

Department of Homeland Security Promulgates New Regulations Addressing “No Match” Letters

After more than a year of anticipation, the Department of Homeland Security (DHS) promulgated its final regulations which discuss the steps an employer should follow upon receiving a “no match” letter from the Social Security Administration (SSA) or DHS. The new regulations are expected to become effective on September 13, 2007.

In the last few years, no match letters have befuddled both employers and immigration legal practitioners alike because there has been no clear guidance from the government agencies on what to do. Many employers understood correctly a no match letter often times is a strong indicator that the employee, who is the subject of the letter may not be authorized to work in the United States. Employers worried a no match letter may be considered evidence that the employer had “constructive” knowledge that its employee was unauthorized. The letter has special significance because it is issued by a federal agency. For these reasons, employers were concerned they would be held liable for knowingly employing an unauthorized alien. However, many employers also understood they could not fire an employee on the mere receipt of a no match letter because doing so might lead to a finding the employer wrongfully terminated the employee. No match letters could arise from something as simple as a clerical or transcription error. Many employers were reluctant to terminate an employee on this basis alone.

With the new regulations, the DHS has offered a measure of uniformity as to the type of steps an employer should take upon receipt of a no match letter. The DHS has determined that if an employer followed the procedures discussed in the regulations, the employer is entitled to a “safe harbor.” That is, even if the employee who is the subject of the no match letter turns out to be an unauthorized alien, the DHS will not make a finding that the employer “knowingly” employed an unauthorized alien. Thus, the employer will not be fined. The immigration laws prohibit an employer from knowingly employing an unauthorized alien. If the employer has actual knowledge of an employee’s unauthorized status, it is clear that sanctions will result. An employer may also be charged with “constructive” knowledge in certain situations where even though it did not have actual knowledge, it could nevertheless be held liable for knowingly employing an unauthorized alien. The new regulations add two more examples of situations where an employer may be deemed to have constructive knowledge: (1) the employer receives written notice from the SSA that its submitted information for an employee does not match SSA records; and (2) the employer receives written notice from DHS that the employer’s I-9 record for an employee does not match DHS records.

Upon receipt of a no match letter, the new regulations prescribe the following steps an employer should undergo to take advantage of DHS’s safe harbor provisions:

- (1) The employer should check its records to determine whether the discrepancy resulted from a typographical or transcription error. If this is the case, the employer must make corrections, notify the agency of the corrections, and verify that the corrected

information matches the agency records. Records for the SSA may be verified by calling 1-800-772-6270 or by accessing the SSA website at <http://www.ssa.gov/employer/ssnvadditional.htm>. The employer should document the date and time it made the verification and store such documentation with the employee's I-9 file. This should be done within 30 days of receipt of the no match letter.

(2) If the discrepancy is not the result of the employer's error, the employer must request that the employee confirm that the employer's records are correct. If the records are not correct, the employer should make the corrections, notify the agency of the corrections, and verify that the corrected information matches the agency records. The employer should document the date and time it made the verification and store such documentation with the employee's I-9 file. This should be done within 30 days of receipt of the no match letter.

(3) If the employer's records are correct according to the employee, the employer should ask the employee to personally pursue the matter with the relevant agency. The employer should also advise the employee of the date of the employer's receipt of the no match letter, and that the employee must resolve the discrepancy within 90 days of this date.

(4) Within 93 days of receipt of a no match letter, the employer must complete a new I-9 verification Form for the subject employee. However, the employer may not accept for employment verification purposes any document which contains a disputed social security or alien registration number. The employee must present a document that contains a photograph in order to establish identity or employment authorization. The employer must keep the new I-9 Form with the prior I-9 Form.

In situations where the employer has actual knowledge of an employee's unauthorized status (i.e., the employee admits he or she is in fact undocumented), the above steps will not provide safe harbor to the employer who continues to employ such employee.

If the discrepancy addressed by the no match letter cannot be resolved, or the employee's identity or work authorization cannot be verified, the employer must choose between terminating the employee or face the risk that DHS will find that the employer had constructive knowledge of the employee's unauthorized status, thus subjecting the employer to fines or other sanctions.

The DHS cautions employers must apply the above procedures uniformly in order to avoid anti-discrimination laws. Although an employer may take other steps it believes are reasonable to address a no match letter, DHS may not provide a safe harbor if it does not agree with the employer's actions. Therefore, the best policy is to follow DHS's procedures as scrupulously as possible. Finally, if the subject employee is no longer working for the employer, no action is required.