

No-Match Letter “Safe Harbor” Rule in Flux: Best Practices for Employers to Follow in the Meantime

09/14/07

On August 15, 2007, U.S. Immigration and Customs Enforcement ("ICE"), an agency within the Department of Homeland Security ("DHS") published a final rule, entitled "[Safe Harbor Procedures for Employees Who Receive a No-Match Letter](http://a257.g.akamaitech.net/7/257/2422/01jan20061800/edocket.access.gpo.gov/2006/pdf/E6-9303.pdf)" (<http://a257.g.akamaitech.net/7/257/2422/01jan20061800/edocket.access.gpo.gov/2006/pdf/E6-9303.pdf>). The rule was scheduled to take effect on September 14, 2007, and if it does take effect, it will impose new burdens on employers of U.S. workers as well as foreign workers.

However, on August 31, 2007, a federal judge issued a temporary restraining order ("TRO") preventing the government from implementing the [rule](http://www.aclu.org/immigrants/workplace/315351g120070831.html) (<http://www.aclu.org/immigrants/workplace/315351g120070831.html>). The U.S. District Judge found that the plaintiffs raised "serious questions" about inconsistencies with existing employer obligations. Concerns raised included possible reactionary terminations of U.S. citizens and other authorized workers, the use of error-prone Social Security records as a tool for immigration enforcement, and employer liability for discrimination and document abuse claims. The court scheduled a hearing on October 1, 2007, ordering the government to show cause why it should not be enjoined from enforcing the rule. The background information below, along with the suggestions for best practices for employers to follow in the meantime, should help employers as we await the outcome of the court's decisionmaking.

What Changes Would the New DHS Rule Cause?

The new DHS rule addresses employers' responses to Social Security Administration ("SSA") "Employer Correction Requests," known as "No-Match Letters," issued to employers. A No-Match Letter informs the employer that discrepancies exist between an employee's name and Social Security number contained in SSA's database and those in the employee's W-2 form. SSA's purpose in issuing No-Match Letters is to allocate Social Security funds correctly.

SSA has been advising employers they should not fire employees simply based on a listing on a No-Match Letter, considering no-matches are triggered by a variety of reasons for U.S. and foreign workers alike. The new DHS rule would represent a departure from recent practices and could result in employers being placed in the position of doing the following:

- Having a duty to make sure employees correct discrepancies in the SSA database;
- Unnecessarily firing employees;
- Second-guessing the validity of employment documents;
- Subjecting the company to discrimination and document abuse claims;
- Not having the advertised "safe harbor" from ICE enforcement action.

Without implementation of the DHS rule, the prior procedure is likely to remain in effect.

Does Receipt of a No-Match Letter Mean an Employee is Not Authorized to Work in the U.S.?

The receipt of a No-Match Letter listing information about an employee does not mean the employee is not authorized to work in the United States. The DHS rule makes no change to the existing prohibition against employing persons who lack authorization to work in the United States. However, implementation of the DHS rule would allow DHS to significantly alter its enforcement approach, particularly on the issue of what constitutes an employer's "constructive knowledge" that an employee might not be authorized to work. Under existing law, receipt of a No-Match Letter alone is insufficient evidence that an employer knew an employee was not authorized to work in the United States. Courts have required that an employer must become "aware that the fact in question [i.e., lack of employment authorization] is highly probable" before finding constructive knowledge. *Collins Food International, Inc. v. INS*, 948 F.2d 549 (9th Cir. 1991) (no constructive knowledge due to employer's not reviewing the back of the person's Social Security card). Given the many possible reasons for an SSN mismatch (truncating of long names, name changes, typographical errors, etc.), the discrepancy should not create a presumption of lack of employment authorization.

The new DHS rule would expand the definition of "constructive knowledge." Under the rule, DHS could construe the failure of an employer who received a No-Match Letter to take certain steps as evidence the employer knew an employee lacked valid work authorization, even though there was no other basis for the employer to be aware of the lack of authorization.

How Can an Employer Use the "Safe Harbor" from a Constructive Knowledge Claim?

The DHS rule describes a "safe harbor" after receipt of an SSA No-Match Letter. Under the safe harbor, the employer would have a total of 93 days to take certain steps to reconcile a discrepancy. The DHS rule offers immunity from use of the No-Match Letter by DHS as evidence that the employer had constructive knowledge of lack of employment authorization, if the employer takes all the steps. Employers who do not follow the protocol would not have a "safe harbor" from a finding of constructive knowledge in the event the employer is found, during an administrative, civil or criminal investigation, to be employing unauthorized aliens.

If the rule is implemented, certain actions would need to be completed within 30 days, 90 days, and 93 days. The triggering date is the date the employer receives the No-Match Letter. The timeframes in the rule are not easy to follow, as the rule does not specify when to start or what to do in the meantime. To meet the designated timeframes, an employer who receives a No-Match Letter would need to start taking action much sooner than the timeframes indicated.

What Are the Best Practices for Responding to a No-Match Letter?

Employers could implement some of the procedures as "best practices" to clear up discrepancies even if the new DHS rule never is implemented. Following are recommended steps to follow so that the actions are not only started, but are also completed within the timeframes.

1. Employer action: Check internal records.

Regulatory timeframe: 30 days after receipt of Letter

Recommended timeframe: Begin as soon as possible, and complete within 14 days (or 2 calendar weeks) of receipt of a Letter

As soon as possible after receiving a Letter, the employer should begin reviewing the records of each person whose SSN is listed to determine the following:

- Does the person whose name or SSN is listed currently work for the company? If no, there probably is little reason to continue the review since the safe harbor would only apply to unauthorized employees at the time of a DHS investigation.
- Is there an easily identifiable discrepancy that results from a typographical, transcribing, misspelling, name change or similar clerical error in the employer's records, such as the following:
 - Employment Eligibility Verification (I-9) Form
 - W-4
 - Records on file that list the SSN
 - Personnel records to indicate whether the person had a name change, or other reason for the discrepancy.

The employer should have completed the review within 14 days (2 calendar weeks) of receipt of the Letter in order to follow up with the next actions in a timely manner.

2. Employer action: Correct discrepancies, if possible.

Regulatory timeframe: 30 days after receipt of Letter

Recommended timeframe: within 21 days (or 3 calendar weeks) of receipt of a Letter

If there is an identifiable error, as soon as possible after checking the records, the employer should do the following:

- Correct internal records;
- Inform the SSA or relevant agency;
- Verify that the name and number, as corrected, match the agency records;
- Record the correction; and
- Update the I-9 to reflect corrections.

The employer should plan on having completed the correction and notification within 21 days (three calendar weeks) of receipt of a Letter, in case any additional actions are required within the requisite timeframe.

3. Employer action: Contact employee (if employer was not able to resolve discrepancy).

Regulatory timeframe: 90 days after receipt of Letter

Recommended timeframe: within 30 days (or 1 calendar month) of receipt of a Letter

If, by the 30th day (or one calendar month) after the date of the Letter, the employer has not been able to resolve the discrepancy, the employer should advise the employee of the discrepancy and ask the employee whether the SSN listed for him or her is correct. If the employee indicates the SSN is his or her correct number, the discrepancy is presumed to be an SSA error, and the employer should advise the employee to go to the Social Security office to resolve the discrepancy.

The new DHS rule specifies that the employee's efforts to correct the discrepancy must be completed by the 90th day after the employer has received the Letter. To allow plenty of time to deal with the government agencies, the employer should contact the employee by one month after receiving the Letter, by undertaking the following actions:

- Notify the employee, preferably in writing, of the discrepancy;
- Notify the employee of the date the employer received the Letter;
- Notify the employee of the 90-day time limit; and
- Direct the employee to report back within one month about actions to resolve the discrepancy.

4. Employer action: Have the employee provide information about actions to correct the discrepancy.

Regulatory timeframe: 90 days after receipt of Letter

Recommended timeframe: Begin no later than 60 days (or 2 months) of receipt of a Letter and complete within 90 days after receipt of the Letter.

If the employee provides information to correct the records, then the employer must take the following actions:

- Correct its records;
- Inform the relevant agency;
- Verify the corrected records with the relevant agency;
- Record the correction internally; and
- Update the I-9 form.

If the employee has not been able to correct the discrepancy, then the employer should give the employee the remainder of the 90-day time limit to follow up. Even assuming the employee is unable to resolve the discrepancy, the employer should *not* terminate simply due to receipt of a No-Match Letter.

5. Employer action: Request that the employee provide alternate employment verification documents.

Note: This action is not recommended unless the new DHS rule is implemented following the pending court proceedings; otherwise, the employer could be liable for discrimination or document abuse claims.

Regulatory timeframe: 90 days after receipt of Letter

Under the rule, if the discrepancy is not resolved within 90 days of receipt of the Letter from the SSA, the employer must do the following:

- Give the employee the Form I-9 and its document list.
- Have the employee bring in different work authorization documents within three days thereafter.
- Notify the employee of the following restrictions on documentation used to establish employment authorization, identity or both:
 - No document containing the SSN can be used.
 - If an alien number was listed on the Letter, no document containing the alien number can be used.
 - No receipt for an application for a replacement of such a document (containing the SSN or the alien number) may be used.
 - No document without a photograph may be used to establish identity, or both identity and employment authorization.

Under the rule, if the employee's work eligibility is not resolved through completing a new I-9, the employer would need to decide whether to terminate the employee or face the risk in a subsequent DHS enforcement action of being found to have possessed constructive knowledge, and being penalized for the continuing employment of an unauthorized alien worker. The rule provides that whether an employer would be found to have constructive knowledge in any particular case will depend on the "totality of relevant circumstances," and that good faith, but ultimately unsuccessful, attempts to comply with the provision should be taken into consideration where the employer subsequently is charged with constructive knowledge of hiring unauthorized workers.

In any event, an employer should not terminate an employee until the process set out in the "safe harbor" rule is completed, unless the employer obtains actual knowledge (such as through an admission by the employee) or believes it is highly probable that the employee is not eligible for employment in the United States.

How Safe is the Safe Harbor?

The "safe harbor" does not provide immunity from prosecution. It creates a rule of evidence that the SSA No-Match Letter cannot be used as evidence of employment of unauthorized workers if the steps are followed. Other evidence could be used. In addition, the rule provides no "safe harbor" from discrimination, wrongful termination or document abuse claims. Under the document abuse provision of the Immigration Reform and Control Act ("IRCA"), employers cannot request more or different documents than are required for completion of the I-9 Form, prefer or require one form of documentation over another, or refuse documents that appear reasonably genuine on their face, *if made for the purpose or with the intent of discriminating against an individual on the basis of national origin or citizenship status.*

DHS acknowledged that many of the comments to the proposed rule expressed concern that the rule "puts employers in a 'no-win situation,' in which they would be liable for discrimination if they terminate an employee who is the subject of a No-Match Letter, but could also be liable for continuing to employ an alien with constructive knowledge that the alien is unauthorized..." DHS responded to these comments by stating: "The rule does not impose upon employers any new responsibilities that do not already exist under current law. . . . Moreover, employers will not be engaging in unlawful discrimination by uniformly following the procedures of this regulation without regard to perceived national origin or citizenship status."

Of course, an unhappy terminated employee or an enforcement agency (such as the Equal Employment Opportunity Commission or equivalent state agency) may still assert that an employer's response to a particular No-Match Letter was motivated by the employer's perception of the employee's national origin or citizenship status. The outcome of such a claim in any given situation will depend on its specific facts, but, in general, compliance with federal and state anti-discrimination laws requires employers to be careful not to respond to No-Match Letters differently based on their perception of the national origin or citizenship status of the employee in question. Instead, employers who are relying on the safe harbor provisions of the final DHS rule (assuming it is ultimately approved by the courts) should, as described in the rule, "uniformly follow" its provisions, "without regard to perceived national origin or citizenship status."

What Could Happen Next?

As noted above, with the issuance of the TRO on August 31, 2007, the new DHS rule will not go into effect on September 14, 2007. The federal district court has scheduled a hearing on October 1, 2007, ordering the government to show cause why it should not be enjoined from enforcing the rule. If the new DHS rule is implemented, it is highly likely that additional worksite compliance responsibilities will be placed upon employers. Now is an appropriate time for employers to consult with immigration and employment counsel to assess their existing hiring practices and I-9 procedures.

For more information, you may also contact Diane M. Butler, Chair, Immigration Law Department, at butlerd@lanepowell.com or (206) 223-7715.

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