

DEPARTMENT OF HOMELAND SECURITY ISSUES FINAL RULE
REGARDING NO-MATCH LETTERS

The Department of Homeland Security's (DHS) final regulations relating to the unlawful hiring or continued employment of unauthorized workers becomes effective September 14, 2007.

Constructive Knowledge Expanded

The rule adds two more examples to the current regulation's definition of "knowing" to illustrate situations that may lead to a finding that an employer had such constructive knowledge: (1) the employer receives a written notice from SSA (such as an "Employer Correction Request" commonly known as an employer "no match letter") that the combination of name and social security account number submitted to the SSA for an employee does not match agency records; or (2) the employer receives written notice from DHS that the immigration status or employment-authorization documentation presented or referenced by the employee in completing Form I-9 was not assigned to the employee according to DHS records.

Safe Harbor Procedures: Required Steps Clarified

The regulations provides for "safe-harbor" procedures that an employer can follow after receiving a "no match" letter which bars DHS from using the letter as evidence that the employer had constructive knowledge that it was employing unauthorized workers.

Under the final rule, an employer who receives a no-match letter has 30 days to verify that the discrepancy was not the result of employer recordkeeping error. If this is not the problem, the employer must then instruct the employee to confirm the accuracy of employment records and resolve the problem with SSA. The employee has 90 days to fix the problem. If, after 90 days, the problem remains, the employer has three days to complete a new I-9 form and obtain new evidence that the worker is authorized to work . If work eligibility cannot be determined at that point, the employer must terminate the employee or do so at its peril.

Significance

Now, more than ever, employers must carefully review their policies and be prepared to respond to SSA no-match letters. Failure to follow the steps set forth in the DHS safe harbor rule could result in significant penalties and sanctions.