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RESUMPTION OF SOCIAL SECURITY NO-MATCH LETTERS AND CONSTRUCTIVE KNOWLEDGE

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By Cyrus D. Mehta

On April 6, 2011, The Commissioner of the Social Security Administration announced that SSA would resume sending "no-match" letters, https://secure.ssa.gov/apps10/public/reference.nsf/links/04052011011437PM. Two I-9 compliance mavens, John Fay, http://www.electronici9.com/enforcement/the-return-of-the-social-security-no-match-letter/ and Kevin Lashus, http://www.immigrationcomplianceblog.com/ice/social-security-administration-resumes-sending-no-match-letters/, have adequately commented on this new development, and I will not go into the technicalities of the specifics of such a letter. This post analyzes whether an employer who receives such a letter from the SSA – indicating that its employee's number does not correspond with an account at the agency - has constructive knowledge that he or she is employing an unauthorized worker in violation of the law.

While INA §274A(a)(1)(A) clearly makes it unlawful to hire "an alien *knowing* (emphasis added) the alien is an unauthorized alien," an employer cannot bury his or her head in the sand in the ground like an ostrich, and ignore telltale signs that the person may indeed not be authorized. The regulations at 8 C.F.R. §274a.1(*l*)(1) defining "knowing" includes "constructive knowledge" and defines the term as follows:

> 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. Constructive knowledge may include, but is not limited to, situations where an

> employer:
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> (i) Fails to complete or improperly completes the Employment Eligibility Verification Form, I-9;
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> (ii) Has information available to it that would indicate that the alien is not authorized to work, such as Labor Certification and/or an Application for Prospective Employer; or
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> (iii) 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.
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> 2) Knowledge that an employee is unauthorized may not be inferred from an employee's foreign appearance or accent. Nothing in this definition should be interpreted as permitting an employer to request more or different documents than are required under section 274(b) of the Act or to refuse to honor documents tendered that on their face reasonably appear to be genuine and to relate to the individual.

Yet, not all courts or administrative tribunals have found that an employer had knowledge that an alien was unauthorized to work in the US. In *Collins Food International, Inc. v. INS*, 948 F.2d 549 (9th Cir. 1991), a seminal case involving the application of constructive knowledge, an employer was sanctioned for knowingly hiring an alien as he made a job offer prior to checking the alien's documents and because the employer did not verify the back of the social security card. The Ninth Circuit rejected the government's charges under both the factual circumstances. First, there was nothing in the law or regulations that required an employer to verify documents at the time of the job offer and prior to the hire of the alien. In fact, pre-employment questioning concerning the prospective employee's national origin, race or citizenship would expose the employer to charges of discrimination under Title Seven. Regarding the employer's failure to properly verify the back of the social security card, the Ninth Circuit held that under INA §274A(b)(1)(A) an employer will have satisfied its verification obligation by examining a document which "reasonably appears on its face to be genuine." There was also nothing in the statute that required the employer to compare the employee's social security card with the example in the handbook of the Immigration and Naturalization Service, and the "card that Rodriguez presented was not so different from the example that it necessarily

would have alerted a reasonable person to its falsity." Finally, the Ninth Circuit was concerned that if the doctrine of constructive knowledge was applied so broadly, the employer may be tempted to avoid hiring anyone with appearance of alienage to avoid liability.

Similarly, even if 8 C.F.R. §274a.1(c)(1)(iii)(A) attributes an employer with constructive knowledge if the employee requests sponsorship through a labor certification, it should not be automatically assumed that the individual is not authorized to work in the US. Such an employee could possess a valid employment authorization as one who has been granted withholding of removal or temporary protected status, which without a sponsorship through the employer, may not provide him or her with any opportunity to obtain permanent residence.

The facts in *Collins Food International* ought to be contrasted with situations where an employer has been notified by the government after a visit to its premises that certain employees are suspected to be unlawful aliens and is asked to take corrective action. Thus, in *US v. El Rey Sausage*, 1 OCAHO no. 66 1989, aff'd, 925 F.2d 1153 (9th Cir. 1991), where the INS found several employees using improper or borrowed alien registration numbers, and the INS warned in a letter that unless these individuals provide valid employment authorization they will be considered unauthorized aliens, and the employer simply accepted the word of the aliens as to their legal status, the Ninth Circuit found constructive knowledge. Therefore, it is one thing when an employee who is untrained accepts a false document, as in *Collins Food International,* and quite another when an employer receives notice from ICE that certain employees may not have proper work authorization.

With regards to a social security "no-match" letter, the issue of whether the employer is deemed to have constructive knowledge continues to remain fuzzy. The employer's receipt of a no-match letter does not fall squarely within the facts of *Collins Food International,* yet such a letter still does not constitute a direct indication, as in *US v. El Ray Sausage,* that the worker is unauthorized. The DHS promulgated a rule in 2007 that would have imputed constructive knowledge to an employer who received either a "no-match" letter from the Social Security Administration (SSA) or a DHS notice. 72 Fed. Reg. 45611 (August 15, 2007). The rule would have provided a safe harbor to an employer if it took the following steps to remedy the no-match within 90 days. The employer first checks its own

records to determine whether there is a typographical error or similar clerical error. If it's not the employer's error, the employer asks the employee to confirm the information. If the employee says that the information is incorrect, the employer must correct its records and send the correct information to the SSA. If the employee insists that the information he or she gave to the employer is correct, the employer must request the employee to resolve the discrepancy with the SSA. If the employer is unable to verify with the SSA that the erroneous information has been corrected within 90 days, the employer must allow the employee to present new verification documents without relying on the documents that created the mismatch. The regulation was stayed as a result of a challenge in federal court, and the rule was finally rescinded.

In light of the vacuum resulting in the rescinding of this regulation, what guidance can employers rely on? Paul Virtue, former General Counsel of the INS, issued a letter stating that a no-match letter from the SSA did not, standing on its own, provide notice to the employer that the employee is not working without authorization in the US. Letter, Virtue, General Counsel, INS HQCOU 90/10.15-C (Apr. 12, 1999), available on AILA InfoNet at Doc. No. 01061431 (posted on June 14, 2001). However, in the same letter, Mr. Virtue stated that a subsequent action or inaction by the employer, after receipt of such a letter, would be viewed under the "totality of circumstances" in determining whether the employer possessed constructive knowledge of whether the employee was authorized or not in the US. Notwithstanding, employers must not be too hasty in terminating employees if they receive no match letters.

A recent decision on the precise issue of no-match letters, *Aramark Facility Services v. Service Employees International*, 530 F.3d 817 (9th Cir. 2008), sheds more clarity on whether the employer has constructive knowledge. There, the employer upon receiving no-match letters from the SSA gave its affected employees three days from the post mark of its letter to either get a new social security card or a receipt from the SSA that it has obtained a new one, and if the employee produced a receipt, the employee had 90 days to submit the new card. Those employees who could not comply with this demand were fired, but were told that they could be rehired if they obtained the correct document. Moreover, the employer did not have any specific basis to believe that the employees who were the subject of the no match letters were not authorized to

work, and each of these employees had properly complied with the I-9 verification requirements at the time of their hire. The Ninth Circuit had to decide whether to set aside an arbitrator's award under a narrow exception that the award violated public policy in ordering back pay and reinstatement as the firings were without cause. Aramark's main argument under the public policy exception was that if it continued to employ these workers it would be sanctioned for knowing that they were not authorized to work in the US. The Ninth Circuit disagreed with the district court's decision setting aside the arbitrator's award and held that the mere receipt of no-match letters from the SSA without more did not put Aramark on constructive notice, and forcefully stated that by its own admission the SSA has acknowledged that "17.8 million of the 430 million entries in its database (called "NUMIDENT") contain errors, including about 3.3 million entries that mis-classify foreign-born U.S.citizens as aliens." The Ninth Circuit, which relied on *Collins Food International*, further noted that employers do not face any penalty from SSA, which lacks an enforcement arm, for ignoring a no-match letter. Furthermore, the Ninth Circuit also gave short shrift to Aramark's second argument that the employee's reaction to the notification to take corrective action imputed constructive knowledge on the ground that the arbitrator found no proof of any employee having undocumented status as well as to the fact that the employer's demand to take corrective action was even more demanding than the DHS's proposed 2007 regulations. Finally, the Ninth Circuit refused to upset the arbitrator's award in failing to consider that Aramark had offered to rehire the workers if they came back with the corrected document even after the time frame that it had stipulated in its notification to its employees.

The Department of Justice's Office of Special Counsel for Immigration-Related Unfair Employment Practices recently issued the following do's and don'ts for employers on Social Security Number "no-match" letters, http://www.justice.gov/crt/about/osc/htm/SSA.php, which provide useful nuggets on what one can do and one cannot do when an employer receives a no-match letter.

DO:

•Recognize that name/SSN no-matches can result because of simple administrative errors.

•Check the reported no-match information against your personnel records.

•Inform the employee of the no-match notice.

•Ask the employee to confirm his/her name/SSN reflected in your personnel records.

•Advise the employee to contact the SSA to correct and/or update his or her SSA records.

•Give the employee a reasonable period of time to address a reported no-match with the local SSA office.

•Follow the same procedures for all employees regardless of citizenship status or national origin.

•Periodically meet with or otherwise contact the employee to learn and document the status of the employee's efforts to address and resolve the no-match.

•Submit any employer or employee corrections to the SSA.

DON'T:

•Assume the no-match conveys information regarding the employee's immigration status or actual work authority.

•Use the receipt of a no-match notice alone as a basis to terminate, suspend or take other adverse action against the employee.

•Attempt to immediately re-verify the employee's employment eligibility by requesting the completion of a new Form I-9 based solely on the no-match notice.

•Follow different procedures for different classes of employees based on national origin or citizenship status.

•Require the employee to produce specific documents to address the no-match.

•Ask the employee to provide a written report of SSA verification.

In conclusion, an employer walks on thin ice upon receiving an SSA no-match letter, and is also caught within the cross currents of the conflicting policies of two agencies. While ICE may require an employer to take action upon receiving a "no match" letter, leading to the employee's termination, the DOJ's Office for Special Counsel may find that the employer has engaged in discriminatory practices. It is thus incumbent upon an employer in such a situation to consult

with experienced immigration counsel to safely navigate through such murky waters by designing employer policies that would be consistently applied each time the employer receives a no-match letter.

Substantial portions in this blog post have been extracted from **KEEPING TRACK: SELECT ISSUES IN EMPLOYER SANCTIONS AND IMMIGRATION COMPLIANCE by Gary Endelman and Cyrus D. Mehta,** http://blog.cyrusmehta.com/News.aspx?SubIdx=ocyrus20101218204951#_ftn27