

EMPLOYMENT & LABOR LAW NEWS

SECTION BOARD

S. Charles Archuleta , Chair
Gregory P. Williams, Chair-elect
J. Edward Hollington, Budget-Officer
Ernestina Rebecca Cruz, Secretary and YLD Liaison

Eleanor Katherine Bratton
Danny William Jarrett
K. Lee Piefer
Rita G. Siegal
Aaron Charles Viets
Carlos Quinones, Past Chair

BOARD MEETINGS

The Board meets the first Wednesday of each month. Section members are welcome at all meetings.

WHEN MEDIATION FAILS: THE SUMMARY JURY TRIAL ALTERNATIVE

by Dionna K. Mitchell, Esq. and Leslie C. Smith, US Magistrate Judge

"NO-MATCH" PROVISIONS STALLED, BUT SHOULD NOT BE FORGOTTEN

by Danny W. Jarrett and Kevin G. Gick

When Mediation Fails: The Summary Jury Trial Alternative

**By Dionna K. Mitchell, Attorney at Law¹
with Leslie C. Smith, United States Magistrate Judge²**

Consider this common settlement scenario: At the conclusion of your mediation in a Title VII case, you have reached a stalemate with opposing counsel and her client. One of you bottomed out at \$300,000, the other refused to go higher than \$60,000. The mediator suggested that the case should settle around \$150,000, but neither side was interested. You know you've got a great case, but it's obvious opposing counsel feels the same way. Is trial your only option? Not necessarily.

A. When Should Parties Consider a Summary Jury Trial?

When a mediation fails after a wide disparity in settlement offers, it is often a sign that one or both parties have mis-evaluated the case. Often an attorney's next step is to spend a significant sum on a mock jury panel or focus group in order to prepare for trial. Mock jury panels may be useful to assess the strengths and weaknesses of a case and to evaluate how real people will react to the basic facts and arguments. The summary jury trial process, however, is far more effective. Aside from the fact that the court will empanel a jury from the same jury pool that would be used for trial, the real advantage is that the summary jury trial turns "the biggest unknown – a juror's reaction to [opposing counsel's theory of the case] – into a highly effective case valuation and settlement tool."³

In federal court, judges and parties may decide to hold a summary jury trial "when

¹ Dionna Mitchell recently finished her second year as Law Clerk for Judge Smith.

² Judge Leslie C. Smith is a United States Magistrate Judge with the United States District Court in Las Cruces.

³ Keith R. McCurdy & Keith J. Rosenblatt Grott, *The Summary Jury Trial: An Alternative to the Traditional Alternative Dispute Resolution Process*, THE METROPOLITAN CORP. COUNSEL 16 (May 2005), available at <http://www.metrocorp.counsel.com/pdf/2005/May/16.pdf> (last visited August 21, 2007).

witness credibility is an issue, when settlement talks have stalled over differing perceptions of the amount a jury is likely to award, and when the procedure” will result in a cost savings to the court.⁴ Essentially, a summary jury trial is a mini-trial. The court calls a jury panel, and the parties follow a traditional – albeit shortened – trial format. And while the parties may choose whether to make summary jury trials binding or advisory, these alternative mediation procedures are likely to result in settlement regardless, because the parties get to have their day in court.

B. Preparing for and Structure of a Summary Jury Trial

Before a summary jury trial, the attorneys and the referral judge draw up a stipulated order setting guidelines and time limits.⁵ These guidelines may include provisions that specify: (1) what evidence the parties may offer (usually any evidence that would be admissible at trial); (2) the number of witnesses who may be called to testify for each side; and (3) whether the jury’s decision is binding or advisory. The order also allows the parties to set time limits on opening statements, witness testimony, and closing statements. Rarely will the Court permit the summary jury trial to extend beyond one day, including time for deliberations.

One to two weeks before the proceedings, the parties submit proposed jury instructions and verdict forms. The instructions should be abbreviated and case specific; there is no need to include stock or general instructions. The parties should also submit exhibits, specifying which exhibits are stipulated to and which are contested. Parties may choose to prepare exhibit notebooks for each juror in order to save the time spent passing exhibits between jurors. If the

⁴ Excerpt from ELIZABETH PLAPINGER & DONNA STIENSTRA, ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS: A SOURCEBOOK FOR JUDGES AND LAWYERS (1996), *available at* http://www.fjc.gov/public/home.nsf/autoframe?openform&url_1=/public/home.nsf/inavgeneral?openpage&url_r=/public/home.nsf/pages/765 (last visited August 16, 2007).

⁵ An example of such an order follows this article.

parties choose to read from depositions, statements, or reports, the relevant excerpts should be submitted to the court. In our experience, attorneys have spared no expense on exhibits; they have used power point presentations, professionally printed posters and diagrams, and high quality video presentations. While the evidentiary rules will likely be more relaxed at the summary jury trial, parties may make the same objections they can make at a normal trial.

On the day of the summary jury trial, the attorneys will participate in the jury selection process. The jury pool will be smaller than normal, so attorneys may only get one or two peremptory challenges. A six to eight member jury is ideal. To ensure that the verdict is authentic, the jury is not told that the decision is non-binding until after they have reached a verdict. After the jury is sworn in, each side will have the opportunity to present a brief (usually ten to fifteen minutes) opening statement. Time limits should be strictly enforced to keep the proceedings moving. The remainder of the trial will unfold as agreed to in the stipulated order.

After the judge gives the jury the streamlined instructions, the jury should be given at least an hour to deliberate. If the jury has not reached a verdict within the time set aside, the parties and judge may decide to ask the jury where they are in their deliberations. To maintain the cost savings and convenience of the proceedings, it is important that the deliberations not spill over to another day. If the stipulated order requires a unanimous verdict, it may be prudent to agree to a consensus verdict instead. Once the jury has reached a verdict, the court may explain the nature of the proceedings and encourage the jurors to talk to the attorneys about the case presentation and the deliberations.

C. Benefits of Summary Jury Trials

The greatest advantage to conducting a summary jury trial is the opportunity to present your case to a real jury. After the jury has reached a verdict, it is also helpful to get the jurors'

insight on the credibility of the witnesses and the effectiveness of your strategy. Because parties go into a summary jury trial with widely differing settlement values, the verdict should make at least one side reconsider its bargaining position. Consequently, the best time to attempt to settle a case is while the jury is still out. If the case does not settle while the jury is out, settlement is still a possibility. For the party on the wrong side of the verdict, “[t]he possibility of losing becomes real[, and a] client’s perceived invincibility may be rapidly replaced with the reality of trial.”⁶ If the parties do not settle before or immediately after the verdict is announced, it may be beneficial to request a continuation settlement conference with the Magistrate Judge. To ensure that the proceedings and verdict are still fresh in the minds of the parties, any continuation settlement conference should be held no more than thirty days after the summary jury trial.

The parties may also decide, either in the stipulated order or while the jury is out, to make the verdict dispositive. To make this option more attractive, the parties can agree to set a cap and floor on damages. The advantages to making the verdict dispositive are: (1) a cost savings to the parties; (2) a private settlement with no judgment; (3) elimination of the unknown factors inherent in dispositive pre-trial motions; and (4) elimination of all appeals. Further, an end to the case will decrease the stress and emotional turmoil parties often associate with litigation.

D. When Summary Jury Trials Are Not Appropriate

For a summary jury trial to be effective, it is important that no one pull a punch by withholding relevant evidence – everyone must agree to give it her best shot. In other words, the

⁶ *Summary Jury Trials*, available at <http://www.rcreo.com/pg84.cfm> (quotation marks and reference omitted) (last visited August 21, 2007). On the other hand, “[o]ne drawback to a summary jury trial is that it may have a polarizing effect, entrenching a party further in his or her position.” *Id.* (quotation marks and reference omitted).

parties must honestly use the proceedings as a settlement tool, or they will be a waste of time and resources. A summary jury trial is not appropriate where one of the parties has an ace up his sleeve. With our expansive discovery rules, however, this possibility is unlikely. The proceedings may also be inappropriate when one party sees delay as an advantage. Both parties must want to work toward a resolution of the case.

Finally, this method of alternative dispute resolution must be cost effective for the court. Because the court is putting resources into the settlement efforts, and because it is fairly expensive to bring a jury panel in, the court will not agree to this process for a case that would normally have a short trial. If the case can be tried in two days, it makes no sense to hold a summary jury trial in one. Normally, the court will not agree to a summary jury trial unless the real trial is scheduled for four or more days.

E. Conclusion

When traditional mediation has failed, a summary jury trial may be an appropriate detour on the road to trial. Summary jury trials represent a cost savings to both the parties and the court, allow parties to present their cases to a real jury panel, and encourage parties to reevaluate their settlement positions based on the jury's verdict. Additionally, the flexibility of summary jury trials allows the court to adapt the process to the needs of each case. Rather than gear up for trial after you reach an impasse in your next mediation, consider the summary jury trial as an alternative settlement tool.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

JON DOE,

Plaintiff,

v.

No. CIV 07-0000 RB/LCS

JOHN DOE and BILL ROE,

Defendants.

STIPULATION FOR FINAL RESOLUTION OF THIS CAUSE

1. The court finds after a settlement conference was conducted in this cause by the Magistrate Judge, that the parties hereto have agreed that a summary jury trial is an appropriate method for fully resolving all of the issues in this cause. Therefore, this action is designated as one for summary jury trial proceedings.

2. The action shall be in trial readiness when called for Summary Jury Trial. This matter is hereby set for Summary Jury Trial before the Honorable (Judge) on (date) at (time) p.m. in the United States District Courthouse, (address).

3. This action shall be heard before at least a six-member jury, to be selected from the general venire. Counsel will be permitted (number) challenges to the venire – normally one peremptory challenge each. The Court will conduct the voir dire. (*OR, Counsel will be allowed to conduct 15 minutes of voir dire per party. All other voir dire shall be conducted by the court.*) Challenges to the venire, both peremptory and for cause, shall be in accordance with law and the Rules of Civil Procedure.

4. At least ten days prior to the trial, counsel shall submit abbreviated written jury instructions and jury advisory opinions (verdict forms). In addition, counsel shall submit brief memoranda on any novel issue of law or evidence presented. Prior to their submission to the

court, counsel shall confer on the proposed jury instructions and verdict forms in order to reach an agreement as to their use.

5. Unless excused by order of the Court, parties or parties' representatives shall be in attendance at the Summary Jury Trial.

6. Except as hereinafter provided, all evidence (except the videotaped or transcribed depositions of all physicians or other expert witnesses as approved by the court) shall be presented through the attorneys for the parties, who may incorporate arguments on such evidence in their presentations. The depositions of the physicians and others upon whom counsel may agree will be read to or played for the jury. Only evidence that would be admissible at trial upon the merits may be presented. All documents agreed to by counsel, answers to interrogatories and any other exhibits agreed to by the parties shall be automatically admitted into evidence. Other exhibits proffered by the parties shall be admitted into evidence in accordance with the Rules of Evidence. Counsel may only present factual representations supportable by reference to discovery materials, to a sworn (or unsworn) signed statement of a witness, or to a stipulation. Statements, reports, and depositions may be read from but not at undue length. Physical exhibits, including documents, may be exhibited during the presentation and submitted for the jury's consideration. Exhibits prepared exclusively for use at the summary trial shall be shown to opposing counsel at least twenty days prior to commencement of the trial. Exhibits will be returned to counsel after the verdict. A verbatim record of the proceedings will be made by electronic recording device or by court reporter. *(OR, If the parties wish to record the proceedings, they must agree on the recording device and payment method. OR, no recording of the proceedings will be allowed.)* In this case, the Court will allow brief testimony by the parties. *(If no testimony is allowed, delete relevant section from paragraph 7.)*

7. Counsel for Plaintiff shall be limited in her combined opening and closing arguments with an overview of the exhibits to forty-five minutes, with rebuttal of fifteen minutes. Counsel for the Defendant shall be limited to one hour. *(OR, Counsel for each party shall be given a total time of (number) hours for opening, interim, and closing arguments.)* Strict timekeeping will be kept and enforced by the court. Counsel for the plaintiff shall advise opposing counsel of how she will divide her allotted “argument time” at least twenty days prior to the day of the trial. All other counsel will advise plaintiff’s counsel of how he/she will allot his/her time no more than five days after being advised by plaintiff’s counsel. Plaintiff’s counsel will advise the court of the allocation of time by all parties at least five days before trial.

(Omit this paragraph if no witnesses will testify) (Number) lay person(s) from each party may testify. The testimony for each lay witness is limited to twenty-five minutes on direct examination, fifteen minutes of cross-examination, and five minutes of re-direct. No re-cross will be permitted. All of these time limits will be strictly enforced. Witnesses will be sworn before testifying. The parties will identify to each other and the court their choice of live witnesses no later than (number) days prior to the date scheduled for the summary trial.

8. Prior to summary trial, counsel shall confer with regard to physical exhibits, including documents and reports and reach such agreement as is possible as to the use of such exhibits. Any disagreement will be brought to the attention of the court at least ten days prior to the summary jury trial.

9. Objections will be received if in the course of a presentation counsel goes beyond the limits of propriety in presenting statements as to evidence or argument thereon.

10. After counsel’s presentations, the jury will be given an abbreviated charge on the applicable law of liability and damages.

11. *(Use this paragraph if your summary jury trial will be dispositive)* Counsel hereby stipulate that a unanimous verdict by the jury will be deemed a final determination on the merits. Upon receipt of the jury's verdict, the parties will execute standard releases, a check in the amount of the verdict will be delivered by the Defendant to Plaintiff's counsel, and this cause shall be dismissed with prejudice. Further, the parties have agreed to "bracket" the verdict of the jury so that in the event the jury's verdict is for the defendants or is less than a pre-agreed upon "floor" amount, plaintiff will still receive the "floor" amount; and in the event the verdict exceeds the "cap", the plaintiff will only receive the "cap" amount all as set forth in the separate agreement of the parties. It is also ordered that the jury will not be told of the "bracketing" of the possible verdicts. The parties have further agreed that no appeal will be taken from the result of the summary jury trial. The amount of any verdict will include costs and attorney fees. The parties and counsel have agreed in writing to the cap and floor amounts in a separate document, and have also agreed that the summary jury trial will be fully dispositive of all of the issues in this case; the original of this document will also be filed with the Court.

(Use this paragraph if your summary jury trial will be non-dispositive) The jury may return either a consensus verdict or a special verdict consisting of an anonymous statement of each juror's findings on liability and/or damages (each known as the jury's advisory opinion). The jury will be encouraged to return a consensus verdict. If the jury has not reached a unanimous verdict after forty-five minutes of deliberation, they will be questioned as to whether they can reach a unanimous verdict and if not, then they will be given special anonymous verdict forms. These forms will be prepared by counsel and submitted to the court prior to the summary jury trial. Counsel may stipulate that a consensus verdict by the jury will be deemed a final determination on the merits and that judgment be entered thereon by the Court, or they may

stipulate to any other use of the verdict that will aid in the resolution of the case. Without such a stipulation, the verdict will not be binding on the parties nor may it be referred or alluded to at trial.

12. These rules shall be construed to secure the just, speedy and inexpensive conclusion of the Summary Jury Trial procedure.

13. Final issues concerning the conduct of the Summary Jury Trial, pre-trial motions, the admissibility or propriety of the use of certain exhibits and testimony, and issues concerning voir dire, jury instructions and forms of verdict are hereby set for hearing before the Honorable (judge) on (date/time).

14. This procedure has been fully explained by counsel to the respective parties and counsel affirmatively state and certify that the parties are in agreement as to the use of this procedure to fully dispose of all of the issues in this case and that there will be no appeal from the verdict and judgment entered as a result of its use.

APPROVED AND AGREED TO:

Counsel for Plaintiff

Counsel for Defendant

“NO MATCH” PROVISIONS STALLED, BUT SHOULD NOT BE FORGOTTEN

By Danny W. Jarrett¹ and Kevin G. Gick²

On August 15, 2007, the Department of Homeland Security (DHS) (which oversees Immigration and Customs Enforcement (ICE)) published new regulations outlining the safe-harbor procedures for employers who receive a “no match” letter from the Social Security Administration (SSA) or DHS³. The new rules were to go into effect on September 14, 2007. However, their implementation has been stalled pending judicial review.

On August 31, 2007, the U.S. District Court for the Northern District of California issued a temporary restraining order stalling implementation of the new regulations⁴. The plaintiffs in the case, a consortium of union and business interests including the AFL-CIO, the United States Chamber of Commerce, and the American Civil Liberties Union, then filed a motion for preliminary injunction to delay implementation of the regulations. On October 10, 2007, the Court granted the motion, finding that the plaintiffs raised serious questions regarding the potential harm the new regulations posed to their members, as well as the potential that the government defendants violated federal law in the promulgation of the rules⁵. As of the date of this publication, the new rules have not been implemented.

There are no guarantees that the new regulations will take effect in the future. In any case, attorneys, particularly those representing employers, should be aware of the safe-harbor procedures in the regulations should they be implemented.

THE “NO MATCH” LETTER

A “no match” letter from the SSA, often in the form of an “Employer Correction Request,” informs the employer that the information submitted on the employer’s yearly earnings reports (W-2 Forms) does not match the information in the SSA’s records⁶. The letter may refer to inconsistencies between an employee’s reported name and Social Security Number (SSN). Such an inconsistency may merely be due to clerical error; however, the regulations state that it may also be an indicator that the employee is an undocumented alien. In any case, to illustrate the magnitude of this information disjunction, the regulations indicate that, as of 2003, 255 million unverifiable W-2 forms had accumulated since 1936, representing \$519.6 billion in earnings.

DHS may also issue employers a “no match” letter in the form of a “Notice of Suspect Documents,” which often follows an employer’s submission of its Employment Eligibility Verification (I-9) forms for audit by the DHS. If the audit results in DHS’

¹ Danny W. Jarrett is the President of Noeding & Jarrett, A Professional Corporation.

² Kevin G. Gick is a third-year law student at the University of New Mexico School of Law and law clerk at Noeding & Jarrett, A Professional Corporation.

³ “Safe-Harbor Procedures for Employers Who Receive a No-Match Letter,” 72 Fed. Reg. 45,611 *et seq.* (codified at 8 C.F.R. Part 274a). Unless otherwise indicated, this document serves as the source of all subsequent information in this article.

⁴ *AFL-CIO, et al v. Chertoff, et al*, (N.D. Cal. Case No. 07-CV-4472 CRB), Dkt. No. 21.

⁵ *Id.* at Dkt. No. 135.

⁶ See 20 C.F.R. 422.120(a).

inability to confirm the identity of an employee by the immigration or citizenship documents the employee references on the I-9 form, then DHS may send the employer a “no match” letter.

ACTUAL AND CONSTRUCTIVE KNOWLEDGE

When an employer receives a “no match” letter from either agency, the regulations indicate that the employer must act in order to avoid DHS sanctions. If the employer does not act, DHS may determine that the employer is complicit in a violation of immigration laws. In order for such a violation to occur, DHS must deem the employer to have had either “actual” or “constructive” knowledge of the subject employee’s status as unauthorized to legally work within the United States⁷.

A determination that an employer had actual knowledge of an employee’s unauthorized status means that the employer actually knew that the employee was not authorized to work according to United States immigration laws. Such knowledge imputes liability for a violation to the employer for hiring and continuing the employment of the unauthorized employee.

A DHS determination that an employer had “constructive” knowledge of the employee’s unauthorized status under the new regulations is, as the name suggests, an inference of knowledge based on the evident facts and circumstances. In such a case, the employer’s knowledge of an employee’s unauthorized status may be inferred because such facts and circumstances should have led the employer to know of the employee’s unauthorized status. For instance, the regulations state that a deliberate failure by the employer to investigate an employee’s status when the employer has received a “no match” letter from DHS or SSA may be used to demonstrate the employer’s constructive knowledge that it has hired or maintained the employment of an unauthorized employee.

Importantly, however, while the totality of relevant circumstances may be used to impute the employer’s constructive knowledge of a violation of immigration laws, the regulations specifically state that foreign appearance or accent may not be so used⁸.

THE SAFE- HARBOR PROCEDURES

The new regulations state that, so long as an employer takes reasonable steps, DHS will not be able to use the “no match” letter to demonstrate that the employer had constructive knowledge of an employee’s unauthorized status. These steps constitute the “safe-harbor” procedures that comprise the bulk of the new regulations. The procedures include:

- Checking employment records promptly after receiving the “no match” letter to rule out clerical, typographical, or similar errors in the employer’s records or

⁷ See 8 C.F.R. 274a.1(l)(1).

⁸ See also 8 U.S.C. § 1324b(a)(1)(A): “It is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual (other than an unauthorized alien, as defined in section 274A(h)(3)) with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment because of such individual’s national origin.”

in communications between it and the SSA or DHS. Employers have thirty days from the receipt of the letter to correct such errors and verify the corrections with the appropriate agency.

- Having the employee confirm that the information in the employer's records accurately reflects what the employee has reported. If confirmation is given, the employer should refer the employee to the relevant agency to clear up any documentation issues that may exist. The employer should then revise its records and contact the relevant agency with the revised information. This step should be completed within ninety days of the receipt of the "no match" letter.
- Following verification procedures within ninety-three days of receipt of the "no match" letter to verify the employee's status. This requires the employer and employee to complete a new I-9 form as if the employee were newly hired. The required documentation for the new I-9 form may not consist of the SSN or other identifying number in contention in the "no match" letter. Furthermore, the documentation must feature a photograph of the employee to establish identity and employment authorization.

The regulations state that, if the information discrepancy is not resolved and if the employee's status cannot be verified, then the employer must either terminate the employee or face the risk that DHS may determine that, if the employee is unauthorized, the employer had constructive knowledge that the employee was unauthorized and thus was complicit in a violation.

NON-DISCRIMINATION

It is very important that employers apply any verification procedures consistently amongst all of its employees. As stated previously, an employee's foreign appearance or accent is not a relevant factor when determining whether or not an employer had knowledge of an employee's unauthorized status. Accordingly, the regulations state that employers may not focus on traits that indicate an employee's national origin when acting in response to a "no match" letter. Similarly, employers should not immediately fire the suspect employee without following the verification procedures. Doing so may lead to a discrimination lawsuit.

OTHER CONSIDERATIONS

The regulations indicate that employers may protect themselves from violations of immigration laws by acting proactively to verify their employees' status. Such verification resources include:

- Social Security Number Verification System:
www.ssa.gov/employer/ssnv.html
- Systematic Alien Verification for Entitlements (SAVE) Program and EEV:
www.vis-dhs.com/EmployerRegistration
- ICE Mutual Agreement between Government and Employers (IMAGE) Program: www.ice.gov/partners/opaimage/index.html

Similarly, the regulations indicate that employers should act reasonably if they wish to overcome any presumption that they had actual or constructive knowledge of an employee's unauthorized status if a violation of immigration laws is determined. For example:

- An employer should act immediately once it receives the “no match” letter.
- The employer should follow the steps contained in the “no match” letter to avoid DHS sanctions.
- The employer should not file a labor certification or employment-based visa petition for an unauthorized employee if it receives a letter, as it may indicate constructive knowledge of the employee's unauthorized status.

THE CONFLICT IDENTIFIED BY THE COURT

The Federal District Court for the District of Northern California found that serious questions were raised regarding the potential harm to the plaintiffs' members, as well as potential violations of law by the government defendants.

First, the Court found that the harm that the plaintiffs' class members as well as those similarly situated outweighed that which the government would suffer on implementation due to the delay. The Court found that, if the rules were implemented, DHS and SSA would immediately mail no-match letters to 140,000 employers, identifying no-matches for approximately 8 million employees. Employers would have to comply with the safe-harbor procedures within the new rule's 90-day timeframe. Accordingly, the cost to employers in complying would be significant, as they would have to develop expensive human resources systems in order to take advantage of the safe-harbor provisions outlined in the new regulations. Similarly, the impact to employees would be great, as there would be a strong likelihood that employers would conduct mass layoffs in order to avoid DHS sanctions, even if the employees were authorized to work. Conversely, the impact to the government would be low if the injunction were granted, as the SSA already had the infrastructure necessary to comply with such an order. Accordingly, the Court determined that the plaintiffs sufficiently expressed their concern that their members would suffer disproportionate harm with implementation of the rules.

Next, the Court found that the plaintiffs raised a serious question as to whether the rule would be arbitrary and capricious in violation of the Administrative Procedures Act (APA)⁹. Prior to the regulation, the DHS' predecessor took the position that a no-match letter did not put an employer on notice that an employee was not authorized to work. However, the safe harbor provision indicates that constructive knowledge could be inferred if the employer does not act upon receiving the letter. In fact, the Court stated, the regulation indicates that no evidence would be required beyond receipt of the letter to impute civil and criminal sanctions. This, the Court determined, constituted an agency change-in-course. The APA imposes a burden on the government to justify such a change through reasoned analysis. The agency failed to express such an analysis. Thus, the Court determined, the plaintiffs raised a serious question regarding

⁹ 5 U.S.C. § 706(2)(A).

whether the government violated the APA by implementing the regulations without a proper analysis.

Third, the Court questioned whether DHS exceeded its authority by interpreting the Immigration Reform and Control Act (IRCA). The IRCA provision in question¹⁰ prohibits discriminatory employment action based on national origin. The new regulation assures employers that, by following the safe harbor provision, they would not be subject to suit under the anti-discrimination provision. However, DHS is not charged with enforcement of the anti-discrimination provisions of 8 U.S.C. § 1324(b). Rather, that onus falls on the Department of Justice. Thus, the plaintiffs raised a serious question regarding whether the DHS exceeded its authority by promulgating the regulation.

Finally, the Court questioned whether DHS violated the Regulatory Flexibility Act (RFA) by not conducting an appropriate final flexibility analysis. The business plaintiffs alleged that DHS failed to conduct a final flexibility analysis even though the final rule would have a significant impact on small businesses. RFA requires agencies, when promulgating a new regulation, to prepare a flexibility analysis that describes, among other things:

- A summary of the significant issues raised by the public comments in response to the initial regulatory flexibility analysis;
- A summary of the assessment of the agency of such issues; and
- The steps the agency has taken to minimize the significant economic impact on small entities¹¹.

DHS did not prepare a flexibility analysis prior to promulgating the new rules¹². Rather, the agency explained, the analysis was not necessary as the new regulations would not mandate any new burdens on employers and would not impose new or additional costs. In fact, the agency argued, the regulations only outline a “safe harbor” procedure regarding the issuance of no-match letters. DHS also asserted that the new regulations were only interpretive, and thus the analysis requirements did not apply. However, the Court did not consider the latter assertion, as it was only asserted in the face of the preliminary injunction motion. In addition, because the Court already found that the plaintiffs raised a serious issue with the prospective costs associated with complying with the new rule, the Court determined that there were serious questions whether DHS violated the RFA by not conducting a flexibility analysis.

On October 10, 2007, the Court granted the plaintiffs’ motion for preliminary injunction. The parties were to submit position statements on October 12, 2007 for hearing. As of publication of this article, no such hearing has been held. As such, implementation of the new regulations has been put on hold pending a determination of the issues raised.

¹⁰ 8 U.S.C. § 1324b(a)(1).

¹¹ 5 U.S.C. § 604(a).

¹² Flexibility analyses by agencies are not necessary if the agency “certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.” Such a certification must include “a statement providing the factual basis for” the agency’s determination as such. 5 U.S.C. § 605(b).

DHS, under which Immigration and Customs Enforcement (ICE) operates to enforce immigration laws, indicated that it intends to comply with the Court's ruling. In a statement, DHS Secretary Michael Chertoff said that, while disappointing, the ruling would not impede the enforcement or implementation of other plans, such as requiring higher compliance standards for those employers doing business with the federal government¹³. "This is only one single measure in a whole bucket full of measures," he said. "We're going to continue to turn the heat up on employers who knowingly and systematically violate the law."

CONCLUSION

DHS maintains that, if the new regulations are implemented, they would not impose any new obligations on employers. Rather, they would help employers avoid sanctions by DHS in an immigration investigation. Conversely, critics of the new regulations assert that the new rules would place a huge economic and social burden on the nation's employers and workers. Regardless, even though the regulations have not been implemented, existing immigration laws are still in effect and federal agencies have not mitigated their efforts to enforce those laws in the face of the U.S. District Court's decision. Accordingly, attorneys should continue to advise their employer-clients of the methods that exist to verify employees' status as well as what to do if their employer-clients receive a "no match" letter from the SSA or DHS. Attorneys should also be mindful of DHS' pledge to "turn up the heat" on certain employers.

¹³ Emily Bazar, *Judge Blocks Immigrant Crackdown* (October 10, 2007), available at http://www.usatoday.com/news/nation/2007-10-10-immigration-ruling_N.htm.