



FINAL DHS SOCIAL SECURITY NO-MATCH REGULATION ISSUED



Judith A. DePrisco ...

"The long-awaited safe-harbor procedures for employers who receive a no-match letter from Social Security (SSA) were issued on August 10 2007, and go into effect September 14, 2007."

The long-awaited safe-harbor procedures for employers who receive a no-match letter from Social Security (SSA) were issued on August 10, 2007, and go into effect September 14, 2007. The final rule is very similar to the proposed rule issued on June 14, 2006, except that an additional 30 days has been allowed to resolve the discrepancies between names and Social Security numbers (SSNs). That change results in a 90 day time period during which employers may pursue clarification of specific issues.

1. Summary of the Rule Itself

The most concise summary of the new rule is contained in the comments, which set forth the timing of employer actions required under the proposed and final rules:

Action	Proposed Rule	Final Rule
Employer receives letter from SSA or DHS indicating mis-match of employees name and social security number.	Day 0	Day 0
Employer checks own records, makes any necessary corrections of errors, and verifies corrections with SSA or DHS.	0-14 Days	0-30 Days
If necessary, employer notifies employee and asks employee to assist in correction.	0-60 Days	0-90 Days
If necessary, employer corrects own records and verifies correction with SSA or DHS.	0-60 Days	0-90 Days
If necessary, employer performs special I-9 procedure.	60-63 Days	90-93 Day

2. Issues Addressed in DHS Comments

A. Constructive Knowledge

DHS notes that the common definition of "constructive knowledge" is "knowledge that one using reasonable care or diligence should have, and therefore that is attributed by law to a given person." DHS acknowledges that an SSA no-match letter by itself does not impart knowledge that the identified employees are unauthorized aliens. However, the receipt of an SSA no-match letter may create a duty to investigate, depending on the totality of the circumstances. DHS notes that SSA no-matches

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may occur due to a name change or typographical error. In some situations, a listed SSN is especially suspect, particularly when the first 3 numbers of an employee's claimed SSN are "000," or is in "800" or "900" series, which are not used.

Will employers who follow the procedures in the rule will be protected from all claims of constructive knowledge, or just claims of constructive knowledge based on the letters for which the employers followed the safe-harbor procedure? DHS states that other independent evidence may exist to prove that an employer has constructive knowledge in spite of following the rule, but this could be unusual, provided the employer (1) carefully follows the safe-harbor procedures and (2) there is no information suggesting that the employer is using another person's identity.

B. 14-Day and 60-Day Time Frames

DHS believes the 90-day time frame will be sufficient for all but the most difficult cases and that the rule does not create a new requirement that an employer resolve a discrepancy within 90 days. In situations not covered by the rule, constructive knowledge will continue to be based on a number of factors, including whether the employer made a good-faith, but ultimately unsuccessful, attempt to comply with the safe-harbor procedure. When there are special circumstances, an employer should make a good faith effort to resolve a situation as rapidly as practical, and keep a file documenting such efforts.

Questions have arisen about the employee's status and the employer's liability while an employer is following the safe-harbor procedure. In response, DHS states that an employer is prohibited from knowingly employing unauthorized aliens, so an employer may not continue to employ an individual if the employer obtains actual knowledge during the safe-harbor procedure that the individual is an unauthorized alien. If the employer does not have actual knowledge during the safe-harbor process, and instead merely has information that could lead to a finding of constructive knowledge from the no-match letter, the employer may continue to employ the individual until all of the steps in the safe-harbor procedure have been exhausted.

DHS also notes that the regulation identifies a combination of reasonable steps that DHS has approved for resolution of notices from SSA and DHS, emphasizing that only the combination of those steps may guarantee that DHS will not use the employer's receipt of the notices from SSA and DHS as evidence of the employer's constructive knowledge that its employee is an unauthorized alien.

C. Verification and Record-Keeping

DHS discusses the safe-harbor procedure that requires employers in some circumstances to verify with SSA that the employee's name and Social Security account number, as corrected, match SSA records. DHS states that employers may do so in any manner they choose, and that www.ssa.gov/employer/ssnv.htm describes how employers may verify this information over the internet, and www.ssa.gov/employer/ssnvadditional.htm describes other methods, such as an SSA 1-800 number.

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The final rule version requires employers to store records of verified resolutions along with the employee's Form I-9. This may be accomplished by updating the employee's Form I-9 or completing a new Form I-9, to the extent that verified resolutions demonstrate inaccuracies in the employee's initial Form I-9.

The final rule clarifies the safe-harbor's retention requirements for the Form I-9 verification after 90 days, so that the new Form I-9 will be retained for the same period as the original Form I-9.

Employers are encouraged to document telephone conversations, in addition to retaining all SSA correspondence, computer-generated printouts, e-mails, and SSNVS screen prints evidencing that the discrepancy has been corrected. Employers should confirm and document that the discrepancy referenced in the no-match letter has been resolved by SSNVS or the SSA 1-800 number.

D. Mechanics of Form I-9 Verification

Some commentators requested that DHS clarify how an employer can complete a new Form I-9 verification when an employee insists that the disputed SSN and name are correct. If the employee insists that the SSN is correct, but takes no action during the 90-day period to resolve the SSA notice, employers who wish to receive the benefits of the safe-harbor rule must proceed with the special Form I-9 verification procedure, which provides the employer with assurance that the employee is not an unauthorized alien. During this Form I-9 verification, the employer may not rely on documents containing the disputed SSN, although the employer can and should rely on other listed documents that do not contain a SSN, but nevertheless demonstrate identity and employment authorization - for example, a U.S. passport, DHS Permanent Resident Card, or other specified DHS immigration documents.

The next very important question was what DHS expects employers to do when they follow the procedure and an employee with an unmatched SSN fails to resolve the discrepancy with SSA. Under the safe-harbor procedures of this rule, employers should complete the special I-9 verification at this point. If this special Form I-9 verification is unsuccessful, or if the employee refuses to participate in the Form I-9 verification, the employer risks being deemed to have constructive knowledge of unlawful employment of workers in a subsequent enforcement action. An employer who wishes to follow the safe-harbor procedures should require a Form I-9 verification of **all** employees who fail to resolve SSA discrepancies, and apply uniform policies to **all** employees who refuse to participate or whose Form I-9 verification is unsuccessful.

This Form I-9 verification does not include verifying with SSA that the name and SSN match SSA's records. Employers may request, however, that the employee continue to pursue resolution of the discrepancy and inform the employer when the discrepancy is resolved, so that the employer can ensure that another SSA no-match letter will not be generated the following year.

DHS indicates, too, that the safe-harbor procedure is merely one way for employers to avoid liability for knowingly hiring or continuing to employ unauthorized aliens. Employers are free to develop other reasonable methods for resolution of SSA notices, although they face the risk that DHS may not agree that their methods are reasonable.

E. Further Employer Responsibilities

DHS admits that failure to adhere to the guidance and regulation will not automatically constitute constructive knowledge. Rather, the benchmark of constructive knowledge is reasonableness. The rule states that whether an employer will be found to have constructive knowledge that an employee is an unauthorized alien will depend on the totality of relevant circumstances. DHS adds that employers may wish to consider enrolling in the EEV program, the IMAGE program, or other programs administered by private companies that offer electronic Form I-9 completion and retention along with automatic verification through SSA and DHS databases.

DHS acknowledges that these procedures do not ensure that employees are authorized to work in the U.S., and that an alien not authorized to work in the U.S. may nevertheless present a fraudulent name and matching fraudulent SSN, and that this rule does not address such fraud.

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PERSPECTIVE

COMMENTS ON NEW DHS MIS-MATCH REGULATION



Mike Jones
"The rules leave room for one to argue if the employer follows the rules as stated, the mere fact an employee uses a different social security or other number in the process, is not in itself conclusive of constructive knowledge of illegal status."

The Department of Homeland Security's answers to questions raised in the rule-making process provide some useful interpretation of the new regulation. DHS repeatedly emphasizes all of the procedures in the proposed rule must be followed to create a "safe-harbor." The comments allow the employee an opportunity to complete a new Form I-9 utilizing the final Form I-9 verification procedure, should discrepancies not be resolved within the 90-day period.

The comments state there are other procedures an employer could follow in response to a no-match letter that will be considered reasonable by enforcement personnel, but such a finding would depend on the totality of the relevant circumstances. Further, the regulation would not preclude DHS finding that an employer had actual knowledge an employee was an unauthorized alien.

DHS gives further commentary, but does not directly answer the issue of the employer's dilemma when an employee presents a new Social Security number and/or other new information, as part of the final I-9 verification process, where the matter has not been resolved within 90 days. The rules leave room for one to argue if the employer follows the rules as stated, the mere fact an employee uses a different Social Security or other number in the process, is not in itself conclusive of constructive knowledge of illegal status. However, the employer should expect DHS to look at all the facts and circumstances in evaluating whether the new

information constitutes constructive knowledge.

DHS is explicit in its commentary that in addition to the government programs, employers are given "credit" for using other verification programs, including "other programs administered by private companies that offer electronic Form I-9 completion and retention along with automatic verification through SSA and DHS databases."

The comments also emphasize an employer's actions following completion of the 90 day process, and final Form I-9 verification, should be uniform in that all similarly situated individuals must be treated in the same manner. Therefore, it is important for employers to develop a uniform and written protocol as to how to respond to such no-match letters. This protocol should be developed with the advice of counsel as advice of counsel can be of assistance in some types of criminal prosecutions.

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