

To our clients and friends:

PLEASE NOTE: This is an updated version of the Immigration Alert sent on August 22, 2007, and contains a corrected link to the revised regulations discussed in the Alert. We apologize for any confusion or inconvenience.

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IMMIGRATION
ALERT

AUGUST 23, 2007

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Immigration and Customs Enforcement Publishes Revised "No Match" Regulations, Effective September 14, 2007

On August 15th, Immigration and Customs Enforcement (ICE) published its revised regulations related to the hiring or continued employment of unauthorized aliens in the United States. These regulations describe the legal obligations of an employer when the employer receives a "no match" letter from the Social Security Administration (SSA) or receives a letter regarding the immigration status document or employment authorization document from the Department of Homeland Security (DHS) (usually as a result of an I-9 audit). These regulations further describe the affirmative steps an employer must take in order to establish a "safe harbor" from the legal liability that may attach when the employer has "constructive knowledge" that it is employing an unauthorized alien. The employer is deemed to be on notice that an employee may be an unauthorized alien when it learns of discrepancies or misrepresentations in the course of hiring or verifying foreign national employees, including through the following:

1. receipt of a "no match" letter from the SSA;
2. receipt of a notice from DHS that an employee's employment authorization documents (gathered for purposes of I-9 compliance) do not match DHS records; or
3. employee requests employer sponsorship of labor certification or visa petition and it becomes clear at that time that the employee is an unauthorized alien in the United States.

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The employer must then take “reasonable steps” to ascertain whether or not the employee is, in fact, authorized to work. While DHS will continue to review the “totality of relevant circumstances in determining if an employer had constructive knowledge that an employee was an unauthorized alien” in these situations, the regulations formalize the steps employers should take to ensure they are protected from a finding of “constructive knowledge” in the event of a criminal or civil investigation.

These include such steps as checking the employer’s records, requesting the implicated employees provide confirmation of employment records and repeating the formal I-9 employment eligibility process to attempt to resolve any discrepancies. One notable change is the extension of the timeframe from 63 to 93 days during which time an employer should perform the formal steps required to effectively investigate and/or address either a “no match” letter from SSA or a DHS notice of employment authorization inconsistency. Also notable in the revised regulations is the DHS’s assertion that there is no avenue for an employer to establish a “safe harbor” against a finding of “constructive knowledge” of unauthorized employment for example 3 above. If an employer learns of an employee’s inability to legally work in the U.S. and keeps the employee on, in the event of an audit or investigation, the employer may be charged with actual or constructive knowledge of unauthorized status.

If the employer is unable to confirm the employee’s identity or work authorization using these steps, these revised regulations require that the employer terminate the affected employee or risk a finding that the employer knowingly hired or continued to employ an unauthorized worker in violation of the Immigration Reform and Control Act (IRCA). *Please note that we always advise our clients **not** to initiate termination without consulting an employment lawyer.*

If you have received a “no match” letter from SSA or a notice of inconsistency from DHS as described above, please contact an attorney at Mintz Levin to discuss the situation further. If you would like to examine the revised regulations in detail, please refer to [the document linked here](#).

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If you would like more information on any immigration matter, please contact your immigration attorney at Mintz Levin or go to www.mintz.com.

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