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ICE "No-Match" Regulation and "Safe Harbor" Procedures

I am receiving a large number of inquiries regarding "No-Match" letters issued by the Social Security Administration. This month's e-newsletter is dedicated to this topic, and in particular, the "Safe Harbor Procedures for Employers Who Receive a No-Match Letter," as contained in the ICE No-Match Regulation.

With the increased work-site enforcement efforts by the Department of Labor (DOL) and the Department of Homeland Security (DHS), it is critical that you understand your obligation as an employer under the final ICE "No-Match" Regulation.

The "Safe Harbor" protocol is as follows:

Within 30 days of Receipt of the Notification from the Government

No-Match Letter from SSA: The employer must check its records to determine whether the discrepancy was caused by a clerical error, correct the error with the SSA, and verify that the corrected name and social security number now match SSA's records. The rule advises employers to retain a record of the manner, date, and time of such verification. The employer may update the I-9 form relating to the employee or complete a new I-9 (retaining the original), but should not perform a new I-9 verification.

If the employer determines that the SSA no-match is not a result of an error in the employer's records, the employer must promptly request that the employee confirm that the name and social security account number in the employer's records are correct. If the information is incorrect, the employer must make corrections, inform the SSA of the correction and verify a match on the corrected information, and make a record of its actions.

If the employee confirms that the employer's record information is correct, the employer must promptly advise the employee of the date of receipt of the no-match letter and advise the employee to resolve the discrepancy with the SSA no later than ninety (90) days after the receipt date. The employer is under no legal obligation to advise the employee regarding the means or manner of resolving the discrepancy with the agency.

Notice of discrepancy from DHS: The employer must contact the local DHS office in accordance with the written notice's instructions and attempt to resolve the question raised by DHS about the immigration status document or employment authorization document. Note that the specific instructions in the notice may provide less than thirty (30) days for the employer to respond.

Within 93 days of Receipt of Notification from the Government

If the discrepancy cannot be resolved with either SSA or DHS within 90 days of receipt of the written communication from either agency, the employer must attempt to reverify the worker's employment eligibility by completing a new I-9 employment verification form.

Companies should use the same procedures as when completing an I-9 form at the time of hire, with a few exceptions:

- The employee must complete section one and the employer must complete section two of the new I-9 form within 93 days of receipt of the notice from either SSA or DHS.
- The employer cannot accept any document (or receipt for such a document) referenced in the DHS notification or any document (or receipt) that contains a social security number that is the subject of the SSA no-match letter to establish employment authorization or identity.
- The employee must present a document that contains a photograph in order to establish identity or both identity and employment authorization.
- The new I-9 form should be retained with the original I-9 form(s).

If the employer cannot verify the employee's work eligibility through completion of a new I-9 form, the employer must decide whether to terminate the employee, or face the risk in any subsequent DHS enforcement action of being determined to have **constructive knowledge** and being penalized for continuing to employ the unauthorized alien.

The final rule provides that whether an employer would be found to have **constructive knowledge** will depend on the "totality of relevant circumstances." An employer should not terminate an employee until the process is completed, unless the employer obtains actual knowledge (such as an admission made by the employee) that the employee is not eligible for employment in the United States.

The final rule expands the definition of "constructive knowledge" to include the failure to take reasonable steps to address three (3) situations:

1. An employee's request for the employer's sponsorship of the employee for a labor certification or visa petition;
2. Receipt of a no-match letter from the Social Security Administration (SSA); and
3. Receipt of a notice from DHS (usually after an I-9 audit) that the employee's employment authorization documents presented in connection with completion of the I-9 form do not match DHS records.

DHS has taken the position that applying the safe harbor rule in a uniform manner for all employees whose account numbers or work authorization documents are challenged by the SSA or DHS should not subject an employer to liability for document abuse and/or unlawful discrimination on the basis of national origin and citizenship status.

There is no "safe harbor" protocol in a situation where an employee requests employer sponsorship for a labor certification or visa petition and the employee is unauthorized to work in the U.S. Where the request is made by an employee who admits to the employer that he or she is currently unauthorized, or where the request is inconsistent with information provided by the employee in connection with the employment verification process, the employer may be charged with **actual or constructive knowledge** of unauthorized status if the employer permits the employee to continue working for the employer.

I will continue to monitor the protocol and keep you updated as changes occur. If you have any questions or would like additional information on this topic, please call my office.

The information contained in this e-newsletter is intended as information only, and is not to be construed as legal advice.

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