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The Ninth Circuit ruled that receipt of a no-match letter, without more, is not "constructive knowledge" that an employee is undocumented, reinstating and awarding backpay to 33 employees terminated for failure to resolve no-match letters.

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Global Edition

A Littler Mendelson Newsletter specifically for the Global Industry

Employer Ordered to Reinstate Employees Who Were Terminated Based Solely on the Employees' Failure to Resolve "No-Match" Letters

By Hans Tor Christensen and Jennifer L. Mora

It has been a busy 12 months for employment-related immigration issues. Employers have watched as the Department of Homeland Security (DHS) announced safe harbor rules to guide employers upon receipt of no-match letters from the Social Security Administration (SSA), a California federal district court prohibited the implementation of those rules, and, finally, DHS recently re-issued the rules to comply with the district court's ruling. Just when it appeared that some clarity may be arising from the confusion, however, employers must now consider how to respond to the U.S. Court of Appeals for the Ninth Circuit's decision in *Aramark Facility Services v. Service Employees Int'l Union Local 1877*, No. 06-56662, 2008 U.S. App. LEXIS 12704 (9th Cir. June 16, 2008). That decision raises the stakes for all employers, especially unionized employers.

Prior to the Ninth Circuit's holding in *Aramark*, employers who took no action in light of no-match letters faced the possibility of criminal and civil penalties under federal immigration laws, which were written, in part, to encourage employers to terminate those employees not legally authorized to work in the United States. However, at least pending further judicial analysis of DHS' safe harbor provisions, the holding in *Aramark* may place employers in an awkward legal position. At least in the Ninth Circuit, employers who receive no-match letters may be forced to reinstate terminated employees with full back pay if the employer did not afford employees enough time to resolve their no-match letters, but they also face the possibility of civil and criminal penalties if the employees are given too much time.

Social Security No-Match Letters and the Current State of the No-Match Safe Harbor Rules

The SSA uses earnings information in an employee's W-2 for the purpose of determining whether the employee is entitled to Social Security benefits and, if so, the amount to which the employee is entitled.[1] If an employee's name and social security number listed on the W-2 form do not match the SSA's records, the agency is unable to attribute the earnings in the W-2 to the employee.[2] When this occurs, the SSA will send a "no-match"' letter to the employer, which states that the information received from the employer does not match SSA records and directs the employer "to obtain corrected information to help SSA identify the individual to whom the earnings belong so that the earnings can be posted to the individual's earnings record."[3]

In August 2007, DHS issued a final rule, which provided that an employer's receipt of a no-match letter from the SSA can represent constructive knowledge that an employee does not have appropriate authorization to work in the U.S. See Littler's August 2007 ASAP, *DHS Publishes Final "Safe-Harbor" Procedures for Employers Who Receive SSA "No-Match" Letters and DHS Notices*. The final rule also created safe-harbor mechanisms for employers to follow upon receipt of a no-match letter in order to avoid liability for continuing to employ the individual in question. Under the rule, upon receiving a no-match letter, an employer and an employee were given 90 days to "correct" the mismatch. The rule further provided that if the mismatch is not corrected, the

employee has three days to complete a new I-9 form; otherwise the employer is required to either terminate the employee or risk penalties, including criminal liability.

In October 2007, the U.S. District Court for the Northern District of California issued an order prohibiting DHS from enforcing the no-match rule after certain labor and civil rights organizations, followed by certain trade and employer associations, requested an injunction. See Littler's October 2007 National ASAP, *Federal Court "Ices" DHS' No-Match SSN Rule*. However, that litigation is currently stayed pending the district court's potential approval of DHS' decision on March 21, 2008 to issue a Supplemental Proposed Rule and to re-issue its earlier guidance on the no-match letters. Although the substance of the rule remains unchanged, DHS' purpose in issuing the supplemental rule was to clarify the intent and the impact of the prior rule in an attempt to diffuse the district court's concerns. See Littler's March 2008 National ASAP, *DHS Circles the Wagons and Refuses to Budge on No-Match Rule*. In short, the safe harbor rule is on hold pending a further ruling by the California district court.

Aramark Terminated Employees Who Failed to Resolve Discrepancies in No-Match Letters

In early 2003, several years before DHS issued its final rule, the SSA sent letters to Aramark Facilities Services notifying the company that the social security numbers for approximately 3,300 employees nationwide did not match those in the SSA's records. In response, Aramark directed its regional managers to verify that the information provided to the SSA matched the information that the employees had provided to the company. If the information did not match, the employees were required to take corrective steps to resolve the discrepancies.

In April 2003, 48 Aramark employees working at the Staples Center in Los Angeles received notice of the mismatch and were told to: (1) visit the SSA office to correct the discrepancy; and (2) provide Aramark with either a new social security card or verification that a new card was being processed. According to the notice, the employees had three working days to provide the requested documentation; otherwise, they would be terminated. The Service Employees International Union (SEIU), a labor organization that represented the employees, requested an extension of time for its employees to comply with Aramark's requirement. They based this request on the belief that the three-day deadline for responding was "too onerous" on employees. Aramark denied this request. Ultimately, only 15 employees obtained the requested documentation in time and continued to work. The remaining 33 employees were terminated, but Aramark notified all of them that they would be rehired upon supplying the required documentation.

SEIU filed a grievance on behalf of the terminated employees, claiming that they had been terminated without just cause in violation of SEIU's collective bargaining agreement with Aramark. Because the just cause standard modifies the general principle of "at will" employment, an employer that terminates an employee subject to a just cause provision in a labor agreement has the burden of justifying the discharge. Here, the arbitrator agreed with SEIU that just cause did not exist to terminate the employees and found that Aramark had failed to present "convincing information" that any of the terminated employees were undocumented workers. As a result, the arbitrator reinstated the employees and awarded them backpay.

Aramark filed a complaint in federal court seeking to vacate the arbitrator's award. At the same time, SEIU filed a counterclaim requesting that the district court confirm the award. Ultimately, the district court agreed with Aramark and set aside the arbitrator's award. According to the district court, Aramark had just cause to terminate the 33 employees because the "employees failed to indicate that they were beginning the process of correcting the SSN mismatch." Therefore, Aramark had "constructive notice" that the employees were not eligible to work in the United States. As a result, the district court held that the arbitrator's award of reinstatement and backpay could not stand as it "violated public policy because it would require Aramark to violate the immigration laws."

The Ninth Circuit Holds That Receipt of a No-Match Letter, Without More, Is Not "Constructive Knowledge" that an Employee Is Undocumented

After SEIU appealed the district court's decision to vacate the arbitrator's award, the Ninth Circuit categorically disagreed with Aramark and upheld the arbitrator's original award, which reinstated the employees and awarded them over five years worth of backpay. Because the Ninth Circuit was faced with deciding whether to vacate or confirm an arbitrator's award, it set the stage for its discussion by noting the well-settled rule that although review of an arbitrator's decision is "extremely narrow," the decision may be set aside if the award violates public policy. The Ninth Circuit then agreed with Aramark that compliance with the nation's immigration laws constituted a "sufficiently explicit, well-defined, and dominant public policy." However, the court then rejected Aramark's contention that the arbitrator's award of reinstatement and backpay violated this public policy.

The Immigration Reform and Control Act of 1986 (IRCA) subjects employers to civil and criminal liability if they knowingly employ undocumented workers or if they have "constructive knowledge" of a worker's undocumented status. The Ninth Circuit agreed that the arbitrator's award would contradict the policies articulated in the IRCA if reinstatement would result in Aramark "knowingly" reinstating undocumented workers. However, given the fact that Aramark failed to present any evidence that it had actual knowledge that any of the employees were undocumented, the focus of the court's analysis centered on whether Aramark had "constructive knowledge" of this fact. As noted, Aramark's only evidence that the 33 employees may have been undocumented rested solely on Aramark's receipt of the no-match letters and the employees' failure to correct the discrepancies within the short time allowed by Aramark. Faced with these limited facts, the Ninth Circuit disagreed that Aramark had constructive knowledge of the employees' undocumented status and rejected Aramark's argument that reinstating the employees would violate the IRCA's policy against employing undocumented workers.

The IRCA's regulations define "constructive knowledge" as "knowledge that may be fairly inferred through notice of certain facts and circumstances that would lead a person, through the exercise of reasonable care, to know about a certain condition."4 Aramark argued that it had constructive knowledge of the employees' undocumented status given its receipt of the

no-match letters along with the employees' response (or lack thereof) when Aramark directed them to correct the discrepancy. Noting that the IRCA "prohibits the hiring of an alien 'knowing the alien is an unauthorized alien,'" the court disagreed with Aramark.

In holding that the no-match letters alone could not support a finding of constructive knowledge of an employee's undocumented status, the Ninth Circuit noted that the underlying purpose behind the SSA's no-match letters "is not immigration-related," but rather is simply to provide notice that the employee's earnings are not being properly credited for social security purposes. The court further added that a no-match letter could result from a number of issues, including a typographical error, a name change, inaccurate or incomplete employer records, or "compound last names prevalent in immigrant communities." As a result, the court reasoned that a discrepancy between information in a W-2 and the SSA's records "does not automatically mean that an employee is undocumented or lacks proper work authorization." In fact, the SSA notifies employers in no-match letters that the information provided in the letters is not designed to pass judgment on an employee's immigration status and "is not a basis, in and of itself, to take any adverse action against the employee." The court also cited to a statement from the Office of Special Counsel of Immigration-Related Practices that "[a] no match does not mean that an individual is undocumented" and that employers should not rely on the mere receipt of a no-match letter "as the reason for taking any adverse employment action against any employee."

The court then turned to Aramark's argument that the employees' failure to respond to the discrepancy provided Aramark with constructive knowledge of their undocumented status. The court disagreed, given what it characterized as Aramark's "extremely demanding policy" that employees resolve the discrepancy within three days, which the court found was simply too short a period of time for a worker to gather the documents necessary to correct a mismatch. Moreover, in the absence of any "convincing information" of immigration violations, the court held that it was improper for the district court to draw negative inferences against any given employee due to his or her failure to correct the discrepancy within a certain period of time.

As the Ninth Circuit stated, the SSA does not intend for a no-match letter to contain "positive information" of immigration status. Instead, the primary purpose of the no-match letter is to state that an employer's earnings are not being credited properly for social security purposes. As the court recognized, one explanation for the mismatch could be "fraudulent SSNs," but a fraudulent social security number is not the only explanation for a mismatch. Rather, the no-match letter could be the result of a number of other issues that can be explained or corrected. Without any other evidence to suggest that the employees were unauthorized to work in the United States, the court agreed with the arbitrator that Aramark did not have constructive knowledge of immigration violations and, therefore, did not have just cause to terminate the employees under the collective bargaining agreement.

Implications for Employers

The Ninth Circuit in *Aramark* did not provide any guidance – other than exercising additional patience – as to what the company could have done differently to avoid the substantial monetary liability that was ultimately imposed, while at the same time avoiding criminal and civil penalties for employing undocumented workers. Moreover, although the safe harbor provisions in DHS' final rules were implemented several years after Aramark received the no-match letters at issue in the Ninth Circuit's decision, those same rules do not provide employers with much, if any, guidance as to what facts and circumstances will be enough to qualify as "constructive knowledge" under existing immigration laws. Regardless, there are many lessons to be learned from the court's ruling, and the current state of DHS' final and supplemental rules:

- Employers that receive a no-match letter should allow employees a reasonable period of time to correct the mismatch and not terminate employees based solely upon the receipt of the no-match letter. A reasonable time period is approximately 90 days, using the DHS rule as guidance.
- Employers with unionized workforces should consider the use of E-Verify to determine immigration status, allowing for clearer evidence of potential non-legal status and termination during any probationary period that exists.
- Employers should respond rationally and in measured fashion to no-match situations, including providing time to respond and assessing whatever information the employees in question provide.
- Employers should conduct I-9 audits to ensure that all employees have submitted a proper I-9 form and that human resources staff are properly trained on I-9 verification.
- Employers should put procedures and protocols into place before the receipt of the first no-match letter, so that they are prepared to respond quickly if and when a letter is received.
- Employers should monitor future developments with DHS' safe harbor program. Additional judicial analysis of those rules will occur.
- Employers should seek counsel before discharging an employee under the immigration laws, particularly if a labor agreement is in place or if the events occur in California or other states in the Ninth Circuit.

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[1] Social Security Administration, *Overview of Social Security Employer No-Match Letters Process, available at* http://www.ssa.gov/legislation/nomatch.2.htm.
[2] Id.
[3] Id.
[4] 8 C.F.R. § 274a.1(l).