



NATIONAL COUNCIL OF
AGRICULTURAL EMPLOYERS

ALERT MEMORANDUM

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NURSERIES, INC.



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TO: NCAE Members

FROM: Sharon M. Hughes, CAE*
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SUBJECT: How Do I Comply With The New No Match Rule?

As you are probably aware, the Department of Homeland Security (“DHS”) has issued a new regulation about how to respond to a social security no match letter or a notice of suspected document from DHS itself.¹ There are a number of ambiguities in the new rule and it is unclear how it will ultimately be applied. Based on several hours of discussion with high DHS officials, it is clear that DHS will apply the rule rigidly and strictly. In these conversations, DHS officials signaled that ambiguities both in the facts and the law will likely be construed against employers. The guidance that follows is therefore conservative.² While others may recommend a more aggressive approach or seek loopholes in the rule, such approaches involve more risk. Whether you follow such an aggressive approach or the more conservative one set out in this guide is ultimately a business judgment in the particular circumstances.

Unfortunately, the no match rule does not cover even the most likely scenarios that employers will encounter. Conversations with DHS officials indicate that the agency will take a rigid approach to applying it and consider the totality of the circumstances. If an employer deviates from the rule, DHS may, but not necessarily will, deem the employer’s response to be unreasonable and evidence of knowing employment of unauthorized workers. Moreover, *nothing in the rule lessens the duty to act reasonably in situations not addressed in the rule and its explanatory comments where there is information that a person is or has become unauthorized.* DHS will consider whether the employer’s conduct was reasonable when viewed under the totality of the circumstances.

* This memorandum was prepared by NCAE’s Washington, D.C. legal counsel, Siff Cerda & Lake, LLP.

¹ For a more complete explanation of the no match rule and related background information, see *NCAE Alert Memorandum AL 09-07* dated August 14, 2007.

² This memorandum is intended to provide a general overview and discussion of the relevant issues. It is not legal advice applicable to any specific situation. You should obtain competent legal advice based on a full discussion of the precise circumstances, as all relevant facts, regardless of how minor, may affect the specific legal advice.

SCENARIOS

What follows is a set of common scenarios that employers are likely to experience and must address in responding to a no match letter in light of the new rule. No attempt has been made to exhaust every possibility and there are few bright line answers. The scenarios are intended to illustrate how the principles might be applied.

Scenario No. 1

The employer receives a no match letter after the effective date of the rule. It does nothing and continues to employ the employee in question. The employee is later discovered to be unauthorized after a DHS audit of the employer's I-9 Forms. What happens?

This is the worst case scenario. The employer's failure to comply with the rule or take other steps to address the no match letter likely will cause DHS to initiate an enforcement action and seek penalties. It is also important to note that the Internal Revenue Code also requires a response to no match letters. Not investigating could open the employer up to the possibility of fines imposed by the Internal Revenue Service (IRS).

Scenario No. 2

The employee fills out Section One of the I-9 form and provides his/her social security number (SSN). The provided SSN is used by the employer for SSA and IRS requirements. The employee, however, does not use a social security card in Section Two as a List C document employment authorization document. The employer receives a no match letter based on the SSN. What happens?

While the social security card was not used as an employment authorization document, the rule still requires that the employer work with the employee to address the no match letter. If the employer cannot verify the validity of the SSN within 90 days of the receipt of the no match letter, the rule requires that the employee complete a new I-9 Form within 3 days after the 90th day from the receipt of the no match letter. The employer cannot use the SSN to establish work authorization in completing the new I-9 Form. The rule states that no document containing the SSN or alien number that is the subject of the no match letter may be used to establish work authorization or identity or both. Even if the SSN is not used as a work authorization document, the comments accompanying DHS' rule suggest that the problematic SSN listed in Section 1 of the I-9 Form will continue to trigger no match letters. Informal comments by highly placed DHS officials conclude in this situation that the no match letter regarding the SSN, even though it was not used for employment authorization, may be enough for DHS to conclude that the employer had notice that the employee was unauthorized, based on the rule of reasonableness based on the totality of relevant circumstances. Again, DHS' review is based on a totality of the circumstances review.

In this situation, it is important to have a uniform practice to lessen the risk of claims of discrimination. Senior DHS officials have said that following the no match rule should protect

employers from discrimination claims.³ However, in this scenario, receipt of the no match letter does not directly call into question the employee's work authorization and so discrimination claims are a particular risk. The key to lessening this risk is to respond the same way each time with every employee in this scenario and to document that response so that you can prove it later. Company procedures should clearly establish a uniform process for addressing no match letters for all employees.

Scenario No. 3

The employee uses a social security card as a List C document employment authorization document. The employer receives a no match letter. What happens?

This is the main scenario envisioned by the no match rule and the answer is clear. First, check if a clerical error was made and if so, correct it within 30 days. If so, correct it and re-verify the corrected information with the Social Security Administration ("SSA"). If not, ask the employee to check whether the information was correct. If the employee says yes, he/she should be referred to the SSA to resolve the discrepancy. If the employee says no, get the correct information and re-verify it with the SSA. If, after the end of 90 days, the employee has not resolved the situation with the SSA, complete a new I-9 using work authorization documents with a photo, as specified in the rule. The document cannot be the same SSN. If the employee refuses to complete the new I-9 Form or cannot provide acceptable work authorization documents as an alternative to the SSN, then he/she must be terminated at the end of the 93rd day.

Scenario No. 4

The employer receives a no match letter indicating that a female employee's name and SSN do not match. In response to her employer's inquiry regarding the no match, the employee tells her employer that the problem was due to the fact she used her married name in completing the W-2 Form but that the SSN was issued under her maiden name. The employer asks the employee to update her SSA records and report to the employer when it was done so that it can reverify the SSN with SSA. The employee fails to do so by the end of the 90th day. What happens?

In spite of the fact that the employee gave a reasonable explanation for the no match, she failed to act in a timely manner. As a result, the employee should be asked to complete a new I-9 Form with the appropriate work authorization documents other than the SSN subject to the no match letter. If, however, she cannot complete the new I-9 form, the safest course is to terminate her employment. If you do not, you are giving up the "safe harbor" and DHS may use the fact of the no match letter against you. She should be informed that if she later informs the employer

³ DHS does not enforce the anti-discrimination laws. Instead, that task is given to the Equal Employment Opportunity Commission through investigation, mediation, and conciliation and the courts through private lawsuits. In addition, the Department of Justice's Office of Special Counsel for Unfair Immigration-related Employment Practices enforces citizenship status and national origin discrimination laws (with respect to employers that employ between 3 and 14 employees).

that she has corrected her name with SSA, that she can be rehired if a position is available and SSA verifies that her SSN is valid.

Scenario No. 5

A male employee is informed of a SSA no match letter after the appropriate clerical checks have been made. He immediately informs his employer that the social security number is correct, but that he intentionally provided an incorrect name in order to avoid his child support obligations in a different state. What happens?

This scenario is covered by the rule. The employee failed to confirm that the social security information he provided was correct. The employer's duty under the rule is to obtain the new information and attempt to verify it with the SSA using the new name. If the SSA confirms the accuracy of the new name and number, the matter is resolved. If the employee is not able to correct the error and SSA cannot verify any corrections within the 90-day period, the employee should be required to complete a new I-9 Form using alternative acceptable work authorization documents. The employee should be terminated if he cannot do so.

Scenario No. 6

In the same circumstance as Scenario No. 5, can the employee be fired on the spot for lying in his employment documents?

Many employers have an "honesty policy" that requires employees to provide truthful employment-related information, subject to discipline or discharge if they are untruthful.⁴ The employee has clearly violated this policy in this scenario. An employer could enforce such a policy, but it must be applied uniformly to all employees under similar circumstances. The danger here is not so much a violation of the immigration laws, but violating the anti-discrimination laws. If a child support evader from Mexico is fired but not a child support evader who is native to the U.S. without a very good reason for the difference in treatment, the employer is exposing itself to a potential claim of national origin discrimination.

Scenario No. 7

A 6-year seasonal employee has always been known as "James Madison." His employer receives a SSA no match letter relating to him (as it has 5 times before). He insists that the information that he provided is correct. The employer follows the rule and directs him to SSA to resolve the situation. He stops coming to work without notice and the employer doesn't see him for several months. At the beginning of the next season, he appears and asks for work. The employer decides to rehire him; however, the hiring official notices that the work authorization documents he presents refer to him by a different name and he has a different social security number. What happens?

⁴ It is prudent to check the state laws in the states in which your company does business to determine if they have specific requirements regarding employee terminations based on employee misrepresentations on employment-related documents.

In this scenario, the employer should inquire carefully about why his name changed and why his social security number changed. Is it reasonable for a male employee to change his name and SSN? What is a credible explanation? Was he truly authorized to work but lied at the time of hire, as in Scenario 5, in order to avoid other legal problems? Or, did he admit that he was unauthorized to work at the time he was hired but subsequently married a U.S. citizen and currently has legal permanent resident status authorizing him to work? Or, does he not provide any reason for the change?

The employer's handling of these circumstances will be viewed under DHS' "reasonableness" standard and the totality of the circumstances. The comments accompanying the rule indicate that "An employee who produces different documents with different numbers, then, depending on the circumstances, may put the employer on notice that the employee has committed document fraud." While DHS addresses the consequences of such conduct for the employee, the clear implication is that an employer that doesn't address this situation in a reasonable manner may subject itself to the constructive knowledge presumption by DHS.

In the examples above, where James Madison admitted through his conduct that he lied about his identity or was not authorized to work when he was first hired, he may actually be legally authorized to work at the time of rehire. In such circumstances, the employer needs to be mindful of a potential discrimination claim if it summarily fires him before attempting to verify the name and documents that he claims are legitimate, unless it can do so under consistent application of an "honesty policy." These are the types of circumstances that must be handled carefully by the employer, which should take careful documented steps with SSA or DHS to verify the validity of the currently claimed legal status. A company-wide process for addressing these scenarios and uniform application are essential to avoiding anti-discrimination violations.

Scenario No. 8

You employ a seasonal workforce. After the season is over, you receive a number of no match letters. You look for clerical errors and find none. By then, however, the employees have left and are no longer employed. Are you required to track them down? Are you allowed to rehire them?

The obligation to verify an employee ceases upon termination of employment. If the employees come back looking for work at the start of the next season, however, the obligation to confirm identity and work authorization applies again. Under DHS' reasonableness standard, a prudent employer would investigate the earlier no match letter you received using the rule's procedures. For employers which hire a large number of seasonal workers and might not recognize former employees, it is especially important to have a tracking system for former employees whose social security and alien numbers were listed on no match letters from DHS or SSA after they terminated employment. If such a worker is identified as having been on a no match letter, upon his/her application for rehire, DHS officials suggest that the 90-day period would begin to run on the date of rehire. The employer should then follow the procedures set forth in the final rule.

Scenario No. 9

A company hires a labor contractor that does not respond to a no match letter in a timely manner as required by the rule. Is the company using the contractor liable for its violations of the no match rule?

Whether the company would be liable depends on whether the labor contractor is actually an independent contractor or not. If the labor contractor is not an independent contractor, the company would be liable as the employer. Deciding whether the labor contractor is truly an independent contractor depends on all of the facts, such as whether the contractor makes its services generally available to the public, whether it works for a number of clients at the same time, whether it has an opportunity for profit or loss, supplies the tools or materials, directs the order or sequence in which the work is to be done and determines the hours in which the work is to be done, and other factors.⁵ This DHS independent contractor test is not as broad as under the Fair Labor Standards Act or the Migrant and Seasonal Agricultural Worker Protection Act. However, you should work only with reputable labor contractors who comply with the law. This is an area in which ignorance is not bliss.

Scenario No. 10

An employee properly completes the I-9. The employer does not receive a no match letter concerning him. Yet, the employer receives credible information from a trusted source that the employee is unauthorized. What should the employer do?

The employer should investigate the information. Remember, an employer's primary obligation is not to knowingly continue to employ people who are not authorized to work in this country. The information received in this scenario called that employee's work authorization into question. In order to meet its obligation under the law, the employer needs to get to the bottom of the employee's work authorization. This may entail confronting the employee and taking reasonable steps, mindful of the possibility of a discrimination claim if the employee is terminated without substantiation of the allegation or asked to complete a new I-9 Form by producing more or different documents than originally presented. The no match rule makes clear that an employer that complies with the no match rule will not have the benefit of the safe harbor if it has independent knowledge that an employee is not authorized to work.

CONCLUSION

No guide can anticipate every possible scenario. This guide has surveyed some of the most common situations employers face and provides a short summary of one way to handle them. Unfortunately, the rule does not provide a bright line for compliance and the tension

⁵ DHS' independent contractor definition can be found at 8 C.F.R. § 274a.1(j). Moreover, IRCA prohibits an entity from using a contractor or subcontractor to obtain the labor of aliens, knowing that the aliens are unauthorized to work. A business that used a contractor knowing that the contractor was not completing I-9 Forms or complying with the no match rule could face some exposure. Moreover, if a contractor is aware that its subcontractors are employing illegal workers, DHS may claim that the contractor is liable, too.

between immigration law compliance and discrimination that has plagued employers in the past has not be relaxed by this rule. In some cases, the tension is aggravated.

In the end, however, the proper response turns on an informed business decision about how best to comply with the law's prohibition of knowingly employing unauthorized workers. Complying with the no match rule is a component of a proper response. Getting legal advice is critical in making that judgment especially until the courts interpret the law and establish clear rules of law. Ultimately, an employer's actions will be judged by a trier of fact based of whether a reasonable person would have acted as the employer did in view of the totality of the circumstances. If a set of circumstances would be suspicious to a reasonable person, it is better to investigate and attempt to find the truth, rather than to potentially violate the law.