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No-Match Letter Final Rule: A No-Go Says Court

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A federal judge in California recently blocked the Department of Homeland Security ("DHS") from implementing the final rule regarding the much hyped no-match letter. DHS had intended its regulation pertaining to no-match letters to take effect on September 14, 2007. The regulation sets forth the legal obligations of employers when they receive so-called "no-match" letters from the government and describes safe-harbor procedures that an employer may follow in response to receiving such a letter. The injunction imposes a nationwide ban on the regulation.

No-match letters refer to letters employers receive when the Social Security Administration ("SSA") discovers that its social security records do not match employer records on a particular employee. Each year, employers send millions of employee W-2 forms to SSA containing employee information. Based on that information, the agency may discover that the employee's name and social security number fail to match SSA records. Since 1994, the SAA has attempted to correct such discrepancies by sending what has become commonly known as a "no-match" letter to the employer informing it of the mismatch and requesting that it correct the information. The U.S. Immigration and Customs Enforcement sends a similar letter or "Notice of Suspect Documents" if it discovers that an employee's employment eligibility verification form (Form "I-9") does not comport with agency records. The final regulation sets forth an employer's obligations and options for avoiding liability after receiving letters from either the SSA or DHS.

Immigration Concerns: the Heart of the New Rule

In 1986, Congress passed the Immigration Reform and Contract Act ("IRCA"). Among other things, IRCA imposes penalties on employers who knowingly hire unauthorized aliens, it also imposes penalties for continuing to employ aliens if they become unauthorized after being hired.

Under current rules, an employer can satisfy its obligations not to knowingly hire unauthorized workers by obtaining specified documents from workers. If the information the worker provides and government records fail to match, the employee is ineligible to have his or her earnings credited for Social Security benefits. The government, however, takes no

action against the employer. The new regulation changes that.

In 2006, the Department of Homeland Security ("DHS") proposed to amend regulations to define the term "knowingly" to include circumstances where an employer receives a no-match letter. In such situations, an employer may be considered to have "constructive knowledge" of the employee's unauthorized alien status. In an effort to provide some employer protection, however, DHS also proposed safe harbor procedures that, if followed, would prevent DHS from finding the employer had constructive knowledge of an employee's unauthorized status.

The plaintiffs in the California action, which included a consortium of unions and numerous business groups, challenged implementation of the rule, arguing it unfairly puts the attempt to resolve the country's divisive immigration issues on the backs of employers. According to opponents, the rule would force employers to establish costly new systems to verify workers' immigration status and give employers an impossibly short time in which to do so.

Safe Harbor: What Must an Employee Do Under the New Rule, If Applied?

The final DHS rule provides that, depending on the totality of the circumstances, an employer may be deemed to have constructive knowledge that an employee is an unauthorized alien where, among other things, the employer receives a no-match letter from SSA or notice from DHS that the information provided to the government does not comport with agency records. Pursuant to the rule, DHS would nevertheless be precluded from using the no-match letters as evidence of constructive knowledge if an employer follows the steps outlined below after receiving notice of the mismatch:

- If the employer contacts DHS and attempts to resolve the mismatch within 30 days, by, among other things, checking its own records to ensure the mismatch is not the result of employer error;
- If the mismatch is not due to employer errors, the employer must request that the employee confirm the accuracy of the information he or she provided to the employer; if the employee confirms the information is correct, the employer must advise the employee to resolve the discrepancy with the DHS within 90 days of the date the employer received the no-match letter:
- If the employer is unable to resolve the matter within 90 days, it must complete a new Form I-9 for the employee. The new form must be completed within 93 days of the date the employer received the no-match letter. The employer is precluded from accepting the documents that contain a disputed social security number or alien number referenced in the no-match letter. The employee must also present a document

that contains a photograph in order to establish his or her identity or to establish both identity and employment authorization.

Employers that are unable to verify their employees' work eligibility through completion of the new Form I-9 must decide whether to terminate the employee. The government contends that employers should not fire employees until the aforementioned process is complete unless during that time the employer obtains actual knowledge of the employee's unauthorized status. DHS advises, however, that if the Form I-9 process is unsuccessful, or if the employee refuses to participate in the verification process, an employer that continues to employ such an employee risks being deemed to have constructive knowledge of the employee's unauthorized status in a subsequent DHS enforcement action.

Enjoining Implementation of the Rule

In granting the injunction barring implementation of DHS' rule, Judge Breyer of the U.S. District Court for the Northern District of California found that the balance of harms tipped sharply in favor of the plaintiffs and that the plaintiffs had raised "serious questions going to the merits."

In a 22-page opinion, the court found that the plaintiffs had successfully established that the balance of hardships tipped in their favor. Calling the effect of the safe-harbor rule "severe," the court noted that if it were to take effect, DHS and SSA would immediately mail no-match "packets" to approximately 140,000 employers, pertaining to approximately of 8 million workers. Previously, employers could resolve no-match issues at their leisure. Under the new rule, the court found that employers would have to establish costly human resources systems that would permit them to resolve no-match issues within the relatively short timeframe set forth in the rule.

The court also agreed with union arguments that, if implemented, the new regulation would irreparably harm employees. According to the unions, numerous employees who are legally authorized to work would be unable to resolve mismatch issues within the prescribed timeframe. Further, according to the court, because empirical research suggests that mass layoffs typically follow receipt of no-match letters, "there is a strong likelihood that employers may simply fire employees who are unable to resolve [discrepancies] within 90 days, even if the employees are actually authorized to work."

The court also found that the plaintiffs had raised serious questions about the legitimacy of the new rule with at least some of their arguments on the merits of their claims. For instance, the court noted that when a government agency adopts a rule that changes the agency's prior position on a given policy, it must set forth a reasoned analysis for the

change. Historically, no-match letters did not by themselves put employers on notice that an employee is unauthorized to work. The new regulation, of course, alters that position. The agency, however, failed to offer a reasoned basis for its abrupt change in policy. DHS, according to the court, may have authority to change its position, but, because it did so without a reasoned analysis, the plaintiffs raised serious questions as to whether the agency properly ignored its precedent in violation of the Administrative Procedures Act.

The court also found merit with the plaintiff's argument that DHS exceeded its authority by interpreting the IRCA's antidiscrimination provisions. In enacting IRCA, Congress prohibited employers from discriminating against any person with regard to the individual's national origin or, in some instances, based on the person's citizenship status. DHS planned to alert employers, among other things, that if they followed the rule's safe harbor provisions, they would not be subject to suit under IRCA's antidiscrimination provisions. The problem with that pronouncement, the court found, is that Congress delegated to the Department of Justice, not DHS, the responsibility of enforcing IRCA's anti-discrimination provisions. DHS, therefore, may have exceeded its authority by interpreting IRCA's anti-discrimination provisions to preclude enforcement if an employer complies with the safe-harbor provisions.

Finally, the Court found that the plaintiffs had raised serious questions regarding whether promulgation of the final rule violated the Regulatory Flexibility Act ("RFA"). RFA requires agencies to prepare a "regulatory flexibility analysis," which among other things, determines the "steps the agency has taken to minimize the significant economic impact on small entities." The RFA allows for an exception if the agency certifies that the rule will not significantly impact a significant number of small entities. DHS originally made such a certification. The court, however, questioned the veracity of that claim considering the plaintiffs' declarations that small businesses would incur substantial costs to comply with the new rule within the 90-day timeframe.

The court's ruling blocks implementation of the final rule indefinitely until the court issues a final decision in the case or unless and until the district court's Order is reversed on appeal before the United States Court of Appeals for the Ninth Circuit. As of early December, the district court had not yet set a trial date.

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