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## IMMIGRATION LAW

### OBAMA ADMINISTRATION INHERITS DEFENSE OF BUSH IMMIGRATION POLICIES

By Jonathan Willmoth\*

In the last few years, the government has been stepping up its enforcement activities against employers, including raids of facilities and criminal prosecutions of employees and their employers. Managers of the affected companies have been sentenced to severe penalties including millions of dollars in fines and years in jail. President Obama inherits three key ongoing lawsuits against Bush administration immigration policies. He will have to determine whether to continue the same underlying policies or to simply change course, thus mooted the lawsuits. These three lawsuits involve, in one way or another, enforcement actions against employers. The first is a challenge to the implementation of the Social Security no-match letter final rule. The second involves a challenge to the authority of the administration's implementation of the federal contractor requirement to participate in E-Verify, an online system for checking whether employees are authorized to accept employment. The last involves a challenge to the Department of Homeland Security's rule extending the amount of time a student can work after graduating from a U.S. college, prior to changing to an employment-based visa.

#### Social Security No-Match Letters

In order to avoid a finding that they have constructive knowledge that they are employing illegal workers, employers are required to take undefined "reasonable steps" to confirm their employees' employment authorization once they receive notice from the Social Security Administration, or SSA, or the Department of Homeland Security, or DHS, that the employer's tax reports for employees do not match the government's records. Given that the government is in such a frenzied mode of enforcement against employers, they need to be aware of what those reasonable steps might be. The no-match letter is generated when the SSA attempts to link the name and information on the W-2 with an SSA account. The SSA notes that there are many reasons why the name and information "may not agree with our records, such as typographical errors, unreported name changes, inaccurate or incomplete employer records or misuse of an SSN."

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On June 14, 2006, the DHS issued proposed rule-making, adding two examples of conduct that will be considered to establish an employer's "constructive knowledge" that an employee is not authorized. Those are receipt of SSA no-match letters, or written notice from the DHS that the employment authorization documents submitted either belong to someone else, or they have no record of them. The government took no further action for one year. Then, on Aug. 15, 2007, the DHS issued a new final rule for the no-match letters, including the process for responding to no-match letters in order to get a safe harbor from a presumption of constructive knowledge of an employee's unlawful status. Within 30 days of receiving a no-match letter, the employer was required to check its records for clerical errors to determine whether the problem is a simple data entry error that could be easily remedied. If the records are consistent, then the employer must notify the employee that he or she has to check with the SSA, or DHS, depending on the circumstances, in order to rectify any errors they may have in their records and provide the employer with evidence of the correction. If the employee has not provided such information to the employer, then the employer must have the employee complete a new I-9 form without the mismatched information within 93 days of receiving the no-match letter, or else terminate the employee. These are not the only steps that will be considered reasonable steps to resolve a no-match, but they are the specifically elucidated steps contained in the new rule. Employers who fail to either remedy the situation following the safe harbor protocol or terminate the employee face a determination by the DHS that they have constructive knowledge that the employees listed in the no-match letter are not employment authorized, and they can then be subject to fines. It is still possible for the DHS to find that an employer has actual knowledge that employees were unauthorized and the safe harbor procedures cannot cure such actual knowledge.

The American Federation of Labor and Congress of Industrial Organizations, the American Civil Liberties Union, the National Immigration Law Center and others sued the federal government to stop the enactment of this new rule on Aug. 29, 2007, before its effective date. The Northern District of California federal court issued a temporary injunction Oct. 10, 2007, against the implementation of this new rule because the government did not show: a reasoned analysis why the rule is being changed to make the mere receipt of a no-match letter constructive knowledge that employee is not authorized; whether it was going beyond its authority into areas entrusted to the Department of Justice, specifically the anti-discrimination provisions of the Immigration Reform and Control Act; and that they have complied with the Regulatory Flexibility Act. The government then issued new proposed rule-making March 21, 2008, with a comment period that was open until April 25, 2008.

On Oct. 28, 2008, the DHS issued a final rule reaffirming the Aug. 15, 2007, rule but including missing analysis and indicating that a new DHS insert to the SSA no-match letter would remove the anti-discrimination language. Also, the Department of Justice Office of Special Counsel issued guidance in the Federal Register that it, and not the DHS, enforces the anti-discrimination provisions dealing with U.S. citizens and certain employment authorized aliens. It further clarified that if an employer terminates an employee only after following the DHS-prescribed "safe-harbor" provisions and applying those same provisions to all employees listed in the no-match letter, then they will not be subject to an anti-discrimination suit under the listed provisions of the INA. Then, on Nov. 6, 2008, the DHS filed a motion for summary judgment and to lift the injunction, arguing that the new final rule had corrected the errors the court cited when it granted the injunction.

For the Dec. 5, 2008, status conference, the DHS asked the court to expedite the briefing schedule, arguing that there was emergent need for a decision on their motions in order to have the 2008 no-match letters sent out to employers with final information considering the court's ruling. The court disagreed, citing the 15 months the case had been pending and "the slow pace at which DHS proceeded with its supplemental rulemaking" indicating that it "makes clearer that no emergency requires implementation of the no-match rule." The court then scheduled the case for a briefing schedule in January and February for a spring 2009 decision.

### **Student Employment Authorization Extension**

The U.S. District Court for the District of New Jersey dismissed a claim by the Programmers Guild Inc. and other organizations and individuals involved in computer programming and engineering to enjoin the government from extending the employment authorization offered to students who graduate from U.S. colleges and universities from 12 months to 29 months. Their challenge to the final rule continues, however as the Programmers Guild appealed the decision of the New Jersey court to the 3rd Circuit Dec. 3, 2008.

Immigration regulations have long allowed students to apply for 12 months of employment authorization once their degree has been completed, called Optional Practical Training. The DHS issued an interim final rule extending Optional Practical Training to 29 months for students who graduate with a degree in mathematics, engineering, science or technology. The purpose of this extension is to allow them to remain in the United States in valid visa status, with employment authorization, until they are allowed to begin employment under the H-1B visa program. Because there are only 65,000 H-1B visas available to students graduating, and because more than 100,000 applications for those visas have been filed in recent years, U.S. Citizenship & Immigration Services has to have a lottery to pick who has a chance at obtaining the H-1B visa. This extension of OPT time allows most students a second or even third chance at the H-1B visa lottery.

The plaintiffs alleged that they would face competition for jobs from these students who are given extended employment authorization, and that such an increase harms American workers. The court denied the preliminary injunction request and dismissed the case for lack of standing because there was no causal connection between the harm alleged, lack of jobs and the implementation of the final rule. The court noted that only about 12,000 students, or "0.2% of the 5.5 million jobs in computer and engineering fields" would be eligible to apply for these extensions, and that the government had no direct role in a third-party hiring or not hiring the plaintiffs.

### **Federal Contractors Required to Use E-Verify**

President Bush issued Executive Order 13,465, requiring federal contractors to enroll in and comply with the E-Verify online employment authorization verification system. This system, maintained by USCIS (formerly INS), checks the information the employer is required to obtain to complete the I-9 form against the databases of the DHS as well as the SSA. In November, the final rule implementing this executive order was issued, requiring that all federal contractors use E-Verify on all new employees, and that they use E-Verify to check on existing employees who will be working on the federal contracts.

The U.S. Chamber of Commerce, as well as other interested groups, filed suit in the U.S. District Court for the District of Maryland, Southern Division on Dec. 23, 2008, requesting the court to enjoin the implementation of this final rule and declare the executive order and final rule illegal and void. They argued that the final rule contradicts the congressional mandate that no employer be required to use the E-Verify system, which is still a pilot program. Additionally, they argue that, because the standards for determining which existing employees need to be re-verified, employers will face extensive costs in time and man-power in re-verifying all or almost all of their employees. Because of this extensive re-verification, there is also a serious concern about the potential of costly litigation regarding the unlawful re-verification of employees, which could be considered race or national origin discrimination.

This suit could have major implications for employers across the country since, in addition to all companies with federal contracts being required to enroll and comply, many states have passed similar laws requiring state contractors to use the E-Verify system as well.

### **Conclusion**

These ongoing lawsuits give the Obama administration the opportunity to have its own say in immigration policy. During the campaign, Obama indicated that he supported enforcement against employers, though he also called for a more comprehensive immigration reform strategy. In the short-term, it seems unlikely that any major changes in rulemaking will take place before decisions or continued litigation on these issues are resolved. The rulemaking process takes a substantial amount of time, including the notice and comment period and regulatory analysis of the impact of the proposed rulemaking. However, employers need to be aware of the outcome of this litigation in how it impacts their interactions with the government, and the potential fines and imprisonment that enforcement activities can bring.