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ICE Issues Final Rule for SSA No-Match Letter "Safe Harbor"- Opponents Fire Back

The author reports on the newly issued ICE final rule that elevates receipt of a no-match letter to evidence of constructive knowledge of unauthorized employment.

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The New Rule

On Friday, August 10, 2007, ICE announced its new final rule concerning how employers should respond to SSA no-match letters if they do not want the no-match letters held against them as evidence of constructive knowledge that the employee was unauthorized to work in the U.S. The regulation was issued on August 15, 2007 and is located at 72 Fed. Reg. 45611 (Aug. 15, 2007). As noted by many in the past, by denying "safe harbor" to employers who do not meet the terms of the new rule, ICE elevates receipt of a no-match letter to evidence of constructive knowledge of unauthorized employment. The new rule provides the same no-match response procedures outlined in last summer's proposed rule, and therefore creates a difficult employment decision for employers when the employee cannot straighten things out with SSA in the allotted time. However, the timelines for completing the procedures have been extended in response to the employer community's comments/complaints to the proposed regulations. The 14 day/60 day periods have been enlarged to 30 day/90 day milestones. If the mismatch is not resolved within 90 days, the employer may re-I-9 the employee within three days. If the I-9 cannot be re-verified by day 93, the employee may be discharged or if retained, the employer loses the safe harbor defense. The regulation provides employers no protection against liability for discrimination on the basis of national origin where an employee discharged for inability to clear up a mis-match turns out to be lawfully employable. ICE continues its attempts to obtain a change in law from Congress allowing it access to the SSA database.

According to ICE, all SSA mismatch letters will now include a letter from ICE reminding employers how to comply with the safe harbor provisions. Under current law, at least, ICE will not be provided the names of employers or individuals receiving no-match letters.

An interesting 'Fact Sheet' regarding ICE work-site enforcement is located at http://www.ice.gov/pi/news/factsheets/worksite.htm

The new rule and comment may be found at http://www.ice.gov/doclib/finalsafe.pdf A summary introduction for employers to the new rule is located at http://www.ice.gov/partners/employers/safeharbor/index.htm

An extensive list of questions and answers (FAQ's) may be found at the "Safe Harbor Information Center" at http://faq.ice.gov/cgi-bin/ice_faq.cfg/php/enduser/std_alp.php?p_sid=6IbfqOIi

A few points of government emphasis justify particular employer attention. ICE has decided and states expressly that civil fines serve no deterrent purpose, so their main focus is on seeking criminal fines, forfeitures and jail time for employers. ICE now provides a new "hotline" for reporting of illegal aliens. The old "Basic Pilot" program for electronic employee verification system has been renamed to "E-Verify" and is touted as the best method available for employers to have peace of mind over new hires and a secure work force. Use of "E-Verify" does not, however, relieve employers from the new rule's requirements and may not be used to

circumvent its provisions for purposes of the safe harbor.

With this new rule and the extensive accompanying materials ICE is seeking to build on the momentum developed over the last 16 months of unprecedented work-site enforcement to further increase employer attention and tension regarding the subject. Undoubtedly the content of this roll-out will be utilized against employers who do not acknowledge it or who disagree with its extensive interpretations of law. Employers must determine whether compliance with the safe harbor requirements will benefit them in their specific circumstances upon receipt of the next round of SSA no-match letters, and for employees unable to clear up SSN problems within the time allotted under the rule, whether to re-I-9 under the rule and ultimately, whether to terminate or continue the employment of affected employees.

Labor Fires Back

On August 29, 2007, a coalition of labor-advocate plaintiffs, headed by the AFL-CIO filed a complaint in the U.S. District Court for the Northern District of California seeking declaratory and injunctive relief forbidding DHS and ICE from implementing the new regulation, and against SSA prohibiting them from sending out "no-match" packets which include DHS/ICE guidance and instructions concerning the new rule. The initial relief sought was a temporary restraining order blocking implementation of the rule, which was granted by the court two days later, on August 31, 2007. The TRO forbids DHS/ICE and SSA from giving effect to or taking any action to implement the new rule, or mailing no-match letter packets with DHS rule guidance information.

The thrust of the plaintiffs' objection to the new rule is that by equating a SSA no-match letter with knowledge of unauthorized employment, the new rule exceeds the underlying statute, 8 U.S.C. 1324(a), by changing the definition of "knowing" employment and imposing unauthorized employment verification procedures on employers. These objections were advanced by many observers during the summer, 2006, comment period for the proposed rule. The suit alleges that issuing the rule was an *ultra vires* act which will provoke the firing of millions of lawful workers and citizens whose SSA mis-match problems have nothing to do with authorization to work by fearful or exploitive employers seeking 'safe-harbor'. Relying on statistics cited by the plaintiffs which reflect the systemic magnitude of SSA mis-match errors and the government's inability to reliably relate those errors to unauthorized work status, the court found that "…Plaintiffs have raised serious questions as to whether the new Department of Homeland Security rule is inconsistent with statute and beyond the statutory authority of the Department of Homland Security and the Social Security Administration". *AFL-CIO, et.al. v. DHS, et.al.*, #CO7 4472, U.S. District Court Northern District of California, Order, August 31, 2007.

A number of additional business groups and chambers of commerce requested and were granted leave to join the matter as plaintiffs on September 11, 2007. The TRO sets October 1, 2007 as the date for a hearing on the court's order to show cause why a preliminary injunction granting the relief sought should not be issued.