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FINDING A "SAFE HARBOR" AMONG THE "ICE" STORMS

By: Laurie M. Chess

As we reported in August of 2006, the Department of Homeland Security ("DHS") proposed a rule broadening the definition of an employer's "constructive knowledge" of hiring or employing an alien unauthorized to work in the United States. More than one year after the publication of the proposed rule, DHS has issued its final rule, one which Immigration and Customs Enforcement ("ICE") is expected to use with DHS to audit employers and prosecute them for knowingly hiring or continuing to employ aliens unauthorized to work. This year, while Congress has debated and proposed various immigration reform packages, the only real action taken has been on the enforcement side, and more employers are feeling the effects of this every day. Thus, now more than ever, it is important to know what steps to take to remain in compliance with the current immigration laws.

To reach the harbor:

The "safe harbor" gives employers a series of steps to take in response to a "no match" or "mismatch" letter from: (1) the Social Security Administration ("SSA"), in which the employer is told that the information in its databases does not match the name or Social Security number for particular employees as reported on earning reports filed by the employer; or (2) DHS, in which the employer is notified that the immigration status employment authorization documentation presented by the employee in completing the I-9 form was not assigned to the employee, according to DHS records. Employers who receive these notices from SSA or DHS may now be deemed to have constructive knowledge that the individual who is the subject of the notice is not authorized to work in the U.S. To avoid being deemed with constructive knowledge, the employer can take these steps to be able to use the "safe harbor" defense:

(1) **Within 30 days of receipt of the notice/no-match letter**: You must check your own personnel and payroll records to see whether the discrepancy was due to a clerical error on your part. If that is the case, you need to make the correction, notify SSA of the correction, verify that SSA made the change and that the new information matches their records, and make a record of the manner, date, and time of such verification. You must retain the record with the employee's I-9 form.

If there is no clerical error on your part, then ask the employee whether the information you have in your records is correct. If the employee claims the information is correct, you should direct the employee to the nearest SSA office and ask him or her to resolve the discrepancy with the SSA. As a practical matter, it is a good idea to document your meeting with the employee, what you tell him or her, and that the employee has agreed to follow up with the SSA. If the employee claims the information is not correct, then you should correct your records and verify that the employee's name and Social Security number now match SSA's

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records, as described above.

(2) **Within 90 days of receipt of the notice/no-match letter**: The employee should be advised that he or she must resolve any discrepancy with SSA or DHS within 90 days of the date you receive the notice. Again, as a practical matter, you should advise the employee of this in writing.

(3) **Within 93 days of receipt of the notice/no-match letter**: If the employee has not resolved the discrepancy within 90 days of your receipt of the notice, you must again verify the employee's employment authorization and identity by completing a new I-9 form. The employee must complete section one and you must complete section two within 93 days of your receipt of the written notice. You cannot accept any document that contains a disputed Social Security number or any receipt for the replacement of such a document to establish identity or employment authorization. Also, the employee must present a document that contains a photograph in order to satisfy identity or both identity and work authorization. You must retain the newly completed I-9 form with the prior form. The original form, however, is used for calculating the retention period.

"No-match" does not equal automatic termination:

As always, you should not discharge someone just because you receive a "no-match" letter or a notice from DHS. Similarly, if you get a request from an employee to file a labor certification or to sponsor an employment-based visa petition, this does not mean you should automatically terminate someone. However, the new rule also clarifies that you may be deemed to have "constructive knowledge" if you fail to take reasonable steps after receiving a request from an employee to file a certification or petition. The reasoning behind this rule is that if the employee has already indicated to you on the I-9 form that he or she was a lawful permanent resident or U.S. citizen, then, in most circumstances, the employee would not need you to sponsor him or her for permanent residence based on employment.

When the "safe harbor" does not apply:

Remember, the "safe harbor" provisions only apply to "constructive knowledge." If at any time after you receive a "no-match notice" you acquire **actual** knowledge, then it is time to discharge the employee. Actual knowledge is information that you become aware of **first-hand** as to an employee's immigration status or authenticity of identity and work documents. ICE gives the following examples of what constitutes actual knowledge: (1) your employee tells you that he or she is not present in the U.S. legally; (2) the employee tells you that he or she does not have work authorization documents; (3) the employee asks you where he or she can obtain work documents; and (4) you know that an employee's work authorization documents have expired and that the employee has not obtained renewal documents. So, if you receive a "no-match letter," and when talking to the employee he or she admits being unauthorized to work, you would not continue with the steps described above. You now have actual knowledge and should

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discharge the employee. If, however, you do not acquire first-hand knowledge, but rather another employee or supervisor tells you that another employee is not authorized to work, you should conduct an investigation into this matter (as you would other workplace investigations) and you may proceed with the above steps during the pendency of the investigation. If you are not able to conclude that the employee is unauthorized to work, you may still utilize the "safe harbor" defense.

When the "safe harbor" takes effect:

The final rule may be published in the Federal Register any day now. The rule then takes effect 30 days after the date of publication. You should use this time to review the status of your I-9 compliance and review your process for addressing and responding to "no-match" letters. Also, continue to be vigilant about "no-match" letters in the merger and acquisition context in accordance with your review of the other company's immigration compliance.

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Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

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