NATIONAL IMMIGRATION LAW CENTER

What the Order Granting a Preliminary Injunction Means for the DHS Rule about Social Security "No-Match"

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On Aug. 15, 2007, the U.S. Dept of Homeland Security (DHS) published a final rule regarding what employers should do in order to benefit from a "safe harbor" protection when they receive a letter from the Social Security Administration (SSA) stating that the information submitted for an employee does not match SSA records (otherwise known as an SSA "no-match" letter). DHS claims that if an employer follows the "safe harbor" procedures set forth in the final rule, it will not use the no-match letter as evidence that the employer has "constructive knowledge" that it has hired undocumented workers. The rule was scheduled to go into effect on Sept. 14, 2007, and SSA planned to send no-match letters to approximately 140,000 employers — affecting about 8 million workers — beginning Sept. 4.

The ACLU Immigrants' Rights Project, the AFL-CIO, Altschuler Berzon, LLP, the San Francisco and Alameda Central Labor Councils, and NILC filed a lawsuit on Aug. 29, 2007, arguing that DHS does not have the legal authority to implement this rule and that the changes DHS seeks to make to the immigration laws can be made only by Congress and not through this administrative procedure.

On Aug. 31, the U.S. district court in northern California, where the lawsuit was filed, granted the plaintiffs' request for a temporary restraining order (TRO). On Oct. 1, 2007, the court held oral argument concerning the plaintiffs' motion for a preliminary injunction, and at the conclusion of that hearing the court extended the TRO for a further 10 days. On Oct. 10, 2007, the court granted the plaintiffs' request for a preliminary injunction.

What does it mean that the court granted the preliminary injunction?

In granting the preliminary injunction, the court found that the DHS rule would result in the termination of lawfully employed workers and that if the DHS rule were "allowed to proceed, the mailing of no-match letters, accompanied by DHS's guidance letter, would result in irreparable harm to innocent workers and employers." The granting of the preliminary injunction means that the court has prohibited DHS from implementing the final no-match rule until the court makes a final ruling, after trial, on whether or not the rule is legal. This means that the final DHS rule still cannot go into effect. SSA remains prohibited from sending no-match letters that refer to the DHS rule, as the agency had planned to do in a mailing that would have included a notice from DHS. The court order applies to the entire country, not just northern California. The rule is blocked indefinitely until the court issues a final decision on the rule.

Can SSA still send the no-match letters to employers?

Although SSA technically could send no-match letters to employers without referring to the DHS rule, the government has indicated that SSA will not send letters to the 140,000 employers until the court decides the agency can send the new letters out. However, SSA will continue its longstanding practice of sending no-match letters to individual workers at their homes and to employers about specific individual workers. The letters sent to or about individual workers do not contain the reference to the new DHS rule and are not affected by the litigation.

How can advocates help dispel confusion about the rule?

The DHS rule has caused lots of confusion and panic among workers and employers alike. Many employers are not even aware that the rule is indefinitely suspended and have started to implement the rule. Advocates are urged to contact NILC for assistance if they learn of such cases and of workers at risk of being fired or otherwise affected.

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