
The Farm Bill, introduced to U.S. Congress in early 2007, would have created a pathway to citizenship for visiting agriculture workers (see April, 2007 MDR). Attempts to turn the Farm Bill to law were not successful, though. In response to this, the Department of Homeland Security issued new rules regarding no-match letters received from the Social Security Administration. The new rule, originally effective September 14, is controversial and currently is being challenged by immigration rights and labor movement groups.

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Congress failed to agree on immigration reform legislation, therefore, a number of measures will be used to more strictly enforce existing laws, including worksite enforcement. One of these measures is the new Department of Homeland Security (DHS) rule on how employers should deal with so-called no-match letters received from the Social Security Administration (SSA). The final rule called “Safe-Harbor Procedures for Employers Who Receive a No-Match Letter” was scheduled to go into effect September 14, 2007. However, at the time of this publication, the implementation of this rule has been temporarily halted by a federal judge after a lawsuit was filed against the rule by immigration rights and labor movement groups. In addition to addressing no-match letters, the rule also provides guidance on how to deal with a DHS notice (for example, after an audit) that the immigration status or employment-authorization documentation presented or referenced by the employee in completing the I-9 form was not assigned to the employee according to DHS records.

Form I-9 Required

Every employer is required to have an I-9 form on file for every employee hired after November 6, 1986 (see MDR 2003, Issue 1 for details on I-9 requirements). In following the I-9 procedure, employers must verify the identity and authorization to work in the U.S. for every employee they hire. Accordingly, a farmer, as well as every other employer, is prohibited from hiring a person who is not authorized to work or to continue employment of a person after obtaining knowledge about this person’s lack of work authorization. It does not matter whether this knowledge is actual or constructive. DHS considers the lack of (properly) completed I-9 forms as an example of constructive knowledge. Another example potentially encountered by a dairy farmer is an employee, such
as a milker, who requests an employment-based visa petition on his or her behalf.

The No-match Letter

The no-match letter is an “Employer Correction Request” sent out by SSA, if employees’ names and Social Security Numbers (SSN) provided on earning reports (W-2 Forms) do not match SSA records. There are many reasons for a mismatch between employer and SSA records, including transcription errors and name changes due to marriage that have not been reported to SSA. Employers should not assume that the mismatch is the result of any wrongdoing on the part of the employee. Moreover, an employer who takes action against an employee based on nothing more substantial than a mismatch letter may violate the law. Knowledge that an employee is unauthorized also may not be inferred from a job applicant’s or an employee’s foreign appearance or accent.

However, DHS’s new rule explicitly includes the receipt of a no-match letter from SSA in circumstances under which an employer’s knowledge “may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition” (that certain condition being the lack of work authorization). But if the employer follows “reasonable steps after receiving such information” (safe-harbor procedures), DHS will not use the letter in an allegation that the employer had constructive knowledge that the employee referred to in the letter was an alien not authorized to work in the U.S.

A Step-by-step Response

No-match letters issued by SSA for the 2006 tax year (and thereafter) will be accompanied by a letter from U.S. Immigration and Customs Enforcement (ICE), a division of DHS, informing employers which specific steps to take to deal with the no-match letter in a manner consistent with obligations under U.S. immigration laws. Following these steps will protect employers against the allegation of constructive knowledge based on a no-match letter.

1) A “reasonable” employer checks within 30 days whether the mismatch was the result of a typographical, transcription, or similar sort of clerical error on the employer’s part. If such an error is discovered, the employer corrects records and verifies the corrected information with SSA. Employers may verify SSNs through calling 1-800-742-6270, weekdays 7 a.m. – 7 p.m. EST. Information on the online verification procedure is available at http://www.ssa.gov/employer/ssnv.htm. The employer retains a record of the verification with SSA.

2) If step 1 does not resolve the discrepancy, the employer requests that the employee checks the accuracy of employment records. If the employee discovers an error, the employer corrects records and verifies the corrected information with SSA, and retains a record of this verification.

3) If the employee finds the records to be correct, the employer asks the employee to resolve the issue with SSA, for example through visiting a local SSA office with original documents or by mailing these documents (or certified copies) to the SSA office.

4) If neither of these steps resolves the problem, the employer should continue to follow instructions on the no-match letter itself to correct information with SSA, and retain the record of all steps undertaken and the verification with SSA.

5) If the SSN could not be corrected within 90 days of the receipt of the no-match letter, DHS requires the completion of a new I-9 form without using the questionable Social Security number and instead using documentation presented by the employee that conforms with the I-9 document identity requirements and includes a photograph and other biographic data. In this case, the I-9 form should be completed as if the employee was newly hired; but the previous I-9 form must also be kept on file. No document containing the disputed SSN or an alien number referenced in a DHS notice and no receipt for application for a replacement of such a document may be used. These requirements do not permit an employer to request more or different documents than the I-9 procedure specifies or to refuse to honor documents that on their face reasonably appear to be genuine and relate to the person presenting them (document abuse).

6) If the SSN could not be corrected and a verification of the employee’s identity and work authorization could not be accomplished, DHS asks the employer to choose between (a) taking action to terminate the employee or (b) face the risk that DHS may determine that the employer had constructive knowledge that the employee was an unauthorized alien and therefore, by continuing to employ the alien, violated the law. If an employer ignores a no-match letter and DHS/ICE establishes that employees referred to in the letter are indeed unauthorized aliens, the employer may be subject to civil and criminal penalties. For a first violation, the civil penalty currently ranges between $275 and $2,200 per worker. Criminal charges for a pattern or practice of knowingly hiring or continuing to employ unauthorized aliens may carry additional fines and imprisonment of up to six months. Additional criminal charges are also a possibility.

Timeline for Response

The employer has 90 days from receiving the no-match letter for resolving the situation through steps 1 through 4. A new I-9 form, conforming with the special requirements put forth by DHS needs to be filled out by the 93rd day after receiving the letter. If employees referred to in the no-match letter are no longer working for the employer, they should be informed (under their last known address) of the no-match letter, but further steps are not required. However, if these employees were hired seasonally, the issue would have to be dealt with in the following season should they want to return to work.
This article serves educational purposes only and does not constitute legal advice.

Additional Information

The Department of Homeland Security (DHS) features a “Safe Harbor for Employers Information Center” on how to deal with no-match letters from the Social Security Administration at its website: <http://www.ice.gov/index.htm>. Links provide the full text of the final rule and a large questions and answers section.

Information on the lawsuit filed against the rule is available at <http://www.aclu.org/immigrants/workplace/31537prs20070831.html>. 