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CLIENT UPDATE

Avoiding Jail and Fines When Employees May Be Out Of Status: What Employers Need to Know about Immigration Rules for "Constructive Knowledge" and Social Security "No Match" Letters

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Effective September 14, 2007, a Final Rule from the Department of Homeland Security's (DHS) U.S. Immigration and Customs Enforcement (ICE) bureau amends the regulations relating to when an employer may be charged criminally or civilly for the unlawful hiring or continued employment of unauthorized aliens. While ICE has been temporarily enjoined from enforcing these rules, employers need to understand ICE's enforcement position as embodied in these rules and review their policies for dealing with employees whose continued work authorization is questioned.

This Update summarizes the steps DHS considers "reasonable" in the Final Rule, and which an employer should take after receiving a "no match" letter from the SSA or a notice of discrepancy from DHS. Taking such "reasonable" steps may provide the employer with a "safe harbor" from a charge of "knowingly" employing any unauthorized persons mentioned in the "no match" letter or notice of discrepancy from DHS. The Final Rule provides that DHS will not use such a written notice as any part of an allegation that the employer had constructive knowledge that the employee referred to in the notice was not authorized to work in the U.S.

What Situations Does the Final Rule Cover?

As background, the Immigration and Nationality Act (INA) provides both criminal sanctions (a felony offense) and civil liability (administrative fines) for employers who knowingly employ unauthorized immigrants in the United States. Employers must understand that the statute and regulations already bar employment of unauthorized immigrants either when the employer has actual knowledge of the employee's unauthorized status, or when the employer has constructive knowledge of an employee's unauthorized status. "Constructive knowledge" is a legal concept similar to the idea of "willful blindness" – even where the employer does not actually know whether an employee lacks legal status, an employer cannot intentionally fail to make further inquiries if the employer does know information that would lead a reasonable person to conclude that employee might lack legal status.

ICE's Final Rule provides three situations in which the employer's failure to take reasonable steps could lead to a finding that an employer had "constructive knowledge" of the fact that an employee is an unauthorized alien. These situations include an employee's request to be "sponsored" for a "green card;" a notice from the Social Security Administration (SSA) that an employee's name and number do not match a name and number in the SSA's records; and a written notice from DHS that a document presented by an employee to verify identity or employment authorization does not match document records of DHS.

Compliance with the Law While Avoiding Discrimination

While complying with the Final Rule, employers must be sure to avoid terminating employees who are lawfully authorized to work, and to avoid discriminating against employees on the basis

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of their race, national origin, English ability or perceived "foreign" background. Many "no match" letters are caused by simple paperwork errors, such as data entry mistakes in the employer's payroll system, or an employee's using her married name in the employer's payroll records without having updated her records from her maiden name with the Social Security Administration. Similarly, an employee may have a temporary status authorizing employment, but still want his or her employer to file for permanent residence on his or her behalf. In fact, Social Security's own inspector general found that 4.1% of the agency's records contain errors, so that a "no match" letter may be rooted in problems having nothing to do with an employee's immigration status. Therefore, employers must carefully navigate between the requirement to make reasonable inquiries about the source of an employee's "no match" letter and the requirement not to take employment actions based on unwarranted assumptions about an employee's immigration status.

What is the Content of the Final Rule?

The rule, while temporarily prevented from going into effect by a federal court in California, in many ways is only a codification of obligations employers have had since 1986. The Rule provides a definition of when an employer will be considered to "know" an employee is unauthorized for employment. The Rule requires employers to take certain affirmative steps to resolve questions about an employee's employment authorization; if the employer fails to take those steps, it can be found to "know" that the employee was not authorized.

1. <u>Steps an Employer Must Take Within 30 Days of Receipt of No Match Letter from SSA</u>

SSA sends out "no match" letters to employers who submit earnings reports (W-2 Forms) in which the combination of employee name and SSN do not match SSA records. After receiving an SSA "no match" letter, the Final Rule requires an employer to promptly check its records to determine whether the discrepancy results from a typographical, transcription or similar clerical error in the employer's records or its communications to SSA. If the employer determines that the discrepancy is due to such an error, the employer must correct the error, inform SSA of the correct information, verify with SSA that the information in the employer's files matches the agency's records, make a record of the manner, date, and time of such verification and then store this record with the employee's Form I-9(s). The employer may update the employee's Form I-9 or complete a new Form I-9 (and retain the original Form I-9), but the employer should **not** perform a new Form I-9 verification (i.e. request new documents from the employee showing the employee's identity and work authorization) for this level of problem.

If the employer determines that the discrepancy is not due to an error in its own records, the employer must promptly request that the employee confirm that his or her name and social security account number in the employer's records are correct. If the employee states that the employer's records are incorrect, the employer must correct them, inform the SSA, verify the corrected records with the agency and make an appropriate record of the corrections. As with the prior level of correction, the employer may update the employee's Form I-9 or complete a new Form I-9 (and retain the original Form I-9), but the employer should **not** perform a new Form I-9 verification (i.e. request new documents from the employee showing the employee's identity and work authorization) for this level of problem.

If the employee confirms that the employer's records are correct, the employer must promptly advise the employee of the date that the employer received the SSA no match letter and advise the employee to resolve the discrepancy with the SSA within ninety days of the employer's receipt of the No Match Letter.

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2. Steps an Employer Must Take Within 30 Days of Receipt of a "Notice of Discrepancy" Letter from DHS

Upon receipt of a "Notice of Discrepancy" letter from DHS (in which ICE or USCIS indicate that the information in a document presented by the employee for I-9 purposes does not match the government's records), the employer must contact the local DHS office and attempt to resolve the question raised by DHS notice about the immigration status document or employment authorization document of that employee.

3. Prompt Action in Response to SSA and DHS No Match Letter

An employer who completes the steps described above in response to of a SSA no match letter or a DHS no match letter within 30 days of receipt will be considered by DHS to have acted promptly.

4. Verification of Employer's Authorization or Identity

If the discrepancy cannot be resolved with either SSA or DHS within 90 days of receipt of the written communication from either agency, the employer must attempt to reverify the employee's employment eligibility by completing a new I-9 employment verification form within an additional three days (i.e., no later that 93 days from the receipt of the initial "no match" or discrepancy letter). Companies should use the same procedures for reverification that they use when completing an I-9 form at the time of hire, with a few exceptions:

- The employee must complete section one and the employer must complete section two of the new I-9 form as ususal.
- The employer must not accept any document (or receipt for replacement of such a document) to establish employment authorization or identity, or both, if the document contains a DHS "A-file" number or social security number that is the subject of the SSA no match letter or DHS notification.
- The employee must present a document that contains a photograph in order to establish identity or both identity and employment authorization.
- The new I-9 form should be retained with the original I-9 form(s).

5. Employer Options if Employee's Identity and Work Authorization Cannot Be Verified

A discrepancy will be considered resolved **only if** the employer verifies with SSA or DHS, as the case may be, that the employee's name matches in SSA's records the number assigned to that name, or, with respect to DHS letters, verifies with DHS that DHS records indicate that the immigration status document or employment authorization document was assigned to the employee. If the discrepancy referred to in the SSA no match letter or notice of discrepancy from DHS is not resolved and an employee's identity and work authorization cannot be verified through completion of a new I-9 form, the employer must choose between terminating the employee or facing the risk that DHS may find that the employer had constructive knowledge that the employee was an unauthorized alien and therefore, by continuing to employ the alien, that the employer violated INA Section 274A (a) (2).

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The Final Rule also provides that whether an employer will be found to have constructive knowledge in any particular case will depend on the "totality of relevant circumstances." No "safe harbor" protocol is available where an employee requests employer sponsorship for a labor certification or employment-based visa petition. DHS considers this an example of a situation that may, depending on the totality of relevant circumstances, require an employer to take reasonable steps in order to avoid a finding by DHS that the employer has constructive knowledge that the employee is an unauthorized alien. DHS does acknowledge that not all situations involving such a request will be evidence of constructive knowledge and cites as an example work-authorized employees who are seeking permanent residency.

DHS takes the position that employers should apply the safe harbor procedures uniformly and without regard to perceived national origin or citizenship and that those who do so will not be found to have engaged in unlawful discrimination.

Conclusion and KRSS Recommendations

According to DHS, an employer who follows the "safe harbor" procedures laid out in the Final Rule avoids only the risk of being found to have constructive knowledge that an employee is not authorized to work in the United States based on receipt of a no match letter. DHS is not precluded from finding that an employer had constructive knowledge from other sources or that an employer had **actual** knowledge that an employee was an unauthorized alien. An employer with actual knowledge that one of its employees is an unauthorized alien cannot, therefore, avoid liability by following the safe harbor procedures described in the Final Rule. Indeed, even if the employer takes the steps set forth in the Final Rule and the discrepancies in the no match letter are resolved, that in and of itself, according to DHS, does not demonstrate that the employee is authorized to work in the United States.

In the face of this Final Rule and the additional burden it imposes, we strongly recommend that employers reexamine very closely the procedures they have in place to ensure I-9 compliance and to avoid the unlawful hiring or continued employment of unauthorized aliens. Similarly, upon receipt of a "no match" letter, a Notice of Discrepancy from DHS, or a request by an apparently employment-authorized worker for "immigration sponsorship," employers should consult with an attorney before taking any action so as to comply with the law while avoiding unlawful discrimination.

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