

## How does the 2008 supplemental final DHS rule about Social Security “no-match” letters affect the federal lawsuit and injunction?

October 2008

**O**n October 23, 2008, the U.S. Department of Homeland Security (DHS) issued a supplemental 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). This supplemental final rule (which expands upon a March 2008 proposed rule) included additional legal analysis and a Final Regulatory Flexibility Analysis, but ultimately re-issued the August

2007 no-match final rule “without substantive change.” The August 2007 final rule stated that if an employer 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” that it has hired undocumented workers. The August 2007 rule was scheduled to go into effect on September 14, 2007, but on October 10, 2007, it was preliminarily enjoined by the U.S. District Court for the Northern District of California. The preliminary injunction remains in effect

### 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 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 DHS rule still is not in effect. 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.

### What impact does the 2008 DHS supplemental final rule have on the preliminary injunction?

The preliminary injunction remains in place unless and until the court decides to dissolve it. With the issuance of the supplemental final rule DHS has said it plans to go back to the court to ask the court to dissolve the injunction. But

the rule remains blocked until the court either decides to dissolve the injunction or decides whether or not the rule is legal.

### 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, this year SSA has not sent any no-match letters to employers (as of April 2008), and SSA stated that it will not send any such letters (about more than one worker) until the federal lawsuit is

settled. While SSA will continue its longstanding practice of sending no-match letters to individual workers at their homes, unlike in years past, if SSA knows that the home address it has for an individual worker is not correct, it will not send the worker’s letter to his or her employer.

### How can advocates help dispel confusion about the rule?

The DHS rule has caused lots of confusion and panic among workers and employers alike. It is likely that publication of the final rule may prompt many employers to implement it (even though no no-match letters were sent out in

2008). 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. The primary contact person is Nora Preciado ([preciado@nilc.org](mailto:preciado@nilc.org)).



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