# SSA "No-Match" Letters and DHS's Proposed Rules

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## The Proposed DHS Regulations

The U.S. Dept. of Homeland Security (DHS), Bureau of Immigration and Customs Enforcement (ICE), has released new federal regulations that are intended to improve worksite enforcement, reduce the employment of unauthorized workers, and help prevent the alleged use of false Social Security numbers (SSNs). The proposed regulations, entitled "Safe Harbor Procedures for Employers Who Receive a No-Match Letter," published in the Federal Register on June 14, 2006, provide guidance for employers to follow when handling "no-match" letters received from either the Social Security Administration (SSA) or DHS. The proposed rules are subject to a 60-day public comment period. **Written comments must be submitted on or before August 14, 2006.**

These regulations are only proposed regulations, and employers are not required to follow these procedures upon receipt of a no-match letter from the SSA until the rules are finalized. While the DHS rules are merely proposed regulations, employers will undoubtedly be impacted by them and may feel obligated to comply with the proposed regulations.

It is very likely that these proposed regulations will change after the 60-day public comment period. The final regulations may be very different from what DHS has proposed. For these reasons, employers should wait until the proposed regulations are finalized before taking any actions upon receipt of no-match letters.

## Warning for Employers about the Proposed Regulations

Because the DHS SSA no-match safe harbor procedures are only proposed rules, prudent employers should not feel obligated to comply with these proposed rules and instead should follow the advice on SSA no-match letters as promulgated by the SSA, the Internal Revenue Service (IRS), the Office of Special Counsel for Unfair Immigration-Related Employment Practices (OSC), and the DHS (which has up until now adopted the former Immigration and Naturalization Service's position). Employers should know that:

- The DHS notice is simply a *proposed* regulation that is likely to change once it is finalized. This means that current law is still in effect (i.e., arbitration decisions holding that firing workers protected by a union contract is a violation of the "just cause" clause of the collective bargaining agreement).
- If employers change their policies or try to implement the steps set forth in the proposed regulation, they are subjecting themselves to greater liability and potential employment lawsuits if they do take adverse actions now before the regulation is finalized.
- There are many potential reasons for the types of discrepancies reported in no-match letters. SSA specifically advises employers not take adverse action against any employee based on the no-match letter.

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- Under current law, the no-match letter is not a notice about a worker's immigration status, and therefore employers should not be reverifying work authorization documents in response to the no-match letter.

Employers who do take adverse action against workers may be subject to liability for violating the antidiscrimination provisions of the Immigration and Nationality Act or other labor and employment laws. This is of particular concern because of the great potential for unjust firings of authorized workers due to errors in the SSA database.

For more information about the proposed SSA no-match regulations, please contact Tyler Moran at moran@nilc.org.