

## In This Issue:

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The election results are not likely to change immigration enforcement strategies. The new Administration cannot afford to be “soft” on enforcement policy. The number of enforcement personnel doubled during the last Administration, and those resources will not be easily diverted to other tasks. As a result, immigration enforcement is here to stay.

## New Administration Not Likely to Change Immigration Enforcement Strategy

By David C. Whitlock

Immigration enforcement is here to stay. The Bush Administration was successful in dramatically increasing the number of law enforcement personnel devoted to immigration enforcement. The statistics demonstrate that the Department of Homeland Security's (DHS) enforcement strategy is generating positive results. Arrests of immigration violators are up, as are criminal investigations and indictments.

Regardless of the presidential election outcome, the new Administration cannot be viewed as “soft” on immigration enforcement. The Executive Branch must be seen to be vigorously enforcing immigration law at the border and in the interior if Congress is to consider meaningful immigration reform in the future. As a result, employers can expect to be the target of continuing enforcement efforts, and the DHS will continue to use all enforcement tools at its disposal. Further, the current state of the economy will likely lead to protectionist measures toward U.S. workers. What better evidence than to make sure that U.S. authorized workers are the ones working in U.S. jobs.

Because of its past successes, the DHS is likely to continue focusing its enforcement efforts upon key, “targeted” industries that have historically employed significant numbers of legal and illegal immigrants. Thus, employers in agriculture, construction, food processing, hospitality, and textiles will continue to be subject to heightened enforcement scrutiny. In addition, because the DHS perceives that there is a high correlation between terrorism and illegal immigration, enforcement efforts will continue to focus upon critical infrastructure, (e.g., military bases, airports, ports and harbors, nuclear power plants, water treatment facilities, etc.).

One of the most effective enforcement tools that the DHS uses is the threat of criminal prosecution. It is likely that the number of criminal investigations and indictments will continue to increase as the DHS, through Immigration and Customs Enforcement (ICE), target and prosecute employers that are knowingly employing illegal aliens.

Once effective, the DHS will take advantage of the No-Match Safe Harbor regulation to assert that employers receiving no-match correspondence from the Social Security

Administration or “suspect document notification” from the DHS are on constructive notice that they employ illegal aliens.<sup>1</sup> Failure to act correctly in response to such correspondence may lead to criminal prosecution.

The DHS will continue to encourage employers to participate in its E-Verify and IMAGE programs. As federal contractors are added to the E-Verify system, the number of employers participating is expected to approach 300,000. In order to ensure the integrity of the system and the enrollment mandates, the DHS will need to focus additional scrutiny upon participating employers. It is possible that there will be more interagency cooperation and more state-level participation in confirming E-Verify enrollment. For example, as the Office of Federal Contract Compliance Programs (OFCCP) already conducts on-site audits of federal contractors, confirmation of E-Verify enrollment could easily be added to the checklist for compliance. Similarly, cooperative agreements between the DHS and those states that mandate E-Verify enrollment for some or all employers would give the federal government an enhanced ability to police the E-Verify system.

Unfortunately, because immigration reform is such a polarizing issue, it remains unlikely that Congress will enact any comprehensive immigration reform legislation for the foreseeable future. Instead, we should expect to see enactment of piecemeal, “band-aid” legislation addressing only the most urgent and critical problems. It is highly likely that Congress will extend the authorization for the E-Verify program and appropriate funds to make it more accurate and efficient.

Because Congress is not expected to enact comprehensive immigration reform legislation, more and more states will seek to regulate illegal employment. Once the regulation is implemented requiring federal contractors to enroll in E-Verify, it is particularly likely that more states will enact legislation obliging state contractors and subcontractors to enroll in E-Verify also.

Given that enforcement efforts are likely to continue for the foreseeable future, prudent employers will make sure that their I-9 compliance is as good as it can get. Most enforcement efforts begin with an audit of I-9 compliance. If the employer’s compliance level is fairly high, the prospects of any enforcement action against the employer diminish radically. Conversely, if the employer’s I-9 compliance is deficient, the DHS and ICE may assume that the poor compliance is the direct result of actual knowledge that illegal workers are being employed.

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<sup>1</sup> See Littler’s October 2008 ASAP *DHS to Publish Final Supplemental No-Match Rule*.