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Proposed Regulations Would Create Safe-Harbor Procedures for Social Security "No-Match Letters"

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On June 9, 2006, the federal Department of Homeland Security ("DHS") announced new proposed regulations that purport to make it easier for employers to comply with federal immigration law provisions, including employer obligations when they receive a "no-match" letter from the Social Security Administration ("SSA").

Since 1993 thousands of employers have periodically received "no-match" letters from the SSA. These letters generally provide employers with a list of employees whose names or Social Security numbers on their W-2 Forms do not match SSA records. These "no-match" letters represent an attempt by SSA to correct errors in its database and to properly credit employees' earnings. According to DHS, out of 250 million wage reports SSA receives each year, as many as 10 percent belong to employees whose names don't match their Social Security numbers.

The proposed regulations review the legal obligations of an employer, under current immigration law, when the employer receives a no-match letter from the SSA or DHS. It also describes "safe-harbor" procedures for employers to use in dealing with such a letter. If followed in good faith, these procedures would provide certainty that DHS will not find, based on a receipt of a "no-match" letter, the employer in violation of their legal obligations.

Specifically, the proposed regulations identify steps deemed reasonable by DHS that an employer might take after receiving a no-match letter. If the discrepancy is not resolved within 60 days of receipt of the no-match letter, the proposed regulations describe a verification procedure for employers to follow. The proposed regulations further provide that "[i]f the discrepancy referred to in the no-match letter is not resolved, and if the employee's identity and work authorization cannot be verified using a reasonable verification procedure . . . then the employer must choose between taking action to terminate the employee or facing the risk that DHS may find that the employer had constructive knowledge that the employee was an unauthorized alien and therefore, by continuing to employ the alien, violated [federal immigration law]."

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In addition, the proposed regulations seek to address employer frustration with being required to keep paper forms or to store the forms on microfilm or microfiche when all other aspects of their record-keeping have been computerized. The proposed regulations would give employers the option to sign and store Forms I-9 electronically, such as in PDF.

LESSON: While there are a number of valid reasons why an employer's records may not match SSA's (e.g., marriage, divorce, clerical error), sometimes a "no-match" letter may suggest that a particular employee may not be legally authorized to work in the United States or may be using false documentation. Employers must be especially cautious in responding to "no-match" letters and taking any action against listed employees given federal and state prohibitions against national origin discrimination and the protections for legally-authorized workers under federal immigration law. While the proposed regulations clearly signal DHS's intention to increase the sharing of information between SSA and DHS and to bolster workplace immigration enforcement efforts, the "safe harbor" provision is beneficial to employers in that it provides protection to employers that abide by its requirements.

The regulations are subject to a 60-day public comment period before they will be finalized. Employers desiring to examine the proposed regulations may review the published proposed rules at www.remboltludtke.com under "Legal News."

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