

## **HAVE YOU RECEIVED A “NO-MATCH” LETTER REGARDING AN EMPLOYEE’S SOCIAL SECURITY NUMBER?**

### **Summary of Department of Homeland Security’s Final Rule on “No-Match” Letters**

8 U.S.C. 1324a(a)(2) makes it unlawful for an employer to continue employing an alien knowing that the alien is, or has become, unauthorized for such employment. 8 C.F.R. 274a.1 further defines the term “knowing” to include “constructive knowledge” – “knowledge that may fairly be inferred through notice of certain facts and circumstances that would lead a person, through the exercise of reasonable care to know about a certain condition.”

There has been much confusion about whether an employer could be deemed to have “constructive knowledge” that a particular employee is unauthorized when the employer receives a letter from the Social Security Administration stating that individual’s name and social security number, as provided by the employer in its W-2 earnings reports, do not match agency records for that number/name. These are referred to as “No-Match” letters. Employers may also receive a letter from U.S. Immigration and Customs Enforcement, usually following an investigation audit of the employer’s I-9 forms, stating that the agency cannot confirm that the immigration status document or employment authorization document was assigned to the employee who presented it during the I-9 process.

Because the reason for the “no-match” could be something as simple as a clerical error or a name change by the employee (e.g. after getting married), or alternatively, could be an indication that the employee is not authorized for employment, businesses are often unsure about what actions to take in response to such “No-Match” letters.

Department of Homeland Security’s Immigration and Customs Enforcement has issued a Final Rule explaining the circumstances under which receipt of a “No-Match” letter can lead to a finding of constructive knowledge by the employer that the worker lacks employment authorization. The Final Rule amends this definition to provide that an employer may be found to have constructive knowledge based on the employer’s failure to take reasonable steps after receiving a No-Match letter from the Social Security Administration or from Department of Homeland Security. Such finding would not be automatic, but would be based on the totality of the circumstances. The rule also explains the steps an employer can take to avoid a finding of constructive knowledge, and spells out the actions that would be considered “reasonable steps” by the employer to create a “safe harbor” thereby preventing a finding of constructive knowledge.

The final rule was published on August 15, 2007, and is scheduled to become effective 30 days thereafter (i.e. September 14, 2007). However, a temporary restraining order has been issued restraining the government from taking steps to implement the final rule, pending a hearing scheduled for October 1, 2007.

### **Notice from the Social Security Administration**

Within 30 days of receiving a No-Match letter from the Social Security Administration (SSA), the employer should first check its own records to determine whether a clerical or typographic error is the cause. If it is, the employer should correct the error in its records and notify the Social Security Administration of the correct information. The employer should then verify with the SSA that the employee name and number, as corrected, now match agency records. The employer should document this verification and should correct the employee's I-9 form, but the employer should not perform a new I-9 verification on the employee.

If the employer determines that the discrepancy is not due to an error in its own records, the employer should ask the worker to confirm that the name and social security number in the employer's records are correct. If they are not, the employer must make the correction, verify the corrected information with the Social Security Administration, and document that it has taken these steps.

If the employee confirms that the employer's records are correct the employer should notify the employee of the date it received the No-Match letter and ask the employee to resolve—within 90 days of the employer's receipt of the letter--the discrepancy with the Social Security Administration.

If, within 90 days of having received the SSA letter, the employer has not been able to verify that the employee's name and social security number match SSA records, the employer must then perform, within the next 3 days, a new I-9 verification of the worker's employment authorization and identity as if the employee were newly hired. The employer must not accept any document referenced in the notice from Social Security Administration or any document that contains the disputed social security number. Also, the employee would have to present a document that contains a photograph in order to establish identity or both identity and employment authorization. The employer should retain the new I-9 form along with the prior I-9 form.

### **Notice from Department of Homeland Security**

An employer may also receive written notice from DHS that the immigration status document or employment authorization document presented by the employee is assigned to another person or has not been assigned to anyone. Within 30 days of receiving such notice, the employer must contact DHS to try to resolve the questionable document, and the employer should make a record of these contact efforts.

If, within 90 days of receiving the DHS letter, the employer has not been able to verify that the document in dispute has in fact been assigned to the employee, the employer has an additional 3 days to perform a new I-9 verification of the worker's employment authorization and identity. The employer must not accept any document referenced in the notice from DHS, nor any document that contains the disputed social security number or alien number listed in the notice, nor any receipt for a replacement version of a disputed

document. Again, the employee would have to present a document that contains a photograph in order to establish identity or both identity and employment authorization. The employer should retain the new I-9 form along with the prior I-9 form.

### **If the Employee's Work Authorization Cannot be Verified**

The employer should work through the steps listed above – attempting to resolve the discrepancy and if necessary conducting a new I-9 verification – before taking action to terminate the employee, unless of course the employer gains actual knowledge during the process that the person is unauthorized (e.g. if the employee admits to lacking work authorization). However, if the problem has not been resolved and employee has not able to produce documentation for a new I-9 verification, the employer then must decide whether to terminate the employee or face the risk in a subsequent government enforcement action of being found to have constructive knowledge that the worker was unauthorized for employment.

### **No Discrimination**

The regulation does not change the employer's obligation to refrain from discriminatory practices. Employers are reminded to follow these steps consistently and uniformly. Employers should not make inferences about a worker's immigration status or employment authorization from factors such as his or her accent or foreign appearance. Further, employers should not ask for more or different documents beyond those listed as acceptable for I-9 verification. Nor should employers refuse to accept documents tendered by the employee which reasonably appear to be genuine and to relate to the individual, except of course those documents in dispute about which the employer has received the written notice from SSA or DHS.