PROSKAUER ROSE LLP®

Client Alert

A report
for clients
and friends
of the Firm

August 2007

The Department Of Homeland Security Publishes Regulations Providing A "Safe Harbor" Procedure For Employers Who Receive No-Match Letters From The Social Security Administration

Is It Really A "Safe Harbor"?

New Rules Regarding "No-Match" Notification Letters

Today the Department of Homeland Security (DHS) published its amended regulations, providing further guidance to employers who receive written notification from the Social Security Administration (SSA) that an employee's name and Social Security Number do not match SSA records (commonly referred to as a "no-match" letter) or who receive written notification from DHS that the immigration status document or employment authorization document referenced by the employee in completing Form I-9 was not assigned to that employee.

The new regulations, which will become effective on September 14, 2007, state that if the employer "fails to take reasonable steps" after receiving such a notification from SSA or DHS, it may be found to have "constructive knowledge" of the employee's unauthorized work status in violation of federal immigration law. Current penalties for knowingly employing individuals without work authorizations include civil sanctions ranging from $250 to $10,000 for each employee and criminal penalties in some circumstances.

The new regulations also specify "safe harbor" procedures that employers should follow in order to avoid the risk of being found to have constructive knowledge that an employee is not authorized to work based on receipt of a SSA or DHS notification. These "safe harbor" procedures, which should be undertaken by the employer within a maximum of 93 days of receipt of a SSA or DHS notification unless specified sooner in the notification itself, include the following:

- Check Employment Records: Within 30 days of receiving written notification from SSA or DHS, the employer should check its own records in order to determine whether the discrepancy is the result of a typographical, transcription, or similar clerical error. In the event there is such an error, the employer should correct its own records, inform the relevant agencies of the correction, and make an internal record of the manner, date, and time of the verification.

- Request Employee to Resolve the Discrepancy: If the employer is unable to resolve the discrepancy by reviewing its own employment records, and the employee confirms that the employer's records are correct, then the employer must promptly advise the employee to resolve the discrepancy with the relevant agency and notify the employee of the receipt date of the notification letter. The employee then has the obligation to resolve the discrepancy with the relevant agency. Discrepancies with SSA must be resolved within 90 days of receipt of the written notification by the employer. Discrepancies with DHS must be resolved as per the instructions of the written notification, which may be as early as 30 days of receipt from the notification by the employer.

- Repeat the I-9 Process: If the discrepancy cannot be resolved with the relevant agency within 90 days of receipt of the notification, the employer must attempt to re-verify the employee's employment eligibility within the next 3 days (within 93 days from the original receipt date) by completing a new I-9 employment verification form using the procedures for new hires, with some limitations as to acceptable documents. These limitations are:

- The employer cannot accept any document referenced in the DHS notification or any document that contains a social security number that is the subject of the SSA no-match letter to establish employment authorization or identity.

- The employee must present a document that contains a photograph in order to establish identity or both identity and employment authorization.

If the employee's identity and work authorization cannot be verified within the 93 day period, the employer must terminate the worker in order to benefit from the "safe harbor" protections.

Employers are advised not to terminate an employee until the above procedures are completed unless the employer obtains actual knowledge that the employee is not eligible for employment, such as an admission by the employee.

While acknowledging that other actions taken by employers may constitute "reasonable steps" in the context of a "total facts and circumstances test," the new regulations state that employers who fail to follow the above procedures will not benefit from the "safe harbor" and may be found to have constructive knowledge of the employee's undocumented status in the event of an investigation.

The Employer's Dilemma

The message this regulation sends is loud and clear: Comply with the protocol outlined herein or operate at your own risk. An alternative strategy that you might think is "reasonable" may be rejected by the Department of Homeland Security, and you will be found to have "constructive knowledge" of the undocumented status of employees with social security "no-match" letters. The irony is that there will be employers who will follow the protocol, not succeed in resolving the "no-match" and find that when they repeat the I-9 process, the employee will successfully execute the new I-9 form, but the mismatch will remain, in fact, unresolved.

It is disturbing that the regulation does not in any way provide the employer with "indemnity" against a claim by the employee of unlawful discrimination on the basis of national origin or citizenship status should a termination take place.

DHS takes the position that applying the "safe harbor" rule in a uniform manner for all employees whose account numbers or work authorization documents are challenged by SSA or the DHS should not subject an employer to such liability. That is not much assurance at all!

It is to be anticipated that there will in the future be congressional initiatives in response to or based upon this regulatory protocol.

Client Alert

Proskauer's nearly 175 Labor and Employment lawyers are capable of addressing the most complex and challenging labor and employment law issues faced by employers. For more information about this practice area, contact:

New York

Elise M. Bloom
212.969.3410 – ebloom@proskauer.com

Fredric C. Leffler
212.969.3570 – fleffler@proskauer.com

New Jersey

David Grunblatt
973.274.6021 – dgrunblatt@proskauer.com

Avram E. Morell
973.274.3263 – amorell@proskauer.com

Washington, D.C.

Lawrence Z. Lorber
202.416.6891– llorber@proskauer.com

Boston

Mark W. Batten
617.526.9850 – mbatten@proskauer.com

Boca Raton

Allan H. Weitzman
561.995.4760 – aweitzman@proskauer.com

Los Angeles

Anthony J. Oncidi
310.284.5690 – aoncidi@proskauer.com

Arthur F. Silbergeld
310.284.5624 – asilbergeld@proskauer.com

New Orleans

René E. Thorne
504.310.4090 – rthorne@proskauer.com

Special thanks to associate **Leni Battaglia** for his assistance in drafting this Client Alert.

973.274.6095 – lbattaglia@proskauer.com