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"

8 CFR Part 274a; 73 FR 63843–87 (October 28, 2008).

NOVEMBER 24, 2008

On October 28, 2008, the U.S. Department of Homeland Security (DHS) published a supplemental final rule on "Safe Harbor Procedures for Employers Who Receive a No-Match Letter."[1] The final rule states that if an employer, in dealing with a "no-match" letter sent by the Social Security Administration (SSA), follows the "safe-harbor" procedures set forth in the rule, DHS will not use the no-match letter as evidence that the employer has "constructive knowledge"[2] that it has hired unauthorized workers. The 2008 final rule is essentially identical to a final rule DHS issued in August 2007 and the subsequent supplemental proposed rule it issued on March 26, 2008.[3] The supplemental *final* rule summarized below includes additional justifications for the rule and a "Final Regulatory Flexibility Analysis"; but, ultimately, DHS has reissued its August 2007 final rule "without substantive change."[4]

The August 2007 rule was scheduled to go into effect on September 14, 2007, but 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, on October 10, 2007, it was preliminarily enjoined by the U.S. District Court for the Northern District of California.[5] By issuing the 2008 supplemental final rule, DHS unsuccessfully attempts to address the issues raised by the federal court. Specifically, the court questioned (1) whether DHS had supplied a reasoned analysis to justify the agency's change in position — that a no-match letter from the Social Security Administration may be sufficient, by itself, to put an employer on notice that workers referenced in a no-match letter may not be authorized to work; (2) whether DHS had exceeded its authority by creating an exception under the antidiscrimination provisions of the Immigration and Nationality Act (INA) for employers who follow the safe-harbor rule; and (3) whether DHS had violated the Regulatory Flexibility Act by not conducting a regulatory

[1] The supplemental final rule is published in the Federal Register at 73 FR 63843–87 (Oct. 28, 2008) (available at www.nilc.org/immsemplymnt/SSA_Related_Info/DHS_Final_Rule/Fed_Reg_DHS_No-Match_Supplemental_Final%20Rule_10-28-08.pdf).

[2] As defined in 8 CFR 274a.1(l)(1).

[3] The supplemental proposed rule is published in the Federal Register at 73 FR 15944–55 (Mar. 26, 2008) (available at www.nilc.org/immsemplymnt/SSA_Related_Info/no-match-73FR15944-2008-03-26.pdf). The 2007 final rule is published at 72 FR 45611–24 (Aug. 15, 2007) (available at http://www.nilc.org/immsemplymnt/SSA-NM_Toolkit/DHS_No-Match_Rule.pdf).

[4] 73 FR at 63844.

[5] 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.

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

flexibility analysis.[6] The 2008 supplemental final rule, however, fails to make any substantive change to the safe-harbor procedures in the 2007 final rule. Instead, in it DHS unsuccessfully attempts to explain away the inherent problems caused by relying on the deeply flawed SSA database to verify workers' authorization to be employed in the U.S. The preliminary injunction covers the 2008 supplemental final rule, and the government will seek to have the preliminary injunction dissolved in order to implement the rule

Summary of the 2008 Supplemental Final Rule

The 2008 supplemental final rule, with a few minor corrections, repromulgates the August 2007 final rule and the March 2008 supplemental proposed rule that created new examples of circumstances in which an employer could be found to have knowledge that an employee is unauthorized to work.[7] The examples provided in the 2007 final rule include: (1) upon receiving a letter from SSA stating that the information submitted for an employee does not match SSA records (otherwise known as an SSA no-match letter); (2) upon receiving a notice from U.S. Immigration and Customs Enforcement (ICE) that the immigration document establishing employment authorization presented by the employee does not match DHS records (known as a "Notice of Suspect Documents"); or (3) upon an employee's request for the employer's sponsorship of the employee for a labor certification or visa petition.

The March 2008 supplemental proposed rule made three minor clarifications: First, the supplemental rule defined "prompt" notification that employers must provide to workers listed in a no-match letter as being immediately upon receipt of the no-match letter or within 5 business days of the employer completing the internal review; second, it said that the 2007 final rule does not apply to workers hired before November 6, 1986; and third, it said that the 2007 final rule does not require employers to make or retain any new documentation or records should employers choose to follow the safe-harbor steps laid out in the rule. The 2008 supplemental final rule reaffirms these clarifications. Additionally, in the 2008 supplemental final rule, DHS clarifies that "the SSA notice to which the safe harbor rule applies is the 'EDCOR' letter listing multiple no-matches" and not the "'DECOR' letter identifying a single employee with an SSN/name no-match."[8] However, the actual text of the rule does not specify which written notice it applies to because, as the rule's supplementary information explains, DHS wants to "allow the safe harbor procedures to apply to notices that SSA may issue in the future"[9]

1. DHS Policy on the Use of SSA No-Match Letters

In the 2008 supplemental final rule, DHS continues its attempts to justify its change in policy that would allow DHS and ICE to use an employer's receipt of a no-match letter as evidence that the employer has "constructive knowledge" that an employee is unauthorized to work. The rule includes safe-harbor procedures that such an employer should follow upon receipt of a no-match letter from SSA in order to avoid liability under INA section 274A(a)(2).

Each year, SSA sends letters to certain employers informing them of the fact that their Wage and Tax Statement (Form W-2) contains employee names and Social Security numbers (SSNs)

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[6] See *AFL-CIO v. Chertoff*, D.E. 135 (N.D.Cal. Oct. 10, 2007) (order granting motion for preliminary injunction), at 8. More information on the case is available at www.nilc.org/immsemplymnt/SSA_Related_Info/index.htm#DHS_Rule.

[7] 73 FR at 63861 ("The final rule does not make any substantive changes from the August 2007 Final Rule or the Supplemental Proposed Rule.").

[8] 73 FR at 63852.

[9] *Id.*

that do not match SSA records. While DHS acknowledges that there are many reasons for why such a no-match letter might be sent to an employer, including clerical errors and name changes, it continues to justify its safe-harbor rule based on the alleged "growing evidence and consensus within and outside government" that SSN no-matches are a legitimate indicator of possible illegal work by unauthorized aliens."[10] DHS cites to various governmental reports, academic reports, and to some of the comments previously submitted to DHS opposing the 2007 final rule.

According to DHS, another justification for reissuing the August 2007 final rule and its change in policy is the need to eliminate ambiguity regarding an employer's responsibility upon receiving a no-match letter. According to DHS, the 2008 supplemental final rule allows DHS to provide "greater predictability through a clear set of recommended actions for employers to take," assuring employers "that they would not face charges of constructive knowledge based on SSA no-match letters or DHS letters that had been handled according to DHS's guidelines."[11]

Additionally, because SSA does not send no-match letters to all employers, DHS believes that only employers "who have potentially significant problems with their employees' work authorization" receive employer no-match letters,[12] thereby justifying the repromulgation of the 2007 final rule. Finally, DHS attempts to justify its change in policy, if such a change exists as the federal court that issued the preliminary injunction assumes, by pointing to the "longstanding principle that employers may be liable for INA violations based on constructive knowledge."[13]

2. Antidiscrimination Provisions of the INA

In response to the federal court's finding that DHS may have exceeded its authority by providing an exception under the INA's antidiscrimination provisions for employers who follow the suggested procedures in the August 2007 final rule upon receipt of an SSA no-match letter, DHS rescinds (via the supplemental proposed rule and now the 2008 supplemental final rule) those statements from the 2007 final rule. In the 2007 final rule, DHS created an exception under the INA's "document abuse" antidiscrimination provisions.[14] In the 2008 supplemental final rule, DHS reaffirms that rescission.[15] So long as employers applied the same safe-harbor procedures to all employees referenced in the no-match letter, the employer would not be subject to being sued by the U.S. under the INA's antidiscrimination provisions. The Office of Special Counsel for Unfair Immigration-Related Employment Practices (OSC), an agency within the U.S. Department of Justice (DOJ), has authority to enforce the INA's antidiscrimination provisions. Accordingly, DOJ issued its own public guidance in the Federal Register when the rule was finalized. [16]

3. Regulatory Flexibility Analysis

The Regulatory Flexibility Act (RFA) requires the federal government to take into account the impact that certain changes in regulation might have on small businesses. The federal court

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[10] 73 FR at 63847.

[11] *Id.*

[12] 73 FR at 63848.

[13] 73 FR at 63849.

[14] INA § 274A(b), 8 U.S.C. § 1324a(b).

[15] 73 FR at 63849.

[16] See "Civil Rights Division; Office of Special Counsel's Antidiscrimination Guidance for Employers Following the Department of Homeland Security's Safe-Harbor Procedures," 73 FR 63993-94 (Oct. 28, 2008) (available at http://edocket.access.gpo.gov/2008/pdf/E8-25723.pdf). For a summary of OSC's guidance, see *Facts about U.S. Department of Justice Guidance for Employers Following the Department of Homeland Security's No-Match Letter–related Safe-Harbor Rule* (NILC, Nov. 2008), www.nilc.org/immsemplymnt/SSA_Related_Info/no-match-OSC-guidance-2008-11-30.pdf.

found that the August 2007 final rule created obligations for employers who received no-match letters that would likely have an impact on their businesses, that DHS was therefore obligated to conduct a regulatory flexibility analysis prior to issuing the rule, and that it had failed to do so. While DHS claims that its no-match rule will not require employers to incur additional costs, it nevertheless attempted to address the federal court's concerns by finalizing the RFA analysis under the 2008 supplemental final rule.

August 2007 Final Rule Provides a "Safe-Harbor" to a "Reasonable" Employer if the Employer Takes Certain Steps Upon Receipt of a No-Match Letter

The 2008 final rule is substantially identical to the August 2007 final rule and the subsequent March 26, 2008, supplemental proposed rule. The following is a summary of the steps employers should take in order to benefit from a "safe harbor," as provided in the August 2007 final rule and the 2008 supplemental final rule. Under the rule, a "reasonable" employer who receives a no-match letter from the SSA will not be deemed to have "constructive knowledge" that an employee is an unauthorized worker if the employer takes the following steps:

1. **Within 30 days** of receipt of the no-match letter, the employer would have to:
    a. Check the employer's records to determine if the discrepancy is because of a typographical, transcribing or similar clerical error in the employer's records or in its communication to the SSA or DHS. If there is an error, the employer should correct its records, inform the relevant agency, and verify that the corrected name and SSN match agency records (either over the phone or by using the Internet); and
    b. If the employer's records are accurate, "promptly" ask the employee to confirm that the information the employer has in its records is correct. DHS defines "promptly" as immediately upon receipt of the no-match letter or within 5 business days of the employer completing the internal review.
        - If the employee provides corrected information, the employer should correct its records, inform the relevant agency, and verify that the corrected name and SSN match agency records.
        - If the employer's own records are correct, the employer should ask the employee to resolve the discrepancy with the relevant agency within 90 days of the receipt of the no-match letter to the employer.

    In the August 2007 final rule, the regulations suggested that in all instances the employer should make a record of the manner, date, and time of the verification and store such record with the employee's Form I-9. The 2007 rule also encouraged employers to document telephone conversations as evidence that the discrepancy is corrected. The supplemental proposed rule and the 2008 final rule, however, state that employers are not required to make or keep new records as a result of the new safe-harbor rule.
2. If the discrepancy is not resolved within 90 days of receipt of the no-match letter, the employer may reverify the employee's employment eligibility and identity by completing a new Form I-9. The employer and employee would have 3 additional days to complete this form (or it must be completed within a total of 93 days of receipt of the no-match letter). An employee may not use a document containing the SSN or "alien number" that is the subject of the no-match letter to establish employment eligibility, or identity, or both

(including a receipt showing that the employee has applied for a replacement of such document). Additionally, all documents used to prove identity, or both identity and employment eligibility, must contain a photograph.

3. If the no-match is not resolved and the employer cannot verify the employment eligibility and identity of the employee (through completion of a new I-9 form), the employer must choose between terminating the employee or facing the risk that DHS may find that the employer had constructive knowledge that the employee was unauthorized to work, and is therefore in violation of immigration laws.

The August 2007 rule stated that reverification procedures should be applied uniformly to *all* employees with a no-match. The 2007 final rule reminded employers that selectively reverifying certain employees may subject employers to liability under applicable antidiscrimination laws and that "knowledge that an employee is unauthorized may not be inferred from employee's foreign appearance or accent."[17] The supplemental proposed rule and the 2008 supplemental final rule rescind the exception in the August 2007 final rule that would have found employers not liable for unlawful discrimination for following the safe-harbor procedures.

In the August 2007 final rule, DHS stated that it did not *require* employers to follow the rule and allowed for other procedures that an employer *could* follow in response to a no-match letter that would be considered "reasonable" by DHS. However, unless the employer followed the safe-harbor procedures outlined in the rule, the employer ran the risk that DHS would find the employer had constructive knowledge that the employee who was listed in a no-match letter was unauthorized to work. According to DHS, any particular case would depend on the "totality of relevant circumstances."[18] Additionally, DHS noted that even if an employer followed the safe-harbor procedures outlined above, it would not preclude DHS from finding that an employer had "actual" knowledge that an employee was unauthorized to work. In this instance, the burden would be on the government to prove that the employer had actual knowledge. DHS could also find that the employer had constructive knowledge from sources other than the no-match letter.

Finally, under the August 2007 final rule, DHS stated that the final rule applies only to written notice that is issued directly to the employer from the SSA or DHS. It does not apply to information employers receive through sources other than no-match letters. This includes a discrepancy the employer may learn about in using the Social Security Number Verification Service (SSNVS), Basic Pilot/E-Verify, or the ICE Mutual Agreement between Government and Employers (IMAGE) program.[19] DHS stated that it would exercise its prosecutorial discretion favorably for employers who use such programs. However, use of these programs would mitigate only against being found liable for violating immigration law and would not provide an automatic "safe harbor."

FOR MORE INFORMATION, PLEASE CONTACT
Nora A. Preciado, National Immigration Law Center, 213-674-2823, preciado@nilc.org, or
Mike Muñoz, National Immigration Law Center, 213-674-2817, munoz@nilc.org

[17] 73 FR at 45624.

[18] 72 FR at 45623.

[19] For more information about the Social Security Number Verification Service (SSNVS), E-Verify (formerly known as the Basic Pilot Program), or the IMAGE Program, *see* www.nilc.org/immsemplymnt/SSA_Related_Info/index.htm.