

Evolving Employer Responsibilities Under The No-Match Regulations

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Immigration Customs Enforcement (ICE) recently finalized regulations requiring employers to respond in specific ways to letters informing them of non-matching employee names and social security numbers. On the eve of implementation, however, a federal court has enjoined the regulations from taking effect. Companies should nevertheless be prepared for their possible implementation.

For several decades, the Social Security Administration has mailed "no-match" letters to employers when an employee's name fails to match the social security number. INS (now DHS) audits have also turned up non-matching names and numbers, and ICE now issues "no-match" letters as well. The new "no-match" regulations are an attempt to use the "no-match" letters so as to prevent fraudulent use of social security numbers and detect unauthorized employment. They were scheduled to go into effect in September of 2007.

The no-match regulations state that receipt of a "no-match" letter can be evidence an employer had constructive knowledge that the employee lacks authorization to work. To avoid such potential liability, including fines and penalties, the new regulations require employers to go through a series of steps. Generally, within 30 days the employer must check its own records and verify the accuracy of the employee's name and social security number so as to rule out clerical or typographical errors. Absent such error, the employee must be asked to confirm his or her name and social security number, and that information must then be resubmitted and proper agencies notified (note that additional reasonable steps must be taken if the no-match comes from DHS). If the employee claims the information is correct but resubmission fails to resolve the discrepancy, the burden is placed upon the employee to pursue the matter with the Social Security Administration.

If after 90 days the matter is not resolved, then beginning on the 90th day the employer is given 3 days to submit a new I-9 form, with documentation from the employee not including the questionable social security number, and including a photograph. If unable to confirm employment eligibility through these further efforts, the employee will ordinarily be terminated within 93 days, or else the employer will risk fines and penalties, and risk liability for knowingly continuing to employ an unauthorized person.

The "no-match" enforcement notices were to begin being sent in mid-September of 2007, but a temporary restraining order, which later matured into a preliminary injunction, has prohibited the enforcement. In its decision the federal court warned that the planned regulations could hurt legitimately documented workers, as well as businesses, stating that in the court's opinion the implementation would be "severe" causing "irreparable harm to innocent workers and employers."

Employers are cautioned to keep an eye on future developments, and to be prepared for quick action. The preliminary injunction buys time for employers, but a decision dissolving or overturning the injunction could result in an immediate need for compliance

procedures by employers. If they have not already done so, employers will want to be prepared with policies and procedures that are in compliance with the regulations in the event they need to be immediately implemented.