Genova, Burns & Vernoia

NEWS ALERT
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Homeland Security's No-Match Rule

On October 28, 2008 the Department of Homeland Security's ("DHS") final No-Match Rule took effect. The final Rule addresses the concerns raised by U.S. District Court Judge Charles Breyer who in October 2007 restrained the DHS and the Social Security Administration ("SSA") from implementing the DHS's August 2007 version of the Rule and its *Safe-Harbor Procedures for Employers Who Receive a No-Match Letter*. AFL-CIO et al. v. Chertoff et al. (N.D. Cal. Case No. 07-CV-4472 CRB). DHS will return to Judge Breyer's courtroom later this month to try to convince him to lift the injunction. In the meantime DHS cautions employers to treat the final No-Match Rule as law.

The final No-Match Rule alters none of the safe harbor procedures that the August 2007 version of the Rule made available to employers to respond to receiving a no-match letter from the SSA. However, the final Rule clarifies DHS's policy on no-match letters and alters the Rule's anti-discrimination language.

Specifically, the Rule's safe harbor procedures provide that an employer's receipt and response to a SSA no-match letter will not constitute evidence that an employer had constructive knowledge of an employee's illegal status if the employer follows the Rule's procedures uniformly and without regard to the employee's or applicant's perceived national origin or citizenship status. Briefly the safe harbor procedures are as follows:

1. **Employer's Duty to Check Records Check and Correct Its Errors** After receiving a no-match letter from the SSA, the employer must check its records to determine whether the discrepancy between the employee's name and the SSN the employee provided to the employer resulted from a typographical, transcription or similar clerical error. If the discrepancy resulted from an employer error, the employer must take certain specified steps to correct the error within 30 days.

2. **Employee Duty to Confirm Name and SSN and Correct Discrepancy** If the employer determines that the source of the discrepancy is not an error in the employer's records or reports, the employer must promptly request that the employee confirm that the employee name and social security number in the employer's records are correct. *If the employee states the employer's records are incorrect,* then the employer must correct its records and re-verify the information the employee provided with the SSA. *If the employee confirms the employer's records are correct,* then the

employer must advise the employee of the date the no-match letter was received from the SSA and that the employee must rectify the discrepancy with the SSA within 90 days of the employer's receipt of the no-match letter.

3. **If Discrepancy Not Corrected, Employer Must Repeat Employment Authorization Verification Procedure on I-9 Form** Within 93 days of receiving the no-match letter, the employer must either verify with the SSA that the employee's name and social security number match the SSA's records, or the employer must again verify the employee's employment authorization and identity on an I-9 Form consistent with the Rule's verification procedures. In the I-9 process, the employer may not accept any document containing a disputed social security account number or alien number or a receipt for an application for a replacement of such document.

A complete copy of the final Rule can be found at http://www.thefederalregister.com/d.p/2008-10-28-E8-25544. The Rule makes employers accountable for resolving social security number mismatches that the SSA brings to the employer's attention. The Rule provides no express guidance on the point at which an employer must terminate an employee owing to receipt of a no-match letter. However, the civil and criminal penalties imposed by federal law for knowingly employing an illegal alien range from a $250 fine for employing one unauthorized individual, up to $10,000 for each unauthorized employee if the employer is a repeat violator. A criminal conviction may lead to imprisonment for up to six months.

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