No-Match Letters Have Homeland Security Implications for Employers

by Cathy L. Stickels
cstickels@dbllaw.com

On September 14, 2007, new regulations aimed at addressing the impact of Social Security "no-match" letters on employers are slated to take effect. A no-match letter is correspondence provided directly to the employer from the Social Security Administration informing the employer that the Social Security Administration is unable to match the name and Social Security number provided for a specific employee to its records.

The importance of these no-match letters is that the Department of Homeland Security ("DHS") has taken the position that no-match letters are a distinct indication that the subject employees noted in the letter are unauthorized to work in the United States. For purposes of the DHS, receipt of a no-match letter may be evidence that the employer has constructive knowledge that it is employing one or more unauthorized workers. The new regulations issued by the DHS specify step by step actions that should be taken by the employer once a no-match letter is received. If the employer follows the actions specified by the DHS, the employer will be considered to have demonstrated a reasonable response to receiving the no-match letter. Evidence of a reasonable response by the employer will substantially limit the possibility that the no-match letter will be used by the DHS to allege that the employer had constructive knowledge that it was employing individuals not authorized to work in the United States.

In order to act reasonably after receiving a no-match letter and to avoid the appearance of constructive knowledge of employing unauthorized workers, the no-match regulations outline several steps considered to be a safe harbor for employers. If an employer follows the suggested safe harbor steps, the DHS will not make a finding that the employer had constructive knowledge.

Upon receipt of a no-match letter, the employer must first check its records to determine if the no-match letter is the result of a clerical error. The Immigration and Customs Enforcement ("ICE") considers 30 days as a reasonable time period upon receipt of a no-match letter to determine if the error was clerical. If it is determined that the discrepancy was not due to a clerical error, the employer must then contact the employee and request confirmation that the employee's information is correct. If, according to the employee, the information is correct, then the employer must instruct the employee to pursue the matter personally with the Social Security Administration.

Employers who take this corrective action within 30 days of receipt of the no-match letter are also considered by ICE to have acted reasonably. If an employer is unable to verify the Social Security number in question within 90 days of receipt of the no-match letter, the DHS then requires the employer to complete a new Form I-9 as if the employee was a new hire. In completing the new Form I-9, the employer is prohibited from accepting any documents containing the Social Security number or Alien Number that is the subject of the no-match letter. Additionally, the employer may not accept any document presented by the worker to establish identity and/or employment authorization that does not contain a photograph of the employee.

Although compliance with the no-match regulations and safe harbor provisions does not guarantee that an employer will not inadvertently employ an unauthorized worker,

compliance with the regulations will ultimately protect the employer and relieve the employer from monetary penalties associated with employing unauthorized workers.