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DHS Rescinds No-Match Rule: Ball is in SSA's Court

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October 06, 2009

The Department of Homeland Security has published a final regulation rescinding the Bush Administration's "safe harbor" regulation from 2007 about no-match letters sent to employers from the Social Security Administration. Nevertheless, the essential, longstanding lesson of the regulation has not changed at all: completely ignoring a no-match letter could reflect "constructive knowledge" of the lack of work authorization of the affected employees.

DHS has chosen not to include DHS letters to that effect in SSA no-match letters, but instead to spend resources on enforcement activities such as audits, investigations, and prosecutions, and on educational, cooperative, and prospective verification efforts such as "IMAGE" and "E-Verify." The implication is that an employer takes a risk by not participating in the voluntary verification programs, and there is some truth in that, but each employer must make its own evaluation among the available options.

In the regulation preamble, DHS essentially repeats the lesson that the safe harbor rule taught:

Receipt of a No-Match letter, when considered with other probative evidence, is a factor that may be considered in the totality of the circumstances and may in certain situations support a finding of "constructive knowledge." A reasonable employer would be prudent, upon receipt of a No-Match letter, to check their own records for errors, inform the employee of the no-match letter, and ask the employee to review the information. Employers would be prudent also to allow employees a reasonable period of time to resolve the no-match with SSA.

But now it is less clear than it might have become exactly how employers should determine whether a worker has resolved a mismatch, and exactly how and when employers should take action such as completing a new I-9 or terminating the worker's employment.

The issue is not a moot one. DHS says whether SSA will resume issuing no match letters to employers is up to SSA. (Note: SSA has continued to send letters to workers, sometime delivered to the employer when the worker used the employer's address on Form W-4). Resolving discrepancies for social security accounts, which is SSA's only purpose for the letters, would seem to remain a compelling interest for SSA. But by perhaps unintended consequence, SSA no-match letters are an involuntary system for employer notification concerning possible lack of authorization of existing workers, whereas E-Verify can only be used to query systems about new hires (except certain government contractors must E-Verify some existing workers and may do so for all). The continued employment of many unauthorized workers in the United States may hang in the balance of SSA's next step.

The regulation now returns to its former wording, removing SSA and DHS notifications (and the elaborate "safe harbor" provisions) from the listing of what is "constructive knowledge." But the regulation states that "Constructive knowledge may include, but is not limited to, …" the items it lists. Employers, especially large ones, would be surprised to realize all that is learned by the whole of its employees, and the law can attribute that collective knowledge to the employer, seemingly holding the employer accountable for what action an

omniscient being would take on that collective knowledge. Employers must consider corporate compliance programs of varying types to manage the resulting legal risk.

How We Can Help

Baker Donelson's Immigration Group regularly counsels employers on I-9 compliance. We perform private audits of I-9 documents, prepare compliance programs, and train managers and workers in implementing those programs. We evaluate particular questionable documents and situations. We help employers decide whether and how to create or store I-9 forms electronically, to use Social Security Administration's Number Verification System, or to participate in the Department of Homeland Security's E-Verify program. We help federal contractors design and implement E-Verify programs in compliance with Executive Order 13465 as implemented in Federal Acquisition Regulations.

We defend sanctions actions by ICE for "paperwork" and "knowingly hire" violations of I-9 rules. We work with our strong Litigation Department to bring and defend claims against competitors based on employment of unauthorized aliens. We advise and defend claims against competitors based on employment of unauthorized aliens. We advise and defend employers and managers in the increasingly common criminal investigations and proceedings relating to employment of aliens.

We coordinate our Team's services closely with our firm's well-respected Labor and Employment Law Group and with our firm's Government Investigations and Litigation Group. We provide advice and coordinate with U.S. and foreign preparers concerning U.S. taxation of international companies doing business in the U.S., and concerning the U.S. taxation of international workers placed in the U.S. and abroad.