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Immigration Alert

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Department of Homeland Security Proposes Federal Regulations Aimed at Improving Worksite Enforcement:

How Should Employers Respond to Social Security No-Match Letters?

This has been a year of increased worksite enforcement. In April alone, Immigration and Customs Enforcement (ICE) arrested more people (including both employers and employees) for unauthorized employment then they had in the entire previous year. Public statements issued by Assistant Secretary of ICE Julie Myers and other Department of Homeland Security officials indicate that worksite enforcement operations will continue and that employers who fail to adhere to employment verification procedures can expect to face heavy civil and criminal penalties. It is therefore imperative for employers to comply with employment eligibility verification procedures. Even employers who comply with the Form I-9 requirements, will likely receive what is known as a **Social Security no-match or mis-match letter** at some point in the course of doing business. We now have additional guidance from ICE on what to do upon receiving such a letter.

On June 14, 2006, ICE issued proposed federal regulations[1] providing guidance on employer obligations and outlining "safe-harbor" procedures employers may follow upon receipt of a no-match letter.[2] ICE has requested comments from the business community regarding these proposed regulations by August 14, 2006.[3] However, immigration advocates and employers nationwide have recognized that the timelines delineated in the proposed regulations are impractical. Likewise, the proposed regulations are overly broad and do not address employer liability and responsibilities in certain situations. For example, the regulations do not address what employer liability will be if the Social Security Administration (SSA) fails to respond to their inquiries, what to do if one of their employees is a victim or identity theft and as a result receives a no-match letter and what employer's obligations are in cases where employees have

[1] A proposed regulation is a regulation proposed by a government Agency that does not yet have a binding effect. A proposed regulation is generally published in the Federal Register in order to begin a public comment period on its provisions. This comment period enables the Agency to assess public reaction to the regulation, consider revisions to the regulation and incorporate additional information into the regulation before its final publication.

[2] From the Social Security Administration (SSA). The proposed regulation also provides guidance on the steps employers should take upon receipt of a letter from the Department of Homeland Security that the immigration status document or employment authorization document presented by the employee completing Form I-9 was assigned to another person or that there is no agency record the document was assigned to anyone.

[3] Comments on the proposed regulations may be submitted through the Federal eRulemaking Portal available at: http://www.regulations.gov, by emailing ICE directly at rfs.regs@dhs.gov or by U.S. Mail addressed to:

Director, Regulatory Management Division
USCIS, Department of Homeland Security
111 Massachusetts Ave., NW, 2nd Floor
Washington, DC 20529

Please remember to include DHS Docket No. ICEB- 2006-0004 in the subject line of your correspondence.

"ICE places a high priority on investigating identity fraud and document fraud cases," said Jerry Phillips, resident agent-in-charge of the ICE office in Louisville. "Counterfeit documents create the illusion of legitimacy and allow dangerous criminals to hide in plain sight. ICE is committed to shutting down illegal enterprises that compromise the security of our nation."

not presented a Social Security Card as an underlying document when completing Form I-9. As the business community is rallying and expressing concerns to Congressional leaders as well as the White House, it is hoped that the implementation of these regulations will be delayed. We urge employers to comment on the regulations so that ICE may review and address the problems, as well as refine the language where necessary. While employers are certainly in need of guidance in this area, it is disappointing to note that the proposed regulations were introduced before comprehensive immigration reform was enacted.

What is a no-match letter?

Employers annually send the SSA millions of W-2 forms; in numerous cases the employee names and Social Security Numbers (SSNs) do not match. When this occurs, the SSA sends out letters to employers throughout the United States listing the names and SSNs of employees whose names do not match the social security numbers provided to the employer. Often these letters are the result of clerical errors or name changes. Nevertheless, ICE argues that these are sometimes indicators that employees are unauthor-ized to work in the United States and should be used as one of the triggers for an investigation.

As indicated above, no-match letters can also be sent to employers by ICE following an inspection of the employer's Form I-9s. If ICE is unable to successfully confirm the employee's immigration status or work authorization from the Form I-9, ICE will generate a type of DHS no-match letter informing the employer of the discrepancy.

What is Constructive Knowledge?

ICE contends that following its guidance in the proposed regulation will minimize an employer's exposure and liability. Specifically, in the proposed regulations, ICE provides examples of concrete steps that employers can take to provide them with a "*safe-harbor*" from liability for hiring unauthorized workers. The "*safe-harbor*" provisions relate to an important concept, that of *constructive knowledge*. An employer may be in violation of federal regulations if they have *constructive knowledge* that an employee is an unauthorized worker.[4] An employer is deemed to have constructive knowledge if a reasonable person would infer from the facts[5] that the employee is unauthorized. Constructive knowledge constituting a violation of federal law has been found where (1) the I-9 employment eligibility form has not been properly completed, including supporting documentation, (2) the employer has learned from other individuals, media reports, or any other source of information available to the employer, that the alien is unauthorized to work, or (3) the employer acts with reckless and wanton disregard for the legal consequences of permitting another individual to introduce an unauthorized alien into the employer's work force.[6]

"Broadening the Definition of Constructive Knowledge"

ICE's proposed regulation attempts to broaden this definition by offering that *constructive knowledge* of unauthorized employment may now be provided to employers who received a SSN no-match letter from the government. Specifically, the proposed federal regulation adds two more examples of what the Federal government would

[4] C.F.R. 274A (a) (2), 8 U.S.C. 1324a (a) (2)

[5] 8 C.F.R. 274a.1(l)

[6] 8 C.F.R. 274a.1(l)

"ICE has no patience for employers who tolerate or perpetuate a shadow economy," said William L. Wallrapp, resident agent in charge of the ICE Office of Investigations in Omaha. "We will use all our investigative tools to bring such employers to justice, no matter how large or small the company."

consider *constructive knowledge* available to an employer indicating that an employee may possibly be unauthorized for employment in the U.S. These include:

- Written notice from the SSA that the combination of name and SSN submitted for an employee do not match Agency records; and
- Written notice from 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 anyone.

What is the "Safe Harbor" outlined by ICE?

The proposed regulation specifies the steps that an employer should take as a reasonable response to receiving a no-match letter. If an employer takes such steps, DHS will not allege that the employer had constructive knowledge. The regulations recommend that upon receipt of no-match letters, employers take the following "*safe-harbor*" procedures to verify the employment eligibility of the employee in question:

1. The employer must check their records *promptly* upon receipt of a no-match letter to determine if it was the result of a clerical error. If the letter is the result of a clerical error, the employer should correct their records, inform the relevant agencies of the error and verify that the name and number as corrected, match the Agency's records. ICE considers employers to have acted reasonably if they resolve the discrepancy with the relevant agency within **14** days of receipt of a no-match letter.
2. If by checking their records, the employer cannot resolve the discrepancy, they must contact the employee and request confirmation that the employee's information is correct. If they are incorrect, the employer must correct the employee's information in their records, inform the relevant agencies of the correction and match the corrected information with the Agency's records.

   If the records are correct according to the employee, then the employer must ask the employee to pursue the matter themselves with the SSA. Once again, ICE considers employers who take these corrective actions within **14** days of receipt of a no-match letter to have acted reasonably.

Please note, that ICE will consider the discrepancy resolved **only if the employer verifies** with the SSA or DHS that the employee's name matches in SSA's records a number assigned to that name, and that the number is valid for work or work with DHS authorization.

Employers may verify a SSN with SSA by calling 1-800-772-6270, weekdays from 7 a.m. to 7 p.m. EST. Employers may also assess SSA's online verification procedures at http://www.ssa.gov/employer/ssnv.htm. Generally, when a company representative calls the SSA, they are connected to an SSA representative who will ask them for the their name, EIN, and company name. The company representative must then explain that they received a no-match letter, and provide the employee's name and SSN for verification. The SSA representative then runs the number through the Agency's records. The representative will then ask the company representative for the employee's name, date of birth and gender in order to confirm not only that the SSN is valid, but that the number matches the employee in

"In fiscal year 2005, ICE initiated 511 criminal worksite investigations nationwide. These cases resulted in 176 criminal arrests, 140 criminal indictments and 127 criminal convictions. Through May of fiscal year 2006, ICE has launched more than 219 criminal worksite investigations. These cases have resulted in 382 criminal arrests, 82 criminal indictments, and 80 criminal convictions. Furthermore, these efforts have resulted in the arrest of 2,100 individuals on administrative immigration violations. Immigration laws exist to protect American citizens," stated U.S. Attorney Sullivan.

question. Please note that whenever a representative of your company contacts SSA they should always record the date and time of the SSN verification for your records.

However, contacting a representative from the SSA to verify employment eligibility is often a lengthy process because of the difficulty in speaking to a live person. The line is constantly busy and wait times are exhausting. Many employers, particularly larger employers who receive numerous no-match letters may not be able to complete the SSA verification process within the proposed 14 day time-frame. This proposal may also substantially impact small employers who may not have the resources to allocate significant employee time to SSA verification. GT attorneys recognize that the proposed time-frame offered by ICE is unrealistic and can assist interested parties in the preparation of comments to be sent to the Agency calling for a longer time-period in the final regulations for employer compliance.

If the no-match issue is not verified with 60 days of receipt of the no-match letter, the regulation also describes another procedure that the employer may take to verify the employee's identity and work eligibility. This procedure would require the employer and employee to complete a new Form I-9 as if the employee was a new hire, with certain restrictions. These restrictions:

- Require Section 1 to be completed within 63 days of receipt of the no-match letter. Under current law, employers are given 3 days to complete the Form I-9;
- Exclude any document that was the subject of the no-match letter from being used to establish employment eligibility; and
- Exclude any document without a photograph of the employee from being used to establish identity. While the requirements focus on documentation, employers are reminded not to over-document new Form I-9s, as that could subject them to additional liability for discrimination.

If the procedure described above is completed and it is determined that the employee is unauthorized, DHS will not consider the employer to have constructive knowledge of an unauthorized worker's status.

Be careful not to go overboard

Employers should also be aware that they must not employ discriminatory methods to verify employment eligibility or verify employee's identities, resorting to "citizen only" hiring policies to avoid SSA inquiries is illegal. If employers have general questions about potential anti-discrimination claims, we urge them to contact the Office of Special Counsel directly. More detailed questions warrant a consultation with immigration or labor counsel.

Problems with the Proposed Regulations

Remember, the current procedure described above is not the only means by which employers may verify the identity and work eligibility of their employees upon receipt of a no-match letter. However, following these guidelines provides a "*safe- harbor*" to employers. Even after the passage of a final regulation however, employers may choose to take a different approach after considering the totality of circumstances. There will be circumstances where employers may make an informed business decision and choose not to follow the "safe harbor" advice.

"It is understandable that many from around the globe would want to come to live, work and raise families here in the greatest democracy in the world. However, this must be done in compliance with United States immigration laws – not in violation of them."

"'Employers who take advantage of illegal labor to gain a competitive advantage for their own profit will be identified, arrested and prosecuted,' said Julie L. Myers, Department of Homeland Security Assistant Secretary for ICE. 'ICE has no patience for employers who tolerate or perpetuate a shadow economy.'"

In reality the proposed regulations do not take into account the economic and business realities that employers face. Aside from situations where employers may be facing a significant loss of employees in their work force (depending on the number of social security mis-match letters received), implementing the system described above will be difficult in practice. The proposed regulation does not take into consideration the real life scenarios that often present themselves in the workplace. For example, the timing offered to correct an error with the SSA is not reasonable in a world of red-tape. Additionally, the proposed regulation does not consider other situations often encountered by employers including:

- A no-match letter resulting from a case of mistaken identity, because some people may have a common name, i.e. John Smith, that may result in a system error;
- A SSA database entry may return a result that shows the person is using another's SSN, but will not take into consideration that someone may have been the victim of identity theft;
- Cases where the SSA is unresponsive to employer inquires preventing them from verifying information in the proposed time-frame; or
- A person presenting valid documents to fulfill the I-9 requirements with no SSN card used as an underlying document to provide eligibility.

Having performed initial audits and drafted social security mis-match policies, we know there will be many situations where an employer will need to consider the *totality of the circumstances*[7] to determine what actions to take or not take in light of this new guidance.

Experienced counsel will be invaluable to companies as they will assist management in reviewing the *totality of the circumstances* and determining what to pursue. When faced with a government review it will be critical to prove to DHS that the employer did not have *constructive knowledge* that the employee was unauthorized to work in the U.S. Creating a good record and documenting the process of determining the course of action will be critical in the future.

That being said, employers should understand that even if they choose to follow ICE's final guidance, there will still be employment issues including potential discrimination charges. At the end of the day if the employee fails to resolve the SSN discrepancy, the employer does not have an automatic right to terminate the employee. In fact, firing an employee for these reasons may leave an employer liable for wrongful termination, if it is found that the employee was in fact authorized to work in the United States.

Is this something we should be implementing now?

Our telephones have been ringing off the hook with calls from weary employers who want to understand what needs to be done to comply and when it needs to be done. Since we are unsure of the effective date of this regulation, and since we are even more unsure of how the final regulation will read, we would suggest that immigration policy handbooks not be immediately rewritten. Nevertheless, this is the future of worksite enforcement and employers need to begin preparations to further review the work eligibility of their workforce. Whether we end up with comprehensive immigration reform or "enforcement first" in the upcoming years, employers will bear a much

[7] A totality of the circumstances standard suggests that there is no single deciding factor, to determine if the employer had constructive knowledge of the employee's employment eligibility. Rather the employer must consider all the facts, the context, their response to the no-match letter and conclude from the whole picture whether the government would be justified in finding them to have had constructive knowledge of the immigration status of their employee.

heavier burden in terms of a time commitment and loss of workers. At this point in time, it is not necessary to implement the policies or guidelines described in the proposed regulation.

However, employers who receive a number of no-match letters, must take certain concrete actions to respond to the letters. As part of that process, they may also want to conduct voluntary, in-house audits to assess the state of their company's I-9s and how they can correct errors and ensure proper compliance with immigration regulations. Often we find that many of our client's I-9 recordkeeping practices need to be updated, which often provides an excellent opportunity for employers to develop consistent record-keeping procedures, that in-turn reduce the number of no-match letters they receive.

The world of work-site enforcement is becoming much more sophisticated and the burden on employers appears to be increasing. ICE has renewed and increased funding and will be using those resources to target employers at critical infra-structure site, as well as targeted industries. Employer's acting in bad faith and engaged in egregious actions will continue to make the headlines while the rest of us work quickly to clean house and understand our obligations.

GREENBERG TRAURIG'S BUSINESS IMMIGRATION GROUP has extensive experience in advising multinational corporations on a variety of employment related issues, particularly I-9 employment eligibility verification matters and minimization of exposure and liabilities. GT develops immigration related compliance strategies and programs, as well as performs internal I-9 compliance reviews. GT has successfully defended businesses involving large-scale government raids and audits. GT attorneys provide counsel on a variety of I-9 issues including penalties for failure to act in accordance with government regulations, anti-discrimination laws and employers' responsibilities upon receiving social security "no-match" number letters.

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