

Article Reprint

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The Latest on 'No-Match' Letters

By John D. Shyer and Phillip J. Perry

New Safe-Harbor Procedures for Employers. Part One of a Two-Part Article

In the wake of a failed attempt to negotiate legislation for comprehensive US immigration reform with Congress, the Bush Administration recently announced a series of "regulatory" reforms to tighten immigration enforcement. Perhaps the most significant and controversial of those reforms is the Department of Homeland Security's new regulation addressing "no-match" letters. Although the new regulation has been temporarily enjoined pending a hearing in federal court, employers should begin considering how they will comply with it if an injunction is not granted.

Recent statistics have suggested that several million people are working in the United States illegally. See generally, Michael Hoefler, Nancy Rytina and Christopher Campbell, *Department of Homeland Security, Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2005* (2006). On Aug. 10, 2007, US Immigration and Customs

Enforcement (ICE), a division of the US Department of Homeland Security (DHS), announced new regulations to help federal authorities and US employers identify illegal workers who have used fraudulent documents to obtain employment. Every year, the Social Security Administration (SSA) and ICE send "no-match" letters, titled "Employer Correction Requests" (SSA) and "Notice of Suspect of Documents" (ICE), notifying employers that certain of their employees' Social Security numbers or immigration data do not match the employees' names in official records. The new ICE regulations provide employers with specific instructions on how to address these no-match notifications properly, and create a "safe harbor" for those employers who follow the instructions carefully. An employer who receives a no-match letter but does not follow the instructions or take other appropriate action may risk a later ICE determination that the employer had "constructive knowledge" that the employee(s) at issue were working illegally. This could expose the employer to civil penalties and, in certain circumstances, to prosecution.

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The regulations were to take effect on Sept. 14, 2007, but have been enjoined by a temporary restraining order issued by a federal judge in the Northern District of California pending a hearing, which was held Oct. 1, 2007, on whether a preliminary injunction should be issued. *AFL-CIO v. Chertoff*, No. 07-4472 (N.D. Cal. filed Aug. 31, 2007). The order also prohibited SSA from dispatching thousands of notifications coupled with inserts from DHS/ICE regarding the new regulation that were to have been mailed out to employers in September of last year. At the Oct. 1 hearing, Judge Charles R. Breyer issued a preliminary injunction preventing the government from enforcing the No-Match regulation. Barring a successful appeal, the injunction will remain in effect until the lawsuit goes to trial.

Totality of Circumstances

Regardless of whether the new rule takes effect, whether an employer failed to act reasonably in response to a no-match letter is considered in the "totality of circumstances" used to determine whether an employer had constructive knowledge of an employee's unauthorized work status. *Safe Harbor Procedures for Employers Who Receive a No-Match Letter*, 72 Fed. Reg. 157, 45620 (hereinafter, *Safe Harbor Procedures*) (to be codified at 8 C.F.R. § 274a) at 45612. The conclusion of this two-part article suggests strategies employers may use to reduce the number of "no-matches" and to respond to no-match letters.

Background

US employers are familiar with the "I-9" Employment Eligibility Verification Form they must complete for each new employee. The form requires employers to request and review specified documents from new employees by no later than the third day of employment. Most employees meet the requirement by presenting a driver's license and Social Security card or a green card

or other immigration-related work authorization document. A US passport and certain other specified documents can also be sufficient. Under current law, employers are not required to be experts in examining documents, but they must review the documents the employee presents and check to ensure the documents appear genuine. If the employer properly completes the I-9 form in good faith, the employer has established a rebuttable "affirmative defense" that it has not violated the ICE regulation by knowingly hiring an illegal worker. 8 C.F.R. § 274a.4; 8 U.S.C. § 1324a.

Every year, SSA receives millions of earnings reports (W-2 Forms) from employers in which the combination of name and social security number does not match SSA records. In response to many of these discrepancies, SSA sends no-match letters to employers. For the past few years, SSA has generally sent no-match letters if an employer has at least 10 "no-matches" or "no-matches" for at least 0.5% of its employees. ICE sends similar letters when it detects discrepancies in immigration documents used to establish work authorization. While such discrepancies could occur for many reasons, including clerical errors or name changes, they could also indicate that the employee is working illegally.

Prior to the recent amendments to the regulation, the obligations of an employer receiving a no-match letter were unclear. Typically, SSA did not follow up on employer recipients of no-match letters and did not share the lists of those employers with DHS/ICE. The no-match letters themselves warned employers that singling out workers who might appear to be immigrants could give rise to discrimination claims, and the Department of Justice issued confusing guidance on the issue. In the new rule, however, ICE — in consultation with the Justice Department — delineates specific

steps that, if applied uniformly to all employees with “no-matches,” will be appropriate and will preserve an employer’s “presumption of good faith” under the employer liability provisions of the Immigration and Nationality Act (INA). 8 U.S.C. § 1342; 8 C.F.R. § 274.

Key Provisions of the Regulation

Under the new regulation, receipt of a no-match letter from either SSA or DHS can serve as evidence of an employer’s constructive knowledge that an employee is not authorized to work. The amended regulation sets out steps an employer should take to remain in good faith compliance with immigration laws. Specifically:

Within 30 days of receiving the no-match letter, the employer should:

- Check the employer’s own records to determine whether the discrepancy resulted from a clerical error in the employer’s records or in its communication to SSA or DHS. If such an error is found, the employer should promptly correct its records, inform the relevant agency, and verify that the correction matches the agency’s records. The employer should record the manner, date and time of the verification and keep this record on file with the employee’s Form I-9; or
- If no clerical error is found, ask the employee to confirm that the employer’s records are correct. If the employee cannot identify a clerical error, the employer should ask the employee to resolve the discrepancy with the relevant agency.

If the employee cannot resolve the discrepancy with SSA or DHS within 90 days, the employer should ask the employee to complete a new Form I-9 within three days to re-verify the employee’s work authorization and identity. The same procedures should be followed as if the employee were newly hired, except that the re-verification can only be based on a photo identification

(such as a passport), and no document may be used with the problematic social security number or visa/work authorization number that is the subject of the no-match letter.

If the employer and employee are unable to resolve the discrepancy through these steps, the employer must choose between terminating the employee or assuming the risk of being found to have had constructive knowledge that the employee was unauthorized to work.

While an employer could take other steps that DHS would consider a “reasonable” response to a no-match letter, an employer can only be certain that it will not be found to have constructive knowledge of the employee’s unauthorized employment status if it follows the safe-harbor procedures described in the new regulation. DHS has not yet identified any other appropriate “reasonable steps” with any specificity, but has indicated that participation in certain other government programs, such as the Electronic Employment Verification System, may qualify. *Safe Harbor Procedures*, at 45620. If the employer does not follow the safe-harbor procedures described in the new rule or take other appropriate action, the employer may be found to have constructive knowledge regarding the illegal work status of the employee, and may be held liable under section 274A(a)(2) of the INA. Current civil penalties range from \$250 to \$2,200 for each unauthorized alien for the first offense, \$2,000 to \$5,500 for the second offense, and \$3,000 to \$11,000 for subsequent offenses. 8 C.F.R. § 274a.10(b). ICE has announced its intention to increase these civil penalties by regulation in the near future. *Press Release, Department of Homeland Security, Fact Sheet: Improving Border Security and immigration within Existing Law* (Aug. 10, 2007). The employer may also be subject to criminal penalties,

including fines and/or imprisonment for up to six months if it engages in a pattern “or practice of violations. 8 C.F.R.

§ 274a.10(a).

Additionally, the Attorney General may bring a civil action in a United States District Court seeking an injunction or restraining order against an employer who the Attorney General has reasonable cause to believe is engaged in a pattern or practice of employment, recruitment, or referral in violation of the regulation. 8 C.F.R. § 274a.10(c). Further, 8 U.S.C. § 1324 may impose criminal liability for a range of conduct that can be broadly described as encouraging or inducing illegal immigrants to reside or remain in the United States with knowledge or in reckless disregard of the immigrant's illegal status.

Also, while the safe harbor procedures protect an employer from federal claims of civil liability on the grounds of constructive knowledge, they do not provide a safeguard against civil or criminal liability when the government can prove that the employer had actual knowledge of the employee's illegal status.

Legal Challenges to the New Regulation

The AFL-CIO and other labor groups in the United States District Court for the Northern District of California challenged the new regulation. On Oct. 10, Judge Charles R. Breyer issued a preliminary injunction preventing the government from enforcing the No-Match regulation, citing, among other issues, DHS's failure to analyze the costs to employers of compliance with the new regulation. In response to the injunction, the SSA refrained from mailing the no-match letter packets that were originally scheduled to be mailed in September 2007 (see above). On Oct. 23, Rep. Tom Tancredo (R-CO) and six co-sponsors introduced a bill (H.R.

3950) that would directly approve the No-Match rule as published on Aug. 15 as law. At press time, the bill was before House committees.

On Dec. 14, 2007, Judge Breyer issued an order to stay proceedings in the case through March 28, 2008 to allow DHS time to amend the rule. While the injunction remains in place, DHS is working to correct the largely procedural flaws that Judge Breyer identified in his preliminary injunction order, but is also simultaneously pursuing an appeal. It is expected that DHS will publish a revised regulation correcting the procedural flaws this Spring and may at that time drop the appeal.

The conclusion of this article will discuss strategies for employers.

John D. Shyer, a member of this newsletter's Board of Editors, is a labor and employment law partner in the New York office of Latham & Watkins LLP. Philip J. Perry is a litigation partner in the firm's Washington, DC, office. He previously served as the General Counsel of the U.S. Department of Homeland Security and the White House Office of Management and Budget, and as the Acting Associate Attorney General of the Department of Justice. Melinda Li, an associate in the New York office, assisted with the preparation of this article.