
LEGAL ALERT

Department of Homeland Security Announces Final Rule Regarding SSA Mismatch Letters

Today, the Department of Homeland Security announced publication of a final rule establishing safe harbor procedures for employers who receive an SSA mismatch letter or notice from DHS that an individual lacks authorization to work. The final rule is expected to be published in the Federal Register in the next couple of days and it will take effect 30 days after publication.

Every year, the Social Security Administration analyzes W-2 tax return data to determine if the name and number shown on the W-2 return match Social Security Administration records. SSA will send out a mismatch or "no match" letter to an employer if that employer has submitted more than 10 W-2's with mismatches and this amounts to more than one half of 1% of all the W-2's submitted by the employer. Typically, mismatch letters start to go out in March or April of each year.

The final rule would give an employer who receives a mismatch letter 30 days to examine its own records to see if the deficiency can be cured. If the error lies in the employer's records, the employer is to notify SSA of the correct information. If the error cannot be resolved by reference to the employer's records, the employer must notify the employee of the date that the employer received the mismatch letter and give the employee 90 days from that date to cure the problem. At the end of the 90 day period for curing the discrepancy, the employer has three days in which to complete a new I-9 form for the employee. The employee cannot present a document that is in dispute and must present a document that contains a photograph. The employer must retain the new I-9 form with any prior I-9 form completed by the employee. If the safe harbor procedures are followed, the employer will not be charged with constructive knowledge that the employee lacks authorization to work. The same procedures apply in the event that the employer receives notice from DHS that the immigration or work authorization document presented or referenced by the employee in connection with completing form I-9 is not valid.

As a practical matter, this regulation will not have any immediate impact because the SSA mismatch letters for 2006 W-2 returns have already been sent to employers. Mismatch letters for 2007 W-2 returns will start to go out to employers next Spring.

DHS also announced several other enforcement measures that it plans to implement in the near future. These include a new I-9 regulation reducing the number of acceptable documents, regulations increasing civil money penalties applicable to I-9 deficiencies and knowing employment violations, continued and increased use of criminal sanctions to deter employment of illegal aliens, improvements to the DHS online employment verification system, and a regulation requiring all federal contractors to use the online verification system.

Since it is clear the DHS enforcement efforts will increase in the future, prudent employers will begin to take steps to improve I-9 compliance immediately. Employers that suspect that they may be employing illegal workers or that it received mismatch letters in the past may wish to gradually phase in a process of re-verifying current employee Social Security numbers so that they are not forced to replace large numbers of workers 90 days after receipt of a mismatch letter.

If you have any question about the DHS final rule or the safe harbor procedures, or if you need assistance or advice regarding I-9 compliance or a self audit, please contact your Fisher and Phillips LLP attorney, David Whitlock (404-231-1400 or dwhitlock@laborlawyers.com), or Ian Macdonald (404-231-1400 or imacdonald@laborlawyers.com).