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"No Match" Regulations Are No Match For Federal Judge

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On August 15, 2007, United States Immigration and Customs Enforcement ("ICE") published its "Safe-Harbor Procedures for Employers Who Receive a No-Match Letter" setting forth specific procedures employers must follow upon receipt of a letter from either the Social Security Administration (SSA) or Department of Homeland Security (DHS) which calls into question an employee's immigration status. As drafted, the new regulations were slated to take effect on September 14, 2007. However, on August 31, 2007, in a lawsuit filed by various labor unions and immigrants' rights groups, a federal judge in San Francisco issued a temporary restraining order enjoining the implementation of these new regulations.

Background

The US Immigration and Nationality Act makes it unlawful for an employer to "continue to employ" an alien "***knowing*** the alien is (or has become) an unauthorized alien with respect to such employment." Prior to the adoption of the new regulation, there was confusion as to the extent of an employer's obligations under the immigration laws when it received a "no match" letter from the SSA (indicating that a social security number reported on a W-2 form was not assigned to the identified employee) or a communication from the DHS calling into question the authenticity of a document presented or referenced by an employee in connection with the Form I-9 verification process. The new regulations state that the receipt of such a letter from the SSA or DHS may be sufficient to establish "constructive knowledge" that an employee is an unauthorized alien. However, if upon receipt of such a letter the employer takes certain steps outlined in the new regulations, "the receipt of the written notice [from the SSA or DHS] will therefore not be used as evidence of constructive knowledge."

The "Safe-Harbor" Procedures Outlined in the New Regulations

If and when the new regulations go into effect, the following steps must be taken by an employer when it receives either a "no match" letter from the SSA or a discrepancy letter from the DHS:

- Within 30 days of receipt of a "no match" letter from the SSA, the employer will be required to examine its records to determine whether the discrepancy resulted from a clerical error and, if so, to correct the error and so inform the SSA. The employer will then be obligated to verify the corrected information with the SSA and to retain a record of the manner, date, and time of such verification, either by updating the employee's existing I-9 form or by completing a new I-9 (retaining the original) ***without reexamining any documents***. If the "no match" discrepancy did not result from a clerical error, the employer will be required promptly to request that the employee confirm that the name and social security number in the employer's records are correct. If the employee states that the information is incorrect, the employer must make (and inform the SSA of) any correction and verify the corrected information with the SSA. Further, the employer again

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Q: Does the Court's issuance of the temporary restraining order mean that the new rule will not become effective?

A: Not necessarily. The Court's order will remain in force until October 1, 2007. On that date, the Court is scheduled to rule on whether or not to issue a preliminary injunction that would remain in effect during the pendency of the litigation. However, the plaintiffs' ultimate goal in the lawsuit is to obtain a permanent injunction barring implementation of the rule.

Q: On what basis was the request for a temporary restraining order granted?

A: The Court found that there were "serious questions" as to whether the Department of Homeland Security had the statutory authority to adopt the regulations and utilize social security data to enforce the immigration laws.

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must document its actions and update or complete a new I-9 ***without reexamining any documents***. On the other hand, should the employee confirm that the information on record is correct, the employer will be required promptly to advise the employee to resolve the discrepancy with the SSA no later than ninety (90) days after the receipt date of the "no match" letter. The employer will not have any legal obligation to advise the employee regarding the means or manner of resolving the discrepancy with the agency.

- Within 30 days of receipt of a letter from DHS calling an immigration status document into question, the employer must contact the local DHS office and attempt to resolve the question raised by the agency.

- If, after taking the foregoing steps, the discrepancy noted by either the SSA or DHS has not been resolved within 90 days, the employer will then have an additional three days to commence a new I-9 verification in the same manner as if the employee were a new hire. However, the employer may ***not*** accept any document containing a disputed social security number or any disputed document referenced in a letter from DHS and the employee must present a document that contains a photograph in order to establish identity or both identity and employment authorization.

- Finally, if the employer is unable to verify the employee's work eligibility through the new I-9 verification, the employer must then terminate the employee or face the risk in any subsequent DHS enforcement action of being deemed to have constructive knowledge that it is continuing to employ an unauthorized alien.

By following the foregoing steps (and in the absence of other evidence creating actual or constructive knowledge), an employer that has received a "no match" or discrepancy letter will have a "safe-harbor" from criminal or civil prosecution if the employee is not authorized to work in the United States, while an employer that fails to follow the protocol will not be able to avail itself of the "safe harbor" defense in the event of a civil or criminal investigation.

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Q: In the interim, what should an employer do if it receives a "no match" letter from the SSA or a letter from DHS noting a discrepancy in a document?

A: Even while the restraining order is in place, it may be prudent to follow the procedures set forth in the new regulations as they would likely be deemed to be "reasonable steps" to take in order to defeat a claim that the employer had constructive knowledge that it is continuing to employ an unauthorized alien. However, if employment eligibility cannot be verified using the foregoing steps, it would be wise to seek legal counsel before making any decision which will impact an employee's work status.

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