

**WIMBERLY, LAWSON,
STECKEL, SCHNEIDER & STINE, P.C.
ATTORNEYS AT LAW**

Suite 400, Lenox Towers ! 3400 Peachtree Road,
N.E.

Atlanta, Georgia 30326-1107

404-365-0900 ! FAX: (404) 261-3707 ! INTERNET: WWW.WIMLAW.COM

ALERT

October 25, 2007

**HOW TO REACT TO REPORTS THAT YOU MAY HAVE ILLEGALS
IN YOUR WORKFORCE**

The public debate and litigation over the new DHS regulation concerning Social Security “no-match” letters, has triggered a national debate as well as national interest over the subject of “constructive knowledge.” The premise of the indefinitely postponed regulation is that the receipt by an employer of a letter from Social Security indicating that its employees’ names and Social Security numbers do not match, may be constructive knowledge of their unauthorized status. The regulation then deals with the issue of what an employer should reasonably do in response to such a no-match letter, at least in order to gain a “safe harbor” from potential DHS prosecution.

This postponed regulation has served as a “wake-up” call to employers as to other types of information they may receive, as to whether it may constitute constructive knowledge, and what actions they must take. There is very little guidance on a resolution of these issues, which are of utmost importance to employers. The purpose of this Alert is to outline the important considerations, in order to suggest an overall approach. Since each situation is different, a specific approach should be left to advice of counsel, or other general guidance protected under the attorney-client privilege.

**Executive Summary As To Suggestions Developed From Prior Case Law
And The Postponed Regulation**

From the existing case law and the postponed DHS regulation, some suggestions for the development of appropriate policies and procedures can be drawn. The following executive summary attempts to draw some conclusions. These conclusions are based upon certain case law and regulatory developments that will be subsequently discussed in

this Alert, but it should be noted that other counsel may have different opinions either more cautious or more daring on these controversial and unsettled issues.

1. If an employer acquires knowledge, either actual or constructive, that a worker is unauthorized, the employer is obligated to take action within a reasonable period of time or be in violation of the immigration laws. Depending on the facts and circumstances, the employer may either have an obligation to terminate the employee in question within a reasonable period of time, or conduct a further investigation to determine whether the employee is authorized to work. Whether an employee is immediately terminated or whether further investigation is conducted, depends upon the source, credibility and the type of information received that the worker is unauthorized.
2. The information leading to an employer's knowledge or constructive knowledge of illegal status, may come from responsible governmental sources, such as DHS, from less directly involved government agencies such as Social Security or various tax officials, or from a variety of third parties.
3. The potential for a finding of constructive knowledge and/or duty to investigate, may depend on the credibility, quality, or detail of the information received. For example, a specific and written notification from DHS that a worker is unauthorized, would probably constitute knowledge, while it is unlikely that a rumor of illegal status would even trigger a duty to investigate.
4. It should be constructive knowledge that triggers a duty to investigate. In the absence of constructive knowledge, it is unlikely that there should be a duty to investigate, although no case law currently has spelled out this distinction. Oftentimes the courts and DHS tend to merge the two concepts of constructive knowledge and duty to investigate, so that DHS may argue that an employer may have constructive knowledge by failing to investigate after suspecting a worker as being unauthorized.
5. Neither the courts nor the postponed DHS regulation provides clear guidance as to what type of information can trigger the constructive knowledge standard, that it is "likely " that a worker is unauthorized. However, some considerations can be determined from the case law, including the credible nature of the source, the manner in which the information is provided, and whether the information includes "why" the person is unauthorized.
6. Once an employer acquires constructive knowledge, it is also not clear how comprehensive any subsequent investigation must be as to the status of the employee(s) in question. At least some case law suggests that simply asking the worker if he is unauthorized is an insufficient investigation. Suggestions have been mentioned by at least one judge of asking the worker for other documentation, contacting a lawyer for advice, or contacting ICE for advice.
7. Any investigation conducted by the employer as to the lawful status of certain worker(s) probably need not include the duty to suspend the employee until the outcome of the investigation is resolved.

8. There is only general guidance as to how quickly an employer should react in response to such constructive knowledge. Where there is credible information provided to the employer of unauthorized status, such as from DHS, some case law suggests that 5 business days is quick enough, while 10 business days may be too long. Where there is less credible information provided to the employer, the cases suggest that a longer period may be in order. The DHS no-match regulation, for example, allows an employer 90 calendar days to take action, where the information received is based upon a mis-match from Social Security. It is also unclear where within a reasonable period of time allowed for the investigation, the employer need only initiate the investigation, or complete it.

Discussion of Prior Case Law And Regulatory Developments Used To Formulate The Above Suggestions And/Or Conclusions

It is not necessary that the reader review the case law and regulations in order to evaluate the above suggestions and analysis, but the reader is referred to the following discussion if a review of the prior case law and regulatory developments is desired. The most important cases are analyzed based under pertinent headings of what issue the cases or regulations involve. In reviewing the prior case law, the reader should keep in mind that many of these cases are a number of years old, or come from the 9th Circuit Court of Appeals, and DHS may take a more aggressive position in prosecuting the current cases. In addition, in some respects the employer has already “lost” even if it wins its case, because the mere act of prosecution creates uncertainty, adverse publicity, and additional costs and exposure to the employer. Some employers naturally therefore prefer a more conservative approach. In addition, many of the cited cases deal with specific directions from DHS, a highly credible form of direct knowledge, putting a heavy burden on the employer to react quickly. Presumably, information coming to the employer’s attention from a less credible and direct source, would not require as quick and significant response from the employer.

What Is “Constructive Knowledge”

The first two issues are, what is constructive knowledge, and what must an employer do in response to such constructive knowledge. The statute prohibits the hiring of an alien “knowing the alien is an unauthorized alien . . . with respect to such employment, “ and so there are many cases indicating that “to preserve Congress’ intent in passing the employer sanctions provisions of IRCA, then, the doctrine of constructive knowledge must be sparingly applied.” Collins Foods International, Inc. v. U.S. Immigration and Naturalization Service, 948 F. 2d 549 (C.A. 9, 1991). Several of the relevant cases rely on the standard that a constructive knowledge finding is based upon “a mental state in which the defendant is aware that the fact in question is highly probable but consciously avoids enlightenment.” U.S. v. Jewell. 532 F. 2d 697 (C.A.9), cert. denied,

426 U.S. 951 (1976). In other words, based upon the information that the employer receives, is it “highly probable” that the worker is unauthorized?

The current DHS regulation provides that “the term knowing includes not only actual knowledge but also knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition.” 8 CFR 274 a.1(1)(1). The postponed DHS no-match regulation in its comments discusses cases based on whether the employer has received “specific information that several of his employees were likely to be unauthorized,” or whether the employer failed to make any inquiries or take appropriate corrective action after receiving information that some employees were ‘suspected’ of having presented false documents. At least one administrative law judge ruling, U.S. v. Jonel, Inc., d/b/a Maaco Auto Painting and Body Works, 8 OCAHO 1008 (1998), discussed the “high probability” standard, but then goes on to also discuss that the courts have used a variety of terms in discussing the theory of constructive knowledge, such as willful ignorance, avoidance of any endeavor to know, conscious purpose to avoid learning the truth, deliberate ignorance, deliberately choosing not to learn, willful shutting of the eyes, omitting to inquire, knowledge in the second degree, and other comparable terms.

There is some case law demonstrating the nature of the “constructive knowledge” standard, and how quickly an employer must react to such information. In general, case law suggests that an employer should consider “an inquiry into a reasonable time frame for termination will include consideration, in certain cases, of factors other than the number of days alone – such as certainty of the information providing the knowledge of unauthorized status, and steps taken by the employer to confirm it.” Mester Manufacturing Co. v. INS, 879 F. 2d 561 (C.A. 9, 1989). Many of the cases applying the standard involved circumstances where employers had continued to employ unauthorized aliens without re-verifying their eligibility even after receiving actual notice from INS of their questionable status. See cases discussed in U.S. v. Jonel, Inc., d/b/a Maaco Auto Painting and Body Works, 8 OCAHO 1008 (1998). Many of the cases hold that an employer acquires a duty to re-verify the eligibility of its alien workers when it is put on notice by INS that their documentation is faulty. However, the cases also make clear that knowledge of or notice to the employer can come from any source, and that the law is indifferent as to how the employer’s knowledge is acquired. *Id.*

The case of Mester Manufacturing Co. v. INS, 879 F. 2d 561 (C.A. 9, 1989), deals with many of the relevant issues. In Mester, the employer argued that unless it received official written notice from INS that the green cards in question were false, it did not have the required knowledge to establish a violation. The administrative law judge initially deciding the case noted, however, that the statute does not require that the knowledge come to the employer in any specific way. An INS agent had given the employer a handwritten “interview list” containing the names of three employees whom the INS suspected of using false alien registration cards (green cards). The administrative law

judge had found that Mester was put on notice that it should check the green card numbers of these employees and that, if the numbers match those on the interview list that the INS had found in a computer search belonged to other aliens, they should be fired. Further, Mester had refused to allow the INS to interview the employees directly. There was no follow-up by the employer, except to write to the INS to complain that the INS agents had intimidated its employees.

On these facts, the court affirmed the administrative law judge's findings that the employer was put on notice that the three aliens were suspected of green card fraud, and the employer was instructed how to confirm this information. The court noted that if the instructions had been delivered more formally, Mester might have followed them correctly. However, Mester had received specific information that several of its employees were likely to be unauthorized, and it made no further inquiry of INS, and failed to take appropriate corrective action. On these facts, the court found that the knowledge element was satisfied, and that Mester had constructive knowledge. Further, the court noted that Mester's deliberate failure to investigate suspicious circumstances could impute knowledge.

How Quickly Does Employer Have To Act

The court then addressed a separate question, involving another unauthorized employee, who was terminated two weeks after Mester received an official INS citation that the employee was unauthorized. The question was whether Mester was required to fire the employee on the very day it received the citation (notice), or should the employer be allowed a reasonable period of time in which to allow the employee to wind up his employment. The court stated that the statute does not answer these questions.

Counsel for the INS conceded that a basic rule of reason would apply at some point to IRCA enforcement actions. For example, the text of the statute would not prohibit an INS agent from informing Mester at 11:55 AM that one of its employees was unauthorized, issuing a citation at 12:00 Noon, and seeking sanctions for this five minute "continued knowing employment." The potential for abuse is heightened, the court noted, by its recognition that employers are subject to a host of other federal and state laws affecting their right to terminate employees. Counsel for the INS conceded that employer sanctions for the five-minute violation would likely be unreasonable, but maintained that 21 or 30 days continued employment would not be reasonable. On the facts, the court deferred to the administrative law judge's conclusion, based on the relevant facts, that a two-week delay in firing the employee after receiving actual notice from the INS, amounted to an IRCA violation. In doing so, it noted that even after Mester received actual notice that the employee was unauthorized, it did not fire him, or even take investigatory action within a reasonable time.

Thus, in Mester, the employer's failure to do any investigation or take any steps within two weeks after being provided an official written notice from INS (ICE) that an employee was an unauthorized worker, constituted a violation.

Another case (New El Ray Sausage Co. Inc. v. USINS, 925 F. 2d 1153 (C.A. 9, 1991), deals with a slightly different fact pattern, in which an employer had received a hand-delivered letter from INS that according to INS records, certain alien registration cards were found to pertain to other individuals, or there was no record of the alien registration numbers being issued. The letter went on to state that unless those individuals could provide valid employment authorization from INS, they were to be considered unauthorized aliens. The only action the employer took was to instruct an employee to ask the listed employees if their documents were valid. Two employees insisted that they were authorized. The employer accepted their word, reviewed the employer's copies of their I-9 forms, but did not ask to see their authorization cards or any other documents.

The court addressed whether the employer's response to the written, hand-delivered letter from INS was sufficient. The court noted that the employer was provided with specific, detailed information, and told the employer whom it considered unauthorized and why. Under these circumstances, the court upheld the administrative law judge's findings that a constructive notice standard was appropriate. The court refused to require an immediate suspension or termination standard, however, noting that even the INS conceded that "so long as the employer investigates the situation in a timely way, there seems to be no reason for an employer to suspend the worker during the investigation." Instead, the court upheld the finding that the employer was being found liable for its failure to take any steps sufficient to demonstrate a good faith attempt to comply with the statute. All the employer did was ask its employees whether their cards were valid. It then relied on the employees' self-serving statements without requiring anything further from the employees, apparently assuming that the INS must have made a mistake. It was noted that the employer could have required some additional independent and more specific evidence, such as asking for other documentation, contacting a lawyer, or re-contacting the INS.

The court next addressed whether the employer committed a further violation by taking six days to terminate the employees after being specifically informed by INS of their unauthorized status. It was argued by an intervener, Amicus Mexican-American Legal Defense Fund, that a rule requiring immediate termination or suspension of employees is unconstitutional. It points out that "regulations implementing IRCA . . . recognized that individuals may need up to twenty-one business days to secure acceptable documents." The court therefore refused to find that the employer was in violation when it failed to comply with the letter within six days. While the court refused to lay down a blanket rule that all employers had at least six days to comply, it agreed with the employer's conclusion that there should be a reasonable time frame for termination including consideration of

factors other than the number of days alone – such as a certainty of information providing the knowledge of unauthorized status, and steps taken by the employer to confirm it.

The Issue Of An Employee Providing False Information, Or Giving A New Name Or Social Security Number

One of the issues not directly addressed by DHS in its postponed regulation, concerns what actions an employer should take if the employee returns with a new name or Social Security number or both on a Form I-9 verification after 90 days. While the regulation states that the employer may and should allow an I-9 verification process, whereby the employee is allowed to fill out a new I-9 form, potentially furnishing a new or the same Social Security number, the regulation does not directly address whether furnishing a new name constitutes an additional type of constructive knowledge to the employer that the worker is unauthorized. Subsequent requests to DHS to clarify its position on this issue, have generated ambiguous responses such as it “may be” (not “is”) constructive notice.

There appears to be at least one case precedent on the subject, U.S. v. Jonel, Inc., d/b/a Maaco Auto Painting and Body Works, 8 OCAHO 1008 (1998). In that case, an employee filled out an I-9 form providing documents with a driver’s license showing his name to be Jose A. Jimenez, and a Social Security card showing his name to be Jose Mario Montoya. The administrative law judge found that apart from the fact that the documents were in two wholly different names, there was nothing in the appearance of the driver’s license or Social Security card per se to suggest that the two documents did not reasonably appear to be genuine. In spite of this fact and the further facts that there were errors in the I-9 form, including that it failed to provide a date, an alien number, or a date until which he was authorized to work, the judge found nothing on the face of the I-9 or the accompanying documents which would lead a reasonable person to know that the employee was unauthorized for employment. Other evidence, however, caused the judge to conclude that the employer knew about Montoya’s unauthorized status.

Many law firms, including Wimberly & Lawson, have developed a protocol for investigatory procedures to determine constructive knowledge and/or responding to such knowledge. However, information such as this should be obtained under advice of counsel to protect the attorney-client privilege.

For further information please contact Jim Wimberly, Marty Steckel, Larry Stine, Les Schneider, or Jim Hughes at (404) 365-0900.

Wimberly & Lawson, P.C. © 2007. This publication is intended for general information purposes only and does not constitute legal advice. Readers may consult with any of the attorneys at Wimberly & Lawson to determine how laws, suggestions and illustrations apply to specific situations.