



ASA Special Report: The Employer Safe Harbor Under the New DHS 'No-Match' Rule

August 15, 2007

Background

Since 1986, it has been unlawful for employers to *knowingly* employ workers who are not authorized to work in the United States. An employer that knowingly employs an illegal worker is subject to penalties, referred to as "sanctions." "Knowingly" employing unauthorized workers includes actual or constructive (i.e., that which can be fairly inferred) knowledge of employing them. To avoid sanctions, employers are required to verify employees' work eligibility, using an official government form, the I-9. At present, employers that properly complete and maintain I-9 forms are granted a safe harbor from sanctions.

Changed Safe Harbor Effective Sept. 14, 2007

On Aug. 15, 2007, the U.S. Department of Homeland Security (DHS) issued a final, revised rule that limits the safe harbor for employers that unknowingly employ an alien not authorized to work in the United States. The rule expands employers' potential liabilities by adding scenarios in which employers are presumed to have constructive knowledge of employing workers not authorized to work in the United States:

1. Receipt of an "Error Correction Request", or "no-match letter," from the Social Security Administration (SSA).
2. Written notice from DHS that the immigration status document, or employment authorization document (EAD), presented or referenced by the employee in completing Form I-9 was assigned to another person, or that there is no agency record that the document was assigned to anyone.

The most significant of these examples is the no-match letter from SSA, as millions of these letters are sent to employers annually. They are triggered when an employer's W-2 earnings report contains a name and social security number (SSN) combination that does not match SSA records. These letters are sent to employers that report more than 10 no-matches that represent more than 0.5 percent of the W-2s in their reports. Even though the mismatch could be due to a clerical error or name change, under the revised rule, receipt of this letter by an employer represents constructive knowledge that it could be employing an unauthorized worker.

Safe Harbor Process for Employers

In the past, employers were not required by DHS to take action in response to no-match letters. This regulation spells out very clearly that if employers do not resolve erroneous SSN and name combinations they could face potential liability for knowingly employing an unauthorized worker. By taking the following steps, employers can avoid the risk that a no-match letter could be used



as part of an allegation that the employer had constructive knowledge that an employee was not authorized to work. This process should be completed for all employees who are the subject of a no-match letter and employers should retain thorough documentation of the entire process. In fact, the DHS rule expressly states, “Employers are encouraged to document telephone conversations, in addition to retaining all SSA correspondence, computer-generated printouts, e-mails and SSNVS screen prints evidencing that the discrepancy has been corrected.”

(1) **Check Internal Records for Clerical Errors Within 30 Calendar Days**

“A reasonable employer would check its records promptly after receiving a no-match letter, to determine whether the discrepancy results from a typographical, transcribing, or similar clerical error in the employer’s records or in its communications to the SSA or DHS.” If the employer determines that it made such an error, it should take action to correct the error and inform the appropriate agency to ensure that the name and number, as amended, matches the records. An employer must take such action within 30 days of receipt of the government notice in order for its action to be considered “reasonable.”

(2) **Have the Employee Verify or Correct Information Within 30 Calendar Days**

If the employer’s actions in Step (1) above do not resolve the discrepancy, the employer should request that the employee confirm that the employer’s records are correct. If an error is found, the employer must make any necessary corrections, inform the appropriate agency involved and confirm that the information now matches the agency’s records. If the employee states that the employer’s information is correct, the employer must ask the employee to go to the local SSA office and resolve the matter personally. The government agency will consider the issue “resolved” only if the employer follows up with SSA to confirm the name and SSN match or with DHS to verify that the individual is authorized to work. The rule suggests that the employer maintain a record of any such verification, since the agency is not required to do so. Again, the employer must take such action within 30 days of receipt of the government notice for its action to be considered “reasonable.” Employers may verify a SSN with SSA by calling 1-800-772-6270, weekdays from 7 a.m. to 7 p.m. EST. See [http:// www.ssa.gov/employer/ssnvadditional.htm](http://www.ssa.gov/employer/ssnvadditional.htm). For information on SSA’s online verification procedure, see <http://www.ssa.gov/employer/ssnv.htm>.

(3) **Complete a New I-9 Within 93 Calendar Days**

If the employer’s action in Steps (1) and (2) do not result in a resolution of the discrepancy within 90 days of receipt of the original no-match letter or DHS notice, the employer can complete a new Form I-9 for the employee no later than three days following the 90-day period, using the same procedures as if the employee were newly hired. However, the employer cannot use a document containing the SSN that is the subject of a no-match letter or an application for a replacement of such a document to establish authorization or identity. Further, no document without a photograph may be used to establish identity.



If an employer takes all of the above steps and is still unable to resolve the discrepancy, it may terminate the employee. If it does not terminate the employee, it risks sanctions for violating federal law.

Other Enforcement Factors

DHS might consider other procedures an employer chose to follow “reasonable” and not find that the employer had constructive knowledge that an employee was an unauthorized alien. However, such employer risks that DHS would not agree that its procedures were reasonable. DHS would base its finding on “the totality of relevant circumstances.”

While an employer that follows the procedures set forth in the revised rule reduces its risk of being found to have constructive knowledge that an employee is not authorized to work in the United States, the rule does not preclude DHS from finding that an employer had “actual knowledge” that an employee was an unauthorized alien. The burden of proving “actual knowledge” is on the government.

This revised rule takes effect Sept. 14, 2007. It addresses only the limited situation where an employer receives a no-match letter from SSA or notice from DHS. According to the rule, however, DHS, “may exercise its prosecutorial discretion favorably for employers who take other affirmative steps to ensure that they do not employ aliens who are not authorized to work in the United States,” such as the use of:

SSA’s Social Security Number Verification System (SSNVS)

<http://www.ssa.gov/employer/ssnv.htm>

USCIS’ Systematic Alien Verification for Entitlements (SAVE) Program and E-Verify <https://www.vis-dhs.com/EmployerRegistration>

ICE’s IMAGE program

<http://www.ice.gov/partners/opaimage/index.htm>

Obtain a Copy of the Rule

A copy of the DHS rule is available at

<http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/pdf/E7-16066.pdf>

For more information, contact ASA Manager of Government Relations Freeman Smith at (703) 684-3450, Ext. 1321, or fsmith@asa-hq.com.

DISCLAIMER: This publication does not contain legal advice. Individual circumstances vary widely, so readers should consult their attorneys before acting on the premises described herein.