
THE OBAMA ADMINISTRATION MAKES TACTICAL SHIFT FROM THE SOCIAL SECURITY NO-MATCH “SAFE HARBOR” REGULATION TO SUBPOENAS, FINES, AND INDICTMENTS

Today Department of Homeland Security (DHS) Secretary Janet Napolitano announced that the Obama Administration will abandon the Bush-era Social Security No-Match “Safe Harbor” Rule. At the same time, she announced continued commitment to enforcement and affirmed the Administration’s intent to proceed with the FAR rule requiring the use of E-Verify by federal contractors.

The timing and juxtaposition of the announcements demonstrates that the Administration is not retreating in its enforcement battle but is shifting tactical enforcement mechanisms. Last week U.S. Immigration & Customs Enforcement (ICE) announced the issuance of audit notifications to 652 companies nationwide in an [enforcement initiative](#) focused more on employers than on their undocumented workers. Today’s [DHS Press Release](#) referred to continuing enforcement initiatives, and foreshadowed other initiatives underway which would add new detection and enforcement tools to the Federal arsenal.

The Administration never needed the regulation to enforce the law against the knowing hire and continued employment of unauthorized workers. The “Safe Harbor” Rule would have prescribed a mechanical and onerous formula for employers to follow in order to receive protection of a “safe harbor.” Abandonment of the rule does not mean that the Social Security Administration cannot issue “No Match” Letters.

More importantly, this announcement does not mean that ICE will not use an employer’s receipt of a No-Match Letter, and the employer’s subsequent inaction, to make a case for “constructive knowledge” of an employee’s lack of work authorization. In fact, the opposite result is more likely, and employers may expect that the past years’ No-Match Letters now may be updated and mailed to employers.

What action, or inaction, employers take after receipt of a No-Match Letter can still be used to mount a criminal case.

As always, Foster Quan will continue to monitor breaking news in the area of worksite enforcement and will make new information available via future Immigration Updates[©] and on the [Foster Quan website](#).