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Summary of Department of Homeland Security Final Rule “Safe Harbor Procedures for Employers who Receive a No-Match Letter”

by

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Introduction

- In the wake of Congress’ failure to pass immigration-reform legislation, the Bush administration in August 2007 announced a **series of administrative immigration measures**
- One measure was a **new rule** issued by Department of Homeland Security (DHS) that would have affected employers who receive “**no-match letters**” from the Social Security Administration (SSA)
- A **no-match letter** states that the **combination of name and social security account number** (SSN) submitted by the employer to SSA for an employee **does not match SSA records**

The Rule’s Status

- Due to a court injunction, **the rule has never been in effect**
- SSA **intended to send** a no-match (Code V) **letter** to an employer about **2006 IRS Forms W-2** along with a **DHS guidance letter** about its no-match rule only if both applied:
 - The employer filed **more than 10** no-match Forms W-2, and
 - Those no-match forms were **at least ½ percent** of all Forms W-2 filed by the employer
- Due to the injunction, SSA **did not send** Code V letters about 2006 Forms W-2
- SSA does not plan to send Tax Year 2007 Code V letters before the litigation is settled
- DHS on March 26 issued a **supplemental proposed rule (SPR)** to address the court’s concerns
- DHS is **preparing responses to comments** it received on its SPR
- A **status conference** in the court case **is set for September 12, 2008**

Background

- Since 1987, federal law has:
 - **Required** every employer to verify the identity and authorization to work in the U.S. of every newly hired employee
 - **Prohibited** every employer from
 - **Hiring** a person the employer **knows** is not work authorized
 - **Continuing to employ** a person after getting **knowledge** that the person is not work authorized
- **Knowledge** of an employee’s work ineligibility can be either **actual** or **constructive**

Constructive Knowledge

- **Constructive knowledge** is 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
 - **Example:** A longstanding DHS regulation has stated an employer may have constructive knowledge that an employee is not work eligible where the employer fails to complete or improperly completes Form I-9 (Employment Eligibility Verification) for the employee

- **Constructive knowledge** of work ineligibility can also be imputed to an employer who,
 - **After getting information** casting doubt upon an employee’s purported work eligibility,
 - **Fails to take reasonable steps** to ascertain whether the employee is truly work eligible
 - **Example:** An employer had constructive knowledge his employees were not work authorized where, after being told by an INS officer that he suspected them of using fraudulent immigration documents, the employer made no further inquiry and took no appropriate corrective action (*Mester Mfg. Co. v. INS* (9th Cir. 1989) 879 F.2d 561, 566-67)
- In other words, a deliberate **failure to investigate** suspicious circumstances **imputes knowledge**
- The **rule** would **add** these **three items** as **examples of information** that, depending upon the **totality** of the **circumstances**, DHS could use to **impute** to an employer **knowledge** that an **employee is not work authorized** where the employer **failed to take reasonable investigative steps**:
 - The **employee’s request** that the employer file a **labor certification** or employment-based **visa petition** for the employee
 - A **DHS notice** that the **immigration-status** or **employment-authorization document** used by the employee in completing Form I-9 is **not assigned to the employee** (DHS notice)
 - An **SSA no-match letter**

The Rule’s Safe Harbor

- The rule says **DHS cannot use a no-match letter** as evidence of an employer’s constructive knowledge of an employee’s work ineligibility **where the employer has taken these steps**:
 - **Step 1 (Employer Checks its Records)**
 - The employer must **check its records** to see if the mismatch was due to a record-keeping error by the employer
 - If it was due to a **record-keeping error**, then the employer must:
 - **Correct** the error,
 - **Inform SSA** of the correct information, and
 - **Verify with SSA** that the corrected name and SSN match SSA records
 - The employer should **document that verification** and **store that documentation** with the employee’s Form I-9
 - The employer must do all of this **within 30 days** after it received the no-match letter

If it determines the mismatch **was not due to its record-keeping error**, the employer must **go to**

- **Step 2 (Employer Asks Employee for Information Confirmation)**
 - The employer must promptly **ask the employee to confirm** that the name and SSN in the employer’s records are correct
 - If the employee says they are **incorrect**, then the employer must do the things specified in **Step 1** to correct record-keeping errors

If the employee says the name and SSN in the employer’s records are **correct**, the employer must **go to**

- **Step 3 (Employer Asks Employee to Resolve Issue with SSA)**
 - The employer must promptly **ask the employee to resolve the issue with SSA**
 - In doing so, the employer must **advise the employee**:
 - Of the **date** on which the employer **received the no-match letter** and
 - To **resolve the mismatch within 90 days** of that date

The employer must then **go to**

Step 4 (Employer Tries to Verify Information with SSA)

- Within 90 days after the employer's receipt of the no-match letter, the **employer must try to verify with SSA** that the employee's name and SSN match SSA records
- The SSN Verification System can be accessed online at www.ssa.gov/employer/ssnv.htm or by telephone at (800) 772-6270

If the employer within those 90 days **cannot verify with SSA** that the employee's name and SSN match SSA records, the **employer must go to**

○ **Step 5 (Employer and Employee Complete New Form I-9)**

- The employer and employee must, within 93 days after the no-match letter receipt date, **complete a new Form I-9** for the employee as if the employee were newly hired **except**
 - To establish **employment authorization, identity, or both**, the employer **may not accept**
 - A document referenced in a **DHS notice**
 - A document containing a **disputed SSN** or **alien number** referenced in a **no-match letter** or **DHS notice**
 - A **receipt for application** for a replacement of any such document
 - To establish **identity** or both **identity and employment authorization**, the employee must show a document that contains the **employee's photograph**
- The employer must **keep the new Form I-9 with the employee's prior Form(s) I-9**
- The rule's summary says that if the **discrepancy can't be resolved** and the employee's **identity and work authorization can't be verified** by that modified Form I-9 process, the employer must choose between
 - **Firing** the employee or
 - **Risking a DHS finding** that the employer had constructive knowledge that the employee was an unauthorized alien and, by continuing to employ the person, violated the law

No Inference Employee is Unauthorized from Employee's Appearance or Accent

- **Knowledge that an employee is unauthorized may not be inferred** from an employee's **foreign appearance or accent**

Honoring of Documents

- The rule **does not permit** an employer to
 - Ask an employee for **more or different documents** than those ordinarily required by law
 - **Refuse to honor documents** that on their face reasonably **appear to be genuine** and to **relate to the employee, except** for a **document** referred to in an SSA no-match letter or DHS notice as to which the employer **hasn't received verification** from SSA or DHS

Range of Fines for Knowingly Employing an Unauthorized Person (Per Employee)

- **First offense:** \$375 - \$ 3,200
- **Second offense:** \$3,200 - \$ 6,500
- **Third+ offense:** \$4,300 - \$ 16,000

Issues/Comments

- **Accepting New Documents Could be Risky**
 - **Step 5** of the safe harbor **allows an employer to continue to employ** an employee with a disputed SSN by **completing a new Form I-9**
 - Further, the rule's **prohibition against an employer's refusal to honor apparently genuine documents** shown by the employee in that process seems to mean an employer **could and should accept** as proof of work authorization, for example, an alien card (perhaps even the one the employee may have shown to prove work authorization when first hired) or a Social Security card with a non-disputed SSN that seems genuine

- By doing so, the employer would **technically** be **complying with a strict and narrow reading** of the rule’s safe harbor and should thus be **entitled to its protection** (i.e., against use by DHS of the no-match letter as evidence of the employer’s constructive knowledge that the employee was an unauthorized alien)
- But the rule’s summary notes that the **presentation** by an employee of “**different documents with different numbers,**” depending on the circumstances, may put the employer on notice that the employee has committed **document fraud**
- The implication is that being put on **such notice could be deemed constructive knowledge**
- But: Then **why didn’t DHS include** in the rule itself the **presentation by an employee of different documents** as an example of **constructive knowledge**?
- A court may ultimately weigh in on this, but meanwhile **an employer accepting different documents would be acting at its own risk**
- **Seasonal Employees**
 - The rule **covers** only situations where a person is **currently employed**
 - It **doesn’t cover** situations where a no-match letter identifies **an ex-employee**
 - Its summary notes that an **employer need not act** on a no-match letter identifying an **ex-employee**; the employer **couldn’t be guilty** of a continuing-employment violation as to an ex-employee
 - The summary says in situations **where an employer cannot use the safe harbor** (perhaps such as for seasonal employees whose employment breaks and resumes sporadically) an employer should **act in good faith** to resolve no-match issues as soon as practicable and make and **keep documentation** of those efforts
 - So, for example, an **employer might be able to show it made a good-faith effort** where it rehires a seasonal employee for whom a no-match letter was received during the off season but then **applies the safe-harbor steps the best it can**

Advice

- **Follow Form I-9 Procedures**
 - When **hiring** employees, **meticulously follow the Form I-9** employment-eligibility verification steps
 - **Audit** Forms I-9 periodically (*e.g.*, yearly)
- **Don’t Ignore No-Match Letters**
 - If, **upon getting a no-match letter**, you **decide to follow** the rule’s **safe-harbor steps**, follow them **precisely**
 - In any event, **upon getting a no-match letter, don’t ignore it**; even if you can’t or decide not to follow the safe-harbor steps, **take some action** that is **reasonably intended** to resolve the discrepancy, *e.g.*, the steps suggested in the no-match letter (essentially, Steps 1 to 3 above)
 - **Thoroughly document** all steps you take to resolve no-match discrepancies, and keep that documentation
- **Consider** using the **H-2A** temporary foreign agricultural worker program
- **Consider** using **E-Verify** (http://www.dhs.gov/ximgtn/programs/gc_1185221678150.shtm), an Internet-based system operated by DHS and SSA that allows employers to electronically verify the employment eligibility and SSNs of their newly hired employee