



United States Homeland Security Department Increases Employer Responsibility For Verifying Employee Eligibility To Work

By now you may have seen a fair amount of discussion in the press about a new regulation that will result (some say) in the mass firing of unauthorized alien employees. Although the popular press may be exaggerating certain aspects of the new regulation, a central theme of these reports is accurate: As of September 14, 2007, employers must become more diligent upon receipt of certain inquiries from the Social Security Administration or the Department of Homeland Security. Here is the full story, starting with a quick review of existing regulatory requirements.

Employers are prohibited from knowingly employing individuals who are not authorized to work in the United States. Employers must take reasonable steps to verify that each new employee is authorized to accept U.S. employment, but employers are also prohibited from engaging in conduct that reflects or suggests an unfair presumption that certain individuals are illegal aliens. The cornerstone of the mandatory verification process has long been the Immigration and Naturalization Service's *Form I-9*, which must be completed by new employees and reviewed and retained by employers. The Form I-9 requirements are long established, and all employers should by now be familiar with and fulfill their responsibilities in the Form I-9 process.

In August, *U.S. Immigration and Customs Enforcement* or "ICE" (this is one of the several federal agencies that replaced the *U.S. Immigration and Naturalization Service* or INS) amended an existing regulation that has long required employers to conduct an investigation upon receipt of a so-called "*no-match letter*" from the *Social Security Administration* or SSA. The SSA routinely sends a no-match letter whenever an employer sends it a social security number that does not match any valid social security number in SSA's database or does not match the corresponding taxpayer name in SSA's database. The prior regulation required employers to conduct a reasonable investigation for the purpose of determining whether the incorrect SSA number might suggest or indicate that the no-match employee lacks authority to work in the United States. But those former regulations also cautioned employers that they should refrain from jumping to conclusions in a way that would unfairly penalize workers that were the subject of a no-match letter. ICE has now amended the former regulation, and the new regulation takes effect next week (September 14, 2007). The amended regulation requires employers to conduct a more rigorous investigation than before, and it also establishes fairly demanding timelines for conducting that investigation. Employers that fail to comply with these expanded investigatory requirements may be deemed to have "constructive knowledge" that they are illegally employing an unauthorized alien. The new regulation reflects a law enforcement shift by ICE. ICE is now less concerned about potential employment discrimination against aliens who are authorized to work in the U.S., and is now more interested in preventing the illegal employment of unauthorized aliens. But employers must still refrain from unlawful discrimination. Here are the key components of the new regulatory regime:

- Employers must not "knowingly" employ unauthorized aliens. The term "knowing" includes *actual knowledge* and *constructive knowledge*. According to the regulation, "constructive knowledge may fairly be inferred through notice of certain facts and circumstances that would lead a reasonable person, through the exercise of reasonable care, to know about a certain condition." The regulation then provides examples of circumstances that would result in a determination of constructive knowledge, including (1) failure to timely and appropriately respond to an SSA no-match letter; (2) failure to timely and appropriately respond to an inquiry from the Department of Homeland Security; and (3) failure to properly complete the Form I-9.
- An employer's response to an SSA no-match letter will be deemed timely and appropriate if the employer

complies with each of the following requirements: (1) the employer must promptly check its own records to determine whether its own clerical or administrative error was the cause of SSA's inability to match the social security number with the employee identified in the no-match letter; (2) if the employer determines that a clerical or administrative error caused the no-match discrepancy, it must promptly correct the error, update all relevant records (including, as necessary, records in the employee's file) and notify the SSA within 30-days of receiving the no-match letter that the corrections have been completed; (3) if the employer is unable to identify its own clerical error, it must promptly confer with the no-match employee to verify the data on the Form I-9; (4) if the employee provides corrected information, the employer must promptly correct its records and notify the SSA of the corrections within 90 days of receiving the no-match letter; (5) if the employee confirms that the employer's records are correct, the employer must promptly ask the employee to resolve the discrepancy with the SSA and indicate that all such efforts must be completed within 90 days of the employer's receipt of the no-match letter.

- In addition to the no-match letters that are periodically distributed by the SSA, employers must now anticipate the possible receipt of written inquiries from the Department of Homeland Security regarding an employee's work status documents. Last week, a federal judge in Washington, D.C. issued a temporary restraining order that would prevent the Department from distributing such letters, but the judge's order could be withdrawn or revised at any time. In any event, if the Department begins to send such letters, employers will be required to contact the Department (as instructed in the Department's letter) to resolve the discrepancy within 30 days of receiving that inquiry, and will be required to fully resolve any discrepancies within 90 days of receipt of that inquiry.
- The regulation does not expressly state that an employer must fire an employee if the problems are not resolved within 90 days of the inquiry, but it comes pretty close to doing so. If an employee fails to clear up a discrepancy within 90 days of the no-match letter or Department of Homeland Security inquiry, it will be unwise in most circumstances for the employer to continue employing that individual. At the same time, the new regulation continues to warn employers to refrain from assuming that an individual is an unauthorized alien because of his or her appearance or accent. The regulation also cautions against firing an employee before a full and appropriate analysis.

If you receive an SSA no-match letter or an inquiry from the Department of Homeland Security inquiry, we strongly encourage you to direct your immediate attention to the matter without any delay. We also encourage you to confer with legal counsel at the earliest opportunity if you receive such a letter.

The Labor and Employment Group at Riddell Williams:

Rebecca L. Andrews
206.389.1635
randrews@riddellwilliams.com

Stephen E. DeForest
206.389.1779
sdeforest@riddellwilliams.com

Robert M. Howie
206.389.1561
rhowie@riddellwilliams.com

Karen F. Jones
206.389.1638
kjones@riddellwilliams.com

Laurence A. Shapero
206.389.1661
lshapero@riddellwilliams.com

Skylar A. Sherwood
206.389.1584
ssherwood@riddellwilliams.com

Riddell Williams P.S.
1001 Fourth Avenue
Suite 4500
Seattle, WA 98154-1192
www.riddellwilliams.com

Telephone: 206.624.3600

Facsimile: 206.389.1708