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DHS Continues to Push SSA No-Match Letters in Worksite Enforcement Strategy

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Continuing its effort to use Social Security Administration “No Match” letters to employers for immigration enforcement purposes, the Department of Homeland Security has filed a “supplemental” proposed rule seeking to cure deficiencies of its “Safe Harbor” rule.

The Department of Homeland Security (DHS) knows that many employers continue to employ significant numbers of unauthorized foreign workers. Since 1986 all U.S. employers have been required to complete Form I-9 and review documents supplied by each newly hired worker to verify the worker's identity and employment authorization. False documents using fabricated or stolen identities have evaded the effectiveness of the I-9 process.

DHS is pursuing many parallel paths to prevent the employment of unauthorized workers, including:

- Increased audits by U.S. Immigration and Customs Enforcement (ICE) of employers' I-9 forms for existing workers
- Increased ICE worksite raids followed by deportation of unauthorized workers and prosecution of the employers and individual managers ICE alleges to have known the workers were illegal
- Promotion and expansion of DHS' technically voluntary and pilot “E-Verify” electronic employment verification system through cooperation with states that are increasingly enacting laws threatening employers with loss of government contracts and state business licenses and through an imminent federal regulation that will require all federal government contractors to use E-Verify
- Clarification to employers that ignoring Social Security Administration (SSA) “no-match letters” will constitute “constructive knowledge” that affected workers are not unauthorized to work in the U.S.

The DHS proposed rule, to be published in the Federal Register during the week of March 24, 2008, relates to the last measure. DHS had planned to use SSA no-match letters in its worksite enforcement strategy, both by inserting a new ICE letter with each SSA no-match letter and by updating its I-9 regulations to clarify that an SSA no-match letter can constitute “constructive knowledge” unless the employer receiving it follows certain “safe harbor” procedures. DHS' “safe harbor” regulation is currently held up by a court injunction in a lawsuit brought by combined employer and union interests, AFL-CIO, et al. v. Chertoff, et al., No. 07-4472-CRB (N.D. Cal. Aug. 29, 2007). DHS is trying to cure the legal defects pointed out by the court even while it appeals the injunction.

One of the most important defects cited by the court was the failure of the past regulation to conduct an analysis of its impact on small businesses as required by the Regulatory Flexibility Act. In the supplemental proposed rule (the “Supplement”), DHS purports to conduct that analysis, but it only assesses the cost of complying with the “safe harbor” procedures, such as “human resources personnel, certain training costs, legal services, and lost productivity.” DHS estimates the costs at between $3,000 and $34,000 per employer, depending on the number of workers employed. DHS refuses to recognize the economic costs to employers and the economy as a whole that will result from the loss of the services of unauthorized employees who end up being terminated as a result of no-match letters. DHS states that such economic costs are attributable to the twenty-year old law prohibiting employment of unauthorized aliens, “not to this rule.” The plaintiffs in the

pending lawsuit will challenge this assumption and seek to continue the injunction of the revised no-match letter process.

Meanwhile, however, in the Supplement DHS has clarified that it-—as well as INS before it—-has always taken the “informal” position that ignoring a SSA no-match letter can constitute “constructive knowledge” of employment of unauthorized aliens. DHS portrays the new “safe harbor” regulation as an effort to provide specific guidance and protection to employers who follow its steps after receiving a no-match letter. For this reason, employers should not ignore the few no-match letters that SSA has been issuing lately and should consider what steps to take in light of no-match letters received over the past several years.

Moreover, DHS states that “[t]he rule does not affect the authority of the SSA to issue no-match letters, or the authority of the Internal Revenue Service (IRS) to impose and collect taxes, or the authority of DOJ to enforce the anti-discrimination provisions of the INA or adjudicate notices of intent to fine employers.” In addition, the rule might not limit the ability of U.S. Attorneys in the Department of Justice to use employers' responses to SSA no-match letters in prosecutions of employers and managers, which has been increasing.

DHS continues to raid employers it suspects of knowingly employing illegal workers. In doing so, DHS frequently subpoenas employers' SSA no-match letters from the past and evaluates them as indicators of the employer's knowledge for purposes of prosecution and fines.

In an unfortunate and odd legal twist, DHS, reacting to court criticism that it tried to speak for other federal departments, has withdrawn statements from its rule that had reassured employers that compliance with “safe harbor” procedures would insulate them from discrimination charges by the Department of Justice's Office of Special Counsel. Employers must implement immigration enforcement measures in a manner that is consistent for all workers and is carefully timed to avoid the appearance of retaliation against workers asserting labor and discrimination protections.

Employers must not use no-match letters to terminate employers without affording them the opportunity to correct the many types of errors in SSA's database that lawful workers can suffer from, such as spelling errors, incomplete names, date order inversion, valid name changes from divorce or marriage, as well as cultural differences in name order. Meanwhile, all U.S. workers should seek to correct errors in their social security account information even aside from a no-match letter in order to reduce confusion with employers. Workers who realize their identity has been stolen should report the problem to a SSA office as quickly as possible. The pressure to correct records exerted by DHS' strategy could put a strain on SSA staffing capability.

In another odd twist, the Supplement seems to acknowledge that employers can ignore SSA no-match letters relating to "grandfathered" employees hired before November 6, 1986, when the law requiring I-9 forms was enacted.

Employers expecting SSA no-match letters once the injunction is lifted should seriously consider joining the E-Verify system, which in effect performs at the time of hire a match against the SSA database (as well as against immigration databases for workers not claiming U.S. citizenship). E-Verify currently cannot be used to verify existing workers, but using E-Verify should help avoid future no-match letters and will prepare employers for increasing requirements by state and federal governments mentioned above.

Of course, neither SSA no-match resolution procedures nor E-Verify participation can prevent effective use by unauthorized employees who have stolen a real person's identity embodied in convincing false documents. Thus, even employers using these measures must remain alert to other signs of a worker's lack of authorization in order to avoid "constructive knowledge."

How We Can Help

Baker Donelson's Immigration Group regularly counsels employers on I-9 compliance. We perform private audits of I-9 documents, prepare compliance programs, and train managers and workers in implementing those programs. We evaluate particular questionable documents and situations. We help employers decide whether and how to create or store I-9 forms electronically, to use Social Security Administration's Number Verification System, or to participate in the Department of Homeland Security's E-Verify program. We defend sanctions actions by ICE for "paperwork" and "knowingly hire" violations of I-9 rules. We work with our strong Litigation Department to bring and defend claims against competitors based on employment of unauthorized aliens. We advise and defend claims against competitors based on employment of unauthorized aliens. We advise and defend employers and managers in the increasingly common criminal investigations and proceedings relating to employment of aliens. We coordinate our Team's services closely with our firm's well-respected Labor and Employment Law Group and with our firm's White Collar Crime Group. We provide advice and coordinate with U.S. and foreign preparers concerning U.S. taxation of international companies doing business in the U.S., and concerning the U.S. taxation of international workers placed in the U.S. and abroad.