

NEW RULES FOR EMPLOYMENT ELIGIBILITY VERIFICATION FORM I-9

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THE DEPARTMENT of Homeland Security (“DHS”) has the authority to pursue sanctions against employers who knowingly employ aliens not authorized to work in the United States or who do not properly verify employees’ eligibility to work. DHS has adopted a new rule that amends the regulations relating to the unlawful hiring or continued employment of unauthorized aliens, which was initially scheduled to become effective September 14, 2007. The new rule sets forth the obligations of employers when they receive a No-Match Letter from the Social Security Administration or a letter regarding employment verification forms from DHS.

CHANGES TO DEFINITION OF “KNOWLEDGE” OF THE EMPLOYER

An employer has the requisite “knowledge” if the employer does not complete or improperly completes the Form I-9 or has information available to it that would indicate that the employee is not authorized to work. The new regulations amend the definition of “knowledge” by adding two examples of situations where an employer will be deemed to have knowledge that an employee is not authorized to work in the United States.

The additional situations in which an employer may be deemed to have the requisite knowledge include: (i) written notice to an employer from the Social Security Administration (“SSA”) that the combination of name and Social Security Number submitted for an employee does not match SSA (“No-Match Letter”); and (ii) written notice from DHS that the immigration status or employment authorization document presented by the employee in completing the Form I-9 was assigned or was issued to another person or that there is no agency record that the authorization document presented by the employee was issued to anyone (“Notice of Suspect Documents”).

EMPLOYER OBLIGATIONS

The new regulations describe procedures that employers should follow in response to a No-Match Letter or a Notice of Suspect Documents so that DHS will not use such letter as any part of an allegation that the employer had knowledge that the employee referred to in the letter was not authorized to work in the United States.

STEPS EMPLOYERS SHOULD TAKE AFTER RECEIVING A NO-MATCH LETTER OR NOTICE OF SUSPECT DOCUMENTS:

- Check employer records to determine whether the discrepancy is a result of a typographical error.
- If the discrepancy is due to a typographical error, employers should correct their records and inform the relevant agencies within 30 days of receipt of the applicable written notice.
- If such actions do not resolve the discrepancy, employers should request that the employee confirm the records are correct.
- If the records are incorrect, employers should correct them and inform the relevant agencies.
- If the records are correct, employers should pursue the matter personally with the relevant agency to resolve the discrepancy within 30 days.

“If an employer has actual or constructive knowledge that an employee is not authorized to work in the United States, the employer is in violation of the Immigration and Nationality Act.”

If the discrepancy is not resolved within 90 days of receipt of the No-Match Letter, the employer and employee must complete a new Form I-9 using the same

procedures as if the employee were newly hired, except that no document containing the Social Security Number or alien number that is the subject of the discrepancy can be used, and no document without a photograph can be used to establish identity.

If, after all these steps have been taken, the discrepancy referred to in the No-Match Letter or Notice of Suspect Documents is still unresolved, the new regulations require the employer to choose between terminating the employee or facing the risk that DHS may find the employer had the requisite knowledge the individual at issue was not authorized to work in the U.S. and therefore violated the Immigration and Nationality Act.

Andrew Singer of Tannenbaum Helpert Syracuse & Hirschrift LLP notes that the new regulations do not provide guidance on all situations that may arise when employers receive and respond to a No-Match Letter or a Notice of Suspect Documents. He advises employers to consult with their employment attorney on such matters and can be reached at singer@thshlaw.com.



*Robert M. Pesce, Jr. is a Partner at Marcum & Kliegman LLP and head of the Agency Services Group. He specializes in providing accounting and consulting services to artists, authors, literary agents and publishers. Direct Dial: (212) 981-3016
Email: rpesc@mkllp.com*

New York
Tel (212) 981-3000
655 Third Ave., 16th Floor
New York, NY 10017

Melville
Tel (631) 414-4000
10 Melville Park Road
Melville, NY 11747

Greenwich
Tel (203) 861-9700
115 E. Putnam Ave.
Greenwich, CT 06830

Grand Cayman
Cayman Corporate Centre
27 Hospital Road
P.O. Box 1748
George Town, Grand Cayman
Cayman Islands BWI

Email: literary@MKLLP.com

Web: www.MKLLP.com

