

DEPARTMENT OF HOMELAND SECURITY "NO-MATCH" LETTER REGULATIONS

Background

On August 10, 2007, the Department of Homeland Security ("DHS") issued a final rule which amends the regulations relating to the unlawful hiring or continued employment of unauthorized aliens. Notably, the amended regulations provide additional examples of when an employer will be deemed to have "constructive knowledge" of the employment of illegal aliens thereby subjecting the employer to civil and potentially criminal penalties. For purposes of the amended regulations, "constructive knowledge" has been defined as "knowledge that may fairly be inferred through notice of certain facts and circumstances that would lead a person, through the exercise of reasonable care, to know about a certain condition." The amended regulations, which become effective on September 14, 2007, detail a recommended step-by-step approach for an employer upon the receipt of a "no-match" letter from the Social Security Administration ("SSA") or a letter regarding employment verification forms from the DHS in order to avoid a determination that the employer had constructive knowledge of its employment of unauthorized aliens. The course of action provided in the regulations, if followed in good faith, will provide a "safe-harbor" for the employer on the issue of constructive knowledge. In order to reach this safe-harbor, the amended regulations require an employer to act as a "reasonable employer" given the situation. In an effort to provide clear guidance regarding this standard, the amended regulations delineate a series of time requirements as provided below. Before directly reviewing the time requirements, it should be noted that the new regulations do not create an affirmative requirement that an employer resolve a discrepancy within a certain time frame or take any particular action. Instead, the regulations create a safe-harbor from the use of the no-match letter or DHS audit request as part of a case against the employer based on its constructive knowledge of violations of federal immigration law.

New Procedures & Time Requirements

In order to fall under the safe-harbor of the amended regulations, an employer must comply with the following steps. Upon receipt of a no-match letter or request for verification, an employer is expected to promptly check its own records for possible clerical or administrative errors that would explain the discrepancy. An employer is expected to complete this review within 30 days of the receipt of the no match or request for verification letter. Upon a finding that the discrepancy was due to an error in its own records, the employer is required to contact the appropriate governmental agencies and fix the problem. If the discrepancy is not found to be the result of a typographical error, the employer is expected to discuss the matter with the employee(s) named in the no-match letter to ascertain whether the employee can provide some sort of simple explanation (e.g., a change in last name that had yet to be updated). If the employee insists that the recorded information is correct, the employee must personally pursue the matter with the appropriate agencies to resolve the discrepancy.

Ultimately, the discrepancy addressed in the no-match letter must be resolved within 90 days of the receipt of the letter – either by the employer or employee verifying the adjustments with the appropriate governmental agency. If at the conclusion of 90 days, the discrepancy remains unresolved, the employer may seek to reverify the work eligibility of the employee. This procedure must be completed within 3 days, and with a few exceptions, tracks the regular Form I-9 verification process customarily used for new hires. In

reverifying the employee's eligibility, the employer cannot rely on any document containing the number that is the subject of the no-match letter. Furthermore, the employee must present a document that contains a photograph in order to establish identity, or both identity and employment authorization. If the original discrepancy cannot be resolved and the new verification process is unsuccessful, the employer must either: (1) terminate the employee; or (2) face the risk of being deemed to have constructive knowledge of employing an illegal alien.

<u>Action</u>	<u>Time Frame</u> (from receipt of no-match or request for verification letter)
Employer receives letter from SSA or DHS indicating a mismatch of an employee's name and social security number.	Clock starts
Employer checks its own records, makes any necessary corrections of errors, and verifies corrections with SSA or DHS.	0-30 days
If necessary, the employer notifies the employee and asks the employee to assist in correction.	0-90 days
If necessary, the employer corrects its own records and verifies the corrections with SSA or DHS.	0-90 days
If necessary, the employer performs special I-9 procedure.	90-93 days

Penalties

Fines for illegally employing illegal aliens are currently set at a maximum of \$2,200 for the first offense with increases for second and third offenses up to \$11,000 per unauthorized alien. In his comments regarding the new regulations, DHS Secretary Michael Chertoff noted that the DHS will be attempting to raise the fines in the near future. Mr. Chertoff also noted that willful violations will result in criminal prosecutions with the current maximum penalty set at 6 months in prison for each series of violations.

Implementation

Once the amended regulations become effective, the SSA will begin to send no-match letters to employers. The current estimation is that 15,000 letters will be sent out every week over the initial 8-10 weeks following the effective date.

Discrimination Concerns

During the comment period for the new regulations, several advocacy groups voiced concerns that the new regulations would result in discrimination against certain groups of employees. Likewise, employers raised concerns that they would be unable to comply with the new regulations and state and federal anti-discrimination laws. In an attempt to alleviate such concerns, Mr. Chertoff stated that as long as the aforementioned procedures are applied uniformly across the workforce, there should not be a problem with discrimination. Employers must be careful to respond in the same way to a no-match letter regardless of the assumed nationality of any given employee.

DEPARTMENT OF LABOR'S "REQUEST FOR INFORMATION" RESULTS IN THOUSANDS OF COMMENTS

New legislation intended to clarify aspects of the Family and Medical Leave Act ("FMLA") may be on the horizon! In 2006, the Department of Labor ("DOL") initiated a review of the FMLA. As part of this review, on December 1, 2006, the DOL published a Request for Information ("RFI") asking the public to provide information and comments describing their experiences with the FMLA. The DOL received 15,000 comments from employers, employees and others, and recently issued a Report summarizing the same.

According to the DOL's Report, between 8% and 17% of eligible workers took FMLA leave in 2005. The majority of comments received by the DOL addressed three primary subjects. First, employees expressed gratitude with respect to the flexibility the FMLA provided which allowed the employee to balance work and family care responsibilities. Second, employees expressed their desire for increased benefits such as additional time off, paid benefits and the coverage of additional family members. Third, employers criticized and described the difficulty of maintaining employee staffing and monitoring attendance problems related to unscheduled intermittent leave used by employees with chronic health conditions.

Employees' use of unscheduled, intermittent leave for chronic health conditions was described by the DOL as an unexpected "central defining theme" in the comments received. Further, the DOL described the issue as the "most serious area of friction between employers and employees seeking to use FMLA leave." Specifically, employers expressed frustration with employees' use of unscheduled or unforeseeable intermittent leave and the resulting difficulties employers experienced with scheduling, monitoring attendance, productivity, morale and related issues. Such feedback criticized the DOL's lack of guidance with respect to an employee's use of intermittent leave as well as the prohibitions which limit an employer's ability to verify that an employee is using intermittent FMLA leave for legitimate reasons.

Also, the Report reflected problems with the FMLA's current medical certification process. Interestingly, the DOL noted that employers, employees and health care providers all expressed unhappiness with the current system. Employees indicated their concerns regarding the time and cost of visits to obtain medical certifications. Employers described frustration with respect to medical certifications that fail to provide clear guidance or predict the employee's future attendance and/or need to use intermittent leave. Finally, health care providers complained they are unable to accurately predict the frequency in which a medical condition will "flare up."

We have addressed the issues identified in the Report with many clients. While the Report does not indicate any FMLA changes will be made, legal commentators have opined that the RFI signals the DOL's intent to propose legislation to address the myriad complaints reflected in the Report.

We will continue to monitor any changes in Department of Homeland Security regulations regarding no-match letters and the Family and Medical Leave Act. Please contact a member of Koley Jessen's Employment Law and Labor Relations Group if you would like to further discuss either of these topics.

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