Employment Edge 74th Edition (Immigration Issue) - DHS Releases Final “No-Match” Regulation

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On August 15, 2007, the Department of Homeland Security ("DHS") published the final "Safe Harbor Procedures For Employers Who Receive A No-Match Letter" regulation in the Federal Register. This Rule sets forth recommended procedures for employers to follow after receiving a No-Match Letter from the Social Security Administration ("SSA") or a Notice of Suspect Documents from DHS. Following these recommended procedures can help employers avoid civil and criminal liability for employing an unauthorized worker. The final "No-Match Safe Harbor Rule" will take effect on September 14, 2007.

Employers are prohibited by the Immigration and Nationalization Act from employing workers who are not authorized to work in the United States. An employer who knowingly employs an unauthorized worker is subject to substantial civil and criminal penalties. An employer may be considered to have knowledge of a worker's unauthorized status on a constructive basis even if the employer does not have actual knowledge of such status. An employer has "constructive knowledge" where facts and circumstances that are known to the employer indicate that a reasonable employer should have known the worker was not authorized.

The final No-Match Safe Harbor Rule expands the bases on which an employer may be deemed to have constructive knowledge that a worker is unauthorized. The expanded bases now include the failure to take reasonable steps after receiving a No-Match Letter from SSA or a Notice of Suspect Documents from DHS. The SSA sends an employer the No-Match Letter when there is a discrepancy between the information they reported on the Form W-2 (including the name and Social Security number) and the SSA's own database. Similarly, the letter from DHS alerts an employer that there is a question about an employee's immigration status since the document the employee presented during the process of completing the Form I-9, Employment Eligibility Verification does not match DHS' records.

Having expanded the bases for a finding of constructive knowledge, the No-Match Safe Harbor Rule then provides an employer with a safe harbor against such a finding. The safe harbor is available to employers who do not have actual knowledge of a worker's unauthorized status and who consistently follow the specific procedures for responding to a No-Match Letter or Suspect Documents Notice set forth in the Rule. In other words, if an employer regularly adheres to the procedures in the Rule and a worker is later determined to be unauthorized to work in the U.S., the employer will not be deemed to have constructive knowledge of the

worker's unauthorized status and will avoid possible fines and sanctions. The safe harbor procedures outlined in the final No-Match Safe Harbor Rule are as follows:

Within 30 Days of Receiving a No-Match Letter from SSA or DHS

The employer should attempt to resolve the problem by checking its personnel records to determine whether the discrepancy is the result of a typographical, transcriptional, or similar clerical error in the employer's records or in its communication with SSA or DHS. If such a clerical error exists, the employer must correct the error and notify the relevant agency of the changes. The Rule also advises employers to make a record of the manner, date, and time of the verification with the agency.

If the information in the employer's records is consistent with the No-Match Letter or DHS Notice, the employer must ask the employee whether the information in its personnel records is accurate. If the employee indicates the information is incorrect, the employer should correct any inaccuracies, notify the relevant agency of the changes, and make a record of the verification. If the employee provides a different Social Security number, the employer must verify the number by calling SSA or using available online verification resources. If the employee states that the information is correct, the employer must direct the employee to resolve the discrepancy no later than 90 days after it receives the No-Match Letter or DHS Notice.

Within 90 Days of Receiving a No-Match Letter from SSA or DHS

If the discrepancy is not resolved within 90 days of the employer's receipt of the No-Match Letter or DHS Notice, the employer must then act to re-verify the employee's employment eligibility as though the employee was a new hire, but with certain added verification restrictions. This requires the employee and the employer to complete a new I-9 within an additional three days. The employee, however, may not present the document that is referred to in the DHS Notice or that contains the social security number referred to in the SSA No-Match Letter to establish employment authorization or identity. In addition, the document presented to establish identity and/or employment authorization must include a photograph of the employee. The new I-9 should be maintained along with the original I-9 for the same time period as the original I-9. That period is three years beyond the hire date or one year beyond the termination date, whichever period is longer.

If the employer cannot verify the employee's work authorization by completing a new I-9, the employer must take action to terminate the employee or risk that DHS will find that the employer continued to employ the worker despite the employer's constructive knowledge that the worker was an unauthorized alien. Continued employment of an unauthorized alien violates the Immigration and Nationality Act and bears significant penalties. An employer should generally not terminate an employee, however, until it has received actual knowledge that the employee is unauthorized or the process to resolve the discrepancy has

concluded, whichever comes first. Preemptive termination without proper process creates its own risks of employment discrimination liability.

Additional Immigration and Worksite Enforcement Measures

DHS has also announced that it intends to implement further enforcement actions in the near future, including a proposed rule that would require all federal contractors to participate in the electronic employment verification system, now called E-Verify (formerly known as the Basic Pilot program) and an increase of approximately 25% in the maximum amount for civil fines imposed on employers who knowingly hire illegal immigrants.

If you need assistance responding to a no-match letter or Notice of Suspect Documents, or if you have other immigration or employment law questions, please contact Mark Mathison, Casey Nolan, or another member of the Gray Plant Mooty Employment and Labor Practice Group.

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