



NEW REGULATION SOLVES THE SOCIAL SECURITY NO-MATCH LETTER RIDDLE

Employers have faced a quandary in recent years when they received a letter from the Social Security Administration (“SSA”) advising them that the social security number provided by one or more of their employees does not match the information that SSA has on file for the particular number (“no-match letter”). The no-match letter provides constructive notice that the document used by the employee to verify employment eligibility on the I-9 form *may* be fraudulent, meaning that the employer has a duty to further investigate its validity. What an employer is required to do after receiving the letter has been quite a conundrum as employers attempt to balance their IRS and SSA obligations to correctly withhold social security and payroll taxes with their INA obligations not to discriminate based on ethnicity or national origin and to only employ authorized persons. On August 15, 2007, the Department of Homeland Security’s (“DHS”) Bureau of Immigration and Customs Enforcement (“ICE”) published a final regulation, originally issued as a proposed regulation in mid-June 2006, providing clarification and guidance for these circumstances. The regulation is effective September 14, 2007.

The Employer’s Obligation: An employer has a duty not to knowingly employ or continue to employ persons who are not eligible to work in the United States. At the outset, the regulation (8 CFR Part 274a) adds the failure to adequately address a no-match letter (either from SSA or, less commonly, DHS) to the current list of employer conduct that *may* result in a determination that the employer had constructive knowledge that it was employing unauthorized workers. Note that the no-match letter will only be a factor that is considered under the totality of the circumstances, but it is certain to be a significant if not dispositive factor in determining whether the employer had knowledge.

What Can Employers Do: The regulation provides a three-step process to address the no-match situation. If an employer follows the three-step process, ICE will not use the no-match letter as evidence of constructive knowledge of unauthorized employment, a so-called “safe harbor” from the constructive knowledge imputed from the no-match letter.

The three-step process:

Step 1: Within thirty (30) days (note increase from 14 days in proposed regulation) of receiving the no-match letter, the employer must review its records to determine whether the discrepancy resulted from a typographical, transcription or other clerical error by the employer and inform SSA of the correct information as instructed by the no-match letter. The employer must also verify that the corrected name and number match SSA records. An employer can verify SSNs on the web (www.ssa.gov/employer/ssnv.htm) or by telephone (1.800.772.6270).

Step 2: Where the employer determines that the error is not one in its records, the employer must “promptly request” that the subject employee(s) confirm that the name and social security number in the employer’s records are correct. Where the employee represents that the employer’s records are in error, the employer must follow the verification procedures outlined in *Step 1* (i.e., correct the data error and verify the new information with SSA) for the new information provided by the employee. Where the employee states that the employer’s records are correct, the employer must request that the employee resolve the discrepancy with SSA. The burden is on the employee to correct the SSA information and the employee has ninety (90) days (increased from 60 days in the proposed regulations) from the date that the employer received the no-match letter to resolve the discrepancy. The employer must inform the employee that it received the no-match letter on x date and that the employee has ninety days from x date to resolve the discrepancy. In either of these cases, the employer should update the subject employee’s I-9 noting on the I-9 what has been updated. Where the employee is unable to correct the discrepancy within ninety days, the employer should proceed to Step 3.

Step 3: Where Step 1 and Step 2 fail to resolve the discrepancy, the employer essentially restarts the employment eligibility verification process (I-9) over and the employee has three days to provide materials to complete the I-9. The same

standards for initial I-9 completion apply except (1) no document containing the “no-match” SSN or alien number can be used in completing the new I-9, (2) no receipt for a replacement document can be used, and (3) no document without a photograph may be used to establish identity or both identity and employment authorization.

Where Steps 1 - 3 fail to resolve the discrepancy, the employer must elect between terminating employment or risk a potential determination that the employer had constructive notice that the employee was unauthorized. The choice is simple unless you are an employer who receives a no-match letter for a significant percentage of your employees or the employees for whom the no-match applies are essential to your operation (e.g., your crew leader or primary interpreter). In that case, a true risk assessment must be made between the benefits of continued employment and the potential penalty that could be imposed (up to \$2200 per unauthorized worker for a first time offender) where you are found to have knowledge of unauthorized employment. It should be noted that adherence to the safe harbor process will not eliminate the possibility of sanctions and/or liability, it simply removes the no-match letter from the equation. If an employer has other knowledge that the employee is unauthorized, either actual or constructive, the employer can be held responsible even if the employer followed the no-match procedure.

Practical Application

We project that increased funding and enforcement efforts will result in a significant increase in the number of no-match letters issued in the future. SSA reportedly received more than nine million wage reports that could not be matched in 2002, and had received 255 million wage reports that could not be matched by the end of 2003 representing \$519.6 billion in earnings. Only a small percentage of these actual no-matches result in no-match letters but that percentage is certain to increase. Additionally, there is an immediate wave of no-match letters on the horizon: SSA has held no-match letters for several months awaiting the final regulation and intends to release the letters, encompassing appropriately the last nine months, in the near future.

Furthermore, although ICE noted that the no-match safe harbor is limited to the no-match letters issued by SSA and DHS, it noted that good faith compliance with the regulation in other circumstances would be considered as part of the ICE determination whether sanctions are appropriate. In other words, they strongly recommend that you play by their rules in all circumstances where employment eligibility is questionable. It is also advisable, as with most employment issues, that you maintain documentation of your efforts to verify employment eligibility when either complying with the safe harbor or through other efforts. This “evidence” (telephone logs, dated meeting notes from conferences with employees, computer screen shots, etc.) of your compliance efforts will also serve to mitigate any penalties that might be considered in a close case.

The regulation does not directly address an issue of significant concern to many employers who receive no-match letters: returning seasonal employees. For example, in seasonal industries (e.g., tourism, landscape), employees are often off the payroll for several months each year and may or may not return in the future at which time a new I-9 is typically completed assuming a sufficient lapse between periods of employment. If the employee is not on the payroll at the time the no-match letter arrives, there is (a) no requirement to follow the safe-harbor provisions and (b) no “continuing employment” (the standard for liability) of someone who is not authorized to work. However, when or if the employee returns to work, the employer can be assured that the earlier no-match letter will be considered evidence of constructive knowledge if the employee uses the same information to verify employment eligibility. Of course, even if the employer attempted to comply with the substance of the safe harbor procedure, the employer would often be unable to comply with the 30 and 90 day time limits since those time limits begin as of the date that the employer receives the no-match letter. It remains to be seen whether ICE will permit the 90 day period to commence as of the date of rehire as part of the employer’s good faith effort to comply with the employment eligibility requirements. The challenge to employers is to create some “tickler” system whereby the employer is aware of the earlier no-match even through changes in human resources and administrative personnel.

Many of the issues related to the no-match situation (as well as many of the other issues frustrating employers of foreign labor) would be addressed through comprehensive immigration reform measures as each comprehensive proposal has included a mandatory electronic employment verification (“EEV”) requirement. Currently, such action is voluntary and optional – and fraught with its own issues – but arguably prevents the “back-end” no-match issue by determining on the “front-end” whether the information provided by the employee is legitimate.

This bulletin provides a general update on employment issues for subscribers and is provided for general information purposes only. Please contact us if you have any questions about the material discussed herein or specific questions about its impact on your business. This update was prepared by Michael L. Thompson, an attorney with the law firm of Lehr, Middlebrooks, & Vreeland, P.C. Mike can be reached for questions/further information at mthompson@lehrmiddlebrooks.com or at (205) 323-9278.

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