



DHS FORMALLY PROPOSES RECISSION OF THE NO-MATCH SAFE HARBOR RULE

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The August 19, 2009 Federal Register will contain a proposed regulation formally rescinding the DHS August 2007 no-match safe harbor rule. This move was heralded in prior statements by Homeland Security Secretary Janet Napolitano.

The August 2007 safe harbor rule was quite controversial and was the subject of a preliminary injunction issued by the U.S. District Court for the Northern District of California. Although DHS attempted to respond to the court's concerns about the rule by means of a March 2008 supplemental rule-making, the rule remained subject to the injunction pending further litigation. The publication of a proposed rule to rescind the August 2007 rule reflects the current Administration's decision to abandon the litigation.

The proposed rule states that the DHS definition of "constructive knowledge" will revert back to its pre-August 2007 state. Specifically, the language stating that receipt of an SSA no match letter put the employer on constructive notice of a potential illegal worker will no longer be part of the regulatory definition. Instead, "constructive knowledge" may be presumed where the employer: (1) fails to properly complete an I-9 form; (2) has information suggesting a lack of lawful immigration status, e.g., a request for visa

sponsorship from a worker who appears not to need it; or (3) acts with reckless disregard with respect to allowing a third party to introduce a worker into the workforce or otherwise act on behalf of the employer.

DHS will now devote its enforcement efforts to worksite enforcement, targeting employers whose business model exploits unauthorized workers and those employers involved in critical infrastructure projects. DHS will put more emphasis upon the E-Verify and IMAGE programs as the preferred tools for employers to use to minimize the employment of unauthorized workers. Ironically, the Social Security Administration acknowledged in a December 2008 report that use of the no-match letter may no longer be the most efficacious way to cure name-number matching errors. This is so because roughly 85% of employer W-2 returns are now filed electronically through software that helps employers correct errors before returns are submitted.

Employers should note that although DHS is abandoning the use of the no-match correspondence, enforcement continues. The Administration has made it plain that it will continue to go after employers who are employing unauthorized workers, and that the first step in most enforcement efforts



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will be an inspection of the employer's I-9 forms. As a result, prudent employers should take steps to ensure that their I-9 compliance is as good as it can be. For help

with this or other labor and employment related matters, contact your [Elarbee Thompson attorney](#).