

August 27, 2007

Dear Secretary Chertoff and Commissioner Astrue,

The business community, as represented by EWIC and the undersigned, understands and supports the enforcement of immigration laws, however we are particularly concerned about the "Social Security No Match Letter" regulation, which directs employers to take certain steps when they receive notice from the Social Security Administration ("SSA") that an employee's name and social security number do not match, and to potentially terminate them if the discrepancy cannot be resolved within a short time-frame. Many lawful U.S. Citizens and those legally allowed to work in our country will be caught up in Social Security no-match letters due to the poor quality of the SSA database. Employers will be overwhelmed with paper work as the government seeks to make employers responsible for the decades old administrative problems. This is not a positive way to enlist the business community in working to fix the problems that the government created. The regulation also jeopardizes vital U.S. industries and the U.S. economy as a whole by needlessly creating uncertainties, disruptions, and dislocations throughout broad swaths of the workforce. Moreover, the regulation would foster anti-Latino and anti-immigrant discrimination and would rely upon a database --Social Security-- that is not an effective tool in worksite immigration enforcement.

We understand that the SSA plans to send out the first letters with DHS guidance beginning as early as September 4, 2007. As every day passes, there is growing confusion as to how to comply with the rule and the practical impact of its implementation. The administrative time it will take and the costs involved in educating employers and workers as to how this regulation should be implemented and enforced far exceed what we believe SAA and DHS have projected. DHS has said that it will prepare responses to frequently asked questions. However, given the sheer number of unresolved questions/issues, it is clear that these answers will not be available before the September 14, 2007 implementation date. It is also clear that no compelling reason exists to implement the rule on September 14, 2007. We therefore ask that DHS and SSA stay the implementation of the rule for a minimum of 180 days and that SSA hold off on including letters with DHS guidance for like period.

We are enclosing a list of numerous questions/issues that have arisen in the short time since the publication of the rule on August 15, 2007. We will forward additional questions on a rolling basis as they come in to us. We ask for your immediate response to this request for a delayed implementation.

Sincerely,

American Hotel & Lodging Association  
American Immigration Lawyers Association  
American Meat Institute  
American Nursery and Landscapers Association  
American Subcontractors Association, Inc.

Associated Builders & Contractors, Inc.  
Associated General Contractors of America  
Associated Landscape Contractors of Colorado  
California Association of Nurseries and Garden Centers  
California Landscape Contractors Association  
Colorado Employers for Immigration Reform  
Essential Worker Immigration Coalition  
FEWA  
Florida Nursery, Growers & Landscape Association  
Idaho Nursery & Landscape Association  
Indiana Chamber of Commerce  
Indiana Nursery and Landscape Association  
International Franchise Association  
Mason Contractors Association of America  
Massachusetts Nursery and Landscape Association, Inc.  
National Chicken Council  
National Club Association  
National Council of Chain Restaurants  
National Restaurant Association  
National Retail Federation  
National Roofing Contractors Association  
OFA-an Association of Floriculture Professionals  
Outdoor Amusement Business Association, Inc.  
Plumbing-Heating-Cooling Contractors- National Association  
Professional Landcare Network  
Retail Industry Leaders Association  
Small Business & Entrepreneurship Council  
Society of American Florists  
Texans for Sensible Immigration Policy  
Texas Nursery & Landscape Association  
Texas Poultry and Affiliates  
The South Carolina Nursery & Landscape Association  
Tree Care Industry Association  
United Fresh Produce Association  
US Chamber of Commerce  
US Hispanic Chamber of Commerce  
Women Entrepreneurs Inc.

## **List of questions drafted by business community on “Social Security No Match Letter”**

- 1) How do we handle a No-Match for someone who is on an authorized leave?
- 2) Should I stop hiring foreign born applicants so I don't have to worry about any of this?
- 3) Should I have all my employees complete a new I-9?
- 4) Can I ask for more documents than the I-9 asks for; just to be safe?
- 5) Can I refuse to accept identification documents that are commonly faked?
- 6) During a reference check can I ask if the employer ever received a no match letter on the applicant?
- 7) What do you mean by "Safe Harbor"?
- 8) Why not do Basic Pilot now?
- 9) Do we have to go back and verify existing employees, if we sign up now?
- 10) Could we get on Pilot for a short trial, and then drop until its mandatory?
- 11) What is the "no-match" letter? How will the new one be different in content from the old ones?
- 12) What if you get multiple SSN that are wrong?
- 13) If you don't terminate, then what?
- 14) What is the timing of the letters?
- 15) If re-certified I-9's, do I supply the new I-9 to INS?
- 16) Am I knowingly employing if I'm using new information?
- 17) What do I do if I can't find labor??? Beyond the short-term shock... what about the long term?
- 18) No-match letters -- used to be that if you were 10% or more, then you got a letter. Is it now that you would get a letter for each individual no-match?
- 19) Do I need to go back over any letters from 2006 or earlier? Will I be held responsible for letters I did not address before the finalization of this regulation? Please define the effective date of implementation?

- 20) What do I do if there's no verification in the 90 days, especially if waiting for a response from government and they're having capacity issues?
- 21) The regulations states I will not be held responsible for terminating employee, does the Office of Special Counsel agree? Will lawsuits be prohibited?
- 22) What if some of the names/ social security numbers that are on the "No Match" list are no longer working for you?
- 23) If a discrepancy with a Social Security no-match is not resolved, and the employee completes a new I-9 with the supporting documents, including a photo ID, won't the "no-match" from Social Security just arrive again since the employee would continue to use the same SS #, required for payroll purposes?
- 24) Is there mandated use of either of SSA verification website or the Department of Homeland Security verification website within these new regulations?
- 25) If we check and see that we need to talk with the employee about SS card and they say they have a new one for us due they need to take care of that or due we submit the change info? If we send in the change info what happens if we get another No Match letter on that same employee?
- 26) Should I give a copy of the no match letter to the employee?
- 27) What should I do if an employee brings me a no-match letter sent to them? Do the same safe harbor standards apply and must I follow the procedure outlines in the regulation?
- 28) Are employers required to maintain a copy of the No-Match letter with the Form I-9 verification documentation from the SSA?
- 29) Are employers required to keep copies of the resolutions to no-matches with the Form I-9s?
- 30) What if I don't get a letter (lost in the mail)? Will SSA send a reminder out?
- 31) What if I am contacted by ICE?

**A: ICE is entitled to take your I-9 documents however; you are allowed 72 hours to present them. You must make copies of these documents before providing ICE with the originals. Also only allow them to see the I-9 documents, not any other personnel documents**

- 28) If we end up having an employee complete an I-9 because we haven't been able to resolve the discrepancy, and they list the same at-issue social security number on the I-9, but then provide documents that appear valid and do not contain the offending number, can we accept the I-9 is the company protected from liability?

- 29) If the answer to #28 yes, we will likely get another no match notification from SSA the next year? Do we need to go through this process over and over with the same employee?
- 30) We often have married employees who never change their name with SSA. If we get a no match letter regarding them, do we instruct them to fix it with SSA? What if they don't?
- 31) If we are re-verifying the I-9 with a current employee, is the 3 day deadline business or calendar? Can we re-verify prior to the 90 days running completely?
- 32) If we are a basic pilot participant and end up having an employee complete a new I-9 because they haven't been able to resolve the discrepancy, and they list the same at-issue social security number on the I-9, but then provide documents that appear valid such as a green card, can we accept the I-9 and is the company protected from liability? Please keep in mind that basic pilot participants generally run the social security number through the program. What happens if we receive another no-match letter the next year?
- 33) If we are a basic pilot participant and end up having an employee complete a new I-9 because they haven't been able to resolve the discrepancy, and they list another social security number on the I-9, and provide documents that appear valid such as a green card, can we accept the I-9 and is the company protected from liability? What if this person has now totally changed his/her name?
- 34) If we are a basic pilot participant and end up having an employee complete a new I-9 because they haven't been able to resolve the discrepancy, do we need to run thru the exact same basic pilot procedures as if they are a new hire? Do we need to run the social security number and the name, date and DHS numbers through basic pilot? Alternatively, could we just complete a new I-9 form?
- 35) If we participate in the basic pilot program now on a voluntary basis, can we withdraw from participation?
- 36) Will DHS provide hands on training for employers on how to comply with the No-Match Rule?
- 37) Are DHS and SSA sharing information on who receives the no-match letters? If so, pursuant to what authority?
- 38) If we receive an anonymous call informing us that we have an employee who cannot legally work in the United States, what is our responsibility?
- 39) During the 31-90 days of the "No Match Letter" it states that if an employer reviews its records, finds no errors and the discrepancy in the No Match Letter remains, then employee is to review the company records for errors. Can you be more specific as to what the employee can have access to in order to review company records. Also, if a parent or guardian desires to review company records, what is our position?

- 40) What is the "Layman's definition" of Constructive Knowledge? What does Constructive Knowledge mean? Give some examples.
- 41) Can you please define what is the "Safe Harbor" process and how will I know I have met this?
- 42) When the employee tells the employer that he/she has corrected the problem with the respective agency and it says the employer will be responsible for verifying this, what will the verification be? Will it be a telephone call to the agency by the employer? Will it be a letter the employer is sent or an email from the agency?
- 43) If an employer received a No-Match letter some time in 2006, the old rules required the employer to direct the affected employee to resolve the issue with SSA. If the employer knows the issue has not been resolved but no new No-Match letter has come, should the employer start the 93 day clock on 9/14/07 or should the employer wait until a new No-Match letter is issued and then start the 93 day clock?
- 44) When will the business community receive instructions on the new documents that are acceptable for I-9 purposes?
- 45) What documents will be eliminated from the current list on Form I-9?
- 46) Will there be a new Form I-9 published?
- 47) When will the new civil penalties go into effect?
- 48) What is DHS's authority for increasing civil penalties by 25%?
- 49) Are employers required to maintain a copy of the No-Match letter with the Form I-9? Verification documentation from the SSA?
- 50) If there is an ICE audit or raid, will employers be protected from liability if they have complied with the safe harbor provisions?
- 51) What happens if a lower level employee has knowledge of a workers unauthorized status, but doesn't relay that information to the hiring authorities at the company and the company complies strictly with the safe harbor provisions. Is the company protected from liability?
- 52) In an attempt to cut down on the number of no-match letters we receive we plan to require that an employee brings in an actual copy of his/her SS card before they are able to make any changes to their name, i.e., claim a marriage etc. Is that against the law?
- 53) In an attempt to cut down the number of no-match letters we receive our payroll department plans to require an actual copy of the original SS card. Is that against the law?

- 54) In order to be ahead of the game our company plans to run every current employee through SSNVC today, shall we then follow the safe harbor procedure for any mis-matches we receive? We understand that for the regulation purposes this does not fall under the definition of no-match letter.
- 55) Can an employer continue to allow an employee to work (and, of course, pay that employee) during the 93-day time frame in which they're trying to straighten out the no-match? In other words, do they have to take them off payroll/not allow them to work, or can they continue to work?
- 56) There will be obvious labor shortages resulting from the dramatic attrition of the workforce. Will DHS work with employers to expeditiously process H-2B or H-1A applications? Since many of these works are not in "seasonal" jobs, they may not meet the current interpretation of what constitutes "temporary" for H-2B. Will DHS relax the current standard so that the traditional "double temporary" criteria doesn't have to be met? Will DHS hold enforcement in abeyance against an employer who has filed an H-2A or H-2B application so that a work permit can be obtained?
- 57) What increased resources does SSA have at its disposal to deal with the countless number of inquiries it will face by discharged employees over the accuracy of their SS number?
- 58) How should an employer report wages to the IRS once it learns that the SS number is not valid?
- 59) Why did ICE wait for so many years to promulgate this regulation and give guidance to employers when it knew that this issue was percolating for many years? ICE inaction allowed the number of no matches to increase exponentially at the workplace, creating a crises of epidemic proportions for employers.
- 60) Instead of a fixed 90 day period, why doesn't ICE use 90 days as the minimum but depending on the size of the no-match list provide for longer periods?
- 61) Both DHS and the SSA have said that no-match letters have not been sent out this year because the DHS needed to put a letter in. However, some employers report having received letters that were dated this year. Is the SSA going to resend no-match letters that went out earlier in the year, or are they going to be sending out new letters only? Would the failure to comply with the new DHS procedures, which may be considered under the new rule to constitute "constructive knowledge" that a worker is not properly authorized to work, be the basis itself (without any other factor) to find a criminal violation of IRCA?
- 62) On ICE's instructions on how to resolve a mismatch, it states that the employer will have 90 days from the receipt of the no match letter to either terminate if one cannot confirm the authorization to work or have the employee complete a new I-9 form with the new ID. What if the employee brings a new SS card with a new number? Are we to terminate and rehire as a new employee or adjust their old SS# to the new SS#?

- 63) Are we to apply the new regulations to the letters we already received and addressed earlier in the year, or only apply the regulations to letter received from now on?
- 64) DHS indicated it was going to first target employers with 10 or more no match letters. How would that affect a company with 35 restaurants in 15 states? Does that mean receiving 10 total letters for all 35 restaurants and their employees or would it mean any one restaurant location that receives 10 or more letters?
- 65) If any employer uses E-verify, will they have legal protection from possible database mistakes? More specifically, if an employer terminates an employee based on no-match information and it is later revealed that the problem was with the information stored in the database, is the employer protected from legal action from the terminated employee?
- 66) On the conference call, Barry Jackson said that if an employer attempts to take additional affirmative steps to determine the work eligibility of an employee and receives a notification that that employee is not verified through that system, the employer would be responsible for taking steps laid out by DHS for no-match letters. However, in the rules Section E. Practical Application point 1 (page 29) makes mention that the employer can take these additional steps to firm up an affirmative defense in the case that they are prosecuted for having constructive knowledge of an employees' ineligibility to work. This section does not address employer requirements regarding independent attempts at verification which result in an employee being found "unauthorized". If an employer uses an additional verification tool such as SSNVS, USCIS, or ICE's IMAGE program, and receives a "no-match," are they then required to follow the rules for SSA no-match letters? Can you please clarify this point?
- 67) Is an employer required to still pay an employee who has received a no-match letter while they are trying to resolve any discrepancy?
- 68) Is there a standard an employer can reference when an employee presents paperwork resolving their problem, i.e., is there anything to protect employers from a forgery provided by employee?
- 69) I would like to know about ICE's focus on employers who receive no-match letters for 10 or more employees or those who receive letters for employees that constitute 0.5 percent of their entire workforce. Does this mean that employers who have 100 employees and get one "no match" letter, constituting 1% of their workforce, are now going to be under investigation?
- 70) Could you walk us through a brief step by step of what we need to do once we get a "no match" letter? Since large employers may have several dozen no match numbers, what happens if these are not all resolved in 90 days? Will there be automatic fines or will we be guaranteed a visit from ICE?
- 71) What happens when an employee of 3 or more years shows up on the most recent no match list and the employee is not able to resolve the no match issue. Will they and we have any

protection or must we terminate the employee?

- 72) If an employer that uses E-Verify gets a no match on an existing employee and they have to file another I-9, can the employer then put that employee thru E-Verify?
- 73) Both DHS and the SSA have said that no-match letters have not been sent out this year because the DHS needed to put a letter in. However, some employers report having received letters that were dated this year. Is the SSA going to resend no-match letters that went out earlier in the year, or are they going to be sending out new letters only?
- 74) Once a person has been identified as using an invalid social how should we change our records and those we submit to the IRS, etc. moving forward so that they are aware we have already addressed the situation? For example: can we just change the invalid social to 000-00-000?
- 75) Some employers are currently presenting Non-Confirmation letters to any new employee who's SSN doesn't match. The information we have received from the SSA is that we must give the new employee 8 Federal Government working days to get any error straightened out, allowing them to remain on their regular schedule during these 8 days. Is this still a correct procedure with the new rules? Why does the SSA allow 90 days for the No-Match vs. the 8 days in the Non-confirmation letters for new hires?
- 76) Where the no-match letters be sent? Will they be sent to the corporate office, regional office, employee's home, and/or employee's restaurant?
- 77) Will there just be one copy of each letter sent or will the employer and employee each receive one?
- 78) If the letter is being sent to employer, is it the person who sends out our W2's that would be the recipient?
- 79) The preamble to the final regulations advises employers that if a no-match discrepancy is not resolved, and the employee's identity and work authorization cannot be verified using a reasonable verification procedure, such as that described in the regulations, then the employer "must choose between" (1) taking action to terminate the employee or (2) facing the risk that DHS may find that the employer had constructive knowledge that the employee was an unauthorized alien and violated the INA by continuing to employ the alien. 72 FR 45613.

In response to a question about what employers should do when they follow the regulatory procedures and the discrepancy is still unresolved, the preamble advises that employers should complete the special I-9 verification "at this point." 72 FR 45619. The preamble further advises that if this verification is unsuccessful, "the employer risks being deemed to have constructive knowledge of unlawful employment of workers in a subsequent enforcement action." The special verification process is described as offering the employee "one last chance to show the employer that he or she is not an unauthorized alien." However,

the next sentence cautions that "Employers who follow the safe harbor procedure and complete the I-9 verification should not be tempted to mistakenly terminate employment for citizens and authorized aliens." 72 FR 45619.

On what grounds or circumstances could an employer "mistakenly" terminate at this point? Presumably, initiation and completion of the special I-9 verification would allow the employee another opportunity to resolve any discrepancies. The preamble is clear about the likely consequences of an unsuccessful verification, but the caution implies that the employee is entitled to another chance and/or that the employer should then use some other verification or confirmation method before acting. When is the preamble's choice of termination justified, or presumption of constructive knowledge triggered, under these circumstances? On what grounds, documentation or evidence could an employer continue to employ an employee under these circumstances to avoid "mistakenly" terminating him or her and, at the same time, avoid the presumption of constructive knowledge?

- 80) Even though there is an implied statement in the communications that have already come out regarding this topic, there is nowhere that specifically states that the employee must be terminated. The rule states that a new I-9 must be completed, but stops short of stating that the employee must be terminated. What actions should follow a new I-9?
- 81) Many organizations, such as unions and putative community-service groups are filing lawsuits on behalf of employees who are not legally authorized to work in the USA. When their illegal status is discovered in litigation, some state and federal judges are ruling that an employer may not now enforce or apply the law to discharge them, since that could be considered retaliation for filing the lawsuit. Will employers who follow the new rule be protected from the risk of being the target of a claim, charge, lawsuit, e.g., Wage & Hour, OSHA, EEOC, NLRB, etc.?
- 82) If every step is taken as noted in the rule and at the end of the process the employee in question still has a no-match, is the employer required to terminate the employee? If so, is the employer then subject to being sued or is the employer protected from all litigation by the federal government if all steps were taken in accordance with the rule? If not, if the employer continues to employ the worker, is the employer then not liable for the worker potentially being an undocumented worker?
- 83) After completing the safe harbor procedures and assuming the employee remains on the payroll, what steps should be taken when a SSA no match letter is received during the next calendar year and, for that matter, each year thereafter? (real-life example: my paralegal's name from birth does not match her SSN in the SSA database. She uses a US passport to complete her first I-9 at time of hire. Company receives a SSN no match letter, but employee does not want to take the numerous hours necessary to deal with the government to correct her SSN so she chooses not to correct it, but understands from the letters the company provided that her SSA earnings may not be properly allocated to her account. Does the company just continue to fill out an I-9 each year using her US passport and staple each new I-9 to the old I-9 and continue this process for 5 years in a row if that is how long she worked for the company?)

84) If the discrepancy with the no match is not resolved within 90 days and employee/employer complete another I-9, can the second I-9 use the same documents as the original I-9, as long as the document used to complete section 2 of the I-9 does not contain a SSN?

Ex.: The employee used a permanent resident alien card to complete the first I-9 at time of hire, and then employee wants to use the same permanent resident alien card to complete the second I-9 that is to be completed based on employer's receipt of a SSA no-match letter.

85) If an employee affirms that the information that he or she provided is correct and on, for example, day 71 reports to the employer that the discrepancy has been remedied, is the employer required to verify through the SSNRS that the discrepancy has in fact been resolved, and record the manner, date and time of verifying the info and keep it with the form I-9?

86) If after 90 days the employee provides a different SSN and facially valid documents to complete another I-9 does that 2nd I-9 with a different SSN provide the "safe harbor" of the regulations? Does the answer make a difference as to whether the SSN is only one or two digits off or an entirely different SSN?

87) Does the safe harbor apply only if the employer has either (1) verified the SSN/name with the SSA, or (2) completed another I-9 without using documents containing SSN on mismatch letter?

88) Is employer expected to follow safe harbor procedure upon receiving the "Request for Employer Information" on a single named individual – not the list of SSNs? (For background, DHS recently stated on one of its conference calls that the single named individual no match letters were provided as a courtesy to the employer to forward to the individual employee to handle but were not deemed a no match letter for purposes of completing the new safe harbor procedure)

89) Are there any recommendations or requirements for recordkeeping regarding former employees subject to the mismatch letter? As part of a record retention policy, can companies discard SSN match letters from past years?

90) Is there any requirement in the regulation or in any law that employers retain the SSA no-match letters they receive?

91) Is there going to be an employer assistance help line that is answered by a live person? (Currently we have made attempts to talk to live persons to answer questions and there has not been the resources or abilities to do so at the government)

92) Is there going to be consideration or credit given to employers who attempt in good faith to follow the requirements of the safe harbor but commit some technical error? E.g. 2nd I-9 done on 97th day after letter of 2nd I-9 not 100% complete (missing date or similar item).

- 93) The IRS requires a new W-4 be completed upon receipt of a SSN no match letter because an employer is to presume the current W-4 on file is invalid. If a new W-4 is not completed, the employer is to treat the paycheck with single zero withholdings for tax deduction purposes. If an employer follows these steps the employer generally has a defense against knowingly having submitted false information to IRS. How does the IRS guidance and defense fit with the DHS SSA no-match regulation?
- 94) The final rule takes effect on September 14th. Why doesn't the regulation provide any guidance to employers on how to handle social security no-match letters that they have already received, whether this year or in prior years?
- 95) How can you expect employers to understand what their responsibilities are when federal agencies are providing conflicting guidance? The safe harbor procedures in the final rule require employers to use SSNVS to verify employee's social security information for I-9 compliance purposes. However, the Social Security Administration website states that it is "not proper to use SSNVS for non-wage reporting purposes" including for identity checks. How are employers supposed to reconcile these instructions?
- 96) Similarly, the SSA website still states that a "mismatch does not make any statement about an employee's immigration status and is not a basis, in and of itself, for taking any adverse action against an employee. Doing so could subject you to anti-discrimination or labor law sanctions." However, the DHS final regulation is warning employers that they will face liability under the employment verification provisions in the immigration laws unless they terminate an employee who has an unresolved mismatch? Why can't the Government give clear and coordinated guidance to employers on these issues?
- 97) The rule doesn't indicate what kind of documentary evidence employees will receive from SSA once they have resolved a no-match issue. What can employers expect to receive as evidence?
- 98) DHS states that the rule will not result in an annual effect on the economy of \$100 million or more, or have significant adverse effects on employment. What is the basis for this statement in light of the estimates that there are over 5-10 million (not sure what the best number for this is) unauthorized workers in the current workforce, and many companies are faced with the loss of significant percentages of their workforce?
- 99) Will DHS know which specific employers are receiving a no-match letter or will Social Security send the letter and place a generic DHS letter inside? In other words, will Social Security share no-match information with DHS? If so, to what extent? If not, is this prohibited by law?
- 100) Should she run the social security number of an American born (She believes that to be the case) employee who started just yesterday. If she does that, is that a violation of HIPPA?
- 101) "If our privacy rights regarding our Social Security Numbers are only supposed to be viewed by SSA, IRS and Employers, then how is "lawful" for the DHS to view and have

access to our Social Security Numbers?? Isn't this against the law and doesn't this violate the one's privacy?"

102) "As an employer am I violating the law by giving the DHS my employees Social Security Numbers and can I be sued for divulging such?"