WILMERHALE

Department of Homeland Security Publishes SSA No-Match Safe-Harbor Provisions

2007-08-16

On August 15, 2007, the Department of Homeland Security (DHS) published its final rule regarding Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, which will take effect on September 14, 2007. The rule is a welcome clarification for employers who receive no-match letters from the Social Security Administration (SSA) and notices of discrepancies from the DHS, and outlines steps employers should take in order to avoid charges of constructive knowledge of employment of an unauthorized alien, on the one hand, or document abuse, on the other.

Employers have long been concerned about what to do with SSA no-match letters, as they inform the employer that the combination of employee name and social security number it submitted to the SSA does not match agency records or, in the case of a notice of discrepancy from the DHS, the immigration status or employment authorization document was not actually assigned to their employee. The new regulations provide safe-harbor provisions by which employers can avoid liability after receipt of a no-match letter or a notice of discrepancy from DHS. First, within 30 days of the receipt of the no-match letter, an employer must check its records to determine whether or not the discrepancy was caused by a clerical error. If affirmative, the employer is to correct the error with the SSA and verify that the corrected name and social security number now match the SSA's records. The employer may then update the I-9 form relating to the employee or complete a new I-9 (while retaining the original), but should not perform a new I-9 verification.

If a clerical error is not involved in the no-match, the next step is for the employer to promptly request that employees confirm that their names and social security numbers in the record are correct. If the information is incorrect, the employer must correct the information, inform the SSA of the correction, verify a match on the corrected information and maintain a record of its actions. If an employee confirms that the employer's record is 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 from that date. Similarly, if an employer receives a notice of discrepancy from the DHS, it must contact the local DHS office in accordance with the notice's instructions and attempt to resolve the immigration status issue in the same manner as it would the no-match letter.

If the employee cannot resolve the discrepancy with either the SSA or DHS within 90 days, the employer must then attempt to re-verify the worker's employment eligibility by completing a new I-9 employment verification form, using the same procedures employed when completing the I-9 form at the time of hire, with the following exceptions: (1) the employee must complete Section One and the employer must complete Section Two of the new I-9 form within 93 days of receipt of the no-match notice from either SSA or DHS; (2) the employer cannot accept any document (or receipt for such a document) referenced in the DHS notification or any document (or receipt) that contains a social security number that is the subject of the SSA no-match letter to establish employment authorization or identity; (3) the employee must present a document that contains a photograph in order to establish identity or both identity and employment authorization; and (4) the new I-9 form should be retained with the original I-9 form(s). If the employer cannot verify the employee's work eligibility through completion of a new I-9 form, the employer may terminate employment. If the employer decides not to terminate employment, it risks the accusation of possession of constructive knowledge and subsequent penalties for the continuing employment of an unauthorized alien. An employer may not terminate an employee until the process is completed, unless the employer obtains **actual** knowledge that the employee is not eligible for employment in the United States.

For more information on this or other employment and immigration matters, please contact:

Lisa Stephanian Burton
+1 617 526 6538
lisa.burton@wilmerhale.com

Neil Jacobs
+1 617 526 6970
neil.jacobs@wilmerhale.com

Jonathan Rosenfeld
+1 617 526 6941
jonathan.rosenfeld@wilmerhale.com

Laura Schneider
+1 617 526 6846
laura.schneider@wilmerhale.com