

DEALING WITH IMMIGRATION ISSUES

If anyone watches television then you are aware that the United States Congress is currently debating immigration issues. While many of you might look at your workforce and determine that this does not apply to you, I caution you that employers have had immigration issues in this area going back to the past five years that I have had to assist in dealing with. Do not ignore these issues because ignorance will not be an adequate defense.

How do such issues come up for an employer that has required all proper forms? It comes up through false documentation or some internal error. What do you do when you are notified by the Social Security Administration that your employee has a false SSN number? Talk about a new issue of identity theft! You need to take prompt action.

While some no matches are clearly errors as a result of typos or other human error, there is a time when you might have to deal with this scenario involving fraudulent documentation submitted to you. If you ever receive notice that something is wrong with an employee's Social Security Number (SSN), you cannot rule out the prospect that you are possibly employing an illegal alien.

The Department of Homeland Security has suggested to Congress (remember, this has been suggested and not passed) a proposal that provides employers steps to follow so that if an employer follows all required steps they will not be penalized for any wrongdoing. If you have direct knowledge that an employee is an illegal immigrant, this multi step process does not apply to you and you cannot be exonerated by following these steps.

The proposed regulation of the DHS states as follows:

1. When you receive a no-match letter from Social Security, you must promptly investigate the discrepancy described in the letter to decipher whether or not there is a clerical or other error. If there is a known error, then you must promptly correct the error in all paperwork and inform SSA of the error, indicating the discrepancy has been resolved;
2. If step one does not resolve the discrepancy, then the employer needs to promptly request that the employee confirm that the employer's records are correct. If the employer's records are not correct, then they need to be corrected and SSA needs to be notified within 14 days of the employer's receipt of the no-match letter (if a new number is involved in this correction then the SSA must be contacted to confirm it is a valid SSN number and the employer must make a written record of the date, manner, and time of any such verification).
3. If the discrepancy is not resolved within 60 days of an employer receiving a no-match letter, the proposal provides the employer a verification procedure to be followed. If that procedure is completed and the employee is verified, then even if the employee is an

unauthorized alien, the employee will not be considered to have constructive knowledge of that fact. If the procedure does not resolve the discrepancy and the employee cannot be verified, then an employer must choose between taking action to terminate the employee or face the risk that DHS may find the employer guilty of having constructive knowledge as to employing an unauthorized alien in violation of the Immigration Nationality Act, sec. 274A(a)(2).

The verification procedure requires the employer to:

1. Complete both Sections 1 and 2 of the new I-9 within 63 days of receipt of the no match letter (current procedure for new hires allows for three completing this form);
2. No document containing the problematic SSN number that resulted in the no-match letter can be used to establish employment authorization;
3. No document without a photograph may be used to establish identity or both identity and employment authorization.

Warning: This procedure must be applied uniformly to all employees having unresolved no-match indicators and if this is not the case, the employer may also be guilty of violating applicable anti-discrimination laws.

If you are contacted by Immigration and Customs Enforcement (ICE), a bureau of DHS by the way, questioning an employee's authorized status, do not ignore it and make sure that you respond within 14 days documenting your attempt to resolve the discrepancy similar to the procedure that is described above.

This rule is not final and does allow all who want to submit comments to do so prior to August 14, 2006. After that date, DHS will issue its final Rule.