



Department of Homeland Security Seeks to Heighten Immigration Enforcement Policy by Stepping Up Employer Obligations Under the "No-Match Rule"

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On August 10, 2007, the Department of Homeland Security ("DHS") announced several procedural changes to strengthen enforcement of existing federal immigration laws. Included in these changes are regulations that employers must follow when they receive a "no-match" letter indicating that an employee's social security number or work eligibility information does not match government records. Due to a recent California federal court ruling, the date on which the regulations will take effect is unknown. Nonetheless, "no-match" letters themselves are not new, and the new regulations seek to ultimately impose heightened obligations that employers should be aware of to ensure compliance and avoid increased fines and penalties once the new regulations ultimately take effect.

What Exactly Are "No-Match" Letters?

No-match letters are issued by either the Social Security Administration ("SSA") or Immigration and Customs Enforcement ("ICE"), a division of DHS. The SSA may issue a no-match letter when information contained in an employee's W-2 form does not match the SSA's records for that employee. ICE may issue a no-match letter when an employee's immigration status or employment authorization is inconsistent with ICE's records for that employee.

What Is The Current Law?

Under the Immigration Reform and Control Act ("IRCA"), all U.S. employers must verify the identity and employment eligibility of all new employees. It is illegal for an employer to hire, recruit or continue to employ an individual when the employer either knows that the individual is an unauthorized alien or has constructive knowledge of the same. While current law requires employers to verify the immigration status of workers *at the time they are hired*, it does not impose any further verification obligations.

What Are The New Requirements?

The new regulations seek to *broaden* the definition of constructive knowledge by adding that an employer's constructive knowledge may begin when it receives a no-match letter from SSA or ICE. In other words, an employer's receipt of a no-match letter may be used as evidence that the employer has constructive knowledge that an employee is unauthorized to work in the United States.

- **Within 30 days of receiving a no-match letter**, an employer should verify that the mismatched information is not an employer-created error (i.e., typographical, clerical, *etc.*). If there are employer-created errors, the employer should correct its records and inform SSA or ICE. If there are no employer-created errors, the employer should ask the employee to confirm the accuracy of the information. If the employee corrects the information, the employer should notify SSA or ICE of the corrected information. If the employer indicates that the information is correct, the employer should ask the employee to resolve the discrepancy with SSA or ICE.
- If the discrepancy is not resolved **within 90 days of receiving a no-match letter**, within three (3) days the employer should re-verify the individual's work authorization by completing a new I-9 employment eligibility verification form for the employee *without* using the documents that were the subject of the "no-match" letter. In other words, an employee cannot use a document containing the social security number or alien number that is the subject of the no-match letter to establish work authorization or identity.

- If the employee is unable to resolve the mismatched information, the employer may choose to terminate the employee or run the risk that DHS will find that the employer had constructive knowledge that it was employing and/or is continuing to employ an unauthorized employee.

By following these steps, employers may have a "safe harbor" even if the worker is later found to be undocumented. Notably, however, the "safe harbor" does not apply to a situation where DHS believes the employer had *actual knowledge* it was hiring an undocumented worker or had previous constructive knowledge of the individual's alien status.

An Employer's Continuing Obligation Not to Discriminate or Retaliate

Even in the face of the new no-match regulations, it is always important for employers to be mindful of their continuing obligation not to discriminate against employees based on, among other things, race or national origin. Relatedly, it is unlawful for employers to retaliate against employees for engaging in union-related activities. In the context of no-match letters, this means that employers should resist taking *preemptive* action against employees who are the subject of no-match letters. Instead, employers should take care to first follow the steps outlined in the regulations (described above). Only when mismatched information is unable to be resolved at the end of that process should an employer consider terminating an individual subject to a no-match letter to avoid a finding that it continued to employ the individual despite constructive knowledge of his or her alien status.

The Bottom Line

An employer's obligation to verify the identity and employment eligibility of all new employees remains unchanged. Nonetheless, under the new regulations, employers will additionally be obligated to, in effect, *re-verify* such information for employees who are the subject of no-match letters. In order to ensure compliance with the new regulations once they go into effect and to avoid violation of anti-discrimination and/or retaliation laws, employers should:

- Continue to take great care in verifying the employment eligibility information of newly-hired employees.
- After receiving a no-match letter, carefully follow the steps outlined in the new regulations (as described above). Doing so will enable employers to take advantage of the safe harbor provision provided for in the new regulations.
- Avoid preemptively taking adverse action – by way of termination or otherwise – against any individual who is the subject of a no-match letter. In cases where an employer believes that adverse employment action is required *before* resolution of the mismatched information, employers should consider consulting legal counsel to ensure anti-discrimination and retaliation laws are not violated.

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