ASAP™ A Littler Mendelson **Time Sensitive** Newsletter

in this issue:

SEPTEMBER 2007

Implementation of the DHS's Final Rule governing Social Security mismatch notices is on hold until at least October 1, after a coalition of organizations obtained a Temporary Restraining Order (TRO) against the DHS and SSA from implementing the Rule. The TRO prevents SSA and DHS from issuing no-match letters linked to SSA's no-match program. Under the Final Rule, notice of such mismatches effectively forced an employer to undertake a 93-day process to reconcile and correct records, terminate employment of such employees or face potential DHS sanctions for employing an unauthorized worker. The TRO proponents raise a number of issues including potential harm to innocent employees, inaccuracy in SSA reconciliation process and challenge the authority of SSA and DHS to create such a Rule.

DHS "No-Match" Rule on Hold After Federal Court Issues Temporary Restraining Order

By GJ Stillson MacDonnell, Bonnie K. Gibson, and Jorge Lopez

The recently issued Department of Homeland Security's (DHS) Final Rule regarding employers' obligations to respond to the Social Security Administration's (SSA) Social Security Number (SSN) mismatch notices was temporarily put on hold. On August 31, the U.S. District Court for the Northern District of California granted a nationwide Temporary Restraining Order (TRO) enjoining the implementation of the Rule, at least until after a hearing scheduled for October 1, 2007 on a preliminary injunction motion (*AFL-CIO v. Chertoff*, No. CV 04472-CRB (N.D. Cal. 2007).

Background

On August 15, 2007, a DHS Final Rule was published in the Federal Register and was scheduled to become effective on September 14, 2007. See Littler's August 2007 ASAP, *DHS Publishes Final "Safe-Harbor" Procedures for Employers Who Receive SSA "No-Match" Letters and DHS Notices* for more details. Under the Rule, plans were for the SSA to include a "Special Notice" from the DHS as part of the standard mismatch correspondence.

Annually, the SSA sends no-match letters to employers whose W-2 wage reports result in more than ten mismatches if those mismatches constitute at least one-half a percent of all W-2 forms filed by that employer in one year. In other words, statistically, the burden of mismatch notices falls more heavily on smaller employers, where 10-25 mismatches are likely to represent a higher proportion of the workforce.

Normally, SSA sends its no-match letters in early summer. In anticipation of DHS finalizing the Rule, SSA held back sending letters relating to 2006 W-2 – SSN - name mismatches pending publication of the Rule, and then, when the Rule was published in August, implemented a process to post 2006 no-match notices beginning around September 4, 2007.

The Legal Challenge

In anticipation of the SSA mailing, the AFL-CIO, other labor groups, and several civil rights organizations (Plaintiffs) sued to block the Rule, alleging that the Rule exceeds DHS's statutory authority and conflicts with existing law. After an August 31 hearing, the court decided that the harm affected employees would suffer if the Rule went into effect outweighed the harm to the government, and entered the TRO. The TRO bars the SSA and DHS from proceeding with their plans to mail the no-match SSA/DHS package pending further order by the court. Although the SSA is not barred by the TRO from sending "ordinary" no match correspondence - without reference to the DHS Rule - it so far has not announced plans to do so.

Within days of the court's entry of the TRO, the DHS and SSA sought to an expedited hearing on the preliminary injunction claiming that, among other things, that delay would be burdensome on the SSA's staff as it would necessarily increase the volume of notices sent within a shorter period of time, making it difficult for the SSA to respond within the Rule's 90-day window. The challengers argued that the SSA had not been required to delay its 2006 notices to accommodate the DHS, and that any administrative hardship was the result of its own business decisions. Indeed, the SSA did not distinguish itself in its opposition, particularly given that the jam it finds itself in now—with the long-delayed 2006 no-match letters still sitting in queue - would have been avoided had the SSA convinced the DHS not to try to piggy-back on this current year's letters, and waited to collaborate until

after the DHS Rule actually became effective. The court agreed with the Plaintiffs' position and stuck to its briefing schedule and the calendared October 1, 2007 hearing, thus further barring implementation of the Rule.

On September 7, a coalition of employer organizations, including the U.S. and San Francisco Chambers of Commerce, as well as trade organizations representing restaurants, roofing, nursery and landscaping, produce and franchising industries, filed a motion to intervene in the AFL-CIO lawsuit, on the side of the challengers. As of this writing, the court has not decided whether to allow intervention, but neither the government nor the challengers have objected to their intervention. A hearing is scheduled for September 14th on the motion to intervene. Since the proposed intervenors did not ask for a modified briefing schedule, we anticipate that the court will allow them to join in the action.

Initial Issues Confronting the Court

Among the more interesting claims in the Plaintiffs' complaint are allegations that:

- General Accountability Office (GAO) recently found that, although there is a high rate of mismatched SSA records (approximately 4% according to GAO), there is not as strong a correlation between mismatches and immigration status as DHS contends because most issues arise with U.S.-born or work-authorized non-citizens;
- Congress under IRCA expressly limited an employer's obligations to verify work authorization status only at the time of initial hire and specifically "grandfathered" from the I-9 hiring process persons continually employed since before November 6, 1986;
- the SSA no-match letter process is authorized only as a mechanism for ensuring the correct crediting of wages for social security benefit purposes – and not immigration enforcement; and
- the Rule effectively expands the statutory definition of "knowing" employment by imparting knowledge from evidence that does not fairly support the inferences, nonetheless forcing employers' hands because of their fear of facing civil and criminal penalties.

Intervenors' Claims

The business-oriented intervenors (Intervenors) raise a variety of issues, some overlapping with those discussed above. Most interesting is their assertion that when the proposed Rule was published for comment in 2006, the DHS certified that the Rule would not have a significant economic impact on a small business, a certification required under the Regulatory Flexibility Act. The Intervenors argue that the Rule will require them to spend increased personnel resources and will cause lost productivity (because employees will need to take time off to deal with the SSA) and impose increased unemployment insurance premium costs (most employers will choose to terminate employees with unreconciled names/SSN at the end of 93-day time period in the Rule, and in most states, these workers will qualify for unemployment insurance benefits). Another issue raised by the Intervenors is that the DHS's pronouncements that assure employers who terminate employees for failing to resolve a SSN mismatch will be safe from discrimination claims is misleading. Although the DHS is careful to limit its self-ordained discrimination "safe haven" to claims for national origin (including document discrimination) under the Immigration Control and Reform Act (ICRA), this limitation is likely not well understood. The DHS has no authority to bind other agencies of the government, including the Department of Justice, the EEOC or NLRB from pursing discrimination claims where facts warrant. Moreover, the DHS does not address claims for violation of state and federal antidiscrimination laws other than IRCA. Such claims are certainly not barred by a defense of adherence to the DHS Rule. Finally, the Intervenors claim that, based on the steps required by the Rule, it is unrealistic to expect that mismatches will be resolved within the time frames provided under the Rule. Consequently, they claim, the DHS's failure to perform a Regulatory Flexibility Analysis will cause such small entities "imminent and irreparable injury" if the Rule becomes effective.

Where Do We Go from Here?

Although it is technically possible for the government to ask the Ninth Circuit to dissolve the TRO, the odds against a reversal are strong. Perhaps this latest legal blow to enforcement efforts under existing law will revive congressional interest in a solution, but it is unlikely that any legislative action will occur in the foreseeable future. For now, the employer community must await the showdown between the government and the business-labor-civil rights alliance.

The court's decision to issue a TRO does not prove that the AFL-CIO challenge necessarily has merit, as the court remarked "Plaintiffs have demonstrated that the balance of harms tips sharply in favor of a stay based Plaintiffs' showing that they would suffer irreparable harm if the Rule is implemented, while Defendants [DHS, SSA] would suffer significantly less harm from a delay in the implementation of the rule pending consideration of the Plaintiffs' claims." Whether the arguments against the Rule will ultimately carry the day is not yet clear. However, it is likely that the court will not resolve the matter at the October 1, 2007 hearing, but rather will take some time to deliberate and draft a written opinion before ruling. This may force the SSA to make a decision about when and how to send 2006 mismatch notices and whether to decouple them from the Rule.

While many of the arguments raised by the Plaintiffs and Intervenors appear convincing, one cannot overlook the sway the DHS may have on the judiciary. This dispute could wage on in appellate courts for years. In the meantime, October 1 is approaching, and there remains a possibility that the Rule will become effective. Employers should continue to familiarize themselves with the DHS Rule and consider establishing a plan for acting on future no-match letters in the event the courts permit the implantation of the DHS's Rule. Developments in this area will continue to be monitored.

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