FACTS ABOUT
U.S. Department of Justice Guidance for Employers Following the Department of Homeland Security's No-Match Letter–related Safe-Harbor Rule

NOVEMBER 2008

On October 30, 2008, the U.S. Department of Homeland Security (DHS) published a supplemental final rule identical to its August 2007 final rule on "Safe Harbor Procedures for Employers Who Receive a No-Match Letter."[1] Implementation of the August 2007 rule had been preliminarily enjoined on October 10, 2007, by the U.S. District Court for the Northern District of California as a result of a lawsuit filed by the AFL-CIO, the American Civil Liberties Union (ACLU), the National Immigration Law Center (NILC), and other labor groups.[2] The 2008 final rule also is covered by that injunction and cannot be implemented without the court's approval. The supplemental final rule seeks to clarify concerns raised by the federal district court in its October 10, 2007, order granting the preliminary injunction. The federal court found, among other things, that DHS may have exceeded its authority by stating that employers who, when dealing with employees who are the subjects of Social Security "no-match" letters, follow the August 2007 rule's safe harbor procedures without regard to the employees' national origin or citizenship status, as required by section 274B(a)(6) of the Immigration and Nationality Act (INA), will not be found to have engaged in unlawful discrimination. The supplemental final rule rescinds this statement.

In response, the U.S. Department of Justice (DOJ) Civil Rights Division's Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) issued guidance, published in the Federal Register on October 28, 2008, to clarify when OSC may find reasonable cause to believe that employers following the safe-harbor procedures have engaged in unlawful discrimination in violation of the antidiscrimination provisions of the INA.[3]

OSC enforces the INA's antidiscrimination provisions. These provisions protect United States citizens and work-authorized non–U.S. citizens from *intentional* discrimination in employment based on citizenship or immigration status, national origin, and "document abuse," which is when an employer does not allow the *employee* to choose which documents, of those that are legally acceptable, to present during the employment eligibility verification process, or rejects documents

---

[1] For a summary of the DHS rule, see *Summary of U.S. Dept. of Homeland Security 2008 Supplemental Final Rule: "Safe Harbor Procedures for Employers Who Receive a No-Match Letter: Clarification; Final Regulatory Flexibility Analysis"* (NILC, Nov. 2008), www.nilc.org/immsemplymnt/SSA_Related_Info/no-match-DHS-finalrule-summary-2008-11-24.pdf.

[2] For more information on the preliminary injunction, see *How Does the 2008 Supplemental Final DHS Rule about Social Security "No-Match" Letters Affect the Federal Lawsuit and Injunction?* (NILC, Oct. 23, 2008), www.nilc.org/immsemplymnt/SSA_Related_Info/no-match_PI_2008-10-23.pdf.

[3] The DOJ guidance is available at: www.nilc.org/immsemplymnt/SSA_Related_Info/DHS_Final_Rule/Fed_Reg_DOJSafe-Harbor_Procedures_10-28-08.pdf.

NATIONAL IMMIGRATION LAW CENTER
www.nilc.org

LOS ANGELES (Headquarters)
3435 Wilshire Boulevard
Suite 2850
Los Angeles, CA 90010
213 639-3900
213 639-3911 fax

WASHINGTON, DC
1444 Eye Street, NW
Suite 1110
Washington, DC 20005
202 216-0261
202 216-0266 fax

that *are* legally acceptable. The law further prohibits retaliation against individuals who file charges with OSC, who cooperate with an investigation, or who otherwise assert their rights under section 274B.

The DOJ guidance provides examples of circumstances in which OSC might find that the employer committed discrimination and circumstances in which OSC will not find that an employer violated the antidiscrimination provisions.

Employer acts that OSC may find constitute unlawful discrimination include:

- Terminating employees listed in a no-match letter without attempting to resolve the mismatches; or
- Treating employees differently, or acting with the purpose or intent to discriminate, based upon their national origin, citizenship status, or other characteristics that, under the law, may not be bases for discrimination or differential treatment.

OSC will NOT find unlawful discrimination if:

- An employer terminates employees named in a no-match letter only after it has followed the safe harbor procedures and applied the exact same procedures to all employees named in the letter "uniformly and without the purpose or intent to discriminate" based on national origin or citizenship status.

■ How can the DOJ guidance protect workers who are listed in a no-match letter?

The DOJ guidance will protect workers who are employed by unscrupulous employers who may intentionally discriminate against them based on national origin or citizenship status, or who may retaliate against workers for exercising protected workplace rights.

For example:

- If an employer receives a no-match letter listing, for example, 100 workers, but asks only the 30 workers who are of a specific national origin (such as those whose ancestry or national origin is Guatemalan) to reverify their work authorization documents, that action, combined with other facts, may lead to a finding by OSC that the employer violated the INA's antidiscrimination provisions.
- If an employer receives a no-match letter listing several workers and the employer decides to fire all of the workers for fear that some may be undocumented, that action could also be deemed unlawful discrimination in violation of the INA.

It is important for advocates to monitor closely how employers are responding to no-match letters and implementing the proposed rule so that, in the event that an employer is unlawfully discriminating against workers, those workers can contact OSC to file charges.

■ What are the limitations of the DOJ guidance?

Notwithstanding the OSC guidance, which was issued to protect workers from unlawful discrimination when employers apply the DHS safe harbor rule, circumstances may exist in which workers may be unjustly fired based on being named in a no-match letter but will *not* be protected by the INA's antidiscrimination provisions.

For example:

- If an employment-authorized worker is named in a no-match letter because she uses only her first name and one surname for work, but her employment authorization document and valid Social Security number include her first name, middle name and two surnames, the Social Security Administration, when contacted by the worker who is trying to resolve the discrepancy, will simply notify the worker that her information is correct. When she reports to her employer that the information is correct, the employer may become confused or may not believe her, since the worker has no new information or new Social Security number to show him, despite her having been named in the no-match letter. If he fires her because she is not able to present a Social Security number other than the one that prompted the no-match letter listing, it is unlikely that she will have a viable claim under the antidiscrimination provisions unless she can prove that the employer intended to discriminate against her. Lawfully authorized workers nationwide will unfortunately lose their jobs unjustly due to employer confusion about the no-match letter.

■ How to file a charge with OSC

Workers (and/or advocates on their behalf) should contact OSC if they believe they have been discriminated against based on national origin or citizenship status. It is important to act quickly in such cases, however, as charges of discrimination must be filed with OSC within 180 days of the discriminatory act. OSC operates a worker hotline to assist in answering questions and determining whether an employer may be contacted directly in an attempt to resolve the problem before a charge is filed. OSC relies on its multilingual staff and has access to telephone interpreters to communicate with workers in many languages.

Contact information for OSC is:

- Information and Worker Hotline: 1-800-255-7688; or TDD for those with hearing impairment: 1-800-362-2735
- Employer Hotline: 1-800-255-8155; or TDD: 1-800-362-2735
- Website: www.usdoj.gov/crt/osc

It is important to note that the INA's antidiscrimination protections cover only U.S. citizens and certain authorized noncitizen workers. Workers who are not protected from discrimination under the INA may be protected under Title VII of the Civil Rights Act of 1964. Title VII protects workers based on national origin, race, color, gender, religion, age, disability, or pregnancy.

Workers (and/or advocates on their behalf) should contact the Equal Opportunity Employment Commission (EEOC) if they believe they have been discriminated against based on the above categories. To be accepted, charges must be filed with EEOC within 180 days of the discriminatory act, so it is important to act quickly. In states or localities that have antidiscrimination laws and an agency authorized to accept EEOC complaints, charges may be filed within 300 days of the discriminatory act. It is best to contact EEOC or a workers' advocate experienced in discrimination claims as soon as discrimination is suspected to seek guidance on how to proceed.

Since OSC and EEOC both enforce laws against national origin discrimination, OSC has jurisdiction over small employers with 4 to 14 employees. EEOC has jurisdiction over employers with 15 or more employees.

Contact information for EEOC is as follows:

- EEOC field offices: www.eeoc.gov/offices.html
- If there is no field office in your immediate area, call 800-669-4000; or people with hearing impairment can call the TDD number: 800-669-6820
- Website: www.eeoc.gov

FOR MORE INFORMATION, CONTACT

Nora Preciado, Employment Policy Attorney | preciado@nilc.org | 213-639-3900 x. 123