



Quarterly

Your Keys to *Compliance*



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New DHS Safe Harbor Rules to Help Employers Comply with IRCA

It is difficult to watch the news these days without hearing about another employer being raided by immigration agents for employing undocumented workers. Both Federal and State governments have significantly increased employer penalties and criminal prosecutions for the employment of undocumented workers. The new "Safe Harbor" rules from the Department of Homeland Security give employers a process to follow when they are notified that an employee may have used improper documentation to obtain their job.

What are the safe harbor procedures?

The Department of Homeland Security (DHS) has finalized the Supplemental Proposed Rule published on March 26, 2008 and reaffirmed regulations providing a "safe harbor" from liability under section 274A of the Immigration and Nationality Act for employers that follow certain procedures after receiving a notice--either a "no-match letter" from the Social Security Administration (SSA), or a "notice of suspect document" from DHS--that casts doubt on the employment eligibility of their employees. DHS has also corrected a typographical error in the rule text promulgated in August 2007. This final rule was effective as of October 28, 2008.

What happened to the original Safe Harbor regulations?

On August 29, 2007, the American Federation of Labor and Congress of Industrial Organizations and others filed suit seeking to enjoin implementation of the August 2007 Final Rule in the United States District Court for the Northern District of California. The district court granted plaintiffs' initial motion for a temporary restraining order. DHS published a supplemental notice of proposed rulemaking in March 2008 to address the specific issues raised by the court in the preliminary injunction order.

What is the purpose of the Rules?

The Federal Government has been aware for many years that employment in the United States is a magnet for illegal immigration, and that a comparison of names and social security numbers submitted by employers against SSA's data provides an indicator of possible illegal employment.

Why do employers receive a letter from Department of Homeland Security (DHS)/ Immigration and Customs Enforcement (ICE) along with a Social Security Administration (SSA) No-Match letter?

Employers who receive an SSA No-Match letter will also receive an DHS/ICE letter. This DHS/ICE letter will provide additional guidance regarding what procedures an employer should follow upon the receipt of SSA No-Match letters to achieve safe harbor. This precludes the use by DHS of receipt of the No-Match letter to establish constructive knowledge of knowingly hiring or continuing to hire unauthorized workers

What should an employer do when it receives a Social Security Administration (SSA) No-Match letter?

The employer should take reasonable steps to resolve the No-Match, and apply these steps uniformly to all employees listed in the SSA letter. It is possible that a No-Match was the result of a clerical error on the part of the employee, the employer, or the government. DHS/ICE considers the following to be reasonable steps if the employer:



- 1) Promptly (no later than 30 days) checks its records to ensure that the mismatch was not the result of an error on the part of the employer, (0-30 days);
- 2) If this does not resolve the problem, asks the employee to confirm the accuracy of the employer's records;
- 3) If necessary, the employer should ask the employee to resolve the issue with the SSA. The employer should inform the employee that the employee has 90 days from the date the employer received the No-Match letter to resolve the matter with SSA;
- 4) If the employer was able to successfully resolve the mismatch, the employer should ensure that all of the instructions in the SSA letter have been followed. The employer should also verify that the error has been corrected by using the Social Security Number Verification Service (SSNVS) administered by the SSA, and retain a record of the date and time of verification; and
- 5) If none of the foregoing measures resolves the matter within 90 days of receipt of the No-Match letter, the employer should complete, within three days, a new

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I-9 Form (90-93 days) as if the employee in question were newly hired, except that no document may be used to verify the employee's authorization for work that uses the questionable Social Security number. Additionally, the employee must present a document that contains a photograph in order to establish identity or both identity and employment authorization.

If the employer cannot confirm that the employee is authorized to work (by following the above procedures), the employer risks liability for violating the law by knowingly continuing to hire unauthorized workers.

What is constructive knowledge? "Constructive knowledge is 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 final rule also does not change the current standard that DHS/ICE reviews the totality of relevant circumstances in determining if an employer had constructive knowledge that an employee was an unauthorized worker.

Should an employer skip the 90-day resolution timeframe and go directly to the Form I-9 procedure if the employee indicates he/she is not able to resolve the discrepancy with the SSA but agrees to establish work authorization through some other document? No. Employers should encourage employees to use the 90 days to resolve the problem that

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created the No-Match letter. If the problem is ignored, it is likely the SSA will generate a No-Match the following year and will only result in additional work for the employer

Will DHS/ICE fine the employer if I do not address these No-Match letters? The SSA No-Match letter alone does not necessarily impart knowledge that the identified employees are unauthorized workers. However, a SSA No-Match letter, when combined with other evidence known to the employer, may indicate that the employee is not authorized to work. An employer who follows the safe-harbor procedure in the "Safe-Harbor Procedures for Employers Who Receive a No-Match Letter" rule will be considered to have taken reasonable steps in response to the notice and the employer's receipt of the written notice will therefore not be used as evidence of constructive knowledge of knowingly hiring or continuing to hire unauthorized workers. If, in the totality of the circumstances, other independent evidence exists to prove that an employer has constructive knowledge, the employer may still face liability. This safe-harbor procedure does not protect an employer who has actual, as opposed to constructive, knowledge that an employee is an unauthorized worker. Employers found

to have constructive or actual knowledge are subject to both civil and criminal fines as well as possible imprisonment depending upon the circumstances of each case.

Will ICE attempt to criminally prosecute employers engaged in the practice of hiring illegal workers? Yes. In conjunction with the mission of the Department of Homeland Security, ICE prioritizes investigations based on matters of national security and public safety. As a result, ICE has set priorities and provided national guidance for its field offices. ICE has determined that worksite enforcement investigations relating to critical infrastructure protection are among the most important. Additionally, ICE has found that simple penalties are not an effective deterrent. Therefore, ICE is looking at ways to bring significant criminal charges against businesses engaging in routine hiring of illegal aliens.

