The Department of Homeland Security Releases An Updated No-Match Letter Rule

Insights
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On October 23, 2008, the Department of Homeland Security (DHS) released its supplemental final No-Match Letter Rule and announced that it will take effect immediately upon publication in the Federal Register on a not yet scheduled date. The supplemental final rule does not substantively change the safe harbor procedures described in the rule as originally written and issued in August 2007 or as supplemented in March 2008. The DHS will seek to lift the preliminary injunction imposed by Judge Charles Breyer of the Northern District of California in October 2007. Once the injunction is lifted, employers who receive No-Match letters issued by the Social Security Administration (SSA) but follow the safe harbor procedures described in the No-Match Letter Rule, will be sheltered from a charge of constructive knowledge that the individual named in the letter was not authorized to work in the United States. DHS takes the position that its supplemental final rule addresses the issues raised by Judge Breyer and if the injunction is lifted, will take immediate steps to implement the rule. Judge Breyer has rescheduled a status conference in the case from October 31 to November 21, 2008.

The SSA issues No-Match Letters when at least 11 of the employees' names and Social Security Numbers listed on an employer's W-2 Wage and Tax Statement do not match its records and when the total number of no-matches in a wage report represents more than 0.5% of the total in the report. The SSA is expected to issue the next series of No-Match letters in the Spring of 2009.

The safe harbor procedures require an employer, within 30 days of receipt of a no-match letter, to verify that the no-match was not due to a clerical or typographical error and if it is an error on the employer's part, to correct the error, ensure that the SSA receives the corrected information, and retain documentation of these steps with the employee's I-9 form. If the error was not due to a clerical or typographical error, the employer is required to notify the employee within five business days of its determination and the employee has 90 days from the date that the employer received the no-match letter to resolve the matter with the SSA. If the discrepancy is still unresolved after 90 days, the employee must complete a new I-9 form, as if the employee were a new hire, within 93 days. An employer could be charged with a knowing violation of the Immigration Reform and Control Act (IRCA) if it takes no action in response to a SSA no-match letter. In addition, an employer may be found to have engaged in unlawful discrimination if it terminates an employee or treats an employee differently based on a prohibited characteristic after receiving a SSA no-match letter and failure to follow the safe harbor procedures.

Until the injunction is lifted, there is no requirement that an employer take any steps after receiving a SSA No-Match Letter. We anticipate that the No-Match Letter Rule will be implemented before the end of 2008, and as a result, recommend that employers familiarize themselves with the safe harbor procedures and requirements of the rule and be ready to implement a policy for resolving no-match letter discrepancies.