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CLIENT ALERT

FINAL RULE REGARDING SOCIAL SECURITY MISMATCH LETTERS

On August 10, 2007, the Department of Homeland Security (DHS) issued a final rule establishing procedures for employers who receive either a Social Security Administration (SSA) "mismatch" letter or notification from the DHS stating that an individual is not authorized to work. The rule will soon be published in the *Federal Register* and will take effect 30 days after publication.

Possible reasons for receiving such a mismatch letter from the SSA or DHS are that an employee's name and Social Security Number do not match agency records or that a document used by an employee in completing the I-9 employment eligibility process was not actually assigned to the employee.

According to the final rule, an employer must take the following steps upon receipt of a mismatch letter:

- Within thirty (30) days of receipt of a mismatch letter from the SSA or a notice from the DHS an employer must review its records to see if the mismatch is a clerical or other recordkeeping error. If the employer finds an error in its own records, the employer must immediately advise the SSA or DHS of the correct information.
- If the employer cannot remedy the problem through an examination of its records, the employer must inform the employee of the discrepancy and ask the employee to verify the information on file with the employer. If the employer's records are incorrect, the employer should correct its information and inform the relevant agencies. If the employee provides the same information as previously provided, the employer must inform the employee that the employee has 90 days from the date of the mismatch

letter to resolve the inconsistencies with the appropriate government agency. At the conclusion of the 90 days, the employer has a further 3 days to complete a new I-9 form for the employee. In completing the new I-9 form, an employee cannot provide a document previously found to be in dispute and must provide a document that includes a photograph.

- The employer must retain both the new and old I-9 forms.
- If the information discrepancies cannot be remedied within the 93 days or the repeated I-9 process fails due to mismatched or inadequate information, the employer must terminate the employment of the employee at issue. If the employer fails to terminate the employee at issue, the employer may be found to be in violation of the Immigration Reform and Control Act (IRCA).

Employers that follow the procedures set forth in the final rules will have a defense to charges of violations of the IRCA. However, such defenses will be unavailable if an employer has actual knowledge that an employee is not authorized to work.

Employers should take measures to immediately review their I-9 verification procedures for compliance with this Alert.