

## **Frequently Asked Questions for the Social Security No-Match Safe Harbor Regulation**

Note: This information includes guidance from the Department of Homeland Security (DHS), other sources we deem reliable, and our own reading of the new regulation. The DHS has also issued a set of FAQs, which appear at <http://faq.ice.gov>.

### **What does this regulation do?**

The rule describes the obligations of employers when they receive a No-Match letter from the Social Security Administration (SSA) or a letter from DHS highlighting problems with employment authorization documents used in completing I-9 forms. If employers follow the rule, they will be given a “safe harbor” from prosecution for knowingly hiring or employing an illegal immigrant, even if it turns out that the worker did in fact lack the right to work here.

### **Is it possible to escape prosecution even if I don't follow the rule?**

Yes. Immigration and Customs Enforcement (ICE) and ultimately, the courts, will always look at the totality of circumstances when trying to determine if an employer knowingly hired illegal workers, and the burden would be on the government to prove that an employer had actual knowledge of the worker's status. By following the rule, the employer has created a strong presumption that they have followed the law.

### **When is this rule effective?**

It becomes effective September 14, 2007.

### **Is it retroactive?**

No. It applies to No-Match letters received after 9/14/07. Our information is that many No-Match letters will be sent out by SSA in the last quarter of 2007.

### **In summary, what does the rule require?**

Upon receipt of a letter from SSA or ICE, the rule requires that the employer begin an inquiry as follows:

1. Within **30 days** of receipt, check employer records for clerical errors, and try to check the actual social security card to see how the name is printed.
2. If the problem is not resolved by examination of the employer's records, ask the employee to resolve the issue directly with the SSA within **90 days** of the employer's receipt of the letter.
3. If the employee cannot resolve the issue within 90 days, **re-verify** within the next three days (according to **specific procedures** set out in the new regulations) the employee's authorization and identity. The entire process must be completed within **93 days** of the employer's receipt of the letter.

### **What do you mean, re-verify?**

Essentially, complete a new I-9. Sections 1 and 2 of the I-9 would need to be completed within 93 days of receiving the No-Match letter. So if an employer took the full 90 days to try and resolve the problem, they then have three more days to complete the new I-9. An employee may not use a document containing the disputed SSN, alien number, or a receipt for a replacement of such a document. Only documents with a photograph may be used to establish identity. When

the worker offers a different SSN, the employer should immediately verify the new SSN using the online SSN verification system.

**What if I am unable to verify the new SSN?**

At that point, you would probably have an honest conversation with the employee. If the discrepancy is not resolved and the employee's identity and work authorization are not verified, the employer must either terminate the employee or face the risk that DHS will find constructive knowledge of lack of employment authorization. Employers may terminate as well if they notify an employee of the No-Match letter and the employee admits that he or she is unauthorized to work.

**Does an employer have to help an employee resolve the discrepancy with SSA or DHS?**

No. An employer merely needs to advise the employee of the time frame to resolve. They are not obligated to help resolve the question or share any guidance provided by SSA.

**Does DHS or ICE get copies of mismatch letters sent by the Social Security Administration?**

Our information is that SSA currently does not share No-Match letters with DHS, and the same is true for Immigration Customs Enforcement (ICE).

**Does an employer need to use the same procedure to verify employment authorization for each employee that is the subject of a No-Match letter?**

Yes, the anti-discrimination rules require employers to apply these procedures uniformly. In addition, you must honor documents that, on their face, appear reasonable. Employers now have the safe harbor of a new regulation stating the above provision does not apply to documents that are the subject of a No-Match letter.

**What is "constructive knowledge?"**

The law prohibits employers from . . . *knowingly hiring or employing*. DHS contends that while a No-Match letter does not provide the employer with *actual knowledge*, it does provide the kind of information that a reasonable person would want to make a further inquiry into. The agency believes that the letters provide constructive knowledge, and a further investigation is required by the employer.

**What if the employer has heard that an employee is unlawfully present aside from hearing from SSA or DHS in a No-Match letter?**

Employers who have ACTUAL knowledge that an alien is unauthorized to work are liable under the Immigration and Nationality Act (INA) even if they have complied with the I-9 and No-Match rules. But the government has the burden of proving actual knowledge. DHS also notes that constructive knowledge may still be shown by reference to other evidence.

**Does an employer filing for a labor certification or employment-based green card application have "constructive knowledge" constitute that a worker is unauthorized?**

The new rule includes language stating "an employee's request that the employer file a labor certification or employment-based visa petition on behalf of the employee" may be an example of a situation that may, depending on the totality of relevant circumstances, require an employer

to take reasonable steps in order to avoid a finding of constructive knowledge. But DHS notes that some employees are work-authorized and are not necessarily unauthorized to work just because they request such sponsorship from an employer.

**What happens if I don't follow this rule? What is the maximum penalty?**

If an employer retains employees without following the “safe harbor” procedures outlined above, the government may use the SSA “No-Match” letter (or its DHS equivalent) as evidence of the employer's constructive knowledge that it has employed an unauthorized alien in violation of the INA. Ignoring No-Match communications can expose an employer to a multitude of penalties, *both civil and criminal*. These penalties can be severe, especially in the case of repeat violations, with fines reaching as high as \$10,000 *per unauthorized employee*, and/or a criminal sentence of up to six months in prison.