



THE WORKPLACE WORD

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A Safe Harbor for Employers in the Latest ICE Storm:

Responding to Social Security "No-Match" letters

U.S. Immigration and Customs Enforcement ("ICE") officials announced last year that aggressively pursuing employers who knowingly hire unauthorized workers is one of their top priorities. As part of this agenda, ICE has started to file criminal charges against employers who employ unauthorized workers. Although most employers do not knowingly hire undocumented workers, ICE has made it clear that employers who have "constructive knowledge" of a worker's undocumented status still can be held liable. Receipt of social security no-match letters can constitute "constructive knowledge."

Millions of these no-match letters are sent to both employers and employees every year informing them that there is a discrepancy between the records kept by the Social Security Administration ("SSA") and the name and social security number submitted on the employee's W-2. The purpose of this notification is to correct the problem and update the SSA database to ensure that the correct account is being credited with each employee's earnings. ICE has now indicated that failure to act on social security no-match letters can constitute constructive knowledge of undocumented workers.

Employers who receive no-match letters are understandably confused. Discrepancies between the worker's name and social security number resulting in the no-match letter can often result from clerical or transcription errors as well as name changes due to marriage or divorce. Because these types of errors have nothing to do with immigration or work authorization, an employer cannot assume that receipt of the letter alone implies anything about the employee's legal status. In fact, the letter itself expressly states that it makes no statement about immigration status.

At the same time however, ICE has stepped up its enforcement of the laws prohibiting employment of undocumented workers and is looking at these no-match letters as a way to establish "constructive knowledge." There is some guidance for employers who receive social security no match letters. In



June 2006, the Department of Homeland Security issued proposed regulations that would establish a safe harbor for employers who receive social security no-match letters if they followed the guidelines.

The proposed rule identifies steps that employers can take to avoid a finding that they had constructive knowledge that their employees were not authorized to work in this country. Under the new rule, completing these steps would provide a “safe harbor” that protects employers from a constructive knowledge finding, even if it is later established that the workers were indeed unauthorized to work in the U.S.

Steps every employer should take when they receive a no-match letter:

1. Within 14 days of receiving the letter, the employer should review company records to make sure the discrepancy is not due to a clerical or transcription error, such as inverting a number or neglecting to accommodate a name change due to marriage or divorce.

If a mistake is found, the employer should notify SSA to verify the correction. The employer should record actions taken to verify the correction, i.e. internet or phone call verification, and the date and time of the verification.

2. If a mistake is not found in the company’s records, the employer should ask the employee to confirm that the employer’s records are accurate. This should also occur within 14 days of receiving the no match letter.

a. If the employee identifies a mistake in the record, the employer should notify SSA and keep a record of his or her actions related to verification.

b. If the employee informs the employer that the record is accurate, the employer should require the employee to follow up with SSA personally to resolve the issue.

3. If the discrepancy is not resolved within 60 days of receiving the no match letter, the employer and the employee should complete a new I-9 form within 3 additional days.

The employer should follow the same I-9 process used for new hires EXCEPT:

a. The employee cannot submit the same document or another document with the same social security number that is the subject of the no-match letter.

b. Any documents presented for identification must include a photo.

4. If problems arise again after the second I-9 form, the employer must decide whether to terminate the employee or do nothing and risk sanctions.

The same procedures must be used for all employees identified in the no-match letter. Singling out only those employees suspected of being unauthorized can give rise to violations of discrimination laws.

The steps identified above are intended only as a guideline to avoid a finding of constructive knowledge after receiving a no-match letter. Because of the complexity of existing law regarding termination, document abuse, discrimination, and uncertainty over the fate of the proposed rule, specific questions regarding no-match letters and work authorization should always be directed to legal counsel.

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