

EXECUTIVE SUMMARY

SAFE-HARBOR PROCEDURES FOR EMPLOYERS WHO RECEIVE A NO-MATCH LETTER

On August 10, 2007, The Department of Homeland Security (DHS) released an advance copy of the final ICE “No-Match” regulation, “Safe Harbor Procedures for Employers Who Receive a No-Match Letter”. The final rule was published in the **Federal Register** on August 15, 2007 and becomes effective September 14, 2007.

The final rule describes a “Safe Harbor” procedure that an employer can follow in response to such a “No- Match” letter and thereby be certain that DHS will not find that the employer had “constructive knowledge” that the employee referred to in the “letter” was an alien not authorized to work in the United States.

The term “knowing” includes not only “actual knowledge”, but also knowledge which may fairly be inferred through notice of certain facts and circumstances that would lead a person, through the exercise of reasonable care, to know about a certain condition. Constructive knowledge may include, but is not limited to, situations where an employer:

- ✓ Fails to complete or improperly completes the Employment Eligibility Verification Form I-9;
- ✓ Has information available to it through SSA or DHS that would indicate that an individual is not authorized to work; or
- ✓ Acts with reckless and wanton disregard of the legal consequences of permitting another individual to introduce an unauthorized alien into its workforce or to act on its behalf. (8 CRF 274a.1(l)).

The final rule amends the definition of “knowing” in 8 CFR 274a.1(1), in the portion relating to constructive knowledge. First, it adds two more examples of information available to an employer indicating that an employee could be an individual who is not authorized to work in the United States. It also explicitly states the employer’s obligations under current law after receiving a “No-Match” letter or the other information identified in 8 CFR 274a.1. **If the employer fails to take reasonable steps after receiving such information, and if the employee is in fact not authorized to work in the United States, the employer may be found to have had constructive knowledge of that fact.**

This final rule is important because it describes more specifically the steps that an employer should take after receiving a “No-Match” letter, steps that DHS considers reasonable. By taking these steps, in a timely fashion, the employer would avoid the risk that the “No-Match” letter would be used as any part of an allegation that the employer had constructive knowledge that the employee was not authorized to work in the United States.

NEW REGULATION

The regulation states that an employer gains constructive knowledge, if the employer fails to take reasonable steps in responding to any one of the following:

- ✓ The employer receives written notice from the Social Security Administration (SSA), e.g. an “Employer Correction Request,” that the combination of name and social security number submitted to SSA for an employee does not match SSA agency records;
- ✓ The employer receives written notice from 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;
- ✓ The employer receives a request by an alien to file an alien labor certification or an employment based immigrant visa petition.

The regulation describes the specific steps that an employer should take after receiving a “No-Match” letter.

- ✓ A reasonable employer checks promptly after receiving a “No-Match” letter, to determine whether the discrepancy resulted from a typographical transcribing, or similar clerical error in the employer’s records

or in its communication to the SSA or DHS. (ICE would consider a reasonable employer to have acted promptly, if the employer took such steps within 30 days of receipt of the “No Match” letter.)

- ✓ If such actions do not resolve the discrepancy, a reasonable employer would promptly request the employee to confirm that the employer’s records are correct:
 - a. If the employer’s records are incorrect, the employer would take action to correct their records; or
 - b. If the employer’s records are correct, the employer would ask the employee to pursue the matter personally with the relevant agency, such as by visiting a local SSA office.
- ✓ The regulation also describes a verification procedure that the employer should follow, if the discrepancy is not resolved within 90 days of receipt of the “No-Match” letter. This procedure would verify (or fail to verify) the employee’s identity and work authorization.
 - a. The procedure to verify the employee’s identity and work authorization described in the regulation involves the employer and employee completing a new I-9 Form, Employment Eligibility Verification Form, using the same procedures as if the employee were newly hired, as described in 8 CFR 274a.2, with certain restrictions.
 - i. Under the new regulation, both Section 1 and Section 2 of the new I-9 Form would have to be completed within 93 days of receipt of the “No-Match” letter.
 - ii. No documentation containing the SSN or alien number that was the subject of the “No-Match” letter, and no receipt for an application for a replacement of such a document, may be used to establish employment authorization or identity or both on the same I-9 Form.
 - iii. No document without a photograph may be used to establish identity (or both identity and work authorization).

If, after 93 days from the date of receipt of the “No-Match” letter from SSA, the discrepancy referred to in the “No-Match” letter is not resolved, and if the employee’s identity and work authorization cannot be verified using a reasonable verification procedure, such as described in the regulation, then the employer has the choice of the following three options:

- A. Take action to terminate the employee;
- B. Disregard the “No-Match” situation(s) and demonstrate that the employer has constructive knowledge that they are continuing to employ an individual(s) who were not legally authorized to work;
- C. Fully comply as noted above, (and as defined by DHS), and create a “Safe Harbor” for each employer who does so.