

SUMMARY OF U.S. DEPT. OF HOMELAND SECURITY PROPOSED RULES

“Safe Harbor Procedures for Employers Who Receive a No-Match Letter”

71 FR 34281–85 (June 14, 2006).

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■ Summary

U.S. Immigration and Customs Enforcement (ICE), a bureau within the U.S. Dept. of Homeland Security (DHS), has issued proposed rules regarding an employer’s legal obligations 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) or a notice from DHS that the immigration document establishing employment authorization presented by the employee does not match DHS records. Under the proposed rule, ICE could use the receipt of either of these letters 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.

These are *proposed* regulations and are subject to a 60-day public comment period. **Written comments must be submitted on or before August 14, 2006.** For a copy of the rule, see <http://a257.g.akamaitech.net/7/257/2422/01jan20061800/edocket.access.gpo.gov/2006/pdf/E6-9303.pdf>.

■ Reasons for proposed regulations

Each year, SSA sends certain employers letters 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. 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.”

ICE sends a similar letter after it has conducted an I-9 audit under which it inspects an employer’s employment eligibility verification forms (Forms I-9) and determines there is a discrepancy with the immigration document presented by the employee to establish his/her work authorization as part of the I-9 process.

¹ As defined in 8 CFR 274a.1(l)(1).



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

Under the proposed regulations, an employer who receives a no-match letter from the SSA or DHS 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 14 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. The employer should also make a record of the manner, date, and time of the verification; or
 - b. Ask the employee to confirm that the information the employer has in its records is correct if the employer did not find any error in its own records. If the employee provides corrected information, the employer would 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. In both instances, the employer should make a record of the manner, date, and time of the verification.
2. If the discrepancy is not resolved **within 60 days** of receipt of the no-match letter, the employer may reverify the employee’s work authorization and identity by completing a new Form I-9. The employer and employee would have **3 days** to complete this form (or within 63 days of receipt of the no-match letter). An employee **cannot** use a document containing the SSN or alien number that is the subject of the no-match letter to establish work authorization or identity or both. 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 work authorization and identity of the employee, 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.

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. 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.

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