Social Security Mismatch Letters: New ICE Rule Increases Risk to Employers

On August 10, 2007, U.S. Immigration and Customs Enforcement (ICE) announced plans to publish a final rule requiring employers who receive a social security mismatch letter to take specific steps to resolve the mismatch within a given time-frame. Under the rule, if the mismatch is not resolved and if the employer continues to employ the individual, then ICE can use the mismatch letter as the basis to find that the employer knowingly continued to employ an unauthorized worker in violation of Federal I-9 law.

The rule establishes so-called "safe-harbor" provisions describing clearly what an employer should do if it receives a mismatch letter and wishes to avoid being charged with "constructive notice" that the employee is an unauthorized worker. The regulations make clear that an employer who does not follow these guidelines will be susceptible to an I-9 violation and possible fines in the event of an audit or workforce raid.

When will this rule be effective?

The final rule was published in the *Federal Register* on August 14th and becomes effective thirty days following publication (on September 14th). This rule appears to be a part of the current administration's goal of tighter enforcement of immigration rules and regulations. The administration also announced that it plans to increase civil fines for I-9 violations by up to 25 percent.

What is a mismatch letter?

The Social Security Administration (SSA) sends a Notice of Suspect Documents (also commonly referred to as a "mismatch letter") to an employer if an employee's name does not match the information in the SSA database—generally, the social security number (SSN). The purpose of the mismatch letter is to solicit the employer's cooperation in correcting the discrepancy to ensure accuracy of payments and benefits to eligible workers. Although there are legitimate reasons for a "mismatch" (including clerical error and name change), it is also the case that use of a false SSN or use of an SSN assigned to someone other than the employee will cause a mismatch.

Similarly, the Department of Homeland Security (DHS) sends a "mismatch letter" to an employer if an immigration status document, or employment authorization document, was assigned to a different person, or if there is no agency record that the document was issued. Such a discrepancy may arise from a notification that had been sent to the employer by ICE as a result of an audit or investigation.

What is the existing law regarding mismatch letters?

Under current law, an employer's course of action upon receipt of a mismatch letter is not entirely clear. Although many practitioners advise that the employer take some action

to address the mismatch, the mismatch letter itself cautions the employer that the letter, standing alone, is not a basis for termination of employment.

What is changing?

The ICE safe-harbor regulation describes what an employer should do if it receives a mismatch letter in order to avoid being charged with "constructive knowledge" that the employee is an unauthorized worker.

Under the proposed regulation, what should the employer do to benefit from the safe-harbor?

First, *within 30 days of receiving the notice,* the employer should check its records to determine whether the discrepancy results from a typographical, transcription, or similar clerical error in the company's record or in communication to SSA or DHS. If there is such an error, then the employer must correct the record, inform SSA or DHS, and then verify that the corrected record has resolved the discrepancy. The employer should document the manner, date, and time of the verification.

If there is no clerical error, then the employer should ask the employee to confirm the accuracy of the record. If the employee states that the company record is incorrect, then the employer should make the appropriate changes according to the employee, inform SSA or DHS of the corrections, and verify that the corrected record has resolved the discrepancy. If, however, the employee maintains that the record is correct "as is" then the employer must ask the employee to pursue the mismatch matter directly with SSA. If the employee then provides new information that would change the record, the employer must verify the validity of the new information with SSA. If the mismatch involves a DHS document, the new rule requires the employer to resolve the discrepancy directly with DHS.

How does the employer verify that the corrected record has resolved the discrepancy?

Once the record has been corrected, the regulation requires that the employer verify the corrected data with the SSA. Alternatively, if the discrepancy arose from a notification that had been sent to the employer by ICE as a result of an audit or investigation, for example, then the corrected record must be verified with DHS.

Currently, there are two ways to verify:

- By registering to participate in the Employment Eligibility Verification Program (EEV, formerly known as the Basic Pilot Verification Program), which runs employment authorization verification checks against SSA and DHS databases. An employer can register on-line at https://www.vis-dhs.com/EmployerRegistration.
- For SSN verification, the employer can telephone 1-800-772-6270 or go on-line to http://www.ssa.gov/employer/ssnv.htm. For more information, visit http://www.ssa.gov/employer/ssnvadditional.htm.

What if the above steps do not resolve the issue?

If the discrepancy is still unresolved 90 days following receipt of the mismatch letter, the employer may have the employee complete another Form I-9, using the same procedures as if the employee were newly hired *except that* no document containing the SSN or alien number that was the subject of the discrepancy may be used. In addition, no document without a photograph may be used to establish identity. The new Form I-9 must be completed within three days following the initial ninety day period. The rule does not require the employer to verify new I-9 documentation against government databases.

What if the employee cannot produce appropriate documents for the new I-9?

Under the proposed regulation, if the new I-9 does not resolve the matter, the employer must either terminate the employment or risk a finding that the employer had "constructive knowledge" that the employee is an unauthorized worker (thereby putting the employer in violation of the Federal I-9 laws under the Immigration Reform and Control Act).

What issues do the "safe-harbor" provisions not cover?

The regulation does not protect an employer from a finding by DHS that the employer had *actual* knowledge that the employee was an unauthorized worker. Further, the safe-harbor provisions only prevent a finding of "constructive knowledge" based solely on the mismatch letter; the government is permitted to find "constructive knowledge" on the basis of circumstances other than the mismatch letter.

In addition, there are a number of situations likely to arise that are not addressed in the proposed regulation, including:

- What should the employer do where the employment authorization issue is resolved through proper completion of a new I-9 (following unsuccessful attempts to resolve the discrepancy through SSA)? In that situation, the employer still has an incorrect SSN under which to report employee earnings.
- What should the employer do where the employee addresses the discrepancy by providing a SSN that differs from the number initially provided? In that situation, the employee may have provided false information to the employer during the employment application and verification process, perhaps raising the issue of termination due to misrepresentation.
- What should the employer do if an issue arises regarding stolen identity, if the employer is notified by IRS or another individual that an employee's name and SSN belong to another person? In these situations generally there will not be a mismatch letter.

What should employers be doing at this time?

There has been a significant increase in worksite enforcement initiatives, from a resource as well as legislative perspective. Employers should ensure that their employment authorization verification policies and procedures are appropriate and sufficient and that they reflect best practices in this arena. Moreover, employers who anticipate receiving numerous mismatch letters should begin planning now in order to be in a position to implement and monitor the procedures contemplated in the rule.

If you have questions about the new ICE Rule or any other immigration matter, please contact your Seyfarth Shaw attorney, or any Seyfarth immigration attorney on our website www.seyfarth.com.

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