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IMPORTANT NOTICE

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Immigration reform has been a popular topic in the news lately, and it is important that employers understand the changes that have been made to worksite enforcement rules and those changes that are likely still to come. While much of the proposed legislation has not yet passed, the new "no match" rules issued by the Department of Homeland Security deserve our attention and respect.

Michael Chertoff, Secretary of Homeland Security, announced on August 10th of this year that the administration is going to actively pursue and sanction employers who knowingly and willingly violate the law by hiring illegal immigrants. Under the federal law known as the Immigration and Nationality Act, it is unlawful for an employer to hire, recruit, or refer for a fee an alien, knowing that the alien is unauthorized to work in the United States. Furthermore, it is unlawful for an employer to continue the employment of an alien, knowing that the alien is illegal or has become illegal. Both regulations and case law support the view that an employer can violate of this federal law by having constructive knowledge in addition to actual knowledge that an employee is unauthorized to work in America. For instance, the Ninth Circuit Court of Appeals held in *Mester Manufacturing Co. v. INS* that the deliberate failure by an employer who received information that some of its employees were illegal aliens to investigate the situation imputed knowledge to the employer, making it liable. (879 F.2d 561, 567 (9th Cir. 1989)).

The administration has issued a final regulation regarding "no match" letters, which becomes effective on September 14, 2007. The purpose of the new "no match" regulation is to provide those employers who want to avoid civil and criminal sanctions clear guidance as to the specific steps they must take after receiving a "no match" letter from the Social Security Administration (SSA). These letters inform employers that the name and social security number combinations for certain employees do not match governmental records.

Employers annually send the SSA millions of earnings reports (W-2 Forms) in which the combination of employee name and social security number does not match SSA records. In some of these cases, the SSA sends the employer a letter informing it of the mismatch. While such discrepancies may be caused by clerical errors or name changes, another potential cause is the submission of information for an alien who is not authorized to work in the United States and who may be using a false social security number or one that has been assigned to another person. Receipt of a "no match" letter may be an indicator to an employer that some of its employees are illegal workers. The new regulation specifies the steps that must be taken by an employer in order to eliminate the possibility that the "no match" letter will be used as part of an allegation that the employer had constructive knowledge that it was employing illegal aliens. If an employer fails to take the specified steps after receiving a "no match" letter, and if the employee is in fact not authorized to work in the United States, the employer may be found to have had

constructive knowledge of that fact. Of course, whether an employer is found to have had constructive knowledge depends on the totality of the circumstances. In this way, the new regulation provides a safe harbor for employers who follow the law.

The steps laid out in the final regulation are the *only* combination of steps that an employer can take which will guarantee application of the safe harbor provision. While employers may choose to exercise other steps, they run the risk that the Department of Homeland Security (DHS) will not consider those steps to have been reasonable so that the employers may still face an allegation of constructive knowledge.

Under the final regulation, after receiving a "no match" letter, an employer must promptly check its own records to determine if the discrepancy was caused by a typographical or other clerical error. If there was such an error, the employer must correct it, inform the relevant governmental agency, and ensure that the information in the employer's files now matches the agency's records. This must all be done within 30 days of receiving the "no match" letter. If these actions do not resolve the discrepancy, an employer must promptly have the employee confirm that the employer's records are correct. If they are not, the employer must correct them, notify the relevant agency, and verify that the information matches the agency's records. If the employee insists that the employer's records are correct, the employer must tell the employee to pursue the matter personally with the relevant agency. Employers must advise the employee of the time within which the discrepancy must be resolved and share with the employee any guidance the SSA notice provided on how the discrepancy might be resolved. All of this must be done within 30 days of receiving the "no match" letter.

The regulation provides that a discrepancy will be considered resolved only if the employer verifies with SSA that the employee's name matches in SSA's records the number assigned to the name. In the case of a letter from DHS, the employer must verify the authorization with DHS that DHS records indicate that the immigration status document or employment authorization document was assigned to the employee. Employers may verify a social security number by telephoning toll-free 1-800-772-6270.

If the discrepancy is not resolved within 90 days of receiving the "no match" letter, the employer then has an additional 3 days to complete a verification procedure. If the procedure is completed and the employee is verified, then even if the employee is in fact unauthorized to work in America, the employer will not be considered to have had constructive knowledge. This verification procedure provides the safe harbor. The verification procedure required for application of the safe harbor involves the employer's and employee's completing a new Form I-9, Employment Eligibility Verification Form, using the same procedure as if the employee was newly hired with certain restrictions. The restrictions include (1) the form being completed within 93 days of receiving the "no match" letter, (2) no document containing the social security number that is subject of the "no match" letter may be used to establish employment authorization, and (3) no document without a photograph may be used to establish identity. This safe harbor provision only applies to written notice issued directly to employers from SSA or DHS.

If the discrepancy is not resolved after the final verification procedure, the employer must terminate the employee or face the risk that DHS may find that the employer had constructive knowledge that it was employing an illegal alien. Moreover, employers must apply the procedures uniformly to all employees having unresolved "no-match" issues otherwise they may be liable for discrimination. Under the Immigration and Nationality Act, it is illegal for employers to discriminate against any individual with respect to hiring, recruitment, or referral for a fee because of an individual's national origin or because of his or her citizenship status as a United States citizen, an alien legally admitted for permanent residence, an alien lawfully admitted for temporary residence, a refugee, or one who has been granted asylum. Employers who follow the safe harbor procedures set forth in the rule, without regard to perceived national origin or citizenship status, will not be found to have engaged in discrimination.

This new regulation has no effect at all on actual knowledge. There is no safe harbor for an employer having actual knowledge that it is employing illegal aliens. In the case of actual knowledge, the employer is knowingly committing a crime. Additionally, if an employer acquires actual knowledge during the safe harbor procedure, the employer must terminate the employee. On the other hand, if during the procedure the employer does not obtain actual knowledge, the employer may continue to employ the individual until all of the steps in the safe harbor procedure have been completed.

DHS has the authority to investigate and pursue sanctions against employers who knowingly employ or continue to employ unauthorized workers and those who do not properly verify employees' employment eligibility. Under the current law, employers who hire illegal aliens are liable for between $275 and $2,200 in civil fines for first-time offenders, between $3,300 and $11,000 per illegal alien for multiple offenses, and the maximum criminal fine for employers repeatedly hiring illegal workers is $3,000 per illegal alien. DHS announced that it intends to raise the civil fines for employers who hire illegal workers by approximately 25 percent to the maximum amount allowed under current law, though nothing has actually changed at this point.

This new regulation merely clarifies the current standards related to constructive knowledge. The President has indicated that the administration supports comprehensive immigration reform, but Congress has not actually passed any legislation toward that end. In the interim, this "no match" rule provides direction to employers as to how to respond after receiving a "no match" letter.

So what has actually changed? The new rule adds several scenario examples of constructive knowledge to the definition of "knowing" and provides the safe harbor provision. The new rule updates 8 C.F.R. § 274a.1. The new examples for constructive knowledge include: (1) written notice from DHS that the immigration status document or employment authorization document provided by the employee in completing the Form I-9 was assigned to another person or that the document was never assigned to anyone and (2) written notice to an employer from SSA that the combination of name and social security number submitted for an employee does not match SSA records. The existing examples of when an employer is said to have constructive knowledge include situations in which the employer (1) fails to complete or improperly completes the Employment Eligibility Verification Form, I-9, (2) has information available to it

that would indicate that the alien is not authorized to work, such as Labor Certification and/or an Application for Prospective Employment, or (3) acts with reckless or wanton disregard for the legal consequences of permitting another individual to introduce an unauthorized alien into its work force or to act on its behalf.

The new rule does not require an employer to take any particular action; rather, it provides a method for employers to exercise reasonable care in addressing "no match" letters. The rule does not require that employers avail themselves of the safe harbor provision, but it does provide the safe harbor for employers who choose to utilize it. An employer who follows the safe harbor procedure will be considered to have taken reasonable steps in response to a "no match" letter, and therefore, the employer's receipt of the letter will not be used as evidence of constructive knowledge. However, if in the totality of the circumstances, other independent evidence exists to prove that the employer had constructive knowledge, the employer may still face liability. It is important to note that this new rule does not require immediate termination of employees about whom an employer has received a "no match" letter, and the new rule should not result in the firing of legally authorized workers.

The Department of Homeland Security has announced other measures that it *intends* to take to crack down on employers who knowingly hire illegal workers. For instance, the administration plans to publish a regulation that will reduce the number of documents that employers are able to accept as confirmation of an employee's identity and work authorization. Under current law, there are at least 29 categories of documents that can be used for this purpose. Furthermore, the administration plans to continue expanding criminal investigations against employers who knowingly hire large numbers of illegal aliens. There have already been more than 3,200 administrative arrests and 742 criminal arrests in worksite enforcement cases since the beginning of FY 2007. Additionally, the administration plans to implement a rulemaking process to require all federal contractors and vendors to use E-Verify, the federal employment verification system, to ensure that their employees are authorized to work in America. The administration will also encourage states to adopt the E-Verify system.

As it stands now, the only new change to existing law is the "no match" procedure. Other proposed changes are still just proposals which have not taken effect. However, beginning September 14th of this year, employers across the nation who receive "no match" letters are going to have to follow the new "no match" rules if they want to reap the benefit of the safe harbor provision to avoid allegations of constructive knowledge.