



1020 16<sup>th</sup> Street, NW  
Suite 200  
Washington, DC 20036

Phone: (202) 457-7770  
Fax: (202) 457-7776  
www.scllaw.com

## MEMORANDUM

**FROM: MONTE B. LAKE<sup>1</sup>**

**DATE: AUGUST 14, 2007**

**RE: DEPARTMENT OF HOMELAND SECURITY (DHS) ISSUES  
FINAL “NO MATCH” RULE AND INTENDS TO SEEK  
ADMINISTRATIVE REFORM OF SOME EXISTING  
TEMPORARY WORKER PROGRAMS<sup>2</sup>**

The long-pending DHS rule regarding employer responsibilities upon receipt of so-called no match letters will be issued in the Federal Register on August 15, 2007 and will be effective on September 14, 2007. The final rule already is posted on the DHS website at <http://www.ice.gov>. The rule will take effect 30 days after it is published in the Federal Register. The proposed rule was issued on June 14, 2006 and the public comment period ended on August 14, 2006. The rule was not issued in final form pending the outcome of the Bush Administration-supported comprehensive immigration reform legislation in Congress. Congress failed to move the legislation earlier this summer and consequently the rule was finalized.

Recognizing the likely devastating impact of the final rule on industries with large immigrant workforces, such as agriculture, landscaping, construction, hospitality and others, DHS officials indicate that they will start the process of seeking regulatory reform of existing H-2A and H-2B temporary and seasonal nonimmigrant worker programs and perhaps others. In response to employer concerns that such reform could take at least a year, and likely much longer, to go through public notice and comment and fail to provide the immediate relief that is necessitated by the final no match rule, DHS states

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<sup>1</sup> The discussion in this memorandum is of a general nature describing current legal developments. The application of the rules discussed in this memorandum depends upon the particular facts and circumstances of an individual situation. This memorandum should not take the place of competent legal advice tailored to an employer’s specific circumstances.

<sup>2</sup> This memorandum contains minor technical revisions from the version of this memorandum dated August 13, 2007. Please disregard the previous version.

that regulatory reform is the best option, absent enactment of comprehensive reform legislation.

While employer groups may have no choice but to participate in such a rulemaking process, regulatory reform of temporary worker programs is a poor substitute for legislative reform and historically is marked by litigation due to the controversial nature of such programs that typically are opposed by labor groups. This provides little assurance to the employer community that it will receive the “bright line” compliance direction it seeks, without the likely litigation that may ensue from regulatory reform. It is important that agricultural and other employer groups continue to seek legislative reform of the guest worker programs that are applicable to them, as well as a means to deal with the large experienced undocumented workforce that is critical to many industries.

### **Summary of Final DHS Rule**

Summarized below are the key components of DHS’ final no match rule. Following the summary is a detailed discussion of the background related to the rule, as well as a discussion of some of the practical implementation issues raised by it. Key components include:

- Thirty days after the publication date of the final rule in the Federal Register it will become effective. The rule likely will be issued the week of August 13 and its effective date will be mid-September.
- The rule and its prefatory comments are silent as to whether it applies to no match letters received prior to its effective date. The Assistant Secretary for Policy at DHS informed an employer group on August 10 that Social Security Administration (SSA) no match letters that normally would have been received in the winter/spring of 2007 were withheld pending issuance of the final rule and will be mailed to employers the first of September 2007. Thus, the effective date of the rule will coincide with the receipt of the 2007 SSA no match letters and employers will be expected to follow the procedures set forth in the rule with regard to such no match letters.
- Upon receipt of a no match letter from DHS or SSA, an employer will have to review the letter within 30 days of its receipt to determine whether it properly recorded the listed employees’ names and social security number (SSN) or alien documents. If the employer did not and made a clerical mistake, it is required to make the correction and file the corrected information with SSA or DHS within the 30-day time period. The employer must verify the corrections with SSA or DHS within the 30-day period. The proposed rule provided for only a 14-day period.
- If the employer reported the information correctly on its I-9 or W-2 forms, it must confirm with the employee that the employee provided accurate information. If

the employee did report the information accurately, the employer must ask the employee to ascertain and correct the problem with the appropriate agency. While the employer does not have a duty solve the problem for the employee, it must inform the employee of the 90-day time frame within which the employee must provide verifiably legitimate documents.

- The employer and employee have 90 days from the receipt of the agency letter within which to complete this process. The proposed rule provided for only a 60-day period.
- If during the 90-day period the employee provides corrected information, the employer is responsible for verifying the correction with DHS or SSA.
- If at the end of the 90-day period the employer cannot obtain verification from DHS or SSA that the document in question is acceptable, then the employer will have to take action to terminate the employee or face the risk that DHS may find that it had constructive knowledge that the employee was unauthorized.
- If at the end of the 90 days the employer cannot obtain verification, it has an additional 3 days within which to complete a new I-9 Form for the employee, using the same procedures as if the employee were newly hired. In completing the form, the employer may not accept any document referenced in the written notice that is disputed. The employer must require that a document establishing identity or identity and work authorization contain a photograph.
- An employer that follows DHS' procedures will have a "safe harbor." It will not be considered by DHS to have constructive knowledge that it employed unauthorized workers, unless DHS could prove independently that the employer had actual or other knowledge that the employee in question was unauthorized to work. The safe harbor would be available even if the worker later were determined to be unauthorized, assuming the employer followed the DHS procedures and could prove that it did so.
- An employer that fails to follow the procedures set forth in DHS' rule will be considered by DHS to have constructive knowledge that it employed unauthorized workers. This will influence DHS' exercise of its prosecutorial discretion in deciding whether it will bring charges against employers that receive no match letters and do not follow up on them.
- Employers that reverify documents listed in no match letters will have a defense against discrimination allegations based on document abuse provisions of current immigration law.

## **Background**

DHS, through its Immigration and Customs Enforcement agency (ICE), is responsible for ensuring that employers comply with their obligations to verify the work authorization of all new hires and employees. ICE has the authority to audit the I-9 Form that is completed by new hires and employers to establish work authorization. ICE has the authority to audit employers' I-9 Forms. As a part of the audit process, ICE can determine whether alien documents are valid. If it conducts such an audit, DHS sends the employer a letter (called a Notice of Suspect Documents) indicating that the documents of certain employees were not assigned to them or to any person. The final rule describes the legal obligations of the employer under these circumstances.

DHS enforces the so-called employer sanctions provisions of the Immigration and Nationality Act (INA) (8 U.S.C. § 1324a (a) (2)). After an audit of employer I-9 Forms and/or receipt of other evidence DHS believes that an employer is knowingly hiring unauthorized workers, it has the authority to issue a Notice of Intent to Fine the employer. If the employer contests the demand for fines, it may litigate the matter before an administrative law judge. If an employer is found liable, it faces substantial civil fines, ranging up to \$2,000 per unauthorized worker for an employer's first offense. DHS has proposed to increase fines by 25 percent, in conjunction with the issuance of the new rule. In more serious cases, involving a pattern and practice of violation of the employer sanctions provisions, DHS may seek criminal penalties.

SSA receives 250 million W-2 Form tax filings from employers annually. These forms report the Social Security taxes credited to each employee's account by name and social security SSN. Typically, employers with a large number of employees whose SSNs and names that do not match records in SSA's database, or whose SSNs do not exist in the database, receive a Employer Correction Report (commonly referred to as "no match" letters) from SSA. In 2002, SSA indicates that it was unable to match the names and SSNs of 9 million persons. In the past, these letters have informed employers of their duty to make sure that the names and numbers are reported accurately so that employees' social security accounts are properly credited. The letters request employers to work with employees to correct any mistakes. The final rule describes the responsibilities of employers upon receipt of SSA no match letters.

Independent of DHS, the Internal Revenue Service (IRS) has the authority to fine employers up to \$50 per worker if they do not respond to or comply with the SSA no match letter requests for correction of records. IRS seldom executes its authority in this regard; however, the authority exists apart from DHS and is not affected by the final DHS rule.

### **Legal Context of the Final Rule**

DHS has existing regulations that govern employer hiring obligations under the INA. The final no match rule amends the existing regulation that governs the proof standard DHS must meet when it seeks to fine employers for hiring or continuing to employ unauthorized workers. DHS must prove that an employer knowingly hired or continued to employ unauthorized workers. The knowledge required can be actual

knowledge of unauthorized status or “constructive knowledge.” Constructive knowledge is defined in DHS’ current rule as knowledge inferred from certain facts and circumstances that would lead a person through the exercise of reasonable care to know that a worker was unauthorized to work. 8 CFR § 274a.(1)(1)(I). Examples given under the current regulation include failing to fill out or complete an I-9 Form. Three additional examples of constructive knowledge are provided under the final rule. These are:

- an employer’s failure to follow procedures set forth in the final rule upon receipt of a SSA no match letter indicating that an employee’s name and SSN do not match SSA’s records;
- an employer’s failure to follow the procedures set forth in the final rule upon receipt from DHS of a letter indicating that the immigration status or employment authorization documents presented or referred to in an employee’s I-9 Form were assigned to another person or there is no agency record that the document was assigned to anyone; and
- an employer filed a labor certification application or employment-based visa petition at the request of a worker.

DHS’ comments accompanying the final rule indicate that employers do not have to follow the rule; however, if they do, they will have a “safe harbor” from prosecution by DHS, unless DHS can prove through other facts that the employer had actual or constructive knowledge that it was employing illegal workers. By the same token, if employers do not follow the rule, DHS will assume that the employer has constructive knowledge that it is employing unauthorized workers, which will greatly influence DHS’ decision to file a notice of intent to fine an employer. While DHS would have to prove this in an administrative hearing, it is likely that an administrative law judge would defer to an agency’s regulations interpreting statutes under its jurisdiction. Thus, the practical effect of an employer’s failure to comply with the procedures set forth in the rule would likely be that an administrative law judge would conclude, absent strong contrary evidence, that the non-complying employer did not take reasonable steps to ascertain the legal status of its workers and could find liability.

### **Practical Compliance Issues Raised by the Final DHS Rule**

#### **How can I verify the validity of Social Security numbers or alien document numbers?**

Correction of SSNs can be verified through the Social Security Number Verification System. It can be accessed through <http://www.ssa.gov/employer/ssnv.htm> or by telephone at 1-800-772-6270. DHS can be contacted through its website at <http://www.ice.gov> or telephonically at 1-800-421-7105.

#### **Will there be a DHS or SSA record of employer compliance with rule?**

While the comments accompanying the rule indicate that DHS and SSA computer data would evidence employer contacts seeking verification over the internet, they encourage employers to keep accurate records of all of their efforts to comply with the rule, including the making a record of the manner, date and time of any such verification, as SSA may not provide any documentation. It is recommended that employers document telephone conversations, retain all SSA and DHS generated correspondence, computer-generated printouts, e-mails and Social Security Numerical Verification System screen prints showing that any discrepancy that has been corrected. Employer records should show clearly that any discrepancy listed in a no match letter has been resolved with SSA through its internet website or telephonically through its 1-800 number.

**What are the requirements imposed upon employers who seek to reverify an employee by completing a new I-9 Form?**

The rule urges employers that receive a no match letter relating to an employee who fails to take corrective action or cannot establish the validity of the documents used within 90 days of the letter to require the employee to complete a new I-9 Form. The employer is to follow the same procedures used in completing the original I-9 Form. The employer has an additional 3 days after the 90 day period to have the employee complete a new I-9 Form. In doing so, the employee may not rely upon a SSN for work authorization that cannot be verified. The employee would have to use documents that establish identity and employment authorization, such as a U.S. passport, permanent resident card or other DHS immigration documents.

If the employee refuses to participate in the new I-9 Form completion process, the employer must terminate the employee or face loss of the safe harbor provision and face the presumption of constructive knowledge. DHS characterizes the reverification process as a safeguard for the employer in avoiding discrimination allegations if it has to terminate an employee. It suggests that it affords the employee one more opportunity to establish that it is authorized to work.

**In completing a new I-9 Form, may the employer continue to employ the worker if the SSN cannot be verified?**

Section 1 of the I-9 Form requires that the employee provide its SSN. The rule clarifies that an SSN that cannot be verified may not be used for employment authorization purposes, but implies that it can be used to complete Section 1. Circumstances may arise where the employee is asked to complete a new I-9 Form because the SSN cannot be verified by using another document that establishes both identity and work authorization, such as a U.S. passport or DHS issued document. If an employer provides such a document that is verified, the comments accompanying the DHS rule indicate that employer may continue to employ the worker. They indicate, however, that the SSN, which was not used for work authorization purposes, will continue to generate SSA no match letters and that employers may continue to request the employee to resolve the discrepancy with the SSN.

### **Does the final rule impose new recordkeeping requirements?**

The rule clarifies that a newly completed or update I-9 Form must be retained for the same period as the original I-9 Form. This requires that the employer retain the form for a minimum of 3 years after the date of initial hire, or 1 year after the worker terminates employment, whichever is later. Moreover, as noted above, the rule suggests that employers keep records of all efforts to verify the validity of documents with SSA and store such records with the employee's I-9 Forms.

### **Does the final rule establish procedures for employers of seasonal workers who are not employed at the time a no match letter is received?**

Many industries, such as agriculture, rely heavily upon a seasonal workforce. In many areas of the country, seasonal workers have left the employment of employers in the winter and early spring when SSA no match letters normally are received and are not available for employers to confer with in order to resolve no match issues. This raises the question of the employer's obligation to comply with the rule when it is a practical impossibility to do so. The final rule provides ambiguous guidance on this issue. It addresses it incompletely in two different places in the prefatory comments. It briefly discusses seasonal workers, teachers on sabbatical, and employees out of the office for an extended period of time.

With regard to seasonal workers and others out of employment for an extended period, it simply states that in such situations employers may not be able to comply with the rule and states that the rule is "an option, not a requirement." While it is not clear what that statement means, DHS further indicates that in these special situations the employer should make a good faith effort to resolve the situation as rapidly as practicable and keep a file documenting such efforts. Does this mean that the employer should send a letter to the last known address of the former employee immediately upon receiving the letter? With transient workers, it becomes almost a practical impossibility to perform the necessary follow up suggested by the rule. Moreover, when would the 30 day period be triggered?

In a separate but related comment on the final rule, DHS addresses temporary labor and the difficulty employers will have after a person is longer an employee. It states that the rule does not impose on employers a duty to resolve all no match letters and that if the person is no longer an employee at the time the employer receives the letter, the employer need not act on the letter because it is no longer employing the individual.

The comments do not address the situation in which a temporary or seasonal worker, who is not employed at the time the no match letter is received, later seeks reemployment at the start of the next season. What if the employer or those charged with personnel are aware that a rehired employee was listed on the last no match letter? Or, if not, is there an obligation on the part of the employer to establish a rehire system that

flags individuals and SSNs or alien documents that have been listed on previously received no match letters, requiring the employer to follow the safe harbor procedures at the time of rehire?

The heart of the DHS rule is a reasonable care standard on the part of the employer. This is expanded upon in the comments when DHS states that employers should document good faith efforts to contact such workers. A rehire situation would provide such an opportunity. Again, would the 30/90 day rule be triggered at the time of rehire? While final rule does not address the above circumstances, it is not unreasonable to expect that DHS would take a broad reading of its rule, suggesting that a reasonable employer would follow the rule, especially if the rehired employee provided the same name and SSN that triggered the no match letter.

An important related consideration involves private attorneys bringing Racketeer Influenced Corrupt Organization (RICO) lawsuits based on underlying INA violations, including hiring undocumented workers. These lawyers routinely seek no match letters and I-9 Forms during discovery in such cases and undoubtedly will seek information from employers regarding their rehire policies in the context of the final no match rule. They have done so routinely in discovery requests pending prior to the issuance of the final DHS rule. Employers should anticipate such challenges from both DHS and private attorneys, especially if a substantial portion of seasonal workers are listed on no match letters.

It would be prudent to develop computer or other effective systems to correlate names and SSNs and alien documents that show up on no match letters from SSA and DHS with the names and document numbers of rehired workers. While the rule is ambiguous in this regard, including when the 30/90-day compliance period would be triggered, consideration should be given to triggering it upon the time the worker presents himself/herself for rehire. Undoubtedly, such a procedure would impose substantial administrative burdens upon personnel staff; however, such an approach would appear to meet DHS' vague good faith standard and potentially afford the employer protection from substantial legal liability.

**Does final rule address the problem of discrimination encountered by employers who terminate employees based on no match letters?**

Many employers in the past have experienced lawsuits or charges under Title VII of the Civil Rights Act of 1964 or the Unfair Immigration-Related Employment Practices provisions of the Immigration Reform and Control Act of 1986 based on allegations that they terminated employees based on their national origin or citizenship status. These charges often include allegations of document abuse, where it is alleged that the employer required more or different documents than required under the INA. Apparently, numerous comments were filed with DHS raising the concern that termination of employees under the no match rule would trigger a spate of such charges. DHS summarily dismisses such concerns. In conclusory, but not particularly reassuring

fashion, DHS' comments simply state that "employers must comply with all federal statutes in making employment decisions."

DHS further states that employers will not be engaging in unlawful discrimination by uniformly following the procedures set forth in the rule "without regard to perceived national origin or citizenship status." The final rule restates current law by indicating the knowledge that an employee is unauthorized may not be inferred from an employee's foreign appearance or accent. It restates the document abuse standard by stating that an employer cannot require more or different documents than are required under the INA or refuse to accept documents that appear genuine on their face. It modifies the document abuse standard by adding language in the final rule that states an exception to the requirement of requesting more or different documents when the employer has received written no match letters from SSA or DHS.

### **Potential Consequences of Final No Match Rule**

Employer, worker, union and immigrant groups fear that the final rule will result in the widespread termination of thousands of workers if employers comply with it. Industries such as agriculture, with an estimated seasonal workforce that may be 70 percent undocumented, as well as construction, hospitality and many other business sectors, anticipate severe disruption of their businesses by year end when the 90 day compliance period under the rule will take effect for the first time.

The rule poses a monumental dilemma for employers with numerous employees listed on no match letters. If they comply with the rule, they could eliminate a substantial portion of their work force, crippling their businesses. If they fail to comply with the rule, they face the prospect of being targeted by DHS and facing substantial fines.

Most of the legal arguments and practical concerns expressed by employer, union and immigration groups in written comments on the proposed rule were dismissed as baseless by DHS in its comments on the final rule. Major business and labor organizations are considering a legal challenge to the rule and a number of members of Congress have expressed grave concern and may seek congressional intervention in some manner. At this point, these actions are speculative and employers potentially affected by the rule must assume that the rule will be applicable to them within the next 30 days and begin planning how they will adjust their business practices to comply with the rule.

In reaction to the outcry of many affected groups, Bush Administration officials respond that the rule would have been unnecessary had Congress enacted comprehensive immigration reform. Such reform, they argue, would have addressed in statutory language the enforcement issues the rule seeks to solve, as well as providing employers with improved temporary worker programs to supply workers, in the event undocumented workers were displaced. The need for reform of existing guest worker programs and to address the large undocumented worker population has never been more imperative.