



## **DHS Mis-Match Rule Published**

Insights

8.15.07

The final mismatch or "no match" regulation appears in today's Federal Register. Thus, the rule will be in effect September 14, 2007. Employers need to get ready now.

The Bush administration has acknowledged that it delayed publication of a final rule in the hope that Congress would enact comprehensive immigration reform legislation. At the same time, the Social Security Administration held off on sending out mismatch letters based upon 2006 W-2 returns. Now that the final mismatch regulation has been published SSA will begin sending out mismatch letters. Sources within the administration confirm that the mismatch letters will be staggered over the next several months so that the Social Security Administration is not inundated with persons seeking to correct name number mismatches.

### **DHS/SSA Coordinated Effort**

The mismatch letter will be accompanied by a letter from the Department of Homeland Security explaining the final rule in detail and describing the procedures that an employer should follow upon receipt of the letter. DHS confirmed that it will be placing its letter in the SSA envelope. As a result, it is possible that DHS will know which employers are receiving mismatch letters and could use this information for follow up enforcement efforts. When asked to confirm whether or not this would occur, a senior DHS spokesperson merely repeated the DHS would be stuffing the SSA envelope.

DHS also has confirmed that it will be raising the civil money penalty for knowing employment violations by as much as 25%. We expect that DHS will publish a regulation to that effect sometime in the next couple of months. In addition, DHS will publish a regulation by the end of the year that would require all federal contractors to participate in the online E-Verify program (formerly known as Basic Pilot). When asked if employers volunteering to enroll in E-Verify would be subject to investigations, DHS confirmed that investigations would continue when employers are suspected of abusing the system.

### **Steps Employers Should Take Now**

*Hiring.*

Because workers named in the mismatch letter are allowed to continue working during the 90-day period for correcting the mismatch error, and because those letters will start to go out in the next

couple of weeks, employers should anticipate a very tight labor market beginning around Thanksgiving and lasting for several months or longer. Thus, employers that received mismatch letters in recent years and that expect to receive one again should consider ramping up recruitment and hiring efforts to replace workers who will need to be terminated if they cannot cure a mismatch problem.

Similarly, employers with a seasonal need for more workers in late Fall and Winter should begin thinking about steps they will need to take to recruit and hire legal workers. Employers may want to consider alternative staffing arrangements through staffing companies and temp agencies. Employers that anticipate receiving a mismatch letter in the next few weeks may wish to begin ramping up recruitment efforts now to replace those workers who quit when notified of a mismatch error.

### *Correcting Mismatch Problems.*

If you receive a mismatch letter, act quickly to examine your records to see if the mismatch is due to a clerical or administrative error. If so, correct this and notify SSA. You must also verify that the corrected name and number match SSA records. You can do this by using the SSA toll-free telephone number (1-800-772-6270) or by using the free, online Social Security Number verification system (go to [www.ssa.gov/employer/ssnv.htm](http://www.ssa.gov/employer/ssnv.htm) to enroll).

Make a record of the "manner, date, and time of such a verification" and store that data with the employee's I-9 form. The employer must complete these steps within 30 days of receipt of the mismatch letter.

If the mismatch is not due to an administrative or clerical error discovered in your records, promptly advise the affected worker of the date the mismatch letter was received and advise the worker to resolve the discrepancy within 90 days from receipt of the letter. If you are unable to verify the validity of the worker's name and number within 90 days of receiving the mismatch letter, complete a new I-9 form for that worker.

The process at this point is the same as if the worker was a new hire. In other words, the employee should complete section 1 of the I-9 form immediately and the employer should examine documents and complete section 2 of the form by the end of the third day (i.e., by the end of the 93rd day after receipt of the mismatch letter). The employee is not permitted to present a document that is in dispute as a result of the mismatch letter or correspondence from DHS and cannot present another document that has a disputed number.

In addition, the worker must present a document bearing a photograph to establish identity or identity and employment eligibility. The employee cannot present a receipt for a replacement document. You should retain the new I-9 form with any prior I-9 forms and follow the normal retention rules.

The final regulation emphasizes that employers should not react prematurely to receipt of the mismatch letter by immediately terminating workers listed in the letter. Instead, employers should first check their own records and then give each affected worker the opportunity to cure the deficiency.

### **We Recommend . . .**

Publication of the final mismatch rule and imminent mailing of this year's mismatch letters lay the groundwork for DHS enforcement efforts going forward. It is clear that the Administration intends to continue aggressive enforcement efforts. In addition to getting ready for a very tight labor market this Winter, employers need to get ready for the increasing prospect of enforcement.

We recommend that employers take the following steps right away:

- audit your I-9 forms and compliance;
- have a random sample of your I-9 forms audited by an outside expert to ensure that you are doing it right;
- sign up for online Social Security Number verification and begin to verify numbers for all new hires going forward;
- establish a company policy requiring each employee to have a valid name-number combination;
- do not let anyone work who cannot produce a valid name-number combination;
- if you have received a mismatch letter in the past, consider approaching those employees now and starting the process described above;
- if you are in a high-risk industry (agriculture, construction, hospitality, textiles, manufacturing, food processing, or critical infrastructure), consider verifying the Social Security Numbers of your current workers.

Stay tuned for further developments in this evolving area of the law.