

ICE Issues, Regulations on Social Security "No-Match" Letter

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On August 14, 2007, the U.S. Immigration and Customs Enforcement (ICE) published new regulations on what employers need to do when they receive a Social Security "no-match" letter. The new rule establishes safe harbor procedures for an employer to follow to prevent the Department of Homeland Security (DHS) from using the letter as proof that the employer had constructive knowledge that the employee was not authorized to work in the U.S. The rule will become effective on September 14, 2007.

New Examples of Constructive Knowledge

An employer is liable under the Immigration Reform and Control Act (IRCA) for "knowingly" hiring or continuing to employ unauthorized aliens. Employer liability is not limited to those situations in which an employer has actual knowledge that an employee does not have work authorization. The rules also define "knowledge" to include "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." 8 C.F.R. § 274a.1(l). This is also referred to as "constructive knowledge."

The new rule adds two new examples of scenarios where the government may attribute an employer with constructive knowledge that an employee is unauthorized. The current regulations state that constructive knowledge will be inferred when an employer fails to complete or improperly completes a Form I-9, has reckless disregard for the legal consequences of hiring an unauthorized alien, or fails to take reasonable steps after an employee requests that an employer file an employment-based immigration petition on his or her behalf.

The regulations will now state that constructive knowledge may be found if an employer "fails to take reasonable steps" in the following circumstances:

- The employer receives a "no-match" letter, which is a written notice from the Social Security Administration (SSA) that the combination of name and Social Security account number submitted to the SSA for an employee does not match agency records.
- The employer receives written notice from the DHS that the immigration status or employment authorization documentation presented or referenced by the employee in completing the Form I-9 was not assigned to the employee according to DHS records.

In determining whether an employer has constructive knowledge in these scenarios, the DHS will continue to review the "totality of relevant circumstances."

What Employers Need to Do in Response to a "No-Match" Letter

Though the regulation creates new ways for the government to find that employers have constructive knowledge, the regulation is also helpful because it finally establishes some guidance on what employers should do when they receive a Social Security "no-match" letter. If an employer takes the following actions when it receives a Social Security "no-match" letter, the letter will not be used as evidence of constructive knowledge that a worker is unauthorized:

1. Within 30 days of receipt of the "no-match" letter, the employer should check its records to determine whether the discrepancy results from a typographical, transcription, or similar clerical error.
2. If there was such an error, the employer must correct it and inform the SSA that the employee's name and Social Security account number, as corrected, match SSA records. The employer must then record this information and update the employee's Form I-9.
3. If the discrepancy is not due to an error in the employer's 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 records are incorrect, the employer must correct, inform, verify, and make a record. If the employee says that the name and Social Security number 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 "nomatch" letter and advise the employee to resolve the discrepancy within 90 days of that letter.
4. If the employer is unable to verify with the SSA within 90 days of receiving the "no-match" letter that the discrepancy has been resolved, the employer must ask the employee to complete a new Form I-9 to re-verify the employee's employment authorization and identity within three days. The employee should not be allowed to use the problematic Social Security number that is the subject of the "no-match" letter.

If the employer and employee are unable to resolve the discrepancy using these steps, the employer must terminate the employee or risk the possibility that it will be found to have constructive knowledge of an unauthorized worker.

The regulation states that the employer can take other "reasonable steps" to respond to a "no-match" letter, but it does not explain what other reasonable steps might be. The DHS has indicated in the past that participation in certain government programs, such as the Electronic Employment Verification System, may be reasonable.

Conclusion

Employers should carefully follow the safe harbor provisions when they receive a Social Security "no-match" letter. The safe harbor provisions will protect employers from findings that they had constructive knowledge of unauthorized workers. Following the provisions may also serve as a defense against claims under the Immigration and Nationality Act's anti-discrimination provisions, since the government is setting forth what it believes to be a fair and reasonable response to "no-match" letters.

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