

NEW DHS RULES RE: EMPLOYER HANDLING OF SOCIAL SECURITY NO-MATCH LETTERS

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A new rule from the Department of Homeland Security (DHS) is set to take effect that establishes procedures for employers to follow when they receive “no-match” letters from the Social Security Administration (SSA). A no-match letter is notification from the SSA that the combination of an employee’s name and social security number as reported by the employer do not match SSA records. The new DHS rule clarifies that a no-match letter puts the employer on constructive notice that the employee may not be authorized to work in the United States.

The new rule also recommends steps the employer can take to protect itself from a finding that it had constructive knowledge that an employee was not authorized to work but nonetheless continued to employ the person. Until recently, employers had little guidance on how to respond when they receive a no-match letter from the SSA regarding an employee who used his or her social security card to verify employment authorization. The SSA and Department of Justice had announced that the no-match letter did not necessarily mean that the social security card is a fraud or that the employee does not have authorization to work but did not specify how the employer should handle the situation. The new rule is intended to provide employers with some guidance.

Before understanding the proposed rule’s impact, it is important to understand the law’s current requirements. Federal immigration law makes it unlawful for an employer to hire or continue to employ a person who the employer knows is not authorized to work in the United States. In addition to actual knowledge, an employer can be deemed to have constructive knowledge that the person is not authorized to work. The new rule states that an employer will have constructive knowledge that an employee is not authorized to work if the employer receives a no-match letter from the SSA. The new rule also sets forth steps the employer should take when it receives a no-match letter, and it provides that if the employer follows these steps, it will not be liable for knowingly employing an unauthorized alien.

The steps the DHS recommends an employer take are as follows:

1. Check employment records within 30 days of receiving the no-match letter to determine if the discrepancy is due to a typographical error or some other clerical error in the employer’s records or in its communications to the SSA. If there is a clerical error, the employer should correct its records, inform the SSA, and verify

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that the corrected name and number match SSA records by contacting the SSA. The employer must document the verification steps. The employer may also complete a new Form I-9 or update the current Form I-9 with the correct information. The employer should keep the original I-9 Form if it prepares a new one. No new I-9 verification is required or recommended.

2. If there are no clerical errors, the employer must ask the employee to confirm that the employer's records are correct. If the employee confirms the employer's records are correct, the employer must advise the employee of the date it received the no-match letter and advise the employee to pursue the matter with the SSA within 90 days of the employer's receipt of the letter.

3. If within 90 days of receiving the no-match letter, the employer is unable to verify with the SSA (a) that the employee's name matches a number assigned to that name in the SSA's records and (b) that the number is valid for work authorization, the employer must within three days verify the employee's work authorization and identity. The employer must complete a new Form I-9. The employer may not rely on any document containing the social security number that was the subject of the no-match letter or a receipt for a replacement social security card. The employer may only accept an identity document that includes a picture of the employee. The employer must keep both the original and new I-9 Form. If the employee is unable to provide the required proof of authorization to work and identity document, the employer must terminate the employee.

Employers can verify an employee's social security number by calling the SSA at 1.800.772.6270. The SSA also has online verification procedures at www.ssa.gov/employer/ssnv.htm.

Similar procedures exist when an employer receives notice from the DHS that an immigration-status document or employment-authorization document presented or referenced by the employee in completing Form I-9 is assigned to another person or was never assigned to anyone.

The new rule is a double-edged sword for employers. The rule establishes that employers who receive an SSA no-match letter may then be deemed to have knowledge that the employee who is the subject of the no-match letter is not authorized to work. The new rule also provides a safe harbor that will shield the employer from liability if the employer follows the rule's procedures.