Legal Alert: DHS Issues Supplemental Final Rule on SSA No-Match Letters Aimed at Lifting Court Injunction

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The Department of Homeland Security (DHS) has issued a Supplemental Final Rule (SFR) addressing procedures employers may follow when they receive either a no-match letter from the Social Security Administration (SSA) (which states that there is a discrepancy between the Social Security Number (SSN) reported for the employee and the SSA's records) or a notice of suspect document from DHS. The SFR makes no substantive changes to the provisions of the Final Rule published by DHS in August 2007. Instead the SFR addresses the issues raised by a federal court in California, which previously enjoined enforcement of the August 2007 Final Rule. The rule has not gone into effect yet and will not become effective until the court lifts the injunction. For now, employers who receive no-match letters must continue to correct their records and ask employees to correct the problem where applicable, within a reasonable time. Thus, the status quo continues without specific time periods or a safe harbor for employers to deal with no-match letters.

Background

In August 2007, DHS published a Final Rule setting out safe harbor procedures for employers who receive no-match letters from the SSA or notices of suspect documents from DHS casting doubt on their employees' eligibility to work. Subsequently, the AFL-CIO and others filed suit in federal court in California challenging the rule. On October 10, 2007 the court issued an order enjoining implementation of the Final Rule and the issuance of SSA no-match letters containing an insert drafted by DHS.

In its order, the court held that there were serious questions regarding three aspects of the Final Rule. Specifically, the court questioned 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) by interpreting the antidiscrimination provisions of the Immigration Reform and Control Act of 1986 (IRCA); and (3) violated the Regulatory Flexibility Act by not conducting a regulatory flexibility analysis. Following its entry of the preliminary injunction, the district court stayed proceedings in the litigation to allow further rulemaking.

Subsequently, DHS published a Supplemental Notice of Proposed

Rulemaking (SNPR) addressing the court's concerns. After considering the comments received in response to SNPR, DHS adjusted the cost calculations in the Initial Regulatory Flexibility Analysis and prepared a Final Regulatory Flexibility Analysis, finalized the additional legal analysis set out in the SNPR, and determined that the rule should issue without change.

Safe Harbor Requirements

In the SFR, DHS republished the text of the regulation, including the safe-harbor provision, but did not, as noted above, make any substantive changes to the regulation. The safe-harbor provision states that an employer will not be deemed to have had constructive knowledge of an individual's unauthorized employment status if the employer follows the steps below in response to a SSA no-match letter or DHS notice of suspect documents.

Within 30 Days of Receiving a No-Match Letter from the SSA:

• The employer must check its records to determine whether the discrepancy is due to a typographical or clerical error. If so, the employer must:

• **correct** the information and inform the SSA of the correct information; and

• **verify** with the SSA that the employee's name and SSN, as corrected, match the agency's records.

Additionally the employer should make a record of the date, time and manner of this verification and store this information with the employee's I-9 form. The employer should not perform new I-9 verification, although it may update the employee's I-9 form or complete a new I-9 form with the corrected information.

• If the employer determines that the discrepancy is not due to a typographical or clerical error in its own records, it 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, as set forth above.

• If the employee states that the employer's records are correct, the employer must promptly request that the employee resolve the discrepancy with the SSA. The discrepancy must be resolved within 90 days of the date the employer received the written notice from the SSA.

Within 90 Days of Receiving a No-Match Letter:

If the employer is unable to verify the employee's name and SSN within 90 days of receiving written notice from the SSA, the employer has three days in which to re-verify the employee's employment authorization.

• To re-verify the employee's employment authorization, the employer must complete a new I-9 form for the employee using the same procedures as if the employee were newly hired.

• However, the employer cannot accept any document referenced in the no-match letter or any document that contains a disputed SSN or alien number or a receipt for an application for replacement of such a document to establish work authorization or identity.

• The employee must present a document that contains a photograph to establish identity or both identity and work authorization.

• The employer must retain the new I-9 form with the prior I-9 forms in accordance with federal laws and regulations.

The regulation provides for similar procedures for a safe harbor after receiving a notice of suspect document from DHS.

Employers' Bottom Line:

DHS has indicated it will ask the court to lift the injunction prohibiting it from implementing the Final Rule. We will keep you updated on the status of the court's decision. In the meantime, employers should continue to ensure that they have appropriate documentation of their employees' work eligibility.

If you have any questions regarding this issue or other business immigration issues, please contact any member of Ford & Harrison's Business Immigration Practice Group.