

## No-Match Letters

**Immigration regulations proposed in June 2006 include safe harbor for employers notified by the Social Security Administration or the Department of Homeland Security of Social Security numbers that don't match government records. Proposed regulations address definition of "constructive knowledge."**

### Background

In 1993, the Social Security Administration (SSA) began sending annual "no-match" (or mismatch) letters to employers notifying them of employees whose names do not match the Social Security numbers on record. Since then, millions of employers have received these letters. Employers are expected to notify employees of the discrepancy but the employers cannot use the no-match letter as a basis for termination. The correlation to be drawn between the no-match letters and legitimacy of work status has long been an issue for many employers. In recent months, this issue has been highlighted by publicized raids by the U.S. Immigration and Customs Enforcement (ICE) indicting employers for disregarding the no-match letters.

### Proposed Regulations

On June 14, 2006, in a proposed regulation, the Department of Homeland Security (DHS) offers long-awaited guidance for employers who receive SSA no-match letters. In the proposed regulations, DHS outlines legal obligations of an employer and recommended procedures for employers to follow to avoid claims that the no-match letters provided constructive knowledge that the employer employed unauthorized workers. If followed, the procedures provide employers with a "safe harbor" from liability should a determination later find that an employee is an undocumented alien.

### Constructive Knowledge a Risk

Existing law under the Immigration and Naturalization Act (INA) makes it unlawful for an employer to hire or continue to employ an individual *knowing* the employee is an unauthorized alien. 8 U.S.C. §1324a(a)(2). The proposed regulation defines "knowing" to include not only actual knowledge but also "knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition." Thus, an employer may violate the INA even if it only has *constructive* knowledge that the employee is an unauthorized alien. 8 C.F.R. §274a.1(1)(1). Of particular concern in the context of no match letters, the proposed regulation provides two instances in which an employer could be found to have constructive knowledge:

1. No-Match Letter from SSA – Employer receives written notice from SSA that the combination of name and SSN submitted for an employee does not match SSA records; or
2. No-Match Letter from DHS – Employee receives Written notice from DHS that the immigration status document or employment authorization document ("EAD") presented or referenced by the employee in completing Form I-9 was assigned to another person, or that there is no agency record that the document was assigned to anyone.

### Penalties

An employer who with actual or constructive knowledge hires an unauthorized alien faces the following civil penalties:

- \$250 to \$2,000 fine for each unauthorized alien if the employer is a first time offender;

- \$2,000 to \$5,000 for each unauthorized alien if the employer has previously been in violation; or
- \$3,000 to \$10,000 for each unauthorized alien if the employer has been subject to more than one cease and desist order.

In addition, an employer can face a fine of \$110 to \$1,100 for failing to complete and properly maintain I-9 forms for each employee's "paperwork" violation. Besides civil penalties, the criminal penalties include a fine under Title 18 or imprisonment up to 5 years, or both.

### **Safe Harbor for Employers**

The proposed regulations would provide employers with a "safe harbor" from liability should a determination find that the employee at issue is an unauthorized alien. To take advantage of the "safe harbor," employers can follow specified steps after receiving a no-match letter:

### **Response to No-Match Letter**

#### *Check for Clerical Errors*

- Within 14 days of receipt of the no-match letter, check employee records to determine if the discrepancy in the Social Security number is the result of a typographical, transcribing, or similar clerical error. If it is, the employer must make the correction with the SSA's or DHS's records per the instructions in the no-match letter, if any; otherwise in any reasonable way, such as completing of a corrected W-2 . These steps must be completed within 60 days of the employer's receipt of the no-match letter. Verification inquiries can be addressed by telephone with the SSA, Monday to Friday, from 7:00 a.m. to 7:00 p.m. at 1-800-772-6270.

#### *Ask Employee to Confirm Accuracy*

- If the discrepancy is not the result of a clerical error, ask the employee to confirm that the employer's records are correct. If the employee confirms that the information is correct, request that the employee resolve the discrepancy with the SSA or DHS per the instructions in the no-match letter, if any; otherwise, in any reasonable

way. The employee is given up to 60 days from receipt of the no-match letter to resolve the discrepancy.

#### *Complete New I-9*

- If within 60 days the discrepancy is not resolved, then within another 3 days, re-verify the employee's work eligibility by completing a new Form I-9 as if the employee were newly hired. Two conditions are imposed. No document containing the number in the No-Match letter may be used to establish employment authorization or identity or both (section 2 of the I-9). And, a document with a photograph is required to establish identity or both identity and employment authorization.

### **Difficult Choice**

Should the employee provide appropriate documentation, the employer may continue to employ the employee. If at a later date, the employee turns out to be an unauthorized alien, then (assuming no other evidence of knowledge) the employer will not be held to have constructive knowledge of the employee's undocumented status. *If the employer cannot verify the employee's work eligibility using the above steps, the employer faces the choice between terminating the employee or risking being found to have knowingly employed an unauthorized alien.* The proposed regulations offer no guidance for making this critical choice.

The proposed effective date of the regulation has not been published. DHS has indicated it may change the time frame in the proposed rules based on public comments, which are due by August 14, 2006. A complete copy of the proposed regulation summarized above is available from our office or at <http://a257.g.akamaitech.net/7/257/2422/01jan20061800/edocket.access.gpo.gov/2006/E6-9303.htm> .

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