

April 2008

DHS Issues “No-Match” Supplemental Proposed Rule

On March 26, 2008, the Department of Homeland Security (DHS) issued a supplemental proposed rule on procedures for employers who receive a “no-match letter” from the Social Security Administration (SSA) or a “notice of suspect document” from DHS casting doubt on the employment eligibility of the employer's workers. The previous final rule, which was published on August 15, 2007, was preliminarily enjoined by the U.S. District Court for the Northern District of California on October 10, 2007. DHS issued the new supplemental proposed rule to clarify certain aspects of the August 2007 final rule and to respond to three findings underlying the District Court's injunction. However, the supplemental proposed rule, among other things, repromulgates without change the August 2007 final rule despite concerns about its potential negative impact. The New York Times warned in a March 27, 2008, editorial that DHS's proposed rule, if implemented, will “throw thousands of law-abiding American workers and companies off a cliff in perilous economic times,” noting that the SSA's Inspector General estimated that about 17.8 million of the agency's 435 million records contain errors that could lead to a no-match letter, and that 70 percent of those 17.8 million records belong to native-born Americans.

DHS's supplemental proposed rule addresses three findings of the district court, which questioned whether DHS had: (1) supplied a reasoned analysis to justify what the court viewed as a change in DHS's position: that a nomatch letter may be sufficient, by itself, to put an employer on notice, and, thus, impart constructive knowledge, that employees referenced in the letter might not be work-authorized; (2) exceeded its authority (and encroached on the authority of the Department of Justice (DOJ)) by interpreting the antidiscrimination provisions of the Immigration Reform and Control Act of 1986; and (3) violated the Regulatory Flexibility Act by not conducting analysis of the rule's impact on small businesses. DHS noted that although the mere receipt of an SSA no-match letter may not obligate employers to repeat the full I-9 employment verification process, employers “cannot turn a blind eye to SSA no-match letters and should perform reasonable due diligence.” The supplemental proposed rule emphasizes the idea of eliminating ambiguity and confusion regarding an employer's responsibilities upon receipt of a no-match letter, acknowledging that previous guidance was in the form of case-by-case responses to individual queries from employers and others, resulting in a lack of uniformity and multiple interpretations by employers.

DHS reiterated that the August 2007 final rule specifies actions that can be taken by an employer that the agency will consider to be a reasonable response to receiving an SSA no-match letter or DHS letter, which “will eliminate the possibility that either letter can be used as any part of an allegation that an employer had constructive knowledge that it was employing an alien not authorized to work in the United States.”

In light of the District Court's concerns about DHS's possible encroachment upon the authority of DOJ, in the March 2008 supplemental proposed rule, DHS rescinds the statements in the preamble of the August 2007 final rule describing employers' obligations under antidiscrimination law and discussing the potential for antidiscrimination liability faced by employers that follow the “safe-harbor” procedures set forth in the August 2007 rule.

Employers seeking information regarding their antidiscrimination obligations in following the safe harbor procedures in the August 2007 final rule, as modified by the March 2008 supplemental rule, should review new guidance from the DOJ's Office of Special Counsel for Immigration-Related Unfair Employment Practices at <http://www.usdoj.gov/crt/osc/index.html>.

Employers also may seek advice on a case-by-case basis through OSC's toll-free employer hotline at 1-800-255-8155. DOJ's public guidance on employers' antidiscrimination obligations will be published in a Federal Register notice when DHS promulgates the March 2008 supplemental proposed rule as a final rule.

DHS is proposing to further clarify two aspects of the August 2007 final rule. First, the rule instructs employers seeking 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 ordinarily would be satisfied if the employer contacts the employee within five business days after the employer has completed its internal records review.

DHS also said that the August 2007 final rule, as published and as supplemented, does not apply to any workers hired before November 6, 1986 (pursuant to IRCA) that may be listed in an SSA no-match letter.

DHS has filed an appeal to have the preliminary injunction discussed above dissolved; the agency is continuing with this simultaneous rulemaking in the meantime. The supplemental proposed rule is available at <http://edocket.access.gpo.gov/2008/pdf/E8-6168.pdf>.

A press release is available at http://www.dhs.gov/xnews/releases/pr_1206124972832.shtm.