

# Need to Know

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## Immigration and Employment Update: New Regulation proposed by ICE: “Constructive Knowledge” Clarified

By Nancy-Jo Merritt

Immigration Customs and Enforcement (ICE) recently proposed an amendment to the I-9 regulations adding two more examples of situations in which an employer will be held to have “constructive knowledge” of an employee’s unauthorized status, one of which arises out of the Social Security Administration’s (SSA) “no-match” letters.

Although clearly it is a violation of the Immigration and Nationality Act to hire or continue to employ an individual if you know he or she does not have work authorization, it is also a violation if you have “constructive knowledge” of the individual’s lack of work authorization.

The current regulations define “knowing” as including 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.*

To clarify that somewhat involved definition of “constructive knowledge,” the current regulations offer several examples:

- Failure to complete, or improperly completing, the I-9 Form;
- Having specific information available that indicates that the employee is not authorized to work; or
- Recklessly and wantonly disregarding the legal consequences of permitting another individual to bring an unauthorized employee into the company’s workforce.

The proposed regulation offers two more examples of situations that may lead to a finding that an employer had “constructive knowledge” of an employee’s unauthorized status.

The proposed examples of “constructive knowledge” are the following:

- Written notice from the SSA that the combination of name and social security count number submitted for the employee does not match SSA records; or
- Written notice from the Department of Homeland Security (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 any person.

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The example that will be of most interest to employers is receipt of an SSA “no-match” letter. Because of the ambiguities in the SSA notices – the social security number appears to be invalid, but the letters instruct the employer not to fire the employee because of the notice -- these letters have been an on-going concern. The solution provided by DHS in the proposed regulation is to focus on the employer’s response to the “no-match” notice, viewing a lack of response as constructive notice of the employees’ unauthorized status, and adherence to rigid response guidelines as a “safe harbor” from knowledge.

The “safe-harbor” procedure is the same for both examples and is based upon the employer moving promptly to resolve any discrepancy or error. The comments to the proposed regulation are very clear: employers will not avoid “constructive knowledge” by ignoring facts that reasonably lead to the conclusion that a worker is not eligible to accept employment in the U.S. The proposed “safe-harbor” is a series of timed actions that demonstrate the employer’s good-faith attempt to promptly respond to the information received about an employee’s status.

Upon receipt of a “no-match” letter or notice from DHS after an I-9 inspection, within 14 days the employer must first check its own records, and then inform the employee of the need to clarify or resolve the documentation he or she has provided to evidence work authorization. Within 63 days of receipt of the notice, the employee can return only if there is re-verification of work authorization on a new I-9 Form, as though he or she were a new hire. The employee may not use a document containing a social security number or alien registration number, which SSA or DHS has notified the employer is invalid.

Completion of the re-verification process within these time limits will provide the employer a “safe-harbor” from liability, even if the employee later appears to have provided false documentation.

It is important to remember that the regulation is “proposed” and not final. DHS invites comments from the public on the regulation, submitted on or before August 14, 2006, identified by DHS Docket No. ICEB-2006-0004, by one of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- E-mail: You may submit comments directly to ICE by email at [rhs.regs@dhs.gov](mailto:rhs.regs@dhs.gov). Include the docket number in the subject line of the message.
- Mail or Hand Delivery/Courier: Director, Regulatory Management Division, U.S. Citizenship and Immigration Services, Department of Homeland Security, 111 Massachusetts Avenue, NW, 2<sup>nd</sup> Floor, Washington, DC 20529. [To ensure proper handling, please reference DHS Docket No. ICEB-2006-0004 on your correspondence.] This mailing address may also be used for paper, disk, or CD-ROM submissions. Contact telephone number (202) 272-8377.

*Nancy-Jo Merritt focuses her practice in immigration law and has nearly three decades of experience representing domestic and international companies with issues concerning foreign national employees and business immigration matters. She provides strategic counseling to clients and assists employers in developing compliance programs. She earned her B.A., (1964) M.A., (1974) J.D., (1978) from Arizona State University.*



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