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Department Of Homeland Security Issued Supplemental Rules Concerning Safe-Harbor Procedures For Employers Who Receive Social Security No-Match Letters Receipt of Letters Will Require Special Employer Treatment

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In mid-August '07, the Department of Homeland Security (DHS), issued a Social Security No-Match Regulation. The regulation, which was to become effective on September 14, 2007, described the obligations of employers when they receive no-match letters from the Social Security Administration (SSA) or from DHS, called a "notice of suspect document." The regulation provided, what they called, "safe harbors", employers could follow to avoid a finding the employer had constructive knowledge that the employee, referred to in the letter, was an alien not authorized to work in the US. Employers with knowledge that an immigrant worker is unauthorized to accept employment are liable for both civil and criminal penalties.

Personnel Management Conference

Labor Issues, Immigration Reform and a host of other legal aspects of Labor Management will be discussed in an intensive two-day Personnel Management Conference at the Windcrest Civic Center, San Antonio on April 16-17, 2008. The registration fee will be $175 per person for registration postmarked after April 5. Checks and money orders can be made out to Texas AgriLife Extension Conference Services and mailed to: Texas AgriLife Extension Conference Services, 2139 TAMU, College Station, Texas 77843-2139. Payment by credit card or purchase order can be made through secure Web site at http://agrilifevents.tamu.edu/events/details.cfm?RegistrationID=54
If additional information is required, call Margaret Freeman at (806) 677-5600.

On October 10, 2007, the U.S. District Court for the Northern District of California issued a preliminary injunction enjoining and restraining the DHS and the SSA from implementing the Final Rule entitled "Safe-Harbor Procedures for Employers Who Receive a No-Match Letter." Specifically, the court questioned whether DHS had: (1) Supplied a reasoned analysis to justify what the court viewed as a change in the Department's position – that a no-match letter may be sufficient, by itself, to put an employer on notice, and thus impart constructive knowledge, that employees referenced in the letter may not be

work-authorized, (2) Exceeded its authority (and encroached on the authority of the Department of Justice) by interpreting the anti-discrimination provisions of the Immigration Reform and Control Act of 1986 and (3) Violated the Regulatory Flexibility Act by not conducting a regulatory flexibility analysis of the rule on small businesses.

On March 26, 2008, the DHS issued a 44 page supplemental proposed rule that purports to clarify its August 2007 final rule regarding an employer's legal obligations upon receiving a no-match letter from the SSA. While this supplemental proposed rule addresses the three issues objected by the court, it appears that the DHS is reissuing the 2007 rule without change. According to the proposal comments, must be submitted not later than 30 days after date of publication in the Federal, Register. It was unclear when the proposal will be or was posted on the Federal Register. The proposal may be found at http://www.nilc.org/immsemplymnt/SSA_Related_Info/DHS_Final_Rule/No_Match_SNPRM_FINAL.pdf. At this point, it appears that DHS's rules regarding employer required actions upon receipt of a "no-match" letter will be implemented unless substantive comments are received to cause the DHS to withdraw the rules (or the courts further pursue the matter).

Employers are required to report social security earnings for their workers to the Social Security Administration. The purpose of the SSA no-match letter is to help workers get credit for their earnings, which can affect their retirement, survivor, disability, or other benefits administered by SSA in the future. There are many factors that may trigger a no-match letter, including, database errors, typographical errors, transcription errors, name changes due to marriage/divorce that are not reported to SSA, the use of multiple surnames and many other, mostly, administrative errors. Employers should not automatically assume that the mismatch is the result of any wrongdoing on the part of the employee.

These letters were never intended as an immigration enforcement tool. The DHS regulation imposes liability on the employer, based on failure to respond to a SSA 'no-match' letter.

Opponents of the DHS regulation's claim that the rule is bad for the economy and will cause massive layoffs of employment-authorized workers and U.S. citizens. In addition, an employer who takes action against an employee based on nothing more substantial than a mismatch letter from SSA may place him/herself in legal vulnerability. So, it appears that employers could be placed in a "no win" situation.

Safe Harbor Rules

Department of Homeland Security's Social Security No-Match Regulation provides guidance on how an employer should deal with a no-match letter:

- Verifying within 30 days that the mismatch was not the result of a record-keeping error on the employer's part. If there is an error, the employer should correct the error and inform the appropriate agency – DHS or SSA depending on which agency sent the no-match letter. The employer should then verify with that agency that the new number is correct and internally document the manner, date and time of the verification.
- If actions above do not resolve the discrepancy, the employer should request that the employee confirm the accuracy of employment records. If records are not correct, the employer needs to take corrective actions. That would include informing the relevant agency (SSA or DHA) and verifying the corrected records with the agency.
- If the records are correct according to the employee, the employee must resolve the issue with the SSA and bring original or certified copies of required identity documents.
- The rules provide that a discrepancy is only resolved when the employer has received verification from SSA or DHS that the employee's name matches the record.
- Where the information could not be corrected, complete a new I-9 form without using the questionable Social Security number and instead using documentation presented by the employee that conforms with the I-9 document identity requirements and includes a photograph and other biographic data.
- When 90 days have passed without a resolution of the discrepancy, an employer must undertake a procedure to verify or fail to verify the employee's identity and work authorization. If the process is completed, an employer will NOT have constructive knowledge that an employee is not work authorized if the system verifies the employee (even if the employee turns out not to be employment authorized).

The DHS's Regulation indicates that the receipt of a no-match letter from the SSA and receipt of employment verification forms from DHS as two additional examples that an employer may have "constructive" knowledge that an employee is out of status, i.e., "constructive" knowledge that the employer is in violation of the Immigration Reform and Control Act of 1986 (IRCA), the statute that punishes employers for knowingly hiring unlawfully present workers or violating paperwork rules associated with the I-9 employment verification form.