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

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With the end of the year approaching some government agencies have been busy. The DHS has appealed to the Ninth Circuit the grant of a preliminary injunction staying the agencies social security number no-match safe harbor regulations. The SSA has decided to forgo sending no-match letters for 2006 this year, and the USCIS now mandates that employers begin using the new I-9 verification form by December 26, 2007.

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DHS Appeals No-Match Preliminary Injunction, SSA Forgoes No-Match Letters for 2006, and Updated I-9 Form Must Be Used Beginning December 26, 2007

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

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, published by Department of Homeland Security (DHS), (DHS Publishes Final "Safe-Harbor" Procedures for Employers Who Receive SSA "No-Match" Letters and DHS Notices) has serious defects [Federal Court "Ices" DHS's No-Match SSN Rule] and a preliminary injunction was issued.

The Social Security Administration (SSA), whose annual no-match letter forms had been altered to reflect the Rule subsequently announced that it would not send no-match letters in 2007 reflecting issues with 2006 W-2's but rather would resume its letter program in 2008.

On November 23, the DHS moved to stay further proceedings before the federal district court while it proceeded with supplemental rulemaking that would hopefully satisfy the Judge's concerns, while indicating its disagreement with the Judge's decision. On November 23rd, the DHS filed a motion to stay the current district court proceedings until March 28, 2008, or until an amended final rule is issued, whichever occurred first. The plaintiffs did not oppose this action. A hearing on the motion is scheduled for December 28.

On November 24 in a combined press release issued by the ACLU, AFL-CIO, and NILC, these labor orientated plaintiffs effectively declared victory over the DHS. On November 26, notice was published by the DHS to advise all employers that they must transition to a revised I-9 form by December 26, 2007. In a letter appearing to be primarily reactive to the plaintiff's November 24th press release, the Department of Justice took issue with the plaintiff's media release and filed a notice of appeal with the Ninth Circuit seeking a review of the preliminary injunction.

Where Are We Now?

The DHS is attempting to revive its Rule, with revisions, which are expected by March 2008. However, the preliminary injunction, based upon the speed by which the Ninth Circuit usually reacts to such appeals, is not likely to be acted upon before March. The plaintiffs who had very skillfully and successfully processed the preliminary injunction, have seen their braggadocio spur an avoidable appeal. In the interim, the Rule remains "suspended," and it remains to be seen what form any revised Rule will take, particularly given the pending presidential election season beginning to make tallies within the next 30 days. As of December 26, 2007 all employers must begin using the revised I-9 form. Until December 26, the employer may use either the new or the former form.

What Does the Revised I-9 Require?

The U.S. Citizenship and Immigration Services (USCIS) published a notice in the Federal Register that employers must transition to using the revised Employment Eligibility Verification Form I-9 no later than December 26, 2007. In

line with the November 7, 2007, USCIS press release, employers have been given a 30-day grace period from publication of the notice to transition to the new I 9 form. Employers that do not transition to the revised form by December 26, 2007 will be subject to penalties.

The changes to the I-9 are minor and include: (1) confirming existing guidance that the employee need not include his/her social security number in section 1 of the I-9, unless the employer is participating in the E-Verify (formerly "Basic Pilot") program; and (2) reducing the number of "List A" documents that can suffice in Section 2 to establish both identity and employment eligibility. The documents that were removed from List A lacked security features that deter counterfeiting, tampering, and fraud. Removed from List A are the following documents:

- Certificate of U.S. Citizenship (N 560 or N 570)
- Certificate of Naturalization (N 550 or N 570)
- Alien Registration Receipt Card (1 151)4
- Unexpired Reentry Permit (1 327)5
- Unexpired Refugee Travel Document (1 571)

Added to List A is the most recent version of the Employment Authorization Document (EAD) (I 766). The revised List A now consists of the following documents:

- U.S. Passport (unexpired or expired)
- Permanent Resident Card (I 551)
- Unexpired foreign passport with a temporary I 551 stamp
- Unexpired Employment Authorization Document that contains a photograph
- Unexpired foreign passport with an unexpired Arrival Departure Record (I 94) for nonimmigrant aliens authorized to work for a specific employer

It is important to note that the Employer Handbook (M-274) has also been modified. Two modifications are of note. First, the handbook clarifies existing guidance that makes clear that employees are not required to provide their social security number in Section 1 of the I-9, except if the employer is enrolled in the E-Verify program. Another interesting modification relates to employees holding temporary work status "Employment Authorization Documents" and have filed for extensions of temporary employment authorization and the government has not acted on the request after 90 days. The new handbook suggests that in that case, the USCIS will allow the employee to remain employed after expiration of the temporary permit. Specifically, "...the employee will be authorized for employment on form I-766 for a period not to exceed 240 days." But other parts of the handbook are not so clear that this is allowed. Until there is clarification, each situation will have to be reviewed individually to determine whether continued employment is permitted.

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