Legal Alert: DHS Rescinds No-Match Regulation

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The Department of Homeland Security (DHS) has formally withdrawn its Social Security "no-match" regulation, promulgated back in 2007. The no-match regulation set forth a "safe harbor" for employers who receive letters from the Social Security Administration (SSA) stating that an employee's Social Security Number (SSN) does not match the agency's records. The safe harbor rule required employers to take certain steps to resolve the discrepancy within a certain period of time or face liability. Shortly after being issued in 2007, the no-match regulation was challenged in court, subject to an injunction and ultimately never implemented. As of October 7, 2009, the rule was formally rescinded.

In the summary of the final rule , DHS states that it will "focus its enforcement efforts relating to the employment of aliens not authorized to work in the United States on increased compliance through improved verification, including participation in E-Verify, ICE Mutual Agreement Between Government and Employers (IMAGE), and other programs."

Additionally, DHS notes that it and its predecessor agencies have provided guidance on the immigration implications and responding to no-match letters. "DHS, in considering all of its options, does not believe that the addition of a 'safe-harbor' to that guidance is as effective as other tools to assist in compliance with the employment restrictions of the Immigration and Nationality Act."

The final rule will take effect 30 days from October 7, 2009.

Although the no-match regulation has been rescinded, employers who receive no-match letters, or credible notice from any other agency that there may be an issue with an employee's SSN, must continue to take reasonable steps to resolve the discrepancy and correct their records. In addition, it is never too late to act to resolve SSN discrepancies. If you have received no-match letters in the past but have not responded, you should do so now. Failure to make a good faith attempt to resolve these discrepancies could subject a company to potential civil and/or criminal liability if workers ultimately turn out to be undocumented.

The final rule notes that the receipt of a no-match letter "when considered with other probative evidence, is a factor that may be considered in the totality of the circumstances and may in certain situations support a finding of 'constructive knowledge'" on the part of an employer of an employee's lack of employment authorization. Thus, it is essential that employers continue to address any discrepancies in a reasonable and nondiscriminatory manner.

Generally speaking an employer should take the following steps to resolve a SSN discrepancy:

• The company should check its own records to ensure there are no typographical errors.

• If there are no internal clerical errors, the employer should provide the employee written notification stating that his/her SSN is incorrect for wage reporting purposes. The employer should instruct the employee to contact the SSA to resolve the issue within a reasonable timeframe (generally, between 14-90 days). Whatever timeframe is provided should be implemented consistently for all employees.

• The employer should follow-up with the employee at the end of the given timeframe to determine the status of the matter. If the employee can provide credible evidence showing that he or she has either resolved the matter or is in the process of doing so, the employer should document its payroll files regarding the good faith steps it has taken.

• If, at the end of the provided timeframe, the employee has not resolved the matter or cannot provide any evidence that s/he is in the process of resolving the issue, termination is likely necessary.

Employers' Bottom Line:

Regardless of what timeframe an employer gives an employee to resolve an SSN discrepancy, the employer should document its payroll files regarding the steps taken to resolve the issue. In addition, receipt of an SSN discrepancy, by itself, is not sufficient to terminate or take adverse action against an employee. Rather, a company should act methodically, carrying out the steps above, rather than precipitously.

If you have any questions about the final rule or other business immigration issues, please contact Geetha Nadiminti, gnadiminti@fordharrison.com, 404-888-3940 or any member of Ford & Harrison's Business Immigration practice group.