FACT SHEET

DHS Publishes Final Rule on No-Match Letters

By Karen A. Herrling

On August 15, 2007, the Department of Homeland Security (DHS) published in the Federal Register a **final rule** that sets forth guidance for employers on how to handle no-match letters from DHS and the Social Security Administration (SSA). This final rule was supposed to become **effective on September 14, 2007**, thirty days after publication of the new rule. However, the implementation of the final rule has been stayed by a Temporary Restraining Order (TRO) issued by a federal judge on August 31st. A hearing to permanently enjoin the implementation of the rule will be held on **October 1st. The TRO means that the DHS rule will not go into effect on September 14th and the Social Security Administration (SSA) will not send out the no-match letters until the court issues a decision following the October 1st hearing.**

Background: What Is a DHS No-Match Letter?

DHS issues no-match letters after it has inspected an employer's Employment Eligibility Verification forms (Form I-9) and determined that the immigration status or employment authorization documentation presented or referred by the employee in completing the Form I-9 was not assigned to that employee. These letters are sometimes referred to as a "Notice of Suspect Documents."

Background: What Is a SSA No-Match Letter?

A SSA no-match letter is a letter sent from SSA to an employer when the information (name and Social Security Number) on the employer's Wage and Tax Statement (W-2 Form) does not match the information in SSA's database.

This fall, SSA expects to send out approximately 140,000 letters to employers. A similar number was sent out last year. These letters will be sent to any employer who reported more than 10 no-matches where that number represents more than .5% of the W-2s submitted by the employer in 2006.

A copy of the 2007 letter is available SSA's website – www.ssa.gov. Like the letters from previous year, the letter contains strong language cautioning employees against taking any adverse action against workers based simply on the receipt of a no-match letter. Specifically the letter states that the letter does not make any statement about an employee's immigration status and it warns that taking adverse action against an employee could subject the employer to anti-discrimination or labor law sanctions.

Unlike previous years, employers who receive a SSA no-match letter also will receive an "insert" from DHS. The insert is a two page informational letter addressed generically to all employers and explains the purpose of the insert -- to provide employers with additional guidance on how to respond to SSA no-match letter in a manner that is

consistent with your obligations under United States immigration laws. A copy of the insert is available on DHS's website (www.dhs.gov) and SSA's website (www.ssa.gov).

What Does the Final Rule Do?

The final rule significantly changes the nature of a no-match letter. Prior to this final rule, a no-match letter generally was seen as a way for SSA to notify employees via their employers that there is a problem with the employees earning records at SSA. Now, a no-match letter can be considered an enforcement tool. In particular, under the final rule, DHS considers the receipt of a no-match letter as potential evidence that the employer has "constructive knowledge" that an employee is not authorized to work

The final rule has two major parts.

First, as acknowledged above, the final rule adds two more examples to the current regulation's definition of "knowing," particularly with respect to "constructive knowledge."[1] These are additional examples of situations where employers may be deemed to have "constructive knowledge" that the employee is not authorized to work. They include: (1) written notice from SSA that the combination of name and Social Security number submitted for an employee does not match SSA records; and (2) written notice from DHS that the immigration status document or employment authorization document, 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.

Second, the final rule describes specific steps or "safe harbor" procedures that an employer should follow in response to a no-match letter. According to DHS, employers who follow these steps can be certain that the agency will not use the letter to find that the employer had constructive knowledge that the employee referred to in the letter is not authorized to work.

What are the Reasonable Steps/Safe Harbor Procedures that Employers Should Follow to Resolve a Mismatch in a No-Match Letter?

The final rule outlines reasonable steps or "safe-harbor" procedures that an employer should take after receiving a no-match letter to avoid a finding by DHS that it had constructive knowledge that an employee is not work authorized. The steps are set forth below.

First, an employer should check his/her records.

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[1] Current Definition of Knowledge

The current definition of "knowing" can be found at 8 CFR Section 274a.1(l)(1). That definition includes "actual" and "constructive knowledge" and states in part:

> 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.

The current definition gives examples where an employer has "constructive knowledge" that the employee is not authorized to work. The examples included in the definition at 8 CRF Section 274a.1(l)(1) include where an employer:

> (i) Fails to complete or improperly completes the Employment Eligibility Verification Form, I-9;
> (ii) Has information available to it that would indicate that the alien is not authorized to work, such as Labor Certification and/or an Application for Prospective Employer; or
> (iii) Acts with reckless and wanton disregard for the legal consequences of permitting another individual to introduce an unauthorized alien into its work force or to act on its behalf.

An employer should check his/her records to make sure that the discrepancy did not occur because of errors in its internal documentation, such as a typographical, transcription or clerical error. If there is an error, the employer should correct his/her records, inform the relevant agencies of the correction, and verify that the name and number, as corrected, match agency's records. Employers should make a record of the manner, date, and time of any such verification. ICE considers that a reasonable employer will take these steps within 30 days of receipt of the no-match letter.

Note: The regulations suggest two ways in which employers can verify the new information with SSA – by telephone or by internet access. Employers can call SSA weekdays from 7 a.m. until 7 p.m. (EDT) at 1-800-772-6270. Additionally, employers can use the Social Security Number Verification System (SSNVS) at http://www.ssa.gov/employer/ssnvadditional.htm.

Second, an employer should promptly request that the employee confirm that the employer's records are correct.
If the employee states that the employer's records are not correct, the employer should correct them, inform the relevant agencies of the correction, and verify the corrected information with the relevant agency. Employers should make a make a record of the manner, date and time of such verification.

Third, an employer should ask the employee to resolve the issue with SSA.
If according to the employee, the employer's records are correct, the employer should ask the employee to pursue the matter personally with the relevant agency, such as visiting a local SSA office, bringing original documents or certified copies required by SSA, which might include documents that prove age, identity, and citizenship or immigration status, and other documents that may be relevant, such as those that prove name change.

Note: The rule provides that a discrepancy will be considered resolved only if the employer verified with SSA or DHS that the employee's name matches in SSA's records the number assigned to that name, or, with respect to DHS letters, verifies the authorization with DHS that DHS records indicate that the immigration status document or employment authorization document was assigned to the employee.

Fourth, if the mismatch has not been resolved within 90 days, the employer should verify the identity and work eligibility of the employee by using a new Form I-9.
If none of the foregoing steps resolve the mismatch, within 90 days of receipt of the no-match letter an employer should verify the employee's identity and work authorization by having the employer and employee complete a new Form I-9 using a special verification process described below. The new Form I-9 must be completed within 3 days after the 90 days has passed and the new Form I-9 must be retained for the same period as the original Form I-9.

> *Form I-9 Special Verification Process*
> An employer should complete a new Form I-9 using the same procedure as if the employee were newly hired with three restrictions. First, an employer should complete the new Form I-9 within 93 days of receiving the no-match letter. Second, an employer may not accept any document containing the SSN or alien number that is the subject of the no-match letter, and no receipt for an application

for a replacement of such document, may be used to establish employment authorization or identity or both. Third, no document without a photograph may be used to establish identity or both identity and employment authorization.

Fifth, if the employer cannot confirm the employee's authorization to work by the procedures listed above and he/she continues to employ that individual, the employer risks liability for knowingly continuing to employ an unauthorized individual. If the discrepancy referred to in the no-match letter is not resolved, and if the employee's identity and work authorization cannot be verified using the Form I-9 special verification process, then the employer may choose to terminate the employee or face the risk that DHS will find that the employer had "constructive knowledge" that the employee was not authorized to work.

Important Considerations:

The final rule explicitly states that whether an employer will be found to have constructive knowledge "depends on the 'totality of relevant circumstances' present in the particular case." This standard applies in all cases.

Employers who follow the steps outlined in the rule will have "safe harbor" even if the worker is later found to be unauthorized to work. However, DHS makes it clear that "if, in the totality of the circumstances, other independent evidence exists to prove that an employer has constructive knowledge, the employer may still face liability."

Also, the final rule directly relates to "constructive knowledge" and specifies "safe-harbor" procedures that employers could follow to avoid the risk of being found to have "constructive knowledge" that an employee is not authorized to work in the U.S. based on receipt of a no-match letter. The rule does not preclude a finding that the employer had "actual knowledge" that an employee was not authorized to work in the U.S. An employer with "actual knowledge" that one of its employees is not authorized to work cannot avoid liability by following the procedures described in the final rule.

Additionally, the rule acknowledges that there may be other procedures a particular employer could follow in response to a no-match letter that would be considered reasonable by ICE and inconsistent with a finding that the employer had constructive knowledge that the employee was not authorized to work in the U.S. However, such a finding would depend on the totality of relevant circumstances.

If you have questions regarding the final rule, please do not hesitate to contact Karen Herrling at CLINIC at kherrling@cliniclegal.org or (202) 635-7410. Additionally, Ms. Herrling will be working on other materials both to help educate both employers and employees about the new rules.