

Current As of March 16, 2009

## **Employer Verification of Employee Status: USCIS Final Rule on No-Match Letters**

As Human Resource and Personnel managers well know, the Immigration Reform and Control Act of 1986 (IRCA) requires employers verify the legal employment status of their employees to prohibit the hiring or continued employment of undocumented aliens. In order to comply with the law, all employers must verify the employment eligibility and identity of all employees hired by completing Employment Eligibility Verification forms (Forms I-9) for all employees, including U.S. citizens.

IRCA only penalizes employers who hire or continue to employ individuals *with knowledge* that the individual is not authorized to be employed in the United States. In October, the U.S. Citizenship and Immigration Services (USCIS) has issued a supplemental final rule regarding no-match letters and has explained what steps employers must take to receive the benefit of certain safe harbors provided in the rule.

### **Definition of Knowing**

The definition of knowing under ICRA includes, not only actual knowledge, but also "constructive" knowledge, an inference of "certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition." An employer may be deemed to have constructive knowledge when the employee fails to complete or improperly completes the I-9 or when the employer deliberately fails to investigate suspicious circumstances. A letter from the Department of Homeland Security (DHS) of "notice of suspect documents" is another form of constructive knowledge. Constructive knowledge also includes the receipt of a "no-match letter" from the Social Security Administration (SSA) that shows there is a mismatch between the name and social security number given on the W-2.

### **What to Do when you Receive a No-Match Letter**

Basically, a no-match letter signals something is wrong. It may indicate that an "innocent" mistake has been made, such as a typographical error or when a new employee who has recently gotten married and failed to update his or her new name with the SSA. Sometimes, however, it is indicative that the employer has hired somebody who provided a false social security or a false name, and is likely not authorized to work in this country.

The supplemental final rule on no match letters states that the employer is entitled to several "safe harbors" if reasonable action is promptly taken. First, the employer must check its own internal records to determine whether the no match resulted from a typographical or clerical error. If the no match is a result of such error, then the employer must inform the SSA and take steps to verify that the employee's information matches SSA records.

If the no match is not a result of clerical error, then the employer must promptly request the employee to confirm that the name and social security number are correct. If the employee confirms that the information is correct, then the employer must promptly request the employee to resolve the discrepancy with the SSA within 90 days of the date the employer received the no-match letter. If after 90 days there is no resolution, then the employer has 3 days to complete a new I-9 form for the employee in accordance with the supplemental final rule.

### **Penalties**

Violating IRCA with actual or constructive knowledge can result in criminal prosecution or civil penalties. Additionally, if these acts were committed with knowledge or intent, companies can also be charged with identity fraud, document fraud and Social Security fraud, as well as conspiracy or aiding and abetting the commission of those types of crimes. Conviction of any one of these crimes can lead to stiff penalties, including imprisonment and substantial criminal fines and forfeiture of assets.

Mistakes in filling out the forms can result in fines between \$110 - \$1100 per employee, although a good faith exception exists for some I-9 paperwork violations. For knowingly employing unauthorized workers, civil penalties of up to \$16,000 per employee can result. If the employer's actions are deemed a pattern or practice of employing unauthorized persons, an employer may be penalized \$3000 per unauthorized employee and may be subject to up to 6 months imprisonment.

### **Cautionary Note**

Employers should not terminate an employee solely based on the receipt of a no-match letter. The employer may become subject to allegations of discrimination under federal law if the employer terminates the employee without actual knowledge that the employee is unauthorized to work.

This article is not intended as legal advice, but to provide information regarding federal requirements. You should contact the appropriate federal agency or consult with an attorney to determine what is appropriate to your specific situation.