

Safe Harbor Procedures for Employers Who Receive a No Match Letter - Overview

The amended regulation describes the legal obligations of an employer, under current immigration law, when the employer receives a no-match letter from the Social Security Administration or receives a letter regarding employment verification forms from the Department of Homeland Security (DHS).

It also describes “safe-harbor” procedures that the employer can follow in response to such a letter and thereby be confident that the Department of Homeland Security will not use the letter as any part of an allegation that the employer had constructive knowledge that the employee referred to in the letter was an alien not authorized to work in the United States.

The proposed rule adds two more examples to the current regulation’s definition of “knowing” to illustrate situations that may lead to a finding that an employer had such constructive knowledge.

Why did DHS issue this regulation?

Employers annually send the Social Security Administration (SSA) millions of earnings reports (W-2 Forms) in which the combination of employee name and social security number (SSN) does not match SSA records. In some of these cases, SSA sends the “Employer Correction Request” letter, that informs the employer of the mismatch. The letter is commonly referred to as an employer “no-match letter.” There can be many causes for a no-match, including clerical error and name changes. One potential cause may be the submission of information for an alien who is not authorized to work in the United States and who may be using a false SSN or a SSN assigned to someone else.

Why did DHS issue this regulation?

Section 274A(a)(2) of the Immigration and Nationality Act (INA), 8 U.S.C. 1324a(a)(2). This provision of the INA states:

It is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien in the United States **knowing** the alien is (or has become) an unauthorized alien with respect to such employment.

Both regulation and case law support the view that an employer can be in violation of section 274A(a)(2), 8 U.S.C. 1324a(a)(2) by having **constructive** rather than actual knowledge that an employee is unauthorized to work.

Definitions

Safe Harbor: A term used to describe a condition or situation whereby if the employer follows a series of steps outlined in the regulation, DHS or ICE will not use the no match letter as any part of an allegation that the employer had constructive knowledge that the employee referred to in the no match letter was an alien not authorized to work in the United States. The safe harbor provision is not applicable in cases where the employer has actual knowledge.

Knowledge: The term *knowing* includes having actual or constructive knowledge. 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.

A definition of “**knowing**” first appeared in the regulations on June 25, 1990 at 8 CFR § 274a.1(l)(1). See 55 FR 25928. That definition stated: 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.

Definitions

Actual Knowledge: The employer has personal knowledge or information that an employee is not work authorized, i.e. the employee tells the employer they are illegal, the employee requests that the employer file a labor certification or employment-based visa petition on behalf of the employee, or the employee presents a Social Security Card that indicates “Not Valid for Work Authorization”.

Constructive Knowledge: Information or a combination of facts that would lead a reasonable person to conclude that a person is not authorized to work in the U.S. or creates a duty on the part of the employer to act. This regulation adds two new examples and describes four such situations.

Totality of the circumstances: The rule also states that DHS will continue to review the totality of relevant circumstances in determining if an employer had constructive knowledge that an employee was an unauthorized alien in a situation described in any of the regulation’s examples.

Examples of Constructive Knowledge

1. Receipt of a no match letter (Employer Correction Request) from the Social Security Administration
2. Receipt of a no match letter from Immigration and Customs Enforcement (Notice of Suspect Documents)
3. Fails to complete or improperly completes the Form I-9 for employees
4. Acts with reckless and wanton disregard for the legal consequences and permits another individual to introduce an unauthorized alien into its work force
5. Fails to take reasonable steps after receiving information indicating that the employee may be an alien who is not employment authorized, such as an employee's request that the employer file a labor certification or employment-based visa petition on behalf of the employee

Examples of Actual Knowledge

1. Employee tells the employer that they are illegally present in the U.S.
2. Employee tells employer they do not have the required work authorization documents
3. Employee asks the employer where he/she can obtain fraudulent documents
4. The employer is aware that an employee's work authorization documents have expired

Employer Requirements to Achieve Safe Harbor after receiving SSA no match letter Days 1-30

- The employer should note the date they received the SSA no-match letter.
- The employer must check its records to determine whether the discrepancy results from a typographical, transcribing, or similar clerical error.
- If the employer determines that the discrepancy is due to such an error, the employer must correct the error and inform the Social Security Administration of the correct information (in accordance with the written notice's instructions, if any).
- The employer must also verify with the Social Security Administration that the employee's name and social security account number, as corrected, match Social Security Administration records.
- The employer should make a record of the manner, date, and time of such verification, and then store such record with the employee's Form I-9(s).
- The employer may update the employee's Form I-9 or complete a new Form I-9 (and retain the original Form I-9), but the employer should not perform a new Form I-9 verification.
- The employer must complete these steps within thirty days of receiving the written notice.

Employer Requirements to Achieve Safe Harbor after receiving SSA no match letter Days 1-30 (Continued)

- If the employer determines that the discrepancy is not due to an error in its own records, the employer must promptly request that the employee confirm that the name and social security account number in the employer's records are correct.
- If the employee states that the employer's records are incorrect, the employer must correct, inform, verify, and make a record.
- If the employee confirms that its records are correct, the employer must promptly request that the employee resolve the discrepancy with the Social Security Administration (in accordance with the written notice's instructions, if any).
- The employer must advise the employee of the date that the employer received the written notice from the Social Security Administration and advise the employee to resolve the discrepancy with the Social Security Administration within ninety days of the date the employer received the written notice from the Social Security Administration.

Employer Requirements to Achieve Safe Harbor after receiving SSA no match letter Days 31-90

- The employer should allow the employee this time period to resolve the issue with the Social Security Administration.
- If the issue is resolved during this timeframe, the employer must also verify with the Social Security Administration that the employee's name and social security account number, as corrected, match Social Security Administration records.
- The employer should make a record of the manner, date, and time of such verification, and then store such record with the employee's Form I-9(s).
- The employer may update the employee's Form I-9 or complete a new Form I-9 (and retain the original Form I-9), but the employer should not perform a new Form I-9 verification.

Employer Requirements to Achieve Safe Harbor after receiving SSA no match letter Days 90-93

If the employer is unable to verify with the Social Security Administration within ninety days of receiving the written notice that the employee's name and social security account number matches the Social Security Administration's records, the employer must again verify the employee's employment authorization and identity within an additional three days by following the verification procedure specified in the regulation and outlined later in this presentation.

Employer Requirements to Achieve Safe Harbor DHS No Match – Notice of Suspect Documents Days 1-30

An employer who receives written notice from the Department of Homeland Security as described in paragraph (l)(1)(iii)(C) of this section will be considered by the Department of Homeland Security to have taken reasonable steps and receipt of the written notice will therefore not be used as evidence of constructive knowledge if the employer takes the following actions:

1. The employer must contact the local Department of Homeland Security, Immigration and Customs Enforcement (ICE) office in accordance with the written notice's instructions, and attempt to resolve the question raised by the Department of Homeland Security about the immigration status document or employment authorization document.

Employer Requirements to Achieve Safe Harbor DHS No Match – Notice of Suspect Documents Days 1-30

2. If the employer or the employees feel that this determination is in error and the employees are authorized to work, immediately call the ICE point of contact as mentioned in the notice.
3. The ICE agent will re-verify the information provided about the employees, including any new information provided by you or the employees. You will then be notified of the employees' status in writing. In these instances, do not terminate the employees whose status is in question until you receive written notification from ICE. If you or the employees have any other questions, please call the ICE contact mentioned in the notice.
4. The employer must complete steps 1-2 above within thirty days of receiving the written notice (preferably as soon as possible).

Employer Requirements to Achieve Safe Harbor DHS No Match – Notice of Suspect Documents Days 31-90

- If the employer is unable to verify with the Department of Homeland Security within ninety days of receiving the written notice that the immigration status document or employment authorization document is assigned to the employee, the employer must again verify the employee's employment authorization and identity within an additional 3 days by following the verification procedure specified in the regulation.
- The 31-90 day time frame should be used by the employer to resolve the issue with DHS and ICE. The employee will use this time to obtain any relevant proof of work authorization (in his/her possession or on file with USCIS). The employer should make a record of the manner, date, and time of such verification, and then store such record with the employee's Form I-9(s).
- The employer may update the employee's Form I-9 or complete a new Form I-9 (and retain the original Form I-9), but the employer should not perform a new Form I-9 verification.

Employer Requirements to Achieve Safe Harbor DHS No Match – Notice of Suspect Documents Days 91-93

Note: Employees will be requested to fill out Section 1 of the I-9 as mentioned later in this presentation. If employees supply a new Social Security or A-Number, the documents should be examined very carefully and may require the employer to explore why this has occurred (constructive knowledge). Continued consultation with ICE is key in such incidents and all cases will be considered in their totality of circumstances.

Receipt of a written notice from ICE advising the employer that an employee may be unauthorized to work in the United States does not preclude ICE from enforcing the nation's immigration laws. Employers should be aware that this may include arresting the employee and expeditiously removing that individual from the United States. Employers should be aware that the safe harbor procedures discussed are intended to benefit employers that are acting in good faith. It must be stressed that an employer with actual knowledge that one of its employees is an unauthorized alien cannot avoid civil and criminal liability merely by following following the safe-harbor procedures described in the regulation.

Employer Requirements to Achieve Safe Harbor Verification Procedure Days 91-93

The employer completes a new Form I-9 for the employee, using the same procedures as if the employee were newly hired, as described in section 274a.2(a) and (b) of this part, except that:

- Section 1 (“Employee Information and Verification”) and Section 2 (“Employer Review and Verification”) of the new Form I-9 must be completed within ninety-three days of receiving the written notice;
- The employer must not accept any document referenced in any written notice that contains a disputed social security account number or alien number, to establish employment authorization or identity or both; and
- The employee must present a document that contains a photograph in order to establish identity or both identity and employment authorization.

Document Retention Requirements

The final rule clarifies the safe harbor's retention requirements for the Form I-9 verification under (l)(2)(iii) so that the new Form I-9 will be retained for the same period as the original Form I-9. The date of hire for purposes of section 274A(b)(3) of the INA, 8 U.S.C. 1324a(b)(3), and 8 CFR 274a.2(b)(2)(i) is still the same date, even though the safe-harbor procedure under (l)(2)(iii) requires that the employer complete a new Form I-9 “using the same procedures as if the employee were newly hired.” (Emphasis added). For example, an employer completes a Form I-9 when an employee is hired in September 1998, and then completes a new Form I-9 verification under (l)(2)(iii) in July 2007 after learning that the employee is the subject of an unresolved SSA no-match letter. The employee then accepts another position on February 1, 2008, at which point the employment contract terminates. In this example, the employer would need to retain both Forms I-9 until February 1, 2009.

Where can I obtain more information on no match letters and this regulation?

U.S. Immigration and Customs Enforcement has published a list of Frequently Asked Questions (FAQs) on the www.ice.gov website to explain various aspects of this regulation. Employers that receive no match letters from from the SSA this year will also receive a letter from DHS/ICE explaining their obligations as employers under this new regulation if they wish to avoid findings of constructive knowledge by DHS/ICE after receiving a no match letter.

Employers may also consult the Federal Register for a copy of the new regulation at <http://www.gpoaccess.gov/fr/index.html> .

The Social Security Administration website is www.ssa.gov