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ALERT

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DEPARTMENT OF HOMELAND SECURITY ISSUES NEW RULES ON "NO-MATCH" LETTERS

On August 10, the Department of Homeland Security (DHS) announced its Final Rule addressing Social Security "No-Match" Letters. This new regulation imposes new legal obligations on employers that receive a "no-match" letter from the Social Security Administration (SSA). SSA may issue a no-match letter when an employee's social security number does not match the employee's name in the SSA's comprehensive database.

The new rule provides two specific factual scenarios in which an employer may be deemed to have "constructive knowledge" of illegal employment at its workplace sufficient to require action. DHS will impute knowledge of illegality to an employer after its:

- Receipt of written notice from the SSA that the combination of the name and social security number submitted to SSA for an employee does not match SSA's records.

- Receipt of written notice from DHS that an immigration status document or employment authorization document presented by an employee as proof of his/her work authorization actually is assigned to another person or that there is no DHS record of the status document or employment authorization document having being issued to that employee.

"Safe Harbor" Protection Available

The DHS regulations offer employers specific procedures they may follow to enter a safe harbor that will protect them against use by DHS of a no-match letter as evidence of that employer's constructive knowledge of employing an illegal worker. To be eligible for "safe harbor" protection under the new regulations, an employer must take action within *30 days* of receipt of the no-match letter by either (i) correcting any clerical errors that may have caused the mis-match reported by SSA, or (ii) directing the employee to correct the problem directly with the SSA or DHS. If the discrepancy that led to issuance of the "no-match" letter cannot be rectified within 90 days, the employer must then choose between discharging the employee or assuming the risk that DHS will determine that the employer has

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constructive knowledge of employing an illegal worker, subjecting the employer to liability.

Although DHS claims that it will continue to consider the totality of the relevant circumstances in determining whether the employer had constructive knowledge that it was illegally employing a worker who was the subject of a no-match letter, employers should pay special attention to the new safe harbor procedures described above as a means of insulating themselves from liability. Knowledge of the availability of a safe harbor and how it works is especially important in view of the increased visibility of DHS enforcement and the anticipated acceleration of DHS enforcement efforts. Employers also must be mindful of their duty to implement and execute company policies and procedures in a consistent and non-discriminatory manner, and with the knowledge that their discharge of a worker, even under the "safe harbor" provisions, will be judged against that standard.◆

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