



A NEWSLETTER FROM THE LAW FIRM OF FERRARA, FIORENZA, LARRISON, BARRETT & REITZ, P.C.

New Rules for Employers Who Receive “No-Match Letters” from Social Security Administration and Immigration Service

The U.S. Immigration and Customs Enforcement recently amended its regulations relating to the unlawful hiring or continued employment of unauthorized aliens. Specifically, the amended regulation describes the legal obligations of an employer who receives either: (1) a “no-match letter” from the Social Security Administration (SSA) or (2) a letter regarding employment verification forms from the Department of Homeland Security (DHS). An employer “no-match letter” (also known as an “Employer Correction Request”) is a written notice from SSA that the name and social security account number submitted to the SSA for an employee does not match SSA’s records. The DHS letter is a notice that the immigration status or employment-authorization documentation presented by the employee in completing Form I-9 was not assigned to the employee, according to DHS records. Since Form I-9 is retained by the employer – as opposed to being filed with DHS and is only made available to DHS investigators upon request – an employer will likely only receive this type of notification following an audit of its I-9 records.

Obligations Upon Receipt of “No-Match Letter”

Under the new regulation, when an employer receives a no-match letter from the SSA, it must check its records to determine whether it made

some clerical error which caused the mismatch. If so, the employer must correct the error and inform the SSA of the accurate information. The employer must also verify with the SSA that the employee’s name and social security number, **as corrected**, match SSA records. The employer then must make and retain a record of the “manner, date, and time of such verification”, and then store it along with the employee’s Form I-9. The employer must complete these steps within **30 days** of receiving the no-match letter.

If the employer determines that the discrepancy is not due to its error, the employer must “promptly request” that the employee confirm that the name and social security number in the employer’s records are correct. If the employee confirms that the records are correct, the employer must “promptly request” that the employee resolve the discrepancy with the SSA. The employer must also advise the employee of the date that the employer received the no-match letter and advise him/her to resolve the discrepancy with the SSA within **90 days** of that date.

Obligations Upon Receipt of DHS Letter

If the employer receives the letter from DHS, described above, the employer must contact the local DHS office (in accordance with the

written notice’s instructions, if any) and attempt to resolve the question raised by DHS about the immigration status document or employment authorization document. The employer must complete this step within **30 days** of receiving the written notice. If the employer is unable to verify with DHS within **90 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. In other words, the employer must complete a new Form I-9 for the employee, using the same procedures as if the employee were newly hired, except that the employer must not accept any document referenced in any written notice.

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New Rules for Employers Who Receive “No-Match Letters” (cont’d)

Ultimately, if the discrepancy referred to in the no-match or DHS letters is not resolved, the employer must either terminate the employee or risk the DHS citing the employer for “constructive knowledge” that the employee was not authorized to work in the United States.

Penalties for “Constructive Knowledge” of Unauthorized Worker

There are severe civil and criminal penalties for employers under such circumstances. Civilly, it could be fined up to \$2,200 for the first offense, from \$2,200 to \$5,500 for the second offense, and from \$3,300 to \$11,000 for all subsequent offenses. In addition, employers who “knowingly” hire or continue to em-

ploy unauthorized workers are barred from entering into federal contracts for one year.

On the criminal side, employers who engage in a “pattern or practice” of knowingly hiring or continuing to employ unauthorized workers may be prosecuted in criminal proceedings. In such cases, they can be fined not more than \$3,000 for each unauthorized worker, imprisoned for more than six months, or both.

Legal Battle Over Enforcing the New Regulation

As you might expect, this new regulation has already led to significant controversy. Recently, the AFL-CIO and ACLU filed suit challenging

the rule. These groups allege that because the final rule imposes liability on employers who fail to respond to a SSA or DHS letter, errors attributable to the government could threaten the jobs of U.S. citizens and other authorized workers. A federal judge has issued a temporary restraining order preventing DHS or SSA from enforcing the rule. There will be a hearing October 1, 2007 to determine whether that order should become permanent.

We will keep you informed of the status of this regulation in upcoming newsletters. If you have any questions, please feel free to contact us at 315-437-7600.

Major Changes in New York’s Labor Law

Mandatory Written Employment Contracts for Commissioned Staff

Beginning on October 16, 2007, a new state law will require all employers to have written employment contracts with their commissioned salespersons. The contract must include a description of how wages, salary, draws, commissions, etc. are earned and paid on a regular basis and how they will be paid out if the employment relationship is terminated.

The new law also creates a “presumption” in favor of the employee when no agreement is present. In other words, the Department of Labor will presume that the terms of employment set forth by the salesperson are accurate, if you do not have a written agreement to the contrary.

Employers need to understand that having a written employment agreement will give their commissioned sales employees a potential claim for breach of contract if the terms or conditions of their employment change (for example, if their compensation is changed, if they are disciplined or terminated, etc.).

Our office stands ready to assist you in crafting these new agreements so as to permit you to retain as much flexibility in the employment relationship as possible. Please contact either Nicholas J. Fiorenza, Esq. or Michael L. Dodd, Esq. at 315-437-7600 for assistance in this regard.

New Fines for Meal Period and Day of Rest Violations

A new law now permits the Department of Labor to issue civil penal-

ties against employers who either require – or allow – employees to work through their lunches or without a day of rest each week

Most employers in New York are aware that employees (with very few exceptions) must be given at least a 30-minute meal period if they work six hours or more in a day and at least one day of rest every seven days. (N.Y. Labor §§161, 162.) Under the law, employees are not even permitted to voluntarily give up this time off. Moreover, employers found to have either required/allowed employees to work through their lunches or without a day of rest, were subject to criminal prosecution. However, few, if any, prosecutors have pursued criminal sanctions against employers under these circumstances.

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Major Changes in New York's Labor Law (cont'd)

The new law makes it clear that the Department of Labor has the authority, effective immediately, to fine employers for violations of these laws. This will undoubtedly result in greater enforcement of Sections 161 and 162 because of the potential revenue the State will receive from the fines.

More Employees Can Now Claim Wage Violations

New York's Labor Law, section 190, has been amended to allow more employees to file wage payment claims against their employers with the Department of Labor. Prior to this amendment, executive, administrative and professional employees who made more than \$600 per week could not file complaints for any alleged failure to pay wages and/or benefits as they were considered "exempt" under the law. The new law raises the weekly wage threshold to \$900. As the bill's sponsor noted, this change will "... expand the Department's jurisdiction, enabling the Department to investigate and recover wages for more individuals." This change will go into effect January 14, 2008.

No Discrimination on the Basis of Youthful Offender Adjudication

New York State Human Rights Law (N.Y. Executive Law §§292 et seq.) has been amended to prohibit employers from discriminating against applicants or employees

due to a Youthful Offender Adjudication or for a non-criminal conviction which was sealed pursuant to the Criminal Procedure Law. Currently, employers are prohibited from discriminating against applicants or employees on the basis of criminal convictions (N.Y. Correction Law §§752 et seq.) and/or arrests which did not result in convictions (N.Y. Executive Law §296 (16)). According to the bill's sponsors, the state enacted these laws to prevent people who have never been convicted of a crime from suffering the stigma and discriminatory consequences that often result from the disclosure and use of criminal history information. Youthful offender adjudications, which are not judgments of convictions, and convictions for non-criminal offenses, fall under neither of these categories, and thus were not covered. This new law, which becomes effective November 1, 2007, adds these items to the list of "protected categories" under New York's anti-discrimination laws.

Reminder

The new EEO-1 forms and VETS-100 forms must be filed by the end of this month. Call us if you need assistance at 315-437-7600

New Mandatory Leave Requirements

Employers in New York should be aware of two new laws that will require them to grant employees additional time off from work under certain circumstances.

Blood Donations

The first requires "employers" to grant its employees 3 hours of leave in any 12-month period to donate blood. The statute defines "employer" as a person or entity who employs more than 20 "employees". An "employee" is defined as an individual who works 20 or more hours a week, excluding independent contractors. The law was enacted in response to the chronic state of near crisis blood supply and meant to encourage people who would not ordinarily donate blood because they would have to take unexcused time off from work.

Nursing Mothers

The second law requires all employers to provide "reasonable" unpaid break time or permit an employee to use paid break time or meal time each day to express breast milk for her nursing child for up to three years following child birth. The law further requires the employer make reasonable efforts to provide a room or other location, in close proximity to the work area,

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New Mandatory Leave Requirements (cont'd)

where an employee can express milk in privacy. The law was enacted in response to court decisions which held the right of employees to express breast milk at work with adequate facilities is not protected under current federal or state law. Other states, including Hawaii, Tennessee, and California have enacted similar laws.

Employers should revise their personnel policies and employee handbooks accordingly. If you need assistance in this regard, please contact our office at 315-437-7600.

Remember: Affirmative Action Plans Must Be Updated Annually

Federal contractors and other employers who are required to have Affirmative Action Plans (AAP) should remember that they must review and update these plans annually. Specifically, the regulations state that:

The affirmative action programs required under [this regulation] must be developed within 120 days from the commencement of a contract and must be updated annually. 41 C.F.R. §60-2.1(c). (Emphasis added.)

We regularly work with clients to develop, review and update their AAP's. We recommend that employers review and update these plans to coincide with the annual filing requirements for the EEO-1 form and VETS-100 form in late September, since these documents should be key components of their AAP's. Should you need assistance in this regard, please contact our office at 315-437-7600.

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