

PUTNEY, TWOMBLY, HALL & HIRSON LLP

ESTABLISHED 1866

COUNSELORS AT LAW

521 FIFTH AVENUE

NEW YORK, NEW YORK 10175

(212) 682-0020

TELEFAX: (212) 682-9380

PUTNEYLAW.COM

120 WOOD AVENUE SOUTH
SUITE 600
ISELIN, NEW JERSEY 08830
(732) 632-2505
TELEFAX: (732) 632-2506

1205 FRANKLIN AVENUE
GARDEN CITY, NY 11530
(516) 746-0070
TELEFAX: (516) 746-0599

2500 NORTH MILITARY TRAIL
SUITE 200
BOCA RATON, FLORIDA 33431
(800) 935-8480
TELEFAX: (561) 393-9707

COUNSEL
CHARLES J. GROPPE
ALEXANDER NEAVE
LOUIS A. TRAPP, JR.
DUSTAN T. SMITH

DANIEL F. MURPHY, JR.
MICHAEL T. McGRATH
THOMAS A. MARTIN
WILLIAM M. POLLAK
JAMES E. McGRATH, III
CHRISTOPHER M. HOULIHAN
THOMAS M. LAMBERTI
STEPHEN J. MACRI
HARVEY I. SCHNEIDER
MARY ELLEN DONNELLY
JOSEPH B. CARTAFALSA
GEOFFREY H. WARD
ANDREA HYDE
E. PARKER NEAVE
MARK A. HERNANDEZ
JAMES M. STRAUSS
PHILIP H. KALBAN
SEAN H. CLOSE
LANSING R. PALMER
JEROME P. COLEMAN

October 31, 2008

CLIENT ALERT

**DHS Issues Supplemental Final Rule
For Employers Who Receive “No-Match” Letters**

On October 23 2008, the Department of Homeland Security (DHS) issued a Supplemental Final Rule, which implements the 2007 “No-Match” Rule. The Supplemental Final Rule will take effect immediately upon publication in the Federal Register.

The “No-Match” Rule, originally issued by the DHS in August 2007, established procedures for employers who receive “No-Match” letters issued by the Social Security Administration (SSA). “No Match” letters inform employers that certain employee information and employment eligibility documents submitted as part of the employment eligibility process do not match SSA records. Under the “No-Match” Rule, if an employer followed the procedures in good faith, Immigration and Customs Enforcement (ICE) would not use the employer's receipt of a “No-Match” letter as evidence to find that the employer violated the employment provisions of the Immigration Reform and Control Act (IRCA) by knowingly employing unauthorized workers.

The Supplemental Final Rule is a response by DHS to a federal district court ruling in Northern California, which enjoined DHS from implementing the 2007 “No-Match” rule. The new rule addresses the concerns raised by the court and clarifies that an employer will not be liable for violation of the IRCA if an employee who is the subject of a “No-Match” letter was hired before November 6, 1986 or if the employer learns of potential employment eligibility problems from correspondence between the

SSA and individual employees rather than through correspondence addressed to the employer. Otherwise, the Supplemental Final Rule implements the same substantive provisions of the 2007 rule:

- Within thirty (30) days of receipt of a “No-Match” 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 letter to resolve the inconsistencies with the appropriate government agency. At the conclusion of the 90 days, the employer has 3 further 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 inconsistent 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 IRCA.

The DHS announced plans to return to court and request that the injunction be lifted. If successful, the department will immediately proceed with the implementation and publication of the Supplemental Final Rule. Therefore, employers who receive “No-Match” letters or notification from the DHS should adhere to the “No-Match” procedures.

PUTNEY, TWOMBLY, HALL & HIRSON LLP