PUBLICATION

Perhaps No No-Match Letters At All This Year

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The Department of Homeland Security (DHS) and the Social Security Administration (SSA) appear to have given up on a new way of handling SSA no-match letters for this year and may not send out any at all until April 2008.

Each year SSA receives W-2 forms for workers whose information does not match account information in SSA's database. SSA sends out letters to the affected workers and then to the employers alerting them to the "no-match" and instructing them to seek to correct any error and to resubmit the information on a Form W-2c so that correct credits can be given. Early this summer U.S. Immigration and Customs Enforcement (ICE) had issued an interim regulation indicating that each new SSA no-match letter would be accompanied by a letter from ICE stating that employers who ignored no-match letters would be considered to have "constructive knowledge" about any lack of work authorization of alien workers affected by the letters unless the employers followed a set of delineated steps. SSA had withheld sending out any no-match letters until ICE's regulation was promulgated. But before any no-match letters could go out, a federal court in San Francisco issued a preliminary injunction against implementation of the regulation.

A few weeks ago an SSA official had been reported by BNA (a legal publisher) to have stated that SSA would not send out any no-match letters until April 2008 due to the court case. That report gained credibility Friday when DHS filed a brief asking the San Francisco court to delay further action on the injunction case until DHS can issue a new final regulation, probably by April, including an analysis of the rule's costs and benefits that the plaintiffs complained was fatally missing. It would seem that the court proceedings will not be resolved suddenly, and no-match letters might wait even longer than April.

Many employers have been wondering whether to follow ICE's enjoined regulation anyway if they were to receive no-match letters this year. Now the issue may be moot for the moment. Nevertheless, regulation or not, the government is intent on criminally prosecuting employers and managers for knowingly hiring unauthorized alien workers, and the government is not enjoined from making claims of constructive knowledge in those cases. Employers should take this opportunity to review their compliance programs with counsel.

USCIS also published in the November 26 edition of the Federal Register that, while the new I-9 Form published on www.uscis.gov on November 7 is already the only authorized version of the form, DHS will not penalize employers for using the old form until December 26, 2007, 30 days after the November 26 Federal Register notice.

Baker Donelson's Immigration Team regularly counsels employers on I-9 compliance. We perform private audits of I-9 documents, prepare compliance programs and train managers and workers in implementing those programs. We evaluate particular questionable documents and situations. We help employers decide whether and how to participate in the E-Verify, SSNVS and IMAGE programs. We defend sanctions actions by ICE for paperwork and "knowingly hire" violations of I-9 rules. We work with our strong Litigation Department to bring and defend claims against competitors based on employment of unauthorized aliens. We advise and defend employers and managers in criminal proceedings relating to employment of aliens. We coordinate our Team's services closely with our firm's well-respected Labor & Employment Law Group and White Collar Crime Group.

We provide advice and coordinate with U.S. and foreign tax preparers concerning U.S. taxation of international companies doing business in the U.S., and concerning the U.S. taxation of international workers placed here and abroad. We advise concerning export licensing issues including deemed exports to foreign national workers, and assist in obtaining every kind of visa and immigration status.