

# Labor and Employment Corner

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## Challenges to the “No-Match Rule”

In August 2007, the American Federation of Labor and the Congress of Industrial Organizations (AFL-CIO), along with other labor groups, filed a lawsuit against the Department of Homeland Security (DHS) challenging a new DHS rule affecting how employers must respond to certain notices from the DHS and the Social Security Administration (SSA).<sup>1</sup> This lawsuit, filed in federal court in California, claims that DHS's new rule regarding “No-Match” letters is inconsistent with current federal law and goes beyond DHS's authority.



A No-Match letter is a written notice from SSA or DHS that the name and Social Security number of an employee do not match for a particular employee. In early August 2007, DHS set forth regulations requiring employers to follow strict guidelines upon receipt of a No-Match letter or face possible civil and criminal penalties.<sup>2</sup> However, recent developments in this case have sent DHS back to the drawing board.

By way of background, the Immigration Reform and Control Act (IRCA) of 1986 made it illegal for an employer to knowingly employ workers who are not authorized to work in the United States.<sup>3</sup> Under IRCA, employers have a duty to verify the identity and employment eligibility of all new employees within three business days of the commencement of employment. This verification is accomplished by employers completing an I-9 (Employment Eligibility Verification)

form for each new person hired and reviewing documents that establish the worker's identity and authorization. The employer must retain records for three years from the date the worker was hired or one year after the termination of employment, whichever is later.

IRCA prohibits employers from continuing to employ workers when the employers know (or have actual knowledge) or should have known (or have constructive knowledge) that the employee is not an authorized worker. Under IRCA, an employer who gains actual or constructive knowledge that a worker is unauthorized must terminate the worker's employment. Violations of IRCA may result in an employer being subject to civil fines and criminal penalties.

Pursuant to DHS's draft regulations that were set forth in August, employers may also be found to have constructive knowledge if they fail to take reasonable

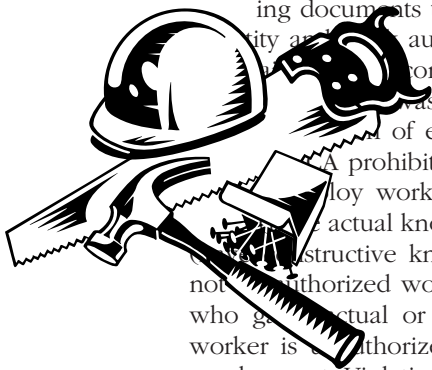
steps after the receiving a No-Match letter, which can take one of two forms:

- written notice from SSA that the name and Social Security number of an employee do not match for a particular employee; or
- written notice from DHS that a document that has been presented or referred to by an employee in completing the I-9 form either has been assigned to another person or DHS has no record of the document being issued to that employee.<sup>4</sup>

The new DHS regulations also include a “safe harbor” provision that protects employers who follow certain procedures. Consequently, if an employer follows these steps, the result would be that the receipt of a No-Match letter could not be used as evidence of constructive knowledge that a worker is not authorized. The regulation sets forth specific steps that a reasonable employer must take after receipt of a No-Match letter from SSA or DHS. For example, within 30 days of receiving a No-Match letter from SSA or DHS, the employer would have to determine if an administrative or clerical error caused the discrepancy in the employee's information. If such an error is found, the employer is responsible for correcting the error and providing the correct information to the relevant agency.

In addition, DHS's new regulation requires that, within 90 days of receipt of a No-Match letter, the employer must notify the employee of the discrepancy and request the employee to confirm the information that was provided on the I-9 form. If the employee confirms that the employer's records are correct, the employer must then ask the employee to resolve the discrepancy with the relevant agency within 90 days of receipt of the No-Match letter. Moreover, 90 days after receiving a No-Match letter, the employer has three days in which to complete an entirely new I-9 form. Finally, if at the end of the 93rd day, the employer is unable to verify the employee's eligibility for employment (through the completion of a new I-9), the employer must terminate the employee. Under the new rule, an employer who fails to terminate that employee risks a finding by DHS that the employer had constructive knowledge that it employed an unauthorized worker, thus possibly facing civil and criminal penalties.

The strict and extensive requirements imposed by this new rule pose obvious difficulties for many employers. Because of these difficulties, within weeks of



the regulation's introduction, the AFL-CIO and various labor and civil rights groups initiated a lawsuit in U.S. District Court for the Northern District of California.<sup>5</sup> The plaintiffs in this case argue that SSA's database is notoriously prone to errors. The plaintiffs also argue that employees face problems under the new regulation as well, pointing out that innocent factors—such as name changes resulting from marriage or divorce and the use of multiple surnames—can cause discrepancies in SSA's records. Such innocent discrepancies can potentially trigger a No-Match letter and termination of employment. Critics of the DHS's new regulation cite to the financial burden that adherence to the new rule will impose on employers and small businesses. Employers and labor groups complain that the No-Match rule shifts the burden of enforcing U.S. immigration laws onto their shoulders.

On Oct. 10, 2007, Judge Charles Breyer of the U.S. District Court for the Northern District of California issued an injunction in the case that barred DHS from enforcing the regulation and accompanying No-Match procedures. The injunction prevented SSA from sending No-Match letters to many employers regarding their employees. In his decision, Judge Breyer emphasized that DHS failed to follow the procedures set by the Regulatory Flexibility Act that require federal agencies to examine the economic impact that new or revised regulations can have on smaller-sized employers. Judge Breyer specifically looked to the significant expense employers would face in complying with the new rule.

Following Judge Breyer's issuance of the injunction, DHS filed a notice of appeal with the Ninth Circuit on Dec. 4, 2007. DHS Secretary Michael Chertoff issued a statement the following day: "Far from abandoning the No-Match Rule, we are pressing ahead by taking the district court's order to the Ninth Circuit Court of Appeals. At the same time, we will soon issue a supplement to the rule that specifically addresses the three grounds on which the district court based its injunction." He added, "By pursuing these two paths simultaneously, my aim is to get a resolution as quickly as possible so we can move the No-Match Rule forward and provide honest employers with the guidance they need."<sup>6</sup>

In addition, DHS also asked the district court to stay the litigation while it takes a closer look at the No-Match rule. In its motion, DHS indicated that, over the next four months, it will work to revise the new regulation.<sup>7</sup> Specifically, DHS wants to satisfy the court's concern as to the legality of the rule and assess its effect on small businesses through a Regulatory Flexibility Act analysis. On Dec. 14, Judge Breyer granted DHS's motion to stay the litigation. As such, the lawsuit is suspended until a new final rule is issued or until the court's cutoff date of March 28, 2008, whichever comes first. Once the rule is revised, DHS is expected to ask the court to vacate the injunction and, consequently, drop its appeal.

The Department of Homeland Security is now working to revise the controversial No-Match regulation, a process it began in December. Employers and employees alike eagerly await DHS's issuance of the revised No-Match rule. **TFL**

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#### Endnotes

<sup>1</sup>*AFL-CIO v. Chertoff*, No. 07-4472 (N.D. Cal. filed Aug. 29, 2007).

<sup>2</sup>Safe Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. 45611-45624. (proposed Aug. 15, 2007).

<sup>3</sup>8 U.S.C. §§ 1324(a)-(b) (2007).

<sup>4</sup>Safe Harbor Procedures for Employers Who Receive a No-Match Letter, *supra* note 3, at 45612.

<sup>5</sup>Defendants' Motion to Stay Proceedings Pending New Rulemaking at 2, filed in *AFL-CIO v. Chertoff*, No. 07-4472 (N.D. Cal. filed Aug. 29, 2007).

<sup>6</sup>U.S. Department of Homeland Security, Press Release, Statement by Homeland Security Secretary Michael Chertoff on the No-Match Appeal (Dec. 5, 2007).

<sup>7</sup>*AFL-CIO v. Chertoff*, *supra* note 1.