

## New Regulations Impose Obligations on Employers Who Receive “No-Match” Letters

Regulations that become effective on September 14, 2007 will require employers to become active participants in verifying the identity of employees whose social security numbers do not match government records. The regulations issued by the Department of Homeland Security (DHS) are intended to ensure that only persons authorized to work in the United States become and remain employed. Employers who do not comply with the new rules can be considered as having “knowingly” hired an illegal worker and can face substantial fines.

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.

### *What Is a “No-Match” Letter?*

Every year SSA sends thousands of no-match letters to employers, which state that an employee’s name and social security number, as reported by the employer, do not match SSA records. There can be many reasons for a mismatch including transcription errors and name changes not reported to SSA. Employers should not assume that a mismatch signals employee misconduct. But with the new regulations, SSA does require affirmative employer action to try to reconcile the discrepancy. If the employer does not take such action and it is determined that the employee is not authorized to work, the employer can be accused of having knowledge of the employee’s ineligibility for employment.

### *What Is Required Upon Receipt of a No-Match Letter?*

Upon receipt of a no-match letter or a letter from DHS identifying a discrepancy in the employee’s work authorization papers, the employer should take the following steps to avoid liability for hiring an unauthorized worker:

- Within 30 days the employer must check its records to determine whether the discrepancy is the result of clerical error. If so, the employer should correct its records, inform and verify with the relevant agency that the corrected information matches government records and document its actions as part of the employee’s I-9 file.
- If not employer error, the employer should ask the employee if s/he misreported information to the employer. If so, the employer should change its records, inform and verify the change with the relevant agency and document its actions in the employee’s I-9 file.

- If a discrepancy remains, the employer must ask the employee to correct the situation with the appropriate governmental agency. The discrepancy must be resolved within 90 days.
- If the discrepancy is not resolved in 90 days, the employer must obtain a new I-9 form for the employee by the 93rd day. The employer may not accept any document containing the suspect social security number or any DHS-issued document that was in question. The employer may not accept any identity document unless it includes a photograph of the employee.
- If the employer cannot verify identity and employment authorization using other than the suspect documents, the employer must terminate the employee. Failure to terminate can result in DHS concluding that the employer had constructive notice of the employee's ineligibility to work.

An employee who admits that s/he is not authorized to work in connection with a request for employer sponsorship for a labor certification or visa petition cannot continue to work for the employer. There is no safe harbor in these circumstances.

DHS takes the position that applying the safe harbor rule in a uniform manner to all employees who are the subject of a no-match letter will not subject an employer to liability for document abuse or discrimination on the basis of national origin and citizenship.

### *Other Government Initiatives*

The government is considering or implementing other initiatives as well. It hopes to expand use of its E-Verify system by gaining access to state records and requiring that federal contractors participate in E-Verify. It intends to reduce the number of I-9 acceptable documents to avoid confusion. It also will expand criminal investigations and increase fines against employers who hire large numbers of illegal aliens.

### *Employer Action*

Employers may want to develop policies when dealing with no-match letters, including the use of standardized correspondence directed to governmental agencies and employees. As noted, employers normally should not take adverse employment action solely on the basis of a no-match letter. At the same time, termination is required if the discrepancy cannot be resolved within 90 days and the employee cannot provide independent authorization to work.

If you have any questions, please contact Gabrielle M. Buckley (312-609-7626), or any Vedder Price attorney with whom you have worked.

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