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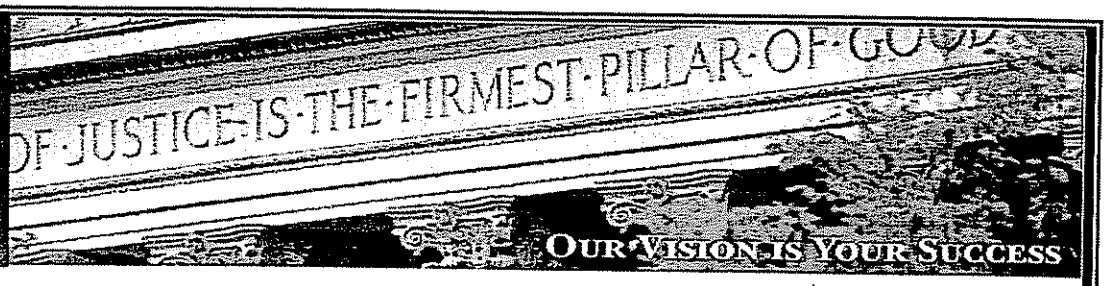

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Recent Trends of Interest to Business and Government

The DHS Issues Final Regulations On Mismatched Social Security Numbers

By Benton J. Mathis, Jr. and Adrian Moore-Pleasant

The Department of Homeland Security ("DHS") has published final regulations concerning safe harbor procedures for employers who receive a "no match" or a "no assignment" letter. These regulations significantly increase the civil and criminal risk of all employers who receive "no-match" letters and fail to take prompt corrective action to ascertain if employees have used a false name or social security number.

The regulations set forth recommended procedures for an employer to avoid a finding of "constructive knowledge" that it is employing an unauthorized alien. Compliance with the recommended steps provides a "safe harbor" that DHS will not use the notice as evidence of constructive knowledge, but it is not a defense to a claim that the employer had actual knowledge or constructive notice from other sources.

It is well-settled that federal law prohibits "knowingly" employing unauthorized or "illegal" workers. Under the current regulations, knowledge of the employees' unlawful status can be either "actual" or "constructive." 8 C.F.R. § 274a.1(l)(1). Constructive knowledge is defined as "knowledge which 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 situation." 8 C.F.R. § 274a.1(l)(1). Examples of constructive knowledge, under the current regulations, of employing a worker not authorized to work in the United States include when an employer: (1) fails to complete a Form I-9; (2) has information available to it that would indicate that the alien is not authorized to work, such as a labor certification or application for prospective employment; or, (3) acts with reckless and wanton disregard for the legal consequences of permitting another individual to introduce an unauthorized alien into its work force or to act on its behalf. Id.

The DHS final rules add two additional circumstances where an employer may be found to have constructive knowledge that an employee is not authorized to work in the United States. The first situation arises when the employer receives an "Employer Correction Request," ("ECR") commonly referred to as a "no match" letter, from the Social Security Administration ("SSA") saying that the name and social security number provided on the employee's Form W-2 earnings report do not match agency records. 8 C.F.R. § 274a.1(l)(1)(iii)(B). The second situation arises when an employer receives a "no assignment" letter from DHS saying that the immigration status document or employment authorization document presented or referenced by the employee in completing Form I-9 is assigned to another person, or that there is no agency record that the document has been

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assigned to any person. 8 C.F.R. § 274a.1(l)(1)(iii)(B).

If an employer receives one of these two notices and willfully fails to respond with appropriate corrective action, and if the employee in fact is not authorized to work, DHS may impute to the employer constructive knowledge of the employee's ineligibility to work lawfully in the United States depending on the totality of circumstances. The penalties under federal law for knowingly employing an unauthorized alien can be both civil and criminal. The civil penalties involve a monetary fine of up to $11,000 per alien and the criminal penalties may include both a monetary fine of up to $3000 per alien and imprisonment for up to six months. 8 C.F.R. § 274a.10.

Under the regulations, an employer may avoid a finding of constructive knowledge by taking reasonable steps to verify employment eligibility. The first step in response to a no match letter is for the employer to promptly check its records to ensure that the mismatch is not the result of an error on the part of the employer. Specifically, the employer should look for typographical, transcription, or other clerical errors.

If the employer determines that the discrepancy is due to a clerical error by the employer, the employer must correct the error and inform the SSA of the correct information. The employer also must verify with the SSA that the employee's name and social security number, as corrected, matches SSA records. The employer may use the SSA's online Social Security Number Verification System ("SSNVS") available at http://www.ssa.gov/employer/ssnv.htm or call the SSA at 1-800-772-6270 to verify the corrected information.

As a practical matter, the employer should make a record of the manner, date, and time of such verification, print the SSNVS screen, and then store such record with the employee's Form I-9. 8 C.F.R. § 274a.2(b). The employer may update the employee's Form I-9 or complete a new Form I-9 (and retain the original form I-9), but the employer should not perform a new Form I-9 verification. The employer must complete these steps within 30 days of the receiving the SSA's no match notice.

If there is no clerical error on the part of the employer, the second step is for the employer promptly to request that the employee confirm that the name and social security number in the employer's records are correct. If the employee states that the employer's records are incorrect, the employer must correct the records, inform SSA, verify the corrected information, and make a record as set forth above. If the employee confirms that the employer's records are correct, the employer must promptly request that the employee resolve the discrepancy with SSA.

Employers are not required to advise employees how to resolve the discrepancy with SSA nor to explain to the employee which documents may be required by SSA. Instead, the rules provide that the employer must: (1) advise the employee of the date that the employer received the written notice; (2) advise the employee to resolve the discrepancy with the SSA within 90 days of the date of the written notice; and, (3) share with the employee any guidance the SSA notice may provide on how the discrepancy might be resolved. The employer should request that the employee inform the employer when the discrepancy is resolved with SSA. The employer also could motivate the employee to act more promptly by informing the employee that SSA will not credit his or her earnings towards retirement benefits unless the discrepancy is corrected.

If the employer is unable to verify with the SSA within 90 days of receiving the written notice, the employer must again verify the employee's employment authorization and identity by completing a new Form I-9 for the employee using the same procedures as if the employee were newly hired. Specifically, the employee must complete Section 1 ("Employee Information and Verification") and the employer must complete Section 2 ("Employer Review and Verification").

Both Section 1 and Section 2 must be completed within an additional 3 days and no later than 93 days after the employer receives the written notice. The employer, however, must not accept: (1) any document that contains a disputed social security number or alien number referenced in the no match notice; or (2) any receipt for an application for replacement of such document, to establish employment authorization or identity or both. In addition, the employee must present a document that contains a photograph in order to establish identity or both identity and employment authorization.

The employer must retain the new Form I-9 with the prior Form I-9 and both documents should be retained for the same period as the law requires for an original Form I-9. If the employee cannot produce the required documents within three days, the employer should terminate the employee's employment. Otherwise, the employer risks the possibility that a DHS audit may conclude that the employer knowingly violated federal immigration laws by continuing to employ a person who it knew or should have known was not authorized to work in the United States.

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Some critics of the final rules have expressed concerns that unauthorized aliens could simply produce another false document with a different social security number or alien registration number.

Under this scenario, the employer could accept these new documents and not be required to verify if the "new" documents genuinely appear to be authentic on their face. However, an employee who produces different documents with different numbers, depending on the circumstances, could still put the employer on notice that the employee has committed document fraud. Under such circumstances, an employee would face not only general policies that an employer applies to employees suspected of criminal conduct, but also could face federal prosecution for fraudulently completing a Form I-9. See Contreras v. Cascade Fruit Co., 9 OCAHO no. 1090 (2003).

The final rules also provide employers with guidance on how to respond reasonably to the receipt of a "no assignment" letter. The first step is for the employer to contact the local DHS office and attempt to resolve the issue relating to the document. If the employer is unable to verify with DHS within 90 days that the document is assigned to the employee, the employer must again verify the employee's employment authorization and identity within an additional 3 days by completing a new Form I-9 following the procedures set forth above. If the employee cannot produce the required documents within 3 days, the employer should terminate the employee's employment.

The regulations also provide that an employer may follow other "reasonable procedures" in response to a no match or no assignment letter. However, failure to follow the procedures approved by DHS runs the risk that DHS will not consider the alter-