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Federal court enjoins DHS Rule regarding the use of SSN no-match letters - what an employer should know and do.

Federal Court "Ices" DHS's No-Match SSN Rule

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On October 10, 2007, the U.S. District Court for the Northern District of California ruled that the "Social Security No-Match Safe Harbor" regulations ("Final Rule"), published by the Department of Homeland Security (DHS) in August 2007, may have serious legal defects. Accordingly, the court entered a preliminary injunction enjoining the DHS from enforcing the regulations, replacing an August 31, 2007, temporary restraining order and effectively barring the government from publishing mismatch notices under the Final Rule for the foreseeable future. Absent intervention by a higher court, this injunction in AFL-CIO v. Chertoff indefinitely puts on hold the DHS Final Rule.

The Final Rule, now enjoined, provided employers a "safe harbor" from immigration fines and penalties based upon receipt of no-match letters. (For a detailed discussion of the procedures contemplated by the Final Rule, see Littler's August 2007 ASAP, *DHS Publishes Final "Safe-Harbor" Procedures for Employers Who Receive SSA "No-Match" Letters and DHS Notices*.) But, before the Final Rule became effective, labor and civil rights organizations challenged it in court and sought to prevent the DHS from implementing the Rule. (See Littler's September 2007 ASAP *DHS "No-Match" Rule on Hold After Federal Court Issues Temporary Restraining Order*.)

The court's October 10 opinion and October 15 order, explaining its rationale for issuing the preliminary injunction against the Final Rule, strongly suggests that the Final Rule is riddled with legal infirmities—likely making it unenforceable as drafted. Unfortunately, however, this decision provides no roadmap for employers trying to square their non-discrimination obligations with their immigration law responsibility not to knowingly employ undocumented workers. On the one hand, the court did find that the plaintiffs "... demonstrated that they will be irreparably harmed if the DHS is permitted to enforce the new rule," based on the following serious questions:

- The Rule may be arbitrary and capricious because the DHS failed to supply a reasoned analysis of the DHS's "new" position that a no-SSN match letter is sufficient, by itself, to put an employer on notice of an employee's unauthorized status.
- The DHS may have exceeded its authority by offering employers safe harbor from government discrimination claims so long as they followed the procedures outlined in the Final Rule.
- The DHS appears to have violated the Regulatory Flexibility Act by not conducting a final flexibility analysis concerning the impact of the Final Rule on small businesses before implementing the Rule.

On the other hand, the court rejected the plaintiff unions' contention that no-match letters are sufficiently unreliable to make them irrelevant to the analysis of an employee's work status:

> [C]onstructive knowledge depends 'on the totality of relevant circumstances [citation omitted.]' Depending on the circumstances, a court may agree with plaintiffs that receipt of a no-match letter has not put an employer on notice that his

> employee is likely to be unauthorized. But this court cannot agree with plaintiffs' fundamental premise that a no-match letter can never trigger constructive knowledge. (Emphasis in original opinion.)

In other words, the Final Rule may never become law, but in the wake of this decision, employers are no freer to disregard future no-match notices than they ever were. This decision merely restores the very murky status quo.

What Will the Government Do Next?

The DHS has 30 days to appeal the issuance of the order granting the preliminary injunction or otherwise seek relief in the Ninth Circuit Court of Appeals. Alternatively, in light of the court's recitation of the many legal infirmities in the Final Rule, the DHS could decide an administrative "do over" would be a more effective way to achieve its goal of increased worksite enforcement. If the DHS does appeal, it is not likely that the injunction will be disturbed during the appellate process, meaning that the current administration will likely end before the status of the Final Rule is resolved. Revised rule making that meets the objections raised in the lawsuit, both practical and legal, seems better calculated to serve the national interest in immigration enforcement and has the collateral benefit of providing much-needed benchmarks for employers who want to act in good faith, without fear of discrimination or wrongful discharge challenges.

The Social Security Administration (SSA) itself appears to be the real loser in this battle. The SSA hitched its no-match letter program to the DHS's overreaching regulations and now, as a result, has substantially derailed its no-match letter program for 2006 W-2 forms. The SSA abandoned its normal schedule for sending no-match notices and has now backed its 2006 work up against the upcoming 2007 W-2 busy season. The SSA elected to author a "new and improved" no-match letter package that not only was to include a notice from DHS about the Final Rule but also that made reference to immigration obligations in the SSA's own letter. The SSA now must decide whether to proceed with redrafting and repacking its 2006 no-match posting of some 140,000 employer letters. Because there are billions of dollars in the no-match "suspense account" that the SSA must attend to, we anticipate that the agency will ultimately send "regular" no-match notices for 2006 wage reports before the end of 2007. But, in the event DHS does repackage its regulations, the SSA may be reluctant to tie itself to DHS promulgations in future years.

What Does the Court's Decision Mean to Employers?

DHS contends that the court's decision in *AFL-CIO v. Chertoff* will not block its attempt to enforce U.S. immigration laws. In fact, DHS Secretary Chertoff, in response to the decision, emphasized that *"The key is to move forward. We're committed to using every tool available to enforce our immigration laws."* We read this message to mean that employers are not off the hook if they ignore mismatch information, and DHS may yet seek to use SSA mismatch notices as an enforcement tool. In fact, SSA is on record that it is able to republish its 2006 notices without reference to the Final Rule or immigration penalties and post notices for mailing within 30 days. This is in full keeping with the court decision: *"[E]ven if a preliminary injunction is granted, SSA should be able to coordinate a mailing well before the peak workload season."* In addition, recent anecdotal evidence suggests that — as we predicted earlier (see *DHS Publishes Final "Safe-Harbor" Procedures for Employers Who Receive SSA "No-Match" Letters and DHS Notices*) - the IRS will exercise its existing authority to mandate that employers maximize income tax withholding from employees with unresolved no-match situations.

Accordingly, the following steps are worth careful consideration:

- Conduct I-9 audits to be sure that every employee has a complete I-9 showing current work authorization;
- Train I-9 staff;
- Develop protocols for prompt response to IRS withholding letters;
- Adopt policies now to guide response to future SSA no-match letters;
- Consider implementing E-Verify or similar programs for new hires;
- Treat future no-match notices carefully and investigate whether the no match relates to the employee's I-9 work authorization documentation;

Most importantly, do not be lulled into thinking that *AFL-CIO v. Chertoff* was a slam dunk win for employers!

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