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***2093** 1. DHS Proposes to Rescind No-Match/Safe Harbor Rule

The Department of Homeland Security (DHS or Department) is proposing to amend its regulations by rescinding the amendments promulgated in August 2007 and October 2008 relating to procedures that employers may take to acquire a safe harbor from receipt of no-match letters. As background, employers annually send the Social Security Administration (SSA) millions of earnings reports (Forms W-2) in which the combination of employee name and social security number (SSN) does not match SSA records. In some of these cases, the SSA sends the employer an employer-correction request, commonly referred to as a no-match letter, that informs the employer of the mismatch. While there can be many causes for a no-match, including clerical error and name changes, one potential cause may be the submission of information for an alien who is not authorized to work in the U.S. and who may be using a false SSN or an SSN assigned to someone else.

U.S. Immigration and Customs Enforcement (ICE) sends a similar letter to employers, called a notice of suspect documents, after it has inspected an employer's employment eligibility verification forms (Forms I-9) during an investigation audit and after unsuccessfully attempting to confirm, in agency records, that an immigration-status document or employment-authorization document presented or referenced by the employee in completing the Form I-9 was assigned to that person.

Over the years, employers have inquired of the former Immigration and Naturalization Service (INS), and now DHS, whether receipt of a no-match letter constitutes constructive knowledge on the part of the employer that it may have hired an alien who is not authorized to work in the U.S. On August 15, 2007, DHS issued a final rule describing the legal obligations of an employer following receipt of a no-match letter from the SSA or a letter from DHS regarding employment-verification forms. [FN1] The rule ***2094** also established safe-harbor procedures for employers receiving no-match letters.

However, on October 10, 2007, implementation of the 2007 final rule was preliminarily enjoined by the U.S. District Court for the Northern District of California, which raised three issues regarding DHS' rulemaking action implementing the no-match final rule: (1) whether DHS had supplied a reasoned analysis to justify what the court viewed as a change in the Department's position--that a no-match letter may be sufficient, by itself, to put an employer on notice and thus impart constructive knowledge that employees referenced in the letter may not be work-authorized, (2) whether DHS exceeded its authority and encroached on the authority of the Department of Justice (DOJ) by interpreting the antidiscrimination provisions of the Immigration Reform and Control Act of 1986 (IRCA), [FN2] INA § 274B [8 USCA § 1324b], and (3) whether DHS violated the Regulatory Flexibility Act [FN3] by not conducting a regulatory flexibility analysis. In response, DHS published a supplemental proposed rule [FN4] and a supplemental final rule [FN5] to clarify certain aspects of the 2007 final rule. Neither of these rules changed the safe-harbor procedures or the applicable regulatory text, and implementation of the 2007

final rule remains enjoined.

DHS has now determined that improvements in U.S. Citizenship and Immigration Services' (USCIS') electronic employment-verification system, E-Verify, along with other DHS programs, including the ICE Mutual Agreement between Government and Employers (IMAGE) program, provide better tools for employers to reduce incidences of unauthorized employment and to better detect and deter the use of fraudulent identity documents by employees.

The E-Verify system compares employee information from the Form I-9 against more than 455 million records in the SSA database and more than 80 million records in DHS immigration databases. E-Verify has expanded exponentially in the past several years to include over 138,000 employers. On average, 1,000 employers enroll in E-Verify each week. Participation has more than doubled each fiscal year since 2007. DHS believes the accuracy of the E-Verify program also has improved. An independent evaluation completed in December 2008 found that approximately 96.9% of all cases queried through E-Verify are instantly found to be work-authorized. Of the 3.1% of queries that resulted in a mismatch of the information in SSA or DHS databases, 0.3% of queries were successfully contested. The remaining 2.8% either did not contest the determination or were unsuccessful in contesting it or were found unauthorized to work at the secondary verification stage.

DHS is dedicated to providing the E-Verify service to employers and continuing to make improvements to the system to address such issues as usability, fraud, and discrimination and to further improve the system's automatic-verification rate. DHS believes that E-Verify is an essential tool for employers committed to maintaining a legal workforce and that E-Verify will continue to be a key element in deterring employment of unauthorized aliens and illegal immigration.

DHS opines that a comprehensive strategy to address worksite enforcement creates a culture of industry compliance. Through the IMAGE program, ICE assists employers in developing a legal workforce. Employers can reduce unauthorized employment and the use of fraudulent identity documents by voluntarily participating in the IMAGE program. ICE and USCIS officers provide education and training on proper hiring procedures, fraudulent document detection, and use of the E-Verify system. In Fiscal Year (FY) 2008, ICE outreach coordinators in 26 field offices made 517 IMAGE presentations to more than 8,300 businesses.

DHS' worksite-enforcement strategy includes a restructured process for imposition of administrative fines "to build a more vigorous program." ICE has established and distributed to all field offices guidance about the issuance of administrative fines and standardized criteria for the imposition of such fines. DHS expects that the increased use of the administrative fines process will result in meaningful penalties for those who engage in the employment of unauthorized workers.

ICE has implemented a debarment policy that prevents employers from receiving federal contracts when they are in violation of worksite laws. After completion of administrative proceedings and on the basis of a determination that an employer has violated the worksite laws, an offending employer may be excluded from doing business with the federal government or from receiving loans under the American Recovery and Reinvestment Act of 2009 (ARRA). [FN6] Since this relatively new program began, 31 companies and 40 individuals have been debarred.

ICE has created Document and Benefit Fraud Task Forces (DBFTF) to combat the vulnerabilities exploited

by identity- and document-fraud organizations and to maintain the integrity of the U.S. immigration system. The DBFTF cooperative effort leverages multiple law-enforcement tools and authorities to identify, disrupt, and *2095 dismantle criminal organizations involved in immigration-benefit fraud and the manufacturing and distribution of fraudulent identity documents, including U.S. passports, birth certificates, state-issued identification cards, social security cards, and alien registration documents. In these taskforces, ICE and USCIS officers work with the law-enforcement functions and the Inspectors General of the Departments of Labor and State, the SSA, the U.S. Postal Service, and various state and local law-enforcement agencies.

In addition, the SSA has continued to refine the wage-reporting process in ways that help to reduce potential errors resulting in a no-match letter. Electronic filing of Forms W-2 rose from 53% of all employee reports in FY 2003 to over 80% in FY 2007, a 51% increase. The SSA has recently reported a further increase in electronic filing of Forms W-2 to 86.3%. Employers who use the SSA's system are able to eliminate most no matches in their reports and thereby significantly reduce their likelihood of receiving a no-match letter. In fact, SSA improvements in related areas have led the SSA Inspector General to question the efficacy of the continuing use of no-match letters.

SSA no-match letters have also formed a basis for multiple criminal investigations by ICE and a number of prosecutions on charges of harboring or knowingly hiring unauthorized aliens. DHS has determined that "focusing on the management practices of employers would be more efficacious than focusing on a single element of evidence within the totality of the circumstances."

Accordingly, DHS proposes to rescind the 2007 final rule and the 2008 supplemental final rule and reinstate the language of 8 CFR § 274.1(l) as it existed prior to the effective date of the 2007 final rule (September 14, 2007):

274.1 Definitions

...

(l)(1) The term knowing includes not only actual knowledge but also knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition. Constructive knowledge may include, but is not limited to, situations where an employer:

- (i) Fails to complete or improperly completes the Employment Eligibility Verification Form, I-9;
- (ii) Has information available to it that would indicate that the alien is not authorized to work, such as Labor Certification and/or an Application for Prospective Employer; or
- (iii) Acts with reckless and wanton disregard for the legal consequences of permitting another individual to introduce an unauthorized alien into its work force or to act on its behalf.

(2) Knowledge that an employee is unauthorized may not be inferred from an employee's foreign appearance or accent. Nothing in this definition should be interpreted as permitting an employer to request more or different documents than are required under section 274(b) of the Act or to refuse to honor documents tendered that on their face reasonably appear to be genuine and to relate to the individual.

The proposed rule was published in 74 Fed. Reg. 41801 (Aug. 19, 2009) and is reproduced in Appendix I of this Release. Comments must be submitted no later than September 18, 2009.

[FNI]. 72 Fed. Reg. 45611 (Aug. 15, 2007), discussed in 84 **Interpreter Releases** 1893 (Aug. 20, 2007).

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[FN2]. Pub. L. No. 99-603, 100 Stat. 3359 (Nov. 6, 1986).

[FN3]. 5 USCA §§ 601 et seq.

[FN4]. 73 Fed. Reg. 15944 (Mar. 26, 2008), discussed in 85 **Interpreter Releases** 999 (Mar. 31, 2008).

[FN5]. 73 Fed. Reg. 63843 (Oct. 28, 2008), discussed in 85 **Interpreter Releases** 2877 (Nov. 3, 2008).

[FN6]. Pub. L. No. 111-5, 123 Stat. 115 (Feb. 17, 2009).
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