

Employers are Facing Stricter Enforcement of Immigration Rules

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It has been over 20 years since President Ronald Reagan signed the Immigration Reform and Control Act of 1986 (IRCA), which made it illegal to knowingly hire or recruit undocumented workers and required employers to attest, on what is now known as the I-9 form, to their employees' immigration status. The law also granted amnesty to undocumented workers who entered the United States before January 1, 1982 and resided here continuously. It is estimated that approximately 2.7 million undocumented workers were legalized at that time.

Currently, the estimate of undocumented workers in the United States is somewhere between 12-21 million. Some estimates put the number of undocumented workers at 1 in 20. In August of 2007, the Department of Homeland Security (DHS) announced several reforms to address border security and other immigration challenges in this country. Pertinent to employers, the reforms included a social security "no-match" regulation that expanded the bases on which an employer may be deemed to have constructive knowledge that a worker is unauthorized under the IRCA. As illustrated by the controversy surrounding the new regulation, immigration reform and thus the dilemma faced by the government, not only with how to treat the current undocumented workers, but also how to stop future undocumented workers, continues to be battled, leaving employers with little direction from the government with how to deal with undocumented workers.

As a matter of law, employers are required to submit wage and earnings reports, commonly referred to as W-2 forms, to the Internal Revenue Service (IRS). On behalf of the IRS, the Social Security Administration (SSA) verifies the accuracy of the information reported on those forms, including the social security numbers and employee names. If an employee name and social security number do not match the records in the SSA database, the SSA notifies the employer that there is a discrepancy between the name reported and the social security number. The SSA notification letters are referred to as "EDCOR" or no-match letters and have been sent to employers since 1994. At the present time, the SSA cannot provide no-match information to the USCIS due to IRS regulations prohibiting the sharing of "tax information." 26 U.S.C § 6103. Therefore, while the law has always prohibited employers from

continuing to report wages under a social security number that does not match the employee's name, 26 U.S.C. § 6721, there has been little enforcement.

In accordance with the law, employers are also required to assure accurate I-9 forms are completed and maintained. DHS itself sends a type of "no-match" letter to employers. If DHS audits an employer's I-9 forms and cannot verify, through its system, that the identity and work authorization information provided on the I-9 is consistent with its records, DHS will similarly send the employer a letter requiring that the employer take steps to verify and have the information corrected.

The quandary for employers has been that proponents of undocumented workers have often sued employers for taking action based upon the inability of an employee, most commonly employees of Hispanic origin, to provide accurate or corrected I-9 documentation, specifically accurate social security numbers. These cases have been brought to the EEOC on the basis of national origin discrimination. According to EEOC regulations, the EEOC can advance a case of discrimination on behalf of an undocumented worker, even though that worker may not be entitled to receive damages for wages. This, along with INS regulations relating to the I-9 form which prohibit an employer who has once seen documentation to support the I-9 from again asking to see that documentation or from asking to see additional documentation (termed "document abuse"), have placed employers in the difficult position of facing a violation of either immigration regulations for hiring and retaining an undocumented worker or EEOC regulations for discrimination on the basis of national origin.

In August, 2007, the DHS issued a final rule outlining a recommended response for employers who receive SSA no-match letters or its own DHS no-match notices. The rule provides that if an employee is unable to resolve the no-match discrepancy, the employer can terminate the employee within 90 days of receiving the letter, and that if the employer does not do so it could be subject to liability for knowingly employing an unauthorized worker under the IRCA.

Last month, however, a judge in the United States District Court for the Northern District of California granted a temporary restraining order against the DHS, preventing it from taking any action to implement the new no-match regulation. In doing so, the judge ruled that the contesting parties demonstrated a high probability of success that, among other things, the rule was arbitrary and capricious and contravened the governing statute.

As the no-match letters assert, a conflict in the records between the name and the social security number "does not, by itself" indicate unauthorized work status or that the employee is using a false social security number. The name and social security number may not match due to clerical

errors by the company in reporting the name and social security number. A no-match letter could also result if the employee uses inconsistent names on legal documents or inconsistent spellings of his or her name. It is also possible that the SSA made a clerical error that the employee did not catch in reference to his or her social security card. However, it is also possible that the employee simply provided a false social security number.

Employers are always counseled to follow the laws to the best of their ability. Although the guidelines are currently facing judicial scrutiny, employers can still look to those “safe harbor” procedures as guidance for reconciling the requirement of nondiscrimination based on national origin or immigration status with the employers need to prevent employment of undocumented workers. Looking to the DHS guidelines, we recommend the following:

1. Upon receiving a no-match letter, the employer is **not** to assume that the employee is an undocumented worker.

2. As soon as possible, but no greater than five days after receiving a no-match letter or other credible information questioning the employment eligibility status of a particular employee, the employer should check its records to determine if it was responsible for any discrepancy and if it completed the I-9 and other required paperwork fully and accurately. One way to do this is by comparing the information written down by the employee on the application and accompanying data given by the employee to what the employer reported on forms to the government agencies.

3. If an error was made by the employer, the employer should correct that error and may consider the matter resolved. If the employer has not properly completed the forms, the employer should take necessary steps to properly do so.

If, however, the forms are fully completed and the employer did not make an error but properly recorded and communicated the information to the government agency, as soon as possible, but within a week of making that determination, the employer should sit down with the employee, explain that the employer has received a no-match letter and explain the steps the employer has taken to assure that it recorded and communicated the information correctly to the government agency. The employer should then show the employee the information submitted by the employee and the information submitted by the employer to the government agency and ask the employee to verify whether, in fact, he or she has recorded the information correctly and whether he or she agrees that the employer has communicated the information correctly. It may be helpful to explain to the employee that discrepancies can be caused if the employee uses different names, nicknames or spellings of their

name. The employer should not ask to again see the social security card or work authorization document.

4. If the employee confirms that the employer has recorded the correct information and communicated the correct information to the government agency, the employer should provide a copy of the document provided by the employee and used by the company to communicate the information. The employer should then direct the employee to contact the Social Security Administration and give the employee a period of at least 30 days but no more than 90 days from the date of receipt of the no-match letter to contact the Social Security Administration and attempt to correct the error.

If the employee indicates that the information is incorrect, at a minimum the employer must review the appropriate correct documents and have the employee complete a new and correct I-9 form. Depending on the employer's work rules concerning issues of falsification, and the employee's explanation for the initial information being incorrect, the employer may have to analyze whether the employee intentionally provided false information and take appropriate action.

5. At the end of the 30-90 day period given to the employee to contact SSA and correct the discrepancy, the employer should follow-up with the employee and discuss any action the employee has taken with regard to correcting the discrepancy.

6. If the employee has failed to take any action, the employer should consult its uniformly applied policies and work rules and determine how it would treat a similar situation, specifically rules regarding falsification and insubordination. If the employee communicates that he or she has contacted the SSA regarding the discrepancy, the employer should ask for verification, and if corrected information was provided, especially information which makes the I-9 currently inaccurate, the employer should obtain the corrected information and have the employee sign a corrected I-9 form.

Lindner & Marsack, S.C. advises employers on immigration issues relating to employment including employment of foreign nationals through H1B and L status and permanent residency through employment. Issues regarding the firm's immigration practice can be addressed to lpetersen@lindner-marsack.com.

If you have any questions about the issues raised by this e-alert, please feel free to contact Laurie A. Petersen at (414) 273-3910 or by e-mail at lpetersen@lindner-marsack.com

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