

## **New Regulation Concerning SSA No-Match Letters**

On August 10, the Department of Homeland Security (“DHS”) issued new regulations intending to help employers ensure their employees are legal U.S. citizens and to assist the government in identifying and punishing employers who knowingly hire illegal workers.

The new rules focus on proposed procedures for employers responding to a “no-match” letter, which is a notice from the Social Security Administration (“SSA”) or DHS that an employee’s name does not match the social security number provided. The regulation, in effect, requires employers to terminate workers who are the subject of SSA “no-match” letters if the discrepancy is not resolved within 90 days after the employer’s receipt of the non-match letter and the employee is not otherwise able to verify his or her employment eligibility without use of the social security number in question.

While stating that whether an employer would be found to have constructive knowledge in particular cases depends on the “totality of the relevant circumstances,” the new regulation issued by DHS describes specific steps that an employer should take upon receipt of a SSA no-match letter or DHS communication to avoid a finding that the employer had constructive knowledge of employing an illegal alien. If the employer failed to follow the “safe-harbor” procedures prescribed in the regulation and an employee, who was the subject of a no-match letter, was found to be an unauthorized alien, the employer may be found to have constructive knowledge of the employee’s unauthorized status and would be liable for an immigration violation. The steps that an employer may take to avoid a potential finding that it had constructive knowledge as set forth in the final rule are as follows:

- (1) Upon receiving a no-match letter from SSA, the employer should check its records promptly to determine whether the discrepancy is due to a typographical, transcribing or similar clerical error in the employer’s records or in its communication to SSA. If there is such an error, the employer would correct its records, inform SSA, and verify that the corrected information resolves the issue with SSA and make a record of the manner, date and time of the verification. The employer is to take these steps within 30 days of receipt of the no-match letter.
- (2) If step (1) above does not resolve the discrepancy, the employer is to request the employee to confirm that the employer's records are correct. If correction is required, the employer would make the correction, inform SSA, verify the corrected records with SSA and make a record of the manner, date and time of any such verification as SSA may not provide any documentation. If the employee states that the employer's records are correct, the employer is to request the employee to resolve the discrepancy

with SSA. Again, the employer is to take these steps within 30 days of receipt of the no-match letter.

(3) If the discrepancy is not resolved within 90 days of receipt of the no-match letter, the employer must, within no more than a total of 93 days after receiving the no match letter, re-verify the employee's identity and work authorization by following a modified version of the I-9 procedure. No document containing the social security number that was the subject of the no-match letter can be used, and only documents with a photograph may be used to establish identity.

(4) If the discrepancy in the no-match letter is not resolved within 90 days and if the employee's identify and work authorization cannot be verified as prescribed in step (3) above, then, according to the DHS proposal, the employer **must choose between terminating the employee or facing the risk that DHS may find that the employer had constructive knowledge that the employee was an unauthorized alien** and the employer violated the law by continuing to employ the individual.

The final regulation acknowledges that there may be other procedures an employer could follow in response to a no-match letter that DHS might consider reasonable depending upon the totality of relevant circumstance. However, DHS warns that an employer who followed a procedure other than the safe-harbor procedures described in the proposed regulation would face the risk that DHS may not agree. Employers are to follow the procedures in the regulations uniformly to all employees who are the subject of no-match letters; otherwise, DHS cautions, the employer may violate applicable anti-discrimination laws.

The final regulation becomes effective 30 days after its date of publication in the Federal Register.

### **Frequently Asked Questions Regarding the New Regulation**

**Q: What should I do when I receive a “no-match” letter from the Social Security Administration?**

In order to avoid the risk that you may be deemed to have construction knowledge that you are employing an alien not authorized to work in the United States, the final rule recommends that within 30 days of your receipt of the no-match letter, you check your records to determine whether the discrepancy results from a typographical, transcription, or similar clerical error in your records, or in your communication to the SSA. If there is such an error, you are to correct your records, inform the relevant agency and verify with the relevant agency that the information in your files matches the agency's records. The final rule suggest making a record of the manner, date, and time of the verification.

**Q: What should I do if I go back and check my records and find that there is no clerical error?**

If a review of your records reveals that you accurately transmitted the information to the relevant agency, the final rule recommends that in order to avoid a finding that you have constructive knowledge that you are employing an alien not authorized to work in the United States, you should request that the employee confirm that your records are correct. If they are not correct, you should take the actions needed to correct them and verify the corrected records with the relevant agency. If your records match the records of the employee, the final rule recommends that you ask the employee to pursue the matter personally with the relevant agency, such as by visiting a local SSA office. The final rule suggests that you take these actions within 30 days of your receipt of the no-match letter.

**Q: If I send my employee to the local SSA office to clarify the discrepancy, how long should I wait to follow up with the employee to see if the discrepancy has been corrected?**

Rather than set forth a deadline for you to follow up with the employee sent to the local SSA office, the final rule instead suggests that in order to avoid a finding that you have constructive knowledge that you are employing an alien not authorized to work in the United States, be sure the discrepancy is resolved within 90 days of your receipt of the no-match letter. So, in effect, you must follow up with your employee no later than 90 days after your receipt of the no-match letter to see if the employee has resolved the discrepancy.

**Q: What happens if I follow up with the employee and the employee provides me with the same social security number that was the subject of the no-match letter?**

The final rule acknowledges that your employee may return from the local SSA office with the number that was the subject of the no-match letter or a different number. In either case, the final rule suggests re-verifying the number with the relevant agency. The final rule suggests making a record of the manner, date and time of any such verification. According to the final rule, it is advised that you take these steps within 90 days of your receipt of the no-match letter.

**Q: What do I do if on the 90<sup>th</sup> day I cannot verify the employee's social security number with the relevant agency?**

If the discrepancy is not resolved within 90 days of your receipt of the no-match letter, you have three choices. First, you can continue to employ the individual at the risk of violating the law. Second, you can terminate the employee. Third, you can do as the final rule suggests in order to avoid a finding of constructive knowledge that you are employing an alien not authorized to work in the United States by re-verifying the employee's employment eligibility by going through the I-9 process as if the employee is

a new hire. The final rule suggests you take this step within 93 days of your receipt of the no-match letter. The final rule also notes that as part of this I-9 process, you are not permitted to rely on any document that contains the disputed social security number. In other words, as part of this I-9 process, no document containing the social security number that is the subject of the no-match letter, and no receipt for an application for a replacement of such a document, may be used to establish employment authorization or identity or both. Examples are a United States passport (unexpired or expired), a United States birth certificate, or any of several documents issued to lawful permanent resident aliens or to non-immigrants with work authorization. Further, no document without a photograph may be used to establish employment authorization or identity or both.

**Q: What if the employee is not able to produce a document, other than the documents with the disputed social security number, to verify employment eligibility? Or what if the employee is not able to produce a document with a photograph to show his or her identity?**

If after 93 days from your receipt of the no-match letter you are not able to verify the employee's employment eligibility without use of a document with the disputed social security number or if the employee is unable to produce a document with a photograph to prove identity, the final regulation is clear that you must terminate the employee or risk being found to have constructive knowledge that you are employing an alien not authorized to work in the United States.

If you choose not to terminate the employee, you are left having to argue to DHS that the steps you did take in response to the no-match letter were reasonable and inconsistent with a finding that you had constructive knowledge the employee was an unauthorized alien. Such a finding would depend on the totality of the relevant circumstances, and you face the risk that DHS may not agree.

**Q: What happens if I decide not to terminate the employee and instead rely on other steps I took to avoid a finding of constructive knowledge, only to find out that DHS disagrees with me? In other words, what if I decide not to follow the suggestions in the final rule and I am later found to have constructive knowledge that I was employing an alien not authorized to work in the United States?**

Employers who are found to have knowingly hired or continued to employ an alien not authorized to work in the United States are subject to fines. Remember, the term "knowing" includes not only actual knowledge, but also constructive knowledge. The fines range from \$275 to \$11,000 per alien, with the fine amount increasing with each violation. Fines range from \$275 to \$2,200 for each unauthorized alien for first violations, while the fine for a second violation ranges from \$2,200 to \$5,000 for each unauthorized alien. Employers that have been the subject of one or more cease-and-desist, the fines range from \$3,300 to \$11,000 for each unauthorized alien. Employers with actual knowledge that they are employing unauthorized aliens also are subject to criminal penalties.

**Q: Is there anything I can do proactively to avoid having to worry about following the recommended steps set forth in the new rule?**

Progressive employers should consider acting pre-emptively by cross-checking their employees' social security numbers so they know in advance what their ultimate exposure may become. By doing so, employers can more effectively plan for dealing with these objectively identified exposures. Employers can verify the social security numbers of all new hires with SSA. Employers may verify a social security number with SSA through the mail or by telephoning toll-free 1-800-772-6720, weekdays from 7:00 a.m. to 7:00 p.m. EST. Additional information can be found at:

<http://www.ssa.gov/employer/ssnvadditional.htm>.

Employers can also verify social security numbers online by signing up with SSA's Social Security Number Verification Service at:

<http://www.ssa.gov/employer/ssnv.htm>

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