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

in this issue:

MARCH 2008

The DHS published on March 21, 2008 a Supplemental Proposed Rulemaking on the No-Match Rule in an effort to overcome objections raised by a federal court in enjoining implementation of the August 2007 No-Match Rule.

# DHS Circles the Wagons and Refuses to Budge on No-Match Rule

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The Department of Homeland Security (DHS) released a Supplemental Proposed Rule on March 21, 2008, and published it in the Federal Register, reissuing its "No-Match Letter" guidance. A prior final rule was published on August 15, 2007, but a federal court enjoined implementation of the rule in October 2007. The litigation has been stayed awaiting DHS's supplemental rulemaking. The substance of the rule remains the same; DHS has attempted only to clarify the intent and impact of the prior rule.

## Overview – Litigation

In August 2007, DHS issued a final rule, providing that the receipt of a Social Security Administration (SSA) no-match letter can be evidence that the employer has constructive knowledge that an employee lacks work authorization. (See Littler's August 2007 ASAP, *DHS Publishes Final "Safe-Harbor" Procedures for Employers Who Receive SSA "No-Match" Letters and DHS Notices.*) The August final rule created safe-harbor procedures that the employer was to follow in order to avoid liability for continuing employment violations.

Last spring, at DHS's request, SSA held back its annual no-match letters (for 2007, letters would be based on 2006 W-2 returns). After the rule was issued in August 2007, SSA planned to send out the 2007 letters beginning in early September 2007. Labor and civil rights organizations and, later, certain trade and employer groups sought and obtained a temporary restraining order against enforcement of the rule. In October 2007, the U.S. District Court for the Northern District of California enjoined DHS from enforcing the rule, finding deficiencies based on: (1) DHS's failure to supply a reasoned analysis of its apparently "new" position regarding use of SSA's no-match process; (2) DHS's position that compliance with the rule provided a safe harbor from a government discrimination claim; and (3) DHS's failure to conduct a "regulatory flexibility analysis" regarding the impact of the rule on small business. (See Littler's October 2007 National ASAP, *Federal Court "Ices" DHS's No-Match SSN Rule*.)

In November 2007, DHS moved to stay further proceedings in the district court, while appealing to the Ninth Circuit. DHS provided notice that it would address the court's concerns through supplemental materials. DHS filed a motion to stay the proceedings until a scheduled March 28, 2008 status conference or until an amended final rule issued, whichever occurred first. On March 25, 2008, in light of the Supplemental Rulemaking and the anticipated comment and review period, DHS moved (apparently unopposed) for the status conference to be delayed until June 20, 2008. In effect, this delay further postpones the implementation date of the rule and potentially further delays the issuance of SSA no-match letters for 2007 W-2 reports.

## Overview of the Rule

The August 2007 rule refined the definition of "constructive knowledge" and set forth procedures for employers to follow upon receipt of a no-match letter.

Upon receipt of a SSA no-match letter, an employer and employee have 90 days to "correct" the mismatch. If not corrected, the DHS safe-harbor rule requires the execution of a new I-9 form by the employee within three days. If that cannot be done, the employee must be terminated or the employer risks higher penalties and possible criminal liability.

Those commenting on or challenging the rule were critical of: (1) the practical impossibility of resolving mismatches under such a rigorous schedule; (2) DHS's undue reliance on the underlying accuracy of the SSA matching process; (3) use of SSA to promulgate DHS's notice to employers; (4) the significant cost in time and staffing to employers; and (5) application of the rule to employees hired prior to the effective date of the Immigration Reform and Control Act (IRCA), which is November 6, 1986.

## DHS's Supplemental Rulemaking

In the March 2008 Supplemental Rulemaking, DHS did not respond with a wholesale amendment of the rule, but instead addressed only the three concerns that the federal court identified in its original ruling. DHS did, however, clarify two aspects of the safe-harbor procedure. First, the rule states that the requirement for employers to "promptly" notify employees identified in SSA or DHS letters will be satisfied if an employer notifies the employee within five business days of its internal review (which must occur within 30 days of receipt of the letter). Second, DHS states that the rule does not apply to employees identified in SSA or DHS letters who were hired before November 6, 1986, since the laws establishing sanctions for employing unauthorized workers do not apply to these employees.

To address the court's first concern regarding a change in agency policy, DHS reviewed the informal guidance it had provided in the past and concluded that it had consistently held that "employers cannot turn a blind eye to SSA no-match letters," although receipt of a no-match letter alone was not necessarily cause to re-verify the employee's I-9 form. DHS states that the current rule is an attempt to provide clear and comprehensive guidance to employers regarding specific actions they may take upon receipt of a no-match letter. Further, in the event that the new rule is still considered a change in agency policy, DHS takes the position that this change is justified by the need to eliminate the ambiguity caused by the previous guidance.

The federal court's second concern with the prior rule, regarding a safe harbor from discrimination laws, was based on DHS's statement in the preamble that employers who uniformly and without regard to national origin or citizenship status took the steps outlined in the rule would not be found to have engaged in unlawful discrimination. The court viewed this as an interpretation of anti-discriminations laws, which fall under the authority of the DOJ, not DHS. To address this concern, DHS completely removed this statement from the regulation. Instead, DHS directs employers to contact the DOJ Office of Special Counsel to obtain guidance regarding how the actions outlined in the rule affect employers' anti-discrimination obligations. Separately, the Office of Special Counsel published guidance on March 24, 2008 confirming that employers who follow the rule consistently and uniformly with respect to all persons named in the no-match letter would not run afoul of IRCA's anti-discrimination provisions.

Finally, the federal court determined that the rule was a mandate for employers rather than a voluntary safe-harbor procedure, creating new compliance obligations for employers that would likely result in significant costs for small businesses. As a result, DHS was required under administrative rulemaking laws to conduct a "regulatory flexibility analysis." DHS provided the analysis in the Supplemental Proposed Rule, but stated that it disagrees with the federal court's determination and provides the analysis solely to expedite implementation of the rule. DHS conducted an economic analysis of the costs that may result from compliance with the rule and determined that the costs are attributable to the requirement already existing in the Immigration and Nationality Act prohibiting companies from employing unauthorized workers.

## Where Are We Now?

In the Supplemental Proposed Rulemaking, DHS provides for a 30-day period to accept comments and thereafter a 60-day review period to consider such comments. DHS is seeking postponement of district court action pending this 90-day period.

Aside from the "clarifications" discussed above, DHS remains determined to implement a final safe-harbor rule. More importantly, DHS continues its aggressive efforts to enforce immigration law, using all tools at its disposal. Since DHS continues to assert that employment is the "magnet" drawing illegal aliens to the United States, employers will continue to bear the brunt of enforcement.

## What Should Employers Do Now?

The following steps are worthy of 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, treat future no-match notices carefully, and investigate whether the social security number relates to the employee's I-9 work authorization documentation;
- Consider implementing programs to verify SSNs for new hires; and
- Monitor future developments. .

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