



Immigration Insider

News from the Alliance of Business Immigration Lawyers
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Details...

1. DHS Issues Final Rule on Employer 'No-Match' Obligations; Judge Issues Temporary Restraining Order Until October 1

U.S. Immigration and Customs Enforcement (ICE), an agency of the Department of Homeland Security (DHS), issued a final rule, effective September 14, 2007, that amends the regulations relating to the unlawful hiring or continued employment of unauthorized workers. The amended regulation describes the legal obligations of an employer, under current immigration law, when the employer receives a no-match letter from the Social Security Administration (SSA) or receives a letter regarding employment verification forms from the DHS. It also describes "safe-harbor" procedures that the employer can follow in response so that the DHS "will not use the letter as any part of an allegation that the employer had constructive knowledge that the employee referred to in the letter was an alien not authorized to work" in the U.S.

Constructive knowledge. The final rule expands the current regulation's definition of "constructive knowledge" and illustrates several situations that may lead to a finding that an employer had constructive knowledge that undocumented workers were employed. These additional examples involve an employer's failure to take reasonable steps in response to several events: The employer receives a written notice from the Social Security Administration (such as an "Employer Correction Request," commonly known as an employer "no-match letter") stating that the combination of an employee's name and Social Security number does not match SSA records,

or the employer receives written notice from the DHS that the immigration status or employment authorization documentation presented or referenced by an employee in completing the I-9 verification form was not assigned to the employee according to DHS records. DHS said it "will continue to review the totality of relevant circumstances in determining if an employer had constructive knowledge that an employee was an unauthorized alien in a situation described in any of the regulation's examples."

Safe harbor procedures. The "safe harbor" procedures that employers may follow to avoid a finding of constructive knowledge include attempting to resolve the no-match and, if it cannot be resolved within a certain period of time, verifying again the employee's identity and employment authorization through a specified process. Safe harbor is unavailable where the employee requests visa or labor certification sponsorship and is unauthorized to work. Additionally, if the employer knows or has enough inconsistent information to suggest an employee's ineligibility, the safe harbor provisions will not protect that employer. On the other hand, the safe-harbor steps should be completed before taking any action against the employee to avoid national origin discrimination or wrongful termination claims.

The regulation describes more specifically the "reasonable" steps that an employer might take after receiving a no-match letter. Such steps include, for example, checking its records promptly after receiving a no-match letter to determine whether the discrepancy resulted from a typographical, transcription, or similar clerical error in the employer's records, or in its communication to the SSA or DHS. If there is such an error, DHS expects the employer to correct its records, inform the relevant agencies, verify that the name and number, as corrected, match agency records, and make a record of the manner, date, and time of the verification. ICE/DHS will consider a reasonable employer to have acted promptly if the employer takes such steps within 30 days of receipt of the no-match letter. The regulation also describes a verification procedure that the employer may follow if the discrepancy is not resolved within 90 days of receipt of the no-match letter.

Enforcement. Previously, the SSA's position was that the no-match letters were only for informational purposes, recognizing that discrepancies could be the result of a variety of clerical errors or name changes. The no-match letters were not used for enforcement. That is expected to change, although how enforcement will look remains unclear. A DHS FAQ states, "ICE has determined that worksite enforcement investigations relating to critical infrastructure protection are among the most important. Additionally, ICE has found that simple penalties are not an effective

deterrent. Therefore, ICE is looking at ways to bring significant criminal charges against businesses engaging in routine hiring of illegal aliens."

SSA's release of the tax year 2006 "no-match" letters will be accompanied by a letter from the DHS. SSA had planned to release the tax year 2006 "no-match" letters to employers beginning in the second week of September when the no-match regulation is due to be effective, but a federal judge issued a temporary restraining order on August 31, 2007, in response to an AFL-CIO lawsuit, and the next hearing is scheduled for October 1, so no letters are expected to be sent before October. DHS Secretary Michael Chertoff said, "They will not send all of them out at once; they'll probably send about 15,000 out a week, over a period of probably about eight to ten weeks." SSA expects to send out approximately 140,000 no-match letters that will cover approximately 8.9 million of the roughly 12 million total no-matches. Letters will only be sent to employers who have more than 10 employees with mismatched information, or for whom the mismatched employees represented one-half of one percent of the W-2s filed with SSAs in any given year, whichever is larger. ICE has 18 phone lines with 25 people on duty to answer questions from employers regarding the no-match rule.

Employers may verify a Social Security number by calling 1-800-772-6270 from 7 a.m. to 7 p.m. EST, or online at <http://www.ssa.gov/employer/ssnv.htm>. Employers should keep a record of any verification. Contact your ABIL member for advice in specific situations.

Reaction. Many business and labor groups oppose the new requirements. The agricultural trade association Western Growers, for example, whose 3,000 members are responsible for about half the produce grown and shipped in the U.S., immediately issued a strongly worded statement denouncing the requirements. "We know and have told the government that much of agriculture's workforce is falsely documented. We are one of the only industries in this country that has been forthright with the fact that much of our workforce is illegal and have pleaded with the government to pass laws to address this problem. Instead of securing a legal, stable workforce for agriculture, these rules will make it even more difficult for farmers throughout Arizona, California and the entire nation to find workers to harvest and process the crops all Americans enjoy," said Western Growers President and CEO Tom Nassif. "In the short term, we are going to see workers fleeing their workplace just prior to the 90-day time limit and beginning anew at a different farm. This cycle could go on for a long time furthering the instability of agriculture's workforce. Secondly, these rules could expedite the move of American farms abroad.

The fact is, our food is going to be picked by a foreign workforce. The question is, will they be harvesting our food here under heavy regulation ensuring our food supply is as safe as scientifically possible, or is it going to be in places like China where regulations are, in some cases, nonexistent?" He advocated a "common-sense" system such as that proposed by the Agricultural Job Opportunities, Benefits and Security Act (AgJOBS) bill.

The full text of the final rule is available at <http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/E7-16066.htm>. A DHS FAQ is available at http://faq.ice.gov/cgi-bin/ice_faq.cfg/php/enduser/std_alp.php?p_sid=6IbfqOIi (scroll down for questions and links to answers). Information from the SSA on the no-match process for employers is available at <http://www.ssa.gov/employer/noMatchNotices.htm>.

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2. ABIL Releases Tips on Verification Compliance

The Form I-9 (Employment Eligibility Verification) issued by U.S. Citizenship and Immigration Services must be maintained by all employers. Since November 1986, every new hire, whether a U.S. citizen or a foreign national, must complete section 1 on the first day of employment, attesting to the individual's identity and employment eligibility. Within the first three days of hire, employers must complete section 2 of the I-9 by examining original documents of identity and employment authorization, recording the starting date of employment, noting the document numbers on the form, and certifying by signing under penalty of perjury that the documents examined appear to be genuine and relate to the employee. Employers must also refrain, however, from engaging in prohibited acts of discrimination against new hires and applicants for employment, such as basing employment decisions on citizenship or national origin status, or insisting that employees provide only specific types of identity documents or work permits.

Recently, the federal government has used the avenue of criminal law enforcement to prosecute employer violations of immigration laws. Prudent employers should follow a set of steps to confirm that their compliance obligations under the immigration laws are fulfilled. This is especially important in the post-Enron era when Sarbanes-Oxley Act compliance and damage to corporate reputations are of heightened concern. This checklist can serve as a starting point for employer immigration compliance:

Current I-9s

1. As long as no formal enforcement proceedings are pending or likely, employers should remove from their files and discard original I-9s no longer subject to the I-9 "retention rule" (I-9s may be destroyed after three years from the date of hire or one year from the date of termination, whichever is later).
2. Employers should perform voluntary audits of all or a representative sample of retained I-9s to measure compliance practices.
3. As a measure of good-faith compliance and to mitigate potential fines, employers should correct I-9s with errors and missing information, keeping original I-9s and initialing changes with the date of correction. Changes should be made in a separate color ink on the existing form, but employers should provide a new I-9 and keep the old one (if it is no longer subject to the retention rule) only if there is sufficient space.
4. Employers should establish a reminder system for the timely reverification of employment eligibility for foreign employees who have time-limited work permission.
5. Employers should take prompt action if notified by the Social Security Administration that a discrepancy exists between employer-provided records on specific workers and the agency's own data (the so-called SSA "no-match letter"). An employer acts appropriately in this situation by checking the employer's records, providing the employee an opportunity to seek an official correction or, if unable to verify and reconcile the discrepancy, considering (on advice of counsel) whether termination of employment is required. For details on the time requirements for such compliance efforts, see <http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/E7-16066.htm>.
6. If numerous no-match letters are received, employers should consider reverifying the entire workforce but should take precautions to avoid unlawful immigration-related employment discrimination.
7. Employers should decide whether to:
 - Copy or refrain from copying original documents of identity and employment eligibility. On the one hand, copying creates a paper trail, making it easier for the employer and the government to review prior compliance actions and for the employer to make corrections to I-9s, if required. On the other, maintaining added

paperwork is burdensome and costly, and requires that employers act uniformly by copying all original documents reviewed on all employees for I-9 purposes and keeping the copies with the I-9s.

- Maintain I-9s and required records in paper, microfiche, or electronic format. Immigration regulations now allow electronic storage and electronic signatures for I-9s. While using digital technology reduces paper storage costs, the regulations pose added requirements for assuring data integrity, facilitating audits and easing the government's investigative burden.
- Participate in the new U.S. Citizenship and Immigration Enforcement (ICE) programs, electronic "Basic Pilot" verification and/or "IMAGE." The Basic Pilot allows an employer to check the employment eligibility of foreign nationals (new hires only) through the government's immigration database. The signing of a Memorandum of Understanding is required. IMAGE is the ICE Mutual Agreement between Government and Employers, a plan for voluntary self-policing and the submission of annual immigration audits first by the government and then by qualified third-party entities. See <http://www.ice.gov/partners/opaimage>.

Future Hires

1. Set up a system for handling future I-9s.
2. Complete Section 1 of the I-9 on the first day of work for all new hires.
3. Complete the rest of the I-9 within three days of the first day of work.
4. Consider pre-completing the Employer's Business Name and Address in Section 2 and pre-fill Employer Authorized Representative's Name and Title if the same person always completes the Employer Certification.
5. Do not accept copies of work or identity documents.
6. Make sure all new hires complete I-9s in person before a company official (to confirm identity) or an authorized agent (with respect to whom the employer must take full responsibility for any I-9 mistakes or omissions).

Company Practices

1. Engage in regular training for employees handling I-9 completion.

2. Establish an I-9 routine and follow it consistently for every employee.
3. Create a system for tracking dates of hire and terminations of employment to purge I-9s from current storage to minimize liability (assuming no actual or threatened government investigation exists or is likely).
4. Consider establishing policies (in consultation with employment law counsel) for future compliance and ongoing voluntary audits.

See your ABIL member for help in complying with the new no-match rules and other verification requirements.

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3. USCIS Proposes Replacement of Green Cards Without Expiration Dates

U.S. Citizenship and Immigration Services (USCIS) has proposed to require nearly 750,000 lawful permanent residents carrying green cards without an expiration date to replace their current cards. The proposed rule would require lawful permanent residents to apply for a new Permanent Resident Card (Form I-551) during a 120-day filing period. USCIS said the change would allow the agency to issue more secure permanent resident cards, update cardholder information, conduct background checks, and electronically store applicants' fingerprint and photographic information.

In August 1989, the former Immigration and Naturalization Service began issuing new cards with a 10-year expiration date and required residents to apply periodically for a new card. Between 1979 and 1989, however, the cards were issued without expiration dates. These latter cards are the subject of the proposed rule.

Under the proposed rule, affected lawful permanent residents would file an Application to Replace Lawful Permanent Residence Card (Form I-90). The I-90 requires applicants to provide current biographic and biometric (photographs and fingerprint) information.

In addition to proposing a 120-day filing period, the rule also would remove all references in the regulations to outdated I-90 application procedures and correct the title and edition date of the I-90. Finally, under the rule, USCIS would be able to terminate permanent resident cards without an expiration date via notice in the Federal Register.

The full text of the proposed rule, which will remain available for public comment until September 21, 2007, is posted at

<http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/E7-16311.htm>. Information is also available in an accompanying announcement (<http://www.uscis.gov/files/pressrelease/I551Replacement.pdf>), fact sheet (<http://www.uscis.gov/files/pressrelease/I551ReplacementFS082207.pdf>) and questions-and-answers (<http://www.uscis.gov/files/pressrelease/I551ReplacementQA082207.pdf>).

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4. CBP Launches Online Application for Cross-Border Travel Program

Cross-border travelers wishing to apply for Nexus now are able to do so through a new, online application system. Nexus is a frequent traveler program between the U.S. and Canada. Applicants voluntarily undergo a background check, in-person interview, and fingerprinting, and pay a \$50 five-year membership fee. Under the new system, individuals may submit an online application and pay the membership fee.

U.S. Customs and Border Protection (CBP) Commissioner W. Ralph Basham said the program "has tremendous benefits for our law enforcement officials as well as travelers, particularly as it has been proposed as an alternative document to a passport under new document requirements, and we want to encourage new members to sign up."

First implemented in 2000, the Nexus program has grown to include 15 lanes at 11 locations along the U.S.-Canada border, at marine reporting locations border-wide, and at five Canadian airports. The Nexus card also has been proposed as an accepted alternative to a passport under new travel document requirements, slated to go into effect for land and sea crossings as early as summer 2008. Ample advance notice and a robust public information campaign will precede full implementation of this requirement. The Nexus card is also acceptable as an alternative to a passport for air travel, a requirement that went into effect January 23, 2007.

Currently, U.S. and Canadian citizens are not required to present a passport or specific document when seeking to enter or re-enter the U.S. at land and sea crossings. CBP "highly encourages travelers to carry, at minimum, proof of citizenship such as a certified copy of your birth certificate, along with government-issued photo ID, such as a driver's license."

Once an applicant is notified that he or she is conditionally approved through the online Nexus account, the applicant schedules an appointment, also through the online account, to complete the interview and fingerprint process and to obtain the membership card. Approved members have access

to dedicated commuter lanes, airport kiosks and telephonic marine reporting that allows expedited processing. Key benefits of the new online application system include expediting the entire application and vetting process, and streamlining the processing time for new applicants and renewals, CBP said, noting that individuals who have already mailed their application to the Canada Border Services Agency should continue with this process.

More than 133,000 travelers from both sides of the border are enrolled in the program, which accounts for more than six percent of border crossings. Travelers may call the CBP Help Desk at 1-800-927-8729 (press 0, then 1 for technical support); or the Canada Border Services Agency Help Desk at 1-888-281-5778 for French calls; or e-mail SGIL-AIDE@cbsa-asfc.gc.ca.

The announcement is at

http://www.customs.treas.gov/xp/cgov/newsroom/news_releases/08162007_3.xml. The online application is available at http://www.customs.treas.gov/xp/cgov/travel/trusted_traveler/goes/.

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5. California CBP Provides Tips for Mexican Students Entering the U.S.

To facilitate the inspection process at the border, CBP Port Director Billy Whitford of the Calexico, California, ports of entry recently released the following tips for F-1 students attending grade school, high school, or college and residing in Mexicali, Mexico, to follow in advance of entry into the U.S.:

- Verify that your passport (with an F-1 student visa) is valid. If your passport has expired, you will need to obtain a valid one.
- Verify that your I-20 (Eligibility for Non-Immigrant F-1 Student Status) form is properly endorsed by the designated school official at your school for the new school year.
- Verify that you have an I-94 document with your passport.
- If you recently obtained an F-1 student visa from the U.S. Consulate, present yourself at the pedestrian permit office at either port to process it before classes commence.
- Upon "application for entry," have your entry document(s) and school identification ready to present to the inspecting officer.

- Once a student enters the pedestrian building at the downtown port of entry, a student may apply for entry at the far left pedestrian booth, Monday through Friday.
- If a student is applying for entry through the SENTRI lane, or in a carpool, the above requirements also apply.

Mr. Whitford's tips are available at

http://www.cbp.gov/xp/cgov/newsroom/news_releases/08162007_2.xml.

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6. USCIS Issues Service Center and Lockbox Receipting Update

U.S. Citizenship and Immigration Services (USCIS) announced that it has experienced a tremendous increase in the number of applications filed, which has resulted in a "front log" of cases awaiting data entry. USCIS will prioritize data entry for specific form types. Delays in data entry and fee receipting will not affect change of status or extension of stay eligibility, assuming all other eligibility requirements are satisfied, USCIS said. The agency also noted that requests for Premium Processing Service will continue to be processed within 15 days.

The actual received date will be honored and recorded on the receipt notice. This date will appear in the "Received Date" box on Form I-797, Notice of Action. The received date on the I-797 is different from the "Notice Date," which also appears on the Notice and identifies the date the receipt notice was generated.

USCIS will provide weekly updates on its Web site. USCIS released information on completed data entry and receipt notices for applications and petitions received on or before the dates listed at <http://www.uscis.gov/files/pressrelease/ReceiptingTimes081707.pdf>. Please note that the receipt dates do not indicate the date the applicant or petitioner will receive the receipt, only the date it is issued. ABIL members have experienced a lag time of 10 or more days until the actual receipt reaches the applicant or counsel.

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7. DV-2009 Lottery Registration Period to Begin in October

The DV-2009 immigrant visa lottery online entry period begins at noon EDT on October 3, 2007, and ends at noon EDT on December 2, 2007. Additional information and instructions are expected to be posted shortly at

http://travel.state.gov/visa/immigrants/types/types_1318.html, which has a link to the previous instructions for reference purposes.

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8. El Salvador TPS Extended

The designation of El Salvador for temporary protected status (TPS) has been extended for 18 months to March 9, 2009, from its current expiration date of September 9, 2007.

The notice automatically extends the validity of employment authorization documents (EADs) issued under the TPS designation for six months, through March 9, 2008, and explains how TPS beneficiaries and their employers may determine which EADs are automatically extended. New EADs with the March 9, 2009, expiration date will be issued to eligible TPS beneficiaries who timely re-register and apply for an EAD.

The 60-day re-registration period began August 21, 2007, and will remain in effect until October 22, 2007. To facilitate processing of applications, applicants are strongly encouraged to file as soon as possible after the start of the 60-day re-registration period. Details are available in the August 21, 2007, Federal Register notice at <http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/E7-16092.htm>.

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9. NCSL Releases Report on 2007 Enacted State Immigration Legislation

State legislators have introduced roughly two and a half times more immigration-related bills in 2007 than in 2006, according to the National Conference of State Legislatures (NCSL), which notes that in the continued absence of comprehensive federal reform, states have developed a variety of approaches and solutions of their own. NCSL has released a comprehensive online report that provides an overview of introduced legislation and summarizes enacted laws relating to immigrants and refugees by state. The report includes legislative proposals and laws concerned with immigration enforcement as well as all those in which legal and undocumented immigrants, migrants, and refugees are affected. The report is available at <http://www.ncsl.org/programs/immig/2007ImmigrationUpdate.htm>.

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10. Report on Web Basic Pilot Released

Westat of Rockville, Maryland, has released an interim report sent to the Department of Homeland Security in December 2006 on the Web version of the Basic Pilot Program. The 116-page report, "Interim Findings of the Web-Based Basic Pilot Evaluation," notes that on the basis of findings from earlier evaluations, the pilot programs other than the Basic Pilot were terminated. The current Web Basic Pilot program incorporates a number of recommended enhancements.

Among other things, Westat found that the Web Basic Pilot instantly verified the work authorization status of employees more frequently than did the original program. In the Web Basic Pilot, the report notes, 92 percent of cases were initially found to be work-authorized compared to 79 percent in the original Basic Pilot. Westat also found that the accuracy of the U.S. Citizenship and Immigration Services database used for verifications has improved substantially but further improvements are needed. Overall, most employers using the Web Basic Pilot found it to be an effective, reliable tool and reported that the program was not burdensome.

The report is available at

<http://www.uscis.gov/files/nativedocuments/WestatInterimReport.pdf>.

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Recent News from ABIL Members

Ron Klasko (bio: <http://www.abil.com/lawyers-klasko.htm>) was quoted in the headline story, "Local Firms Feel Green Card Reversal Impact," in *The Legal Intelligencer* on July 13, 2007. This story dealt with the Department of State and U.S. Citizenship and Immigration Service's reversal of July visa number availability.

NAFSA: Association of International Educators reported on Mr. Klasko's guest appearance on a July broadcast of the Voice of America radio talk show *Encounter*, "International Students in the U.S.: Balancing Openness with Security." A press release is available on NAFSA's Web site at http://www.nafsa.org/partners.sec/global_partnership_program or http://www.nafsa.org/_/File/_/klasko_vofa_aug_07.pdf.

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Government Agency Links

Follow these links to access current processing times of the USCIS Service Centers and the Department of Labor, or the Department of State's latest Visa Bulletin with the most recent cut-off dates for visa numbers:

USCIS Service Center processing times online:

<https://egov.uscis.gov/cris/jsps/ptimes.jsp>

Department of Labor processing times and information on backlogs:

<http://www.foreignlaborcert.doleta.gov/times.cfm>

Department of State Visa Bulletin:

http://travel.state.gov/visa/frvi/bulletin/bulletin_1360.html

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The Alliance of Business Immigration Lawyers' website is:

<http://www.abil.com/>.

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