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Safe Harbor Procedures for Employers Who Receive Social Security No-Match Letters

This edition of the *Employment Law Advisor* addresses the Department of Homeland Security's ("DHS") new regulation, which is entitled "Safe-Harbor Procedures for Employers Who Receive a No-Match Letter." This controversial new regulation sets forth "safe-harbor" procedures for employers to follow to avoid liability that otherwise could arise from the employer's "constructive knowledge" that an employee was not authorized to work in the United States.

Defining "Constructive Knowledge"

Continuing to employ an alien who the employer knows is not authorized to work in the United States violates the Immigration and Nationality Act ("INA"), and subjects the employer to possible fines and penalties. Importantly, an employer can violate the law by having constructive knowledge that an employee is unauthorized to work. This concept of constructive knowledge is what the new DHS regulation addresses. Constructive knowledge is defined as "knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through exercise of reasonable care, to know about a certain condition."

Unreasonable Responses to No-Match Letters May Evidence Constructive Knowledge

Employers annually send the Social Security Administration ("SSA") millions of earnings reports (W-2 Forms) in which the combination of employee name and social security number ("SSN") does not match SSA records. In some of these cases, SSA sends a letter that informs the employer of the mismatch. The letter is commonly referred to as an employer "no-match letter." There can be many causes for a no-match, including clerical error and name changes. One possible cause may be the submission of information for an alien who is not authorized to work in the United States and who may be using a false SSN or an SSN assigned to someone else. Such a no-match letter may be one indicator to an employer that one of its employees may be an unauthorized alien.

In addition, U.S. Immigration and Customs Enforcement ("ICE") will often send a similar letter (currently called a "Notice of Suspect Documents") after it has inspected an employer's Employment Eligibility Verification forms ("Forms I-9") in connection with an investigation audit. ICE letters are sent after the agency unsuccessfully attempts to confirm through its records that an immigration status document or employment authorization document relied upon by an employee in completing the Form I-9 was assigned to that person.

DHS's new regulation amends the definition of "knowing" with respect to "constructive knowledge" by adding two new examples of situations that may lead to a finding that an employer had constructive knowledge that a worker was unauthorized to work: (1) the employer's receipt of a "no-match letter" or (2) the employer's receipt of written notice from DHS/ICE that the immigration status or employment authorization documentation presented or referenced by the employee in completing Form I-9 was not assigned to the employee according to DHS records.

Employers' Safe-Harbor Procedures for Responding to "No-Match" Letters and DHS Notices

The new regulation describes employers' obligations after receiving a no-match letter or a written notice from DHS, and describes "safe-harbor" procedures that the employer can follow in response to no match letters. A response consistent with the safe-harbor procedures will mean that DHS will not use the employers' receipt of the no-match letter as evidence that the employer had constructive knowledge that the employee in question was an alien not authorized to work in the United States. However, if the employer fails to take reasonable steps after receiving such information, and if the employee is in fact not authorized to work in the United States, the employer may be found to have had constructive knowledge of that fact. (The new regulation's safe harbor procedures do not insulate the employer from liability if the employer had <u>actual</u> knowledge that the worker was unauthorized to work.)

Employer's Safe-Harbor Response to SSA No-Match Letters

The new regulations set forth the following steps an employer should take in response to the receipt of a SSA no-match letter:

Step One: The employer must check its records to determine whether the discrepancy results from a typographical, transcription, or similar clerical error. If the discrepancy is due to such an error, the employer must correct it and inform the SSA of the correct information. The employer must also verify with the SSA that the employee's name and social security account number, as corrected, match the SSA's records. (Employers may verify a SSN with SSA by telephoning 1-800-772-6270. For information on SSA's online verification procedure, see http://www.ssa.gov/employer/ssnv.htm.)

The employer should make a record of the manner, date, and time of such verification, and then store such record with the employee's Form I-9. The employer may update the employee's Form I-9 or complete a new Form I-9 (and retain the original Form I-9), but the employer should not perform a new Form I-9 verification. The employer must complete these actions within <u>30 days</u> following receipt of the no-match letter.

Step Two: If the employer determines that the discrepancy is not due to an error in its own records, the employer must promptly request that the employee confirm that the name and social security account

number in the employer's records are correct. If the employee states that the employer's records are incorrect, the employer must correct, inform, verify, and make a record (as set forth in Step 1 above). If the employee confirms that its records are correct, the employer must promptly request that the employee resolve the discrepancy with the SSA. The employer must advise the employee of the date that the employer received the written notice from the SSA and advise the employee to resolve the discrepancy with the SSA within 90 days of the date the employer received the written notice from the SSA.

Step Three: If the employer is unable to verify with the SSA within ninety days of receiving the no-match letter that the employee's name and social security account number matches the SSA's records, the employer must again – within three days – verify the employee's employment authorization and identity (i.e., perform a new I-9 verification). The employer should complete a new Form I-9 for the employee using the same procedures as if the employee were newly hired, except that: the employer must not accept any document referenced in any no-match letter from SSA or any document that contains a disputed social security account number or alien number referenced in any written notice from DHS, or any receipt for an application for a replacement of such document, to establish employment authorization or identity or both; and the employee must present a document that contains a photograph in order to establish identity or both identity and employment authorization.

Employer's Safe-Harbor Response to Resolve DHS Document Mismatches

An employer who receives written notice from DHS of a document mismatch as described above will be considered by DHS to have taken reasonable steps if the employer takes the following actions: The employer must contact the local DHS office and attempt to resolve the question raised by DHS about the immigration status document or employment authorization document. The employer must complete this step within thirty days of receiving the written notice. If the employer is unable to verify with DHS within 90 days of receiving the written notice that the immigration status document or employment authorization document is assigned to the employee, the employer must again verify the employee's employment authorization and identity within an additional three days by following the verification procedure specified above.

Consult Counsel Prior to Terminating Employment

If the discrepancy referred to in the no-match letter is not resolved, and if the employee's identity and work authorization cannot be verified using a reasonable verification procedure, such as the safe-harbor procedures set forth in the DHS regulation, then the employer must choose between: terminating the employee's employment, or facing the risk that DHS may find that the employer had constructive knowledge that the employee was an unauthorized alien and therefore, by continuing to employ the alien, violated INA. Given the complexity of the DHS's regulations and the potential liability that could flow from a bad decision, we advise that you consult with employment/immigration counsel prior to terminating the employee's status – or determining to keep the employee employed.

Avoid Discriminatory Practices

Employers should apply the safe-harbor procedures uniformly to all their employees having unresolved no-match indicators. If they do not do so, they may violate applicable anti-discrimination laws. The new regulations explicitly state that knowledge that an employee is unauthorized may not be inferred from an employee's foreign appearance or accent, and that an employer is not permitted to request more or different documents than are required under I-9 regulations or to refuse to honor documents tendered that on their face reasonably appear to be genuine and to relate to the individual. This is nothing new. It is unlawful for employers to discriminate against anyone in hiring, discharging, or recruiting because of that person's national origin or citizenship status (so long as they are eligible to work in the United States). The I-9 process may not be used to pre-screen employees for hiring. Employers also cannot specify which documents they will accept from an employee and cannot ask the employee to provide different or more documentation than what is set forth in the I-9 requirements. To avoid claims of discrimination, employers should treat all employees the same in connection with completing I-9 forms and in resolving SSA no-match letters and DHS mismatch notices.

Judge Temporarily Halts Implementation

The final rule was issued on August 15, 2007 and was expected to become effective on September 14, 2007. However, on August 31, 2007, a federal district court judge in California, Judge Chesney, temporarily halted DHS and SSA's implementation of the new regulation, pending a hearing scheduled for October 1, 2007. In AFL-CIO v. Chertoff, No. 07-4472 (N.D. Cal.), a coalition of labor unions and immigrant rights groups filed suit and sought a temporary restraining order seeking to halt implementation of the new regulation on the grounds that it is beyond the authority of DHS. On September 12, 2007, the court allowed a group of business groups (headed by the U.S. Chamber of Commerce) to intervene in the lawsuit to oppose implementation of the new regulation. Judge Chesney has ordered SSA to refrain from sending out no-match letters under the new regulation pending the October 1 hearing. It may take some time before the fate of the new rule is finally determined by the federal courts, and we will provide updates of new developments. In the meantime, we recommend that employers evaluate their no-match response practices for compliance with the new regulation.

The Morse, Barnes-Brown & Pendleton, PC, **Employment & Immigration Practice Group** provides sophisticated legal services and practical advice to employers of all sizes, ranging from technology start-ups to Fortune 1000 companies.

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