

Employers Now Facing New Affirmative Compliance Obligation

In a development of significance for graphic arts firms utilizing foreign talent, the U.S. Immigration and Customs Enforcement recently amended its regulations relating to the unlawful hiring or continued employment of unauthorized aliens. Specifically, the amended regulation describes the legal obligations of an employer who receives either: (1) a “no-match letter” from the Social Security Administration (SSA) or (2) a letter regarding employment verification forms from the Department of Homeland Security (DHS). An employer “no-match letter” (also known as an “Employer Correction Request”) is a written notice from SSA that the name and social security account number submitted to the SSA for an employee does not match SSA’s records. The DHS letter is a notice that the immigration status or employment-authorization documentation presented by the employee in completing Form I-9 was not assigned to the employee, according to DHS records. Since Form I-9 is retained by the employer – as opposed to being filed with DHS and is only made available to DHS investigators upon request – an employer will likely only receive this type of notification following an audit of its I-9 records.

Obligations Upon Receipt of “No-Match Letter”

Under the new regulation, when an employer receives a no-match letter from the SSA, it must check its records to determine whether it made some clerical error which caused the mismatch. If so, the employer must correct the error and inform the SSA of the accurate information. The employer must also verify with the SSA that the employee's name and social security number, as corrected ,

again verify the employee's employment authorization and identity. In other words, the employer must complete a new Form I-9 for the employee, using the same procedures as if the employee were newly hired, except that the employer must not accept any document referenced in any written notice.

Ultimately, if the discrepancy referred to in the no-match or DHS letters is not resolved, the employer must either terminate the employee or risk the DHS citing the employer for “constructive knowledge” that the employee was not authorized to work in the United States.

Penalties for “Constructive Knowledge” of Unauthorized Worker

There are severe civil and criminal penalties for employers under such circumstances. Civilly, it could be fined up to \$2,200 for the first offense, from \$2,200 to \$5,500 for the second offense, and from \$3,300 to \$11,000 for all subsequent offenses. In addition, employers who “knowingly” hire or continue to employ unauthorized workers are barred from entering into federal contracts for one year.

On the criminal side, employers who engage in a “pattern or practice” of knowingly hiring or continuing to employ unauthorized workers may be prosecuted in criminal proceedings. In such

cases, they can be fined not more than \$3,000 for each unauthorized worker, imprisoned for more than six months, or both.

Legal Battle Over Enforcing the New Regulation

As you might expect, this new regulation has already led to significant controversy. Recently, the AFL-CIO and ACLU filed suit challenging the rule. These groups allege that because the final rule imposes liability on employers who fail to respond to a SSA or DHS letter, errors attributable to the government could threaten the jobs of U.S. citizens and other authorized workers. As of this writing a federal judge has issued a temporary restraining order preventing DHS or SSA from enforcing the rule, and employers are urged to monitor their affirmative obligations in this regard.

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