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Judge Grants Motion for Preliminary Injunction Enjoining DHS Implementation of Final Rule on Employer "No Match" Obligations

A federal judge in the U.S. District Court for the Northern District of California has issued an order granting a preliminary injunction enjoining the implementation of the Department of Homeland Security's (DHS) final rule amending the regulations relating to the unlawful hiring or continued employment of unauthorized workers.

The judge found the balance of harm tips sharply in favor of plaintiffs, who raised serious questions going to the merits of their claims that the rule (1) contravenes the governing statute; (2) is arbitrary and capricious under the Administrative Procedure Act; (3) is an exercise of ultra vires authority by DHS and the Social Security Administration (SSA); and (4) was promulgated in violation of the Regulatory Flexibility Act.

The Final Rule, should it ever become effective, modifies the current regulation's definition of "knowing" to add three additional situations where the employer's failure to take reasonable steps in response to any one of these situations could lead to a finding that an employer had constructive knowledge of the fact that an employee was an "unauthorized alien." The additional situations are: (1) an employee's request that the employer file a labor certification or employment-based visa petition on behalf of the employee; (2) written notice known as a "no match" letter from SSA that the combination of name and social security number (SSN) submitted for an employee does not match SSA records; and (3) written notice from DHS that the immigration status document or employment authorization document presented or referenced by the employee in completing Form I-9 was assigned to another person or that there is no agency record that the document was assigned to anyone.

The Final Rule also describes the steps that DHS considers reasonable for an employer to take after receiving a "no match" letter from the SSA or a notice of discrepancy from DHS. Such steps would provide the employer with a "safe harbor" ensuring that DHS will not use the written notice as any part of an allegation that the employer had constructive knowledge that the employee referred to in the notice was not authorized to work in the United States.

For further information on this Final Rule, please go to our website at www.klaskolaw.com.