Potential Liability Employers Face if They Take Adverse Action against Employees Based Solely on a "No-Match" Letter

MAY 2008

The U.S. Department of Homeland Security (DHS) published a supplemental proposed rule in March 2008 clarifying its August 2007 final rule on "Safe-Harbor Procedures for Employers Who Receive a No-Match Letter."[1] The rule expands the definition of "constructive knowledge" by creating new legal obligations for employers when they receive a "no-match" letter from the Social Security Administration (SSA).[2] This safe-harbor rule would have gone into effect but for a lawsuit filed by the AFL-CIO, the American Civil Liberties Union, NILC, and other labor and business groups, which blocked implementation of the rule.[3] On October 10, 2007, a federal district court issued a preliminary injunction prohibiting DHS and SSA from implementing the rule and from sending employers no-match letters that reference the rule.[4] The March 2008 supplemental proposed rule does not impact the preliminary injunction, which remains in effect until the rule becomes final and the court issues a decision as to whether or not to lift the injunction.

The safe-harbor rule and the issuance of the supplemental proposed rule have created confusion among employers and workers. Because the rule has not yet gone into effect, it is important that employers not overreact and indiscriminately terminate, suspend, or threaten any adverse action against an employee who is the subject of a no-match letter simply based on the fact that the employer received such a letter. Since the preliminary injunction is still in place, employers should proceed cautiously until the federal court decides the fate of the DHS rule. Since the court blocked SSA from sending no-match letters to employers in 2007, and since SSA is unlikely to send such letters in 2008 until the legal issues are resolved,[5] it is critically important for employers not to take adverse action against workers based on a no-match letter received in a previous year. Taking such action against workers solely because their Social Security numbers (SSNs) appear in a no-match letter could violate state and federal employment laws. Employers should be aware that they face potential liability if they take adverse action against their employees based solely on information in a no-match letter.

Potential Liability for Unlawful Discrimination

- An employer who singles out for adverse treatment employees of certain national origins or ethnic groups when such employees' SSNs are listed in a no-match letter may be liable for violating Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000d and 29 C.F.R. § 1606.1, applicable state laws, as well as the antidiscrimination provisions of the Immigration and Nationality Act (INA). *See* 8 U.S.C. § 1324b.
- An employer who requires employees of certain national origin, racial, or ethnic groups to reverify their immigration status or employment eligibility based solely on the employer having received a no-match letter in which their SSNs are listed may be liable for committing national origin discrimination in violation of the antidiscrimination provisions of federal immigration law. *See* 8 U.S.C. § 1324b.
- An employer who refuses to hire individuals who appear to be foreign-born or "appear to be undocumented," or who imposes more stringent documentation requirements on individuals who "appear foreign," may be liable for citizenship status discrimination or a form of discrimination called "document abuse" under the federal immigration law's antidiscrimination provisions. *See* 8 U.S.C. §§ 1324b(a)(1)(B) and 1324b(a)(6).

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- An employer who simply terminates employees whose SSNs are listed in a no-match letter without attempting to resolve the mismatches or allowing the worker to correct the discrepancy may be liable for unlawful discrimination under 8 U.S.C. § 1324b.

Potential Liability for Unlawful Retaliation

- An employer who retaliates against employees by singling out workers whose SSNs appear in a no-match letter and who have filed a claim with a federal or state agency — such as the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC), the Equal Employment Opportunity Commission (EEOC), or a corresponding state agency — may be liable, under the anti-retaliation provisions of the relevant federal or state statutes relating to the workers' underlying claim, for unlawful retaliation against employees who have engaged in protected activity.
- If workers are engaged in a labor union organizing campaign and an employer singles out for adverse treatment union supporters whose SSNs are listed in a no-match letter, that employer may be liable for violating workers' guaranteed rights under Section 7 of the National Labor Relations Act (NLRA). *See* 29 U.S.C. § 158(a)(3).
- Because Section 7 of the NLRA protects all workers, whether or not they are unionized, who collectively complain to their employer about working conditions, an employer who singles out for adverse treatment workers whose SSNs are listed in a no-match letter and who have advocated on behalf of their coworkers may also be held liable for retaliating against those workers for exercising rights guaranteed them under the NLRA.
- Likewise, if employees who are the subjects of a no-match letter are singled out because they
  - filed a complaint regarding health and safety conditions in the workplace with the federal Occupational Safety and Health (OSH) agency or the relevant state agency, or
  - filed a complaint for nonpayment of wages, or failure to pay the minimum wage or overtime, with the U.S. Department of Labor or a corresponding state agency,

  the employer may be liable for unlawful retaliation in violation of the OSH Act, corresponding state whistleblower laws, or the retaliation provisions of the Fair Labor Standards Act (FLSA), 8 U.S.C. § 215(a)(3), or an equivalent state statute.

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[1] For a summary of the supplemental proposed rule, *see* SUMMARY OF U.S. DEPT. OF HOMELAND SECURITY SUPPLEMENTAL PROPOSED RULE: "SAFE-HARBOR PROCEDURES FOR EMPLOYERS WHO RECEIVE A NO-MATCH LETTER: CLARIFICATION; INITIAL REGULATORY FLEXIBILITY ANALYSIS" (NILC, Mar. 27, 2008), www.nilc.org/immsemplymnt/SSA_Related_Info/DHS_Final_Rule/SSA_no-match_summary_3-26-08.pdf.

[2] For more information about such letters, *see* FACTS ABOUT THE SOCIAL SECURITY "NO-MATCH" LETTER (NILC, Mar. 26, 2008), www.nilc.org/immsemplymnt/SSA-NM_Toolkit/factsaboutno-matchletter_2008-03-26.pdf.

[3] For more information on the preliminary injunction, *see* www.nilc.org/immsemplymnt/SSA-NM_Toolkit/index.htm#inj.

[4] *See* AFL-CIO v. Chertoff, D.E. 135 (N.D. Cal. Oct. 10, 2007) (order granting motion for preliminary injunction), www.nilc.org/immsemplymnt/SSA_Related_Info/no-match_PI_order_2007-10-10.pdf.

[5] *See* SOCIAL SECURITY FACT SHEET: RELEASE OF TAX YEAR 2007 DECOR LETTERS (Social Security Admin., Apr. 2008), http://www.ssa.gov/legislation/Release%20of%20TY07%20DECOR%20040308%20FINAL.pdf.