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DHS Issues Supplemental 'Safe Harbor' Rule to Guide Employers Who Receive Social Security 'No-Match' Letters

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On October 28, 2008, the Department of Homeland Security (DHS) issued a Supplemental Final "Safe Harbor" Rule (the "Final Rule"). Originally proposed on June 14, 2006, and subsequently issued on August 15, 2007, as a final rule (the "Initial Final Rule"), the Final Rule clarifies what steps an employer should take in response to receipt of a "No-Match" letter (NML) issued by the Social Security Administration (SSA) or a Notice of Suspect Document (NSD) from DHS, to preclude DHS from using the NML or NSD as evidence of the employer's "constructive knowledge" that it has employed or continues to employ an unauthorized alien in violation of the immigration laws.

According to the DHS, the Final Rule is effective immediately. As a practical matter, however, it cannot be implemented until the United States District Court for the Northern District of California lifts its order preliminarily enjoining implementation of the Initial Final Rule that it issued on August 31, 2007. Promulgation of the Final Rule follows publication of a Supplemental Proposed Safe Harbor Rule in March 2008, which sought to address the issues raised by the District Court in its order granting a preliminary injunction of the Initial Final Rule. In the Final Rule, the DHS indicates that it shortly will ask the District Court to lift its injunction so that the Final Rule can take effect. The Final Rule does not differ substantially from the Initial Final Rule.

In his comments on the final new rule, DHS Secretary Michael Chertoff stated:

> The additional information in this supplemental rule addresses the specific items raised by the Court, and we expect to be able to quickly implement it.…The No-Match Rule, along with E-Verify, will increasingly make the pleas of ignorance from businesses that seek to exploit illegal labor ring hollow, and equip their responsible competitors with the tools they need to hire and maintain a legal workforce.

Under the immigration laws, an employer can be held liable civilly and criminally for knowingly employing or continuing to employ an unauthorized alien. The term "knowingly" includes both actual and "constructive" knowledge. Under the regulations, constructive knowledge is "knowledge that may fairly be inferred through notice of certain facts and circumstances that

would lead a person, through the exercise of reasonable care, to know about a certain condition." The regulations provide examples of the government's view of what may, depending on the totality of the relevant circumstances, be constructive knowledge. These examples include an improperly completed or signed Form I-9 and the employer's failure to take reasonable steps after receiving information indicating that an employee may be an alien not authorized to work. The Final Rule adds to this list an employer's receipt of a NML from SSA and NSD from DHS. The Final Rule promises employers that DHS will not use the receipt of a NML or NSD as evidence of "constructive knowledge" to prove a civil or criminal violation of the law against employment of unauthorized aliens if the employer follows the protocol outlined by DHS in the Final Rule—even if the employee turns out to be an unauthorized alien.

Now that the DHS has issued the Final Rule, it will be useful again to review the protocol established by the Initial Final Rule and repeated by this Final Rule:

A. SSA NMLs:

1. Upon receipt of a NML, the employer must review its records within 30 days to make sure the discrepancy noted by SSA does not result from a typographical, transcription or similar clerical error. If an error is found, the employer also must verify with SSA that the resulting name and number, as corrected, match the SSA records within the same 30-day period.

2. If no employer error is found, the employer must promptly notify the employee about the no-match. If the employee indicates that the employer's records are not correct, the employer must correct them and check with SSA as noted in sub-paragraph 1. If the employee claims the records are correct, the employer must instruct him or her to correct the no-match problem with SSA within 90 days of the employer's receipt of the NML.

3. When the employee advises the employer that the problem has been corrected, the employer must verify this with the SSA. If the employee cannot resolve the problem within the 90-day period, the employer must re-verify the employee by having him/her complete a new Form I-9 using the same procedures as if it was a new hire except that: (i) the employer and employee must complete sections 1 and 2 within 93 days of receipt of the NML; (ii) the employer cannot accept any document that contains the disputed Social Security number, or any receipt for the replacement of such a document; and (iii) the employee must present a document that contains a photograph to demonstrate identity or both identity and employment authorization.

B. DHS NSDs:

1. Upon receipt of a NSD from DHS, the employer first must contact the local DHS office (as instructed by the NSD) and attempt to resolve the question within 30 days of receipt of the notice.

2. If the employer cannot resolve the question with DHS within 90 days of receipt of the NSD, the employer must re-verify the employee within the next three days by having them complete a new Form I-9 using the same procedures as if it was a new hire except that: (i) the employer and employee must complete sections 1 and 2; (ii) the employer cannot accept any document questioned by the DHS NSD, or any receipt for the replacement of such a

document; and (iii) the employee must present a document that contains a photograph to demonstrate identity or both identity and employment authorization.

C. Form I-9 Retention:

The employer should note all actions taken pursuant to this Final Rule in a transparent manner on the Form I-9 (or memo attached to the Form I-9), and then must retain both the new and former Forms I-9 for the statutory period, namely, three years or one year following termination, whichever is longer.

In its Supplementary Guidance accompanying the Final Rule, the DHS states that Social Security NMLs and DHS NSDs do not, by themselves, conclusively establish that an employee is unauthorized. However, DHS also makes clear that it views no-match letters as legitimate indicators of possible lack of work authorization, and that NMLs and NSDs assist in focusing on employers who may be employing "non-trivial" numbers of unauthorized aliens. Thus, employers can reasonably anticipate that DHS will use NMLs and NSDs to identify targets for enforcement as well as evidence of "constructive knowledge" in enforcement actions. This is particularly likely where an employer has received multiple NMLs or NSDs , or where employees are retained after failing to correct the information noted in these documents. In short, employers can no longer afford to ignore NMLs and NSDs with impunity and those that do can expect to face DHS investigations that could result in civil or criminal penalties.

For additional information on the Final Rule, please visit http://www.dhs.gov/xnews/releases

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