AFL-CIO, ACLU and National Immigration Law Center Challenge New Homeland Security Rule

Groups File Lawsuit Charging DHS Rule Would Cause Widespread Discrimination and Harm U.S. Citizens and Other Authorized Workers

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SAN FRANCISCO - The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), the American Civil Liberties Union (ACLU), the National Immigration Law Center (NILC) and the Central Labor Council of Alameda County, along with other local labor movements, today filed a lawsuit charging that a new Department of Homeland Security (DHS) rule will threaten jobs of U.S. citizens and other legally authorized workers simply because of errors in the government's inaccurate Social Security earnings databases. The rule violates workers' rights and imposes burdensome obligations on employers who receive Social Security Administration (SSA) "no-match" letters that inform an employer of alleged discrepancies between employee records and the SSA database.

Under the new rule, many U.S. citizens and legally authorized workers could be required to be terminated if their erroneous SSA records are not fixed within 90 days of an SSA "no-match" letter being sent to an employer. The rule is scheduled to go into effect on September 14. SSA intends to send out notices to employers enforcing the new rule beginning next Tuesday, September 4. The new notices will be sent to approximately 140,000 employers, affecting about eight million employees.

"This rule is a new tool to repress workers' rights in the name of phony immigration enforcement," said John Sweeney, President of the AFL-CIO. "Employers have used SSA "no-match" letters to fire workers when workers try to organize, when they report a wage claim or workplace hazard, or when they get injured. The new rule gives employers a stronger pretext for engaging in such unlawful conduct."

Currently, under the Immigration and Nationality Act (INA), employers must verify the immigration status of employees upon initial hire, using a process carefully crafted by Congress. The new rule would upset the careful balance struck by Congress that does not impose continuing verification obligations or seek to hold employers liable based on SSA records.

The new DHS rule imposes liability based on failure to respond to an SSA "no-match" letter, even though SSA errors are caused by many innocent factors such as typographical errors and name changes due to marriage or divorce, and the use of multiple surnames, which is common in many parts of the world. According to the Office of the Inspector General in SSA, 12.7 million of the 17.8 million discrepancies in SSA's database — more than 70% — belong to native-born U.S. citizens.

"The new rule turns the law on its head by using the notoriously incomplete and inaccurate Social Security databases to decide who is authorized to work. This will wreak havoc with workers and businesses and will cause massive discrimination against anyone who looks or sounds 'foreign,'" said Lucas Guttentag, Director of the ACLU's Immigrants' Rights Project. "DHS is trying to hijack the Social Security system for improper immigration enforcement."

Under the current system, employers submit records of employee earnings to SSA so that workers can receive credit for their earnings. Sometimes an employee's name and Social Security number do not match the information in SSA's enormous and error-prone database. In that case, a report is placed in SSA's Earning Suspense File, which is protected by tax privacy laws. The database currently contains more than 250 million unmatched records, a substantial portion of which belongs to U.S. citizens and lawfully working non-citizens.

When a database discrepancy occurs, SSA sends "no-match" letters to certain employers advising them of such. In the past, the letters have been purely advisory and clearly state that they do not "make any statement about an employee's immigration status." Indeed, SSA has recognized in the past that the issuance of a "no-match" letter does not indicate that an employee is not authorized to work, and when SSA has been able to resolve mismatches, most turned out to involve U.S. citizens.

Under the new DHS rule, however, an employer who receives a "no-match" letter is required to give the employee 90 days to resolve the data discrepancy with the huge SSA bureaucracy, a formidable challenge. If the employee is unable to do so, the employee must complete a new employment verification form, using identification documents with a different Social Security number. If the worker insists the original number submitted is correct but cannot resolve the discrepancy by the deadline, DHS requires the employer to take "reasonable steps" that might include firing the employee.

Rather than go through this burdensome process, some employers are likely to simply fire workers whose names appear on the letters — including U.S. citizens and other authorized workers — without giving employees a chance to correct the information, said the groups that filed the lawsuit. Unscrupulous employers will simply ignore the letter and continue to employ undocumented workers.

"It is truly ironic that the DHS calls this rule a 'safe harbor,'" said Marielena Hincapié, Staff Attorney and Director of Programs at NILC. "Its real effect would be to create a devastating 'storm' of bureaucratic challenges, increased discrimination, potential

financial ruin for workers, and improper and burdensome obligations upon employers. And we know from years of experience in dealing with 'no-match' letters that unscrupulous employers will use the new rule to legitimize their adverse employment actions against workers exercising their labor rights."

The lawsuit requests a court order preventing DHS and SSA from implementing the new DHS rule, including the initial mailing of "no-match" letter packets scheduled to go out to employers on September 4, until a decision on the rule's legality can be reached. The lawsuit also requests a finding that the rule is invalid.

The lawsuit was filed today in the United States District Court for the Northern District of California.

In addition to the AFL-CIO, which is represented by the law firm of Altshuler Berzon, LLP, other parties bringing the lawsuit include the Central Labor Council of Alameda County, represented by the ACLU, the ACLU of Northern California, and NILC, as well as the San Francisco Labor Council and the San Francisco Building and Construction Trades Council, represented by Weinberg, Roger and Rosenfeld.

In addition to Guttentag and Hincapié, lawyers on the case include Stephen Berzon, Scott Kronland, Jonathan Weissglass, Linda Lye and Danielle Leonard of Altshuler, Berzon; Jonathan Hiatt, James Copess and Ana Avendaño of the AFL-CIO; Jennifer Chang, Mónica M. Ramírez, and Omar Jadwat of the ACLU Immigrants' Rights Project; Alan Schlosser and Julia Mass of the ACLU of Northern California; Linton Joaquin and Monica Guizar of NILC; and David Rosenfeld and Manjari Chawla of Weinberg, Roger and Rosenfeld.

For a copy of the lawsuit visit www.aclu.org or www.aclunc.org, and www.nilc.org.

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