

Immigration versus Discrimination

*Prevent knowingly employing unauthorized workers
while minimizing the risk of discrimination claims*

By Rebecca Shwayder Aman

Hardly a day passes without the evening news or daily newspaper running a story on the issue of immigration. Workplace raids conducted by U.S. Immigrations and Customs Enforcement (“ICE”) last year led many employers to re-examine their employment policies and procedures. Establishing employment practices to satisfy the U.S. Department of Homeland Security (“DHS”), however, places employers in a difficult position. Employers must delicately balance DHS and social security compliance with avoiding claims of discrimination on the basis of national origin or wrongful termination.

Employers are prohibited from knowingly employing or continuing to employ unauthorized workers. All U.S. employers are required to document that all employees, including U.S. citizens, are eligible to work in the U.S. and can prove their identities by completing an I-9 form and verifying documents for each employee, as specified on the I-9 form. The employer must be able to attest that each document reviewed “reasonably appears on its face to be genuine.” While employers are not required to retain copies of the reviewed documents, if they do retain copies, they should do so for all employees.

While an employer may not require a social security card for I-9 purposes, it may receive one as one of the employee’s I-9 verification documents. The employer also may request a valid social-security number to comply with W-2 reporting requirements. A few rules of thumb can indicate whether a number is invalid. Numbers with more or less than 9 digits, numbers whose first three digits are 000 or are in the 800 or 900 series, numbers whose middle digits are 00 and numbers whose last four digits are 0000 are always invalid. Additionally, the employer may, but need not, verify whether a presented number is valid through the government’s Social Security Number Verification Service (“SSNVS”). If an employer chooses to utilize this service, it should do so for *all* employees. (More information on the SSNVS may be obtained at www.ssa.gov/employer/ssnv.htm.)

Sometimes an employer will receive a “no match” letter from the Social Security Administration (“SSA”) or the U.S. Immigration and Customs Enforcement (“ICE”). In such situations, the employer should not automatically discharge the employee because doing so could lead to claims by the employee or Department of Labor (“DOL”) of wrongful termination or discrimination on the basis of national origin. The employer, however, must follow up on the no-match letter unless it wishes to risk a claim by the DHS that the employer knowingly employed or continued to employ an unauthorized worker.

Recently, the DHS attempted to address the problem of responding to a no-match letter without risking discrimination claims by issuing a proposed rule which includes “safe harbor” procedures that an employer can follow in response to a “no match” letter from the SSA or other similar letter from ICE. According to DHS, following the proposed rule’s steps will eliminate the possibility of a finding that the employer had “constructive knowledge” of employing someone unauthorized to work in the U.S. While the DOL has not opined as to whether the rule

serves as a safe harbor for DOL discrimination concerns, the proposed rule provides us with the best option at present for addressing a no-match letter.

Generally, if an employer receives a no-match letter from the SSA or ICE, within 14 days, the employer should confirm that it did not make an error in its records or in communicating with the SSA and attempt to resolve any discrepancy with ICE. If there is no such error and the employee confirms that the employer's records are correct, the employee should contact the SSA to resolve the situation within 60 days of the initial no-match letter. If the situation cannot be resolved, the employer should follow the subsequent verification procedure in the proposed rule, including completing a new I-9 form with some limitations. The proposed rule should be uniformly applied to all employees. Furthermore, the implementation of these procedures should be accompanied by written policies which the employer distributes or makes available to all employees.

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