

Employer Beware - Receiving a "no-match letter" from SSA requires a new response!

The U.S. Immigration and Customs Enforcement agency ("ICE") has recently amended its regulations relating to the employment of unauthorized aliens. The new regulation describes an employer's legal obligations when the employer receives a "no-match letter" from the Social Security Administration ("SSA") or receives a letter regarding employment verification forms from the Department of Homeland Security ("DHS").

If an employer fails to follow the rules outlined by ICE in its new regulation, DHS can use the no-match letter to assert that the employer had constructive knowledge that the employee in question was an illegal alien and not authorized to work in the United States. If found to have had such constructive knowledge, the employer may be fined up to \$10,000 per worker per incident and could potentially face criminal charges.

Fortunately, ICE has included "safe-harbor" procedures in the regulation, which if followed by the employer after receiving a no-match letter, should shield the employer from such monetary sanctions or criminal charges.

The steps that an employer MUST take include:

(1) Within 30 days of receiving the "no-match" letter, the employer must check its records to determine whether the discrepancy results from a typographical, transcription or similar clerical error in the employer's records, or in its communications to the SSA. If such an error exists, the employer must correct its records and inform the SSA of the correct name and social security number.

(2) If the employer's check of its records does not resolve the discrepancy, the employer must, within 30 days of receiving the no-match letter, request that the employee confirm that the employer's records are correct. *If the employee states the records are not correct, but provides the employer the corrected information, that information must be given to and verified with the SSA by the employer (in accordance with any instructions provided by SSA in the no-match letter).*

(3) On the other hand, *if the employee informs the employer that the records are correct, the employer must ask the employee to pursue the matter directly with the SSA. The discrepancy will be considered resolved only if the employer verifies with SSA that the employee's name matches the number assigned to that name in the SSA's records. The valid number may be the number that was the subject of the no-match letter or a different number. Moreover, the employer must make a record of the manner, date and time of any such verification.*

(4) Any discrepancy that is addressed under number 2 or 3 above, MUST be resolved and verified by the employer within 90 days of the employer's receipt of the no-match letter.

(5) If the discrepancy is not resolved within 90 days of receipt of the no-match letter, the employer must complete a new I-9 with respect to the employee within 93 days of receipt of the no-match letter. Therefore, if an employer and employee tried to resolve the discrepancy described in the no-match letter for the full ninety days, they have an additional three days to complete a new Form I-9 using the same procedures as if the employee was newly hired. Two important exceptions apply to the completion of a new I-9:

- (i) No document containing the social security number or alien number that is the subject of the no-match letter, nor the receipt for an application for a replacement of such a document, may be used to establish employment authorization or identity or both.
- (ii) No document without a photograph may be used to establish identity.

If the new I-9 is not satisfactorily completed within the 93 day period, THE EMPLOYEE MUST BE TERMINATED.

Three important points regarding these new rules - *First*, employers should apply these procedures uniformly to all of their employees having unresolved no-match letters. Otherwise, the employer may violate non-discrimination laws. *Second*, employers should adopt a policy (or amend their employee handbook) to incorporate these new no-match letter procedures. *Third*, an employer MUST NOT take adverse action against the employee on the basis of having received the no-match letter. Only if the employer and the employee are unable to resolve the discrepancy within the 90 day period, and the employee is unable to provide documentation for the new I-9, should the employer take adverse employment action.