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DHS Publishes Final Regulations on "Safe Harbor" Provisions for Employers Receiving Social Security Administration No-Match Letters and DHS Notices

The Department of Homeland Security (DHS) issued its Final Regulation regarding an employer's duty to respond to Social Security Administration's (SSA) No-Match letters and DHS Notices. The Final Regulation was published in the Federal Register on August 15, 2007 and becomes effective on September 14, 2007.

The Regulation provides that receipt of the No-Match Letter can be evidence that the employer has constructive knowledge that an employee is not authorized to work. However, an employer is afforded a "safe harbor" from any DHS audits, fines, or sanctions if that employer follows the response provisions contained within the Regulation.

Under existing laws and regulations, an employer is prohibited from employing anyone who lacks employment authorization. The employer can have either actual knowledge or "constructive" knowledge that an employee is not authorized to work. Both actual knowledge and constructive knowledge can lead to DHS audits, fines, and sanctions.

The Regulation defines constructive knowledge as "knowledge which may be fairly 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." In addition to existing examples, the Regulation adds two specific conditions where an employer has constructive knowledge. They are:

1. Written notice from the SSA (typically the SSA's No-Match Letter) advising that the Social Security Number (SSN) and the name of employee submitted to SSA does not match SSA records; or,
2. Written notice from DHS that an employee has presented an immigration document or Employment Authorization Document that is assigned to another person or that there is no record of a status document or Employment Authorization Document issued to the employee.

Under the Regulation, receipt of these notices now conveys information to the employer sufficient to conclude that the employer has constructive knowledge that it employs an unauthorized worker. The employer can avoid any resulting liability by taking advantage of the "safe harbor" provisions contained in the Regulation.

A. Procedures for Responding to SSA No-Match Letters

The "safe harbor" provisions require the employer to try to resolve the discrepancy. Within 30 days of receipt of the notice from SSA, the employer must do the following:

1. Check employment records to determine if the discrepancy was due to employer's clerical error. If there is an error, the employer must:
 - a. Correct the incorrect information in its records.
 - b. Notify the SSA of the correction.
 - c. Verify with the SSA that the employee's name and SSN, as corrected, matches the SSA records, and then record the date, time, and method used to perform this verification.

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2. If there is no clerical error, promptly request the employee to verify whether the information contained in the employment records is correct.
 - a. If the employee states the employer's records are incorrect, the employer must correct its records in the same manner discussed above.
 - b. If the employee states the information is correct, the employer must refer the employee to the SSA to resolve the discrepancy and inform the employee that the discrepancy must be resolved within 90 days of the date of receipt of the No-Match Letter. The employer must provide the date of receipt to the employee.

If the discrepancy cannot be resolved within 90 days of the employer's receipt of the No-Match letter, the employer is given an additional 3 days to complete a new Form I-9 just as if that employee were starting employment for the first time. The employer must do the following:

1. Complete I-9 without relying upon the documents that are the subject of the No-Match Letter. The employee must present different documents to verify authorization to work.
2. Accept only documents containing a photograph to establish the employee's identity.
3. Retain the new Form I-9 and the existing Form I-9 for the same period that would be required if the employee were starting employment for the first time.

Verification of the information collected for the new Form I-9 is not required, as it is when correcting clerical errors and inaccurate information as discussed above.

If the employee cannot provide the documents required for completion of the new Form I-9, the employer is expected to terminate the employee.

B. Procedures for Responding to DHS Notices

DHS does not provide notices similar to the SSA's No-Match Letters. Typically, notice from DHS follows from audits and other investigations. The Regulation states the employer must take reasonable steps to resolve the issues identified in the notice within 30 days of receipt of the notice. In the absence of any guidance regarding those reasonable steps, the employer should follow the procedure provided in the notice. If the notice does not contain such procedure, the employer should contact DHS for further guidance. If the employer is unable to obtain guidance from DHS, then the employer should inform the employee of the notice and follow the same steps as outlined above for response to No-Match Letters.

C. Summary

Womble Carlyle's Labor and Employment Practice Group continues to monitor these changes which greatly impact our clients. As new information and guidance is received, we will continue to update you through our Client Alerts. In addition we will be providing a free webinar in September to discuss proper compliance with the new regulation. You will receive an invitation via email containing registration information shortly.

Should you have any questions about this Final Regulation, contact Stuart Brock in our Charlotte office (704-331-4975 or [email](#)), the Womble Carlyle Labor and Employment attorney with whom you already work, or any one of the Womble Carlyle Labor & Employment attorneys whose contact information may be located via the [web](#).

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