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counselors at law

DHS Proposes Regulation Setting Forth Guidance for U.S. Businesses when Receiving "No-Match" Letters from the Social Security Administration

According to the Government Accountability Office (GAO) a significant percentage of the Social Security Numbers (SSN) submitted on earning reports filed by employers result in a "no-match" against the master list maintained by the Social Security Administration ("SSA"). In response, almost a million "no-match" letters are sent to employers each year. Currently, many employers ignore the letters.

The Department of Homeland Security (DHS) has proposed new rules that would change an employer's obligations for confirming a worker's employment authorization. Under the proposed rule, employers would be deemed to have "constructive knowledge" that an employee does not have employment authorization if:

1. The employer receives a "no-match" letter and the employer is unable to verify the employee's identification and work authorization.

2. The employer receives written notice from the DHS that the immigration status 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 employment authorization document was assigned to anyone.

A DHS finding that an employer possessed constructive knowledge that a worker is not authorized to work could result in fines or other penalties. A key change is that an employer would be required to verify with SSA or DHS that a "no-match" letter has been corrected.

I. The Current State of Law

The Immigration Reform and Control Act of 1986 (IRCA) requires businesses to request and examine identification documents in order to verify that each potential employee is eligible to be employed in the United States. The IRCA requires employers to keep the I-9 forms that are completed by the applicant and also encourages employers to make copies of other identification documents.

The IRCA subjects employers to civil penalties if they do not attempt to ascertain the identity of employees. The IRCA prohibits hiring illegal aliens with knowledge that they are illegal, or retaining employees that are later discovered to be illegal aliens. Violation of these provisions can lead to both civil and criminal penalties. The penalties

increase where a pattern of illegal hiring can be shown.

Enforcing the IRCA has been difficult because forged or stolen identification materials have become commonplace and difficult to detect. In addition, many employers ignore or turn a blind eye to the requirements of the IRCA knowing that enforcement of its provisions are unlikely to occur.

The proposed regulations have been described by DHS as an effective enforcement tool that would allow the government to identify employers that frequently hire illegal immigrants.

2. Best Practices

Given the recent attention within the government and the public to the issue of illegal employment, employers should make the best efforts to comply with current law and prepare for future legislation. An important preventative measure is to make sure employees complete I-9 forms and that these forms are up to date and filed. In addition, employers should look into discrepancies reported in no-match letters and make efforts to ensure the identity of employees. The proposed regulation also provides a safe harbor for employers who take reasonable steps within 14 days after receiving a no-match letter from the SSA:

- The employer should check its records to determine whether the discrepancy resulted from a typographical, transcribing or similar clerical error. If there is such an error, the employer should correct its records, inform and verify with the relevant agencies that the discrepancy has been resolved and make a record of the manner, date and time of the verification.

- If the steps above do not resolve the discrepancy, the employer should request that the employee confirm the documentation provided to the employer and, if necessary, work with the DHS or the SSA to resolve any discrepancy

If, within 60 days of the receipt of the no-match letter, the discrepancy is not resolved, and if the employee's identity and work authorization cannot be verified by the employer and employee, then the employer must choose between taking action to terminate the employee or face the risk that the DHS may find that the employer had constructive knowledge that the employee was an unauthorized alien.

By following the safe harbor provisions in a timely fashion, an employer may avoid a DHS finding that, based on the totality of circumstances present in the particular case, the employer had constructive knowledge that the employee was not authorized to work in the United States.

Please note that the proposed regulations are now undergoing a period of public comment and could be changed in that process before being implemented.

This update is a summary for general information and discussion only. It is not a complete analysis and may not be relied upon as legal advice. Please contact William E. O'Gara, Esquire for further consultation at 401-824-5117 or send an email to wogara@pldw.com