

***ALABAMA FEED & GRAIN
ASSOCIATION***

***“MANAGING OUR WORKFORCE”
SEMINAR
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UPDATE ON STATUS OF IMMIGRATION ENFORCEMENT

Immigration enforcement issues continue to make the news, and vitally affect many employers. While the same basic legal requirements have been around for many years, enforcement policies have changed dramatically over the past 12 months, and are still in the process of developing. Some of the developments relate to the fact that there is a great national interest in immigration enforcement (some would argue it is a politically motivated interest), and the Administration seems interested in promoting a pro-enforcement image in order to secure a legislative compromise that would provide some solution. Further, many of the leading immigration enforcement government officials are relatively new in their positions and developing their own approaches.

The Background To The Swift Raids

The most dramatic application of the changing winds of ICE enforcement policy were demonstrated in the ICE raids of Swift meat packing plants in 6 states on December 12, 2006. Swift had been participating in the federal Basic Pilot Program since 1997, and had even been charged by the federal government in the past of checking the documents of applicants too closely. Swift had established an anonymous hotline, to which employees could provide confidential information on potentially unauthorized employees, and had instituted regular reviews of the I-9 forms and related paperwork. By many accounts, it appeared to a model corporate citizen.

In early 2006, however, a county sheriff called ICE to report that he had locked up a number of persons charged with crimes, and had checked their immigration status and found them to be unauthorized. He called ICE and asked them to come pick them up. During the process, ICE agents interviewed these persons and found that virtually all of them worked at a Swift plant. ICE initially issued administrative subpoenas for the I-9 forms for all employees at Swift's Iowa facility, and subsequently followed by similar subpoenas to the company's other plants.

Concerned about ICE's investigation, Swift took even further steps to evaluate its hiring practices to determine what steps, if any, should be taken to ensure compliance. Swift retained outside immigration experts to review the company's I-9 files and its hiring practices, and requested that ICE permit the company to more closely review the allegedly questionable I-9 forms to determine whether signs of identity fraud existed and whether any of these forms were tied to unauthorized workers.

In spite of Swift's efforts, ICE informed Swift that it was going to conduct a raid at its plants. Swift told ICE that a raid would directly impact many legal workers, as well as suspected illegal workers, and would irrevocably harm Swift by interfering with its legal business operations and by damaging its reputation. Swift estimated that as many as 40% of its employees might be removed in the enforcement action and the disruption of its operations could result in a \$100 million loss to Swift. Swift offered to cooperate with ICE in a phased or managed process that would accomplish ICE's goals without placing an unnecessary financial and operational burden on the company.

Swift Sues ICE

ICE refused to agree to Swift's review procedures, so Swift pursued a federal court lawsuit attempting to enjoin ICE's planned raid. ICE informed Swift and the court that it planned to shut down 6 of Swift's 7 plants in December so that ICE agents could interview every employee, regardless of suspected illegal status. Swift asserted that ICE's plan, or any comparable mass action, constituted a violation of the immigration laws, as a federal statute prohibits ICE from imposing penalties on Swift for actions taken on information provided through the Basic Pilot confirmation system. Swift further asserted that a mass removal action by ICE would be an unconstitutional deprivation of property without due process of law because Swift had a protected property interest in operating a legitimate business.

ICE Responds To Swift's Lawsuit

In ICE's official response in opposition to Swift's legal action for an injunction, ICE stated that there is no legal right for anyone to continue violating the law, and that the government need not work on a potential law violator's timetable. Regarding Swift's proposals to pursue the investigation in a phased method, ICE contended that proceeding in the manner proposed by Swift would enable a substantial number of illegal employees and the perpetrators of identity theft to avoid detection. ICE stated that participation by an employer in its Basic Pilot Program is not a limitation on a workplace enforcement action, and that no constitutional right requires the government to provide notice of a planned law enforcement action to a company that may be violating the law.

Judge Denies Swift's Requested Injunction Against ICE

On December 7, 2006, the United States District Court Judge for the Northern District of Texas denied Swift's motion for a preliminary injunction against ICE. The judge stated that nothing in the Basic Pilot Program or the statute prevented ICE from causing disruption of business and economic damages by conducting a mass removal enforcement action. The judge commented that the current Basic Pilot Program does not check Social Security or IRS databases to determine if a particular Social Security number is already being used in another workplace. In weighing the various interests, the court concluded that Swift did not carry its burden of showing that the granting of the requested injunction would further the public interest, and that Swift had not proposed a procedure that would not be detrimental to important public interests and at the same time protect Swift from economic loss.

Raids Instituted and Swift Sued Under RICO

On the same day the order was issued denying the injunction, ICE shut down the Swift plants and conducted its raid. Unfortunately, the raids were not the end of Swift's problems. A few days later, Swift was sued in the same federal district court in Texas by several "legal" Swift employees, alleging violation of the Racketeer Influenced and Corrupt Organization Act (RICO). The suit in general alleged that Swift knew that they

could hire illegal immigrants for less wages and at a cheaper cost than hiring individuals who had the legal right to work in the U.S., thus constituting an ongoing scheme to defraud those persons who had the legal right to work at Swift, including the plaintiffs. The plaintiffs seek three times the economic damages they suffered, an amount equal to all profits unlawfully earned by Swift, and punitive damages in the amount of \$23 million, plus other court costs and the like.

Comments And Observations From Swift Raids And Current ICE Enforcement Policies

The Swift litigation establishes that participation by an employer in the federal Basic Pilot Program is not any kind of limitation on a workplace enforcement action or raid by ICE. Indeed, so many problems have resulted from the Basic Pilot, that ICE is now touting its next generation version, called IMAGE (Ice Mutual Agreement Between Government and Employers). Participation in the IMAGE program requires much more hands-on actions by ICE including submitting to an I-9 audit by ICE, establishing a self-reporting procedure for reporting to ICE any discovered deficiencies, submitting an annual report to ICE, as well as verifying the Social Security numbers of all existing employees as well as all new hires.

Very few employers have signed up for the new IMAGE program, and initial experiences have been controversial. The best example was at Smithfield Foods, where Smithfield identified some 600 mis-matches at its North Carolina facility, and began the process of terminating these employees. A union organizing campaign was in process, and the union seized upon the issue to call a strike among Hispanic employees that resulted in a temporary plant shutdown. A resolution was negotiated between representatives of the company and representatives from the Catholic church, Smithfield sought permission from ICE to rescind the terminations. Apparently because Smithfield was on the IMAGE program, ICE allowed Smithfield to apply the proposed new ICE mis-match regulation, which sets forth consecutive 30 days periods in which the employer and employee attempt to resolve Social Security mis-match. After 60 days if there is no resolution, employees are given an additional 3 days to fill out a new I-9 form, utilizing a different Social Security number.

Another lesson from the Swift situation, is that no amount of good-faith or protective measures instituted by an employer can insure itself from an ICE enforcement action or raid. However, there are various types of situations or factual patterns that generate ICE's attention, subsequent enforcement actions, and raids, and employers should be aware of those situations and avoid them to stay out of ICE's path. In addition to evidence of company knowledge of illegal activities, the presence of large-scale counterfeit rings, illegal labor trafficking, or even general criminal activities among employees generate attention from ICE. Many plants are currently experiencing counterfeiting of paychecks, and one wonders whether this is something that might draw ICE's attention in the future. One thing is for sure, is that "identity fraud" is the topic of the day at ICE, where illegal immigrants simply use the name and Social Security number of another person. However, ICE really has not decided how they are going to

deal with this issue, as such persons will pass the Basic Pilot Program matching program verification.

In conclusion, the basic points to avoid ICE enforcement action seem to be as follows. First, do everything possible to create the perception, as well as the reality, of a good faith effort to comply with the law. Even verbal admissions by employer officials have been used by ICE to conduct investigations and raids. Second, look for ways to show good faith compliance, such as by conducting internal audits, training, and the like. A sample immigration audit, conducted by Wimberly and Lawson, follows in the next article. Third, avoid the type factual patterns that generate ICE attention and enforcement actions. Finally, don't get the idea that joining the Basic Pilot Program or IMAGE program is a "silver bullet" to ICE enforcement actions.

IMMIGRATION AUDITS

The following sets forth our procedures for conducting an immigration audit.

I. Initial Meeting

- A. Meet and greet with client, discuss company model, business structure, find out whose in charge of employment issues within the company and who handles related paperwork such as I-9's and W-2's
- B. Find out if the client has been subject to previous immigration violations or investigations and whether the company is suffering from any specific problems or incidents
- C. Ask if the client has received positive or negative publicity locally or nationally-especially in regards to immigration issues
- D. Find out what the percentage of minorities reside in the nearby community and what percentage of Hispanic or other minorities are employed by the company; find out the pay scale within the various divisions of the company
- E. Find out if or how many Social Security mis-match letters the company receives on average or any other indicators that their employees are using fraudulent numbers or documents
- F. Find out what the crime rate is in the surrounding community and whether there is a perception that the company hires illegals and that those individuals contribute to the crime
- G. Discuss current political climate and emphasis on tougher immigration enforcement

II. Immigration Audit

- A. Meet with human resource manager and/or president of company to discuss the employment process: how do they get workers (is it mainly through advertisement, word of mouth, temp services, do people just show up), what are the requirements for employees, how do they get paid
- B. Find out who is in charge of hiring and filling out the paper work for the new employees such as I-9s (stream line process to promote consistency- have one person in charge of the process and one person to review forms)
- C. Go over the storage and maintenance of the I-9 Forms (advise employer to keep forms in a separate file from personnel file to minimize exposure of ICE audit); if not already in place, advise employer to make a Atickler@ file to keep track of authorization documents that expire
- D. Go over the record retention requirements (maintain I-9's three years after date of hire or one year after termination, whichever is longer); advise employer to create separate I-9 file for terminated employees and discard the forms when appropriate; discuss benefits of electronic storage of I-9's (must fill out all info before can move on)
- E. Advise client **not** to maintain copies of I-9's beyond the required time period or copies of the employee's identification or work authorization documents as it not required by law and it could lead to enforcement issues/questions down the line; if they insist on maintaining such records advise them to keep it in a separate file
- F. Conduct either random or complete audit of all I-9's maintained by company (make sure I-9's kept for appropriate time, all info is completed by employee and employer, authorization documents are unexpired and that verification documents are properly listed)
- G. If any corrections need to be made to the I-9's, make them on the original form when possible and initialize and date the corrections; if a new I-9 must be created, attach the old one behind the new one

III. Overview of I-9 Requirements

- A. The employer may fill out the I-9 form at the date of hire but can wait until the person actually begins working; the employee has three (3) business days to provide the required document(s) from the date employment begins or the employee must show that he or she has applied for the necessary document(s); in the latter case, the employee has 90 days to present the actual document(s)

- B. The employer can only accept originals, not copies, of identification or employment eligibility documents required by the I-9 form except for a certified copy of a birth certificate; the employer also cannot accept documents that have expired other than an expired U.S. Passport or any other document from list B
- C. The employee must fill out all parts of Section 1; for consistency and accuracy, the employer may fill out this section but must fill out the preparer/translator section (this also applies for an employee who cannot speak English and must have the form translated to him or her); also, make sure the employee signs or puts some type of mark in the appropriate signature line
- D. When hiring new employees, the employer cannot ask to see specific identification documents such as social security cards and should not list more documents in Section 2 of the I-9 than is required; it is illegal to ask employees to present certain documents for employment because the law requires that an employer rely only on the documents provided by the employee that meet the I-9 requirements
- E. The employer may legally accept any documents that look facially valid; although some questions remain on the extent of this standard, our firm believes that this means the employer can accept laminated, un-signed or altered social security cards and those stamped A not valid for employment@ if accompanied by another facially valid document that establishes their identity and work authorization
- F. The employer must keep track of expiring work authorization cards by creating a reminder or Atickler@ file; when provided with the updated information, the employer should fill out Section 3 of the I-9 for the employee with the new unexpired information instead of creating a new I-9 unless that section has already been filled out; in that case, you may fill out a new I-9 and attach the old one behind it
- G. Any errors made on the I-9 should be marked through with a single line, as opposed to white out, with the initials of the person making the correction
- H. If an employee informs the employer that his or her previous social security number was invalid, and if they don=t have a new number, the employer should tell the employee to get a proper number from the Social Security Administration by completing Form SS-5. Once they provide a new number, the employer should either correct the original I-9 or fill out a new I-9 form and attach the incorrect I-9 behind the new one; the employer does not need to amend its previous income tax returns but should file an amendment for the current tax year indicating the correct

social security number for the employee; the employer must also file a Form W-2C with the Social Security Administration for the years in which it reported income and withholding under the incorrect number; as a practical matter, the hire date remains the original date the employee started working for the employer, not the date he or she provided the correct social security number

- I. If an employee informs the employer that the work authorization documents he or she presented were incorrect, the employee must present new valid documents demonstrating their eligibility to work; if the employee fails to do so or if the employee fails to provide a new social security number (as required above), the employer must terminate the employee
- J. The employer can institute a policy of terminating employees that have provided false information or documents but it must make sure to apply the policy consistently for all employees so as not to open the company up to a charge of discrimination
- K. The employer should maintain I-9 forms separate from the employee=s personnel file; although the employer may retain copies of the verification documents, it is **not** legally required to do so and the retention of such documents may open up the company to a more intense investigation by ICE if an audit were conducted (i.e. ICE may question the legitimacy of copies of verification documents using knowledge and criteria not readily available to an HR Staffer)
- L. The employer must retain I-9's for three (3) years after the date employment begins or one (1) year after the date the person is terminated, whichever is later. For example, if an employee works for 5 years, the employer must maintain his or her I-9 for the 5 years of employment and then for 1 year after termination. If the employee works for one week and then is terminated, the employer must keep their I-9 for three years. If the employee works only 1 year, then the employer must maintain their I-9 for 2 more years. Simply stated, the company must keep all I-9's for at least 3 years from the date of employment and then one year after termination.
- M. The employer should transfer I-9's for employees that have been terminated into a separate file and discard them according to the schedule stated above
- N. To ensure consistency and quality control, the employer should have one person familiar with the necessary requirements in charge of reviewing each I-9 before they are filed; the employer may also want to consider purchasing the recently authorized computer program that can record and store I-9 information electronically; a major benefit of the program is that it will not let you move on to the next I-9 form until all information has

been properly imputed (for more information on pricing and computer programs please call i9Check (866) 210-1634)

- O. The employer should also conduct annual or semi-annual audits of its I-9's to ensure that all information has been recorded properly; if errors are identified, corrections should be made on the original I-9 and initialed and dated by the person making the correction

IV. Mis-Match Letters

- A. Find out how many social security mis-match letters the company receives each year and the percentage of mis-match letters in relation to the entire workforce; ask whether the company receives multiple letters for the same employees
- B. Find out the current policy of the company in regards to the mis-match letters
- C. Inform client of our firm=s current position on such letters.
- D. Inform client of proposed rules that would make receipt of mis-match letter constructive knowledge of unauthorized worker status but which would also create a safe harbor for an employer that takes certain specific steps (employer must try to resolve discrepancy by checking its own records for errors and conferring with the employee in question within 14 days; if this does not resolve the issue, the employer must direct the employee to contact Social Security Administration to settle matter; if nothing happens within 90 days, employee is then given an additional three days to present new work authorization documents all with a photo id and a different social security number then what as at issue in the mis-match letter; if the employee cannot do so with the 3 days, the employer must terminate)

V. PILOT or SAVE Program

- A. Inform client of the programs along with the positives and negatives:

Advantages: The Basic Pilot removes guesswork from document review during the Form I-9 process; allows participating employers to confirm employment eligibility of all newly hired employees; improves the accuracy of wage and tax reporting, and protects jobs for authorized United States workers. The Basic Pilot is easy because all the HR official has to do is log on to the government website and enter the Social Security number provided by the employee. If the number is found within the database, the response is immediate and the person is approved for work. If the number is not found, then the employee has to go to the local Social

Security office to check the online response and receive a work verification certificate if the online response was wrong.

Disadvantages: The system does not verify the identity and work authorization of the employee. The system does not verify that the number provided by the employee is actually the number assigned to the employee. In other words, the system does not identify numbers that are fraudulently obtained. Moreover, the system does not prevent the improper allocation of wages to persons who were assigned the number by SSA. Most importantly, using the system also has the effect of reducing the number of potential workers who an employer can hire/employ while still complying with applicable law. (The law only requires proper completion of Form I-9 and review of the identity and work authorization documents that the employee presents.) Employers have to allocate resources to complete Form I-9, which is required, and allocate additional resources to participate in the program on a voluntary basis. Finally, immigration authorities have raided employers who use the system because the system identifies which employers are attracting a large number of unauthorized workers. It seems to us that the disadvantages outweigh the advantages.

PRESIDENT AND SENATORS COMPROMISE ON COMPREHENSIVE IMMIGRATION REFORM

By Jim Hughes, Principal, Wimberly, Lawson, Steckel, Weathersby & Schneider, P.C.

On May 17, 2007, Administration officials and a bipartisan group of Senators reached an agreement on comprehensive immigration reform legislation. As one political commentator noted, “It is in the nature of a legislative compromise that if you are a true believer -- on either side -- you will not see it as a compromise. You will see it as a sell-out. If you truly believe that illegal immigrants should be evicted then you will oppose this. On the other hand, if you truly believe that undocumented aliens should be fully accepted into American society, then you will oppose this.” Although an official version of the proposed legislation has not been publicly disclosed, the proposal addresses eight key areas:

1. Putting border security and enforcement first. Border security and worksite enforcement benchmarks must be met before other elements of the proposal are implemented. These benchmarks include the construction of several hundred miles of fence, the hiring of additional border patrol agents, the implementation of the “catch and return” policy at the border, and the availability of the employment eligibility verification system to all employers across the country. The proposal also establishes penalties for border crimes and gives the border patrol additional tools to stop illegal border crossings. Those additional tools include the hiring of more border agents with supporting equipment, the construction of additional fencing

and vehicle barriers in targeted areas, and the development of a proper mix of sensors, radar and cameras.

2. Providing tools for employers to verify the eligibility of the workers they hire. The proposal contemplates that within a few years all employers will be required to copy and retain identity and work authorization documents and to verify the work eligibility of all employees using an employment eligibility verification system (EEVS). Required use of the EEVS will be implemented in phases: Employers in critical industries will be required to use the EEVS first, then all employers will be required to use EEVS for new hires, and then all employers will be required to use EEVS for all employees. All workers will be required to present stronger and more verifiable identification documents. The proposal contemplates that the documents will include a fraud-proof driver's license (under the REAL ID Act that some States have rejected) and a fraud-proof Social Security card. Tough new anti-fraud measures will be implemented and stiff penalties imposed on employers who break the law. It is contemplated that the EEVS will allow for immediate verification of employee photos and documents. The Social Security Administration will be able to share "no-match" information with the Department of Homeland Security to ensure that illegal immigrants cannot use the Social Security information of Americans to pose as legal workers. Employer audits will serve as an additional check on employer compliance with the system. **PRACTICAL EFFECT: *Greater administrative and document retention burdens:*** *Within a few years all employers will be required to copy identity and work authorization documents. Employers will be required to participate in the Internet-based EEVS and to verify the employment eligibility of all employees, not just new hires, within a few years. Employers will be expected to deal with Social Security mismatch letters quickly because the Social Security Administration will provide the mismatch information to the Department of Homeland Security.*
3. Creating a temporary worker program. The proposal creates a temporary worker program to fill jobs that Americans are not doing and to provide a lawful way to meet the needs of the American economy. To ensure that the program is truly "temporary," workers will be limited to three two-year terms, with at least a year spent outside the United States between each term. Temporary workers will be allowed to bring immediate family members only if they have the financial ability to support them and they are covered by health insurance. The temporary worker program will require U.S. employers to advertise the job in the United States at a competitive wage before hiring a temporary worker. The temporary worker program will have a cap of 400,000 aliens each year, which can be adjusted up or down in the future depending on demand. The proposal also recognizes the unique needs of agriculture by establishing a separate seasonal agricultural component under the temporary worker program.

PRACTICAL EFFECT: *Labor intensive and seasonal industries will have a source of temporary low-skilled labor:* *The new Y temporary worker program would provide a temporary source of labor for those industries that cannot find enough workers, as it provides only a two-year nonimmigrant visa and requires that workers leave the U.S. for one year before being eligible to renew their work visa for a subsequent 2-year period. These temporary workers generally would not have a path to permanent resident status. There is some concern that the 400,000 cap is too small to meet the need.*

4. No amnesty for illegal immigrants. Illegal immigrants who entered before January 1, 2007 and who “come out of the shadows” will be given probationary status. Once the border security and enforcement benchmarks are met, they must pass a background check, remain employed, maintain a clean criminal record, pay a \$1,000 fine, and receive a counterfeit-proof biometric card to apply for a work visa or “Z visa.” Some years later, these “Z” visa holders will be eligible to apply for a green card, but only after paying an additional \$4,000 fine; completing accelerated English requirements; getting in line behind the current backlog of immigrant visa applicants; returning to their home country to file their green card application; and demonstrating merit under the merit-based system. **PRACTICAL EFFECT: *Amnesty or not amnesty?:*** *The proposal gives those who have been in the United States since before January 1, 2007 the opportunity to remain in the United States so long as they apply for a Z visa, pass a criminal background check, pay certain fees, and remain employed. Some call this part of the compromise amnesty because the illegal aliens are not thrown in jail or returned to their home countries. Others deny this part of the compromise is amnesty because the Z visa holders have to pay substantial fees, pass criminal background checks, and wait a long time before they can become permanent residents.*
5. Strengthening the assimilation of new immigrants. The proposal declares that English is the language of the United States and calls on the United States government to preserve and enhance it, as well as enacting accelerated English requirements for many immigrants. In addition, the Department of Homeland Security Office of Citizenship will be expanded to include coordinating assimilation efforts in its mission and the Department of Education will make an English instruction program freely available over the Internet. **PRACTICAL EFFECT: *Aliens will need to become fluent in English.***
6. Establishing a merit system for future immigration. The proposal contemplates a new merit-based system to select future immigrants based on the skills and attributes they will bring to the United States. Under the merit-based system, future immigrants applying for permanent residency in the United States will be assigned points for skills, education, and other

attributes that further our national interest, including: ability to speak English; level of schooling, including added points for training in science, math, and technology; job offer in a specialty or high demand field; employer endorsement; and family ties to the U.S. PRACTICAL EFFECT: *Shift from a system that granted permanent resident status based primarily on family relationship to a system that grants permanent resident status based on the alien's skills.*

7. Ending chain migration. The immigration system would be reformed to better balance the importance of family connections with the economic needs of the United States by replacing the current system. Under the current system nearly two-thirds of green cards are awarded to relatives of U.S. citizens. Under the new system, visas for parents of U.S. citizens are capped, and green cards for the siblings and adult children of U.S. citizens and green card holders will be eliminated. A new parents' visitor visa will be created to ensure that parents are allowed to visit their children in the United States regularly and for extended periods of time. The diversity lottery program, which grants 50,000 green cards per year through random chance will be eliminated. With this elimination, currently available visas will be used to clear the family backlog in eight years. After the clearing of the family backlog, the new merit system will use these visas for future immigration purposes. PRACTICAL EFFECT: *Fewer immigrant visas will be issued based on family relationships.*
8. Clearing the family backlog. Millions of family members of U.S. citizens now wait years in line for a green card, with some waits estimated at as long as 30 years. Family members who have applied legally and have lawfully waited their turn in line will receive their green card within eight years. PRACTICAL EFFECT: *For those who seek to enter the United States lawfully based on family status the long wait will end and a million or more workers could become available within the next decade.*

There is no assurance that compromise reached between the White House and the bipartisan group of Senators will pass the Senate or the House. In addition, a lot of the details still need to be resolved.

For employers, the proposal has significant ramifications. First, within a few years, employers will be expected to verify the identity and work authorization of all workers using the EEVS. Employers who attempt to evade the verification requirements will face stiff penalties. Second, the Department of Homeland Security will have an additional weapon in identifying illegal aliens through the ability to receive mismatch information from the Social Security Administration. Third, it appears that employer audits will be important to ensure employer compliance with the verification system. Fourth, employers who are having difficulty finding workers will likely benefit from the temporary worker program, which will allow as many as 400,000 aliens to enter the country each year to fill jobs that Americans are not doing. Fifth, illegal aliens who were

in the United States prior to January 1, 2007 will have the opportunity to continue to live, work and travel freely in the United States. This last feature of the agreement is probably the most significant for employers who need to retain workers for labor-intensive jobs.

The proposal suggests several things that employers could do to enhance the possibility of keeping their valued employees. First, employers could encourage employees who have little or no English-speaking ability to take English classes. In addition, employers could encourage employees to complete high school equivalency examinations and to pursue college credits, particularly in areas of math, science and technology.

Overall, the proposal, if passed, could be considered a great benefit for employers, but there remains a lot of opposition to the proposal. On June 28, the U.S. Senate apparently defeated any hopes of passing an immigration reform bill this year, as it went down to defeat 46-53, well short of the 60 Senate votes needed to force the bill to a final vote.

FINAL DHS SOCIAL SECURITY NO-MATCH REGULATION ISSUED

The long-awaited safe-harbor procedures for employers who receive a no-match letter from Social Security (SSA) were issued on August 9, 2007. The final rule is very similar to the proposed rule issued on June 14, 2006, with an additional 30 days allowed to resolve the discrepancies between names and Social Security numbers (SSNs) so that the time for that process is extended to 90 calendar days, and further clarification of specific issues. As many press reports have been misleading, this Alert is designed to summarize the rule itself, and then address important issues raised by the DHS comments on the rule as well as some separate editorial comments by Wimberly & Lawson which will be specifically noted.

1. Summary of the Rule Itself

The most concise summary of the new rule is contained in the comments that set forth the timing of the required actions under the proposed and final rules as follows:

Action	Proposed Rule	Final Rule
Employer receives letter from SSA or DHS indicating mis-match of employees name and social security number.	Day 0	Day 0
Employer checks own records, makes any necessary corrections of errors, and verifies corrections with SSA or DHS.	0-14 Days	0-30 Days
If necessary, employer notifies employee and asks employee to assist in correction.	0-60 Days	0-90 Days
If necessary, employer corrects own records and verifies correction with SSA or DHS.	0-60 Days	0-90 Days
If necessary, employer performs special I-9	60-63 Days	90-93 Days

procedure.		
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2. Issues Addressed in DHS Comments

A. Constructive Knowledge

A number of commenters suggested the proposed rule impermissibly expands the concept of constructive knowledge of illegal status of the workers identified. In response, DHS notes that the common definition of “constructive knowledge” is “knowledge that one using reasonable care or diligence should have, and therefore that is attributed by law to a given person.” DHS cites a number of cases indicating that the term and its meaning in application is subject to interpretation, even citing cases dealing with employers’ constructive knowledge that sexual harassment has occurred. Some specific immigration cases are cited in which a court held that the INS demonstrated an employer had knowledge because it “failed to take appropriate corrective action” after “receiving specific information that several of his employees were likely to be unauthorized.” Other cases are cited indicating that a finding of constructive knowledge could not be based on the employer’s accepting a Social Security card as evidence of employment authorization when the back of the card did not match the Social Security card picture in the INS Handbook for Employers. After citing these cases, DHS states that the cases do not limit findings of constructive knowledge to situations in which employers have been explicitly warned by DHS that an employee may be an unauthorized alien, and that the final rule does not require an employer to take any particular action: the rule simply provides a clear method for employers to exercise reasonable care in addressing “no-match letters.”

DHS expressly acknowledges that an SSA no-match letter by itself does not impart knowledge that the identified employees are unauthorized aliens, but that the receipt of an SSA no-match letter may create a duty to investigate depending on the totality of the circumstances. DHS notes that SSA no-matches may occur due to a name change or typographical error. In some situations, a listed SSN is especially suspect, such as when the first 3 numbers of an employee’s claimed SSN are “000,” or is in “800” or “900” series, which are not used. DHS believes that the initial submission of Form I-9 with facially incorrect information is problematic, and that this type of information cannot be created by an innocent transcription or typographical error. In other cases, an SSA no-match letter sent to the employer may be the first indication of a suspect number, and when combined with other evidence known to the employer, “would lead a person, through the exercise of reasonable care, to know” that the employee is not authorized to work.

DHS gives some clarification as to whether employers who follow the procedures in the rule will be protected from all claims of constructive knowledge, or just claims of constructive knowledge based on the letters for

which the employers followed the safe-harbor procedure. DHS states that other independent evidence may exist to prove that an employer has constructive knowledge in spite of following the rule, but this could be unusual, provided the employer carefully follows the safe-harbor procedures and there is no information suggesting that the employer is using another person's identity.

B. 14-Day and 60-Day Time Frames

Questions suggested that some employers considered the time frames to be insufficient to review their records, to correct their records and verify their corrected information, and for an employee to resolve the no-match with SSA and DHS. In response, DHS states the 90-day time frame will be sufficient for all but the most difficult cases, and that the rule does not create a new requirement that an employer resolve a discrepancy within 90 days. In situations not covered by the rule, constructive knowledge will continue to be based on a number of factors, including whether the employer made a good-faith but ultimately unsuccessful attempt to comply with the safe-harbor procedure. When there are special circumstances, an employer should make a good faith effort to resolve a situation as rapidly as practical, and keep a file documenting such efforts.

Questions were also asked about the employee's status and the employer's liability while an employer is following the safe-harbor procedure. In response, DHS states that an employer is prohibited from knowingly employing unauthorized aliens, so an employer may not continue to employ an individual if the employer obtains actual knowledge during the safe-harbor procedure that the individual is an unauthorized alien. If the employer does not have actual knowledge during the safe-harbor process, and instead merely has information that could lead to a finding of constructive knowledge from the no-match letter, the employer may continue to employ the individual until all of the steps in the safe-harbor procedure are completed. DHS adds that this answer only speaks to an employee's immigration status and the employer's liability under the immigration laws, and does not speak to what actions an employer could or should take under its own internal personnel policies – for example, termination of employment based on an employee's failure to show up for work or an employee's false statements to the employer.

C. Practical Application of Letters to Employers

Questions were asked whether the safe-harbor procedure applies to information employers receive from SSA through sources other than no-match letters. DHS is not extending the safe-harbor procedure that far. For example, the rule does not extend to instances where SSA provides optional SSN verification methods, but DHS fully considers all of an employer's attempts to verify employment authorization status and to employ only authorized workers in determining whether to pursue sanctions.

While the final rule addresses the limited situations in which the employer receives a no-match letter from SSA or DHS, DHS states that it may exercise its prosecutorial discretion favorably for employers who take other affirmative steps to ensure that they do not employ aliens who are not authorized to work in the U.S., such as the affirmative use of:

- 1) SSA's Social Security Number Verification System
- 2) USCIS' Systematic Alien Verification for Entitlements (SAVE) Program and EEV, or
- 3) ICE's IMAGE Program.

DHS states employers should always document their efforts to ensure that they do not employ aliens who are not authorized to work in the U.S. SSA and EEV do not routinely provide documentary evidence of internet or other verification attempts, but employers can print screens to record their actions and both SSA and DHS computer systems record all transactions. The employer's best interest lies in recording its own efforts so that such documentation can be provided in later inspections.

D. Relevance of Labor Certification or an Application for Prospective Employer

The rule and its language provide that "an employee's request that the employer file a labor certification or employment-based visa petition on behalf of the employee" as an example of a situation that may, depending on the totality of relevant circumstances, require an employer to take reasonable steps in order to avoid a finding by DHS that the employer has constructive knowledge that the employee is an unauthorized alien. In many situations such documents show that the petition indicates an effort "to get the employee legalized."

E. Obligation of Employer to Help an Employee Resolve Any Discrepancy

Questions were asked about clarifying an employer's duties for advising employees how to resolve a discrepancy with SSA or determining what documentation employees may need to resolve the discrepancy. DHS states that the employer's obligation under the safe-harbor procedure does not extend that far. Employers need only advise the employee of the time within which the discrepancy must be resolved and share with the employee any guidance the SSA notice may provide on how the discrepancy might be resolved.

F. Whether the Rule Adds Clarity

Some commenters expressed concern that the proposed rule does not provide enough clarity because it includes too many optional steps and references to vague notions of reasonableness. In response, DHS states that the regulation identifies the combination of reasonable steps that DHS has approved for

resolution of notices from SSA and DHS, and that it is the only combination of steps that will guarantee that DHS will not use the employer's receipt of the notices from SSA and DHS as evidence of the employer's constructive knowledge that its employee is an unauthorized alien.

G. Verification and Record-Keeping

DHS discusses the safe-harbor procedure that requires employers in some circumstances to verify with SSA that the employee's name and Social Security account number, as corrected, match SSA records. DHS states that employers may do so in any manner they choose, and that www.ssa.gov/employer/ssnv.htm describes how employers may verify this information over the internet, and www.ssa.gov/employer/ssnvadditional.htm describes other methods, such as an SSA 1-800 number.

The final rule provides for employers to store records of verified resolutions along with the employee's Form I-9. This may be accomplished by updating the employee's Form I-9 or completing a new Form I-9 to the extent that verified resolutions demonstrate inaccuracies in the employee's initial Form I-9.

The final rule clarifies the safe-harbor's retention requirements for the Form I-9 verification after 90 days, so that the new Form I-9 will be retained for the same period as the original Form I-9.

Employers are encouraged to document telephone conversations, in addition to retaining all SSA correspondence, computer-generated printouts, e-mails, and SSNVS screen prints evidencing that the discrepancy has been corrected. Employers should confirm and document that the discrepancy referenced in the no-match letter has been resolved by SSNVS or the SSA 1-800 number.

H. Mechanics of Form I-9 Verification

Some commentators requested that DHS clarify how an employer can complete a new Form I-9 verification when an employee insists that the disputed SSN and name are correct. If the employee insists that the SSN is correct but it takes no action during the 90-day period to resolve the SSA notice, employers wishing to receive the benefits of the safe-harbor rule must proceed with the special Form I-9 verification procedure, which provides the employer with assurance that the employee is not an unauthorized alien. During this Form I-9 verification, the employer may not rely on documents containing the disputed SSN, but it can and should rely on other listed documents that do not contain a SSN but that can nevertheless demonstrate identity and employment authorization – for example, a U.S. passport, DHS Permanent Resident Card, or other specified DHS immigration documents.

The next very important question was what DHS expects employers to do when they follow the procedure and an employee with an unmatched SSN fails to resolve the discrepancy with SSA. “Under the safe-harbor procedures of this rule, employers should complete the special I-9 verification at this point.” If this special Form I-9 verification is unsuccessful, or if the employee refuses to participate in the Form I-9 verification, the employer risks being deemed to have constructive knowledge of unlawful employment of workers in a subsequent enforcement action. An employer who wishes to follow the safe-harbor procedures should require a Form I-9 verification of all employees who fail to resolve SSA discrepancies, and apply uniform policies to all employees who refuse to participate or whose Form I-9 verification is unsuccessful. Questions were asked for clarification of whether the Form I-9 verification stage is optional – in other words, whether employers would be able to terminate employment after 90 days with no resolution and without conducting the Form I-9 verification. “The procedures in this rule provide a safe-harbor in limited circumstances and do not prohibit an employer from terminating the employment relationship.” However, to gain the benefits of the safe-harbor procedure, the employer must proceed to the special I-9 verification stage.

This Form I-9 verification does not include verifying with SSA that the name and SSN match SSA’s records. Employers may request, however, that the employee continue to pursue resolution of the discrepancy and inform the employer when the discrepancy is resolved, so that the employer can ensure that another SSA no-match letter will not be generated the following year.

DHS does indicate that the safe-harbor procedure is merely one way for employers to avoid liability for knowingly hiring or continuing to employ unauthorized aliens. Employers are free to develop other reasonable methods for resolution of SSA notices, although they face the risk that DHS may not agree that their methods are reasonable.

DHS notes that employers performing the Form I-9 verification will be determining whether they may continue to employ an individual after receiving notification from SSA or DHS of a problem that remains unresolved. Also, any document presented that contained a suspect SSN or alien registration number would not be facially valid. Under these circumstances, employers can properly require the employee to present a document that does not contain the suspect SSN or alien number, treating all similarly situated individuals in the same manner without regard to their perceived national origin or citizenship status.

I. Further Employer Responsibilities

DHS notes that failure to adhere to the guidance and regulation will not necessarily constitute constructive knowledge. Rather, the benchmark of constructive knowledge is reasonableness. The rule states that whether an employer will be found to have constructive knowledge that an employee is an

unauthorized alien will depend on the totality of relevant circumstances. DHS adds that employers may wish to consider enrolling in the EEV program, the IMAGE program, or other programs administered by private companies that offer electronic Form I-9 completion and retention along with automatic verification through SSA and DHS databases.

J. Firing of Employees

Many commenters suggested that the rule would result in employers' immediately firing an employee upon receipt of a no-match letter, or that promulgation of the final rule will lead to massive firings across the nation. DHS responds that these concerns are speculative, but does indicate that if an employer obtains actual knowledge that a specific employee is an unauthorized alien as a result of a no-match letter – for example, the employee tells the employer so – then the employer should terminate employment. Further, DHS will not be directing the SSA to issue (or not issue) a no-match letter to an employer. Further, the rule does not impose upon employers any new responsibilities that do not already exist under current law.

K. General Impact

Some commenters suggested that the Form I-9 verification procedure would further encourage widespread identity theft and/or document fraud, as undocumented aliens seek ways to avoid the law. For example, an unauthorized alien could simply produce another false document, perhaps one that contains a different SSN or alien registration number. DHS responds that the procedure may help expose a larger identity theft problem. Further, 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. Thus, an employee who provides such notification would not only face general policies that the employer applies to employees suspected of criminal conduct, but the employee could also face federal prosecution for fraudulently completing the Form I-9.

DHS acknowledges that these procedures do not ensure that employees are authorized to work in the U.S., and that an alien not authorized to work in the U.S. may nevertheless present a fraudulent name and matching fraudulent SSN, and that this rule does not address such fraud.

3. Wimberly & Lawson Comments

DHS's answers to questions raised in the rule-making process provide some useful interpretation of the new regulation. DHS repeatedly emphasizes that all of the procedures in the proposed rule must be followed to create a "safe-harbor," even giving the employee the opportunity to complete a new I-9 form utilizing the final Form I-9 verification procedure, should discrepancies not be resolved within the 90-day period.

The comments state there are other procedures that an employer could follow in response to a no-match letter that will be considered reasonable by enforcement personnel, but such a finding would depend on the totality of the relevant circumstances. Further, the regulation would not preclude DHS from finding that an employer had actual knowledge that an employee was an unauthorized alien.

DHS gives further commentary, but does not directly answer, the issue of the employer's dilemma when an employee presents a new Social Security number and/or other new information, as part of the final I-9 verification process, where the matter has not been resolved within 90 days. The rules leave room for one to argue that if the employer follows the rules as stated, the mere fact that an employee uses a different Social Security or other number in the process, is not in itself conclusive of constructive knowledge of illegal status. However, the employer should expect DHS to look at all the facts and circumstances in evaluating whether the new information constitutes constructive knowledge.

DHS is explicit in stating in its commentary that in addition to the government programs, employers are given "credit" for using other verification programs, including "other programs administered by private companies that offer electronic Form I-9 completion and retention along with automatic verification through SSA and DHS databases."

The comments also emphasize that an employer's actions following completion of the 90 day process, and final Form I-9 verification, should be uniform in that all similarly situated individuals must be treated in the same manner. Therefore, it is even more important for employers to develop a uniform and written protocol as to how to respond to such no-match letters. This protocol should be developed with the advice of counsel, inasmuch as advice of counsel can be of some assistance in some types of criminal prosecutions.

UPDATE ON STATUS OF SOCIAL SECURITY NO-MATCH REGULATION AND SUBSEQUENT ENFORCEMENT

Several developments have occurred since our last Alert in August on this subject. Most notably, a U.S. Chamber of Commerce – organized employer coalition has asked for a postponement of the effective date of the regulations, currently September 14. In addition, the AFL-CIO and the ACLU have filed suit in California seeking to stop the regulation from becoming effective. These various actions raise some interesting issues for employers to consider as they plan their compliance protocols.

The AFL-CIO - ACLU lawsuit argues that many employers will terminate employees who can not resolve data discrepancies on Social Security matches within 90 days, that the Social Security no-match letters have nothing to do with the workers' immigration status, and that the new rule greatly expands liability in a manner contrary to the governing statute adopted by Congress. In early September, DHS and SSA had intended to begin sending employers no-match letters that will be accompanied by a letter

from DHS and ICE stating that it will “provide guidance on how to respond to the enclosed letter from the Social Security Administration . . . in a manner that is consistent with your obligations under the United States immigration laws.” Between September 4, 2007 and November 9, 2007, the SSA expected to mail no-match letters to approximately 140,000 employers around the country. Each letter will list at least 10 mis-matched SSNs and some letters will list 500 or more. Approximately 8.7 million employees will be affected by this initial wave of mailings. On August 31, 2007, a federal district judge in California issued a temporary restraining order against any action to implement the final rule until at least October 1, 2007, at which time the court would hear argument as to whether to issue a preliminary injunction against the enforcement of the new rule. The court found that the plaintiffs had “raised serious questions as to whether the new Department of Homeland Security rule is inconsistent with the statute and beyond the statutory authority of the Department of Homeland Security and the Social Security Administration.”

In another equally important development, the Essential Worker Immigration Coalition, organized by the U.S. Chamber of Commerce, in late August sent a request to DHS and SSA, requesting a stay of implementation of the rule for a minimum of 180 days and that SSA hold off including letters with DHS guidance during that period of time, a request joined by numerous trade associations. The request for a postponement includes approximately 80 questions/issues that have arisen in the short time since the publication of the rule on August 15, including questions like the following:

- 1) Should I have all my employees complete a new I-9?
- 2) 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?
- 3) 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?
- 4) Are employers required to maintain a copy of the no-match letter with the Form I-9?
- 5) There will be obvious labor shortages resulting from the dramatic attrition of the workforce. Will DHS work with the employers to expeditiously process H2B or H1A applications? Since many of these works are not in “seasonal” jobs, they may not meet the current interpretation of what constitutes “temporary” for H2B. 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 H2A or H2B application so that a work permit can be obtained?

- 6) 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?

Comments on the Above Developments

Many law firms, including Wimberly & Lawson, have developed a draft protocol for responding to no-match letters. However, some issues such as the above questions have not been definitively resolved, and so while it is advisable for employers to begin planning their protocols in response to the no match letters that will soon be issued, it is also important to consult with legal counsel at the time such letters are received, to make sure that more recent developments and interpretations do not affect the appropriate response. Further, because the judge's ruling in California postpones the effective date of the new rule for no-match letters, employers need not implement major changes immediately until the effective date of the new rule becomes resolved.

DRAFT PROTOCOL FOR RESPONSE TO SOCIAL SECURITY ADMINISTRATION AND OTHER "MIS-MATCH" LETTERS

Background

The federal immigration laws make it unlawful for employers to knowingly hire or continue to employ unauthorized aliens. Employers violate these laws if they employ aliens who they know are not authorized to work ("actual knowledge"). Employers also violate these laws if they should know from the existing circumstances that they are employing aliens who are not authorized to work ("constructive knowledge").

To help employers avoid hiring or continuing to employ unauthorized aliens, the federal immigration laws require employers to verify the identity and work authorization of all newly hired employees. Employers satisfy the verification process by requiring the new employees to complete Section 1 of Form I-9 and to present certain government approved documents demonstrating identity and work authorization so that the employers may complete Section 2 of Form I-9. Newly hired employees decide which of the government approved documents to present, and employers cannot refuse to accept documents which on their face appear to be genuine and to relate to the employees presenting the documents.

One of the problems facing all employers is how to deal with Social Security Administration (SSA) "mismatch" letters. Such letters state that the names and Social Security numbers (SSNs) of certain employees do not match SSA records. These letters provide instructions on how to correct discrepancies. In addition, the letters warn employers not rely on such letters alone to take adverse action against employees because such actions could violate state or federal law and subject employers to legal consequences. The letters also advise employers against ignoring the letters and doing

nothing. Ignoring the letters could jeopardize the future benefits of employees and, as the Department of Homeland Security (DHS) has advised, expose employers to liability under the immigration laws.

DHS recently issued regulations addressing SSA mismatch letters. The (DHS) regulations suggest that an employer may, depending on the totality of the circumstances, have constructive knowledge that an employee is an unauthorized alien if the employer fails to take reasonable steps after receiving information indicating that the employee is an unauthorized alien, such as written notice to the employer from SSA that the employee's name and SSN do not match SSA records. The regulations also suggest procedures for an employer to follow after receiving an SSA mismatch letter. If an employer follows these procedures, DHS will not use the receipt of the SSA mismatch letter as evidence of constructive knowledge that the employee is an unauthorized alien.

Employers also cannot take actions that discriminate against employees because of their race, color, nationality, ethnic origin, gender and other protected categories. DHS has stated that "the SSA no-match letter alone does not necessarily impart knowledge that the identified employees are unauthorized workers. However, a SSA no-match letter, when combined with other evidence known to the employer, may indicate that the employee is not authorized to work." Therefore, employers should not terminate employees who are subject to a no-match letter without attempting to resolve the discrepancies, unless the employers become aware of other information that the employees are unauthorized to work, such as, for example, the employees' admitting unauthorized status. In such situations employees should be immediately terminated for "unauthorized work status" or something of that nature. If third parties provide information that specific employees are unauthorized aliens, employers must reasonably investigate such allegations. Because it is difficult to anticipate all situations that could arise, advice should be sought from human resources or legal counsel. It is important that employers investigate all allegations or situations in a uniform manner without regard to ethnic origin or nationality.

Procedures

Because our company wants to comply with all applicable laws, it is necessary to establish reasonable procedures that aid in satisfying those laws.

If we receive a letter from the SSA stating that a SSN reported on a Form W-2 does not match information in the SSA database, we should take the following actions:

I. Step 1. Within 30 days of the date on the SSA mismatch letter, we will check our own records, make any necessary corrections, and verify the corrections with SSA by telephoning toll free at 1-800-772-6270, or utilizing the on-line verification procedure at <http://www.ssa.gov/employer/ssnv.htm>. We will make a record of the manner, date and time of any such verification, and attach it as verification to the Form I-9 for the employee in issue.

II. Step 2. If the discrepancy is not corrected in Step 1, we will notify the employee and ask the employee to assist in correcting the discrepancy by furnishing the employee the attached form (memo #1) within 30 days [this is a company-determined period, rather than the maximum period set forth in the federal regulation which is 90 days] of the date of the letter from SSA. If the employee reports back with a correction, the company then will correct its records and will verify the correction with SSA using the procedure in Step 1 above.

III. Step 3. If the company cannot confirm resolution of the discrepancy with SSA within 90 days of date on the SSA mismatch letter, the company will send the employee a second memo, a copy of which is attached, asking the employee to complete a new Form I-9 (memo #2) within 93 days of the date of the SSA mismatch letter. We should use the same procedures as when completing Form I-9 at the time of hire, with a few exceptions:

- The employee must complete Section 1 and we must complete Section 2 of the new Form I-9 within 93 days of the date of the SSA mismatch letter.
- We cannot accept any document (or receipt for such document) that contains the SSN that is the subject of the SSA mismatch letter. We can accept only those other documents that are approved for use with Form I-9, that appear to be genuine on their face, and that relate to the person presenting the documents.
- In order to establish identity, the employee must present a document that contains a photograph. If the document is from List A, it also is acceptable for establishing both identity and employment authorization.
- The new Form I-9 should be retained with the original Form I-9.

IV. Step 4.

A. If the employee does not properly complete a new Form I-9 or does not present acceptable government approved documents within 93 days of the date of the SSA mismatch letter, we must decide whether to terminate the employee or face the risk in any subsequent DHS enforcement action of being determined to have constructive knowledge of, and being penalized for, the continuing employment of an unauthorized alien. In most cases, therefore, the employee should be terminated immediately for “unauthorized work status” or something of that nature.

B. If the employee properly completes a new Form I-9 and presents acceptable government approved documents demonstrating identity and work authorization within 93 days of the date of the SSA mismatch letter, the company will request the employee to continue to pursue resolution of the discrepancy with SSA and to

inform the company when the discrepancy is resolved by giving the employee the attached memo (memo #3).

V. The following table summarizes the preceding steps:

Action	Final Rule
Company receives letter from SSA indicating mis-match of employee's name and social security number.	Day 0
Company checks its records, makes any necessary corrections of errors, and verifies corrections with SSA.	0-30 Days
If necessary, company notifies employee and asks employee to assist in correction.	0-90 Days
If necessary, company corrects own records and verifies correction with SSA.	0-90 Days
If necessary, company performs special I-9 procedure.	90-93 Days

VI. A very similar procedure will be followed if DHS/ICE provides the company with a letter or notice after it has reviewed the company's Form I-9s during an inspection. This notice informs the company that according to the records checked by DHS/ICE, individuals identified in the notice appear, at the present time, not to be authorized to work in the U.S. The procedures the company follows will be similar, but advice from human resources or legal counsel should be obtained if such a letter is received.

VII. Failure to follow these procedures will result in disciplinary action appropriate for the circumstances, including without limitation, immediate termination of employment.

Notification to the Employee

REFERRAL TO THE SOCIAL SECURITY ADMINISTRATION

Name of Employee: _____

First Name

Last Name

Social Security Number (SSN): _____ Month/Year of Birth: ____/____

Reason for Referral: SSN no match.

{EMPLOYER NAME} has been notified by the Social Security Administration (SSA) that your name and SSN listed above do not match SSA records.

Promptly after receiving the notice, {EMPLOYER NAME} checked its records to determine whether the discrepancy resulted from a typographical, transcribing, or similar clerical error.

In your situation, no such error was found. Accordingly, we request that you confirm that the name and SSN at the top of this Notification to the Employee are correct. If there is an error in the name or SSN above, please notify _____ immediately.

If the name and SSN listed above are correct, {EMPLOYER NAME} requests you to resolve the discrepancy with the SSA, such as by visiting a SSA office, and taking original documents or certified copies required by SSA, which might include documents that prove age, identity, and citizenship or alien status, and other documents that may be relevant, such as those that prove a name change.

Please call SSA at **1-800-772-1213**, or **1-800-325-0778 (TDD)** for the hearing impaired, if you have any questions or to find out the location of the nearest SSA office.

It is your responsibility to visit SSA promptly. TAKE THIS FORM WITH YOU TO SSA. If, as a result of your visit to SSA, any of the information you gave {EMPLOYER NAME} changes, you must notify _____ of those changes immediately.

If you do not understand what you are required to do, please call the SSA toll free number and they will assist you or contact _____.

{EMPLOYER NAME} will contact you in the near future to determine whether the discrepancy has been resolved.

Date Referred to SSA: _____

Name of Employer Representative: _____

Phone #:

Employer Official's Signature: _____

Date Signed:

Employee's Signature: _____

Date Signed:

Notification to the Employee

REFERRAL TO THE SOCIAL SECURITY ADMINISTRATION

Second Follow Up

Name of Employee: _____
First Name Last Name

Social Security Number (SSN): _____ Month/Year of Birth: ____/____

Reason for Referral: SSN no match.

On _____, 200__ {EMPLOYER NAME} notified you that the records of the Social Security Administration (SSA) do not match your name and SSN as listed above. At that time, {EMPLOYER NAME} requested that you resolve the problem with SSA and informed you that you would be contacted to determine whether the discrepancy was resolved.

To the knowledge of {EMPLOYER NAME}, the discrepancy has not been resolved with SSA. However, you have presented additional documents that demonstrate your identity and authorization to work and that do not include the SSN listed above.

Although you have presented additional documents demonstrating your identity and authorization to work, it remains important for you to resolve the discrepancy with SSA so that your earnings are properly applied to your Social Security benefits.

If you believe the name and SSN listed above are correct, {EMPLOYER NAME} requests you to resolve the discrepancy with the SSA, such as by visiting a SSA office, and taking original documents or certified copies required by SSA, which might include documents that prove age, identity, and citizenship or alien status, and other documents that may be relevant, such as those that prove a name change.

Please call SSA at **1-800-772-1213**, or **1-800-325-0778 (TDD)** for the hearing impaired, if you have any questions or to find out the location of the nearest SSA office.

If you do not understand what you are required to do, please call the SSA toll free number and they will assist you or contact _____.

Name of Employer Representative: _____ Phone #: _____

Employer Official's Signature: _____ Date Signed: _____

Employee's Signature: _____ Date Signed: _____