Legal Alert: DHS Issues Supplemental Proposed Rule Regarding "Safe Harbor" No Match Regulation

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As discussed in our August 14, 2007 Legal Alert, the Department of Homeland Security (DHS) issued its final rule setting forth a safe harbor from liability for employing unauthorized aliens for employers who follow certain procedures in responding to a Social Security Administration (SSA) No Match Letter or a DHS Notice of Suspect Documents (Safe Harbor rule). That rule subsequently was enjoined by a federal district court in California and currently is not in effect.

On March 21, 2008, DHS issued a Supplemental Proposed Rule (SPR) that tries to alleviate the concerns expressed by the court in its preliminary injunction order. The SPR presents no substantive changes to the safe harbor rule. By issuing the SPR, DHS intends to assuage the court and clarify its position with respect to the court's three primary concerns:

1. **DHS Changed its Previous Position Without Reasoned Analysis.** The court was concerned that by taking the view expressed in the Safe Harbor rule that a No Match letter may be sufficient, by itself, to put an employer on notice that the identified employees may not be work-authorized, DHS had changed its previous position without enough reasoned analysis.

In response to this concern, DHS justifies its August 2007 Safe Harbor rule as necessary to provide consistent and clear guidance to employers on how to respond to SSA No Match letters, an area previously fraught with ambiguity. DHS justifies the "change" in agency policy perceived by the court by stating that the rule eliminates ambiguity and imparts much-needed consistency regarding an employer's responsibilities upon receipt of a No Match letter. DHS reminds employers, via the rule, of their obligation under immigration law to conduct due diligence upon receipt of a No Match letter. In order to eliminate confusion, DHS formally announces its view that employers who fail to take reasonable steps risk being found to have constructive knowledge of listed employees' illegal work status.

2. **DHS Encroached the Authority of the Department of Justice.** The court was concerned that DHS exceeded its authority and encroached that of the Department of Justice (DOJ) by interpreting anti-discrimination provisions of the Immigration and Nationality Act (INA), which is an area entrusted to the DOJ.

In response to this concern, DHS reaffirms its position recognizing that the Safe Harbor rule does not in any way affect the authority of the DOJ to

enforce the anti-discrimination provisions of the INA. Nevertheless, in light of the court's concerns, DHS has rescinded the language that the court found problematic in the August 2007 Safe Harbor rule.

3. **DHS Failed to Conduct a Regulatory Flexibility Analysis in Violation of the Regulatory Flexibility Act (RFA).** The court was concerned that DHS failed to provide a Regulatory Flexibility Analysis as required when a rule creates new obligations and punitive consequences for failure to comply with these obligations. The court found that the Safe Harbor rule is tantamount to a mandate creating compliance obligations for employers who receive No Match letters, thus a Regulatory Flexibility Analysis was required.

In the SPR, DHS responded to this concern by providing an Initial Regulatory Flexibility Analysis. In the SPR, DHS also provides further clarification on two points in the August 2007 Safe Harbor rule:

1. The Safe Harbor rule instructs employers seeking the safe harbor that they must "promptly" notify an affected employee about the mismatch after the employer has completed its internal records checks. According to the SPR, contacting the employee within five business days after the employer completes its internal records review would satisfy the "prompt notice" obligation.

2. Employees hired prior to November 6, 1986 are considered "Grandfathered in," and employers need not conduct Safe Harbor procedures with respect to such employees.

Employers' Bottom Line:

The SPR is primarily aimed at alleviating the court's concerns, positioning DHS to have the injunction lifted, and having the Safe Harbor procedures become effective as soon as possible. No immediate action is required on the part of employers. As for now, the injunction continues and the Safe Harbor procedures are not in effect. However, employers must still, as before, respond in a reasonable manner to a SSA No Match letter or DHS Notice of Suspect Documents. In other words, employers cannot ignore these letters or fail to follow up. Also note, as always, following the safe harbor procedures will not immunize an employer from liability for employing a worker whom the employer knows is unauthorized to work in the United States.

If you have any questions regarding the SPR or the Safe Harbor rule, or any other employment related immigration issue, please contact the author of this Alert, Geetha Nadiminti, 404-888-3940, gnadiminti@fordharrison.com, or any member of Ford & Harrison's Business Immigration practice group.