

## **What is the safe-harbor<sup>1</sup> procedure?**

### Answer

The new federal regulation "Safe-Harbor Procedures for Employers Who Receive a No-Match Letter" describes the steps DHS/ICE considers reasonable for an employer to take after receiving a No-Match letter. By taking these steps in a timely fashion, an employer can avoid the risk that the No-Match letter would be used to support an allegation that the employer had constructive knowledge that an employee was not authorized to work in the United States. An employer who follows the safe-harbor procedure will be considered to have taken reasonable steps in response to the notice, and the No-Match letter will therefore not be used as evidence of constructive knowledge of knowingly hiring or continuing to hire unauthorized workers. If, in the totality of the circumstances, other independent evidence exists to prove that an employer has constructive knowledge, the employer may still face liability. The safe-harbor provision does not protect employers that have actual knowledge of unauthorized employment.

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## **How can an employer avoid discrimination when responding to a No-Match letter?**

### Answer

Employers should treat everyone identified in the No-Match letters alike. An employer's response to No-Match letters should be consistent for each employee identified in the letters. Employers should not treat any workers differently because of his or her national origin, English-language ability, "foreign" appearance, or perceived citizenship status. The Office of Special Counsel for Immigration-Related Unfair Employment Practices ("OSC"), Civil Rights Division, U.S. Department of Justice can assist employers and workers with any questions about responding to SSA No-Match letters in a non-discriminatory fashion. OSC's employer hotline is 1-800-255-8155 and its worker hotline is 1-800-255-7688, or visit <http://www.usdoj.gov/crt/osc/>.

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## **What should an employer do when it receives a Social Security Administration (SSA) No-Match letter?**

### Answer

The employer should take reasonable steps to resolve the No-Match, and apply these steps uniformly to all employees listed in the SSA letter. It is possible that a No-Match was the result of a clerical error on the part of the employee, the employer, or the government. DHS/ICE considers the following to be reasonable steps if the employer:

- 1) Promptly (no later than 30 days) checks its records to ensure that the mismatch was not the result of an error on the part of the employer,
- 2) If this does not resolve the problem, asks the employee to confirm the accuracy of the employer's records,
- 3) If necessary, the employer should ask the employee to resolve the issue with SSA. The employer should inform in order to give the employee as much time as possible to resolve the matter and inform the employee that the employee has 90 days from the date the employer received the No-Match letter to resolve the matter with SSA (explaining that resolution of the mismatch could take time).
- 4) If the employer was able to successfully resolve the mismatch, the employer should ensure that of the instructions in the SSA letter have been followed. The employer should also verify that the error has been corrected by using the Social Security Number Verification Service (SSNVS) administered by SSA, and retain a record of the date and time of verification. SSNVS can be accessed through <http://www.socialsecurity.gov/employer/ssnv.htm> or by telephone at 1-800-772-6270; and

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<sup>1</sup> The DHS No-Match regulations are not yet in effect and have not yet been published in the Federal Register. However, DHS has released an advance copy and has developed updated "Questions & Answers" on its website: <http://faq.ice.gov> These questions and answers were copied from that site.

5) If none of the foregoing measures resolves the matter within 90 days of receipt of the No-Match letter, the employer should complete, within three days, a new I-9 Form as if the employee in question were newly hired, except that no document may be used to verify the employee's authorization for work that uses the questionable Social Security number. Additionally, the employee must present a document that contains a photograph in order to establish identity or both identity and employment authorization.

If the employer cannot confirm that the employee is authorized to work (by following the above procedures), the employer risks liability for violating the law by knowingly continuing to hire unauthorized workers.

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### **What is constructive knowledge?**

Answer

"Constructive knowledge is knowledge that may fairly be inferred through notice of certain facts and circumstances that would lead a person, through the exercise of reasonable care, to know about a certain condition." (8CFR 274a.1(l)(1). See 55 FR 25928.)

The "Safe-Harbor Procedures for Employers Who Receive a No-Match Letter" rule adds to the current regulation's definition of "knowing" two more examples for situations that may lead to a finding that an employer had constructive knowledge that an employee was not authorized to work in the United States. These additional examples involve an employer's failure to take reasonable steps in response to either of two events: (1) the employer receives an "Employer Correction Request", commonly known as a No-Match letter, which is a written notice from the Social Security Administration that the combination of name and social security account number submitted to the Social Security Administration for an employee does not match agency records; or (2) the employer receives written notice through a Notice of Suspect Documents from DHS/ICE that the immigration status or employment-authorization documentation presented or referenced by the employee in completing Form I-9 was not assigned to the employee according to DHS records (Form I-9 is retained by the employer and made available to DHS/ICE investigators on request, such as during an audit). The final rule also does not change the current standard that DHS/ICE reviews the totality of relevant circumstances in determining if an employer had constructive knowledge that an employee was an unauthorized worker.

Examples of constructive knowledge:

- i) Fails to complete or improperly completes the Employment Eligibility Verification Form, I-9;
- (ii) Acts with reckless and wanton disregard for the legal consequences of permitting another individual to introduce an unauthorized alien into its work force or to act on its behalf;
- (iii) Fails to take reasonable steps after receiving information indicating that the employee may be an alien who is not employment authorized, such as--
  - (A) Labor Certification or an Application for Prospective Employer;
  - (B) Written notice from the Social Security Administration that the combination of name and social security account number submitted for the employee does not match Social Security Administration records; or
  - (C) Written notice from the Department of Homeland Security that the immigration status document or employment authorization document presented or referenced by the employee in completing Form I-9 was assigned to another person, or that there is no agency record that the document was assigned to any person.

## What are the currently accepted documents for the Form I-9?

### Answer

The documents identified below are acceptable to establish identity and employment eligibility. Please note that the list of acceptable documents is different than the list that appears on the back of the current I-9 Form due to intervening changes in law. However, employers that continue to follow the list that appears on the back of the I-9 Form will not be sanctioned by the DHS/ICE, until such time as DHS issues a new I-9 Form and Handbook for Employers. In addition, there are the Office of Special Counsel for Immigration-Related Unfair Employment Practices, Civil Rights Division, U.S. Department of Justice at 1-800-255-8155 or visit <http://www.usdoj.gov/crt/osc/> for special rules that apply in certain situations, including receipts, rehiring former employees, workers with temporary protected status (TPS), documentation for individuals with disabilities, and additional acceptable documents.

<b>List A</b> Documents that Establish Both Identity and Employment Eligibility.	<b>OR List B</b> Documents that Establish Identity	<b>AND List C</b> Documents that Establish Employment Eligibility
<ul style="list-style-type: none"> <li>• U.S. Passport (unexpired or expired)</li> <li>• Unexpired foreign passport that contains a temporary I-551 stamp</li> <li>• Alien Registration Receipt Card or Permanent Resident Card (INS Form I-551)</li> <li>• Unexpired Employment Authorization Card that contains a photograph (Form I-766, Form I-688, Form I-688A, Form I-688B)</li> <li>• For non-immigrants authorized to work for a specific employer: an unexpired foreign passport with an Arrival-Departure Record, Form I-94, bearing an unexpired endorsement of the individual's nonimmigrant status.</li> <li>• Unexpired foreign passport with a Machine Readable Immigrant Visa (MRIV) and unexpired temporary I-551 stamp (valid until the expiration date set forth on the temporary I-551 stamp).</li> <li>• Unexpired foreign passport with a MRIV containing temporary I-551 language and endorsed with an unexpired DHS admission stamp (valid for one year from the date of admission).</li> </ul>	<ul style="list-style-type: none"> <li>• Driver's license or ID card issued by a state or outlying possession of the United States provided it contains a photograph or information such as name, date of birth, sex, height, eye color, and address</li> <li>• ID card issued by federal, state or local government agencies or entities provided it contains a photograph or information such as name, date of birth, sex, height, eye color, and address</li> <li>• School ID card with a photograph</li> <li>• Voter's registration card</li> <li>• U.S. Military card or draft record</li> <li>• Military dependent's ID card</li> <li>• U.S. Coast Guard Merchant Mariner Card</li> <li>• Native American tribal document</li> <li>• Driver's license issued by a Canadian government authority</li> </ul> <p>For persons under age 18 who are unable to present a document listed above:</p> <ul style="list-style-type: none"> <li>• School record or report card</li> <li>• Clinic, doctor, or hospital record</li> <li>• Day-care or nursery school record.</li> </ul>	<ul style="list-style-type: none"> <li>• U.S. Social Security card issued by the Social Security Administration (other than a card stating it is not valid for employment or valid only with INS work authorization)</li> <li>• Certification of Birth Abroad issued by the Department of State (Form FS-545 or Form DS-1350)</li> <li>• Original or certified copy of a birth certificate issued by a state, county, municipal authority or outlying possession of the United States bearing an official seal</li> <li>• Native American tribal document</li> <li>• U.S. Citizen ID Card (Form I-197)</li> <li>• ID Card for use of Resident Citizen in the United States (Form I-179)</li> <li>• Unexpired employment authorization document issued by the Department of Homeland Security (other than those listed under List A), including (1) a Form I-94 identifying the holder as an asylee (by stating "asylum", "asylee" or appropriate provision of law), or (2) other documentation issued by DHS (or the former Immigration and Naturalization Service (INS)) that identifies the holder as an asylee, lawful permanent resident, refugee (except for the Form I-94 identifying the holder as a refugee, which is considered a receipt only), or other status authorized to work in the United States incident to status.</li> </ul>

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