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DHS to Publish Final Supplemental No-Match Rule

By David C. Whitlock

The Department of Homeland Security (DHS) announced that it will publish a supplemental final No-Match Safe Harbor regulation that sets forth the same safe-harbor procedures contained in the August 2007 regulation enjoined by the U.S. District Court for the Northern District of California. It is the position of DHS that the preliminary injunction does not prohibit further rulemaking. The DHS asserts that it has fully addressed the court's concerns about the implementation of the 2007 rule. The final rule takes effect immediately upon publication in the Federal Register.

The Department of Homeland Security (DHS) has released an advance copy of the Final Supplemental No-Match rule. It is not surprising that the substance of the rule, and the safe harbor procedure set forth therein, have not changed substantively from the August 2007 No-Match Safe Harbor rule.

In the preamble to the final rule, the DHS clarified two additional points. First, the DHS will not impute constructive knowledge to employers who become aware of individualized correspondence from the Social Security Administration (SSA) to a worker seeking to confirm that worker's earnings. This correspondence, known as a DECOR letter, will not trigger liability or the safe-harbor procedure. Instead, only the employer no-match letter, known as an EDCOR letter, could create constructive knowledge and the risk of liability; albeit, minimally, a highly disfavorable factor in an ICE investigation. Second, the DHS clarified that an employer will not be liable if it does not take action with respect to a "grandfathered" employee listed in no-match correspondence. Employees hired before enactment of the Immigration Reform and Control Act on November 6, 1986 are not covered by the law and this regulation.

This rule's long and checkered history began in June 2006 when the DHS issued a proposed regulation creating a safe harbor process for employers that receive "no-match" correspondence from the SSA or a "suspect document" notice from the DHS. The "notice and comment" period closed in August 2006, and the DHS began to analyze over 5000 comments.

Further action on the rule was delayed while Congress considered and rejected

comprehensive immigration reform legislation in the Spring of 2007. On August 15, 2007, the DHS published a final rule creating the safe harbor. On August 29, 2007, the AFL-CIO brought suit in the Northern District of California seeking to block the rule. Two days later, the federal district court issued a temporary restraining order preventing the SSA from sending out no-match correspondence and preventing the DHS from enforcing the rule. On October 10, 2007, the court granted a preliminary injunction to the same effect and issued an order criticizing the DHS rule.

The order found three flaws in the DHS regulatory process: (1) the DHS failed to provide a "reasoned analysis" for its apparent departure from prior policy and procedure; (2) the DHS exceeded its authority and encroached upon the jurisdiction of the Department of Justice (DOJ) by attempting to interpret the antidiscrimination provisions of the law, which are interpreted and enforced by the DOJ's Office of Special Counsel for Immigration-Related Unfair Employment Practices; and (3) the DHS failed to conduct a proper Regulatory Flexibility Act analysis.

The DHS asked the court to stay the litigation and allow the agency to undertake rule making to address the issues set forth in the order. In March 2008, the DHS published a supplemental proposed rule that addressed the court's concerns. Nearly 3000 comments were received in response to this supplemental rulemaking.

The Final Supplemental rule is expected to be published any day, and will be published in the Federal Register concurrently with advice and guidance from DOJ regarding compliance with the antidiscrimination prohibitions of the law. The final rule takes effect immediately upon publication. Publication of the final rule effectively renders the current litigation moot. It is possible, however, that the plaintiffs in the underlying litigation may seek to amend their complaint to encompass a revised final rule. In the alternative, the plaintiffs, or some other party, may file another lawsuit seeking to block this final rule.

Employers should note that because the rule is effective upon publication, it is likely that the DHS will begin to take advantage of the rule. This means that employers that received no-match correspondence in the past will be at risk if the DHS concludes that they did not take reasonable steps to prevent continuing employment of unauthorized workers named in the no-match correspondence. Because of the litigation, no-match letters were not issued in 2007 (for 2006 W-2s), and the SSA has indicated that it will not be sending no-match correspondence in 2008 (for 2007 W-2s).

David C. Whitlock is a Shareholder in Littler's Atlanta office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, or Mr. Whitlock at dwhitlock@littler.com.