



## **U.S. Department of Homeland Security Makes New Effort to Clarify “Safe Harbor” to No-Match Letters**

The U.S. Department of Homeland Security (DHS) has released a Supplemental Proposed Rulemaking for the No-Match Rule previously issued on August 15, 2007.

This new rulemaking addresses three issues cited in a decision of the U.S. District Court for the Northern District of California enjoining the August 2007 No-Match Rule. The Supplemental Proposed Rulemaking is intended to provide a more detailed analysis of how DHS developed the No-Match policy and help responsible employers ensure that they are not employing unauthorized workers.

Homeland Security Secretary Michael Chertoff stated: “We are serious about immigration enforcement. The No-Match Rule is an important tool for cracking down on illegal hiring practices while providing honest employers with the guidance they need. This supplement specifically addresses the three grounds on which the district court based its injunction. We have also filed an appeal and are pursuing these two paths simultaneously to get a resolution as quickly as possible.”

It is important to note at this time that the rule does not create new legal obligations for businesses.

According to the Department of Homeland Security: “It simply outlines clear steps an employer may take in response to receiving a letter from the Social Security Administration indicating that an employee’s name does not match the social security number on file. If the business follows the guidance in the No-Match Rule, comprising various actions to rectify the no-match within 90 days of receiving the letter, they will have a safe harbor from the no-match letter being used against them in an enforcement action.”

### **Proposed Clarification of the August 2007 No-Match Final Rule**

With its notice of Supplemental Proposed Rulemaking, DHS is proposing to “further clarify” two aspects of the August 2007 Final Rule.

First, a new 5-Day Rule: “The rule instructs employers seeking the safe harbor that they must “promptly” notify an affected employee after the employer has completed its internal records checks and has been unable to resolve the mismatch. After reviewing the history of the rulemaking, DHS believes that this obligation for prompt notice would ordinarily be satisfied if the employer contacts the employee within five (5) business days after the employer has completed its internal records review. DHS emphasizes that an employer does not need to wait



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until after completing this internal review to advise affected employees that the employer has received the no-match letter and request that the employees seek to resolve the mismatch. Immediately notifying an employee of the mismatch upon receipt of the letter may be the most expeditious means of resolving the mismatch.”

Second, clarification of existing Grandfather Clause: “Plaintiffs in the litigation before the Northern District of California raised a question as to whether under the August 2007 Final Rule an employer could be found liable on a constructive knowledge theory for failing to conduct due diligence in response to the appearance of an employee hired before November 6, 1986 in an SSA no-match letter. When Congress enacted INA section 274A as part of the 1986 Immigration Reform and Control Act, it included a grandfather clause in that legislation exempting workers hired before IRCA's date of enactment from the provisions of section 274A(a)(1) and (a)(2).<sup>1</sup> Because those statutory bars against hiring or continuing to employ individuals without work authorization do not apply to workers within that grandfather clause, the August 2007 Final Rule, as published and as supplemented by this rulemaking, does not apply to any such workers that may be listed in an SSA no-match letter.”

## **What is the Law Today?**

Section 274A(a)(2) of the Immigration and Nationality Act (INA)<sup>2</sup> states:

It is unlawful for a person or other entity ... to continue to employ [an] alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment.

Under current federal law, employers are prohibited from knowingly hiring or continuing to employ a worker who is not authorized to work in the United States. In addition to actually knowing an employee is not authorized to work (referred to as “actual knowledge”), employers can also learn that the employee is not authorized to work through “constructive knowledge”. The No-Match Rule attempted to broaden the definition of this “constructive knowledge” by including the receipt of a Social Security No-Match letter as one of the ways such knowledge can be obtained.

In its No-Match Rule, current subject to court injunction, DHS argues that a “reasonable person” should infer an employee’s unauthorized status through receipt of a No-Match letter and forces the employer to take steps to rectify the “no-match”. If the employer does not take such steps and the employee is later

1. Public Law 99-603, section 101(a)(3), 100 Stat. 3359 (1986).

2. 8 U.S.C. 1324a(a)(2).



found to be an unauthorized worker, the employer can be held liable. Conversely, DHS argues that if the employer follows the procedure outlined in the Rule then the employer will be provided a “safe harbor” from liability based only on receipt of the letter.

The original No-Match Notice of Proposed Rule Making was published on June 14, 2006, and the comment period was open for 60 days. DHS then incorporated the comments and issued a final rule on August 15, 2007.

Here is the DHS explanation of the current legal landscape:

As indicated in the preamble of the August 2007 Final Rule, employers annually send the Social Security Administration (SSA) millions of earnings reports (W-2 Forms) in which the combinations of employee name and social security number (SSN) do not match SSA records.<sup>3</sup> In certain cases, SSA sends a letter that informs the employer of the combinations that cannot be matched. SSA sends such letters, commonly referred to as employer “no-match letters,” to employers whose wage report contains more than ten no-matches and where the no-matches represent more than 0.5% of the total W-2s included in the employer's wage report.

There can be many causes for a mismatch, including clerical error and name changes. One potential cause may be the submission of information for an alien who is not authorized to work in the United States and who may be using a false SSN or an SSN assigned to someone else. Because an SSA no-match letter calls into question the accuracy of the identifying information an employer received and submitted for employees, a no-match letter places an employer on notice of the possibility that some of its employees whose Social Security Numbers are listed in the letter may not be who they claimed, and may be unauthorized to work in the United States.

U.S. Immigration and Customs Enforcement (ICE) sends a similar letter (currently called a “notice of suspect documents”) after it has inspected an employer's Employment Eligibility Verification forms (Forms I-9) during an investigation audit and has been unable to confirm the validity of an immigration status document or employment authorization document presented or referenced by the employee in completing the Form I-9. Like an SSA no-match letter, a notice of suspect documents” calls into question the validity of an employee's identifying information, and thus places employers on notice that the subject employees might be unauthorized to

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3. 72 FR 45612.



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work in the United States. Because a "notice of suspect documents" is issued upon ICE's investigation and review of the specific employment authorization documents, receipt of such a notice provides an employer with clear cause to investigate the work authorization status of the employees identified in the notice.

On March 21, 2008 DHS released the current Supplemental Proposed Rulemaking. The Rule was published in the Federal Register on March 26 and comments are due thirty (30) days from the date of publication.

Legal experts anticipate that this Supplemental Rule will lead to a Supplemental Final Rule, which should be released sometime this summer. Employers should bear in mind that the No-Match Rule was originally due to take effect on September 14, 2007, but is currently enjoined from becoming effective by the U.S. District Court. Until the preliminary injunction is lifted the "Safe Harbor" provisions as well as the rest of the Rule cannot take effect. In addition, the Social Security Administration (SSA) was instructed not to issue No-Match letters to employers until the injunction is lifted.

DHS states that the Proposed Supplemental Rule addresses the issues the U.S. District

Court raised in its order granting the injunction. In DHS' view, the Supplemental Proposed Rule sufficiently addresses the issues the Court raised, and the Agency will now ask the Court to "dissolve" the preliminary injunction.

## **A Look Back at the No-Match Issue**

DHS first published a proposed rule in June 2006 that would have provided means for employers to limit the risk of being found to have knowingly employed unauthorized aliens after receiving a No-Match letter from the Social Security Administration (SSA) notifying them of mismatches between names and Social Security Numbers provided by their employees and the information in SSA's database, or after receiving a letter from DHS (called a "notice of suspect" document) that casts doubt on the employment eligibility of their employees.<sup>4</sup>

DHS published a Final Rule on August 15, 2007, setting out "safe harbor" procedures for employers who receive SSA No-Match letters or notices from DHS calling into question the information previously provided by their employees when establishing their work eligibility.<sup>5</sup>

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4. 71 FR 34281 (June 14, 2006).

5. 72 FR 45611 (Aug. 15, 2007)\*



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On August 29, 2007, the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), and others, filed suit against the Department of Homeland Security seeking declaratory and injunctive relief in the United States District Court for the Northern District of California.<sup>6</sup> The district court granted plaintiffs' initial motion for a temporary restraining order against implementation of the August 2007 Final Rule.<sup>7</sup> On October 10, 2007, the district court granted the plaintiffs' motion for preliminary injunction.<sup>8</sup>

The district court concluded that the plaintiffs had raised serious questions about three aspects of the August 2007 Final Rule. Specifically, the court questioned whether DHS had:

- (1) Supplied a reasoned analysis to justify what the court viewed as a change in the Department's position – that a No-Match letter may be sufficient, by itself, to put an employer on notice, and thus impart constructive knowledge, that employees referenced in the letter may not be work-authorized;
- (2) Exceeded its authority (and encroached on the authority of the Department of Justice (DOJ)) by interpreting the anti-discrimination provisions of the Immigration Reform and Control Act of 1986 (IRCA)<sup>9</sup>, and
- (3) Violated the Regulatory Flexibility Act<sup>10</sup>, by not conducting a regulatory flexibility analysis.

This new Proposed Supplemental Rule is intended to address the issues raised by the court in the preliminary injunction order. After addressing these three issues, DHS will seek to have the preliminary injunction dissolved. In the meantime, DHS has made clear that it will continue its defense of the case, and this simultaneous rulemaking (which is intended to lead to the rule becoming effective as quickly as possible) is not a concession of any issue pending in the litigation.

## DHS Rationale for Further Rulemaking

According to DHS, the department “has been aware for many years that employment in the United States is a magnet for illegal immigration, and that a comparison of names and social security numbers submitted by employers against SSA’s data provides an indicator of possible illegal employment”.

6. AFL-CIO, et al. v. Chertoff, et al., No. 07-4472-CRB, D.E. 1 (N.D. Cal. Aug. 29, 2007).

7. AFL-CIO v. Chertoff, D.E. 21 (N.D. Cal. Aug. 31, 2007) (order granting motion for temporary restraining order and setting schedule for briefing and hearing on preliminary injunction).

8. AFL-CIO v. Chertoff, D.E. 135 (N.D. Cal. 2007) (order granting motion for preliminary injunction).

9. Public Law 99-603, 100 Stat. 3359 (1986), 8 U.S.C. 1324b.

10. 5 U.S.C. 601 et seq.



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Similarly, DHS acknowledges “the potential for abuse of social security numbers by aliens who are not authorized to work in the United States” and that “the illegal alien population in the United States and the number of unauthorized workers employed in the United States are both substantial”. DHS asserts that “the scale of the problem the rule seeks to address – employment of aliens not authorized to work in the United States – has become more well-defined through the course of the rulemaking and related litigation”.

In its publication of the Supplemental Proposed Rule, the Department noted: “The comments submitted in response to the initial proposed rule in 2006 by organizations such as Western Growers, and the public statements by representatives of such organizations, have been bracingly frank:

In the midst of the combustive debate over immigration reform, we in agriculture have been forthright about the elephant in America’s living room: Much of our workforce is in the country illegally – as much as 70%”

It is clear that the Department of Homeland Security will proceed towards a final rule, free of court injunction at some point in the future, that “some employers may fail to respond to No-Match letters because they have consciously made the illegal employment of unauthorized aliens a key part of their business model or because they conclude that the risk of an immigration enforcement action is outweighed by the cost of complying with the immigration laws by hiring only legal workers”.

However, DHS also acknowledges that “interactions with employers have also shown ... that many law-abiding employers are unsure what their obligations are under current immigration law when they receive an SSA employer no-match letter, and that some employers fear accused of having violated anti-discrimination laws if they react inappropriately to no-match letters”.

In light of these facts, DHS has concluded that additional employer guidance on how to respond to No-Match letters will help law-abiding employers to comply with the immigration laws. The August 2007 Final Rule and in this Supplemental Proposed Rulemaking, outlines specific steps that reasonable employers may take in response to No-Match letters, and offers employers who follow those steps a “Safe Harbor” from ICE's use of No-Match letters in any future enforcement action to show that an employer has knowingly employed unauthorized aliens in violation of federal law.<sup>11</sup>

### **The Bottom Line for Right Now**

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11. INA section 274A, 8 U.S.C. 1324a



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There may be light at the end of the tunnel relative to clarity around the No-Match Rule. The pending court injunction cannot remain in effective indefinitely, and DHS is positioning itself with this new Supplemental Proposed Rulemaking to move quickly with a final rule, one that is intended to address the issues pending before the court.

It is observed by legal experts that many employers in the U.S. started implementing their own internal Social Security No-Match policies when the regulations were being drafted and throughout the litigation. Employers have taken action in response to the DHS rulemaking and a heightened awareness of the penalties and liabilities associated with hiring and continuing to employ unauthorized workers.

It is recommended by those engaged in compliance counseling that it is imperative for employers to think about internal compliance policies considering the benefits and costs of a Social Security No-Match policy. ICE is stepping up criminal enforcement actions as well as administrative reviews and I-9 audits. ICE is expected to aggressively pursue violators, particularly in identified critical infrastructure sites and targeted industries. Regardless of the outcome of the litigation over this Rule, enforcement activity will continue to increase. Ignoring the issue until the government steps in is not a responsible or cost-effective solution.<sup>12</sup>

As stated in the recent Supplemental Proposed Rulemaking:

DHS recognizes this critical fact – that many employers are aware that large proportions of their workforce are illegal – and has therefore taken steps within the Department's existing authorities to assist employers in complying with the law ... Based on the rulemaking record and the Department's law enforcement expertise, DHS finds that there is a clear connection between social security No-Match letters and the lack of work authorization by some employees whose Social Security Numbers are listed in those letters. DHS's interactions with employers who receive No-Match letters have consistently shown that employers are also aware that an employee's appearance on a No-Match letter may indicate the employee lacks work authorization.

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12. Nothing in this summary of recent Department of Homeland Security proposals or more specifically the No-Match Rule and its current and prospective status should be considered a legal opinion or a rendering of legal advice.



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