



## FEDERAL COURT TEMPORARILY BLOCKS NEW SAFE HARBOR RULES FOR EMPLOYERS WHO RECEIVE A “NO-MATCH LETTER”

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A troublesome issue for employers is how to respond to letters from the Social Security Administration (SSA) advising that social security numbers do not match the employees for whom they were submitted. According to the Department of Homeland Security (DHS), these “no-match” letters, if unresolved, provide an employer with constructive knowledge that the subject workers are unauthorized to work, thereby subjecting the employers to potential liability for employing unauthorized aliens.

Last year, the DHS outlined a procedure in proposed regulations that, if followed, would provide an employer with a “safe harbor” from any contention that a no-match letter provides the employer with constructive knowledge that the subject employee is an unauthorized worker. After receiving almost 5,000 comments, the DHS issued its final rule on August 15, 2007. The final no-match rule was scheduled to take effect on September 14, 2007. However, opponents have joined to file litigation opposing the rule, and a federal judge has granted a temporary restraining order temporarily blocking the rule from going into effect.

Under the new (temporarily blocked) rule, within 30 days after receiving a no-match letter, an employer must check its records

for any clerical errors in reporting the number to the SSA and notify it of any corrections. If no error is discovered, the employer must contact the employee, advise him/her of the no match letter, and obtain confirmation that the social security number reported to the employer was correct. If the employee reported the number correctly, the employer must advise him/her to contact the SSA to resolve the discrepancy.

If the employee fails to resolve the issue within 90 days from the date of the no-match letter, the employer has an additional three days to obtain a new Form I-9 from the employee (93 days from the date of the no-match letter). In completing the new Form I-9, the employee must submit a combined identification/employment authorization (List 1) document or identification (List 2) document with the employee’s photograph. Moreover, the employee may not use any document containing the disputed social security number to establish identity, work authorization or both. If the employee does not successfully complete the process, the employer must terminate the employee or run the risk that the DHS will find that the employer violated the Immigration and Naturalization Act by continuing to employ the employee despite constructive knowledge that s/he is unauthorized.



## CLIENT ALERT

Although compliance with this process would provide the employer with a safe harbor from action by the DHS on the basis of the no-match letter, it does not prevent legal action by the employee or his/her representative.

The future of the safe harbor regulations will depend on results of the court case blocking them. In the meantime, it is an opportune time for employers to review their Form I-9 processes and to evaluate their current responses to SSA no match letters.