

“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.