of both requirements to process and accept filings in person and a lack of equipment.

EOIR Kept Its Detained Docket Operating, Citing Due Process and Logistical Impacts

While the EOIR Director has the authority to direct the postponement of immigration hearings, and then Director James McHenry used such authority for the non-detained and MPP dockets, EOIR stated in its written response to the OIG that several considerations made it important to keep the adult and juvenile detained dockets moving ahead with hearings.⁵ EOIR told the OIG that the indefinite detention of both adult and juvenile immigrants without the availability of recourse to a hearing before an immigration judge would raise significant constitutional due process concerns under the Fifth Amendment. Additionally, EOIR stated that certain categories of detained cases are subject to statutory adjudication deadlines.⁶ Suspending the detained docket could have led to possible crowding in detention facilities, thereby creating its own pandemic-related health risks for detained adults.

Adult respondents on the detained docket have both individual merits hearings and bond hearings, which allow detained individuals the opportunity to argue that they meet the standards to be released from custody pending the completion of their immigration proceedings. Immigration judges told the OIG that bond hearings pose the greatest tension between protecting employees and protecting detained respondents' liberty interests during a pandemic. They explained that, while holding bond hearings in person poses risks to both litigants and EOIR employees, it also offers detained respondents the prospect of gaining release from a detention center where they could otherwise be exposed to COVID-19.⁷ (See the text box below for information on lawsuits to stop detained hearings during the pandemic.)

⁵ Under federal regulations, the Director of EOIR has the authority to "direct that the adjudication of certain cases be deferred." 8 C.F.R. § 1003.0(b)(1).

⁶ For example, 8 U.S.C. § 1225(b)(1)(B)(iii)(III) requires an immigration judge to review negative credible fear determinations within 7 days. EOIR does not have the authority to extend these deadlines.

⁷ Section 236(a) of the Immigration and Nationality Act authorizes U.S. Immigration and Customs Enforcement (ICE) to arrest and detain an immigrant pending his or her removal proceedings with EOIR. Detention under Immigration and Nationality Act § 236(a) is discretionary, and ICE is not required to detain an immigrant subject to removal unless the immigrant falls within one of the categories subject to mandatory detention, such as conviction of specific crimes or terrorist-related grounds. See 8 U.S.C. § 1226. While EOIR immigration judges make decisions in granting bond for a detained immigrant, ICE makes the decision to detain the immigrant.

A different legal standard applies to custody (bond) hearings in detained cases involving Unaccompanied Alien Children (UAC) because they are held in HHS Office of Refugee Resettlement (ORR) shelters while adults are held in U.S. Immigration and Customs Enforcement (ICE) detention facilities. In determining whether to grant bond, an EOIR immigration judge decides whether a UAC is a danger to the community or a flight risk. Even if an immigration judge decides that the child is eligible for bond, the child will not be released from ORR custody until ORR approves an appropriate sponsor. ORR also takes into consideration the immigration judge's decision in the bond hearing about the child's level of danger when assessing the child's placement and conditions of placement. An immigration judge does not make the decision to move a child from an ORR shelter to a sponsor/foster family. That decision is under the control of ORR staff.

In view of the different legal standard in UAC custody decisions, the OIG asked EOIR whether it had considered postponing all detained juvenile cases except for emergency bond hearings and voluntary departure hearings. EOIR stated in a response that, despite the different legal standard, the postponement of UAC hearings raises similar due process concerns as implicated for adults. In addition, EOIR stated there would have been several legal and practical barriers to such postponements:

- First, EOIR stated to the OIG that section 24A of the Flores Settlement Agreement (FSA) requires that "A minor in deportation proceedings shall be afforded a bond redetermination hearing before an immigration judge in every case, unless the minor indicates on the Notice of Custody Determination

Advocacy Groups Sued EOIR to Stop Detained Hearings During the Pandemic

In March 2020, immigrant advocacy groups sought Temporary Restraining Orders against the EOIR Director and other government officials in their official capacities in two separate lawsuits. In one lawsuit, the plaintiffs asked that EOIR suspend in-person immigration hearings for detained individuals and provide remote proceedings or that ICE temporarily release detained immigrants who did not have adequate access to remote communication with legal representatives or the immigration court. In the other lawsuit, the plaintiffs sought to, among other things, require EOIR to toll all court deadlines and grant continuances when requested and prevent EOIR from invoking *in absentia* removal procedures. In April 2020, the courts in both cases denied the Temporary Restraining Orders, based in part on the measures EOIR had taken in response to the COVID-19 pandemic. For example, in one lawsuit, the court held that the plaintiffs were unlikely to succeed on the merits of their complaint based on several factors, including that EOIR had "issued a policy memorandum laying out the threats caused by the pandemic and responding in kind with solutions to prevent the spread of the disease" less than a week after the President declared the COVID-19 pandemic a national emergency. On June 2, 2020, the plaintiffs voluntarily dismissed this lawsuit without prejudice.

Additionally, on July 31, 2020, the New Jersey chapter of the American Immigration Lawyers Association sued EOIR to stop the requirement for in-person hearings. This suit cited the death from COVID-19 of a private immigration attorney who attended an immigration hearing on March 11, 2020, in the Newark Immigration Court and a DHS clerk who was working in the building around the same time. On October 16, 2020, the court denied the plaintiffs' motion for a preliminary injunction after EOIR implemented the option for remote hearings via the WebEx video teleconferencing platform at the Newark Immigration Court.

Sources: *National Immigration Project of the National Lawyers Guild, et al., v. Executive Office for Immigration Review, Civil Action No. 1:20-cv-00852 CJN (D.D.C. 2020)*; *American Immigration Lawyers Association, et al., v. Executive Office for Immigration Review, Case No. 2:20-cv-09748 (D.N.J. 2020)*; and *Las Americas Immigrant Advocacy Center, et al., v. Donald J. Trump, et al., 3:19-cv-02051-IM (D.OR. 2020)*

form that he or she refuses such a hearing."⁸ EOIR further stated to the OIG that evaluating such a proposal, or other such ideas that could potentially violate the FSA and subsequent court orders, would require a legal interpretation, a litigation risk assessment, a DOJ policy determination, and coordination with DOJ components beyond EOIR and other government agencies.⁹ Specifically, we were told by EOIR that any decisions by DOJ leadership to postpone juvenile detained cases would require coordination with DHS and actions that affect detained children would also involve HHS.

- Second, EOIR stated that it could not engage in communications with the children unless it was during a hearing or unless the DHS attorney was present. Therefore, EOIR could not practically identify children who wanted to voluntarily depart the United States prior to their merits hearing.
- Third, according to EOIR, stopping such detention hearings would effectively eliminate one method of requesting an emergency bond hearing. Bond hearings are not required to be requested in writing and may be requested orally when an alien appears before an immigration judge. According to EOIR, "eliminating regular hearings for detained juveniles would effectively require them to request a bond hearing in writing which would impose a requirement on them that is not required by law, that is not imposed on adult detainees, and would likely be found to be in violation of the FSA or relevant court orders."
- Fourth, we were told by EOIR that pausing detained cases, including merits hearings, would be "contrary to longstanding policy prioritizing the adjudication of detained cases," including cases of detained children.
- Finally, EOIR told us that some children wanted to resolve the merits of their cases before they reached adulthood because, upon turning 18, they would be transferred from HHS to ICE custody. Thus, EOIR did not view postponing all detained juvenile hearings except emergency bond hearings and voluntary departure hearings as practical or lawful, and it did not believe it could so within its sole authority without further DOJ, DHS, and HHS input.

In addition, EOIR officials told the OIG that certain DOJ and DHS determinations informed EOIR's decisions about whether to proceed with hearings on the detained docket during the COVID-19 pandemic. In a 2018 business process analysis of essential functions, DOJ classified EOIR's adjudication of immigration cases, issuance of stays of removal or deportation, and issuance of administrative subpoenas through the Office of the Chief Administrative Hearing Officer as essential functions. Further, the DHS Cybersecurity and Infrastructure Security Agency classifies workers who support the "operations of the judicial system, including judges, lawyers, and others providing legal assistance" as

⁸ The FSA has been the subject of decades of litigation, including before the U.S. Supreme Court, and it was the subject of litigation during the time of this review. Moreover, one particular suit related to the FSA resulted in a court order requiring EOIR to hold bond hearings for detained UACs in certain circumstances. See *Flores v. Sessions*, 862 F.3d 863 (9th Cir. 2017).

⁹ The other DOJ components include the Office of the Attorney General, the Office of the Deputy Attorney General, the Office of the Associate Attorney General, the Office of the Solicitor General, the Office of Legal Counsel, the Office of Legal Policy, and the Civil Division.

essential in its guidance memorandum.¹⁰ EOIR cited both DOJ's classification and the DHS Cybersecurity and Infrastructure Security Agency's memorandum as helping inform EOIR's decision to hold hearings on the detained docket during the COVID-19 pandemic.

Throughout the pandemic, ICE continued to arrest new respondents and place them in detention centers, thereby growing the detained docket. An increasing caseload is a potential negative side effect of delaying or stopping the processing of cases for COVID-19 safety precautions. As long as ICE continues to detain people during the pandemic, any EOIR decision to suspend operation of the detained docket could contribute to increased caseloads, longer detention periods for respondents, and crowding of detention centers.

Procedural Decisions by Judges Regarding Conducting Hearings Varied Across Immigration Courts and Were Often Issued Close in Time to a Scheduled Hearing

EOIR provided general guidance to immigration judges on options available to minimize in-person interactions in the immigration courts but did not provide to immigration judges specific directions on when to waive in-person appearances, grant continuances, or take other particular actions to minimize in-person interactions. EOIR leadership officials told us that they do not have the authority to direct judges' decisions in immigration cases and that this extended to decisions on in-person appearances. Accordingly, immigration judges had the discretion to decide whether or how respondents could avoid in-person appearances. This resulted in a landscape of inconsistent decisions and practices across immigration courts nationally and at times uncertainty for respondents and other individuals regarding the status of hearings. Parties to immigration proceedings reported to the OIG that immigration judges' decisions about requests for continuances or telephonic appearances varied and were often issued close to the time of the hearing.

On March 18, 2020, the then EOIR Director emailed to the entire agency Policy Memorandum (PM) 20-10, which outlined guidance and best practices to promote the safety of staff and the public, such as not allowing individuals who had tested positive for COVID-19 in court space, reminding immigration judges of the authorities they have to minimize contact in court space, and encouraging immigration judges to resolve as many cases as possible without the need for a hearing.¹¹ The memorandum specifically reminded judges that they may:

1. waive the presence of represented immigrants;
2. grant a continuance upon a showing of good cause;

¹⁰ Acting Director, Cybersecurity and Infrastructure Security Agency, Advisory Memorandum on Ensuring Essential Critical Infrastructure Workers' Ability to Work During the COVID-19 Response, December 16, 2020.

¹¹ James R. McHenry III, Director, EOIR, PM 20-10 for All of EOIR, Immigration Court Practices During the Declared National Emergency Concerning the COVID-19 Outbreak, March 18, 2020. EOIR updated this policy memorandum on June 11, 2020, in PM 20-13, reiterating the same guidance and providing updates on immigration court operations since the original March memorandum.

3. place reasonable limits on the number of attendees at a hearing, with priority given to the press over the general public;
4. exclude persons from the courtroom on a case-by-case basis if they exhibited symptoms of a potentially communicable condition;
5. issue standing orders allowing and setting the conditions for telephonic appearances by representatives;
6. direct that the provisions of the Immigration Court Practice Manual are not applicable in particular cases;
7. conduct any hearing via video teleconference (VTC) where operationally feasible; and
8. conduct individual merits hearings by telephone in removal proceedings if the immigrant consents after being advised of the right to proceed in person or through VTC.¹²

Further, the memorandum outlined policies to reduce the need for a hearing and thus minimize contact among individuals, such as resolving cases through written pleadings and resolving purely legal questions through briefings.

Respondents' attorneys and other parties to immigration hearings with whom we spoke said that EOIR immigration judges have often made decisions about rescheduling cases or motions to appear telephonically shortly before a scheduled hearing. They told us they often did not know that a motion to waive in-person appearance or for a continuance had been approved until the morning of the hearing. If the parties did not learn of schedule changes until close to the time of the hearing, they would proceed with a trip to the immigration court and face potential exposure to COVID-19 for a hearing that ultimately was canceled.

A timely notice of changes to a hearing status is important in juvenile detained cases. UACs on the juvenile detained docket are in HHS ORR custody in shelters and are taken to court by shelter staff on the days of the hearings. Prior to the COVID-19 pandemic, children would be at an ORR shelter or their sponsors would bring them daily to an ORR shelter, where they could obtain a variety of services and information, including legal services. They would meet pro bono attorneys who could assist them in their immigration cases at the shelters. However, during the pandemic, the shelters were closed to outside agencies, and attorneys told us that they were not able to offer pro bono services. Some immigration courts permit individuals, typically attorneys, or organizations to act as "Friends of the Court." The role of Friends of the Court is to aid the court, not provide representation to the UAC.¹³ Friends of the Court may provide some assistance to the

¹² McHenry, PM 20-10.

¹³ A "Friend of the Court" (or "amicus curiae") is defined as "[s]omeone who is not a party to a lawsuit but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter." Amicus Curiae, Black's Law Dictionary (11th ed. 2019). It is within an individual immigration judge's decision to allow a Friend of the Court to appear in a hearing.

juvenile respondent, such as assisting with the basic mechanics of the docket. We were told by an attorney who acts as a Friend of the Court that some immigration courts will notify the Friends of the Court when cases are continued or if the children can appear telephonically but some do not. EOIR told the OIG that EOIR does not typically notify third parties of schedule changes but courts notify HHS ORR, which then often notifies the Friend of the Court. Sometimes, HHS ORR, as well as a Friend of the Court, may not know about continuances until the day of the hearing. By that time, the children have already traveled to the court in vans with other children and shelter staff only to find out while waiting in the van that they do not have to attend court. As of December 10, 2020, five immigration courts had issued standing orders waiving in-person appearances for UACs in certain circumstances.

Some respondents' attorneys also described the difficulties they encountered in obtaining some of the evidence required for the immigration hearings, especially for UACs. For example, they reported that obtaining psychological evaluations was extremely challenging because psychologists cannot meet with the children in person. UACs, who are housed in ORR shelters or a sponsor's home, may not have access to adequate equipment to make teleconferencing possible. Moreover, we were told that, even if video connections were arranged, psychologists were hesitant to certify on a legal document that they were able to adequately assess a child over video.¹⁴ One respondent's attorney told us that at the time of the interview she was also not able to easily have documents, such as affidavits, notarized because notaries were not working. One attorney who also acts as a Friend of the Court for juveniles on the detained docket provided the OIG with an update in July 2020 and said that she was no longer experiencing the last-minute delays in immigration judges' decisions in one immigration court but was still experiencing issues with obtaining signatures from detained children and obtaining permission to appear telephonically as a Friend of the Court. We found that these factors weighed in favor of EOIR considering postponements of some detained juvenile cases, at least in geographic locations that were experiencing surges in cases of COVID-19.

EOIR leadership officials told us that they can provide general policy guidance but they cannot waive in-person appearances or reschedule particular hearings because these actions would be considered adjudicating immigration cases. While the Director of EOIR has the authority to "direct the conduct of all EOIR employees to ensure the efficient disposition of all pending cases, including the power...to direct that the adjudication of certain cases be deferred...and otherwise manage the docket," the Director does not have the authority to "adjudicate cases" or direct immigration judges how to rule in individual cases and immigration judges exercise "independent judgment and discretion."¹⁵ The Immigration Court Practice Manual allows any party to file a motion for a telephonic hearing. Some immigration courts and some individual immigration judges have further issued standing orders to affirmatively waive in-person appearances for certain hearings during the pandemic. As of December 10, 2020, 57 of 69 total immigration courts had issued at least 1 standing order related to in-person appearances.

In November 2020, EOIR changed its case flow processing model for removal cases of non-detained respondents with representation. According to EOIR, the case flow processing model was intended to both improve efficiency and reduce the need for in-person hearings. EOIR encouraged parties to proceedings to

¹⁴ An immigration psychological evaluation documents the traumas such as persecution, domestic violence, or other facts that could be legally relevant to a respondent's case and helps the immigration judge determine whether a person can lawfully remain in the United States.

¹⁵ 8 C.F.R. § 1003.0 (b), (c), and 8 C.F.R. § 1003.10(b).

use written filings to help reduce the need for parties to appear at hearings, save time and expense, free up docket space, and narrow issues to assist in the resolution of the case.¹⁶ EOIR also discouraged the holding of master calendar hearings solely for filing applications. EOIR started sending with the initial hearing notice a copy of the pro bono legal service provider listing and notice of the respondent's appeal rights. Moreover, if a respondent's representative files an EOIR-28 (Notice of Entry of Appearance as an Attorney or Representative Before the Immigration Court) at least 15 days before the scheduled master calendar hearing, EOIR will vacate the master calendar hearing. EOIR will then send a scheduling order to all parties to the proceeding, setting deadlines for filing and any applications for relief or protection. Once the immigration judge receives the filings and applications, the judge will issue either an order resolving the case or a hearing notice scheduling an individual merits hearing. We found that this change will help reduce the in-person interactions needed at the immigration court.

Once Non-Detained Hearings Resumed, Immigration Judges Had Discretion in Deciding When to Postpone Hearings Due to Potential COVID-19 Exposure, Which May Result in Parties to Proceedings Believing They Need to Come to Immigration Court Even When They Pose a Risk

PM 20-10, which, as described above, was issued in March 2020, stated that the adjudication of cases involving respondents or representatives who may have been exposed to COVID-19 "shall be deferred to another date." However, in June 2020, EOIR placed more discretion with its immigration judges in postponement decisions for non-detained cases in which respondents may fall into categories that would deny them entry to EOIR space, such as having had contact with someone who had been diagnosed with COVID-19.

On June 11, 2020, when EOIR resumed some non-detained hearings, EOIR updated PM 20-10 with PM 20-13 and once again reminded immigration judges of their authority and ability to mitigate the exposure of staff and the public by, among other things, conducting hearings via VTC or postponing hearings.¹⁷ The several best practices from the March version of the memorandum were repeated in the June version. However, PM 20-13 differed from PM 20-10 in its approach to dealing with respondents who may have been exposed to or had COVID-19. According to PM 20-13, respondents were expected to contact the court if they could not attend a hearing because of exposure to COVID-19; but the memorandum stated that it was up to the immigration judge handling the case to approve a motion to reschedule. PM 20-13 further stated that motions for continuance remained subject to the "good cause" standard.¹⁸ While PM 20-13 provided that

¹⁶ James R. McHenry III, Director, EOIR, PM 21-05 for All of EOIR, Enhanced Case Flow Processing In Removal Proceedings, November 30, 2020.

¹⁷ James R. McHenry III, Director, EOIR, PM 20-13 for All of EOIR, Update to Policy Memorandum 20-10, EOIR Practices Related to the COVID-19 Outbreak, June 11, 2020.

¹⁸ According to 8 C.F.R. § 1003.29, immigration judges may grant a motion to continue a hearing for "good cause shown." In addition, 8 C.F.R. § 1240.6 permits immigration judges to grant a "reasonable adjournment either at his or her own instance or for good cause shown" by a requesting party. On August 16, 2018, then Attorney General Jeff Sessions issued a decision in the *Matter of L-A-B-R- et al.* emphasizing the holding in *Matter of Hashmi* that an immigration judge should balance "multiple relevant factors" when deciding a continuance, including the likelihood that a respondent who requested a continuance to pursue collateral relief from another authority—such as a visa from DHS—would receive the collateral relief sought and whether the relief would materially affect the outcome of the removal proceedings. In the L-A-B-R decision, Sessions also directed that immigration judges should consider "relevant secondary factors, which may include the respondent's diligence in seeking collateral relief, DHS's position on the motion for continuance, concerns of administrative efficiency, the length of the continuance requested, the number of hearings held and continuances granted previously, and

Continued

COVID-19 may be relevant to the determination of good cause in some cases, it also warned judges that COVID-19 “is not talismanic and does not automatically mean a motion is meritorious,” especially when the circumstances indicate that COVID-19 is being raised purely as a delay tactic.¹⁹ EOIR told the OIG in a written response that immigration judges were expected to decide whether motions were meritorious or valid using their judgment based on the facts of the case and that there were no standards or criteria provided to determine whether respondents had “good cause” to not attend their hearings due to the pandemic. EOIR also told the OIG that PM 20-10 was issued when EOIR was conducting hearings only on the detained docket and that it issued PM 20-13 when the agency was beginning to hear cases on the non-detained docket. According to EOIR officials, there was a low risk that COVID-19 would be used as a delay tactic in detained cases because (1) detained respondents would not have a reason to delay a hearing because they do not want to remain in detention and (2) DHS would not bring to court a detained respondent who had been exposed to or tested positive for COVID-19. However, EOIR officials expressed the view that non-detained respondents have an incentive to seek postponements and that automatically granting continuances to all respondents who claim COVID-19 exposure or illness would “feed the incentive to delay” hearings.

In October 2020, some respondent attorneys told the OIG that they worried that filing motions to request a delay because of COVID-19 risk to self would be viewed by an immigration judge as a delay tactic and could create a hostile environment. These respondent attorneys perceived that the only time immigration judges would automatically approve a continuance is when a respondent or attorney is actively exhibiting symptoms of COVID-19. Another attorney reported to the OIG that she was granted a continuance when she filed a motion stating that she had potentially been exposed to COVID-19 and was awaiting test results.

We noted concerns cited in news reports from respondents and respondents’ attorneys that immigration judges might issue *in absentia* deportation orders if respondents did not come to hearings because they had COVID-19 or had been exposed to the virus.²⁰ We asked EOIR whether such orders were issued in cases in which a respondent did not come to court because of a COVID-19 illness or exposure. EOIR told us that, because this information is not tracked in the official record, and because a respondent may not have specifically informed the immigration court that the reason for a failure to appear was due to COVID-19 illness or exposure, it was unable to make that determination. We did not find that the number of *in absentia* deportation orders increased during the pandemic. According to documents on EOIR’s website, immigration judges issued 85,962 *in absentia* removal orders out of a total of 152,021 removal orders in the first 3 quarters of fiscal year (FY) 2020, but issued only 51 *in absentia* removal orders out of a total of 1,006 removal orders between June 15, 2020, and August 7, 2020, after immigration courts began reopening for non-detained hearings. However, it is difficult to draw any conclusions from this data because (1) the first 3 quarters of FY 2020 include the beginning of the pandemic, when EOIR would have issued little to no *in absentia* orders because it was not operating the non-detained and MPP dockets, and (2) even after EOIR began to reopen for non-detained hearings in June, many immigration courts were still not holding non-

the timing of the continuance motion.” Further, the decision stated, “The immigration judge should not grant a continuance merely because the respondent expresses the intention to file for collateral relief at some future date or where the respondent appears to have unreasonably delayed filing for collateral relief until shortly before the hearing.”

¹⁹ McHenry, PM 20-13.

²⁰ For example, “[Masks, Cleaning Rules Vary as Immigration Courts Reopen](https://www.law360.com/articles/1301204/masks-cleaning-rules-vary-as-immigration-courts-reopen),” August 14, 2020, www.law360.com/articles/1301204/masks-cleaning-rules-vary-as-immigration-courts-reopen (accessed April 14, 2021).

detained hearings, and thus issuing a small number of *in absentia* orders. Due to the inability to assess whether immigration judges were issuing *in absentia* removal orders against respondents who were unable to come to court due to COVID-19 illness or exposure, we found that respondents' concerns about being removed if they did not attend hearings are understandable.

EOIR should ensure that immigration judges are responsive in a timely manner to requests for continuances by respondents who represent that they have recently experienced symptoms of, or have been exposed to, COVID-19 and should encourage immigration judges to fully consider continuance requests. We note that the Centers for Disease Control and Prevention (CDC) recommends that individuals who may have been exposed to COVID-19 follow directions from their state or local health department, which may advise a shorter quarantine period than the CDC recommendation of 14 days if the individual has no symptoms or a negative test.²¹ The CDC also recommends that individuals who were infected with COVID-19 isolate for at least 10 days after symptoms first appear.²² Thus, a continuance to adhere to these public health guidelines alone should not require a lengthy delay. EOIR told the OIG that, due to EOIR's large caseload, rescheduling continued hearings can delay cases for years. However, we believe that any risk of a lengthy delay must be balanced against the risk that respondents may come to immigration courts when they pose a risk to others.

In December 2020, EOIR issued PM 21-06, a policy memorandum that consolidated and updated EOIR policy for asylum applications that can provide a respondent reprieve from having to come to court when they may pose a risk of COVID-19 infection to others. EOIR processes asylum applications, to the maximum extent possible, within 180 days consistent with the Immigration and Naturalization Act (INA).²³ The 180-day asylum clock begins when a respondent files an application for asylum and is only paused during any delay attributable to exceptional circumstances.²⁴ In PM 21-06, EOIR's Chief Immigration Judge determined that disruptions caused by COVID-19 are considered "exceptional circumstances" for the purposes of the INA.²⁵ A respondent's 180-day asylum clock will stop and restart at the next hearing if hearings are adjourned for exceptional circumstances, such as COVID-19.

²¹ CDC, "[When to Quarantine](https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/quarantine.html)," updated March 12, 2021, www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/quarantine.html (accessed April 14, 2021).

²² For individuals who think or know they have had COVID-19 and who have had symptoms, the CDC additionally instructs that they isolate until they are fever free for at least 24 hours with no fever-reducing medication and until other symptoms of COVID-19 (besides loss of taste or smell) are improving. For individuals who tested positive with no symptoms, the CDC recommends isolation until 10 days have passed since the positive test. According to the CDC, individuals who were hospitalized for COVID-19 may have to remain in isolation for up to 20 days. CDC, "[Isolate if You Are Sick](https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/isolation.html)," updated February 18, 2021, www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/isolation.html (accessed April 14, 2021).

²³ INA § 208(d)(5)(A)(iii).

²⁴ There is not a current definition of "exceptional circumstances" for the purposes of INA § 208(d)(5)(A)(iii), and EOIR has proposed a regulatory definition similar to the statutory definition in INA § 240(e)(1). See 85 Fed. Reg. at 59696. In PM 21-06, EOIR states that, until there is a final rule on the definition, immigration judges will make their own determinations of exceptional circumstances.

²⁵ James R. McHenry III, Director, EOIR, PM 21-06 for All of EOIR, Asylum Processing, December 4, 2020.

EOIR's Limited Electronic Filing Capabilities Created Challenges for EOIR in Limiting Certain In-Person Interactions During the Pandemic

During the pandemic, EOIR made some strides in building on its limited pre-pandemic electronic capabilities. However, these changes were in some cases temporary and applied to only certain aspects of EOIR's paper-oriented processes. Moreover, while EOIR started accepting some filings by email and expanded its electronic filing system to additional immigration courts, the timing of filing deadlines and EOIR's continued acceptance of paper filings during the pandemic still led to in-person interactions among staff and other parties.

We found that, in practice, many filing deadlines remained in place for cases other than MPP hearings, which had been indefinitely postponed since the spring of 2020. Some filing deadlines are set by statute or regulations (e.g., motions to reopen or reconsider a case), and EOIR does not have the authority to alter them. Other filing deadlines are linked to the date of the hearing. For detained cases, which EOIR continued hearing throughout the pandemic, filing deadlines did not change. For non-detained cases, because EOIR postponed hearings for only 2 weeks at a time during the pandemic, many of the filing deadlines similarly did not change. For example, if a filing deadline fell more than 2 weeks before a scheduled hearing, the filing deadline would have already passed when EOIR announced the postponement of the hearing. In these situations, respondents and respondent attorneys would have already had to file the documents to meet the deadline, which may have required them to travel to mail the documents or submit them in person at an immigration court.

EOIR noted in a March 2020 statement that its "current operating status is largely in line with that of most federal courts across the country, which have continued to receive and process filings and to hold critical hearings, while deferring others as appropriate." However, EOIR's response failed to recognize a crucial difference between federal courts and immigration courts, namely that federal courts have an established and well-developed online filing system. While federal courts have fully implemented online filing and operate in a largely paperless environment, according to the National Association of Immigration Judges (NAIJ), immigration courts remain "largely paper-based."²⁶

The ability to conduct business fully electronically, as opposed to via paper-based processes, reduces in-person contact and therefore can be an important means to limit potential COVID-19 exposure for EOIR staff and visitors. Prior to the COVID-19 pandemic, EOIR had developed and piloted an electronic case and filing system, called the EOIR Court & Appeals System (ECAS).²⁷ However, only 14 immigration courts were participating in ECAS as of March 2020, leaving 55 immigration courts still working exclusively with paper copy files at that time. Further, all immigration courts have continued with at least some paper filing for

²⁶ NAIJ and American Federation of Government Employees (AFGE), rebuttal letter to EOIR's Response to the Occupational Health and Safety Administration (OSHA) Complaint, May 15, 2020. The NAIJ and AFGE filed a complaint to OSHA in April 2020 alleging that EOIR employees were exposed to a known and deadly contagion within EOIR headquarters and surrounding communities because of EOIR's inaction. OSHA decided not to conduct an investigation but asked EOIR to provide an update on how it was addressing safety hazards. The NAIJ and AFGE provided a rebuttal to EOIR's update to OSHA. See the [text box](#) below for additional information.

²⁷ EOIR stated that the goal of ECAS is to "phase out paper filing and processing, and to retain all records and case-related documents in electronic format." Registered ECAS users can electronically file documents and view the status of their cases. EOIR, "[EOIR Courts & Appeals System \(ECAS\)–Online Filing](#)," www.justice.gov/eoir/ECAS (accessed April 14, 2021).

reasons that include providing *pro se* respondents (i.e., respondents who do not have legal representation), who may have technological limitations, the ability to file. In addition, DHS has not made it mandatory for its staff to initiate a case in ECAS. EOIR told the OIG that, because the complete case record must exist in one format, if DHS does not initiate the case using ECAS in an immigration court that has ECAS, EOIR staff will scan the initiating documents into ECAS and maintain the file in ECAS.²⁸ EOIR officials described a desire to broaden the use of ECAS and noted that, on December 4, 2020, EOIR published a proposed rule in the Federal Register to implement electronic filing and records applications for all immigration cases.²⁹ Pursuant to the proposed rule, EOIR has proposed that electronic filing be mandatory for all attorneys and accredited representatives, with limited exceptions, while keeping the electronic filing system voluntary for *pro se* respondents and certain other petitioners.³⁰ EOIR estimates that this rule will generate efficiencies and cost savings in the future. As of March 2021, EOIR was reviewing the public comments on the proposed rule and told the OIG that EOIR would continue to pursue finalization of the rule. Nevertheless, throughout the pandemic, regardless of the status of ECAS adoption, many immigration courts still were either exclusively or significantly using paper filing. Staff at each immigration court had to come into the office in person to accept, scan, and file these documents. This resulted in paper being handed between individuals on a daily basis in immigration courts, in addition to staff interactions with filers and the person-to-person social interaction that occurs in these workplaces.

As the pandemic persisted in the months following March 2020, we learned that EOIR was able to deploy ECAS to an additional 18 immigration courts by the end of November 2020. EOIR told the OIG that prior to the pandemic the EOIR Office of Information Technology (OIT) had provided ECAS training on site and launched ECAS at immigration courts located near each other in order to make the most of staff and travel time. EOIR said that, while in-person training for ECAS was preferable, the OIT began conducting remote training due to the pandemic. As a result, the agency was able to deploy ECAS to more immigration courts. EOIR developed a virtual training session, and OIT staff used the VTC system to train immigration court staff and interact live with the staff while they practiced using the system. EOIR planned to continue the deployment to five additional immigration courts by the end of January 2021 and, as of March 18, 2021, 47 immigration courts had ECAS.

Additionally, to address the lack of an electronic filing system, shortly after EOIR closed immigration courts in March 2020, EOIR created email addresses for the immigration courts that were not already using ECAS. This allowed parties to proceedings to file documents by email. The respondent attorneys we interviewed told us that the email filing option was helpful, and most said it worked well; but a couple said that they did not receive confirmations that the filings were sent within the due date. EOIR does not guarantee

²⁸ EOIR estimated that since July 2018, when EOIR went live with ECAS, at the immigration courts where ECAS was an option, DHS filed about 43 percent of the Notices to Appear (NTA) electronically, compared to nearly 57 percent on paper. In the same timeframe, DHS filed electronically only about 18 percent of the supporting documents for immigration cases at these courts, according to EOIR. For the remaining supporting documents and the NTAs that DHS filed on paper, which amounted to over 113,000 separate documents, EOIR reported that its staff had to scan them into ECAS.

²⁹ Executive Office for Immigration Review Electronic Case Access and Filing, 85 Fed. Reg. 234, 78240 (December 4, 2020).

³⁰ The proposed rule allows use of ECAS to be voluntary for *pro se* applicants or petitioners, and for reputable individuals and accredited officials, as defined in 8 C.F.R. §§ 1292.1(a)(3) and (a)(5).

confirmation of receipt of information filed through the email system.³¹ We learned, however, that some immigration judges and immigration courts put 50-page limits on email filings, which required respondents and attorneys to file in-person or through the mail if they had larger filings. An additional challenge related to email filings arose due to EOIR's lack of a fully electronic case filing system. If an immigration court had ECAS, the submissions would be made in ECAS. However, as described above, because EOIR has to maintain case files in a consistent format (either electronic or paper), for cases with paper case files EOIR staff would have to print any emailed submissions. Thus, even when the temporary email option was available, support staff had to come into the office to print or scan emailed filings. In these situations, the support staff had reduced interaction with the general public in a more controlled environment than they have when filings are required to be made in-person. However, EOIR officials expressed the belief that email filing increases the risk of COVID-19 exposure to staff who must come into the court to print and file the email submissions and does little to mitigate the risk to attorneys and respondents who generally still have to serve the documents on DHS by mail or in person. EOIR also told the OIG that printing the email filings has been prohibitively expensive and has required a great amount of staff resources.

On June 11, 2020, EOIR updated PM 20-10 with PM 20-13, which said that, 60 days after an immigration court resumed hearings for non-detained cases, those courts would no longer accept email filings.³² For immigration courts that heard detained cases only, the memorandum stated that those immigration courts would stop accepting email filings 60 days after another immigration court in the same federal judicial district had resumed non-detained hearings. EOIR created a public website that listed the exact date on which each immigration court would stop accepting email filings. As of December 2, 2020, 24 out of 69 immigration courts had not yet set a date to terminate email filings. In view of the ongoing nature of the COVID-19 pandemic and in the interest of better controlling COVID-19 exposure risks for parties to the immigration proceedings and EOIR staff, until EOIR has completed deployment of an electronic filing system more widely, we believe that EOIR should consider whether it can continue permitting email filings without increasing the risk to staff during the pandemic. In particular, EOIR should assess the feasibility of having staff scan paper filings into electronic files rather than print emailed filings and whether this would reduce the need for staff to report to work in person.

We asked EOIR whether it could extend filing deadlines to alleviate the need for in-person presence at immigration courts and person-to-person contact. EOIR in its written response told us that it could provide general policy guidance to the immigration courts but it could not issue extensions on filing deadlines for all immigration cases. EOIR stated that this would be considered adjudicating immigration cases, which, as stated above, EOIR told us is within the discretion of individual immigration judges.³³ We believe that, in view of the ongoing nature of the COVID-19 pandemic, and to benefit at all times from operational efficiencies accompanying electronic, as opposed to paper-based, systems, EOIR should ensure that it has an electronic filing system for all immigration courts, whether ECAS or email filing. We also believe that EOIR should further deploy ECAS to all remaining immigration courts and continue to pursue making ECAS mandatory.

³¹ EOIR, "[Filing by Email-Immigration Courts](https://www.justice.gov/eoir/filing-email)," updated December 21, 2020, www.justice.gov/eoir/filing-email (accessed April 14, 2021).

³² McHenry, PM 20-13.

³³ EOIR told the OIG that 8 C.F.R. § 1003.31(c) assigns authority to set filing deadlines to the immigration judge presiding over the case and that there is no regulation assigning similar authority to the EOIR Director.

EOIR Was Unable to Implement Widespread Telework for Staff Because of a Lack of Equipment, Technological Limitations, and the Need to Process Mailed and In-Person Filings

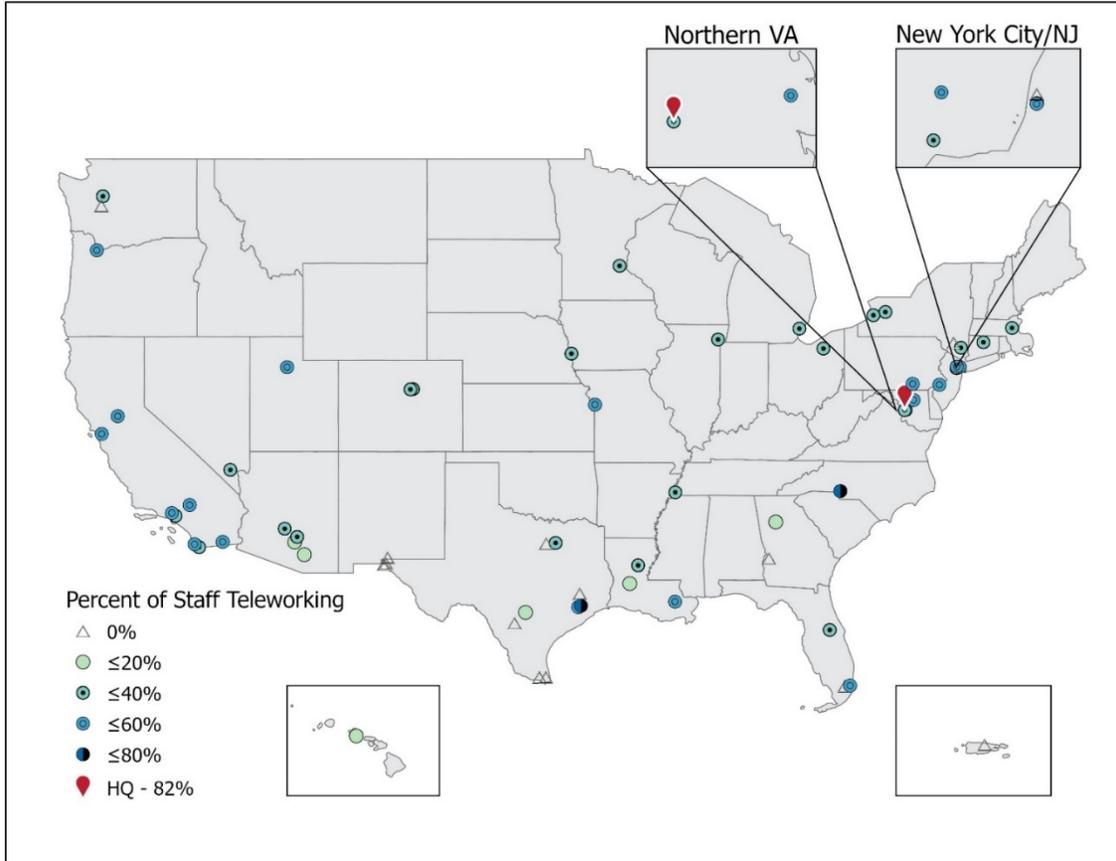
Although EOIR implemented its telework plan at the beginning of the pandemic, and some EOIR staff whose positions are not normally telework eligible were able to telework at that time, approximately one-third of all EOIR staff continued working in EOIR office space at the onset of the pandemic in the United States. In March 2020, EOIR quickly designated positions as telework eligible and changed its business process to incorporate the use of telework more broadly across the agency. Yet, EOIR has not been able to fully maximize telework during the pandemic to mitigate staff exposure to COVID-19 largely due to its technological limitations, an initial shortage of equipment, and the fact that only approximately 46 percent of its positions have been designated telework eligible.

EOIR provided the OIG with data from Pay Period 7 (March 29–April 11, 2020) showing that, among non-headquarters staff, 36 percent were teleworking; 34 percent were working in immigration courts or EOIR office space; and 30 percent were on leave (including weather and safety, maternity, family, and administrative leave).³⁴ Yet, we found that the telework percentages for individual immigration courts varied greatly, from 0 percent to 69 percent. In 24 of the 67 courts that reported staff working, 50 percent or more of the staff were still working in the office; in 11 of the 67 courts, none of the staff was teleworking. Only two courts had no staff working in the office. (See [Appendix 2](#) for a list of all immigration courts.) During that same time period, 81 percent of the staff in EOIR headquarters offices were able to telework, mostly because the duties and types of work for headquarters staff differ from those of staff in the immigration courts. Figure 1 below is a map that shows each immigration court and the percent of staff teleworking during the selected pay period in ranges. Figure 2 is a map that shows the incidence rate (the number of confirmed COVID-19 infections divided by the county population) across the United States for a day in the middle of the selected pay period depicted in Figure 1.

³⁴ Sixty-seven of the 69 immigration courts were open and had staff working during Pay Period 7.

Figure 1

Percent of Staff Teleworking in Each Immigration Court, March 29–April 11, 2020

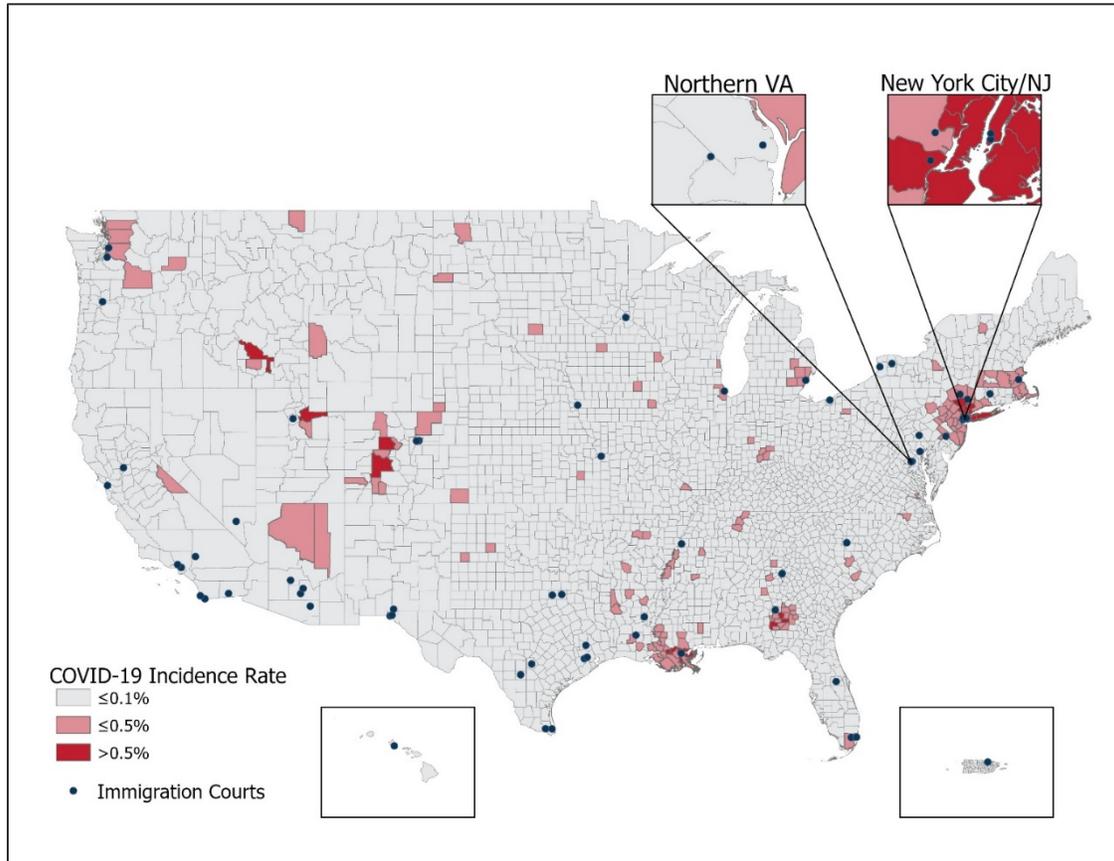


Note: Some symbols may be obscured on the map if there is more than one immigration court in a given area.

Source: EOIR telework data for Pay Period 7 from 67 immigration courts

Figure 2

COVID-19 Incidence Rate, by County, April 4, 2020



Source: COVID-19 Data Repository by the Center for Systems Science and Engineering at Johns Hopkins University

One of the reasons EOIR was not able to maximize telework was a lack of equipment, including laptops, for staff. On March 17, 2020, when the U.S. Office of Management and Budget (OMB) first directed federal agencies to maximize telework for the federal workforce, EOIR had a total of 1,289 laptops for its staff of approximately 2,073.³⁵ Those laptops were allocated to headquarters (697 for approximately 512 staff and over 300 contractors) and to the various immigration courts (592 for approximately 1,561 staff). EOIR reported that it encountered difficulties procuring additional laptops to cover the expansion of telework. EOIR's OIT distributed 350 additional laptops in March 2020. EOIR ordered 400 more laptops on March 24, 2020, and received the laptops in June 2020. EOIR stated that the order was delayed because of disruptions in the supply chain when the overseas manufacturing facility was shut down due to the COVID-19 pandemic. EOIR borrowed and deployed 35 additional laptops from the Justice Management Division (JMD) in May 2020 and returned and replaced those laptops when the 400 new laptops were received and deployed. EOIR also purchased and received 100 laptops from the Drug Enforcement Administration and deployed them all to

³⁵ OMB, Memorandum M-20-16, March 17, 2020.

EOIR staff by June 2020. In June 2020, EOIR ordered an additional 800 laptops, and, as of November 23, 2020, EOIR had set up and deployed 500 of the 800, for a total of 2,639 laptops. Most of the laptops were deployed to EOIR personnel, but some were deployed to contractors. EOIR told the OIG in November 2020 that it should now have enough laptops for all staff that want to telework. Analysis of EOIR telework data from Pay Period 16 (August 2–15, 2020) shows that in all immigration courts the percentages of staff teleworking did not vary much compared to the March/April 2020 data. See Table 2 below for the comparison.

Table 2

Breakdown of EOIR Staff Work Status, Comparison of March/April 2020 and August 2020

	March/April 2020	August 2020
Percent of EOIR Staff Teleworking	36%	35%
Percent of EOIR Staff Working in EOIR Space	34%	40%
Percent of EOIR Staff on Some Type of Leave	30%	25%
Total	100%	100%

Source: EOIR telework data

By August 2020, some immigration courts had reopened and resumed in-person hearings, so staff would have returned to work in EOIR space even if they had a laptop to telework.

A second factor limiting the use of telework among EOIR personnel was the fact that EOIR by law must record all immigration court hearings for an official transcript but it has not widely deployed technology to enable it to do so remotely.³⁶ EOIR uses a digital audio recording (DAR) system to record hearings in immigration courts and has 32 DAR-enabled laptops with the software to formally record immigration proceedings outside of courtroom settings.³⁷ While immigration judges can conduct non-hearing work such as reviewing documents and case information while teleworking with regular laptops, they are not currently able to conduct hearings remotely.

Prior to November 2020, EOIR said that it had not yet been able to allow the use of video conferencing platforms, such as WebEx, which would have allowed respondents and other parties to proceedings to attend hearings remotely, primarily because any system needs to be integrated with the DAR system and

³⁶ 8 C.F.R. § 1240.9 requires that all immigration hearings be recorded verbatim, except for statements made off the record with the permission of the immigration judge.

³⁷ EOIR has an internal VTC system that it uses for some immigration proceedings and hearings, often for detained respondents. The VTC system is integrated with the DAR system to record the immigration hearings as required by 8 C.F.R. § 1240.9.

meet DOJ security standards. However, EOIR told the OIG that it had determined that one of the video conferencing platforms meets these requirements and that EOIR expected that half of the immigration courts would have video conferencing capability by the end of calendar year 2020. EOIR expected to roll out the capability to the other half of the immigration courts by mid-March 2021. This capability will allow parties to attend proceedings remotely, either by video or telephone call. On November 6, 2020, EOIR issued a PM that outlined policies surrounding the use of telephones and other video conferencing tools during immigration hearings.³⁸ The PM states that either party in an immigration proceeding may file a motion for the respondent or the representative for either party to appear at a hearing remotely through WebEx for the duration of the declared national emergency related to COVID-19. Further, the PM states that immigration judges may issue standing orders and immigration courts may have local operating procedures addressing remote appearances. Immigration judges have the discretion and authority to decide whether a party to a proceeding can attend a hearing via video conference. As of March 19, 2021, 42 immigration courts had WebEx capability.

Additionally, EOIR stated that it is determining the information technology requirements to expand this video conferencing capability to laptops to allow immigration judges to hold hearings while teleworking. EOIR assembled a working group that is developing the policies and procedures surrounding the use of video conferencing platforms by immigration judges outside of the courtroom to ensure privacy protections and public access to hearings as required by regulations.

EOIR's requirement that staff accept in-person filings and process mail filings also limited the ability of its staff to maximize telework during the pandemic. As described above, despite some measures to expand electronic filing alternatives, EOIR's process to receive and track filings still relied upon in-person involvement and remained largely paper based. Accordingly, support staff in the immigration courts, even in locations that were considered "hot spots" for the COVID-19 virus and where federal courts suspended in-person hearings, were required to report to the court to work. EOIR staff expressed concern to us about the potential for exposure to the virus when they interacted with the public to process filings, as well as those personnel who had to travel on public transportation to get to their office.³⁹ However, EOIR officials reported that there was not much in-person filing after March 2020 and there was little public interaction when immigration courts were not conducting hearings.

The OIG saw a discrepancy in telework eligibility by the type of position held. A higher percentage of attorneys and immigration judges than support staff or interpreters were telework eligible. Interpreter positions are often not telework eligible because of the type of work they perform and the need to be present in the courtroom or on video, which is available only in the courtroom. However, other types of support staff positions were not telework eligible, which could be a result of staff having to be present in EOIR space to accept and process regular and hand-delivered mail filings or to process email filings. In September 2020, EOIR provided the OIG with the number of positions that were telework eligible in each

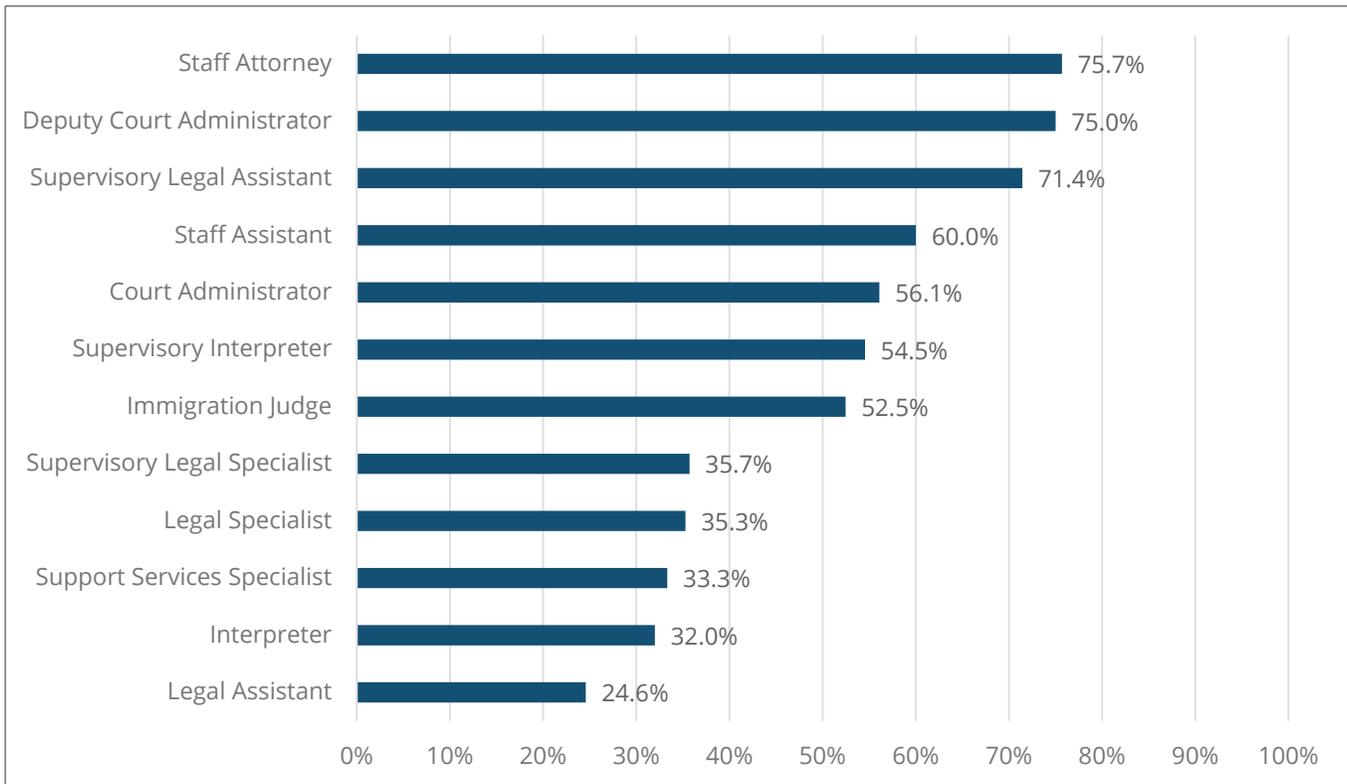
³⁸ James R. McHenry III, Director, EOIR, PM 21-03 for All of EOIR, Immigration Court Hearings Conducted by Telephone or Video Teleconferencing, November 6, 2020.

³⁹ EOIR had some PPE for staff who had to work in the office, but it initially had difficulty obtaining supplies in March 2020. The OIG discusses this further in the next section.

immigration court. Figure 3 below displays the percent of telework-eligible positions for each type of position EOIR-wide.

Figure 3

Percent of Telework-Eligible Positions, by Position Type, Across Immigration Courts



Source: EOIR data

Some of the percentages in Figure 3 represent a small number of positions across all immigration courts, and some represent a large number of positions. Please see [Appendix 3](#) for the total number of positions for each position type.

EOIR’s Efforts to Mitigate Risk of Exposure for EOIR Staff and Visitors to EOIR Workspaces Were Limited

In the areas we reviewed, we found that EOIR struggled to mitigate the risk of exposure to COVID-19 for individuals present in person at immigration courts and EOIR headquarters. For example, EOIR attempted to apply some social distancing measures in its operations, with mixed success. EOIR also required the wearing of face masks (or face shields for interpreters), but the OIG has heard anecdotal reports of non-compliance since immigration courts have started reopening. We also found that EOIR had difficulty obtaining adequate PPE and disinfectants to help prevent the transmission of COVID-19, particularly early on in the pandemic; however, we found that EOIR management was actively engaged in seeking to ameliorate the problem and that EOIR has managed to acquire supplies more recently. On whether to

conduct temperature checks for visitors to immigration courts, we found that EOIR follows the decisions of the entities controlling the privately owned or federal buildings where immigration courts are located.

EOIR Made Efforts to Increase Social Distancing in Its Workspaces and Immigration Courts, but Staff and Parties to Immigration Hearings Faced Difficulty Achieving Social Distancing

The OIG heard conflicting reports about EOIR's level of success at ensuring physical separation between participants in immigration proceedings. EOIR implemented policies and practices to attempt to increase social distancing and minimize interaction among individuals. For example, EOIR adjusted some of its workspace layouts and the placement of hearing participants in ways that enhanced distancing and reduced in-person contact. EOIR's decision to delay hearings—which otherwise would have required respondents to appear in person and have personal interactions—was a positive step to reduce the risk of COVID-19 transmission. However, we heard concerns about a lack of distancing in common areas of other EOIR spaces that held ongoing proceedings and an inability to mitigate risk of exposure while traveling to work or court.

While Social Distancing Is Difficult to Implement at EOIR Workplaces, EOIR Has Made Plans and Efforts to Facilitate Social Distancing and Require Mask Wearing; However, Some Stakeholders Believe that These Efforts Have Been Inadequate and Report Non-Compliance

EOIR made efforts to encourage social distancing among visitors and staff in the workplace, though we heard varying accounts on the success of these changes. EOIR was able to facilitate social distancing in courtrooms by using technology to spread people out across different rooms and by controlling the seating in courtrooms. The Office of the Chief Immigration Judge (OCIJ) created new social distancing floor plans, and some hearings were held via VTC between courtrooms in lieu of having all parties sit in the same room. For some detained adult docket cases, EOIR had respondents appear via VTC from the detention center. For those immigration court buildings that have more courtrooms than judges, some immigration judges sat in an empty courtroom and other court staff members and attorneys were able to call in or sit in a different court room and view the judge and the respondent through VTC. In this manner, EOIR was able to limit the number of people in each confined room. Additionally, EOIR told the OIG that it had stopped holding master calendar hearings with multiple individuals in the same room after the onset of the COVID-19 pandemic. For the non-detained docket, some cases were scheduled to have in-person hearings but the immigration courts were able to make changes such as installing plexiglass barriers. Non-detained respondents with upcoming cases received a *Notice of Public Health Practices* flyer reminding them that social distancing was required and informing them that, in order to maintain appropriate social distancing and best facilitate hearings, they “may be asked to move or leave a particular area.”⁴⁰ The notice also instructed respondents not to switch seats if instructed to sit in a particular location.

⁴⁰ EOIR, Notice of Public Health Practices, June 15, 2020.

EOIR also reported proactively changing the layout of its workspaces to mitigate the risks COVID-19 presented to its offices. For example, EOIR moved staff within buildings to distance them, in some cases moving units of staff to different floors. EOIR also stopped the practice of shared offices and closed off cubicles that violated the 6-foot rule. Courts were required to use red tape to visually indicate 6-foot markers for social distancing in elevators, hallways (including the screening areas), the lobby, public reception, the courtrooms, staff reception, printer and copy areas, breakrooms, and file rooms. EOIR's *Notice of Public Health Practices* specifically told respondents to remember social distancing guidelines of 6 feet when choosing to enter an elevator and cautioned that wait times for elevators may be "significantly longer" than in normal times.⁴¹ While the OIG recognizes that common areas are not controlled by EOIR, we heard concerns from interviewees about areas in buildings such as the elevators and the security screening line, which respondents and their attorneys must pass through in order to arrive at their immigration hearings and which might be congested with other people.

The OIG received conflicting information about the status of social distancing in EOIR workplaces and proper mask wearing. Regarding social distancing, the OIG learned of measures EOIR had taken to ensure social distancing. However, the National Association of Immigration Judges (NAIJ) and American Federation of Government Employees (AFGE) unions complained to the Occupational Safety and Health Administration (OSHA) that EOIR's refusal to close certain courts "require[d] judges and court staff to continue to travel to courthouses and work shoulder-to-shoulder in hearings."⁴² (See the text box for a description of the complaint to OSHA.) In one

Unions Filed a Complaint with OSHA Regarding EOIR Workplace Conditions

On April 23, 2020, OSHA informed EOIR that it had received a formal complaint that employees were exposed to a known and deadly contagion within the EOIR headquarters building and surrounding communities due to the agency's inactions. The complaint alleged:

1. no employer-provided guidance of safeguarding measures;
2. a lack of social distancing and a failure to introduce preventive workplace controls;
3. insufficient PPE, such as face coverings and gloves;
4. failure to minimize contact exposure in common areas; and
5. insufficient notification of incidents or confirmed positive COVID-19 cases throughout the building.

The NAIJ and AFGE also described EOIR's work being conducted "exclusively with paper files" as one impediment to social distancing.

OSHA decided not to conduct an investigation but ordered EOIR to respond with an update on steps taken to address potential hazards.

In late April 2020, EOIR informed OSHA that it had moved individual workspaces at its headquarters building to increase social distancing. The AFGE and NAIJ unions confirmed to OSHA that EOIR made attempts to distance workstations; but the unions asserted that concerns were immediately raised that employees remained in close proximity to each other. According to the unions, EOIR declined to make further adjustments. EOIR, in its response to OSHA, said that it has been challenging to keep PPE such as face coverings and gloves stocked when left in common areas. EOIR indicated that, if stock is missing, employees can have it replaced upon request. EOIR reported to the OIG that, as of October 1, 2020, it was waiting for a response from OSHA.

Sources: NAIJ and AFGE complaint to OSHA, April 21, 2020; OSHA letter to EOIR, April 23, 2020; EOIR response letter to OSHA, April 30, 2020; and NAIJ and AFGE rebuttal letter to EOIR's response to OSHA, May 15, 2020

⁴¹ EOIR, *Notice of Public Health Practices*.

⁴² NAIJ and AFGE, rebuttal letter to EOIR's Response to OSHA, May 15, 2020. On November 2, 2020, the Federal Labor Relations Authority issued a decision saying that immigration judges were management officials and excluded from the

Continued

immigration court in New York City, which had a large number of COVID-19 cases, the OIG heard that the number of support staff required to report to the office in person actually increased from April to May, from 10 to 20 staff members, which could affect the ability to socially distance. By August 2020, this one immigration court had directed all 40 support staff members to report in person to work. EOIR told the OIG that it expected that those 40 support staff would go back to the workplace on a rotational schedule—such that they were not all in the office at the same time—after a 2-week period. The OIG confirmed in November 2020 that those employees had reverted to the expected rotational schedule each pay period. That immigration court was not yet holding non-detained hearings while its staff were on rotation.

EOIR has a mask-wearing policy that mandates that every person, including staff, in EOIR and immigration court space must wear a mask. The one exception is for an interpreter, who is allowed to wear a face shield instead of a face mask because lip reading can be very important for a respondent. EOIR decided to allow interpreters to use a face shield instead of a mask to prevent the interpreters from having to take their masks on and off throughout the hearing.

In October 2020, the OIG received reports of noncompliance with the EOIR mask requirement in one immigration court. A respondent attorney told the OIG that, at the immigration court where she litigates, she encountered an EOIR clerk at the filing window who was not wearing a mask. While a pane of glass separates the clerk from members of the public, the attorney noted that the clerk's colleagues were close to the clerk and could come into contact with the public at the immigration court in other areas. This same attorney told us that, while she was representing a client in the same court, an immigration judge entered the room with a mask on but removed his mask as soon as he sat down at the bench. According to her account, the judge conducted the trial mask-less and coughed multiple times. This attorney recounted that the judge put on his mask before asking the attorney to approach the bench; but the attorney had been uncomfortable and contemplated asking the judge to wear his mask if he had not done so unprompted. After the hearing, the attorney's client said that she had been uncomfortable with the judge not wearing a mask and coughing. The attorney said that she explained to her client that she did not want to prejudice her case by offending the judge over the mask issue.

Another respondent attorney who practices in the same immigration court as the attorney above told the OIG that he has encountered the same immigration judge failing to wear a mask in court during hearings. He stated that he has encountered issues only in this one immigration judge's courtroom and has not seen other judges or EOIR staff without masks. This immigration judge's behavior deviates from EOIR policy; EOIR told the OIG that immigration judges do not have the authority to waive the mask requirement. Further, EOIR stated that all individuals in EOIR space must wear a face mask (or a face shield for interpreters) unless they have a medical condition preventing it and EOIR is not aware of anyone claiming such a medical exemption. Consistency of proper mask wearing is important to COVID-19 risk mitigation; however, the OIG did not directly assess the level of success of implementing the mask policy in the immigration courts. The OIG referred to EOIR the complaints it received about the EOIR staff not adhering to the face covering policy. EOIR leadership officials reported that they had taken action to address the violations of the face covering policy, including: notifying (in writing and telephonically) those staff alleged not to have worn face coverings that further violations of the policy could result in formal disciplinary action,

bargaining unit. 71 FLRA No. 207, U.S. Department of Justice, Executive Office for Immigration Review (Agency) and National Association of Immigration Judges, International Federation of Professional and Technical Engineers, Judicial Council 2 (Union).

monitoring the compliance of these staff with the policy, and reminding all personnel in the immigration court of the policy.

Concerns About Travel to EOIR Locations

For EOIR staff and parties to immigration proceedings, traveling to an immigration court presents another concern, especially in urban epicenters of the pandemic. In at least one location, EOIR took action to mitigate the commuting risk by offering parking to some employees who usually commuted via public transit. Additionally, when evaluating its readiness for reopening, each immigration court reports how many staff use public transportation, how many modes of public transportation are currently operating, whether public transportation is operating, and whether there is adequate public parking near the court. In one location where immigration courts have reopened for non-detained cases, one respondent attorney raised concerns to the OIG about the COVID-19 risks of witnesses traveling long distances. Additionally, some localities have put in place laws that persons who travel out of state must self-quarantine in certain circumstances. One attorney told the OIG that, due to such a quarantine order, if a respondent's witness travels from New York to Boston, for example, the witness cannot work for 2 weeks after returning home. While most immigration courts have standing orders that allow telephonic appearances by attorneys and witnesses, respondent attorneys have told the OIG that they have concerns that their clients may not be adequately represented over the telephone.

For respondents in the MPP program, traveling to the U.S.-Mexico border presented another potential COVID-19 transmission risk. While traveling on buses through Northern Mexico, it is extremely difficult or unfeasible to socially distance. There has been widespread COVID-19 transmission in the region, which puts the migrants at risk and risks transmission to DHS contractors staffing the tent facilities where the hearings take place. In the spring of 2020, when EOIR initially postponed the MPP hearings until early June, DHS still required migrants to travel to the border on their originally anticipated hearing date in order to receive a form called a "tear sheet," which lists the date and time of their next immigration hearing. DHS required in-person service for documents including these tear sheets until May 10, 2020, when it temporarily suspended in-person document service.⁴³ In light of the continuing emergency health conditions in the United States, Mexico, and the international community, DOJ and DHS on June 16, 2020, postponed both MPP hearings and in-person document service, which included the tear sheet, while pandemic conditions in Mexico remained severe.⁴⁴ DOJ and DHS reevaluated the timing for resumption of MPP hearings on a weekly basis, and, on July 17, 2020, EOIR and DHS jointly announced a plan to restart MPP hearings as soon as specific public health criteria were met on the U.S. and Mexican sides of the border.⁴⁵ When these conditions were met, DOJ and DHS planned to provide notice 15 days prior to resumption of MPP hearings with additional, location-specific information. By stopping in-person document service and hearings, EOIR and DHS eliminated the need for immigrants to risk COVID-19 on a commute to MPP tent facilities.

⁴³ DHS temporarily resumed in-person document service from June 8 to June 16, 2020.

⁴⁴ EOIR, Stakeholder Update, Joint DHS/EOIR Statement on MPP Rescheduling, June 16, 2020.

⁴⁵ The public health criteria are: (1) when California, Arizona, and Texas progress to Stage 3 of their reopening plans; (2) when the U.S. State Department and the CDC lower their global health advisories to Level 2, and/or a comparable change in health advisories, regarding Mexico in particular; and (3) when the Government of Mexico's "stoplight" system categorizes all Mexican border states (i.e., Tamaulipas, Nuevo Leon, Coahuila, Chihuahua, Sonora, and Baja California) as "yellow." EOIR, Stakeholder Update, Department of Homeland Security and Department of Justice Announce Plan to Restart MPP Hearings, July 17, 2020.

However, while waiting for these hearings to resume, immigrants were remaining in Mexico for longer periods of time in living conditions that could also pose a high risk of COVID-19 contraction.

For respondents on the MPP docket, DHS stopping in-person document service was a proactive, positive change to reduce COVID-19 exposure, though, without reliable contact information for many migrants in Mexico, it might have been difficult for EOIR to provide effective notice regarding new hearing dates. In light of this, EOIR instructed immigrants via an electronic update email and on its website on June 16, 2020, as well as on the automated case information hotline, to continue to check on case status through the hotline or by visiting the EOIR automated case information portal on the Internet.⁴⁶ The hotline and the portal are both available in English and Spanish.

In February 2021, DHS announced that it was going to start processing MPP respondents who have active cases with EOIR and would provide a virtual registration process that would be accessible from any location.⁴⁷ DHS stated that once MPP respondents are registered they should wait for further information and not present themselves to the border until instructed. DHS also said that it would test each individual passing through the program for COVID-19 before he or she could enter the United States. According to the DHS announcement, DHS would “only process individuals consistent with its capacity to safely do so while fully executing its important national security and trade and travel facilitation missions.” As of April 2021, EOIR provided an update that DHS had started paroling MPP respondents into the United States because the MPP program had ended. MPP cases are no longer considered detained cases, and EOIR informed the OIG that it would schedule the cases for hearings within the established guidelines for processing non-detained cases.

EOIR Attempted to Address Shortages in PPE and Disinfectants but Initially Had Difficulty Obtaining Supplies

Given that EOIR required many staff to report to work in person, there was an ongoing need for staff to be provided with PPE and disinfectants; but EOIR had difficulty obtaining a steady supply, especially early in the pandemic. EOIR informed the OIG that face coverings, sanitizer, and gloves are continually being purchased for use in the field and at headquarters. EOIR contracted with supply sources that JMD provided and has worked with the OCIJ to implement purchasing flexibilities in local areas where supplies are difficult to acquire. In response to inconsistent stock and deliveries, supplies have been mailed from one court to another to facilitate coverage. Additionally, soap is required in all EOIR restrooms and is provided either by

⁴⁶ EOIR had an automated case information telephone hotline prior to the pandemic and, in February 2020, added an online automated case information portal. The automated case information application allows users to receive the most recent information about a case after inputting a unique alien registration number. Users can access an immigration court’s operating status, next scheduled hearings, hearing decision information, and court contact information. DOJ Office of Public Affairs, “[Executive Office for Immigration Review Expands Automated Case Information Channels](#),” February 25, 2020, www.justice.gov/opa/pr/executive-office-immigration-review-expands-automated-case-information-channels (accessed April 14, 2021).

⁴⁷ DHS, “[DHS Announces Process to Address Individuals in Mexico with Active MPP Cases](#),” February 11, 2021, www.dhs.gov/news/2021/02/11/dhs-announces-process-address-individuals-mexico-active-mpp-cases (accessed April 14, 2021).

the lessor, or by the General Services Administration (GSA) when a court is located in a federally owned building.

To mitigate the risk of contracting COVID-19, EOIR provided gloves to employees. However, the OIG was told by staff that EOIR provided the gloves only to those personnel that the agency determined to require gloves for their work, such as employees who interact with the public or handle mail and packages. If glove stock was missing, EOIR said that employees could have it replaced by request but the onus was on the individual employee to ask, rather than such materials being affirmatively and frequently stocked and distributed to all employees. The OIG heard from one immigration court in May 2020 that staff could receive two to three pairs of gloves and two face coverings daily, but only if they asked for these items. According to EOIR, as of August 2020, there were sufficient gloves in all immigration courts. EOIR stated as an example that there were enough gloves for a judge to use a new pair each time he or she reviewed a new file.

The OIG has also heard reports of intermittent unavailability of hand sanitizer and disinfectant cleaning supplies, products which nationally experienced supply chain disruptions and peak consumer demand. According to a support staff member, the staff at her immigration court each received a small bottle of alcohol that could last up to 2 weeks depending on individual usage. Some EOIR staff stated that they were told in April to bring their own sanitation supplies to work but that such supplies were difficult for individual staff and judges to obtain.

Court Administrators have government purchase cards and can purchase supplies from specific vendors. The OIG learned that one court, for example, was able to purchase hospital-grade wipes in large quantities. Those canisters of sanitizing wipes were placed in the vicinity of high-touch items such as printers. EOIR headquarters also provided the immigration courts with additional needed supplies and was able to order hand sanitizers through newly approved vendors. Despite these efforts, as of mid-April, the OIG heard that courts' cleaning supplies consisted of what they had on hand prior to the pandemic due to delays in acquiring supplies. Throughout this time, some staff at EOIR were required to report to work in person or to take annual leave, despite potential lapses in cleaning supplies or PPE availability.

It appears that EOIR was following official government guidance regarding face coverings and placed an order for them shortly after the CDC's recommendation for their expanded use; however, government guidance was rapidly evolving early in the pandemic. The official government guidance about whether to wear face coverings changed from January to April. In January 2020, the CDC advice to "people who were feeling well" was to not wear them.⁴⁸ On February 29, 2020, the U.S. Surgeon General further discouraged people from buying masks. On April 3, 2020, the CDC changed its guidance and recommended that Americans wear homemade cloth face coverings as an "additional, voluntary public health measure."⁴⁹ Once the CDC recommended face coverings for all Americans, EOIR placed an order for face coverings on April 9, 2020. Due to supply issues, this PPE was not delivered until April 27, 2020.

⁴⁸ Transcript for CDC Media Telebriefing: Update on 2019 Novel Coronavirus (2019-nCoV), January 31, 2020.

⁴⁹ CDC, "[Guidance for Wearing Masks](https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover.html)," April 3, 2020 (updated April 6, 2021), www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover.html (accessed April 14, 2021).

EOIR also provided written guidance to employees regarding wearing face coverings. On April 15, 2020, the then EOIR Director provided staff with the Deputy Attorney General's memorandum, dated April 14, 2020, which instructed the use of personal face coverings in workplace common areas to the extent practicable.⁵⁰ Although the Deputy Attorney General's memorandum instructed the use of cloth face masks or coverings, the memorandum also stated that it was not intended to supersede component-level guidance for workplaces that are not traditional office settings, such as courts. Specifically, the memorandum said, "components with such facilities have already directed their workforce to follow guidance that is appropriately tailored to relevant locations and circumstances, consistent with applicable workplace safety requirements and recommendations, and that component guidance should be followed."⁵¹ On June 11, 2020, EOIR issued PM 20-13, which said that, consistent with DOJ guidance, EOIR was directing all visitors to EOIR-controlled space to wear a face covering and observe applicable social distancing guidelines (to the maximum extent practicable).⁵²

By August 2020, EOIR reported to the OIG a number of improvements in terms of increased types and availability of PPE, compared to April. For example, EOIR reported that immigration judges had asked for plexiglass barriers in court. After conducting research on the preventive measures other courts around the nation were taking, EOIR senior leadership received approval from the Director to begin installing such plexiglass around the judge's bench and near the interpreters. EOIR also updated the OIG on the availability of face coverings and hand sanitizer. Regarding face coverings, we were told that there is no specific amount per person set by headquarters but that staff in the immigration courts are using the face coverings freely and that headquarters had not heard of any recent complaints of unavailability. Hand sanitizer was available at EOIR workspaces, and, while there were complaints that hand sanitizer was running out at headquarters, EOIR's further inquiry determined that someone was removing the hand sanitizer bag from the dispenser in the common area for personal use. EOIR addressed this issue, so hand sanitizer was subsequently available for all at headquarters again.

EOIR Follows the Decisions of Entities Controlling Facilities Where Immigration Courts are Located on Whether to Conduct Temperature Checks

Given that many immigration courts are housed in shared buildings that are not in the exclusive control of EOIR, EOIR cannot unilaterally make the determination on whether to test the temperature of visitors entering the buildings housing its courts.⁵³ EOIR reported that EOIR immigration courts are located in three types of buildings: (1) DHS space (leased from GSA or directly by DHS), (2) GSA federal building, and (3) GSA-

⁵⁰ Jeffrey Rosen, Deputy Attorney General, DOJ, memorandum for Department of Justice Employees, [Use of Face Coverings in Department of Justice Workplaces](https://www.justice.gov/coronavirus/page/file/1318886/download), April 14, 2020, www.justice.gov/coronavirus/page/file/1318886/download (accessed April 14, 2021).

⁵¹ Rosen, memorandum for DOJ Employees, April 14, 2020.

⁵² McHenry, PM 20-13.

⁵³ The CDC suggests that employers consider conducting health checks, such as temperature screening of employees before they enter a facility, in accordance with state and local public health authorities. The CDC further states that screening and health checks are not a replacement for other protective measures like social distancing and wearing masks and will not identify individuals with COVID-19 infection who are asymptomatic or presymptomatic (have not developed signs or symptoms yet but will later). CDC, [Guidance to Businesses and Employers Responding to COVID-19](https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html#), updated March 8, 2021, www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html# (accessed April 14, 2021).

leased commercial space. Table 3 below outlines the type of buildings and number of immigration courts in each type of building.

Table 3

Types of Buildings Housing Immigration Courts

Type of Building	Number of Immigration Courts
DHS Space (leased from GSA or directly by DHS)	22
GSA Federal Buildings	26
GSA-leased Commercial Space	20
Split Between GSA Federal Building and GSA-leased Commercial Space	3

Source: EOIR data

At immigration courts co-located in DHS detention facilities, DHS controls the visitor screening protocols; EOIR's then Director told the OIG in July 2020 that DHS was conducting temperature checks for visitors in these facilities.

DOJ states in its DOJ Framework for Returning to Normal Operations Status (DOJ Framework) that it does not conduct temperature screening upon entrance to DOJ facilities, with two exceptions:

- first, components are encouraged “to ensure visitors to DOJ owned or leased buildings have their temperature scanned with a no-contact device upon entry wherever practicable,” and
- second, DOJ law enforcement components that operate their own training facilities and/or other specialized operational facilities (such as immigration courts or laboratories) may require temperature scanning at their discretion “wherever it is likely the population of the facility will have close and frequent contact and social distancing cannot be guaranteed.”⁵⁴

The DOJ Framework further states that, for components that are in locations where DOJ components are sharing a facility with other federal agencies, the local Facility Security Committee (FSC) will make decisions on temperature screening.⁵⁵ Pursuant to this DOJ policy, EOIR follows the determinations of the FSCs in buildings EOIR shares with other DOJ and/or other federal tenants regarding temperature scanning of

⁵⁴ Lee Lofthus, Assistant Attorney General for Administration, DOJ, memorandum for Heads of Department Components and U.S. Attorneys, Department Framework for Returning to Normal Operations Status, May 18, 2020.

⁵⁵ Lofthus, memorandum for Heads of Department Components and U.S. Attorneys, May 18, 2020.

visitors once buildings are reopened.⁵⁶ EOIR told the OIG that as of July 2020 it was EOIR's understanding that the relevant FSCs had not elected to require temperature checks for visitors at the federal buildings EOIR shares with other federal tenants.

For non-detained hearings that resumed in federal buildings, the then EOIR Director asserted that there was "minimal likelihood that visitors to the court will have close and frequent contact or that social distancing cannot be enforced." Given the NAIJ and AFGE reports in a complaint to OSHA of crowded waiting rooms and elevators while attending detained hearings, the OIG is not assured that the Director's statement regarding the need for temperature screening will be true in all immigration courts.

The OIG notes that as stated above the DOJ Framework authorizes law enforcement components, including EOIR and immigration courts, to require temperature screening and/or testing for the presence of COVID-19 for all entrants at the component's discretion wherever it is likely the population of the facility will have close and frequent contact and social distancing cannot be guaranteed. EOIR leaders told the OIG in January 2021 that this provision was inapplicable to EOIR because EOIR does not operate its own facilities. While the DOJ Framework specifically mentions immigration courts in this context, EOIR asserted that the reference was "simply incorrect."⁵⁷ According to EOIR, the provision of the DOJ Framework that "strongly encourage[s]" all DOJ components to scan visitors to DOJ-owned or leased buildings for fevers does not apply because EOIR does not own or lease any buildings. EOIR also noted that the DOJ Framework does not address DOJ components located in non-federal multi-tenant leased facilities without an FSC. Nevertheless, by analogy, for immigration courts located in such facilities, EOIR informed the OIG that it adheres to the determination of the lessor regarding temperature screenings for visitors. Overall, the OIG determined that decisions on whether or not to conduct temperature screenings at EOIR immigration courts are made at the local level, in some places where DOJ policy requires them to be locally directed by FSCs and in other places where DHS or lessors take on this role.

EOIR's Early Communication to Staff and the Public About the Pandemic Was Untimely, Unclear, and Inconsistent, Leading to Confusion and Anxiety

EOIR responded to the pandemic by creating a team to handle matters related to COVID-19 and issued various communications to staff, including best practices for immigration judges to mitigate potential exposure. However, we found that EOIR's communication with staff at the beginning of the COVID-19 pandemic was untimely and often not clear or transparent enough for staff to understand how and why EOIR was making decisions related to the pandemic. Additionally, until November 2020 the communication to the public about the closing of immigration courts did not include information about possible COVID-19 exposure. Communication from EOIR and immigration court management about telework was confusing; staff learned when immigration courts or office spaces were closing at the same time as the public; and differing and changing federal guidance on cleaning that EOIR had to follow led staff to believe that EOIR

⁵⁶ In buildings with at least two federal tenants, an FSC is established with voting representatives from each agency who meet annually or as needed to discuss security issues related to the facility. In its COVID-19 Mitigation Measures Reopening Checklist, EOIR includes information about the applicable FSC's guidance regarding screening processes, temperature checks, or visual inspections to reduce risk of COVID-19 transmission.

⁵⁷ EOIR told the OIG that it did not have the opportunity to review the DOJ Framework memorandum prior to its issuance.

was not adhering to government standards. Staff were therefore anxious and worried about having to continue to work in EOIR office space without complete and timely information.

EOIR Made Efforts to Communicate with Staff and the Public About the Pandemic

In March 2020, when the World Health Organization declared COVID-19 a pandemic, EOIR assembled a team of headquarters staff, headed by the acting Deputy Director, that met every morning to review issues related to COVID-19. EOIR set up an “incident” email box to which staff could report possible COVID-19 cases or exposure in the immigration courts and at headquarters. The email incident reports were handled by one of three team members, who are each located in different time zones, allowing them to respond to reports within their respective time zones in a timely manner. The acting Deputy Director told us that she tried to respond to each email within an hour. Throughout the pandemic, EOIR communicated to staff through email and telephone, and with the public through social media outlets, its website, and EOIR Stakeholder Update emails.

In March 2020, the U.S. federal government started closing offices where possible and moved to nearly full telework, with the exception of certain mission-critical work. EOIR’s initial response to the pandemic involved communication to the public and staff through the various formats and platforms listed above:

- On March 10, 2020, EOIR communicated publicly the first closing of an immigration court because of suspected COVID-19 exposure.
- On March 13, 2020, EOIR postponed only master calendar immigration hearings in non-detained cases through April 10, 2020, in 10 immigration courts.
- On March 17, 2020, all non-detained hearings were postponed indefinitely and 10 immigration courts were closed.
- Over the next few days, EOIR announced the closing of additional immigration courts for cleaning after potential COVID-19 exposure.
- On March 30, 2020, EOIR postponed all non-detained hearings until May 1, 2020.
- On April 1, 2020, EOIR postponed all Migrant Protection Protocols (MPP) hearings through May 1, 2020.
- Throughout April and May 2020, EOIR continued to extend the postponement dates for non-detained hearings.
- By June 2020, EOIR announced that it intended to reopen certain immigration courts on an individualized, local level to once again hear non-detained cases.
- Also in June 2020, EOIR announced that it would further postpone MPP hearings and suspend in-person document service at the border during the pandemic. DHS and EOIR released a joint

statement describing this change and noting that it would “alleviate the need for travel within Mexico to a U.S. port of entry while pandemic conditions in Mexico remain severe.”⁵⁸

The Director of EOIR first communicated with all staff about the pandemic on March 15, 2020—2 days after the President issued a Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak—in an email that went to the entire agency explaining the postponement of some hearings.⁵⁹ On March 18, 2020, the then EOIR Director emailed a PM to the entire agency that (1) outlined guidance to promote the safety of staff and the public, including not allowing individuals who had tested positive for COVID-19 in court space; (2) reminded immigration judges of the authorities they had to minimize contact in court space, such as waiving appearances, granting continuances, and conducting hearings by VTC or telephone; and (3) encouraged immigration judges to resolve as many cases as possible without the need for a hearing.⁶⁰

On March 30, 2020, the Director sent another email to the entire agency thanking employees for their work; describing the work of different headquarters units in dealing with the pandemic; and describing how the agency was assessing how to ensure the safety of the staff, parties to immigration proceedings, and visitors. The Director continued to email the staff through April 2020 about suspected or confirmed cases of COVID-19 in EOIR space, new Board of Immigration Appeals members, and the new policy memoranda related to EOIR operations during the COVID-19 pandemic. Additionally, starting in May 2020 the Director communicated with all EOIR staff through the Director’s Spotlight, a monthly email that described activities in the agency, including those related to COVID-19.

EOIR and Immigration Court Management Initially Did Not Adequately Communicate with Staff About Reporting to Work in Person or Telework, Creating Confusion

EOIR staff and immigration judges we spoke with told us that inconsistent and varying communication from EOIR and immigration court management created confusion and low morale. An AFGE representative from one immigration court said that initially it was not clear which staff were to telework and which staff were to report in person to immigration courts because immigration court management kept changing its direction. Support staff from this immigration court were told by court management during the week of March 23, 2020, to go home on administrative leave until April 13, 2020, after their immigration court was closed at the onset of the COVID-19 pandemic. Subsequently, on March 25, a supervisor called the support staff and said that the immigration court needed two to three support staff to come in and sort mail and accept filings. Most of the support staff did not want to go in; only two said that they would be willing to go into the immigration court. After those calls, the staff in the same immigration court were told by court management during a conference call with all staff that they were to share laptops and alternate

⁵⁸ EOIR Stakeholder Update, June 16, 2020.

⁵⁹ While this first internal communication to the entire agency was sent after the first closing of an immigration court and the postponement of master calendar hearings were announced publicly, EOIR communicated with staff in those affected immigration courts prior to this email.

⁶⁰ McHenry, PM 20-10, March 18, 2020. EOIR updated this policy memorandum on June 11, 2020, reiterating the same guidance and providing updates on immigration court operations since the original March memorandum.

teleworking.⁶¹ In May 2020, the OIG was informed that staff at this immigration court were no longer sharing laptops. Thus, only a few staff were able to telework and only a couple of days a week each. The AFGE representative told us that staff at this immigration court believe that the agency was putting the processing of mail above staff health and safety. This representative also told the OIG that staff in this immigration court were required to report in person for 3 days per week in order to receive weather and safety leave for the remaining 2 days of the week.⁶² Staff members at that one court who were not ill, yet were unwilling to come into the office in person for those 3 days a week, had to cover the time with annual leave and could not invoke weather and safety leave.

We were also told that some immigration judges experienced similar confusion at the beginning of the pandemic. Representatives from the NAIJ told the OIG that immigration judges from across the country were complaining to them that the communication from EOIR on protocol and standards related to when employees should telework was lacking. The NAIJ also said that Assistant Chief Immigration Judges (ACIJ) were telling them that they did not know what was happening and they did not have the authority to make decisions for their immigration courts. ACIJs reported to the NAIJ that they were told by the acting Chief Immigration Judge not to put anything in writing or make decisions related to the pandemic and were frustrated because they were “in the middle” between the agency and the staff. We spoke with one immigration judge, who said that he was not getting any information from management about the agency’s response to the pandemic and what judges and courts should be doing.

Staff Believed that EOIR Provided Untimely Communication When Immigration Courts or EOIR Office Spaces Were Closing Due to COVID-19 Exposure, Particularly Early in the Pandemic

EOIR staff said that they were not adequately notified when there was potential exposure to COVID-19 in EOIR space or when immigration courts were closing or opening. Some staff said that EOIR was publicly announcing closings before the staff was notified. According to a DOJ memorandum, EOIR was required to have all external communications approved through the DOJ Office of Public Affairs (OPA) before release and this directive applied to external messaging related to COVID-19.⁶³ EOIR told the OIG that in practice DOJ generally reviews all communications but some communications are not reviewed. EOIR officials told the OIG in a written exchange that, due to the high visibility of both immigration issues and COVID-19 and because internal communications are often “subject to distortion and manipulation when presented by

⁶¹ At this immigration court, staff members did not personally interact to exchange laptops. A staff member would leave a shared laptop at the office after use, and another staff member would pick it up to use subsequently.

⁶² 5 U.S.C. § 6329(c) allows federal agencies to approve “weather and safety leave” for an employee or a group of employees only if they are prevented from safely traveling to or performing work at an approved location due to (1) an act of God, (2) a terrorist attack, or (3) another condition that prevents the employee or group of employees from safely traveling to or performing work at an approved location. On March 12, 2020, the acting Director of OMB issued OMB Memorandum M-20-13, which encouraged federal agencies to make use of telework flexibilities and allowed the agencies to grant weather and safety leave to an employee with a higher risk of serious complications from COVID-19 who is not telework eligible. The memorandum said that federal agencies could approve the leave due to a “condition that prevents the employee or group of employees from safely traveling to or performing work at an approved location.” OMB, [Memorandum M-20-13 for the Heads of Departments and Agencies](#), Updated Guidance on Telework Flexibilities in Response to Coronavirus, March 12, 2020, www.whitehouse.gov/wp-content/uploads/2020/03/M-20-13.pdf (accessed April 14, 2021).

⁶³ Jeffrey A. Rosen, Deputy Attorney General, DOJ, memorandum for EOIR Director and Director of Public Affairs, Advance Clearance of External Communications, September 24, 2019.

different media outlets, which creates additional confusion,” the Department “has an interest in ensuring that internal communications do not occur prior to approval of a closure and the associated external messaging” to the public. EOIR officials stated that, once external communications are approved by the DOJ OPA, internal communications are made to EOIR staff prior to any public announcement.

In the event of a possible COVID-19 exposure, the OIG was told by EOIR that immigration court management immediately started contact tracing, which included notifying any staff who may have been exposed to the virus or had close contact with the person suspected of having the virus. Immigration court management submitted requests for closure and cleaning through the incident email box described above that EOIR established to handle reports of issues related to the pandemic. Through this mechanism, EOIR headquarters received notification that there had been a COVID-19 related incident in an immigration court (or EOIR office space). Once in receipt of this notification, EOIR leadership made a determination on whether to close an immigration court and the EOIR OPA would prepare the proposed internal and external communication on the status of a particular court for the DOJ OPA to review, as described above.

At the beginning of the pandemic, the EOIR acting Deputy Director prepared an assessment of each exposure-related closure request for final approval of the Director. Upon approval by the Director, the closure request, as well as the accompanying communication, was submitted to JMD and the White House COVID-19 Task Force for approval. Once JMD and the White House COVID-19 Task Force approved the request and the communication, EOIR headquarters notified local immigration court management that the court was officially closed. This triggered the immigration court management to start a calling tree to internally notify staff of the closure. EOIR then publicly announced the closure of the immigration court on social media outlets, as well as through electronic notices. Because (1) both internal and external communications are contingent on the same DOJ OPA approval process and (2) it takes time for EOIR to circulate a closure decision internally to all staff via calling tree, the public announcement of the closing occurs at practically the same time as the internal notification to some staff. As a result, staff expressed concern that EOIR was announcing to the public before notifying all of its own staff of a COVID-19 exposure and associated immigration court closure.

EOIR told us that, since April 14, 2020, if a specific immigration court was closed because of COVID-19 exposure and JMD and the DOJ OPA had already approved the external and internal messaging on the closure decision for that particular court, EOIR could send additional internal messaging related to that closure without JMD and OPA approval. However, any additional public announcements regarding a court that was already closed still had to be approved by JMD and the OPA. In addition, according to a written response from EOIR, EOIR still sent both internal and external messaging surrounding all initial closure decisions to JMD and OPA to ensure “consistency with Departmental decisions and communications.” If there was a need for an immediate closure of an immigration court during business hours, staff in that immigration court were notified immediately to leave but external formal notification to the public and notification to EOIR employees outside that immigration court still was made only after approval from the DOJ OPA. Additionally, since July 2020, to help expedite the process, the acting Deputy Director made the closure decision, with a notification to the Director.

Some Staff Believed that EOIR Was Initially Not Sufficiently Transparent in Sharing Information When EOIR Personnel Tested Positive for COVID-19

As described above, on April 21, 2020, the NAIJ and AFGE, the unions for immigration judges and some support staff, respectively, filed a complaint with OSHA alleging that EOIR was not providing workers a place of employment that was “free from recognized hazards that are causing or are likely to cause death or serious harm” because of EOIR’s response to COVID-19.⁶⁴ The complaint listed five alleged hazards, including that EOIR had not provided notification to all employees of all incidents of confirmed positive COVID-19 cases in the EOIR headquarters building. As discussed above, OSHA determined that it would not formally investigate the complaint but asked EOIR to provide a response to the allegations, which EOIR provided on April 30, 2020.

In its response to OSHA, EOIR said that it followed the U.S. Office of Personnel Management (OPM) memorandum, dated March 7, 2020, which explained that “the infected employee’s privacy should be protected to the greatest extent possible; therefore, his or her identity should not be disclosed.” The OPM memorandum directed management to share only information determined to be necessary to protect the health of the employees in the workplace but maintain confidentiality as required by the Americans with Disabilities Act. Per OPM, supervisors were responsible for consulting with the agency General Counsel to determine what information was releasable.⁶⁵ As part of its response to OSHA, EOIR stated that management officials personally notified close contacts of a suspected or confirmed case of COVID-19 and asked them to quarantine. EOIR provided OSHA a list of all incidences of possible COVID-19 exposure or illness reported by staff to EOIR from mid-March through April 2020, along with EOIR’s resulting actions and any communication EOIR made to staff regarding the situation. According to that information, EOIR notified close contacts of an exposure without revealing personally identifiable information.

There were five instances early in the pandemic, in March 2020, in which EOIR employees reported symptoms or positive tests of COVID-19 infection or contact with an infected person. The employees in those incidences self-quarantined or were not in the office during the CDC-defined time of contagion and continued working at home.⁶⁶ EOIR did not take further action in these five incidences and did not notify employees about the incidences. In the first incident, an employee exhibited COVID-19 symptoms outside of the office but had not been in the workplace during the time the CDC estimates that individuals with COVID-19 are infectious or contagious. In two of the five incidences, an employee came into contact with a possibly symptomatic person. EOIR said that it considered this contact to be secondary or indirect. In the fourth incident, an EOIR employee’s child was suspected of having COVID-19 but the employee had been working at home and self-quarantined for the remainder of the infectious time period. In the last of the five

⁶⁴ NAIJ and AFGE, complaint to OSHA, April 21, 2020.

⁶⁵ Dale Cabiness, Director, OPM, Attachment to OPM Memorandum #2020-05, U.S. Office of Personnel Management Questions and Answers on Human Resources Flexibilities and Authorities for Coronavirus Disease 2019 (COVID-19), March 7, 2020.

⁶⁶ The CDC instructs that individuals who think or know they have COVID-19 can be around others as long as the following conditions are met: “10 days since symptoms first appeared, 24 hours with no fever without the use of fever-reducing medications, and other symptoms of COVID-19 are improving.” The CDC further instructs that “anyone who has had close contact with someone with COVID-19 should stay home for 14 days after their last exposure to that person.” CDC, “[When You Can Be Around Others After You Had or Likely Had COVID-19](https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/end-home-isolation.html),” updated March 12, 2021, www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/end-home-isolation.html (accessed April 14, 2021).

incidents, an employee had been out of the office for 6 days before exhibiting symptoms and self-quarantined for the remaining infectious time period.

Later in the pandemic, EOIR began to manage communication about possible exposure to COVID-19 differently and started including the above types of potential exposure as scenarios that would trigger notification to employees who could have been exposed. For example, in April 2020, an EOIR employee tested positive for COVID-19 but had not been in the office for 3 weeks prior. In this instance, EOIR sent notice to staff even though there had been no recent contact. While we recognize that EOIR faces limitations on disclosing personal information, we believe that EOIR could be more transparent to its staff regarding the threshold criteria it applies in decisions on when and to whom to issue notification of potential COVID-19 exposure.

Some Parties to Proceedings Believed that EOIR Was Not Sufficiently Transparent in Sharing Information When Immigration Courts Were Closed Due to Possible COVID-19 Exposure

Parties to proceedings the OIG spoke with expressed concerns about a lack of adequate communication and transparency on immigration court closures as a result of COVID-19 incidents. EOIR distributes information publicly about the closing of immigration courts or EOIR spaces through social media sites and through its EOIR Stakeholder emails, which are available to any member of the public that signs up on EOIR's website. At the beginning of the pandemic in March 2020, EOIR included information in a few of its notifications that courts were closing because of possible COVID-19 exposure. However, at the beginning of April 2020, that information was no longer included in the social media posts or the EOIR Stakeholder emails. The notifications would simply state that a particular immigration court was closing, and they did not include a reason. Conversely, we note that in instances of closures due to non-COVID-19 related events, such as a hurricane or protest, the EOIR public notifications about immigration court closings included a reason. EOIR told the OIG that it stopped including references to COVID-19 in its communications about closures to avoid disclosing confidential personal or medical information about specific employees. EOIR said that, because there were a small number of employees physically working in EOIR spaces at the time, it could be easy to determine which specific employees were affected.

Some respondent attorneys shared with us their concerns that they were not notified when the federal building housing an immigration court closed in July 2020 because of a case of COVID-19. Specifically, we received two complaints relating to an instance in which a DHS Federal Protective Service security guard who worked in the federal building tested positive for COVID-19. The respondent attorneys we spoke to said that they were not notified by EOIR about this potential exposure and instead found out from a message board where DHS attorneys had shared that information. One of the respondent attorneys said that she had been in the federal building to attend an immigration hearing on one of the days the security guard had come to work with symptoms but did not receive notification from EOIR, or any other federal agency responsible for the federal building or the security guards, that she had been potentially exposed. Another respondent attorney told us that, while his partner who had a hearing that day had received a call from EOIR with notification that the federal building was closing, he had his own hearing on the same morning in that building but did not receive a call from EOIR letting him know that the hearing was postponed and the building was closing.

Both of the respondent attorneys told the OIG that they received the EOIR Stakeholder emails; however, those emails and EOIR social media notifications said only that the immigration court was closing for a week

because the federal building was closed. The notifications did not mention the potential COVID-19 exposure or positive COVID-19 case. The respondent attorneys said that, in response to congressional inquiries made after they contacted their representatives about the lack of notification, EOIR stated that the guard who tested positive for COVID-19 was not an EOIR employee and was not in EOIR space. EOIR said in this response that it does not generally make announcements regarding employees of other federal agencies and that due to privacy concerns it does not publicly identify individuals who have tested positive for COVID-19. EOIR further stated that it would notify any known close contacts if there had been an incident involving an EOIR employee or an individual who was in EOIR space. EOIR further asserted that it would have no way of knowing who may have been in close contact when the individual who tested positive is not an EOIR employee or in EOIR space. In contrast to an employee of another agency in that building who may not interact with many people as part of his or her job, a security guard has potential access to and contact with everyone who enters a building. We believe that in this type of situation a lack of notification to those who have entered the building may unnecessarily increase the risk that those individuals unknowingly further spread the disease. Because EOIR did not include any information in its social media posts or Stakeholder emails in October 2020 about the reason for the closing, parties to the proceedings had no way of knowing whether they may have been exposed to COVID-19. While EOIR officials expressed the view that EOIR cannot issue public communications about incidents that did not occur in its space, we encourage EOIR to coordinate with the other agencies in its buildings to ensure that there is public notification of any COVID-19 exposure.

In November 2020, EOIR decided to change its notifications and started including the following verbiage in social media posts and Stakeholder emails: *“Due to a possible COVID-19 exposure, the [NAME] Immigration Court is closed for cleaning consistent with CDC guidelines. Any known close contacts have been notified.”* EOIR said that, as immigration courts resumed hearings and the number of employees working in EOIR spaces increased, the likelihood of revealing a specific employee’s medical information declined and EOIR changed its announcement format accordingly. We believe that this step increases transparency in these situations and allows those with potential exposure to better understand the risk and take appropriate action.

Some Staff Reported Concerns About Whether EOIR Office Spaces Were Cleaned and Reopened According to Appropriate Standards After COVID-19 Exposures

EOIR staff the OIG spoke with raised concerns that EOIR management was not transparent in identifying which standard it was using to determine when a court should be reopened after a cleaning. The CDC and GSA each issued cleaning standards regarding COVID-19, with the GSA standards being updated in accordance with changes in CDC guidance.⁶⁷ According to complaints to the NAIJ and AFGE, EOIR closed some courts for only 1 day while EOIR closed other courts for 2 days and closed one court annex for 2 weeks.⁶⁸

⁶⁷ GSA, *Cleaning and Disinfection Procedures*, updated March 9, 2020, 1–2; CDC, *“Cleaning and Disinfecting Your Facility,”* updated April 5, 2021, www.cdc.gov/coronavirus/2019-ncov/community/disinfecting-building-facility.html (accessed April 14, 2021).

⁶⁸ NAIJ and AFGE asserted to OSHA that, “EOIR does not explain what it means when a court is ‘deep cleaned’ but remains open, or when a court should be closed and for how long.” NAIJ and AFGE, rebuttal letter, May 15, 2020.

EOIR courts are located either in spaces that are GSA controlled or detention centers that are DHS controlled. If there is a potential COVID-19 exposure in a detention center, EOIR must make a request for DHS to clean EOIR space. In the other EOIR spaces, EOIR requests cleaning by consulting with GSA and the local FSC to ensure that enhanced cleaning is available if needed. GSA hires the staff to conduct a cleaning in accordance with the GSA Cleaning and Disinfection Procedures. The GSA Cleaning and Disinfection Procedures document states that it “will be updated whenever new guidance is received from the Centers for Disease Control and Prevention (CDC) or associated health authority.”⁶⁹

During March and April 2020, guidance on cleaning practices post-exposure varied slightly between different official government sources, specifically GSA and the CDC, which updated their guidelines at different times:

- The GSA Cleaning and Disinfection Procedures, dated March 9, 2020, required agencies to close a space for “*up to 24 hours*” in association with cleaning and disinfecting (emphasis added). Since the GSA guidelines in March 2020 did not require waiting a full 24 hours before cleaning, if a COVID-19 exposure happened, especially late during a workday, under these GSA guidelines the court could open within a day.
- The relevant CDC guidance, effective April 1, 2020, instructs employers to wait 24 hours before cleaning or disinfecting after a COVID-19 exposure. However, this CDC guidance also states that “if 24 hours is not feasible, wait as long as possible.”⁷⁰
- The DOJ Framework, issued by the Assistant Attorney General for Administration on May 18, 2020, directly referred to the CDC cleaning standards and instructed DOJ components, including EOIR, to wait a full 24 hours before cleaning the area traveled by an employee, contractor, or visitor who had tested positive for COVID-19.

The GSA website now incorporates by reference the new CDC guidance, bringing the guidance on this topic into alignment and providing for automatic updates to the GSA directives if CDC guidance were to change. However, we found that the earlier inconsistency on the guidance timelines was confusing and might have contributed to staff members being concerned that cleaning of EOIR spaces was not meeting CDC standards. In documents obtained by the OIG, the NAJ and AFGE unions alleged to OSHA that “often EOIR space is cleaned and reopened within 24 hours of a symptomatic individual’s last contact with the space.”⁷¹ However, EOIR told the OIG that a records search did not find any instances in which EOIR reopened a court less than 24 hours after cleaning. The OIG was not able to verify such timing in this limited-scope review. According to EOIR, the logistics of closing a court and procuring cleaning services almost always require a time period well beyond 24 hours.

EOIR further told the OIG that it does not have a specific reopening timeline to be applied across the board to all post-exposure incidents because it evaluates each COVID-19 incident separately within applicable GSA

⁶⁹ GSA, Cleaning and Disinfection Procedures, 1.

⁷⁰ CDC, “Cleaning and Disinfecting Your Facility.”

⁷¹ NAJ and AFGE, rebuttal letter, May 15, 2020.

and CDC guidelines. While these GSA and CDC protocols may change as government guidance about COVID-19 changes, EOIR told us that it generally considers several factors in deciding how to proceed, such as the layout of the space, the type of building, and the number of staff members who work in close proximity. Moreover, EOIR said that, in consultation with JMD, its understanding is that the 24-hour period commences when the infected person was last in the space. According to a response to the OIG, EOIR will not reopen the space until the cleaning has been completed and verified.

As EOIR Works Toward Reopening, It Must Follow the Direction of DOJ in Determining When to Reopen Immigration Courts; EOIR Is Also Pursuing Vaccines for Staff

The DOJ Framework, issued May 18, 2020, outlines the criteria for how and when DOJ components will move through the phases for reopening, including when EOIR will reopen immigration courts and begin hearing cases on the non-detained docket.

Under the DOJ guidance for Phase 1:

1. JMD compiles data for a particular federal district, evaluating indicators such as state and local operating status announcements and medical trend data.
2. JMD then applies that data to the White House guidelines on reopening to identify locations that were close to meeting thresholds for reopening.
3. JMD provides those locations and data to the Executive Office for U.S. Attorneys (EOUSA) for review by the U.S. Attorneys in those districts.
4. If the U.S. Attorney certifies to EOUSA that these criteria have been met in his or her respective district, EOUSA then makes the final determination on whether the district has met the threshold for entering Phase 1 of reopening.
5. Once EOUSA confirms that a district can move to Phase 1 in accordance with the guidance, any DOJ component within that district is expected to follow its agency plan to resume operations, which for EOIR means hearing non-detained cases, consistent with Phase 1 parameters.

The same process governs progression through the subsequent phases of reopening, Phases 2 and 3. The DOJ Framework establishes that DOJ monitors conditions and data to assess the steps that are necessary to ensure health and safety for DOJ employees. The DOJ Framework also states that, "White House guidelines for Phase 1 and Phase 2 continue to encourage agencies to employ broad telework and scheduling flexibilities, where feasible with business operations."⁷² See Table 4 below for a description of each phase.

⁷² Lofthus, memorandum for Heads of Department Components and U.S. Attorneys, May 18, 2020. At the time of its issuance, the DOJ Framework referred to contemporaneous White House and CDC Guidance, "Opening Up America Again," www.whitehouse.gov/openingamerica.

Table 4

Phases of Reopening

Phase 1	<ul style="list-style-type: none">• Continue to encourage telework, whenever possible and feasible with business operations.• If possible, return to work in phases; close common areas where personnel are likely to congregate and interact, or enforce strict social distancing protocols.• Minimize non-essential travel and adhere to CDC guidelines regarding isolation following travel.• Strongly consider special accommodations for personnel who are members of a vulnerable population.
Phase 2	<ul style="list-style-type: none">• Continue to encourage telework, whenever possible and feasible with business operations.• Close common areas where personnel are likely to congregate and interact, or enforce moderate social distancing protocols.• Strongly consider special accommodations for personnel who are members of a vulnerable population.
Phase 3	<ul style="list-style-type: none">• Resume unrestricted staffing of worksites.

Source: White House guidance for employers on Opening Up America Again, available through January 20, 2021

As of December 7, 2020, 32 immigration courts had resumed non-detained hearings and 37 courts were open only for detained hearings and/or filings. Once EOUSA made the decision to enter Phase 1 in a particular district, EOIR readied its workforce to enter that phase of the process. When EOUSA determined that a particular district could move to Phase 2 operations, each immigration court in that district used a checklist developed by EOIR to prepare itself for reopening and returning to work in person. The checklist included planning considerations such as:

- number of elevators (and whether they can be exclusively used for EOIR);
- number of staff who use public transportation;
- whether public schools and dependent care facilities are open locally;
- where the security screening process is located (e.g., EOIR lobby or outside of EOIR control);
- whether the FSC has implemented temperature checks or visual inspections of individuals entering immigration courts;
- whether the court has received PPE, sanitizers, and the OCIJ's social distancing and floor plans;

- how the court envisions managing the docket and public access to the courtroom; and
- whether the court has taped off visual 6-foot markers for social distancing.

By July 2020, at least one U.S. Attorney's Office had certified readiness to move to Phase 2 operations, and the local immigration court in that district followed this progression. The OIG reviewed communication from ACIJ's in two districts, which informed immigration court employees about the DOJ Framework, how the U.S. Attorneys' Offices make the decision to move from Phase 1 to Phase 2, and plans for staff to work together to adjust operations when a district progresses through each phase. While some EOIR personnel expressed to the OIG fears that EOIR might be placing them in dangerous circumstances, as described above EOIR is expected to follow DOJ's decisions on reopening in each district. However, as discussed in the report, resuming non-detained hearings for EOIR often translated to holding hearings in person and requiring staff to report to work sites to process paper filings. Had EOIR adopted more widespread operational and technological adaptations prior to the COVID-19 pandemic, it may have been able to resume hearing immigration cases while minimizing further risk to the public and staff.

As COVID-19 vaccines have received Emergency Use Authorization, DOJ and EOIR are working to provide some staff access to the vaccines, which should help minimize risk to staff while EOIR works toward resuming normal operations. As of January 2021, EOIR leaders told the OIG that DOJ has authorized some positions in the immigration courts that meet the criteria for "public facing and frequent contact" to receive COVID-19 vaccinations. The DOJ JMD has presented the list of EOIR positions that meet the criteria to the federal government's COVID Response team, and EOIR said that it anticipates full approval of all the job categories on the list. If approved, the employees will be in the third tier of Phase One vaccinations. EOIR is working with JMD to develop a plan to distribute the vaccine on a voluntary basis to the employees who meet the criteria.

Conclusion and Recommendations

Conclusion

EOIR faced difficult and sometimes conflicting challenges while responding to the COVID-19 pandemic. We concluded that EOIR attempted to take actions to mitigate the risk of COVID-19 for staff and the public but that various factors limited its efforts. Some, but not all, of these factors were within EOIR's control.

EOIR suspended the non-detained and Migrant Protection Protocols dockets to reduce in-person transmission risk but continued hearing cases from the detained docket due to constitutional due process concerns. The then EOIR Director issued guidance to immigration judges reminding them of their authority to mitigate COVID-19 exposure by issuing rulings or orders such as waiving in-person hearings and limiting the number of attendees in a hearing. However, EOIR told the OIG that it cannot legally issue blanket orders for the hearings and respondent attorneys told the OIG that individual immigration judges' procedural decisions were initially untimely and caused unnecessary exposure risk—especially to juveniles on the detained docket.

For individuals such as respondents and EOIR staff who had to report to immigration courts and EOIR offices in person, EOIR instituted a variety of changes designed to help mitigate exposure to COVID-19. These mitigation efforts included temporarily expanding options for electronic filing, increasing telework, working to obtain and provide personal protective equipment (PPE) to staff, and attempting to create social distance in office and court settings. However, EOIR could not fully limit potential exposure for staff and parties to immigration proceedings because it was still holding certain hearings and requiring some staff to come into the office and these efforts fell short of expectations among staff and other participants in the immigration hearing process. We also found that EOIR did not implement its mitigation adjustments evenly and was further hindered by lack of equipment and supplies. More recently, EOIR initiated the use of external video conferencing platforms to allow parties to proceedings the ability to attend remotely. In areas such as temperature screening for individuals at immigration court locations, decisions are made at the local level, in some places where DOJ policy requires them to be locally directed by Facility Security Committees and in other places where the Department of Homeland Security or lessors take on this role.

EOIR's overall communication related to the pandemic was initially sometimes unclear and inconsistent, especially for internal staff. We identified communication issues on topics ranging from cleaning protocols to expectations for employees to report to work in person. While EOIR proactively created a team led by the acting Deputy Director to address COVID-19 concerns, and the then Director communicated with the entire agency about the pandemic, EOIR was often trying to adjust to changing federal government standards and requirements related to the pandemic and did not adequately communicate these changes to staff. Additionally, EOIR is impeded in providing timely communication because DOJ reviews all of EOIR's external communications, which affects the timeliness of internal communications as they relate to closing and cleaning office space after COVID-19 exposure. Some staff did not feel that EOIR was sharing enough information about individuals who might have exposed others to COVID-19 in EOIR space, but EOIR was hampered in sharing additional information because of privacy rights as communicated by the Office of Personnel Management.

The OIG encourages EOIR to continue to be innovative in finding ways to lessen the number of individuals who conduct EOIR work or participate in immigration hearings in person and to increase social distancing so that those who must participate in person can lessen the risk they present to one another. As the pandemic continues, EOIR will likely continue to face challenges in its ability to acquire necessary supplies, reconfigure work arrangements to increase telework or allow for more social distancing in office spaces, and reduce risks posed in office and court settings. EOIR also must prepare to reopen immigration courts in areas that DOJ has determined will move through reopening phases. While EOIR has expanded its electronic filing system to over half of the immigration courts, if EOIR continues to phase out email filing as immigration courts reopen, EOIR will likely experience an increase in the number of members of the public coming to immigration court buildings to file documents. Thus, as indicated below, we recommend that EOIR consider continuing to permit email filing during the pandemic in all immigration courts that do not yet have electronic filing. Additionally, because Immigration and Customs Enforcement (ICE) has resumed check-in appointments for immigrants, there will also be an increase in the number of individuals entering the buildings that EOIR shares with ICE offices. As EOIR shifts to normal operations and staff gradually return to EOIR spaces, EOIR should ensure that adequate amounts of PPE and disinfectants are available and that EOIR can physically implement social distancing in its workspaces and immigration courts. As it implements improvements, EOIR should keep in mind long-term continuity of operations planning so that it is prepared for future pandemics and other unexpected events that may impact its operations.

Recommendations

The OIG offers the following recommendations to assist EOIR in addressing the COVID-19 pandemic currently and in preparing and planning for other emergencies or pandemics in the future. EOIR should:

1. Ensure that immigration judges are responsive in a timely manner to requests for continuances by respondents who assert that they have recently experienced symptoms of or have been exposed to COVID-19, and encourage immigration judges to fully consider continuance requests.
2. Expand the EOIR Court & Appeals System (ECAS) to all immigration courts, and continue to pursue efforts to make ECAS mandatory. Until ECAS is fully deployed, EOIR should consider whether it can continue permitting email filings without increasing the risk to staff during the pandemic. In particular, EOIR should assess the feasibility of having staff scan paper filings into electronic files rather than print emailed filings and whether this would reduce the need for staff to report to work in person. If EOIR permits email filings, EOIR should ensure that users receive confirmation of receipt of filing and are not unfairly restricted by page limits during the ongoing COVID-19 pandemic in all courts that do not have ECAS.
3. Develop a plan to ensure maximum telework capability for all positions and staff in locations affected by the COVID-19 pandemic, or in the event of a future pandemic or similar conditions, and ensure that it procures sufficient equipment and addresses software limitations to enable the broadest possible telework.
4. Develop methods to ensure that immigration courts and EOIR offices are following social distancing guidelines during the ongoing pandemic and in the event of any future pandemic.

5. Ensure that EOIR has a plan in place to order and maintain appropriate stocks of personal protective equipment for employees reporting to EOIR workspaces and other parties appearing for immigration proceedings.
6. Clearly communicate with staff regarding COVID-19, including concerning when government standards change and what information EOIR is permitted to share regarding potential exposure.
7. Coordinate with other agencies in non-Department of Justice buildings housing EOIR courts on making announcements about potential COVID-19 exposure.
8. Ensure that its communication plan and notice procedures for respondents and representatives are effective in reaching the intended audience, including Migrant Protection Protocols respondents, unaccompanied minors, and respondents who may be quarantined during the pandemic.
9. Update EOIR's Continuity of Operations Plan and pandemic plan based on experience during COVID-19, and adjust the plans to prepare for the future.

Appendix 1: Purpose, Scope, and Methodology

The OIG conducted this limited-scope review in accordance with the Council of the Inspectors General on Integrity and Efficiency's *Quality Standards for Inspection and Evaluation* (January 2012).

This review was limited in scope and focused on specific issues raised through a series of complaints the OIG received beginning in March 2020 about EOIR's response to the COVID-19 pandemic. These complaints originated from a variety of stakeholders, including individual EOIR staff members; the two unions representing EOIR staff, the National Association of Immigration Judges and the American Federation of Government Employees; nonprofit agencies that provide legal services to immigrants; and U.S. Department of Homeland Security staff who work with the immigration courts. The OIG also reviewed complaints received in October 2020 as EOIR was reopening some immigration courts.

We conducted our fieldwork remotely because of Centers for Disease Control and Prevention guidelines and DOJ policy on social distancing. Our remote fieldwork included telephonic interviews, data collection and analyses, and document reviews. The OIG interviewed four EOIR headquarters staff members, representatives from the immigration judge and support staff unions, attorneys who represent individuals in immigration proceedings, and attorneys from nonprofit agencies that provide legal services to adult and juvenile immigrants. We analyzed staff telework data for 2 pay periods during the fieldwork time period. The OIG also submitted a series of questions to EOIR about EOIR's response to the pandemic and to clarify information. The OIG considers EOIR's answers to these questions to be official component responses. We also examined EOIR and DOJ guidance, policies, and practices related to COVID-19, as well as the federal government's guidance and direction to federal agencies during the pandemic.

Appendix 2: Percent of Staff Teleworking, by Immigration Court and EOIR Headquarters, March 29–April 11, 2020

Immigration Court	State	Percent of Staff Teleworking
Eloy	Arizona	12%
Florence	Arizona	25%
Phoenix	Arizona	40%
Tucson	Arizona	13%
Adelanto	California	50%
Imperial	California	42%
Los Angeles	California	47%
North Los Angeles	California	30%
Otay Mesa	California	27%
Sacramento	California	50%
San Diego	California	48%
San Francisco	California	45%
Van Nuys	California	47%
Aurora	Colorado	33%
Denver	Colorado	27%
Hartford	Connecticut	22%
Krome	Florida	5%
Miami	Florida	47%
Orlando	Florida	39%
Atlanta–Peachtree	Georgia	42%
Atlanta–Ted Turner	Georgia	20%
Stewart	Georgia	0%
Honolulu	Hawaii	14%
Chicago	Illinois	30%
LaSalle	Louisiana	22%
New Orleans	Louisiana	60%
Oakdale	Louisiana	18%
Baltimore	Maryland	45%
Boston	Massachusetts	26%
Detroit	Michigan	29%

Immigration Court	State	Percent of Staff Teleworking
Fort Snelling	Minnesota	32%
Kansas City	Missouri	54%
Charlotte	North Carolina	64%
Omaha	Nebraska	38%
Elizabeth	New Jersey	33%
Newark	New Jersey	52%
Otero	New Mexico	0%
Las Vegas	Nevada	38%
Batavia	New York	29%
Buffalo	New York	21%
Fishkill	New York	33%
New York–26 Federal Plaza	New York	57%
New York–Varick	New York	8%
New York–Broadway	New York	56%
Ulster	New York	0%
Cleveland	Ohio	27%
Portland	Oregon	55%
Philadelphia	Pennsylvania	55%
York	Pennsylvania	46%
San Juan	Puerto Rico	0%
Memphis	Tennessee	40%
Conroe	Texas	4%
Dallas	Texas	32%
El Paso	Texas	0%
El Paso–Detained	Texas	0%
Fort Worth	Texas	0%
Harlingen	Texas	0%
Houston	Texas	69%
Houston–S. Gessner	Texas	43%
Pearsall	Texas	0%
Port Isabel	Texas	0%
San Antonio	Texas	17%

Immigration Court	State	Percent of Staff Teleworking
Salt Lake City	Utah	50%
Arlington	Virginia	49%
Falls Church	Virginia	36%
Seattle	Washington	38%
Tacoma	Washington	0%
EOIR headquarters	Virginia	82%

Note: This list does not include the Louisville or Saipan immigration courts because they were not open during this pay period.

Source: EOIR telework data

Appendix 3: Number of Positions for Each Position Type and Percent of Telework-Eligible Positions Across Immigration Courts

Position Type	Number of Positions on Board, September 2020	Number of Telework-Eligible Positions	Percent of Telework-Eligible Positions
Legal Assistant	240	59	24.6%
Interpreter	100	32	32.0%
Support Services Specialist	18	6	33.3%
Legal Specialist	394	139	35.3%
Supervisory Legal Specialist	42	15	35.7%
Immigration Judge	467	245	52.5%
Supervisory Interpreter	11	6	54.5%
Court Administrator	41	23	56.1%
Staff Assistant	5	3	60.0%
Supervisory Legal Assistant	7	5	71.4%
Deputy Court Administrator	4	3	75.0%
Staff Attorney	329	249	75.7%

Source: EOIR data

Appendix 4: EOIR's Response to the Draft Report



U.S. Department of Justice
Executive Office for Immigration Review
Office of the Director

5107 Leesburg Pike, Suite 2600
Falls Church, Virginia 22041

April 5, 2021

Rene Rocque Lee
Assistant Inspector General, Evaluation and Inspection
U.S. Department of Justice
Office of the Inspector General
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Ms Lee:

This is in response to your letter dated March 22, 2021, providing an official copy for review and comment on the Formal Report of the Office of the Inspector General (OIG), "Limited-Scope Audit of the Executive Office for Immigration Review's Response to the Coronavirus Disease 2019 Pandemic." Thank you for the opportunity to review the draft report and provide our agency views prior to its issuance.

The Executive Office for Immigration Review (EOIR) appreciates the OIG's efforts throughout the limited-scope review to comprehensively assess EOIR's response to the coronavirus disease 2019 (COVID-19) pandemic and to offer recommendations for programmatic improvements. EOIR hereby submits its responses to the OIG report's recommendations:

Recommendation 1 — Ensure that immigration judges are responsive in a timely manner to requests for continuances by respondents who assert that they have recently experienced symptoms of or have been exposed to COVID-19, and encourage immigration judges to fully consider continuance requests.

Response: EOIR concurs with the recommendation. Immigration judges are subject to performance standards, which require timely completion of all motions, including motions for a continuance. Compliance with these standards is mandatory, and is routinely monitored and enforced by supervisory immigration judges. The failure to comply with established performance standards may subject an immigration judge to disciplinary action. On March 31, 2021, EOIR's Office of the Chief Immigration Judge (OCIJ) reiterated to immigration judges the requirement to timely complete motions, including motions to continue. Immigration Judges are obligated by the Ethics and Professionalism Guide for Immigration Judges to fulfill their duties with professional competence.

Recommendation 2 — Expand the EOIR Court & Appeals System (ECAS) to all immigration courts, and continue to pursue efforts to make ECAS mandatory. Until ECAS is fully deployed, EOIR should consider whether it can continue permitting email filings without increasing the risk to staff during the pandemic. In particular, EOIR should assess the feasibility of having staff scan paper filings into electronic files rather than print emailed filings, and whether this would reduce the need for staff to report to work in person. If EOIR permits email filings, EOIR should ensure that users receive confirmation of receipt of filing and are not unfairly restricted by page limits during the ongoing COVID-19 pandemic in all courts that do not have ECAS.

Response: EOIR concurs with this recommendation overall. EOIR is currently engaged in the nationwide rollout of ECAS, and fully supports its implementation to all immigration courts. At present, EOIR projects complete rollout to all courts by December 2021. Additionally, EOIR is in the final stages of development of a final rule to require most parties to use ECAS where available. Until such time as the nationwide rollout is complete, EOIR will continue to permit email submissions to be accepted at the immigration courts where ECAS has not yet been implemented, which currently numbers some 40 immigration courts. EOIR also currently provides an automated response to each email filing and will continue to do so. Importantly, filings are limited by size rather than being restricted by page limits, with 50Mb being the present size limit for individual attachments. This limit is set at the Department level, not by EOIR. Further, EOIR notes that any page limitations set by the adjudicator in a particular proceeding or through standing order of an immigration court are subject to adjudicatory discretion and EOIR policy cannot overrule such discretion without raising important legal concerns. EOIR will assess the feasibility of scanning paper filings but notes that this practice may not be in compliance with EOIR's current Records Schedule and best records practices, see <https://www.archives.gov/files/records-mgmt/policy/m-19-21-transition-to-federal-records.pdf>.

Recommendation 3 — Develop a plan to ensure maximum telework capability for all positions and staff in locations affected by the COVID-19 pandemic, or in the event of a future pandemic or similar conditions, and ensure that it procures sufficient equipment and addresses software limitations to enable the broadest possible telework.

Response: EOIR concurs that at the beginning of the COVID-19 pandemic, telework capability as well as equipment availability and software functionality were not in the best posture for a pandemic event. Since that time, EOIR has evaluated a number of positions and has designated additional positions as fully telework capable. For other positions that cannot be converted to 100 percent telework, EOIR has developed business efforts to provide for more telework functionality. As noted, EOIR has historically been a largely paper-based agency. As the agency converts to broader use of ECAS, and as more attorneys and respondents utilize electronic filing, many of the support staff positions will become more telework ready than has historically been the case. At this time, EOIR does not have sufficient bandwidth among existing personnel nor funding for contract support to scan all extant paper records, and, until such time that all records can be scanned, there will continue to be a need for some in-person staffing. We are actively seeking resources to address this need.

In addition, EOIR has procured a sufficient number of laptops so that all employees who have

work that can be done in a telework posture now have the equipment to do so. EOIR will continue to utilize laptops, replacing desktop computers with laptops in future refresh cycles, so that all positions will have laptop capability. Furthermore, EOIR has begun procuring more WebEx licenses and portable digital audio recording (DAR) equipment so that immigration judges can adjudicate cases without being physically in the office. At this time, the equipment and software problems that became apparent at the beginning of the pandemic have been resolved. While expansion of further IT and software capability may be limited by budgetary constraints, EOIR is investigating how to appropriately grow this capability in the future.

Recommendation 4 — Develop methods to ensure that immigration courts and EOIR offices are following social distancing guidelines during the ongoing pandemic and in the event of any future pandemic.

Response: EOIR concurs with this recommendation. As noted in the report, EOIR management directed the physical separation of employees and emphasized the need to maintain appropriate social distancing during the course of the pandemic. Additionally, EOIR has worked with, and will continue to work with, the General Services Administration to ensure appropriate signage is posted in common areas reminding employees and visitors of the CDC-recommended social distancing measures. Throughout the pendency of the pandemic, EOIR has continually assessed, and continues to assess, COVID-19 incidents to ensure that appropriate follow-up action is taken, to include disciplinary action as appropriate, where employees or visitors did not follow social distancing measures.

Nevertheless, EOIR recognizes that there is always room for improvement. As part of the agency's efforts to update the Continuity of Operations Plan (COOP), EOIR will investigate additional methods to ensure that immigration courts and EOIR offices are following social distancing guidelines during a pandemic event. EOIR is also exploring options for future workspace designs to determine if further social distancing measures can be implemented, where feasible.

Recommendation 5 — Ensure that EOIR has a plan in place to order and maintain appropriate stocks of personal protective equipment for employees reporting to EOIR workspaces and other parties appearing for immigration proceedings.

Response: EOIR concurs with this recommendation. EOIR outfitted all headquarters and field locations with personal protective equipment (PPE) specific to that location beginning in March 2020, including hand sanitizers, face masks and guards, and gloves. Additionally, the EOIR Office of Procurement Services (OPS) has increased the purchase card threshold of several purchase cardholders to allow them to rapidly address immediate PPE needs. OPS maintains PPE stock in a supply room, which is staffed Monday through Friday. Inventories are regularly checked and restock orders are routinely placed to ensure an adequate supply of PPE is on hand for use at the headquarters location and for shipment to the field locations as required. EOIR senior leadership is continuously monitoring the evolving COVID-19 environment and regularly consulting EOIR components to ensure they have sufficient stock of PPE and are capable of safely maintaining operations.

Recommendation 6 — Clearly communicate with staff regarding COVID-19, including concerning when government standards change and what information EOIR is permitted to share regarding potential exposure.

Response: EOIR concurs with this recommendation. EOIR will continue to communicate with staff regarding COVID-19 events related to agency operations. In addition, EOIR will continue to evaluate government standards and monitor them for any revisions or updates, to determine the level of detail regarding potential exposures that can be shared, all while taking into account applicable privacy laws.

Recommendation 7 — Coordinate with other agencies in non-Department of Justice buildings housing EOIR courts on making announcements about potential COVID-19 exposure.

Response: EOIR concurs in part with this recommendation. EOIR only has tenancy in non-DOJ buildings, so EOIR ultimately does not control the timing or content of many of the building-related announcements regarding pandemic operations. For federal buildings, the General Services Administration (GSA) coordinates all communication between federal agencies and therefore EOIR is not in a position to facilitate COVID-19 announcements in those facilities. In facilities managed by the Department of Homeland Security (DHS), DHS manages the communication and announcements.

For non-federal buildings, EOIR concurs with the recommendation and will reach out to other federal agencies via the Facility Security Committee (FSC) to determine whether joint announcements on potential COVID-19 exposure are possible. EOIR notes that this would not include private tenants in the buildings. For non-federal buildings, EOIR will begin this process in April 2021 and anticipates completing this recommendation by the end of FY2021. The agency's headquarters and field staff will continue to partner with GSA in providing employees and the public with available and appropriate information regarding COVID-19.

Recommendation 8 — Ensure that its communication plan and notice procedures for respondents and representatives are effective in reaching the intended audience, including Migrant Protection Protocols respondents, unaccompanied minors, and respondents who may be quarantined, during the pandemic.

Response: While EOIR cannot ensure effectiveness of the reach of its communications—including in particular Migrant Protection Protocols respondents, unaccompanied minors, and respondents who may be quarantined—EOIR can enhance the communications to those populations by providing notifications in both English and Spanish. EOIR will endeavor to implement notifications in Spanish before the end of FY2021.

Recommendation 9 — Update EOIR's Continuity of Operations Plan and pandemic plan based on experience during COVID-19, and adjust the plans to prepare for the future.

Response: EOIR concurs with this recommendation. EOIR annually reviews and updates its Continuity of Operations Plan (COOP) and participates regularly in training, testing, and exercise activities (e.g., National Level Exercise (NLE) conducted by the Federal Emergency

Management Agency) to validate the effectiveness of the plan. For Fiscal Year 2021, EOIR developed a detailed strategy to update the COOP and the pandemic plan with experience gained by responding to and recovering from COVID-19. In accordance with [DOJ Order 1703, Justice Continuity Program](#), EOIR's goal is to update the entire COOP and submit the annual certification memo to the Director, Security and Emergency Planning Staff (SEPS), by October 2021.

In conclusion, we appreciate the OIG's efforts to assist EOIR in determining best practices to prepare for and implement proactive, appropriate responses to an emergency such as the COVID-19 pandemic. Should you or your staff require further information, please do not hesitate to contact us.

Sincerely,

Handwritten signature of Carl Risch in black ink.

Signature for Carl Risch, Director, EOIR

Carl Risch
Deputy Director

Appendix 5: OIG Analysis of EOIR's Response

The Office of the Inspector General provided a draft of this report to EOIR for its comment. EOIR's response is included in [Appendix 4](#) to this report. The OIG's analysis of EOIR's response and the actions necessary to close the recommendations are discussed below.

Recommendation 1

Ensure that immigration judges are responsive in a timely manner to requests for continuances by respondents who assert that they have recently experienced symptoms of or have been exposed to COVID-19, and encourage immigration judges to fully consider continuance requests.

Status: Resolved.

EOIR Response: EOIR concurred with the recommendation and stated that on March 31, 2021, the Office of the Chief Immigration Judge (OCIJ) reiterated to immigration judges the requirement for timely completion of all motions, including motions for a continuance. EOIR stated that immigration judges are subject to performance standards that require timely completion of all motions and that EOIR monitors compliance with these standards routinely. EOIR also stated that immigration judges are obligated by the Ethics and Professionalism Guide for Immigration Judges to maintain professional competence.

OIG Analysis: EOIR's actions are partially responsive to the recommendation. By July 23, 2021, please provide a copy of the OCIJ communication reiterating the requirement for timely completion of all motions and the Ethics and Professionalism Guide for Immigration Judges. Additionally, please provide evidence of how EOIR will encourage immigration judges to fully consider continuance motions related to COVID-19, particularly in instances in which parties to immigration proceedings assert that they have recently experienced symptoms of or have been exposed to COVID-19.

Recommendation 2

Expand the EOIR Court & Appeals System (ECAS) to all immigration courts, and continue to pursue efforts to make ECAS mandatory. Until ECAS is fully deployed, EOIR should consider whether it can continue permitting email filings without increasing the risk to staff during the pandemic. In particular, EOIR should assess the feasibility of having staff scan paper filings into electronic files rather than print emailed filings and whether this would reduce the need for staff to report to work in person. If EOIR permits email filings, EOIR should ensure that users receive confirmation of receipt of filing and are not unfairly restricted by page limits during the ongoing COVID-19 pandemic in all courts that do not have ECAS.

Status: Resolved.

EOIR Response: EOIR concurred with the overall recommendation and stated that it expects to complete the rollout of ECAS to all immigration courts by December 2021. Additionally, EOIR stated that it is in the last stages of the development of a final rule to make ECAS mandatory for most parties where the system is available. EOIR stated that it will continue to accept email filings in the approximately 40 immigration courts that did not yet have ECAS as of April 2021. EOIR said that it provides an automated response to each email filing and will continue to do so. EOIR noted that the email filings are limited to a *file size* of 50 megabytes

by DOJ standards, not by EOIR. According to EOIR's response, any *page number* limits are set by individual immigration judges or standing orders of individual immigration courts and EOIR policy cannot override this adjudicatory discretion. EOIR will assess the feasibility of scanning paper filings but notes that it might not be in compliance with EOIR's current Records Schedule and best records practices.

OIG Analysis: EOIR's planned actions are responsive to the recommendation. By July 23, 2021, please provide an update on the rollout of ECAS to immigration courts, including the number of immigration courts with ECAS and the status of the final rule to make ECAS mandatory for certain parties to proceedings. For email filings, please provide an example demonstrating the automated response that is sent out when parties submit them. In addition, please report to the OIG on what steps EOIR can take, consistent with pertinent regulations, to ensure that any page limits individual judges or immigration courts place on email filings do not unfairly limit the ability of litigants to present their cases. If EOIR believes that it cannot take any steps in this regard, please provide the OIG with an explanation of the legal authority that prevents EOIR from doing so. Finally, provide any updates or results regarding EOIR's assessment of the feasibility of scanning paper filings.

Recommendation 3

Develop a plan to ensure maximum telework capability for all positions and staff in locations affected by the COVID-19 pandemic, or in the event of a future pandemic or similar conditions, and ensure that it procures sufficient equipment and addresses software limitations to enable the broadest possible telework.

Status: Resolved.

EOIR Response: EOIR concurred that its telework capability was constrained at the beginning of the pandemic. EOIR stated that since the beginning of the pandemic it has evaluated and designated additional positions as telework capable and, for those positions that cannot be 100 percent telework, EOIR has made efforts to provide more telework functionality. EOIR further stated that, as it moves to broader use of ECAS and electronic filing, many support positions will become more telework ready. EOIR said that it does not currently have the capacity in its existing staff, or the funding for contract support, to scan all paper records. Until the time EOIR can support scanning all the records, EOIR said that there will be a need for some in-person staffing at immigration courts. EOIR is seeking resources to address this need. EOIR said that it has a sufficient number of laptops for all telework-eligible employees. EOIR will continue to replace desktop computers with laptops in future refresh cycles so that all positions will have laptop capability. Additionally, EOIR has begun procuring additional WebEx licenses and portable digital audio recording (DAR) equipment so that immigration judges may adjudicate cases without being physically in the office. EOIR is investigating how to enhance its capability for further information technology and software expansion.

OIG Analysis: EOIR's actions are responsive to the recommendation. By July 23, 2021, please provide updated information on the number of positions that are telework eligible in comparison to the number of telework-eligible positions prior to March 2020. Please also provide a description of how EOIR is seeking resources to address identified needs—including paper record scanning, WebEx licenses, and portable DAR equipment—and how that has affected the ability of EOIR personnel to perform work outside the office setting. Finally, provide any updates or results regarding EOIR's general efforts to enhance its capability for information technology and software expansion.

Recommendation 4

Develop methods to ensure that immigration courts and EOIR offices are following social distancing guidelines during the ongoing pandemic and in the event of any future pandemic.

Status: Resolved.

EOIR Response: EOIR concurred with the recommendation and stated that EOIR management directed the physical separation of employees and emphasized social distancing during the pandemic. EOIR said that it has also worked with the General Services Administration (GSA) to ensure that appropriate signage is posted in common areas reminding employees and visitors of the CDC-recommended social distancing measures. EOIR stated that it will continue to assess COVID-19 incidents to ensure that appropriate action is taken, including disciplinary action if applicable, when employees or visitors do not follow social distancing guidelines. EOIR said that it is exploring additional methods to ensure that immigration courts and EOIR offices are following social distancing guidelines and that it is examining future workspace designs to determine whether further social distancing measures can be implemented.

OIG Analysis: EOIR's planned actions are responsive to the recommendation. By July 23, 2021, please provide an update on EOIR's methods to ensure immigration courts and EOIR offices are following social distancing guidelines, as well as an update on its examination of workspace designs.

Recommendation 5

Ensure that EOIR has a plan in place to order and maintain appropriate stocks of personal protective equipment for employees reporting to EOIR workspaces and other parties appearing for immigration proceedings.

Status: Resolved.

EOIR Response: EOIR concurred with the recommendation and stated that it outfitted all headquarters and field locations with personal protective equipment (PPE), including face masks and guards, hand sanitizer, and gloves, beginning in March 2020. Additionally, the EOIR Office of Procurement Services increased the purchase threshold of several credit card holders to allow them to more promptly address PPE needs. The Office of Procurement Services also maintains PPE supplies, which EOIR said it regularly inventories and restocks for use at headquarters and field locations. EOIR stated that its management is consulting with EOIR components to ensure that they have sufficient supplies to maintain operations safely.

OIG Analysis: EOIR's actions are responsive to the recommendation. By July 23, 2021, please provide supporting evidence to show that EOIR workspaces possess or have access to appropriate stocks of PPE.

Recommendation 6

Clearly communicate with staff regarding COVID-19, including concerning when government standards change and what information EOIR is permitted to share regarding potential exposure.

Status: Resolved.

EOIR Response: EOIR concurred with the recommendation and stated that it will continue to communicate with staff regarding COVID-19 events related to agency operations. EOIR will also continue to evaluate government standards and monitor them for any revisions or updates, to determine the level of detail about potential exposures that it can share, taking into consideration applicable privacy laws.

OIG Analysis: EOIR's actions are responsive to the recommendation. By July 23, 2021, please provide a description of the methods EOIR uses to communicate with staff regarding COVID-19 and under what circumstances EOIR would use each method. Additionally, provide a description of how EOIR evaluates and monitors revisions and updates of relevant government standards and the basis for its determinations on what it can share with staff.

Recommendation 7

Coordinate with other agencies in non-Department of Justice buildings housing EOIR courts on making announcements about potential COVID-19 exposure.

Status: Resolved.

EOIR Response: EOIR partly concurred with the recommendation. EOIR stated that it has tenancy only in non-DOJ buildings so it does not control the timing or content of many of the building-related communications. In federal buildings, the GSA coordinates all communications between federal agencies, and EOIR said that it is not in a position to facilitate public COVID-19 announcements. However, EOIR said in its response that EOIR's headquarters and field staff will continue to partner with the GSA in providing employees and the public with available and appropriate information regarding COVID-19. In facilities managed by the Department of Homeland Security (DHS), DHS manages the communication and announcements. For non-federal buildings, EOIR is a member of the Facility Security Committees (FSC) and said that it will reach out to the FSCs to determine whether joint announcements on potential COVID-19 exposure are possible. EOIR will begin this process in April 2021 and anticipates completing the process at the end of fiscal year (FY) 2021.

OIG Analysis: EOIR's actions are responsive to the recommendation. By July 23, 2021, please provide an update on communication with FSCs regarding joint announcements on potential COVID-19 exposure. Also, provide an update on any outreach to the GSA and DHS to partner with these agencies for public notification or communication when there has been a potential COVID-19 exposure in federal buildings or DHS-managed buildings, respectively.

Recommendation 8

Ensure that its communication plan and notice procedures for respondents and representatives are effective in reaching the intended audience, including Migrant Protection Protocols respondents, unaccompanied minors, and respondents who may be quarantined during the pandemic.

Status: Resolved.

EOIR Response: EOIR stated that it cannot ensure effectiveness of the reach of its communications, especially with regard to Migrant Protection Protocol (MPP) respondents, unaccompanied minors, and quarantined respondents. EOIR stated that it can enhance communications to those populations by providing notifications in both English and Spanish and will endeavor to implement notifications in Spanish by the end of FY 2021.

OIG Analysis: EOIR's actions are partially responsive to the recommendation. By July 23, 2021, please provide information on the steps EOIR has taken to assess its communication plan and enhance its notice procedures in ways that will expand their reach to intended audiences. Such steps should be designed to broaden accessibility of EOIR communication to parties, including MPP respondents, unaccompanied minors, and respondents who may be quarantined. Please provide any updates to EOIR's communication plan as part of this response.

Recommendation 9

Update EOIR's Continuity of Operations Plan and pandemic plan based on experience during COVID-19, and adjust the plans to prepare for the future.

Status: Resolved.

EOIR Response: EOIR concurred with the recommendation and stated that it annually reviews and updates its Continuity of Operations Plan (COOP). Additionally, EOIR said that it participates regularly in training, testing, and exercise activities to validate the effectiveness of the plan. For FY 2021, EOIR stated that it developed a strategy to update the COOP and pandemic plan with experience gained during the COVID-19 pandemic, with the goal of submitting this plan to DOJ by October 2021.

OIG Analysis: EOIR's actions are responsive to the recommendation. By July 23, 2021, please provide a copy or description of the strategy to update the COOP and the pandemic plan with experience gained during the COVID-19 pandemic, as well as the status of these plans.