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DHS Issues Supplemental Final Rule on Social Security No-Match Letters

On October 23, 2008, the Department of Homeland Security published a Supplemental Final Rule regarding the procedures an employer must follow to obtain safe harbor protection after it receives a "no-match letter" from the Social Security Administration (SSA) or a "notice of suspect document" letter from DHS casting doubt on the employment eligibility of an employee. The Supplemental Final Rule addresses failings in the August 2007 No-Match Final Rule, which was scheduled to go into effect on September 14, 2007. Implementation of the No-Match Rule was preliminarily enjoined by the United States District Court for the Northern District of California on October 10, 2007 in a decision that pointed out several failings in the Rule as it was then written. Specifically, the Northern District of California questioned whether DHS had: 1) supplied a "reasoned analysis" to justify its new position that a no-match letter may give an employer constructive knowledge that an employee was not authorized to work in the United States; 2) encroached on the authority of the Department of Justice by interpreting the anti-discrimination provisions of the Immigration Reform and Control Act of 1986 (IRCA); and 3) violated the Regulatory Flexibility Act by failing to conduct a regulatory flexibility analysis.

The Supplemental Final Rule attempts to address the issues raised in the Court's decision. However, the Supplemental Final Rule makes no substantive change to the August 2007 No-Match rule.

Following the issuance of the Supplemental Final Rule, DHS filed a motion in the United States District Court for the Northern District of California to vacate the preliminary injunction and grant summary judgment in favor of DHS. Both motions remain undecided. Should the preliminary injunction be dissolved and the case decided in DHS's favor, employers will be required to immediately comply with the provisions of the August 2007 No-Match Rule re-issued in the October 23, 2008 Supplemental Final Rule.

The Supplemental Final No-Match Rule is available at <http://edocket.access.gpo.gov/2008/pdf/E8-25544.pdf>. A DHS Press Release is available at http://www.dhs.gov/xnews/releases/pr_1224771455239.shtm, and a fact sheet issued by the National Immigration Law Center on the Supplemental Rule is available at http://www.nilc.org/immsemplymnt/SSA_Related_Info/no-match_PI_2008-10-23.pdf. The DOJ's Office of Special Counsel's "Antidiscrimination Guidance for Employers Following the Department of Homeland Security's Safe-Harbor Procedures" is available at http://www.usdoj.gov/crt/osc/pdf/publications/FR_Oct28_osc.pdf. See also KRSS' summary of the August 27, 2007 No-Match Final Rule at <http://www.klaskolaw.com/client-alerts.php?action=view&id=102>.