

Friday February 6, 2009

Immigration Update: The “No-Match” Regulation: Is It Back? Sort Of--

By Nancy-Jo Merritt and Matthew J. Martinez

IDHS recently published a final rule, “**Safe Harbor Procedures for Employers Who Receive a No-Match Letter,**” confirming its guidance in the 2007 Proposed Rules regarding Social Security Administration (SSA) notices to employers listing non-matching social security numbers. The supplemental information accompanying the final rule contains a detailed analysis of DHS’ development of the rule, and an economic analysis of the effects of the rule. The final rule itself is nearly word-for-word exactly as initially published in the proposed rule, which is currently subject to a preliminary injunction issued by the U.S. District Court in the Northern District of California last year at the request of plaintiffs opposing the rule.

The proposed rule was initially scheduled to go into effect on September 14, 2007, but on October 10, 2007 it was preliminarily enjoined by the District Court. The injunction remains in place, but the Department of Homeland Security returned to the Court to ask that the injunction be dissolved after publication of the final rule. The court has set a schedule for motions by the parties, and if the Court eventually decides the new version of the rule is legal, the “No-Match” regulation will be back.

Although the injunction remains in place for the moment, publication of the rule provides a look into the government’s definition of “good faith” when determining the presence or absence of valid work authorizations after receipt of an SSA “no-match” letter.

We discussed the proposed rule after publication in 2007, and are happy to provide a repeat. As we discussed last year, 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, and it is also a violation to hire or continue to hire a worker once you have “constructive knowledge” of his or her lack of work authorization. The SSA no-match notices suggest that the listed employees might not be work-authorized, but warn the employer not to make a quick assumption, and thus the SSA list should not, by itself, provide “constructive knowledge” to the employer of a lack of valid work authorization. Obviously, this puts the employer in an uncomfortable position, which the DHS rule attempts to address.

The final regulation states that “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.

To clarify that somewhat involved definition of “constructive knowledge,” the initial version of the regulation offered several examples, which are still included in the final rule:

- 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

quick links

- [Immigration Practice](#)
- [Labor and Employment Practice](#)
- [Unsubscribe](#)
- [Acrobat Reader](#)

Phoenix
3003 N. Central Ave.
Suite 2600
Phoenix, AZ 85012
(602) 916-5000

Tucson
One S. Church Ave.
Suite 1000
Tucson, AZ 85701
(520) 879-6800

Nogales
420 W. Mariposa Rd.
Suite 200
Nogales, AZ 85621
(520) 281-3480

Las Vegas
300 South Fourth Street
Suite 1400
Las Vegas, NV 89101
(702) 692-8000

Denver
1700 Lincoln
Suite 2900
Denver, Co 80203
(303) 291-3200

- Recklessly and wantonly disregarding the legal consequences of permitting another individual to bring an unauthorized employee into the company's workforce.

The proposed and final version of the regulation adds two more examples of situations that may lead to a finding that an employer had "constructive knowledge" of an employee's unauthorized status.

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

The example 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 employer is instructed not to fire the employee because of the notice -- these letters have been an on-going concern. The solution provided by DHS is a focus on the employer's response to the no-match notice, and a lack of timely response by the employer to the SSA letter will create constructive notice of the employees' unauthorized status.

The response guidelines, if followed by the employer, create a "safe harbor" from "constructive knowledge."

The "safe-harbor" procedure requires the employer to move promptly to resolve any discrepancy or error in its records. The DHS comments to the 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 "safe-harbor" process is a series of timed actions that objectively demonstrate the employer's good-faith attempt to promptly resolve the implications of a non-matching SSN which does not arise from a mis-copied number or similar error.

Upon receipt of a no-match letter, or notice from DHS after an I-9 inspection, the employer must first check its own records for error, and then inform the employee of the need to clarify or resolve the documentation he or she has provided to show work authorization. Within ninety days of receipt of the notice, the employee may return and re-verify his or her work authorization on a new I-9 Form, as though he or she were a new hire, although the employee may not use a document containing a social security number or alien registration number which SSA or DHS has indicated is invalid.

A good faith adherence to 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. As long as the preliminary injunction is in effect, the DHS cannot require that the regulation be followed, but as it provides a specific approved procedure for managing no-match letters, it is valuable. A recent 9th circuit decision allowed back pay and reinstatement to dismissed employees who were given only three days by the employer to resolve SSA no-match notices. The Court pointed out that three-day notice was an "extremely demanding policy," noting that the DHS safe harbor regulation gave employers 90 days to resolve the discrepancies. Thus, the DHS' method for dealing with no-match issues has also received approval from the 9th Circuit, even while the injunction is in effect.

Federal Contractors Required to Use E-Verify . . .But Not Yet

In June of 2008, President Bush issued an Executive Order requiring certain government contractors and subcontractors to participate in the E-Verify program, beginning January 9, 2009. On December 23, 2008, the United States Chamber of Commerce and several other business groups filed a lawsuit challenging the implementing USCIS rule and the Executive Order. On January 9, the Department of Homeland Security agreed to suspend the rule until February 20, 2009. In a notice provided January 29, 2009, U.S. Citizenship and Immigration Services stated that federal contractors and subcontractors will not be required to begin using E-Verify until May 21, 2009, and that the Federal Acquisition Regulation (FAR) has been amended to reflect this change.

Federal contracts and solicitations issued after May 21, 2009 will include a clause requiring government contractors to use E-Verify, and will also apply to subcontracts of over \$3,000 for services or construction. Contracts exempt from this rule include those for less than \$100,000, or for commercially available off-the-shelf items. Companies awarded a contract with the federal government must enroll with E-Verify within 30 days of the contract award date, and must then begin using the E-Verify system to confirm that all new hires, and all other employees directly working on federal contracts, are authorized to legally work in the United States. Unlike instructions for E-Verify applicable to other employers, federal contractors must also check the work authorization status of current employees hired prior to the award of the federal contract.

[FAQs: Federal Contractors and E-Verify](#)

USCIS Postpones Implementation of New Form I-9

USCIS announced on January 30, 2009 that it has postponed the implementation of its new I-9 regulation until April 3, 2009, in connection with the Obama administration's recent regulatory review. The postponement delays implementation of USCIS' new rule revising the list of identity and employment authorization documents employers may accept for completion of the Form I-9, and consequently delays the use of a new edition of Form I-9, both of which were scheduled to take effect on February 2, 2009.

Until the new Form I-9 takes effect, which will be no earlier than April 3, 2009, employers should continue to use the prior version of the Form I-9 carrying the annotation "Form I-9 (Rev. 06/05/07) N" on the bottom right-hand corner and the expiration date of June 30, 2009.

This form can be accessed on the USCIS website at: <http://www.uscis.gov/files/form/I-9.pdf>.

In December 2008, the USCIS published an interim final rule that revised the list of identity and employment authorization documents that employers may accept for completion of Form I-9, Employment Eligibility Verification. A new version of Form I-9 was issued with the rule. The regulation revises the list of documents that employers can accept to establish a worker's identity and employment authorization (List A documents). The following documents have been added to List A on the new version of Form I-9:

- Foreign passports containing the I-551 permanent residence notation printed on a machine-readable immigrant visa. Previously, only the I-551 passport stamp and the I-551 permanent resident card were acceptable.
- The new U.S. Passport Card.
- Passports and various other documents for citizens of the Federated States of Micronesia and the Republic of the Marshall Islands.

Eliminated from List A were several employment authorization documents which are now obsolete, including Forms I-688, I-688A and I-688B (Temporary Resident Card and outdated Employment Authorization Cards), all of which have expired. Once the regulation takes effect, expired documents will no longer be acceptable for employment verification purposes. Only unexpired documents or documents without an expiration date (i.e. Social Security card) will be acceptable. [Remember, though, that it is not necessary to re-verify an employee whose I-551 -- the "green card" -- later expires. [Permanent resident status does not expire.]

The new Form I-9 also makes some changes to Section I of the form, where new employees indicate their current status. In this section, employees must indicate whether they are U.S. citizens, lawful permanent residents or foreign nationals authorized to work in the U.S. The new form creates a new selection for non-citizen nationals of the U.S. Non-citizen nationals of the U.S. include individuals who were born in American Samoa, certain residents of the Northern Mariana Islands who have not become U.S. citizens, and certain individuals who were born abroad to non-citizen U.S. nationals. U.S. nationals do not possess full U.S. citizenship, but they are not considered to be "aliens" and may therefore enter and work in the U.S. without restriction.

If you have questions about the proposed regulations concerning Form I-9 or other immigration issues, please contact Nancy-Jo Merritt at (602) 916-5411 or nmerritt@fclaw.com, or Matt Martinez at (602) 916-5446 or mmartinez@fclaw.com. Fennemore Craig can help employers review their I-9 verification worksite compliance policies.

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.

Matthew J. Martinez focuses his practice in in the area of immigration and nationality law. Mr. Martinez works with companies to conduct internal I-9 audits in an effort to assess compliance with immigration, employment and discrimination laws, and works with clients to develop hiring policies and procedures. He also assists employers in responding to agency-initiated workplace investigations and in defending against immigration-related discrimination complaints. He earned his B.S. (1995) and his J.D. (1999) from Brigham Young University.



Nancy-Jo Merritt
Director
602.916.5411
nmerritt@fclaw.com



Matthew J. Martinez
Of Counsel
602.916.5446
mmartinez@fclaw.com