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LAUNCH CHAT

Summary of October 2008 Final No-Match Rule and August 2007 Enjoined Final Rule

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In August 2007, a long awaited "no-match letter" regulation from US Immigration and Customs Enforcement was released. It quickly was challenged in court and the rule was barred from taking effect by a federal district court. In October 2008, claiming that it had met the court's objections, the agency released a final rule which takes effect immediately upon publication. Despite the fact that the rule is virtually identical to the enjoined rule, ICE claimed the rule is new and that it had the authority to issue it despite the court injunction.

The No-Match rule describes the obligations of employers when they receive no-match letters from the Social Security Administration or receive a letter regarding employment verification forms from the Department of Homeland Security. The rule also provides "safe harbors" employers can follow to avoid a finding the employer had constructive knowledge that the employee referred to in the letter was an alien not authorized to work in the US. Employers with knowledge that an immigrant worker is unauthorized to accept employment are liable for both civil and criminal penalties.

The October 2008 rule finalized a proposed rule released on March 21, 2008.

Why did the court block the first rule from taking effect?

The rule was challenged in court prior to it taking effect in September 2007 and a judge issued a preliminary injunction on three grounds:

1. DHS failed to supply a reasoned analysis justifying what the court thought was a change in DHS' position - that a no-match letter may be sufficient, by itself, to put an employer on notice that its employees may not be work authorized;
2. DHS exceeded its authority (and encroached on the authority of the Department of Justice) by interpreting anti-discrimination provisions in the Immigration Reform and Control Act (IRCA); and
3. DHS violated the Regulatory Flexibility Act by not conducting a regulatory flexibility analysis.

How has DHS attempted to address the court's objections?

On March 21, 2008, DHS released a supplemental proposed rule designed to

address the court's concerns. DHS hoped that the court would overturn the preliminary injunction and allow the agency to implement the proposed rule. That did not happen and the agency decided on October 23, 2008 to release the rule anyway claiming that it had the authority to issue a new rule that met the court's objections.

In the new rule, DHS first addressed the court's concern that that agency had failed to provide a detailed analysis explaining the agency's new position that no-match letters are an indicator of unauthorized status.

DHS first cited a number of sources indicating that Social Security numbers are being used to gain employment authorization by people unauthorized to work. It included quotes from the 1997 report of the US Commission on Immigration Reform and also cited reports issued by the Government Accountability Office and the Inspector General of the Social Security Administration. It also noted that the industries most affected by the rule have admitted that much of their workforce is unauthorized and millions of employees have used false numbers. Finally, the agency cited public and private studies confirming that a sizeable portion of employees identified by no-match letters are working illegally in the United States

DHS cited two other justifications for the law. First, many employers fail to respond to no-match letters because they fear being accused of violating anti-discrimination rules if they react inappropriately to them. The no-match rule would provide protection from such liability if the employer follows the requirements of the regulation. Second, many US citizens and aliens would benefit by being notified of problems in the Social Security database and being able to get proper credit for their earnings. US citizens would also benefit, according to DHS, by seeing an expansion of employment opportunities as a result of unauthorized employees being terminated for not providing a valid Social Security number.

DHS then described a series of rulings and opinions by the agency that it believes show the agency has had a consistent position on no-match letters. But the agency stated that even if it conceded that it was taking a new position, it met the requirement to show a reasoned analysis justifying the chance in policy. In this case, it stated that the "most basic justification for issuance of this rule – and for the "change" in policy found by the district court – is to eliminate ambiguity regarding an employer's responsibilities upon receipt of a no match letter. Absent this rule, employers have been taking very different positions based on DHS' ambiguous statements.

DHS also defended the rule by pointing out that only employers with more than 10 employees identified with no-matches get SSA no-match letters and only if the percentage of no-matches exceeds .5% of the employer's work force.

With regard to the question of usurping the Justice Department's anti-discrimination enforcement authority, DHS insisted that its rule does not interfere with "the authority of DOJ to enforce anti-discrimination provisions of the INA or adjudicate notices of intent to fine employers."

It also specifically rescinded statements from the August 2007 rule's preamble describing employers' obligations under anti-discrimination law or discussing the potential for anti-discrimination liability. That includes the statement "employers who follow the safe harbor procedures…will not be found to have violated unlawful discrimination."

In the October 2008 final rule, DHS also addressed the concerns about a conflict with the Justice Department's anti-discrimination rules by citing a Justice Department memorandum published at http://www.usdoj.gov/crt/osc/htm/Nomatch032008.htm that included the

following assurance:

> *An employer that receives an SSA no-match letter and terminates employees without attempting to resolve the mismatches, or who treats employees differently or otherwise acts with the purpose or intent to discriminate based upon national origin or other prohibited characteristics, may be found by OSC to have engaged in unlawful discrimination. However, if an employer follows all of the safe harbor procedures outlined in DHS's no-match rule but cannot determine that an employee is authorized to work in the United States, and therefore terminates that employee, and if that employer applied the same procedures to all employees referenced in the no-match letter(s) uniformly and without the purpose or intent to discriminate on the basis of actual or perceived citizenship status or national origin, then OSC will not find reasonable cause to believe that the employer has violated section 1324b's anti-discrimination provision, and that employer will not be subject to suit by the United States under that provision.*

With respect to the regulatory flexibility analysis, DHS took the position that the rule is a voluntary safe harbor rather than a mandate. Hence, the rule does not require a showing that employers will not be significantly impacted economically.

However, the agency claimed it would comply with the judge's ruling by providing an initial regulatory flexibility analysis (IRFA). In the March 2008 proposed rule, they provided a very cursory summary of the analysis in the proposed regulation. In the October 2008 final rule, a more detailed analysis was included.

DHS claimed that it has been stymied to some extent in providing a highly specific analysis because the Social Security Administration had denied its request for the names and addresses of the companies already identified by SSA in its preparation to release no-match letters pursuant to the August 2007 regulation. SSA reminded DHS that this disclosure would actually be illegal under taxpayer privacy laws. In the March 2008 proposed rule, SSA did, however, provide more general information including a table showing the distribution of employers slated to receive no match letters in 2006. DHS estimated it would cost employers anywhere from $3,009 to $33,759 depending on the size of the employer and the percentage of current no-match employees assumed to be unauthorized. DHS does not believe these costs constitute a "significant economic impact."

DHS noted that the costs associated with losing an employee as a result of the rule are due to the Immigration and Nationality Act itself and not the new rule. However, the agency did not mention "false positives" where employees authorized to work are incorrectly identified in a no match letter. The agency did not account for costs associated with losing employees unable to resolve problems within 90 days, something that critics fear will become common as hundreds of thousands of people attempt to resolve problems at the same time under the new rule.

DHS did cite the following costs: labor cost for human resource personnel, certain training costs, legal services and lost productivity.

Did DHS mention any changes to the August 2007 rule in the new October 2008 rule?

DHS only made two relatively minor changes. First, DHS changed the rule requiring that employers "promptly" notify affected employees after they are

unable to resolve a mismatch through internal checks. Employers will now be given five business days to notify employees.

Second, DHS made clear that employees hired before November 1, 1986 are not covered by the no-match rule since these workers are not subject to IRCA.

The following is a summary of the October 2008 final rule:

Why did ICE issue this rule?

All employers in the US are required to report social security earnings for their workers. Those W-2 form reports listing an employee's name, social security number and the worker's earnings are sent to the Social Security Administration. In some cases, the social security number and the name of the employee do not match. In some of these cases, the SSA sends an employer a letter informing the employer of the no-match.

In some cases, the no-match is the result of a clerical error or a name change. In other cases, it may indicate that an employee is not authorized to work.

ICE issues similar letters to employers after they conduct audits of an employer's Employment Eligibility Verification forms (the I-9s) and find evidence that an immigration status document or employment authorization document does not match the name of the person on the I-9 document.

To date, there has been considerable confusion and debate over an employer's obligations after receiving a letter like this as well as whether an employer would be considered to be on notice that an employee is not unauthorized to work. This rule clarifies both issues albeit in a way that will be very unfriendly to employers and workers.

DHS cites the Mester Manufacturing case from the 9th Circuit Court of Appeals to remind employers that if they will have "constructive" knowledge that an employee is out of status, they are in violation of IRCA, the statute that punishes employers for knowingly hiring unlawfully present workers or violating paperwork rules associated with the I-9 employment verification form.

When is this rule effective?

It became effective publication in the Federal Register (expected to take place within a few work days of the announcement of the rule on October 23, 2008).

How has the definition of "knowing" changed in the rule?

Two additional examples of "constructive knowledge" are added to the list of examples of information available to employers indicating an employee is not authorized to work in the US. First, if an employer gets a written notice from the SSA that the name and SSN do not match SSA records. And second, written notice is received from DHS that the immigration document presented in completing the I-9 was assigned to another person or there is no agency record that the document was assigned to anyone.

However, the question of whether an employer has "constructive knowledge"

will "depend on the totality of relevant circumstances." So this rule is just a safe harbor regulation telling how an employer can avoid a constructive knowledge finding, but not guaranteeing that an employer will be deemed to have constructive knowledge if the safe harbor procedure is not followed.

What steps must an employer take if it gets a no-match letter?

First, an employer must check its records to determine if the error was a result of a typographical, transcription or similar clerical error. If there is an error, the employer should correct the error and inform the appropriate agency – DHS or SSA depending on which agency sent the no-match letter. The employer should then verify with that agency that the new number is correct and internally document the manner, date and time of the verification. ICE is indicating in the preamble to the regulation that 30 days is an appropriate amount of time for an employer to take these steps.

If these actions do not resolve the discrepancy, the employer should request an employee confirm the employer's records are correct. If they are not correct, the employer needs to take corrective actions. That would include informing the relevant agency and verifying the corrected records with the agency. If the records are correct according to the employee, the reasonable employer should ask the employee to follow up with the relevant agency (such as by visiting an SSA office and bringing original or certified copies of required identity documents). Just as noted above, thirty days is a reasonable period of time for an employer to take this step.

The rules provide that a discrepancy is only resolved when the employer has received verification from SSA or DHS that the employee's name matches the record.

When 90 days have passed without a resolution of the discrepancy, an employer must undertake a procedure to verify or fail to verify the employee's identity and work authorization. If the process is completed, an employer will NOT have constructive knowledge that an employee is not work authorized if the system verifies the employee (even if the employee turns out not to be employment authorized). This assumes that an employer does not otherwise have actual or constructive knowledge that an employee is not work authorized.

If the discrepancy is not resolved and the employee's identity and work authorization are not verified, the employer must either terminate the employee or face the risk that DHS will find constructive knowledge of lack of employment authorization.

What is the procedure to re-verify identity and employment authorization when an employee has not resolved the discrepancy as described above?

Sections 1 and 2 of the I-9 would need to be completed within 93 days of receiving the no-match letter. So if an employer took the full 90 days to try and resolve the problem, they then have three more days to complete the new I-9. And an employee may not use a document containing the disputed SSN or alien number or a receipt for a replacement of such a document. Only documents with a photograph may be used to establish identity.

Does an employer need to use the same procedure to verify

employment authorization for each employee that is the subject of a no-match letter?

Yes, the anti-discrimination rules require employer to apply these procedures uniformly. DHS is also reminding employers about the document abuse provisions which bar employers from failing to honor documents that on their face appear reasonable. But employers now have the safe harbor of a new regulation stating that this provision does not apply to documents that are the subject of a no-match letter.

DHS notes that if employers require employees to complete a new I-9 form, the employer must not apply this on a discriminatory basis and should require an I-9 verification for ALL employees who fail to resolve SSA discrepancies and apply a uniform policy to all employees who refuse to participate in resolving discrepancies and completing new I-9s.

Note that employees hired before November 6, 1986 are not subject to this rule. This reflects a change in the October 2008 rule from the 2007 rule.

What if the employer has heard that an employee is unlawfully present aside from hearing from SSA or DHS in a no-match letter?

Employers who have ACTUAL knowledge that an alien is unauthorized to work are liable under the INA even if they have complied with the I-9 and no-match rules. But the government has the burden of proving actual knowledge. DHS also notes that constructive knowledge may still be shown by reference to other evidence.

Does DHS have the authority to regulate the treatment of notices received by the SSA?

A number of comments on the rule questioned this issue, but they were dismissed by DHS. Presumably, the issue could be the source of litigation.

Why is DHS issuing this rule when the White House supports comprehensive immigration reform that would give employers legal options for hiring these workers?

DHS indicated in the preamble to the rule that while it wants to work with Congress on such legislation, there is no way to predict when it will pass and interior enforcement needs to be conducted. Others are arguing that the White House is interested in demonstrating to Congress that it is "getting tough" on illegal immigration in order to increase the likelihood that members of Congress would support CIR.

Will following the procedures in this rule protect an employer from all claims of constructive knowledge, or just claims of constructive knowledge base on the letters for which the employers followed the safe-harbor procedure?

An employer who follows the safe harbor procedure will be considered to have taken all reasonable steps in response to the notice and the employer’s receipt of the written notice will there not be used as evidence of constructive

knowledge. But if other independent exists that an employer had constructive knowledge, the employer is not protected.

Are there any special rules for circumstances such as seasonal workers, teachers on sabbatical and employees out of the office for an extended period due to excused absence or disability?

No, but DHS has noted that the rule provides a safe harbor to prove an employer does NOT have constructive knowledge and that if an employer makes a good faith effort to resolve a situation as rapidly as practicable and documents such efforts, that would be considered in evaluating the question of constructive knowledge.

What are the time frames required under the rule to take each necessary action after receiving the no-match letter?

- Employer checks own records, makes any necessary corrections of errors, and verifies corrections with SSA or DHS *(0 – 30 days*)
- If necessary, employer notifies employee and asks employee to assist in correction *(0 - 90 days)* [*Note: Under the October 2008 rule, employers have five days to notify employees of the no-match if the employer conducts its internal review, something that differs from the August 2007 rule*]
- If necessary, employer corrects own records and verifies correction with SSA or DHS *(0 - 90 days)*
- If necessary, employer performs special I-9 procedure *(90 - 93 days)*

May an employer continue to employ a worker a worker throughout the process noted above?

Yes. The only reason an employer would have to terminate prior to 93 days if the employer gains actual knowledge of unauthorized employment. DHS notes that it is not requiring termination by virtue of this rule; rather, they are just providing a safe harbor to avoid a finding of constructive knowledge. Employers may be permitted to terminate based on its own personnel files including failing to show up for work or an employee's false statement to the employer. [Note: It is always prudent to consult labor counsel before terminating employees for such reasons during the no-match process].

Employers may terminate as well if they notify an employee of the no-match letter and the employee admits that he or she is unauthorized to work.

What if the no-match letter is sent to the employee, not the employer?

The new rule only applies in cases where the written notice is to the employer.

Does it matter which person at the employer receives the letter?

No and DHS will not allow a designated person to receive these letters despite concerns raised about a no-match letter not making it to the appropriate party for too long. DHS has noted that an employer can determine an office within a company that becomes the recipient of all mail from DHS and SSA.

Does verification through systems other than that described in this rule provide a safe harbor?

No, and this includes instances where SSA provides options SSN verification as well as the USCIS electronic employment verification system. But DHS does note that DHS may choose to use prosecutorial discretion when employers take such steps.

Does an employer filing for a labor certification or employment-based green card application have constructive knowledge constitute "constructive knowledge" that a worker is unauthorized?

The new rule includes language stating "an employee's request that the employer file a labor certification or employment-based visa petition on behalf of the employee" may be an example of a situation that may, depending on the totality of relevant circumstances, require an employer to take reasonable steps in order to avoid a finding of constructive knowledge. But DHS notes that some employees are work-authorized and are not necessarily unauthorized to work just because they request such sponsorship from an employer.

Does an employer have to help an employee resolve the discrepancy with SSA or DHS?

No. An employer merely needs to advise the employee of the time frame to resolve. They are not obligated to help resolve the question or share any guidance provided by SSA.

In what manner must employers retain records required under the new rule?

The rule is flexible in this regard and employers may use any manner it chooses. The rule permits employers to keep records alongside the I-9 form. Employers are encouraged to document telephone conversations as well as all written correspondence.

If a new I-9 is prepared based on this rule, does that affect the amount of time the I-9 must be retained?

No. The original hire date remains the same even though the safe harbor procedure is used. So if an employer was hired several years ago, for example, has the I-9 form prepared again and then moves on to a new employer, the original date of hire applies for purposes of determining whether the one year retention requirement still applies.

Doesn't requiring an employee to fill out a new I-9 form per this rule constitute document abuse?

DHS does not believe this is the case because any document presented that contained a suspect SSN or alien number would not be facially valid and that it is proper for employers to require new documentation.

Won't this rule lead to massive firings across the country?

Many people are certainly worried that employers won't bother to go through the safe harbor procedures and will just panic and fire all workers that are the subject of these notices or will simply decide not to spend the effort complying. DHS denies that this is likely to be the case and has said the rule is in response to confusion under the current process.

Will an employer be liable for terminating an employee who turns out to be work authorized if they get a no-match letter?

If the employee IS authorized to work and an employer does not go through the various safe harbor steps in the rule, then the employer might be liable in an unlawful termination suit.

Won't this rule result in a major negative economic impact on the country?

That is an argument being advanced by many opponents of the rule. DHS only responds that this is speculative and also that complaints that small firms would be disproportionately affected because of the costs in complying are speculative as well.

What if the employee is gone by the time the no-match letter arrives?

An employer is not obligated to act on a no-match letter for employees no longer employed by them.

Aren't SSA and DHS databases unreliable?

DHS admits that the SSA and DHS databases have problems (as evidenced by GAO studies). But they say a no-match letter is nothing more than an indicator of a problem and that this does not warrant alone stopping the changes proposed in the rule. DHS does believe that the system has reached a very high degree of reliability, however.

Won't this rule encourage identity theft?

DHS denies it, but critics are concerned that the only step left for workers is to ensure that a social security number and name match and the only way for an unlawfully present worker to ensure this is to usurp someone's identity. DHS believes the criminal penalties for identity theft will act as a sufficient deterrent.

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