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Immigration Law Alert

September 2007

New "No-Match" Regulations Signal Increase in Immigration Enforcement and Require Employer Action

On September 14, 2007, new regulations were scheduled to go into effect that would directly impact many employers throughout the United States. These regulations define when an employer has "constructive knowledge" that an employee lacks authorization to work legally in the United States. Immigration and Customs Enforcement (ICE) has stated that employers who fail to comply with the new rule may be found to have constructive knowledge of hiring an unauthorized worker and may face substantial penalties.

On August 31, 2007, the U.S. District Court for the Northern District of California issued an order delaying implementation of these regulations until at least October 1, 2007. The order also stops the Social Security Administration (SSA) temporarily from sending notices to approximately 140,000 employers across the country.

For over twenty years, it has been unlawful for an employer to employ a foreign national while having knowledge that the employee is an unauthorized worker. Penalties range from civil to criminal fines, as well as imprisonment. The term "knowledge" includes not only actual knowledge but also constructive knowledge: knowledge that may fairly be inferred through notice of certain facts and circumstances. Prior to the issuance of these regulations, there was no clear guidance from the U.S. Department of Homeland Security (DHS) to employers about what constitutes constructive knowledge and, more specifically, an employer's obligations when it receives a Social Security "no-match" letter.

What Is a "No-Match" Letter?

Every year, SSA informs thousands of employers, via a "no-match" letter, that certain employees' names and corresponding Social Security numbers provided on Forms W-2 do not match SSA's records. Out of approximately 250 million wage reports the SSA receives each year, as many as 4 percent belong to employees whose names and corresponding Social Security numbers do not match SSA's records.

There are many reasons for a mismatch between employer and SSA records, including transcription errors and name changes due to marriage that are not reported to SSA. Employers should not assume the mismatch is the result of any wrongdoing on the part of the employee. Moreover, an employer who takes action against an employee based on nothing more substantial than a mismatch letter may, in fact, violate the law. SSA indicated it will send approximately 140,000 "no match" letters to employers in the next three months, affecting nearly 8 million workers.

What Does the New Rule Require?

The new rule identifies a "safe harbor" from prosecution for employers who take specified action upon receipt of a no-match letter from SSA or a letter from DHS regarding the validity of immigration documents. In order to qualify for safe harbor protection, the employer must take certain steps within a specified time frame after receiving such a letter.

Within 30 Days of Receipt of the Letter

- The employer must check its records to determine whether the discrepancy is a result of the employer's typographical, transcription or similar clerical error. If it is, the employer

should correct the records; inform the relevant agencies; verify that the corrected information matches agency records; and make a record of the manner, date and time of the verification to be kept with the employee's I-9 Form.

- If the discrepancy cannot be clarified through the employer's records alone, the employer must ask the employee to confirm the correct information. If the employee is able to correct the records, the employer should make the correction; inform the relevant agencies; verify that the corrected information matches agency records; and make a record of the manner, date and time of the verification to be kept with the employee's I-9 Form.

Within 90 days of Receipt of the Letter

- If clarification cannot be obtained through verification of records, the employer must advise the employee to contact the appropriate agency directly in order to resolve the discrepancy. The discrepancy will only be resolved upon SSA's verification that the employee's name matches the social security number in the agency's records, or upon DHS's verification that the immigration status or employment authorization document is assigned to that employee. The employer should make a record of the manner, date and time of the verification, to be kept with the employee's I-9 Form.

Day 90

- If the discrepancy cannot be resolved within 90 days, the employer must complete a new I-9 Form for the employee by the 93rd day. When completing this new I-9 Form, the employer may not accept any document containing the social security number that could not be reconciled, nor may the employer accept any DHS-issued document that was in question. Additionally, the employer may not accept any identity document unless it has a photograph.

Day 93

- If the employer is unable to verify the employment authorization of the employee through completion of the new I-9 Form, the employer should terminate the employee. Failure to terminate may lead to a finding by DHS that the employer had constructive knowledge of the employee's lack of employment authorization.
- The new regulations state that "constructive knowledge" may exist under the following circumstances:

  (1) The employer fails to complete or improperly completes the I-9 Form;

  (2) The employer acts with reckless and wanton disregard for the legal consequences of permitting another individual to introduce an unauthorized alien into its workforce or act on its behalf; or

  (3) The employer fails to take reasonable steps after receiving information from the employee that is inconsistent with information provided during the Form I-9 verification process. For example, the employer receives a request to file a labor certification or employment-based visa petition and the employee indicated citizenship or permanent resident status on the I-9 Form.

DHS takes 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.

Please note that the safe harbor exists ONLY with regard to correspondence from SSA or DHS. SSA is not changing its procedures for issuing employer no-match letters, and SSA guidance on how to correct Social Security records is unchanged. However, future no-match letters issued by the SSA will be accompanied by a letter from ICE informing employers on how to respond to the employer no-match letter in a manner consistent with obligations under U.S. immigration laws.

Other Proposed Immigration and Workforce Enforcement Measures

Below is a summary of related immigration and enforcement initiatives:

- DHS will issue a proposed rule requiring all federal contractors to participate in the agency's electronic employment verification system, now called E-Verify (a re-branding of the voluntary Basic Pilot program now used by approximately 19,000 employers).
- To minimize confusion during the Form I-9 verification process, DHS will publish a regulation reducing the number of acceptable documents.
- DHS will raise civil fines imposed on employers who knowingly hire unauthorized workers by approximately 25 percent.
- The Administration is continuing to expand criminal investigations against employers who knowingly hire large numbers of unauthorized workers.
- DHS will extend the authorized period of stay for professional TN workers from Canada and Mexico under NAFTA from one year to three years, in order to attract more of these talented workers to the U.S.

Recommendations for Employers

Integrate the procedures outlined in the final rule as soon as possible.

- Review your Immigration Compliance Policy, or ensure that your company has a written Immigration Compliance Policy.
- Amend your Immigration Compliance Policy to include a written "No-Match Letter Policy" consistent with the final rule (or adopt such a Policy).
- Do not take any adverse employment action solely on the basis of receiving an SSA no-match letter.
- Conduct an internal audit of your I-9 Forms and processes to ensure that your Policy and applicable laws are being followed.
- If you are in a high-risk industry (hospitality, construction, food processing, agriculture, manufacturing, agriculture, critical infrastructure), consider enrolling in the DHS Basic Pilot (now E-Verify) program.
- Review all agreements with temporary agencies and subcontractors to ensure that they are in compliance with the law, and that they will indemnify you for any costs/damages that may arise from unauthorized workers on your job site.

Diversity Visa Lottery Starts Soon

The Diversity Immigrant Visa Program (DV-2009) makes available 50,000 permanent resident visas ("green cards") each year to persons from countries with lower rates of immigration to the United States. The DV-2009 Lottery begins at Noon EDT on October 3, 2007, and ends at Noon EST on December 2, 2007.

Applicants for DV-2009 are chosen by a random computer-generated lottery drawing. There is no cost to apply for DV-2009 and interested applicants may apply online on the Department of State website at http://dvlottery.state.gov.

Please contact Gabrielle M. Buckley (gbuckley@vedderprice.com) or P. Michelle Jacobson (mjacobson@vedderprice.com) of the firm's Business Immigration Practice, or your regular Vedder Price attorney, for more information or assistance regarding these issues.

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About Vedder Price

Vedder, Price, Kaufman & Kammholz, P.C. is a national, full-service law firm with approximately 240 attorneys in Chicago, New York, Washington, D.C. and New Jersey.

The Vedder Price Business Immigration Group

U.S. companies—whether large or small—increasingly hire employees from around the globe. The search for talent within industries such as financial services, biomedical, high tech, pharmaceutical, automotive, engineering and other key sectors of the U.S. economy is relentless in its intensity. In response to the needs of companies to manage their internationally mobile workforce, the law firm of Vedder Price has created a Business Immigration Practice Group, designed specifically to serve the immigration law and compliance needs of companies throughout the country. In addition, the firm provides counsel and assistance with respect to all types of employment-related immigrant and nonimmigrant visa categories.

Specific services include:

- Determining and applying for the most appropriate visa categories for individuals who intend to stay temporarily in the United States for employment or other business-related reasons.
- Preparation and processing of permanent resident visas for executives and other professional employees.
- Due diligence regarding immigration law issues in corporate mergers, acquisitions, divestitures and other forms of corporate reorganization.
- Counseling employers regarding compliance with immigration laws (IRCA) in order to avoid civil and criminal penalties.
- Assisting in processing visa applications and resolving other State Department matters in U.S. Embassies and Consulates around the world.
- Assisting employers with their non-U.S. immigration needs through our network of attorneys licensed in other countries.

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