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## FINAL NO-MATCH RULES ISSUED BY DHS

Now that the Department of Homeland Security (DHS) has issued its final Supplemental Final Rule for “no-match” letters, the next step is seeing if a U.S. federal court will remove its 2007 injunction so that the DHS rule can go into actual effect. “No-match” letters are issued to employers by the Social Security Administration to avoid the employer “knowingly” hiring unauthorized workers under the Immigration Reform and Control Act (IRCA).

The “no-match” rule was initially provided so employers would know what steps to take to address identified discrepancies in hiring that would create potential liability for the employer under the IRCA. However, a federal court issued an injunction in 2007 that stopped implementation of the rule as it then existed. The new Supplemental Final Rule issued on October 23, 2008 is part of the DHS efforts to respond to the court’s concerns and see the injunction lifted so the rule can proceed. While the new rule is the same as the version held up by the federal court, it now includes a more detailed analysis of how and why the policy was developed, along with a financial analysis.

When the Supplemental Final Rule becomes effective, employers who receive no-match letters will need to follow the rule’s guidelines to protect against being found to have knowingly hired unauthorized workers. Here are the DHS safe harbor guidelines:

1. Within 30 days of receiving a no-match letter, the employer should review its records to conclude whether the issue is due to recordkeeping by the employer.
2. Require the employee to confirm the accuracy of his or her employment records.
3. If not resolved, tell the employee to resolve the problem with SSA within 90 days of receipt of the no-match letter.
4. Should the problem still not get resolved, the employer should follow the instructions provided in the no-match letter, correct the information with the SSA, and verify the correction by using the Social Security Number Verification Service (SSNVS). SSNVS can be contacted via <http://www.socialsecurity.gov/employer/ssnv.htm> or 1-800-772-6270. The employer should be certain to document the date and time of the verification efforts.
5. If still not resolved within 90 days of the receipt of the no-match letter, a new I-9 form should be completed within three days, with all required documents, excluding the documents that use the disputed Social Security number. The employee must present a document with a photograph to prove identity or both identity and employment authorization.

If the employee’s no-match issue is still unresolved after 93 days and the steps are exhausted, then the employee should be terminated. **Should the employee not be terminated, it is the employer who risks being found to having knowingly violated the law by employing unauthorized workers.** The penalties include both civil and criminal actions. Please periodically check our website at [www.hranswers.com](http://www.hranswers.com) to see the status of the court’s injunction and information regarding the implementation of the Supplemental Final Rule for no-match letters.

## NEW ADAAM REQUIRES EMPLOYER ACTION!

When the Americans with Disabilities Act Amendments Act (ADAAA) goes into effect on January 1, 2009, there will be several significant changes for organizations’ interactions with their employees. Rather than wait for those changes to hit, organizations will benefit by taking steps now in preparation for the various changes that the ADAAA will impose on the workplace. Among the tasks that organizations should be working on now are:

1. Job descriptions should be reviewed, and revised if appropriate. Management should review job descriptions for validity, accuracy, and consistency. Are the essential functions actually essential and being consistently practiced and met? You can contact HR Answers, Inc. for sample job description format, language, and examples.
2. Documents utilized by the organization in addressing ADA situations should be reviewed. This includes the document seeking medical input and the employee’s written request for reasonable accommodation. This also includes documentation practices used by supervisors when interacting with employees on situations that raise, or might raise, potential ADA issues.

- 3. Front-line supervisors should be trained on the ADAAA changes that impact their interaction with employees.** One inappropriate interaction or ignored employee comment can create employer liability. In addition, the supervisors should be instructed on their role in the ADA interactive process and how to respond when faced with a need for that process. HR Answers, Inc. will be presenting ADAAA update training for front-line supervisors in early December.

In addition to the training and job description samples, HR Answers, Inc. will be compiling an ADAAA Compliance Guide. This comprehensive Guide will include sample language for relevant revisions to Employee Handbooks, policies, and forms for organizations. Also in the Guide will be a “script” for employers to use when dealing with the ADA-required Interactive Process, and specific advice on how to document conversations with employees about the various aspects of the new compliance requirements. The ADAAA Compliance Guide should be available in mid-November, at a cost of \$50 for each Advantage Plan client and \$75 for non-Advantage Plan participants. We’ll send out an email to let you know about its availability.

## OSHA UPDATE

**Is it a reportable accident when an employee is injured while getting into or out of their car?** Injuries that are incurred by employees while entering and/or exiting their personal vehicles in or on the company parking lot must be recorded by the employer on its Occupational Safety and Health Administration (OSHA) recordkeeping log. OSHA has recently narrowed the exception to the recordkeeping regulation that injuries are not recordable if they are caused by a motor vehicle accident on an organization’s company property. Employers required to keep OSHA logs should adjust their recordkeeping procedures to account for the new interpretation.

OSHA’s recordkeeping rule states an injury caused by a motor vehicle accident occurring in/on a company parking lot while the employee is commuting to/from work is *not* recordable (29 CFR 1904.5(b)(2)(vii)). OSHA was asked whether this exception applies to injuries sustained by employees getting into and out of their vehicles upon arriving to or leaving work. OSHA responded that the exception does not cover these injuries. According to the agency, “motor vehicle accidents” means accidents caused by moving vehicles, not stationary ones.

Thus, OSHA has stated that the following incidents are work-related and would be OSHA recordable, assuming other criteria for recording are met (*e.g.*, the injury requires medical treatment beyond first aid or results in days away from work):

- An employee arrives at work and parks his car in the company parking lot. As the employee is getting out of his car he slams the car door shut and “pinches” his finger.
- An employee is in the process of exiting his pick-up truck when he slips on a rail used to enter and exit the vehicle. The employee falls onto the parking lot surface and sustains a twisted right knee.
- An employee opens the driver-side door of his vehicle and starts to exit his car when he catches his right foot on the raised door threshold, falls onto the parking lot, and sustains a kneecap injury.

According to OSHA, these scenarios differ from ones where an employee is injured as a result of moving vehicles, which employers would *not* need to record. For example, if an employee is injured in a car accident in a company parking lot while arriving at work, the case would not be recordable. Similarly, if an employee is walking across the organization’s parking lot in the morning after arriving at work and is struck by a moving car, the injury would not be recordable.

Employers must have procedures in place for complying with OSHA’s recordkeeping rule, and this new interpretation must be incorporated into these procedures in writing. Employee injuries in parking lots are a frequent occurrence and, in the event of an OSHA inspection, OSHA will look to see if employers are making the appropriate recordability determinations related to these injuries.

**Work from home still counts as “days away.”** In a Letter of Interpretation, OSHA clarified several recordkeeping scenarios regarding days away from work, restricted work activity, and work-relatedness.

OSHA addressed whether or not days that an injured employee is performing clerical services for the organization from her home (as a condition of her medical restriction) must be treated as restricted work activity or days away from work. OSHA says that, assuming the employee does not work from home as part of her normal work schedule, the case should be recorded as days away from work. In the scenario, the employer has made the determination that the employee cannot work in the office, but allows her to work from home while she recovers from surgery. In other words, OSHA says, the employer has made a decision that the employee needs days away (from the office) in order to recover from a work-related injury.

However, the answer would be different if the employee’s normal work schedule includes one or more work days at home, OSHA says.

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Editor: Deborah Jeffries, PHR, CPC. Advantage is published monthly and is designed to provide information on regulations, HR practices and management ideas and concerns. The intended audience is managers, supervisors, business owners, human resource and employee relations professionals. If you have questions about the content, an opinion about the information, questions about your subscription, or if you need additional Advantage binders, please give us a call at (503) 885-9815 or e-mail [djeffries@hranswers.com](mailto:djeffries@hranswers.com).

## A WORD FROM THE WISE™ REMEMBER YOUR ROLE

Being in supervision, or in any management role, can be complex when dealing with employees. Your efforts to maintain the business or organizational relationship that goes with your role while dealing with employees who come to you to talk can sometimes become awkward. This is especially true when an employee brings you an issue or concern of a personal nature. While it's important to be accessible to and compassionate for the employee, there are certain pitfalls that open up if you don't remember your role and what goes with it.

Very rarely is the supervisor or manager also a counselor, even though he or she may feel placed in that role. The danger is two-fold. First, the employee may say something that the supervisor or manager really doesn't want to hear, because it creates potential legal questions or even risk. For example, the employee may divulge a personal issue or, worse, a medical condition. Because the supervisor or manager represents the organization, the organization is now aware of that personal information and must often be responsive.

Secondly, the supervisor or manager may offer something to the employee in the way of "counseling," assistance, or empathy that creates an obligation on the part of the organization. This too can create additional issues or risks that must be addressed. And, while the supervisor or manager listens to the employee, there can and should be discretion, but the conversation is neither privileged nor confidential if it raises a legal concern.

So, what can a supervisor or manager do to balance the risks with attempting to assist the employee?

1. Remember your role. Don't play counselor or confidant. You can listen and then talk about the work-related aspects, but don't get into discussions of mental or physical conditions, or sensitive personal problems that are far beyond your expertise.
2. Remember your boundaries. You can't always keep the conversation confidential. Listen to the employee, but also remember to put boundaries on the discussion or the topics. And, if the employee's comments start to get near those boundaries, be prepared to stop the discussion. At that point, you can either contact Human Resources for assistance, or direct the employee to do so. Where are the boundaries? When it gets too close to personal or medical information, especially when there's no direct tie-in to work.
3. Remember your authority. Don't make a commitment to the employee that goes beyond your authority. To be even safer, don't make a commitment to any type of response until you've had time to step back, review what you've been told, and process it with your manager or Human Resources. Referring the employee to the EAP may be the best course of action.
4. Remember your ears. Listen as much as possible. Let the employee talk, but don't feel obligated to talk a lot yourself until you are ready to do so.
5. Remember your memory. Document the conversation when you are done. This allows you to track conversations that extend over a period of time, plus gives you a resource for later recall if necessary.

## HR MUST BE INVOLVED IN LAYOFF PLANNING

Given today's economic climate, we have to expect more activity in the changing structure and employee count of organizations. We encourage organizations to think of every option possible before having to dismiss or layoff employees (we'll talk about those next month). However, we have many clients who are experiencing great difficulty in having to say goodbye to employees, and we wanted to be able to supply some information and support to the process.

HR must work with their corporate counsels to minimize the legal risks of any planned reduction in force. Attorneys tell employers that cases filed regarding layoffs are hard to win. Unfortunately, the plaintiffs often are the "nicer, older" former employees who are much more sympathetic to juries than a faceless organization.

Employers are using interchanging vocabulary, and that can have its own set of challenges – perhaps even before a courtroom. Some definition of terms may be helpful. First, **Layoff** must be defined as the intent to bring the employee back to work once business is back. There is no severance pay in layoff. If you do not intend to bring employees back within six months, then do not call it a layoff. **Discharge** is a general term most aptly defined as released from one's duties. **Termination** is best described as separation from employment due to performance challenges that the employee has not been able to correct, or for violation of organizational policies. **Separation** is the most general term, and one to use when telling employees that you are separating them from the organization due to the changing economy and the lack of new business, orders, demand, finances, etc., and that there is little likelihood of returning anyone to work.

The key to minimizing an organization's liability, and avoiding being before a jury, is planning. A timeline and realistic expectations are needed. One suggestion is to have organizations consider several division-wide RIFs, rather than a companywide RIF. Having this be a series of activities can reduce the possibility of a company-wide class action.

The important first step in any type of separation scenario is the decision-making process. This must be thoroughly documented and must include the business case for the decision. It is the role of the employer to document why particular individuals or workgroups were selected to be laid off or separated, based on objective criteria such as performance, flexibility, skill sets, etc.

Because selection criteria are crucial to making the selection process objective, we recommend making the criteria easy for everyone to understand. Permissible selection criteria include:

- Functional/technical skills
- Communication
- Teamwork
- Leadership
- Task achievement skills.
- Past performance reviews

Impermissible criteria for selection include:

- Protected class
- Proximity to retirement
- Outstanding claims
- Leave status
- Protected conduct (e.g., whistle-blowing)

When reviewing files of individuals selected to be separated or laid off, employers should pay particular attention to recent performance reviews to ensure consistency with the stated rationale and identify any red flags. The organization should review the files of individuals in the same category who were not selected for separation or lay off, to verify the rationale for retaining them. Common risk areas include employees with existing equal employment opportunity, employee relations, benefits, or leave issues.

Any adverse-impact analysis should be conducted under the attorney-client privilege. Employers will want to make sure that, as the workforce has and is changing, the statistics do as well. In addition, employers will want to double check their compliance with WARN (Worker Adjustment and Retraining Notification Act), and any of the state- specific laws as well.

Employers need to be particularly careful about how they communicate the separation and layoff to employees. Don't just send out a memo, have corporate security at the ready, or have employees read an announcement in the paper. Employers need to have HR, including benefits representatives, on-site for consultation during a time of separation or layoffs. It is a good practice to prepare a memo summarizing the relevant points and supporting recommendations for the separation/layoffs. Any efforts to find departing workers other work should be documented as well. Outplacement assistance isn't just a nice thing to do; individuals who have jobs or good prospects for getting a new job tend not to sue as often. HR's involvement will help ensure consistency and fairness. This additional documentation will help lay the groundwork for HR as a witness, should there be a need for a trial.

To aid you in the process of knowing what steps to take and how to communicate with your employees during these troubling times, HR Answers (trainer Judy Clark) will be offering a workshop on Wednesday, December 3, 2009, on the topic "Communicating in Difficult Times – Organizational Changes and Restructuring." This program is designed to give you some tools to use, offer practical advice to get through the rough spots, and ideas on how to communicate what and when you need to. You can register for the program by visiting our website at [www.hranswers.com](http://www.hranswers.com) or by calling 503-885-9815.

## TEST YOUR HR KNOWLEDGE

1. The basic purpose of job evaluation is to:
  - a. Aid in job analysis
  - b. Provide data for job description and job specification
  - c. Increase productivity
  - d. Eliminate pay inequities

2. Service to the customer may suffer most when this type of sales compensation method is used:
  - a. Salary, commission, and bonus
  - b. Straight commission
  - c. Salary and commission
  - d. Bonus
3. What situation suggests that a group incentive plan would be superior to an individual incentive plan?
  - a. Employees are highly skilled and work independently.
  - b. The work group has a strong leader.
  - c. Performance information can be readily obtained.
  - d. Cooperation among employees is important.
4. Joanne is a clerk typist (non-exempt) who is paid a salary of \$170 per week. This week, Joanne worked four hours of overtime (44 hours) and also received a bonus of \$10. What is Joanne's gross pay for this week?
  - a. \$205.32
  - b. \$207.00
  - c. \$180.00
  - d. \$198.00

5. A salary survey shows the following data:

<u>Organization</u>	<u>Number of Incumbents</u>	<u>Average Monthly Salary</u>
A	15	\$700
B	10	\$700
C	25	\$700
D	50	\$800

How does the weighted average salary compare to the unweighted average salary?

- a. It is \$50 lower
  - b. It is \$25 lower
  - c. It is \$25 higher
  - d. It is \$50 higher
6. In translating the results of a salary survey into actual wage rates, what statistical technique would be most appropriate to use?
- a. Least-squares method
  - b. Dispersion method
  - c. Correlation method
  - d. Expected variance method
7. After implementing a new job evaluation plan, it is best to deal with red circle rates by:
- a. Reducing their salary to the new maximum for their respective job grade
  - b. Allowing their base rate to increase as all others do in the same job grade
  - c. Reducing the salary to the maximum of the range and provide the employee the amount of the decrease in the form of a bonus
  - d. Freezing their salary until job grade maximum increases catch up with the red circle rate
8. A 2-tiered wage system could be expected to be most effective in:
- a. Reducing payroll costs
  - b. Increasing individual motivation
  - c. Relating pay to group performance
  - d. Increasing feelings of external equity

## THOUGHTS TO THINK ABOUT

“If a ship has been sunk, I can’t bring it up. If it is going to be sunk, I can’t stop it. I can use my time much better working on tomorrow’s problem than by fretting about yesterday’s. Besides, if I let those things get me, I wouldn’t last long.”

- Admiral Ernest J. King

“To deserve success is more important than to achieve it.”

- Lester B. Pearson

It is not the strongest of the species that survive, nor the most intelligent, but the one most responsive to change.

- Charles Darwin

The greatest of all mistakes is to do nothing because you can only do a little. Do what you can.

- Sydney Smith

Do not mistake busy activity for achievement. Busyness does not equal productiveness.

- Anonymous

See everything. Overlook a great deal. Improve a little.

- Pope John XXIII

The only place you find success before work is in the dictionary.

- May Smith

When you make a mistake, there are only three things you should ever do about it: admit it, learn from it, and don’t repeat it.

- Winston Churchill

The further backward you look, the further forward you can see.

- Winston Churchill

I went to a bookstore the other day. I asked the women behind the counter where the self-help section was. She said, “If I told you that it would defeat the whole purpose.”

- Brian Kiley

## OUNCE OF PREVENTION

**Outplacement** services used by organizations and made available to employees who are let go due to downsizing, mergers, or terminations are viewed as benevolent both by the affected employee(s) and those who continue to work within the organization. These services also greatly reduce the likelihood of litigation, as angry employees have a chance to vent and gain some perspective while distancing themselves from the organization, and begin to look toward the future. If you think outplacement services for your employees are in your organization’s future, take the assessment below to see how prepared you are.

- | <b>T</b>                 | <b>F</b>  |
|--------------------------|---|
| <input type="checkbox"/> | <input type="checkbox"/> All outplacement organizations are the same.   |
| <input type="checkbox"/> | <input type="checkbox"/> Outplacement services offered are all very similar.  |
| <input type="checkbox"/> | <input type="checkbox"/> All a displaced employee really needs is a good resume.  |
| <input type="checkbox"/> | <input type="checkbox"/> The Department of Employment can take care of all my displaced workers’ needs.                                   |
| <input type="checkbox"/> | <input type="checkbox"/> The employment market really hasn’t deteriorated that much, so my displaced employees don’t need any assistance. |
| <input type="checkbox"/> | <input type="checkbox"/> Remaining employees will be unaffected by a layoff.  |
| <input type="checkbox"/> | <input type="checkbox"/> Displaced employees don’t need help in finding new work.   |
| <input type="checkbox"/> | <input type="checkbox"/> After I’ve terminated an employee, my worries are over.  |
| <input type="checkbox"/> | <input type="checkbox"/> Outplacement service is a needless expense.  |

A “True” to any of the above statements may represent a potential concern.

Based on your responses, are you facing some challenges? If you are, you're not alone. The good news is there *are* solutions to these and other outplacement opportunity issues. While some organizations already have all the in-house expertise they need, many don't (or simply don't have the time!). If this is you, we can help. We're CareerMakers, a division of HR Answers that supports organizations who are experiencing downsizing, reorganizing, retention challenges, or having to terminate employees. Our career services make you and your organization look great by providing comprehensive career transition programs that get people moving and give them a lifetime of career help. So, if downsizing, mergers, or terminations are in your future, give us a call. We just may have the ounce of prevention and the support you need!

## THANKSGIVING CHUCKLES

Who isn't hungry at Thanksgiving?

*The turkey—he's already stuffed.*

Why can't you take turkeys to church?

*Because of their fowl language.*

What do hippies put on their turkey?

*Groovy.*

Answers to Test Your HR Knowledge:

1.--D

2.--B

3.--D

4.--B

5.--C

6.--A

7.--D

8.--A

## FOR YOUR CALENDAR

Open up your Daytimers, computer calendars, Palm Pilots, and of course those Blackberries. The following is a look at upcoming events, special days and other diverse and fun activities you will want to be aware of and get scheduled. To register for our workshops, please call any of our offices, send an e-mail to Melissa Sambuceto at [MSambuceto@hranswers.com](mailto:MSambuceto@hranswers.com), or simply register online at [www.hranswers.com](http://www.hranswers.com) and click on the "Workshop Registration" tab at the top of the homepage.

### NOVEMBER

American Diabetes, Epilepsy Awareness, Long-Term Care Awareness, Lung Cancer Awareness, and Peanut Butter Lovers Month.

- Nov. 18 National Memory Screening Day
- Nov. 20 Great American Smokeout
- Nov. 22 Family Volunteer Day
- Nov 23 National Cashew Day
- Nov. 23–29 National Game & Puzzle Week
- Nov. 27-28 Thanksgiving: HRA Offices Will Be Closed**

### DECEMBER

- Dec. 3 HRA Workshop  
Communicating in Difficult Times – Organizational Changes and Restructuring  
HRA Tualatin Office  
7:30am -10:30am**
- Dec. 9 HRA Breakfast Briefing  
ADA Amendments Act for Supervisors  
HRA Tualatin Office  
7:30am – 9:30am**
- Dec. 11 HRA Breakfast Briefing  
ADA Amendments Act for Supervisors  
HRA Tualatin Office  
7:30am – 9:30am**
- Dec. 25-26 Christmas: HRA Offices Will Be Closed**

## ON MY SOAPBOX

It's after the election and no doubt everyone has an opinion on some aspect of the results. People are either elated or sad by the Presidential outcome. There is great curiosity about what is to happen next. CNN continues to report record high viewership as people try to learn what practices and policies might change, who will be selected for critical posts, and how the transition will proceed. There are those who wearied of the election long before it actually occurred, and others who are still hungry for every minute detail.

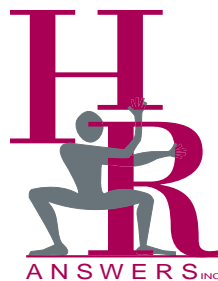
But there are only so many things we can know for sure at this point. The first is that this was an historic event of immense proportion. For someone my age (and I won't say exactly how old that is, but I am old enough to remember the Eisenhower election), this is the culmination of the efforts begun in the turbulent '60s, when race relations moved to the front of the national psyche. My parents attended a Martin Luther King speech held here in Portland and came home raving about this man who challenged everyone's thinking and spoke with great vision and optimism about how America could be. Watching their eyes, listening to their words, and seeing the emotion play across their faces told me this had been a significant experience. I began to watch for every news piece about him and his message. As I got older, and TV coverage became more expansive, I focused on the man, his actions, and his ability to move people to action and belief. His assassination was a blow! To see a man of color ascend to the Presidency is an affirmation of everything King stood for and believed was possible. It marks a passage for America and its people!

The second thing we know is that our new President is in for a rough time. The economy, the wars, the political strife, the need to refresh our spirits after a bruising campaign are likely to weigh heavily upon him. I wonder if there will be a traditional "honeymoon" for our new officeholder. If I had to guess, I would say no. The need for action seems too pressing. I wish him good health and the necessary stamina; and I wonder how long it will be before we see the significant graying of his hair that seems to accompany every new President.

Regardless of your political persuasion, I think it is likely that we agree that President-elect Obama is a smart man. I was interested to read and hear that he was a fan of the Doris Kearns Goodwin's book about Lincoln; and that he was particularly intrigued by the way Lincoln put together his first Cabinet, bringing many of his most vehement opponents into key roles. It was in this way that Lincoln ensured himself that he would have the benefit of a widest range of thinking as he set a course through another tumultuous time. I cannot image how much courage it took to intentionally draw that level of divergence and division into every day of his life, every decision.

Each new day reveals something about what our future is to be. Each day brings us new stories and perspectives of what the Obama presidency will be like. Many of them, I suspect, are pure speculation. But it is sure to be interesting. It is sure to be impactful for each of us. It is sure to be remarkable, because the times and pressures we are currently encountering are remarkable. And I sincerely hope that regardless of our political party or philosophy, regardless of how we voted and who we supported, we are able to unite behind a message of hope and change that is fulfilled for all of us; that the inspired oratory we heard is only the beginning of the next great chapter in the American journey. I have no crystal ball, but I do know that I choose to watch the upcoming events with an open mind and an optimistic point of view.

- Judy Clark, President



"Whatever the Question"

PLEASE FEEL FREE TO VISIT OUR WEBSITE:

[WWW.HRANSWERS.COM](http://WWW.HRANSWERS.COM)