HIRE PERSPECTIVES

Winter 2009/2010

A periodic newsletter from the Labor & Employment Law Group at Dickinson, Mackaman, Tyler & Hagen, P.C.

Social Security No-Match Notices: Safe Harbor No More!

by BRIDGET R. PENICK

On August 15, 2007, the Department of Homeland Security issued a final rule, effective September 14, 2007, explaining employer obligations regarding workers' employment authorization verification. On August 29, 2007, a lawsuit was filed in the Northern District of California, alleging that DHS did not have the authority to implement the rules or to use Social Security records to enforce immigration laws. On September 6, 2007, a temporary restraining order was issued.

On October 10, 2007, a preliminary injunction was issued enjoining the implementation of the final rule. District Judge Charles Breyer concluded that the balance of hardships tipped in favor of Plaintiffs' claims that the rule (1) contravenes the Immigration Reform and Control Act, or IRCA; (2) is arbitrary and capricious under the Administrative Procedures Act, or APA; (3) is an ultra vires or "beyond the powers" action by DHS and SSA; and (4) violates the Regulatory Flexibility Act. The litigation continued.

Subsequently, on October 28, 2008, amended regulations were proposed to define the procedures employers must take to acquire a "safe harbor" upon the receipt of "no-match" letters. Litigation again continued.

After further review (and after the 2008 elections), on August 19, 2009, DHS proposed to rescind the "No-Match / Safe Harbor" regulation. After accepting comments, DHS issued its final rule on October 7, in which it formally rescinded the August 2007 "No-Match / Safe Harbor" regulation, effective November 6, 2009.

DHS has announced that it will focus its enforcement efforts on the employment of aliens not authorized to work in the United States and on increased I-9 compliance through improved verification, including participation in E–Verify, ICE Mutual Agreement Between Government and Employers ("IMAGE"), and other programs. There are advantages and disadvantages for employers to consider before enrolling in the E-Verify or IMAGE programs. Before enrolling, employers are encouraged to carefully read the Memoranda of Understanding they are required to sign as a condition of the program.

Employers also need to be aware that, despite DHS's rescission of the No-Match / Safe Harbor regulation, DHS does plan to continue its I-9 enforcement activities. Employers need to continue to follow proper protocols in verifying the work authorization status of their employees, including periodic internal audits. Employers also need to take immediate and reasonable steps to make further inquiry upon receiving credible information that an existing employee may not have authorization to work in the United States.

DHS did not address how employers are to respond to no-match letters in the future. As a reminder, agencies issue no-match letters notifying employers about discrepancies between the employer's records and an agency's records. For instance, the Social Security Administration (SSA) sends no-match notices if employees' names and social security numbers (as provided by the employer) do not match the SSA database. Likewise, DHS issues notices to employers when it discovers (usually during an agency audit) that employment authorization documents or immigration status documents (usually referenced in an employee's I-9 form) do not harmonize with DHS records.

If an employer receives either of these notices and does nothing, the employer could be subjected to both civil and criminal penalties for knowingly employing illegal workers. Despite the arguable faults with the "safe harbor" regulations, the "bright side" of the regulations was that, finally, employers were going to have clear guidance on how to handle no-match notices.

Employers are again left on their own to forge their own plan for responding to no-match letters. Prior to the 2007/2008 regulations, the SSA advised that employers could not terminate an employee solely because a no-match letter was issued. Ultimately, the key inquiry is whether the employer has knowledge (constructive or actual) of the employee's unverified status. Common sense should prevail.

If you have questions about employer obligations regarding workers' employment authorization verification, please contact a member of the Firm's Employment & Labor Law Group or the Dickinson attorney with whom you normally work.

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