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# CLIENT ALERT

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## NEW FEDERAL REGULATION ISSUED REGARDING EMPLOYER'S RESPONSE TO "NO MATCH" AND "NOTICE OF DISCREPANCY" LETTERS

On August 10, 2007, as part of the Bush administration's ongoing efforts to reform the nation's immigration laws, the Department of Homeland Security (the "DHS") issued a new regulation to "clarify" existing federal laws that impact immigration. Unfortunately, this new "clarifying" regulation imposes new procedural burdens upon employers when they receive a "no match" letter from the Social Security Administration (the "SSA") or a "notice of discrepancy" letter from the DHS after undergoing an audit of its I-9 Forms. The new regulation becomes effective 30 days after it is published in the Federal Register, which is expected to occur this week.

A "no match" letter is a notice to an employer from the SSA that the name and/or social security number reported by the employer for employee(s) does not match the SSA's database. Such a discrepancy can occur for a variety of reasons, including typographical errors, an individual's failure to update the SSA with a name change, and/or an individual's use of an incorrect or fraudulent social security number. A "notice of discrepancy" letter is a notice to an employer from the DHS, normally after an audit of the employer's I-9 Forms, that one or more of the immigration documents the employer used to complete I-9 Form(s) for its employee(s) appear to be incorrect or fraudulent.

Prior to this new regulation, employers had little guidance on how to respond to a "no match" letter from the SSA or a "notice of discrepancy" letter from the DHS (other than a warning to not fire an employee for the sole reason that his/her name appeared in the letter). The approach of most employers has ranged from ignoring the letter entirely to a comprehensive process to try to resolve any discrepancies. The new regulation sets forth step-by-step procedures that employers *may* take when they receive "no match" or "notice of discrepancy" letters. If they follow those procedures, and it turns out that an employee was not authorized to work in the United States, the employer will not be deemed to have had "constructive knowledge" that it was employing the individual illegally.

The DHS claims that the new regulation creates a "safe harbor" for employers that follow the recommended procedures. However, if there are circumstances other than the receipt of the "no match" or "notice of discrepancy" letter that show that the employer had actual or constructive knowledge that it employed someone illegally, there is no protection. Moreover, the regulation was issued as part of the Bush administration's effort to make employers accountable for employing illegal aliens. During the press conference on August 10, 2007 announcing the publication of the new regulation, DHS Secretary Michael Chertoff made clear that the impetus behind the regulation is enforcement against employers:

> Employers have to be held accountable if they are given clear notice of the fact that they may be hiring illegal aliens. . . .
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> We're going to catch – not only are we going to catch a larger percentage, but with these tools, once we do catch somebody, there's going to be no place to hide. If we get somebody who's gotten no-match letters – and we do get a lot of tips, we get a lot of informants, it's amazing the number of people who come forward and tell us about illegality in the workplace – and we go in, we see that someone's gotten no-match letters and they've simply put them in the wastebasket, that's going to be awfully hard to explain to a jury when the time comes for a trial. . . .
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> We're asking Congress in the current budget to give us more money for enforcement . . . more agents.

(Remarks by DHS Secretary Michael Chertoff, August 10, 2007).

**What does this regulation really mean for employers?** All employers should implement the procedures "recommended" in the new regulation which are summarized below. Also, the Immigration and Customs Enforcement website (www.ice.gov) contains a "Safe Harbor for Employers Information Center" with detailed information as well as a link to the regulation.

**In response to a "no match" letter from the SSA, employers should take the following steps:**

(1) Within **30 days** of receiving the "no match" letter, check your records to determine whether the discrepancy results from a typographical, transcription, or similar clerical error. . .

If so, correct the error and inform the SSA of the correct information. Verify with the SSA that the employee's name and social security number, as corrected, match SSA records. Record the manner, date, and time of such verification and store the record with the employee's I-9 Form. You may update the employee's I-9 Form or complete a new I-9 Form, but you should not perform a new I-9 Form document verification (requiring documents again from the employee).

If not, promptly request that the employee confirm that the name and social security number in your records are correct. If the employee indicates they are incorrect, you must correct, verify, and make a record as set forth above. If the employee confirms that your records are correct, you must promptly request that the employee resolve the discrepancy with the SSA. You must advise the employee that the deadline for the employee to resolve the discrepancy is **90 days** after you (the employer) received the "no match" letter.

(2) If within **90 days** of receipt of the "no match" letter you are unable to verify with the SSA that the employee's name and social security number matches the SSA's records, you must again verify the employee's employment authorization and identity within **93 days** of receipt of the "no match" letter (this means you must perform a new I-9 Form document verification, but you cannot accept from the employee any document that contains the suspect social security number). You should keep both the original and the newly-completed I-9 Form together. If the employee is unable to provide documentation to complete the I-9 Form, you must decide whether to terminate the employee or retain the employee (and assume the risk that the employee is not authorized to work in the United States). Given the legal implications of such decision, each such situation should be reviewed by legal counsel.

**In response to a "notice of discrepancy" letter from the DHS, employers should take the following steps:**

(1) Within **30 days**, contact the DHS, in accordance with the letter's instructions, and attempt to resolve any questions raised in the letter.

(2) If within **90 days** of receipt of the "notice of discrepancy" letter from DHS you are unable to verify that the suspect immigration status document or employment authorization document is, in fact, assigned to the employee, you must perform a new I-9 Form document verification within **93 days** of receipt of the "notice of discrepancy" letter (however, you cannot accept from the employee any document referenced in the "notice of discrepancy" letter, any document that contains a suspect social security number, any document that contains the alien number referenced in the "notice of discrepancy" letter, or any receipt for an application for a replacement of any of the above documents). In completing the new I-9 Form, the employee must present a document that contains a photograph in order to establish the employee's identity and/or identity and employment authorization. You should keep both the original and the newly-completed I-9 Form together. If the employee is unable to provide documentation to complete the I-9 Form, you must decide whether to terminate the employee or retain the employee (and assume the risk that the employee is not authorized to work in the United States). As stated above, given the legal implications of such decision, each such situation should be reviewed by legal counsel.

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We hope that this information is useful. Please feel free to contact us if we can be of any assistance in implementing the procedures discussed in this Client Alert or with any other labor or employment issues.