

WALKER & UNGO

IMMIGRATION UPDATE



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Summary of the ICE No-Match Regulation

On August 15, 2007, the U.S. Department of Homeland Security (DHS) through its enforcement agency, the U.S. Immigration and Customs Enforcement (ICE) published rules that amend the regulations relating to the unlawful hiring or continued employment of unauthorized aliens. ICE's "No-Match" final regulation, "Safe Harbor Procedures for Employers Who Receive a No-Match Letter" will become effective on September 14, 2007.

BACKGROUND

Employers annually send the Social Security Administration (SSA) millions of earnings reports (W-2 Forms) in which the combination of employee name and social security number (SSN) does not match SSA records. In some of these cases, SSA sends a letter, such as an "Employer Correction Request", that informs the employer of the mismatch, commonly referred to as "no-match letter".

There can be many causes for a no-match, including clerical error and name changes. One potential cause may be the submission of information for an alien who is not authorized to work in the United States and who may be using a false SSN or a SSN assigned to someone else. Such a letter may be one indicator to an employer that one of its employees may be an unauthorized alien.

ICE sends a similar letter (currently called a "Notice of Suspect Documents") after it has inspected an employer's Employment Eligibility Verification forms (Forms I-9) during an investigation audit.

CONSTRUCTIVE KNOWLEDGE

The final rule amends the definition of "*knowing*" in 8 CFR 274a.1(l)(1), and expands the

definition of "**constructive knowledge**"¹ to include the failure by the employer to take reasonable steps to address **these new situations**:

- (1) **Receipt of a no-match letter** from the Social Security Administration ("SSA");
- (2) Receipt of a notice from DHS (usually after an I-9 audit) that the employee's employment authorization documents presented in connection with completion of the I-9 form do not match DHS records.

"SAFE HARBOR" PROTOCOL

The regulation also describes more specifically the steps that an employer might take after receiving a no-match letter, steps that DHS considers reasonable.

In final form, the "safe harbor" protocol has the following steps:

- 1. Check Employers Own Records.** Within 30 days of Receipt of the Notification from the Government (SSA or DHS) the employer must check its records promptly to determine whether the discrepancy was caused by a clerical error. If so, employers should correct the error with SSA, and verify that the corrected name and social security number now match SSA's records.
- 2. Request Confirmation By Employee.** If these actions do not resolve the discrepancy, the employer must promptly request that the employee confirm that the name and social security account number in the employer's records are correct. If the information is incorrect, the employer must make corrections, inform the relevant agencies, and make a record of its actions ². If the employee confirms that the employer's record information is correct, the employer must advise the employee to resolve the discrepancy with the SSA no later than **ninety (90) days** after the receipt date of the no-match letter.
- 3. Repeat the I-9 Process.** Within 93 days of Receipt of Notification from the Government the employer must attempt to **reverify** the worker's employment eligibility by **completing a new I-9 employment verification form**. Companies should use the same procedures as when completing an I-9 form at the time of hire, with certain restrictions:

1. The employee must complete Section 1 and the employer must complete Section 2 of a new I-9 form within 93 days of receipt of the notice from either SSA or DHS.
2. The employer cannot accept any document (or receipt for such a document) referenced in the DHS notification or any document (or receipt) that contains

¹ A response to a "no-match" eliminates an allegation that an employer had **constructive knowledge** that it was employing 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 which would lead a person, through the exercise of reasonable care, to know about a certain condition.

² The regulation provides that a discrepancy will be considered resolved only if the employer verifies with SSA or DHS. Employers may verify a SSN with SSA by telephoning toll-free 1-800-772-6270.

- a social security number that is the subject of the SSA no-match letter to establish employment authorization or identity.
3. The employee must present a document that contains a photograph in order to establish identity or both identity and employment authorization³.
 4. The new I-9 form should be retained with the original I-9 form(s).

If the employer cannot verify the employee's identity and work eligibility through completion of a new I-9 form, the employer must choose between:

1. Terminating the employee,
2. Face the risk in any subsequent DHS enforcement action of being determined to have constructive knowledge and being penalized for the *continuing employment of an unauthorized alien*.

OTHER CONSIDERATIONS

If these procedures are completed, and the employee is verified, then even if the employee is in fact not authorized to work in the United States, the employer will not be considered to have constructive knowledge of that fact based on receipt of the no-match letter.

However, that these procedures do not safeguard against liability where an employer has **actual knowledge** that an employee is not authorized to work. Also, note that the "safe harbor" protocol is NOT available where an employee requests employer sponsorship for a labor certification or visa petition and the employee turns out to be unauthorized.

Employers should apply these procedures uniformly to all of their employees having unresolved no-match indicators. If they do not do so, they may violate applicable anti-discrimination laws.

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³ Employers cannot request more or different documents than are required under section 274[A](b) of the Act or to refuse to honor documents tendered that on their face reasonably appear to be genuine and to relate to the individual.