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MEMORANDUM

TO: All Employers

FROM: Barsamian & Moody

DATE: August 13, 2007

RE: New Procedures to Follow Regarding “No-Match” Letters
from Social Security or the Department of Homeland
Security

DHS Announces New Rule on No-Match Letters

Last June, the Department of Homeland Security (DHS) announced a draft rule containing procedures employers should follow when they receive notice that an employee’s Social Security number and name, or work authorization documents do not match the federal government’s records. The rule went through a thorough public review and comment period, but DHS held off on implementing it to see if Congress would pass comprehensive immigration reform. That has not yet happened, so DHS has implemented the rule. This rule comes into play either when the Social Security Administration sends notice that the combination of the name and Social Security number it has for a particular employee do not match the information on the W-2 form submitted for that employee, or when DHS sends notice that an immigration status document or employment authorization document submitted by an employee is either assigned to another person, or there is no record of it being assigned to any person. The rule changes the definition of what it means to “knowingly” employ an unauthorized alien under the Immigration and Nationality Act, and provides employers who comply with it a partial “safe harbor” against being found to have knowingly employed an unauthorized alien.

Under the Immigration and Nationality Act, “It is unlawful for a person or other entity, after hiring an alien for employment ... to continue to employ the alien in the United States knowing that the alien is (or has become) an unauthorized alien with respect to such employment.” The term “knowing” goes beyond actual knowledge of the person’s immigration status, and includes those situations when the employer reasonably should know that the person is not authorized, so-called “constructive knowledge.” This new rule protects employers who follow the procedures from a finding of

constructive knowledge based upon the no-match letter. It does not, however, protect against a finding of actual knowledge, or constructive knowledge based upon other circumstances.

Some employers use various available methods to verify that employees are authorized, such as the Social Security Administration's Social Security Number Verification System (SSNVS), the US Customs and Immigration Service's Employment Eligibility Verification (EEV) program, or the Immigration and Customs Enforcement Agency's Mutual Agreement between Government and Employers (IMAGE) program. Each of these programs allows employers to verify the information that an employee provides, through various government databases, but each program is voluntary. Employers can agree to participate in the IMAGE program, for example, but in order to do so, the employer must agree to submit to an audit of its I-9 forms, and agree to utilize the SSNVS to verify the name and Social Security number combination of each employee, among other practices. Under the new DHS rule, employers hoping to avoid a finding of "constructive knowledge" will be required to verify an employee's information after receiving a no-match letter. It does not require employers to use these programs, but it does require employers to verify eligibility, and to maintain proof of verification.

When an employer receives a no-match letter from Social Security, the employer should first check its own records to see if the discrepancy is due to a clerical error. If that is the case, the employer should correct the error, notify Social Security of the correct information, and then verify that the corrected information matches Social Security's records. The employer should make a record of the date, time and manner of such verification. The employer may either update the employee's I-9 form, or complete a new one, but it should not perform a new I-9 verification. These steps should be completed within 30 days of receiving the no-match letter.

If the employer determines that the discrepancy is not due to its own internal clerical error, it should "promptly" request that the employee confirm that the employer's information is correct. If the employee states that there is an error, the employer must correct its records, notify Social Security, and verify that the corrected information matches Social Security's information. If the employee states that the employer's information is correct, the employer should "promptly" tell the employee to correct the discrepancy with Social Security within 90 days of the employer's receipt of the no-match letter. This should be done in writing to the employee, stating the date the employer received the no-match letter.

If the employer cannot verify that the discrepancy has been resolved within 90 days of its receipt of the no-match letter, the employer must then complete a new I-9 on the employee within 3 days (93 days after receipt of the no-match letter). Completing the new I-9 should be done in the same manner as a new hire, but the employer may not accept any document mentioned in the no-match letter, any document that contains a disputed Social Security number or alien number, or any receipt for an application to replace such a document. Further, the employee must submit a document that contains a photograph in order to establish either identity or both identity and work authorization. This is an exception to the normal rule that an employer may not dictate what documents an employee may use to verify his or her identity and work authorization.

If the employer receives written notice from DHS that an employee's immigration status document or work authorization document is either assigned to another person, or there is no record of the document being assigned to anybody, the procedure is virtually identical. The employer should contact the local DHS office to attempt to resolve the dispute within 30 days of receipt of the notice. If

the employer cannot resolve any such dispute within 90 days of the receipt of the notice, it should then complete a new I-9 form on the employee within 3 days (93 days after receipt of the notice). Again, the employer may not accept any document that was identified in the notice, or a receipt for a replacement of such a document, and the employee must present a document containing a photograph in order to establish either identity or both identity and work authorization.

What This Means For Employers:

Following this procedure provides the employer with a so-called “safe harbor.” In other words, an employer who follows this procedure will not be found to have constructive knowledge that an employee is not authorized to work in the US on the basis of the no-match letter. Conversely, if the employer fails to follow this procedure, it can be found to have had constructive knowledge, even based solely upon the no-match letter. Also, the rule does not protect against a finding of actual knowledge, or even constructive knowledge based upon other circumstances.

The new rule is prospective only, meaning that it does not apply to no-match letters received prior to its effective date. The rule will become effective in mid-September (30 days after it is published in the Federal Register). However, we suggest that employers immediately adopt new procedures for responding to all future no-match letters. This should include creating a calendaring system to make certain that you comply with the 30, 90 and 93 day deadlines in the rule. This can be very difficult if you have seasonal employees, but it is important to show good faith efforts to comply.

As in the past, employers should not automatically fire an employee who is the subject of a no-match letter. There are a wide number of legitimate reasons as to why there might be a no-match, such as a simple misspelling or number transposition, either by the employer or the government agency. However, if the employer follows the process all the way through, to the point of having to complete a new I-9 for an employee who is subject to a no-match, and the employer cannot at that point verify the employee’s eligibility to work in the US lawfully (i.e., the employee cannot provide proper documentation), the employer would have to terminate the employee. The rule treats this situation exactly as if the employee were a new hire who cannot provide proper documentation within 3 three days of hire.

This new rule does not create a mandatory duty, and employers can choose not to follow the procedures. Of course, failing to do so will subject such employers to a finding of knowingly employing an unauthorized alien, which carries very stiff penalties (up to \$10,000 currently, and DHS has said it wants to increase the penalties by 25%), and even criminal prosecution. DHS, in announcing this new rule, emphasized that it intends to step up its efforts to enforce work authorization rules, and also to increase its criminal investigations (there were 742 criminal arrests as of July 31 in fiscal year 2007, up from 716 in all of fiscal year 2006). Therefore, this is an issue that employers must take seriously, and take the necessary steps to help ensure that they are making all reasonable efforts to comply with the law.

The goal of this article is to provide employers with current labor and employment law information. The contents should neither be interpreted as, nor construed as legal advice or opinion. The reader should consult with Barsamian & Moody at (559) 248-2360 or toll-free at (888) 322-2573, for individual responses to questions or concerns regarding any given situation.

