SPECIAL Report

NATIONAL ROOFING CONTRACTORS ASSOCIATION

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New DHS Immigration Enforcement Policy

On Friday, Aug. 10, the Department of Homeland Security (DHS) announced a package of 26 new immigration enforcement measures. Among the initiatives is a finalized version of its proposed rule "Safe Harbor Procedures for Employers Who Receive a No-Match Letter." Originally proposed in the June 14, 2006, edition of the *Federal Register*, the rule would alter existing regulations addressing how employers are expected to respond to "no-match" letters from the Social Security Administration (SSA) or DHS.

The new regulation signals DHS' intention to prosecute employers for immigration violations through gaining greater access to SSA records and failure of employers to terminate employees who are the subjects of unresolved SSA no-match letters. The proposed regulation would, in effect, require employers to terminate workers who are the subjects of no-match letters if the discrepancy is not resolved within 93 days after an employer's receipt of a no-match letter.

The rule is expected to be published in the *Federal Register* on Aug. 15 and will become effective 30 days after publication. The rule sets forth the steps employers should take if they want to avail themselves of the safe harbor procedures upon receipt of a no-match letter from SSA or DHS.

What is a no-match letter?

When the information contained on a W-2 form does not match SSA's records, SSA issues a no-match letter so the worker may be properly credited with Social Security earnings. SSA letters are not intended for immigration enforcement purposes, and SSA data currently are not shared with DHS. At the present time, federal immigration regulations do not require employers to take specific actions when they receive SSA no-match letters. Another type of no-match letter is issued by the U.S. Immigration and Customs Enforcement (ICE) division of DHS, which verifies the accuracy of information on I-9 forms. If ICE discovers the immigration-status or employment-authorization documentation presented or referenced by an employee is inconsistent with the agency's records, a no-match letter will be sent to the employer indicating the information provided does not match government records. There can be several causes for a no-match, including clerical errors; name changes; or submission of information for an immigrant who is not authorized to work in the U.S. and is using a false Social Security number, someone else's number or a false immigration registration card ("green card").

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Current law

Following enactment in 1986 of the Immigration Reform and Control Act (IRCA), all U.S. employers are required to verify the identity and employment eligibility of all new employees, citizens and noncitizens hired to work in the U.S. after Nov. 6, 1986. It is illegal for an employer to hire, recruit or continue to employ an individual whom the employer knows is an unauthorized alien or if the employer is found to have "constructive knowledge" of the individual's ineligible work status. Employers who violate IRCA through paperwork violations or knowingly employ illegal aliens are subject to civil and criminal penalties, including imprisonment.

Current federal I-9 requirements

The principal mechanism used to verify identity and work eligibility is Form I-9, Employment Eligibility Verification, now issued by DHS' U.S. Citizenship and Immigration Services. Federal law requires all employers to complete I-9 forms whenever an employee is hired or rehired. I-9 requirements apply only to employees; they do not apply to independent contractors.

Section 1 of Form I-9, titled Employee Information and Verification, is to be completed and signed by the employee no later than the close of business on the first day of work. The employer is responsible for ensuring the employee completes Section 1.

Section 2 of Form I-9, titled Employer Review and Verification, is to be completed and signed by the employer after the employer has reviewed certain prescribed documents to establish worker identity and eligibility to work in the U.S. Section 2 is to be completed and signed by the employer no later than the close of business on the employee's third day of employment. If the employee is being hired for three or fewer days, the I-9 form must be completed at the time of hire. In Section 2, the employer identifies the documents that have been examined from the prescribed list of acceptable documents. The employer is not required to verify the authenticity of the documents presented but must examine the documents and certify the listed documents appear to be genuine and pertain to the employee named. If the documents submitted by the prospective employee have expiration dates, such as an unexpired employment authorization card, the expiration dates must also be included in Section 2. The employer inserts the date employment began and certifies that, to the best of the employer's knowledge, the employee is eligible to work in the U.S.

IRCA requires that employers not discriminate against job candidates on the basis of race, color, national origin or citizenship. Employers who impose citizenship requirements or give preference to U.S. citizens in hiring or employment opportunities may be in violation of IRCA. The Immigration and Naturalization Act of 1990 also prohibits employers from asking for more or different documents than what the prospective employee submits from the prescribed list of acceptable documents. Employers cannot require specific documents. Employers must examine the documents presented and accept them if they reasonably appear to be genuine and relate to the employees that present them. If the documents presented do not reasonably appear to be genuine or relate to the employees who present them, employers must refuse acceptance and ask for other documentation from the list of acceptable documents.

Employers are required to retain I-9 forms for each employee for three years from the date of hire or one year after the date of termination—whichever is longer. Employers are allowed to make and keep copies of the documents that were examined when completing Section 2 of the I-9 form but are not required to do so. If employers make copies of the supporting documents, they should be attached to the I-9 form. Employers may now digitize I-9 forms and maintain I-9 records electronically rather than maintaining paper copies. Although employers do not need to submit completed I-9 forms to any government agency, they must have the forms available for inspection if audited. Employers are entitled to three days' written notice if federal officials intend to conduct an I-9 audit unless a warrant has been obtained.

Employers have a good faith defense to a charge of employing unauthorized workers if they have complied with the I-9 process and do not know they are employing unauthorized workers. However, even if an employer does not know of employment of an illegal immigrant, the employer may be liable for civil or criminal violations of IRCA if the employer is deemed to have "constructive knowledge" or has displayed "willful blindness." Constructive knowledge is knowledge that may 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.

Summary of the rule

The finalized version of the rule essentially mirrors the rule proposed in June 2006. Still, many questions remain unanswered in the finalized version, and it is expected DHS will provide additional guidance in the coming months. When that information becomes available, NRCA will alert members.

The final version of the no-match regulation broadens the previous definition of constructive knowledge by adding that the constructive knowledge of unauthorized employment begins when an employer receives a no-match letter from SSA or DHS. Specifically, the no-match regulation adds three new examples of what constitutes constructive knowledge by an employer that an employee may be unauthorized for employment in the U.S. The examples include:

- A request by the potential employee to file an alien labor certification or employment-based immigrant visa petition
- Written notice from SSA that the combination of name and Social Security number submitted for an employee does not match its records
- Written notice from DHS that the immigration-status or employment-authorization document presented or referenced by the employee in completing Form I-9 was not assigned to the employee according to DHS records

The rule also states DHS will continue "to review the totality of relevant circumstances" when determining whether an employer had constructive knowledge that an employee was an authorized worker.

Safe harbor procedures

The rule describes specific steps an employer should take upon receipt of an SSA no-match letter or DHS communication to avoid a finding that the employer had constructive knowledge of employing an illegal immigrant. If an employer fails to follow the safe harbor procedures prescribed in the proposed regulation and an employee, who was the subject of a no-match letter, is found to be an unauthorized alien, the employer may be found to have constructive knowledge of the employee's unauthorized status and would be liable for an immigration violation. The steps that a "reasonable employer" may take to avoid a potential finding that it possessed constructive knowledge include the following:

1. Upon receiving a no-match letter from SSA, the employer should check records promptly to determine whether the discrepancy is a result of a typographical, transcription or similar clerical error in the employer's records or in its communication to SSA or DHS. If there is such an error, the employer would correct its records; inform the relevant agencies; and make a record of the manner, date and time of the verification. ICE would consider a reasonable employer to have acted promptly if the employer took such steps within 30 days of receipt of the no-match letter.

2. If the first step does not resolve the discrepancy, a reasonable employer would promptly request that the employee confirm his or her records are correct. If correction is required, the employer would make the correction, inform the relevant agencies and verify the corrected records with the relevant agency.

3. If the employee states the employer's records are correct, the employer is to request that the employee resolve the discrepancy with SSA. Again, the employer is to take these steps within 30 days of receipt of the no-match letter.

4. If the previous steps lead to resolution, the employer should follow the instructions on the no-match letter to correct information with SSA and retain a record of the verification with SSA.

5. If the discrepancy in the no-match letter is not resolved within 90 days, the employer and employee would then have an additional three days to complete a new Form I-9 with certain restrictions. No document containing the Social Security number or alien number that is the subject of the no-match letter and no receipt for an application for a replacement of such a document may be used to establish employment authorization or identity. Furthermore, no document without a photograph may be used to establish identity. If at this point an employee's identity and work authorization cannot be verified, then, according to the DHS rule, the employer **must choose between terminating the employee or facing the risk that DHS may find that the employer had constructive knowledge that the employee was an unauthorized alien** and the employer violated the law by continuing to employ the individual.

DHS warns that an employer who followed a procedure other than the safe harbor procedures described in the proposed regulation would face the risk that DHS may not agree that the employer did not possess constructive knowledge. Employers are to apply the procedures in the regulations uniformly to all employees who are the subject of no-match letters; otherwise, DHS cautions, the employer may violate applicable anti-discrimination laws.

The safe harbor is not without its limits. DHS makes it clear that "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" even if the employer strictly adhered to the procedures outlined. Also, the safe harbor does not apply to a situation in which DHS believes the employer had actual knowledge of hiring undocumented workers.

Information sharing

The DHS regulation does not mandate that SSA share information with DHS. Although SSA will continue to send no-match letters to employers, SSA will not provide DHS with the names of employers who have received such letters, and the no-match letters alone will not trigger immigration work-site enforcement actions. However, if DHS is conducting an I-9 audit, it could use the fact the employer received no-match letters to try to prove the employer had actual or constructive knowledge of hiring undocumented workers.

DHS has also clarified that the final rule applies only to written notices issued directly to the employer from the SSA or DHS. It does not apply to information employers receive through sources other than no-match letters. This includes a discrepancy an employer may learn about in using the Social Security Number Verification Service (SSNVS), for example, which is a voluntary program employers can use to verify Social Security numbers.

Other enforcement initiatives

Aside from converting no-match letters into an immigration enforcement tool, the new administration plan contains other significant measures of concern to the employer community. Notably, the package would:

- **Rename and expand the employment eligibility verification Basic Pilot program:** Homeland Security Secretary Michael Chertoff announced DHS will rebrand the Basic Pilot employment verification program, which currently is mostly voluntary, and will expand the program more than tenfold by mandating its use by more than 200,000 federal contractors and vendors. The program will now be called **"E-Verify."** Regrettably, the name change will do nothing to address the serious flaws that have been well-documented in its current small and voluntary state. Those problems include inaccurate data, significant privacy lapses and employer abuse. The information inaccuracies frequently lead individuals to delay their start dates or lose their jobs.

- **Encourage states to make E-Verify mandatory:** The administration plans to conduct outreach and provide technical assistance to states to help them require all businesses to use the E-Verify program.

- **Expand information-sharing between DHS, SSA and state departments of motor vehicles:** The new data sources used in E-Verify will include visas and passport information, as well as pictures and data from state motor vehicle departments. It is unclear what, if any, other sources would be tapped in the increased collection of data that will be widely available to the expanding number of program participants. Such sharing of information between inaccurate DHS databases and SSA raises concerns both about privacy and the potential for proliferation of inaccurate information.

- **Continue efforts at state and local law enforcement of immigration law:** The administration announced plans to continue its 287(g) program that allows states and localities to enter into agreements with the federal government to enforce immigration law.

Conclusion

NRCA submitted comments in opposition when the rule was originally proposed because of concerns about employer liability, workability problems, unintended termination of legitimate workers and damage to the overall economy. Most of the concerns raised by NRCA and other stakeholders are not addressed by the finalized version of the rule; however, NRCA intends to work with DHS as implementation moves forward and additional clarifications are issued.

In the meantime, please be certain to follow carefully the safe harbor procedures outlined in this Special Report, and document and inform NRCA of any difficulties encountered when attempting to comply with the new regulation so NRCA can communicate them to the relevant agencies.

Finally, we have seen during the past couple of years a proliferation of immigration enforcement initiatives at the state and local levels. With the apparent inability of the U.S. Congress to enact immigration reform legislation, state and local authorities have taken it upon themselves to fill the enforcement void left by federal inaction. Please be especially aware of any statutes or regulations—in place or contemplated—that might differ from the new federal no-match rule. For specific information about state immigration laws, refer to "The states take a stand," a feature article that appeared in *Professional Roofing*'s August 2007 issue. You can access the article at www.professionalroofing.net.

If you have any questions or concerns, please feel free to contact NRCA's Washington, D.C., staff directly at (800) 338-5765 or (202) 546-7584.