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Social Security No-Match Letters: Mass Firings or No Big Deal? (Homeland Security's New Regulation Enjoined for Now)

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by Jessica Y. Mols

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PDF Version

The Department of Homeland Security (DHS) recently promulgated a final regulation that could dramatically change employers' responses to Social Security no-match letters. For many years, employers have been receiving no-match letters from the Social Security Administration (SSA) notifying them when an employee's name or Social Security number (SSN) listed on the employer's W-2 form does not match the SSA's records. (See MoFo July 2002 Employment Law Commentary: "A Social Security 'No Match' Letter: Now What?")Í These letters were purely informational and did not necessarily require any action on the part of the employer. DHS's new regulation, which was initially proposed in June 2006 and finalized in August 2007, significantly increases employers' responsibilities upon receiving such letters. However, any immediate impact has been delayed as a legal battle plays out in federal court. A federal court in the Northern District of California has temporarily enjoined the government from taking any further action to enforce the new regulation. A hearing on a preliminary injunction against the new regulation is scheduled for October 1, 2007.

This article addresses the changes that this regulation poses, the steps employers would have to take to address them, and the current status of its implementation.

Social Security No-Match Letters

Each year employers submit wage and tax information to the SSA using W-2 forms. The SSA then compiles records of each employee's earnings using his or her SSN. At times, the SSA will discover that the information submitted by the employer does not match a particular worker's account. In that event, the SSA may send the employer a no-match letter to inform it of this discrepancy.

Following the issuance of the new regulation, DHS intended to include a guidance letter in the SSA's mailings scheduled to occur between September 4, 2007, and November 9, 2007, which was expected to affect approximately 140,000 employers and 8.7 million employees. Each packet would have enclosed an SSA letter containing at least 10 mismatched SSNs (and in some cases 500 or more SSNs) as well as a DHS letter informing employers that they may face civil and criminal sanctions by failing to respond to these letters in accordance with the new regulation guidelines.

The Department of Homeland Security's New Regulation

Although no-matches may be the result of benign causes such as name changes following marriage or clerical errors, they may also indicate that an employee is an unauthorized alien using a false SSN or an SSN assigned to someone else. With the issuance of the no-match regulation, the DHS hopes to use no-match letters to bolster its worksite enforcement efforts and identify and crack down on employers who knowingly hire illegal workers. The DHS intends to accomplish this goal in the new regulation by requiring employers to take specific steps to verify an employee's identity upon receiving a no-match letter. (*See 8 C.F.R.* 274a.1(l)(2).) Employers who fail to respond to these letters may be deemed to have "constructive knowledge" that an

employee is not authorized to work in the United States and could face potential civil or criminal liability.

The new regulation, which amends the rules governing the unlawful hiring or continued employment of unauthorized aliens, comes as the Bush Administration attempts to implement portions of its failed comprehensive immigration package. As expected, this regulation has drawn sharp criticism from business groups, immigration advocacy groups, and labor organizations since its initial proposal in June 2006. Their primary concerns are: the fear of mass firings and retaliation against employees, the burden placed on employers and the economy, and the DHS's constitutional authority to issue such a regulation.

Immediately after the DHS published the final rule on August 14, 2007, these same advocacy groups sought to challenge its implementation. Business groups, making up the Essential Worker Immigration Coalition, sent the DHS and SSA a letter enclosing 82 questions regarding the new regulation and requesting a stay of at least 180 days before implementation. Some of its questions were: "How do we handle a No-Match for someone who is on an authorized leave?", "What if you get multiple SSNs that are wrong?", and "Can I ask for more documents than the I-9 asks for just to be sure?"

Labor and immigration rights groups, including the AFL-CIO, the National Immigration Law Center, and the American Civil Liberties Union, took a different approach and filed a lawsuit on August 29, 2007, in the U.S. District Court for the Northern District of California. (*See AFL-CIO v. Chertoff*, N.D. Cal. No. 07-4472-CRB.) These groups allege that the regulation places the jobs of U.S. citizens and non-citizens in jeopardy and provides additional incentives for unauthorized aliens to work off-the-books, resulting in the loss of Social Security taxes now paid on the wages. The Plaintiffs further argue that the DHS and SSA exceeded the authority granted to them by Congress by issuing this regulation. On August 31, 2007, the District Court granted the Plaintiffs' request and issued a temporary restraining order (TRO) prohibiting the government from implementing the no-match regulation and including the DHS guidance letter concerning the new regulation. Notably, this order does not prevent the SSA from following its normal procedures and distributing no-match letters without DHS guidance letters. The District Court also ordered the DHS and SSA to show cause why a preliminary injunction should not issue. As discussed below, a hearing is scheduled for October 1, 2007.

"Safe-Harbor Procedures for Employers Who Receive a No-Match Letter"

Under the new regulation (assuming the TRO is lifted), each employer who receives a no-match letter will also receive a general notice from the DHS outlining the employer's obligations. Employers are obligated to follow the steps set forth in the regulation (and outlined below), or they face the risk of being deemed to have "constructive knowledge" that the employee referred to in the letter was an unauthorized worker. It is important to note, however, that these provisions will not shield employers from liability where they have actual knowledge that an employee is unauthorized or where they discover a discrepancy from sources other than an SSA or DHS letter. The DHS also acknowledges that there may be other procedures an employer could follow in response to a no-match letter that would be considered reasonable by DHS and inconsistent with a finding that the employer had "constructive knowledge" that the employee was an unauthorized alien. However, such a finding would depend on the totality of the circumstances.

The DHS's Immigration and Customs Enforcement Agency (ICE) does not and cannot have direct access to the list of employers who receive no-match letters. Rather, DHS may learn of the no-match letters as part of discovery during an investigation or audit or when a subpoena is served on the SSA as part of an enforcement action. Consequently, while failure to respond to no-match letters will not automatically result in civil or criminal liability, it is in an employer's best interest to follow the regulation guidelines. Employers should carefully document all actions taken in response to no-match letters so they will be able to adequately demonstrate their compliance under the new regulation in the event that an investigation or audit does occur.

Within 30 days

- If an employer receives a no-match letter, the employer must check its records to determine whether the discrepancy was the result of employer error (e.g. typographical, transcription, or similar clerical error) within 30 days of receipt.
- If the discrepancy is a result of employer error, the employer must: (1) correct its records and inform the SSA of the correct information (in accordance with the written notice's instructions, if any); (2) verify with the SSA that the employee's name and SSN, as corrected, match SSA records; and (3) make a record of the manner, date, and time of such verification and store the record with the employee's Form I-9. The employer may update the employee's Form I-9 or complete a new Form I-9 (and retain the original Form I-9), but should not perform a new I-9 verification at this time.
- Employers may verify the corrected data with the SSA in two ways: (1) registering to participate in the Employment Eligibility Verification (E-Verify) Program (formerly known as the Basic Pilot Verification Program) at https://www.vis-dhs.com/EmployerRegistration; or (2) contacting the SSA at 1-800-772-

6270 or online at http://www.ssa.gov/employer/ssnv.htm.

- The E-Verify Program allows employers to use an automated system to verify the employment authorization of all newly hired employees with information contained in the SSA and DHS databases. Employers' participation in E-Verify is entirely voluntary and is currently free of charge. Employers, designated agents, or corporations may participate by simply registering online and accepting the electronic Memorandum of Understanding (MOU) that sets forth the responsibilities of the SSA, DHS, and employer. Users can access these Web-based access methods with any Internet-capable Windows-based personal computer and a Web browser of Internet Explorer 5.5 or Netscape 4.7 or higher (with the exception of Netscape 7.0). Companies may also elect to use a Web-service access method, which will allow them to extract information from the company's existing system or an electronic Form I-9 and transmit the data to SSA and USCIS to verify the employment authorization of newly hired employees. The Web-service access method requires the company to develop software to interface between its company's system and USCIS's database.

Within 90 days

- If the discrepancy is not due to employer error, the employer must promptly request that the employee confirm that the name and SSN in the employer's records are correct.
    - If the employee states that the employer's records are incorrect, the employer must correct, inform, verify, and make a record of the correction (as discussed above).
    - If the employee states that the employer's records are correct, the employer must: (1) promptly request that the employee resolve the discrepancy with the SSA (in accordance with the written notice's instructions, if any); (2) advise the employee of the date that the employer received the written notice from the SSA; and (3) advise the employee to resolve the discrepancy within 90 days of the date the employer received the written notice from the SSA.

Within 93 days

- If the employer is unable to verify the information with the SSA within 90 days, the employer must again verify the employee's employment authorization and identity within an additional 3 days.
    - Specifically, the employer must complete a new Form I-9 for the employee, using the same procedures as if the employee were newly hired, with the following exceptions: (1) the employee must complete Section 1 ("Employee Information and Verification") and the employer must complete Section 2 ("Employer Review and Verification") of the new Form I-9 within 93 days of receiving the no-match letter; (2) the employer must not accept any document that contains the SSN or alien number referenced in the no-match letter or any written notice or any DHS document that was in question; and (3) the employee must present a document that contains a photograph in order to establish identity or both identity and employment authorization. The employer must retain both the new and the prior I-9 Forms.
- If the employer is unable to resolve the discrepancy and cannot verify the employee's identity and work authorization using different documents, the employer must terminate the employee. Of course, the employer may choose not to terminate the employee, but it then faces the risk that DHS may find that the employer had "constructive knowledge" that the employee was an unauthorized alien and therefore, by continuing to employ the alien, violated federal immigration law.

Recent Developments

As noted above, on August 31, 2007, the District Court granted the Plaintiffs' request for a temporary restraining order, halting the implementation of the new regulation, including the SSA's first round of no-match mailings with DHS guidance. Since then, the Plaintiffs have filed their first amended complaint for declaratory and injunctive relief, and the Court has approved the intervention of two additional parties (the United Food and Commercial Workers and a coalition of business associations, including the U.S. Chamber of Commerce, San Francisco Chamber of Commerce, and National Roofing Contractors Association, among others).

On September 18, 2007, the Government filed its opposition to the Plaintiffs' motions for preliminary injunction. The Government contends that the Plaintiffs lack standing to challenge the DHS regulation and their claims are not ripe. Among other arguments, the Government claims that the Safe Harbor rule is consistent with relevant immigration statutes because it does not impose new legal obligations or change the definition of "knowing" and it does not establish a new re-verification obligation. A hearing on the matter is scheduled for October 1, 2007.

Expected Changes

Assuming that the courts uphold the legality of the new regulation, it is uncertain how it will actually affect

employers, largely depending on the extent to which DHS chooses to enforce it. Not surprisingly, industries that have traditionally employed a higher percentage of immigrant workers (e.g., agriculture, landscaping, manufacturing, construction) will likely feel its effects most strongly.

The no-match regulation is just one of many changes the Bush Administration hopes to implement as a means of heightening worksite enforcement. In the coming months, the Administration plans to publish a regulation that will reduce the number of documents that employers can accept to confirm the identity and work eligibility of their employees. The DHS claims that the sheer quantity of accepted documents (no fewer than 29) invites fraud and this new regulation will help reduce such unlawful employment. The DHS also intends to increase by approximately 25 percent the civil fines imposed on employers who knowingly hire illegal immigrants, with the hopes that it will deter companies from treating these fines as little more than the cost of doing business.

More developments will undoubtedly occur over the next few months, and employers should ensure that their processes involving hiring and I-9 procedures are satisfactory in the face of the potential for increasedenforcement.