

Department of Homeland Security Issues FINAL Regulations on Social Security Number No-Match Letters

On August 15th, the Department of Homeland Security (DHS) issued a regulation addressing the impact of the Social Security Number “no-match” letters on employers. The so-called “no-match” regulation will have a monumental impact on U.S. employers. On August 10th, DHS officials announced the imminent publication of the regulation with key stakeholders and reaffirmed their commitment to U.S. border security and signaled that the new regulation is an “interim fix” to the broken U.S. immigration system. Earlier this year, Congress failed to address the U.S. immigration system by rejecting numerous proposals for Comprehensive Immigration Reform (CIR). While DHS officials have acknowledged the need for economic security of U.S. and multinational businesses doing business in the U.S., they indicated that the regulation must go forward despite the significant burden it will place on employers. The regulation will become effective on September 14, 2007, 30 days from its actual publication date.

It has been more than a year since DHS initially proposed this federal regulation¹ providing guidance on employer obligations and outlining “safe-harbor” procedures that employers may follow upon receipt of a Social Security Number (SSN) no-match letter.² During the interim period, although DHS received numerous formal comments from the business community regarding the impact of the proposed regulation on employers, many of those comments were not incorporated into the final version of the regulation. The comments of the business community expressed concern that the proposed regulation would result in an unstable workforce, with unauthorized workers frequently changing jobs as employers implemented the requirements of the regulation. In response to these concerns, the final rule states that “churning of the workforce” is said to be “speculative” and that low-wage industries employees will simply switch jobs, is noted as “not a costless endeavor, however, and an alternative to leaving undisturbed an illegal employment relationship is unacceptable.”

What is a SSN No-Match letter?

No-Match letters are the correspondence that employers receive from the Social Security Administration (SSA) stating that the SSA is unable to match the name and social security number (SSN) provided for a specific employee to its records. Each year employers send SSA millions of employer generated W-2 forms. From these forms, in order to properly allocate the amounts withheld for social security, SSA matches the employees’ names and corresponding Social Security numbers provided on W-2 forms. Ultimately an employer will receive these SSA issued no-match letters if the employer’s report contains more than 10 mismatching employee names and if the total number of no-matches make up more than one-half of one percent of all the employee earnings reported.

“If they continue to choose not to follow the law, there will be sincere and severe penalties,”
DHS spokeswoman Laura Keehner.

¹ A proposed regulation is a regulation proposed by a government Agency that does not yet have a binding effect. A proposed regulation is generally published in the Federal Register in order to begin a public comment period on its provisions. This comment period enables the Agency to assess public reaction to the regulation, consider revisions to the regulation and incorporate additional information into the regulation before its final publication.

² From the Social Security Administration (SSA). The regulation also provides guidance on the steps employers should take upon receipt of a letter from the Department of Homeland Security that the immigration status document or employment authorization document presented by the employee completing Form I-9 was assigned to another person or that there is no agency record the document was assigned to anyone.

Each year, out of approximately 250 million wage reports, the SSA receives as many as four percent with names and numbers that do not match. When a no-match occurs, SSA sends out a no-match letter to an employer listing the names and SSNs of those employees whose names do not match the information in SSA records. These letters can be generated as a result of a number of important factors, not the least of which are clerical errors or legal name changes. Nevertheless, DHS has now taken the position that these no-match letters are a distinct indication that the subject employees are unauthorized to work in the United States.

What is Constructive Knowledge?

The no-match regulation has created an expansive definition of the term “constructive knowledge” as it relates to an individual’s authorization to work in the U.S. under Section 274a.1 of the Immigration and Nationality Act, as amended. Specifically, the regulation provides concrete steps that employers can take to protect themselves with what DHS terms to be a “safe-harbor” from liability for having unknowingly hired unauthorized workers. The so-called safe-harbor provisions are a central concept of this final regulation. An employer may be in violation of federal regulations if it has constructive knowledge that an employee is an unauthorized worker.³ An employer is deemed to have constructive knowledge if a reasonable person would infer from the facts that the employee is unauthorized.⁴ Constructive knowledge constituting a violation of federal law can be found where (1) the I-9 employment eligibility form has not been properly completed, including supporting documentation, (2) the employer has learned from other individuals, media reports, or any other source of information available to the employer, that the alien is unauthorized to work in the U.S., or (3) the employer acts with reckless and wanton disregard for the legal consequences of permitting another individual to introduce an unauthorized alien into the employer’s work force.⁵

Broadening the Definition of Constructive Knowledge

The final SSN no-match regulation broadens this previous definition of constructive knowledge. Specifically, the SSN no-match regulation adds three more examples of what constitutes constructive knowledge to an employer that an employee may be unauthorized for employment in the U.S. These include:

- A request by an alien to their employer to file an alien labor certification or an employment based immigrant visa petition;
- Written notice from the SSA that the combination of name and SSN submitted for an employee do not match agency records; and,
- Written notice from the Department of Homeland Security (DHS) that the immigration status document, or employment authorization document presented or referenced by the employee in completing Form I-9, was assigned to another person, or that there is no agency record that the document was assigned to anyone.

**“We’re going to clamp
down on employers who
knowingly and willfully
violate the law,”**

*Secretary of the Department
of Homeland Security
Michael Chertoff*

³ C.F.R. 274A (a) (2), 8 U.S.C. 1324a (a) (2)

⁴ 8 C.F.R. 274a.1(l)

⁵ 8 C.F.R. 274a.1(l)

The first illustration is of particular interest as it appears quite vague. Many aliens who are in the U.S. in lawful non-immigrant status request sponsorship for permanent residence and are in no way violating the law. The regulation could have been more clearly drafted to note:

A request by an alien to file an alien labor certification or employment based petition (who otherwise claimed to already be a Permanent Resident, US Citizen or US national on Form I-9).

What is the alleged "Safe Harbor"?

The steps outlined in the regulation that an employer should take as a reasonable response to receiving a SSN no-match letter are very similar to what was included in the proposed regulation. The final SSN no-match regulation will take effect 30 days after being published. Basically, the "safe harbor" provision says if an employer follows the suggested steps, then DHS will not make a finding that the employer had constructive knowledge. The regulations recommend that upon receipt of SSN no-match letters, employers take the following "safe-harbor" procedures to verify the employment eligibility of the employee in question:

1. The employer must check its records promptly upon receipt of a SSN no-match letter to determine if the no-match was the result of a clerical error. If the letter is the result of a clerical error, the employer should correct its records, inform the relevant agencies of the error and verify that the name and number, as corrected, match the agency's records. Immigration and Customs Enforcement (ICE) considers employers to have acted reasonably if they resolve the discrepancy with the relevant agency within 30 days of receipt of a SSN no-match letter.
2. If by checking its records, the employer cannot resolve the discrepancy, it must contact the employee and request confirmation that the employee's information is correct. If it is incorrect, the employer must correct the employee's information in its records, inform the relevant agencies of the correction and match the corrected information with the agency's records.
3. If the records are correct according to the employee, then the employer must ask the employee to pursue the matter him/herself with the SSA. Once again, ICE considers employers who take these corrective actions within 30 days of receipt of a SSN no-match letter to have acted reasonably and within a "safe harbor."

Please note, that ICE will consider the discrepancy resolved only if the employer verifies with the SSA or DHS that the employee's name matches in SSA's records a number assigned to that name, and that the number is valid for work or work with DHS authorization.

If the SSN no-match issue is not verified within 90 days of receipt of the SSN no-match letter, the regulation describes the second half of the procedure that the employer must follow. The regulation allows for a person's identify and work eligibility to be verified in an effort to thwart identify theft, document fraud and similar crimes perpetrated on employers. At this juncture, DHS requires that the employer and employee now complete a new Form I-9, as if the employee were a new hire, with certain restrictions. These restrictions include the following:

- Require Section 1 to be completed within 93 days of receipt of the SSN no-match letter. Under current law, employers are given 3 days to complete the Form I-9 and the new I-9 must be initiated by the 90th day;
- Exclude any document that was the subject of the SSN no-match letter from being used to establish employment eligibility; and
- Exclude any document without a photograph of the employee from being used to establish identity.

"The message we are conveying today is pretty simple: We are serious about immigration enforcement."

*Secretary of the
Department of Homeland
Security Michael Chertoff*

While the requirements focus on documentation, employers are reminded not to over-document new Form I-9s or request more than the form requires, as that could subject them to liability for discrimination.

If the procedure described above is completed and it is determined that the employee is work authorized in the U.S., DHS will not consider the employer to have constructive knowledge of an unauthorized worker's status. However, it is important to note that there is no safe harbor from actual knowledge of the worker's unauthorized status.

Be careful not to over-document

Employers should also be careful that they not employ discriminatory methods in verifying employment eligibility or verifying employees' identities; resorting to "citizen only" hiring policies to avoid SSA inquiries is illegal. Immigration status or citizenship may not be inferred by a person's accent or appearance. If employers have general questions about potential anti-discrimination claims, they should contact the Office of Special Counsel directly. The Office of Special Counsel is part of the Department of Justice and is charged with safeguarding against discriminatory employment practices. More detailed questions warrant a consultation with immigration or labor counsel.

The Economic Reality of the Regulation

It is disappointing that this regulation is being implemented without an avenue for employers to legalize their workforce. The reality is that there are many employers who are dedicated to compliance, but will now be faced with impossible choices. Now, even employees who present facially valid documents at the time of hire may now come under scrutiny once they have been trained and fully integrated into the workforce. A good portion of low and unskilled workers will simply move from one employer to the other as these SSN no-match letters are received and acted on. The pool of legally authorized workers in these essential jobs is limited without a viable guest worker program. Although the Administration is a staunch supporter of CIR, the timing of this publication of their regulation does not take into account the economic and business realities that employers will face and possible fines and penalties.

Aside from the problem that employers may face a significant loss of employees in their work force (depending on the number of SSN no-match letters received), implementing the system described above will be difficult in practice. The regulation also does not consider the scenarios that often present themselves in the workplace. For example, the 90 day timing offered to correct an error with the SSA is not reasonable in a world of red-tape. There will be many situations where an employer will not be able to follow the safe harbor provisions. As a result, these employers will face uncertainty and possible fines and penalties when the government conducts reviews of their records. The language of the regulation is vague and notes that the safe harbor procedure is simply one way for employers to avoid penalties under the Immigration and Nationality Act. The ultimate decision on whether an employer will be found to have constructive knowledge will be made by ICE after reviewing the totality of the circumstances.⁶

⁶ A totality of the circumstances standard suggests that there is no single deciding factor, to determine if the employer had constructive knowledge of the employee's employment eligibility. Rather the employer must consider all the facts, the context, their response to the SSN no-match letter and conclude from the whole picture whether the

Again employers should understand that if they choose to follow the SSN no-match regulation in its final form, they must recognize and safeguard against employment issues, including potential discrimination charges. If the employee fails to resolve the SSN no-match discrepancy, the employer does not have an automatic right to terminate the employee. In fact, firing an employee for these reasons may leave an employer liable for wrongful termination, if it is later found that the employee was in fact authorized to work in the United States. The I-9 process must be revisited and done correctly. Ongoing training and tools for companies' human resources personnel are key. Employers who receive the first round of SSN no-match letters in September, must take certain concrete actions to respond to the letters.

As indicated above, SSN no-match letters can now also be sent to employers by DHS following an inspection of the employer's Form I-9s. If DHS is unable to successfully confirm the employee's immigration status or work authorization from the Form I-9, DHS will generate a type of DHS SSN no-match letter informing the employer of the discrepancy. Under the new regulation, these DHS no-match letters will also now be considered to constitute constructive knowledge by an employer that their employee may not be eligible for employment.

Work-site enforcement is increasing. ICE Assistant Secretary Julie Meyers has repeatedly stated that ICE is targeting organizations it deems to be "bad-faith actors" or perceived repeat offenders in key industries. ICE continues to receive additional funding and is tackling compliance issues with a new-found zeal, particularly in the identified "critical infra-structure sites and targeted industries." Companies are being investigated and employers will need to quickly and carefully reassess their I-9 programs to ensure both past and continuing compliance matters.

Greenberg Traurig's Business Immigration and Compliance Group has extensive experience in advising U.S. and multinational organizations on a variety of employment related issues, particularly I-9 employment eligibility verification matters, and on steps to take to minimize potential exposure and liability. With key former government officials from DHS and ICE as part of our multi-disciplinary team, GT creates and implements comprehensive and innovative compliance solutions, performs internal and pre-audit I-9 compliance reviews. GT attorneys and senior professionals have successfully defended businesses involved in high profile government raids and audits. GT attorneys provide counsel on a variety of I-9 issues including penalties for failure to act in accordance with government regulations, anti-discrimination laws and employers' responsibilities upon receiving "SSN no-match" letters.

government would be justified in finding them to have had constructive knowledge of the immigration status of their employee.