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Interpreter Releases Report and analysis of immigration and nationality law
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***2542** 3. DHS Rescinds No-Match/Safe Harbor Rule

The Department of Homeland Security (DHS) has issued a final rule rescinding the amendments promulgated in August 2007 [FN99] and October 2008 [FN100] relating to procedures that employers may take to acquire a safe harbor from certain adverse consequences associated with receipt of a no-match letter from the Social Security Administration (SSA) or a notice of suspect documents from U.S. Immigration and Customs Enforcement (ICE). 74 Fed. Reg. 51447 (Oct. 7, 2009), effective November 6, 2009, is reproduced in Appendix I of this Release. In the final rule, DHS adopted without change an August 2009 proposed rule regarding the agency's inclination to rescind the rule. [FN101] The preamble to the final rule states: "After further review, DHS has determined to focus its enforcement efforts relating to the employment of aliens not authorized to work in the United States on increased compliance through improved verification, including participation in E-Verify, [FN102] ICE Mutual Agreement Between Government and Employers (IMAGE), [FN103] and other programs."

As background, employers annually send the SSA millions of earnings reports (Forms W-2) in which the combination of employee name and social security number (SSN) does not match SSA records. In some of these cases, the SSA sends the employer an employer-correction request, commonly referred to as a no-match letter, that informs the employer of the mismatch. While there can be many causes for a no-match, 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 U.S. and who may be using a false SSN or an SSN assigned to someone else.

ICE sends a similar letter to employers, 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 after unsuccessfully attempting to confirm, in agency records, that an immigration-status document or employment-authorization document presented or referenced by the employee in completing the Form I-9 was assigned to that person.

The no-match/safe harbor rule described the legal obligations of an employer following receipt of a no-match letter from the SSA or a notice of suspect documents from ICE. The rule was never implemented, however, because of the entry of a preliminary injunction by the U.S. District Court for the Northern District of California on October 10, 2007. [FN104]

DHS received 22 comments regarding its recent proposal to rescind the rule from individuals, professional associations, unions, trade organizations, and advocacy organizations as well as the litigants in the district court case. Some supported the rescission, in part because of the costs the no-match rule would impose on employers (one commentator argued that the use of SSNs for immigration enforcement through delivery of no-match letters turns employers into de facto immigration agents), while others opposed the rescission because the safe harbor/no-match rule provided valuable guidance to employers trying to keep a legal workforce.

Despite DHS' rescission of the no-match/safe harbor rule, employers are advised to heed the following lan-

guage in the preamble to the final rule:

DHS has not changed its position as to the merits of the 2007 and 2008 rules Receipt of a No-Match letter, when considered with other probative evidence, is a factor that may be considered in the totality of the circumstances and may in certain situations support a finding of “constructive knowledge” [that an employee is not authorized to work in the U.S.]. A reasonable employer would be prudent, upon *2543 errors, inform the employee of the no-match letter, and ask the employee to review the information. Employers would be prudent also to allow employees a reasonable period of time to resolve the no-match with SSA. ... [R]eceipt of a No-Match letter and an employer's response to a No-Match letter, in the totality of the circumstances, may be used as evidence of a violation of the employment restrictions of the Immigration and Nationality Act. ... Employers remain liable where the totality of the circumstances establishes constructive knowledge that the employer knowingly hired or continued to employ unauthorized workers.

[FN99]. 72 Fed. Reg. 45611 (Aug. 15, 2007), discussed in 84 Interpreter Releases 1893 (Aug. 20, 2007).

[FN100]. 73 Fed. Reg. 63843 (Oct. 28, 2008), discussed in 85 Interpreter Releases 2877 (Nov. 3, 2008).

[FN101]. 74 Fed. Reg. 41801 (Aug. 19, 2009), discussed in 86 Interpreter Releases 2093 (Aug. 24, 2009).

[FN102]. E-Verify is an Internet-based system operated by U.S. Citizenship and Immigration Services (USCIS) in partnership with the SSA that allows participating employers to electronically verify the employment eligibility of their employees.

[FN103]. Through IMAGE, ICE and USCIS provide education and training to employers on proper hiring procedures, fraudulent document detection, use of the E-Verify system, and antidiscrimination procedures.

[FN104]. *American Federation of Labor v. Chertoff*, 552 F. Supp. 2d 999 (N.D. Cal. 2007), discussed in 84 Interpreter Releases 2416 (Oct. 15, 2009).
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