
Immigration Update – September 28, 2007

REMINDER TO UPDATE I-9 FORMS FOR ALL NEW H-1B EMPLOYEES ON OCTOBER 1

On October 1 employers should complete or update I-9 forms of employees changing or entering the U.S. in H-1B visa status using the original approval notice as proof of employment authorization.

DHS ISSUES FINAL RULE ON EMPLOYER “NO-MATCH” OBLIGATIONS; JUDGE ISSUES TEMPORARY RESTRAINING ORDER UNTIL OCTOBER 1

U.S. Immigration and Customs Enforcement (ICE), an agency of the Department of Homeland Security (DHS), issued a final rule, effective September 14, 2007, that amends the regulations relating to the unlawful hiring or continued employment of unauthorized workers. The amended regulation describes the legal obligations of an employer, under current immigration law, when the employer receives a “no-match” letter from the Social Security Administration (SSA) or receives a letter regarding employment verification forms from the DHS. It also describes “safe-harbor” procedures that the employer can follow in response so that the DHS “will not use the letter as any part of an allegation that the employer had constructive knowledge that the employee referred to in the letter was an alien not authorized to work” in the U.S.

Background

Over the past few years the SSA has issued thousands of “no-match” letters to employers around the country. These letters advise employers that certain Social Security Numbers that were provided to the SSA by employees (through employers) do not match the names of the individuals that the SSA has on file for those numbers. While not always the case, no-matches often involve employees who are not authorized to work in the U.S. and are therefore using either a false Social Security Number or one assigned to another individual.

The New Rule

In an attempt to clarify years of confusion regarding the legal obligations of employers when they receive no-match letters from the SSA, ICE has issued a new rule regarding this issue. This new rule expands the current regulation’s definition of “constructive knowledge” and illustrates several situations that may lead to a finding that an employer had constructive knowledge that undocumented workers were employed. These additional examples involve an employer’s failure to take reasonable steps in response to several events. Specifically, an employer will be on notice for having employed an unauthorized alien if:



- The employer receives a written notice from the SSA (such as a “no-match” letter) stating that the combination of an employee’s name and Social Security Number does not match SSA records; or
- The employer receives written notice from the DHS that the immigration status or employment authorization document (EAD card) presented or referenced by an employee in completing the I-9 verification form was not assigned to the employee according to DHS records.

The DHS said that it “will continue to review the totality of relevant circumstances in determining if an employer had constructive knowledge that an employee was an unauthorized alien in a situation described in any of the regulation’s examples.”

Safe Harbor Procedures

The new rule creates a safe harbor from use of a no-match letter as part of an allegation of constructive knowledge if the employer takes certain steps to resolve the no-match and, if it cannot be resolved within a certain period of time, verifying again the employee’s identity and employment authorization through a specified process. Safe harbor is unavailable where the employee requests visa or labor certification sponsorship and is unauthorized to work. Additionally, if the employer knows or has enough inconsistent information to suggest an employee’s ineligibility, the safe harbor provisions will not protect the employer. On the other hand, the safe-harbor steps should be completed before taking any action against the employee to avoid national origin discrimination or wrongful termination claims.

The new rule describes more specifically the “reasonable” steps that an employer might take after receiving a no-match letter. Such steps include, for example, checking its records promptly after receiving a no-match letter to determine whether the discrepancy resulted from a typographical, transcription, or similar clerical error in the employer’s records, or in its communication to the SSA or DHS. If there is such an error, DHS expects the employer to correct its records, inform the relevant agencies, verify that the name and number, as corrected, match agency records, and make a record of the manner, date, and time of the verification. ICE and DHS will consider a reasonable employer to have acted promptly if the employer takes such steps within 30 days of receipt of the no-match letter. The new rule also describes a verification procedure that the employer may follow if the discrepancy is not resolved within 90 days of receipt of the no-match letter.

Enforcement

Employers may verify a Social Security Number by calling 1-800-772-6270 from 7 a.m. to 7 p.m. EST, or online at <http://www.ssa.gov/employer/ssnv.htm>. Employers should keep a record of any verification.

Previously, the SSA’s position was that the no-match letters were only for informational purposes, recognizing that discrepancies could be the result of a variety of clerical errors or name changes. The no-match letters were not used for enforcement. That is expected to change although how enforcement will be conducted remains unclear.



SSA's release of the tax year 2006 no-match letters will be accompanied by a letter from DHS. SSA had planned to release these letters beginning the second week of September when the no-match regulation took effect, but a federal judge issued a temporary restraining order in response to an AFL-CIO lawsuit, enjoining SSA from mailing the no-match letters to approximately 140,000 employers. The next hearing is scheduled for October 1st, so no letters are expected to be sent out before then.

The full text of the final rule is available at

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

Information from the SSA on the no-match process for employers is available at <http://www.ssa.gov/employer/noMatchNotices.htm>.

TIPS ON FORM I-9 VERIFICATION COMPLIANCE

Form I-9 (Employment Eligibility Verification) issued by U.S. Citizenship & Immigration Services (USCIS) must be completed and retained by all employers for all new employees. Since November 1986, every new hire, whether a U.S. citizen or a foreign national, must complete section 1 on the first day of employment, attesting to the individual's identity and employment eligibility. Within the first three days of hire, the employer must complete section 2 of the I-9 by examining original documents of identity and employment authorization, recording the starting date of employment, noting the document numbers on the form, and certifying by signing under penalty of perjury that the documents examined appear to be genuine and relate to the employee. Employers must also refrain from engaging in prohibited acts of discrimination against new hires and applicants for employment, such as basing decisions on citizenship or national origin status, or insisting that employees provide only specific types of identity documents or work permits.

Recently, the federal government has used the avenue of criminal law enforcement to prosecute employer violations of immigration laws. Prudent employers should follow a set of steps to confirm that their compliance obligations under the immigration laws are fulfilled. This checklist can serve as a starting point for employer immigration compliance:

Current I-9s

- As long as no formal enforcement proceedings are pending or likely, employers should remove from their files and discard original I-9s no longer subject to the I-9 "retention rule." I-9s may be destroyed after three years from the date of hire or one year from the date of termination, whichever is later.
- Employers should perform voluntary audits of all or a representative sample of retained I-9s to measure compliance practices.
- As a measure of good-faith compliance and to mitigate potential fines, employers should correct I-9s with errors and missing information, keeping original I-9s and initialing changes with the date of correction. Changes should be made in a separate color ink on the existing form.
- Employers should establish a reminder system for the timely reverification of employment eligibility for foreign employees who have time-limited work permission.
- Employers should take prompt action if notified by the Social Security Administration that a discrepancy exists between employer-provided records on specific workers and the agency's



own data (the so-called SSA “no-match letter”). An employer acts appropriately in this situation by checking the employer’s records, providing the employee an opportunity to seek an official correction or, if unable to verify and reconcile the discrepancy, considering (on advise of counsel) whether termination of employment is required.

- If numerous no-match letters are received, employers should consider reverifying the entire workforce but should take precautions to avoid unlawful immigration-related employment discrimination.
- Employers should decide whether to:
 - Copy or refrain from copying original documents of identity and employment eligibility. On the one hand, copying creates a paper trail, making it easier for the employer and the government to review prior compliance actions and for the employer to make correction to I-9s, if required. On the other hand, maintaining added paperwork is burdensome and costly, and requires that employers act uniformly by copying all original documents reviewed on all employees for I-9 purposes and keeping the copies with the I-9s.
 - Maintain I-9s and required records in paper, microfiche, or electronic format. Immigration regulations now allow electronic storage and electronic signatures for I-9s. While using digital technology reduces paper storage costs, the regulations pose added requirements for assuring data integrity, facilitating audits and easing the government’s investigative burden.
 - Participate in the Department of Homeland Security’s electronic “Basic Pilot” and/or “IMAGE” verification programs. The Basic Pilot program allows an employer to check the employment eligibility of foreign nationals (new hires only) through the government’s immigration database. IMAGE is the ICE Mutual Agreement between Government and Employers, a plan for voluntary self-policing and submission to annual immigration audits first by the government and then by qualified third-party entities. See <http://www.ice.gov/partners/opaimage>.

Future Hires

- Set up a system for handling future I-9s.
- Complete Section 1 of the I-9 on the first day of work for all new hires.
- Complete the rest of the I-9 within three days of the first day of work.
- Consider pre-completing the Employer’s Business Name and Address in Section 2 and pre-fill Employer Authorized Representative’s Name and Title if the same person always completes the Employer Certification.
- Do not accept copies of work or identity documents.
- Make sure all new hires complete I-9s in person before a company official (to confirm identity) or an authorized agent (with respect to whom the employer must take full responsibility for any I-9 mistakes or omissions).

Company Practices

- Engage in regular training for employees handling I-9 completion.
- Establish an I-9 routine and follow it consistently for every employee.



- Create a system for tracking dates of hire and terminations of employment to purge I-9s from current storage to minimize liability (assuming no actual or threatened government investigation exists or is likely).
- Consider establishing policies (in consultation with counsel) for future compliance and ongoing voluntary audits.

NCSL RELEASES REPORT ON 2007 ENACTED STATE IMMIGRATION LEGISLATION

State legislators have introduced roughly two and a half times more immigration-related bills in 2007 than in 2006, according to the National Conference of State Legislatures (NCSL). In the continued absence of comprehensive federal reform, states have developed a variety of approaches and solutions of their own. NCSL has released a comprehensive online report that provides an overview of introduced legislation and summarizes enacted laws relating to immigrant and refugees by state.

The report includes legislative proposals and laws concerned with immigration enforcement as well as those in which legal and undocumented immigrants, migrants, and refugees are affected. The report is available at

<http://www.ncsl.org/programs/immig/2007ImmigrationUpdate.htm>.

QUESTIONS

If you have any questions about the information in this newsletter, please contact one of the Trow & Rahal attorneys listed below.

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