

## STATUS OF “NO-MATCH” LETTER REGULATION AND COMPLIANCE WITH CONTINUED IMMIGRATION ENFORCEMENT EFFORTS

### Implementation of New “No-Match” Letter Rule Suspended While DHS Prepares Revised Rule

On August 15, 2007, the Department of Homeland Security (DHS) issued a final rule entitled “Safe-Harbor Procedures for Employers Who Receive a No-Match Letter.” The rule outlined a “safe harbor” procedure for employers receiving either (1) a letter from the Social Security Administration (SSA) indicating that SSA records do not match the Social Security information the employee provided on the W-4 form; or (2) a “Notice of Suspect Documents” from DHS concerning the immigration status of a particular employee. Essentially, the safe harbor provided the employer with a specific period of time to resolve the discrepancy at issue and/or complete a new I-9 form.

Although the regulation was to go into effect September 14, 2007, implementation was halted by a legal challenge filed on behalf of several business groups and labor organizations. On October 10, 2007, a federal district judge in California issued a preliminary injunction stopping DHS from implementing the regulation. Then on November 23, 2007, DHS essentially abandoned its attempt to enforce the current version of the no-match regulation and asked the court to stay all proceedings until March 2008. The court continued the preliminary injunction and agreed to stay proceedings until March 24, 2008, based upon DHS’ representation that it plans to publish a revised rule that will pass legal muster. Some reports indicate this new rule may be published by DHS as early as December 2007, though nothing has been published to date.

### Responding to “No Match” Letters After Suspension of New Rule

For now, SSA will continue its current policy of issuing no-match letters to employers who submit more than ten W-2s in a wage report that fail to match SSA’s records, as well as to employers whose no-match letters exceed at least one-half of one percent of all the W-2s in the wage report.

Given the recent mixed messages from federal agencies concerning what is required upon receipt of a no-match letter, employers who receive one face the challenge of determining how to respond in order to comply with the law. For example, employers have previously been advised by SSA that a no-match letter cannot be the sole basis for adverse action against an employee – such as laying off, suspending, firing, or discriminating against the individual – and that a no-match letter should not be used to draw conclusions about one’s immigration status. On the other hand, Immigration and Customs Enforcement (ICE), which monitors the interior enforcement of immigration laws under the umbrella of DHS, has stated that an employer’s failure to adequately follow-up on no-match letters could lead to a determination of constructive

knowledge of an employee's unauthorized status. Moreover, DHS suggested last year that receipt of a high percentage of no-match letters could increase the likelihood of selection for an ICE audit.

Despite the confusion and flurry of legal activity concerning the new no-match regulation, employers should expect DHS to continue its enforcement efforts under the Immigration and Reform Control Act of 1986 (IRCA), which will include the continued issuance of no-match letters. ICE has also continued to pursue worksite audits and raids across the nation. To be prepared for an ICE audit and remain in compliance with IRCA, employers should consider taking the following steps:

### ***Follow Up and Investigate***

Develop a procedure for following up and investigating discrepancies noted in a no-match letter. Review records to make sure there were no typographical errors in reporting information to SSA. If errors are found, correct them with SSA and on the employee's I-9 form. If there were no errors, consider sending the employee a short letter including a copy of the no-match letter and advising the employee to follow up with SSA to ensure his or her name and Social Security number (SSN) have been accurately recorded in the SSA database.

### ***Employee Confirms Correct Information***

If the employee says the correct name and SSN have been provided to the employer, the employer may respond to the no-match letter and advise SSA that the information initially reported has been confirmed and that neither the employer nor employee can explain the discrepancy. While current law does not require the employer to report back to SSA, many employers do so to minimize the risk of ICE violations.

### ***Employee Indicates Correct Information Provided, but Employer Obtains Different Information***

If the employer obtains actual or constructive knowledge that the employee is not authorized to work, the employer should seek legal advice about terminating employment to avoid IRCA fines and/or other civil and criminal penalties. Sometimes, upon presenting the employee with a no-match letter, the employee may admit to not being authorized for employment in the United States; may admit to using false documents; and/or may ask the employer to sponsor him or her for an immigration benefit. Other times the employee will simply not report back to work. As a rule, a tip from a co-worker or any other individual should not be used as the sole basis for termination or requiring re-verification on the I-9 form.

### ***Do Not Jump To Conclusions***

Do not panic or terminate employees upon receiving a no-match letter. Under IRCA, an employer may terminate the employment relationship for employment eligibility violations only if the employer has actual or constructive knowledge that an employee is unauthorized to work in the United States, and a no-match letter alone does not constitute actual or constructive knowledge.

**Periodic Audits and Training**

One of the best strategies in preparing for an ICE audit is to **be prepared**. At minimum, an employer should audit I-9 files annually to make sure a fully completed I-9 form is on file for all employees hired after November 1986. Employers should also invest in training managers and supervisors on I-9 compliance issues to minimize the risk of errors and/or findings of actual and/or constructive knowledge.

While federal agencies create new no-match rules they hope will pass legal muster, employers should have clear internal policies and procedures for handling no-match letters and must ensure appropriate company officials understand and implement IRCA compliance measures in the hiring and employment process.

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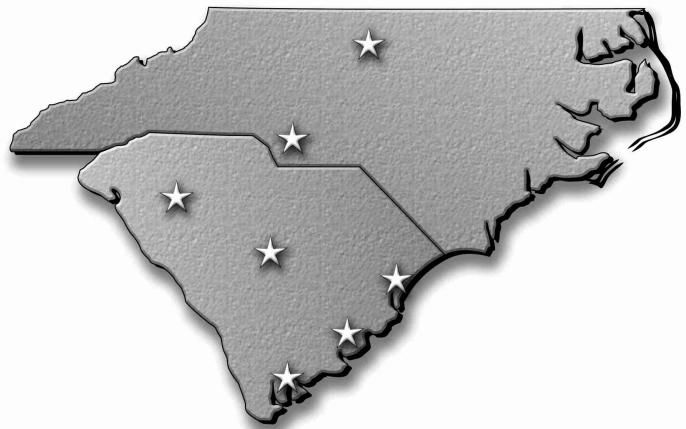
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