

Social Security No-Match Update

From the National Restaurant Association

On August 19th, the below Proposed Rule (provided in part) was published in the Federal Register announcing the rescission of regulations which would have placed onerous requirements on employers relating to the receipt of no-match letters from the Social Security Administration and the Department of Homeland Security. Essentially, under the amendments proposed by DHS, receipt of a no-match letter may have been sufficient, by itself, to put an employer on notice, and thus impart constructive knowledge, that employees referenced in the letter may not be work-authorized.

Employers should note however that DHS' rescission of these regulations is because instead they will focus on immigration compliance through E-Verify, ICE Mutual Agreement Between Government and Employers (IMAGE) and other verification programs.

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

SUMMARY: The Department of Homeland Security (DHS) proposes to amend its regulations by rescinding the amendments promulgated on August 15, 2007, and October 28, 2008, relating to procedures that employers may take to acquire a safe harbor from receipt of no-match letters. Implementation of the 2007 final rule was preliminarily enjoined by the United States District Court for the Northern District of California on October 10, 2007. After further review, DHS has determined to focus its enforcement efforts relating to the employment of aliens not authorized to work in the United States on increased compliance through improved verification, including participation in E-Verify, ICE Mutual Agreement Between Government and Employers (IMAGE), and other programs.

DATES: Comments must be submitted not later than September 18, 2009.

What led up to the Rescission of the Rule?

As stated in the Federal Register. Over the years, employers have inquired of the former Immigration and Naturalization Service, and now DHS, whether receipt of a no-match letter constitutes constructive knowledge on the part of the employer that he or she may have hired an alien who is not authorized to work in the United States. On August 15, 2007, DHS issued a rule describing the legal obligations of an employer following receipt of a no-match letter from SSA or a letter from DHS regarding employment verification forms. See 72 FR 45611. The rule also established "safe-harbor" procedures for employers receiving no-match letters.

On August 29, 2007, the American Federation of Labor and Congress of Industrial Organizations, and others, filed suit seeking declaratory and injunctive relief in the United States District Court for the Northern District of California. *AFL-CIO, et al. v. Chertoff, et al.*, No. 07-4472-CRB, D.E. 1 (N.D. Cal. Aug. 29, 2007). The district court granted plaintiffs' initial motion for a temporary restraining order against implementation of the August 2007 Final Rule. *AFL-CIO v. Chertoff*, D.E. 21 (N.D. Cal. Aug. 31, 2007) (order granting motion for temporary restraining order and setting schedule for briefing and hearing on preliminary injunction). On October 10, 2007, the district court granted the plaintiffs' motion for preliminary injunction. *AFL-CIO v. Chertoff*, 552 F.Supp.2d 999 (N.D. Cal. 2007) (order granting motion for preliminary injunction).

The court raised three issues regarding DHS's rulemaking action implementing the No-Match final rule: Whether DHS had (1) supplied a reasoned analysis to justify what the court viewed as a change in the Department's position—that a no-match letter may be sufficient, by itself, to put an employer on notice, and thus impart constructive knowledge, that employees referenced in the letter may not be work-authorized; (2) exceeded its authority (and encroached on the authority of the Department of Justice (DOJ)) by interpreting the anti-discrimination provisions of the Immigration Reform and Control Act of 1986 (IRCA), Public Law 99-603, 100 Stat. 3359 (1986), INA section 274B, 8 U.S.C. 1324b; and (3) violated the Regulatory Flexibility Act, 5 U.S.C. 601 et seq., by not conducting a regulatory flexibility analysis. DHS subsequently published a supplemental notice of proposed rulemaking (SNPRM) and supplemental final rule to clarify certain aspects of the 2007 No-Match final rule and to respond to the three findings underlying the court's injunction. See e.g. 73 FR 15944 (Mar. 26, 2008), 73 FR 63843 (Oct. 28, 2008). Neither the SNPRM nor final rule, however, changed the safe-harbor procedures or applicable regulatory text. The implementation of the rule remains enjoined.

Basis for the Administration's Policy Change?

As stated in the Federal Register notice. On January 20, 2009, President Barack Obama was sworn into office. Shortly thereafter, on January 21, 2009, Janet Napolitano was sworn in as the Secretary of Homeland Security. Following the transition, the Secretary conducted a review of existing programs and regulations to determine areas for reform or improved efficiency. Pursuant to this review, DHS has determined that improvements in U.S. Citizenship and Immigration Services' (USCIS) electronic employment verification system (E-Verify), along with other DHS programs, provide better tools for employers to reduce incidences of unauthorized employment and to better detect and deter the use of fraudulent identity documents by employees. The DHS, therefore has concluded that rescinding the August 2007 No-Match Rule and 2008 Supplemental Final Rule will better achieve DHS's regulatory and enforcement goals.