



# Employment Law Update

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- Department of Homeland Security Issues Proposed Regulations

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## Highlight Article

### Department of Homeland Security Issues Proposed Regulations: Safe Harbor Procedures for Employers Who Receive a "No-Match" Letter

By Kyle D. Kring and Monica Sanchez

On June 14, 2006, the Department of Homeland Security (DHS) published in the Federal Register proposed regulations outlining procedures for employers to follow after receiving "no-match" letters from the Social Security Administration (SSA) in order to preserve the "safe harbor" defense.

The DHS announced that these regulations are in response to President Bush's recent announcement that the Federal government would make it easier for employers to verify employment eligibility while continuing to hold employers accountable for workers they hire. The regulations describe "safe-harbor" procedures that an employer can follow to be certain that the DHS will not find an employer to have "constructive knowledge" that an employee was an alien not authorized to work in the state after receiving a "no-match letter" from the DHS or the SSA. The proposed regulations are subject to a 60 day comment period before they can take effect. The DHS will most likely make amendments to these regulations to reflect comments that they receive during the public comment period; however, employers should implement these procedures now.

### Background

The SSA annually receives millions of earning reports (W-2 Forms) in which the combination of employee name and social security number (SSN) do not match SSA records. In some of these cases, SSA sends a letter that informs the employer of this fact. The letter is commonly referred to as a "no-match letter." There are many causes for such a no-match, including clerical error and name changes. The Bureau of Immigration and Customs Enforcement (ICE) sends a similar letter after it has inspected an employer's Employment Verification forms (I-9 Form) and after unsuccessfully attempting to confirm in agency records, that an immigration status document or employment authorization document presented or referenced by the employee in completing the I-9 was assigned to that person.

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The proposed regulation specifies the steps to be taken by an employer which will be considered by the DHS to be a reasonable response to receiving a no-match letter. If an employer responds as directed by the DHS regulation it will eliminate the possibility that DHS, when seeking civil money penalties against an employer, will allege that an employer had constructive knowledge that it was employing an alien not authorized to work in the United States.

The Immigration and Nationality Act, Section 274A(a)(2), 8 U.S.C. 1324a(a)(2) states: It is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment.

The DHS highlights the point that both regulations and case law support the view that an employer can be in violation of section 274A(a)(2), 8 U.S.C. 1324a(a)(2) by having "constructive knowledge" rather than actual knowledge that an employee is unauthorized to work in the United States. The proposed regulations only address the constructive knowledge standard. Following the steps proscribed in the proposed regulations would provide a safe harbor defense for "constructive knowledge," not a defense to actually knowing that an employee is unauthorized to work.

### Proposed Rule

Constructive knowledge is defined in the proposed regulations as "not only having actual knowledge but also knowledge which 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." The proposed regulation adds two examples of information available to an employer that would give an employer "constructive knowledge" indicating that an employee could be unauthorized to work in the United States. The two specific situations are:

1. Written notice from SSA that the combination of name and SSN submitted for an employee does not match SSA records; and
2. Written notice from DHS that the immigration status document, or employment authorization document, presented or referenced by the employee in completing an I-9 form was assigned to another person, or that there is no agency record that the document was assigned to anyone.

The proposed regulation also describes more specifically the steps that an employer might take after receiving a no-match letter, dictating steps that DHS considers reasonable. By taking the steps in a timely fashion, an employer would be able to avoid the risk that DHS may find that an employer had constructive knowledge that an employee was not authorized to work in the United States.

### SSA No-Match Letters

Within 14 days, an employer should take one or more of the following steps:

1. Check its records promptly after receiving a no-match letter, to determine whether the discrepancy results from a typographical, transcribing, or similar clerical error in the employer's records or in its communication to the SSA. If there is such an error, the employer would correct its records, inform the relevant agencies (in accordance with the letter's instructions, if any; otherwise in any reasonable way), and verify that the name and number, as corrected, match agency records.

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2. In other words, verify with the relevant agency that the discrepancy has been resolved and make a record of the manner, date, and time of the verification.
3. If the actions above do not resolve the discrepancy, promptly request the employee to confirm that the employer's records are correct. If they are not correct, employers should take the actions needed to correct them, inform relevant agencies (in accordance with the letter's instructions, if any; otherwise in any reasonable way), and verify the corrected records with the relevant agency. If the records are correct according to the employee, asks the employee to pursue the matter personally with the relevant agency.

## Unresolved Mismatches

The proposed regulation also describes a verification procedure that the employer may follow if the mismatch is not resolved within 60 days of receipt of a no-match letter. If an employer tried to resolve the mismatch described in the no-match letter for a full 60 days provided for in the proposed regulation, that employer would have an additional 3 days to complete a new I-9 form, as though the employee were commencing new employment, with important exceptions:

1. An employer should have the employee complete both section 1 ("Employee Information and Verification") and section 2 ("Employer Review and Verification") of a new I-9 form. In section 2, the rules are similar to those of new hires, except that the employee may not present the document containing the SSN or alien number that is the subject of the no-match letter. Also, any document used to establish the identity of the employee must include a photograph; and
2. Retain the new I-9 form, in addition to the prior I-9 form, for the same period and in the same manner as though the employee was a new hire.

The proposed regulation acknowledges that an employer may not be able to resolve the discrepancy referred to in the no-match letter because the employee's identity and work authorization cannot be verified using the verification procedure in the proposed regulation. It also acknowledges that an employer must choose between taking action to terminate the employee or facing the risk that DHS may find that the employer had constructive knowledge that the employee was unauthorized to work and thus violating INA Section 274A(a)(2), 8 U.S.C. 1324a(a)(2). This scenario, as explained by the DHS, shows that an uncorrected Social Security mismatch is evidence of immigration status. However, until the SSA or DHS gives further guidance through the public comment period, employers should be cautious in deciding to terminate employment for unresolved mismatches as suggested by the proposed regulations.

This article was prepared by Kyle Kring and Monica Sanchez. Mr. Kring is the managing partner of Kring & Chung, LLP. Ms. Sanchez is an associate at Kring & Chung, LLP's Irvine and San Diego offices. Mr. Kring and Ms. Sanchez may be contacted at (949) 261-7700.

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