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SPECIAL EDITION: DHS FINALIZES EMPLOYER SAFE HARBOR PROVISIONS FOR NO-MATCH RULE

The Department of Homeland Security (DHS) issued a supplemental rule last week on its “no-match” rule which determines when an employer is liable for knowingly employing an illegal alien. The rule provides a safe harbor against liability for employers who take certain steps upon receiving a “no-match” letter from Social Security Administration's (SSA) or Department of Homeland Security (DHS). The rule was issued to address a federal district court order that stopped the agency from enforcing its requirements over concerns relating to employer liability. The DHS had begun sending out “no-match” letters to employers last year that threatened civil and criminal penalties if they failed to resolve mismatched social security numbers on I-9 Employee Eligibility Verification Forms. The DHS letters stated that failure to respond would be construed as a "knowing" violation of Section 274 of the Immigration and Nationality Act.

The court ruled that the DHS had improperly changed policy in the final rule without notice or public comment when it said that constructive knowledge may be inferred if an employer fails to take reasonable steps after receiving nothing more than a no-match letter in the final rule's text. The DHS supplemental rule addresses the court’s concerns but does not change any provisions in the no-match rule.

Background of The No match Rule

The SSA informs thousands of employers every year via "no-match" letters that certain employees' names and corresponding Social Security numbers provided on the employers' Form W-2 wage reports do not match SSA's records. As many as four percent of approximately 250 million wage reports the SSA receives each year belong to employees whose names and corresponding Social Security numbers do not match SSA records.

The No-Match Rule details steps employers may take when they receive a "no match" letter and guarantees that U.S. Immigration and Customs Enforcement will consider employers who follow those steps to have acted reasonably. If an employer follows the safe harbor procedures in good faith, ICE will not use the employer's receipt of a no-match letter as evidence to find that the employer violated the employment provisions of the Immigration and Nationality Act by knowingly employing unauthorized workers.

When is this rule effective?

The rule became effective October 28, 2008.

What is the purpose of this rule?

The rule is designed to end uncertainty over when an employer is guilty of “knowingly” employing illegal aliens. The rule provides a “safe harbor” from liability for employers that follow certain procedures after receiving a no-match letter from the SSA or the DHS.

How does the “no-match” process work?

All employers in the US are required to report social security earnings for their employees on W-2 forms. Employer’s social security earning reports listing an employee’s name, social security number and the worker’s earnings are sent to the SSA. In some cases, the social security number and the name of the employee do not match due to a clerical error, a name change or it may indicate that the employee is not authorized to work. Regardless of the reason for the discrepancy, the SSA notifies the employer of the

no-match. In addition, the DHS will send a no-match letter where a social security number does not match corresponding information on immigration documents presented in completing I-9 Employee Eligibility Verification Forms.

What steps must an employer take if it gets a no-match letter?

The following steps must be taken in order to **avoid liability** for employing a person not authorized to work.

Step 1: An employer must check its records to determine if the error was a result of a typographical, transcription or similar clerical error. If there is an error, the employer should correct the error and inform the appropriate agency - DHS or SSA - depending on which agency sent the no-match letter. The employer should then verify with that agency that the new number is correct and internally document the manner, date and time of the verification. DHS allows 30 days for an employer to take these steps.

Step 2: If no clerical errors are found explaining the no-match, the employer should request an employee to confirm that the employer's records are correct.

If the records are incorrect according to the employee, the employer needs to take corrective actions. Corrective actions include informing the relevant agency that the information is incorrect as well as providing verified records to resolve the discrepancy.

If the records are correct according to the employee, the employer should ask the employee to follow up with the relevant agency (such as by visiting an SSA office and bringing original or certified copies of required identity documents).

Step 3: When 90 days have passed without a resolution of the discrepancy, an employer must attempt to verify the employee's I-9 identity and work authorization through government databases.

Step 4: If the discrepancy is not resolved and the employee's I-9 identity and work authorization are not verified, the employer must either terminate the employee or face the risk that DHS will find constructive knowledge of lack of employment authorization.

If the process is completed, an employer will be deemed NOT to have constructive knowledge that an employee is not work authorized even if the system verifies the employee (even if the employee turns out not to be employment authorized). It is important to remember that a no-match is only resolved when the employer has received verification from SSA or DHS that the employee's name matches the record or the employee is terminated.

What is the procedure to re-verify identity and employment authorization when an employee has not resolved the discrepancy described above?

Sections 1 and 2 of the I-9 must be completed within 93 days of receiving the no-match letter. If an employer took the full 90 days to try and resolve the problem, they then have three more days to complete the new I-9. And an employee may not use a document containing the disputed SSN or alien number or a receipt for a replacement of such a document. Only documents with a photograph may be used to establish identity.

Note that employees hired before November 6, 1986 are not subject to this rule. This reflects a change in the October 2008 rule from the 2007 rule.

What if the employer has heard that an employee is unlawfully present aside from hearing from SSA or DHS in a no-match letter?

Employers who have ACTUAL knowledge that an alien is unauthorized to work are liable even if they have complied with the I-9 and no-match rules.

Will following the procedures in this rule protect an employer from all claims of constructive knowledge or just claims of constructive knowledge based on the letters for which the employers followed the safe-harbor procedure?

An employer who follows the safe harbor procedure above will be considered to have taken all reasonable steps in response to the notice and the employer's receipt of the written notice will therefore not be used as evidence of constructive knowledge. But if other independent information exists that an employer had constructive knowledge, the employer is not protected.

What are the time frames required under the rule to take each necessary action after receiving the no-match letter?

- Employers who review company records for errors have 30-days to make any necessary corrections and verify corrections with SSA or DHS.

- Employers who find no errors in company records must investigate or require the employee to investigate SSN and I-9 information to verify and correct the documents and notify the applicable agency.

- Employers conducting such investigations must notify employees within five days of receipt of the no-match letter.

May an employer continue to employ a worker throughout the process noted above?

Yes. The only reason an employer would have to terminate prior to 90 days is if the employer gains **actual** knowledge of unauthorized employment. DHS notes that it is not requiring termination by virtue of this rule rather, they are just providing a safe harbor to avoid a finding of constructive knowledge. Employers may be permitted to terminate based on its own personnel files including failing to show up for work or an employee's false statement to the employer. (Note: It is always prudent to consult labor counsel before terminating employees for such reasons during the no-match process). Employers may terminate as well if they notify an employee of the no-match letter and the employee admits that he or she is unauthorized to work

Does an employer have to help an employee resolve the discrepancy with SSA or DHS?

No. An employer merely needs to advise the employee of the time frame to resolve. They are not obligated to help resolve the question or share any guidance provided by SSA.

In what manner must employers retain records required under the new rule?

The rule is flexible in this regard and employers may use any manner it chooses. The rule permits employers to keep records alongside the I-9 form. Employers are encouraged to document telephone conversations as well as all written correspondence.

If a new I-9 is prepared based on this rule, does that affect the amount of time the I-9 must be retained?

No. The original hire date remains the same even though the safe harbor procedure is used. For example, if an employer was hired several years ago has the I-9 form prepared again and then moves on to a new employer, the original date of hire applies for purposes of determining whether the one-year retention requirement still applies.

Will an employer be liable for terminating an employee who turns out to be work authorized if they get a no-match letter?

If the employee IS authorized to work and an employer does not go through the various safe harbor steps in the rule then the employer might be liable in an unlawful termination suit.

What if the employee is gone by the time the no-match letter arrives?

An employer is not obligated to act on a no-match letter for employees no longer employed by them.

Where May I obtain Additional Information?

The Department of Homeland Security Website: http://www.dhs.gov