

SUMMARY OF U.S. DEPT. OF HOMELAND SECURITY FINAL RULE
“Safe Harbor Procedures for Employers
Who Receive a No-Match Letter”
8 CFR Part 274a; 72 FR 45611–24 (Aug. 15, 2007)

August 15, 2007 (rev. Sept. 4, 2007)

U.S. Immigration and Customs Enforcement (ICE), a bureau within the U.S. Dept. of Homeland Security (DHS), has published a final rule that expands the definition of “constructive knowledge.” The rule creates new examples of circumstances in which an employer could be found to have knowledge that an employee is unauthorized to be employed in the United States. Those examples are (1) upon receiving a letter from the Social Security Administration (SSA) stating that the information submitted for an employee does not match SSA records (otherwise known as an SSA “no-match” letter); (2) upon receiving a notice from ICE that the immigration document establishing employment authorization presented by the employee does not match DHS records (known as a “Notice of Suspect Documents”); or (3) upon an employee’s request for the employer’s sponsorship of the employee for a labor certification or visa petition. The rule will become effective on Sept. 14, 2007.

Here we summarize the new rule’s provisions regarding an employer’s legal obligations upon receiving a no-match letter from the SSA. (For a copy of the rule, see www.nilc.org/immsemplmnt/SSA_Related_Info/DHS_No-Match_Rule.pdf.)

■ **Reasons for regulations**

Each year, SSA sends letters to certain employers informing them of the fact that their Wage and Tax Statement (Form W-2) contains employee names and Social Security numbers (SSN) that do not match SSA records. This summary focuses on how the final rule deals with an employer’s receipt of an SSA no-match letter. Under the rule, ICE could use the receipt of the no-match letter as evidence that the employer has “constructive knowledge”¹ that an employee is unauthorized to work. The proposed rule includes “safe harbor” procedures that such an employer should follow in order to avoid liability under section 274A(a)(2) of the Immigration and Nationality Act (INA).

While DHS acknowledges that there are many reasons for a no-match letter, including clerical errors and name changes, DHS claims that “one of the causes” of the no-match “is the submission of information for an alien who is not authorized to work in the United States and is using a false SSN or a SSN assigned to someone else.” According to DHS, the no-match letter “may be one of the only indicators to an employer that one of its employees may be an unauthorized alien.”

¹ As defined in 8 CFR 274a.1(l)(1).



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ICE sends a similar letter after it has conducted an audit of an employer’s I-9 employment eligibility verification forms and determines that an immigration document presented by a worker to establish his or her employment eligibility (during the I-9 employment eligibility verification process) contains a discrepancy.

The rule also provides that an employee’s request that the employer file a labor certification or employment-based visa petition on his or her behalf is an example of a situation that may, depending on the totality of relevant circumstances, require the employer to take reasonable steps to avoid a finding that the employer had “constructive knowledge” that the employee is employment-ineligible.

■ **“Safe-harbor” steps a “reasonable” employer should take upon receipt of a SSA no-match letter**

Under the regulations, a “reasonable” employer who receives a no-match letter from the SSA will not be deemed to have “constructive knowledge” that an employee is an unauthorized worker if the following “safe-harbor” steps are taken:

1. **Within 30 days** of receipt of the no-match letter, the employer would have to:
 - a. Check the employer’s records to determine if the discrepancy is because of a typographical, transcribing or similar clerical error in the employer’s records or in its communication to the SSA or DHS. If there is an error, the employer should correct its records, inform the relevant agency, and verify that the corrected name and SSN match agency records (either over the phone or by using the Internet); and
 - b. If the employer’s records are accurate, “promptly” ask the employee to confirm that the information the employer has in its records is correct.
 - If the employee provides corrected information, the employer should correct its records, inform the relevant agency, and verify that the corrected name and SSN match agency records.
 - If the employer’s own records **are** correct, the employer should ask the employee to resolve the discrepancy with the relevant agency **within 90 days of the receipt of the no-match letter to the employer.**

In all instances, the employer should also make a record of the manner, date, and time of the verification and store such record with the employee’s Form I-9. Employers also are “*encouraged*” to document telephone conversations as evidence that the discrepancy is corrected.

2. If the discrepancy is not resolved **within 90 days** of receipt of the no-match letter, the employer may reverify the employee’s employment eligibility and identity by completing a new Form I-9. The employer and employee would have **3 additional days** to complete this form (or it must be completed within a total of 93 days of receipt of the no-match letter). An employee **may not** use a document containing the SSN or alien number that is the subject of the no-match letter to establish employment eligibility or identity or both (including a receipt for an application for a replacement of such document). Additionally, all documents used to prove identity, or both identity and employment authorization, must contain a photograph.

3. If the no-match is not resolved and the employer cannot verify the employment eligibility and identity of the employee (through completion of a new I-9 form), the employer must choose between terminating the employee or facing the risk that DHS may find that the employer had constructive knowledge that the employee was unauthorized to work, and is therefore in violation of immigration laws.

The rule states that reverification procedures should be applied uniformly to **all** employees with a no-match. Selectively reverifying certain employees may subject employers to liability under applicable antidiscrimination laws. Employers who follow the safe harbor procedures will not be found liable for unlawful discrimination under federal immigration law.

The rule also states that “knowledge that an employee is unauthorized may not be inferred from employee’s foreign appearance or accent.” DHS also states that this final rule does not conflict with the “document abuse” provisions in the anti-discrimination section of the INA (274A(b), 8 U.S.C. 1324a(b)). DHS states that as long as the employer applies the same procedures to all employees referenced in the “no-match” letter, the employer will not be subject to suit by the U.S. under the INA’s antidiscrimination provisions.

DHS states that it is not “requiring” employers to follow this rule. There may be other procedures that an employer **could** follow in response to a no-match letter that would be considered “reasonable” by DHS, but unless the employer follows the “safe-harbor” procedures outlined in the rule, there is a risk that DHS may find the employer had constructive knowledge that the employee was unauthorized to work. According to DHS, any particular case will depend on the “totality of relevant circumstances.” Additionally, DHS notes that even if an employer follows the safe-harbor procedures outlined above, it would not preclude DHS from finding that an employer had “actual” knowledge that an employee was unauthorized to work. In this instance, the burden would be on the government to prove that the employer had actual knowledge. DHS could also find that the employer had constructive knowledge from sources other than the no-match letter.

DHS states that the final rule **applies only to written notice that is issued directly to the employer** from the SSA or DHS. It does **not** apply to information employers receive through sources other than no-match letters. This includes a discrepancy the employer may learn about in using the Social Security Number Verification Service (SSNVS), E-Verify, or ICE Mutual Agreement between Government and Employers (IMAGE).² DHS will exercise its prosecutorial discretion favorably for employers who use such programs. However, use of these programs can only mitigate against being found liable for violating immigration law and will not provide an automatic “safe harbor.”

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² For more information about the Social Security Number Verification Service (SSNVS), E-Verify (formerly known as the Basic Pilot Program), or the IMAGE Program, see www.nilc.org/immseplymnt/SSA_Related_Info/index.htm.