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**NEW FEDERAL REGULATION CREATES SAFE HARBOR
PROCEDURES FOR EMPLOYERS WHO RECEIVE A
SOCIAL SECURITY "NO-MATCH" LETTER**

For years, federal law has given employers conflicting guidance about the appropriate response to a "No-Match" letter from the Social Security Administration (SSA) or Department of Homeland Security (DHS) regarding an employee's social security number or immigration or work permit status. A new DHS regulation, which takes effect September 14, 2007, describes specific procedures that employers may follow to ensure that their continued employment of a worker after receipt of a no-match letter is not a "knowing" violation of the Immigration and Nationality Act (INA).

Despite what you may have read in the paper or heard on the news, the new regulation does not require—much less authorize—employers to automatically fire employees 90 days after receipt of a no-match letter concerning their social security number or work visa status.

The so-called Safe Harbor procedures will not protect an employer who has actual knowledge that an employee is not authorized to work. However, the procedures protect an employer from being found to have "constructive knowledge" that an employee is unauthorized to work merely because the employee was the subject of a no-match letter from the SSA or Immigrations and Customs Enforcement (ICE) agencies. In other words, ***if the no-match letter is the only reason an employer suspects an employee's work authorization status, the employer may continue to employ the worker (without risk of INA employer sanctions) by following the safe harbor procedures.***

It remains illegal to discriminate against applicants or employees solely because of their accent or suspected nationality. Therefore, employers must be consistent in their response to no-match letters about all employees—except when an employer has actual notice that a particular employee is not authorized to work. (E.g., the employee admits she submitted a phony social security number or green card when first hired.)

The new regulation applies only when an employer receives a letter from the SSA titled, "Employer Correction Request," notifying the employer of a mismatch between an employee's name and social security number on the employer's W-2 annual earnings reports. It also applies when an employer receives a letter from the ICE titled, "Notice of Suspect Documents" questioning information on an

employee's Form I-9 during an ICE audit. The regulation does not apply when an employer initiates an inquiry to SSA or ICE regarding an individual's authorization to work and is told the employee's social security or work visa number is invalid.

Timeline for Employer Safe Harbor Procedures Upon Receipt of "No Match" Letter

Employer receives letter from SSA or DHS indicating mismatch Day 0.
of employee name and Social Security Number or work permit
status.

STEP 1: Employer checks own personnel and wage records, 0-30
makes necessary corrections of errors, & verifies corrections days.
with SSA or DHS.

STEP 2 [If Step 1 fails to resolve discrepancy]: 0-90
Employer gives employee a copy of no-match letter, & asks days.
employee to assist in the correction by the 90-day deadline. If
employee provides new information to employer, employer
corrects own records & verifies correction with SSA or DHS.

**STEP 3 [If employee is unable or unwilling to resolve 90-93
no-match issue by 90th day]:** days.
Employer performs "Special I-9 Procedure," accepting
alternative work authorization identification forms to complete
new Form I-9.

Special I-9 Procedure: Step 3 gives employees a second chance to present acceptable Form I-9 identification documents to establish their work authorization. The identification documents may not contain the disputed SSN or work permit number that is the subject of the no-match letter. At least one of the documents must have the employee's photograph. Otherwise, the employer follows the standard Form I-9 rules (used for all new hires) to complete a second Form I-9.

The employer should file the "Special" (or second) Form I-9 with the employee's initial I-9 Form. ***If the employee does not produce acceptable identification documents to complete a special (second) Form I-9, the employer must terminate the employee on the 94th day or risk INA sanctions.***

Record Keeping: It is the employer's responsibility to keep records of all steps taken to comply with the Safe Harbor Procedures, e.g., print screens of SSN verification by the SSA and notes of telephone conversations regarding employee's attempt to correct mistaken SSA or DHS records.