

“No-Match” Safe Harbor Requires Skilled Navigation

By Jeanette Phelan
Winston-Salem, NC Office

The Department of Homeland Security has released its Immigration and Customs Enforcement “no-match” regulation. Although the regulation contains “safe harbor” provisions, getting to the harbor will require skillful navigation through some choppy waters.

The new rule will take effect September 14, 2007. For a copy of the regulations, [click here](#).

Constructive knowledge: When should you know?

Under the Immigration and Reform and Control Act of 1986, it is unlawful for employers to knowingly hire or continue to employ unauthorized aliens. Knowledge can be either “actual” (meaning that the employer really knew that it was hiring illegal aliens) or “constructive” (meaning that the employer did not know but should have known).

The new rule expands the definition of “constructive knowledge” to include the failure to take reasonable steps in the following situations:

- * Employee requests that employer sponsor employee for labor certification or visa petition (in contradiction to information provided in employment verification process);
- * Employer receives “no-match” letter from the Social Security Administration; OR
- * Employer receives notice from Homeland Security, usually after an I-9 audit, that an employee’s authorization documents presented for I-9 purposes do not match Homeland Security records.

Rough sailing into the safe harbor

The rule contains a “safe harbor” for employers caught in these situations, but getting into the “harbor” is likely to be a hassle.

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Social Security no-match. Within 30 days of the employer's receipt of a Social Security "no-match" letter, the employer must check its records to determine whether the discrepancy was caused by a clerical error. The following must also be done within the 30-day period:

- * If the no-match was indeed the result of a clerical error, the employer must correct the error with Social Security, and verify that the corrected name and Social Security number now match the agency's records. The employer should keep its own records of the manner, date and time of this verification. The rule also "suggests" that the employer may update the employee's I-9 form or complete a new I-9, **but the employer should not perform a new I-9 verification.**
- * If the no-match does not appear to have resulted from an error in the employer's records, the employer must promptly request the employee to verify the employer's records of his name and Social Security number.
 - + If the employee provides information indicating that the employer's information was incorrect, the employer must make the necessary corrections, inform Social Security, and verify with Social Security that the corrected information results in a "match." The employer should also make a record of its actions.
 - + If the employee says that the employer's information was correct, the employer must promptly advise the employee of the date of receipt of the no-match letter and advise the employee to resolve the discrepancy with the SSA no later than 90 days after the receipt date of the letter. The employer is not required to advise the employee about the manner of resolving the discrepancy.

Homeland Security notice. In the event of a notice of discrepancy from Homeland Security, the employer **must** contact the local Homeland Security office in accordance with the instructions in the notice and attempt to resolve the issue. *The notice may provide less than 30 days for the employer to respond, so pay close attention to the content of these letters* (which are normally received after an I-9 audit).

In the case of either a Social Security "no-match" letter or a Homeland Security notice that cannot be resolved within 90 days of the employer's receipt of the original communication, the employer has only three additional days to attempt to re-verify the worker's employment eligibility by completing a new I-9 employment verification form. Employers should use the same procedures as when completing I-9s at the time of hire, with a few modifications:

- * The employee must complete section 1 and the employer must complete section 2 within 93 days of receipt of the original notification from the agency.
- * The employer is not permitted to accept, for employment authorization or identification purposes, any document or receipt referenced in the Homeland Security notification or that contains a Social Security number that is the subject of the Social Security no-match letter.

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- * The employee must present a document that contains a photo in order to establish identity or both identity and employment authorization.
- * The new I-9 form should be retained with the original I-9 form.

If the employer cannot verify the employee's work eligibility, the employer must terminate the employee or risk enforcement action by Homeland Security.

Homeland Security advises that applying the rule uniformly for all employees whose Social Security numbers or work authorization documents are challenged should not subject employers to liability for document abuse and/or unlawful discrimination on the basis of national origin and citizenship status.

Penalties! We got penalties!

Penalties for employers who "knowingly" hire or continue to employ illegal aliens can be substantial, and constructive knowledge counts as "knowledge." Depending on the number of violations, an employer can be fined as much as \$11,000 per unauthorized alien, as much as \$5,000 per violation for document fraud, and imprisoned for as much as six months. Employers convicted of "harboring" illegal aliens can receive a maximum of five years in prison.

Constangy recommends

Constangy obviously recommends that employers make every effort to qualify for the safe harbor under the new rule. In addition, all notifications to employees should be in writing. If the employee does not speak English, the notifications should be issued in a language understood by the employee.

And, now, a grain of salt: Although these safe harbor provisions seem burdensome and confusing, and the criminal penalties downright scary, they may not be as bad as they seem in practice. Our experience has demonstrated that most people listed on these governmental notifications are in fact here illegally. If so, they are likely to do one of the following upon learning that you have received a notification: (1) quit immediately; (2) quit at the end of the 93-day resolution period; or (3) provide you with "new documentation" with another person's name on it, which would put you on notice that the employee was here illegally. If so, you will want to maintain your documentation and terminate your "illegal" employees, but you will probably not have an issue with the government.

If you have a question about compliance with the new regulations, please contact any member of Constangy's Immigration Practice Group or the Constangy attorney of your choice.