

EMPLOYMENT LAW

A L E R T

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

Federal Regulations and New Tennessee Laws Focus on Immigration

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New Safe Harbor on Social Security Administration (SSA) No-Match Letters

Employers have greater risk – but also have a new “safe harbor” for that risk – under regulations recently issued by the Department of Homeland Security (DHS). The risk and the corresponding “safe harbor” relate to an employer’s receipt of information that an employee’s work authorization information is suspect. These regulations take effect September 14, 2007.

Under the Immigration Reform and Control Act of 1986 (IRCA), an employer violates the law when it employs (or continues to employ) a person, knowing that the person is not authorized to work in the United States. The term “knowing” includes actual knowledge and *constructive knowledge*. The new DHS regulations deem an employer to have constructive knowledge when it receives (1) a no-match letter from the SSA – that is, a letter that an employee’s name and corresponding social security number (SSN) do not match the SSA’s records or (2) a letter from DHS that the immigration status document or employment authorization document presented by the employee in completing the I-9 is assigned to another person, or that there is no agency record that the document was assigned to anyone.

But, there is a “safe harbor” for this imposed knowledge. An employer may avoid the risk by taking these steps upon receiving a no-match letter:

(1) An employer should first check its records to determine whether the discrepancy results from a typographical, transcription or similar clerical error in its own records. If an error is discovered, the employer should correct its records, inform the SSA, verify with the SSA that the name and number, as corrected, match the SSA’s records¹, and make a written record by either updating the original I-9 or completing a new I-9. If the employer completes this process within thirty (30) days of receipt of the no-match letter, the employer is entitled to a safe harbor.

¹ Employers may verify records at the SSA by calling 1-800-772-6270, weekdays from 7 a.m. to 7 p.m. EST or online at <http://www.ssa.gov/employer/ssnv.htm>.

(2) If the discrepancy is not the result of the employer's clerical error, the employer should consult with the employee to confirm that the information in the I-9 as written is correct. If the employee indicates that the I-9 is not correct, the employer should correct the information, inform the SSA, verify with the SSA that the name and number, as corrected, match the SSA's records and make a written record by either updating the original I-9 or completing a new I-9. If an employer completes this process within thirty (30) days of receipt of the no-match letter, the employer is entitled to a safe harbor.

(3) If the employee indicates that the I-9 is correct, the employer should direct the employee to pursue the matter personally with the SSA and advise the employee to resolve the discrepancy within ninety (90) days of the date the *employer* received the no-match letter. If the discrepancy is not resolved within ninety (90) days, the employer should perform a new I-9 verification, as if the employee were newly hired. This must be completed within ninety-three (93) days of the receipt of the no-match letter. In making this verification, an employer may not use any document containing the SSN or alien number that is the subject of the no-match letter or any receipt for an application for a replacement of such a document to establish employment authorization and/or the employee's identity. Employers must also use documents containing a photograph of the employee to establish identity or both identity and employment authorization.

In the case of written notice from the DHS, the employer may avoid the risk by taking the following steps:

(1) An employer should contact the local DHS office within (30) days of receipt of DHS' letter to attempt to resolve questions regarding the employee's immigration status document or employment authorization document.

(2) If the employer is unable to resolve the DHS' questions within ninety (90) days of receipt of DHS' letter, the employer should perform the same I-9 verification process discussed above for SSA no-match letters.

If an employer is unable to resolve the discrepancy, the employer must either terminate the employee or face the risk that the U.S. Immigration and Customs Enforcement (ICE) will find the employer had constructive knowledge that the employee was an unauthorized alien and violated the law.

Please remember that the safe harbor provisions only provide protection when the employer has received a no-match or DHS letter. The safe harbor is not provided if the employer has some other basis for actual or constructive knowledge that an employee is not authorized to work in the U.S.

New Tennessee Laws

Tennessee employers should be aware of new revisions to state law concerning hiring of illegal immigrants, T.C.A. § 50-1-103. Effective January 1, 2008, employers who do not verify employment by completing an I-9 within fourteen (14) days of the start of employment are subject to having their business license suspended for a first violation, in addition to the penalties imposed under federal law. For later violations occurring within three (3) years from the first violation, the

employer's business license could be suspended for one (1) year. Tennessee's new law does not replace an employer's obligations under IRCA.

A separate Tennessee law, which went into effect on May 24, 2007, prohibits employers from accepting an employee's individual taxpayer identification number as a valid form of identification for purposes of completing an I-9 form.

If you have any questions about the matters described in this *Employment Law Alert* please contact one of the Bass, Berry & Sims attorneys in the Labor and Employment Practice Area listed at the end of this alert.

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The materials contained herein have been abridged from the statutory sources and should not be construed or relied upon for legal advice. Readers are urged to consult legal counsel concerning particular situations and specific legal questions. Certification as a labor and employment law specialist is not currently available in Tennessee.

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