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16	UNITED STATES DISTRICT COURT			
17	NORTHERN DISTRICT OF CALIFORNIA			
18	AMERICAN FEDERATION OF LABOR AND ) CONGRESS OF INDUSTRIAL ORGANIZATIONS; )	Case No.		
19	SAN FRANCISCO LABOR COUNCIL; SAN ) FRANCISCO BUILDING AND CONSTRUCTION )	EX PARTE APPLICATION FOR		
20	TRADES COUNCIL; and CENTRAL LABOR COUNCIL) OF ALAMEDA COUNTY,	TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW		
21	Plaintiffs, )	CAUSE WHY PRELIMINARY INJUNCTION SHOULD NOT		
22	v. )	ISSUE		
23	MICHAEL CHERTOFF, Secretary of Homeland Security;)			
24	DEPARTMENT OF HOMELAND SECURITY; JULIE MYERS, Assistant Secretary of Homeland )			
25	Security; U.S. IMMIGRATION AND CUSTOMS  ENFORCEMENT; MICHAEL ASTRUE, Commissioner  )			
26	of Social Security; and SOCIAL SECURITY ) ADMINISTRATION, )			
27	Defendants.			
28	)	•		
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EX PARTE APPLICATION FOR TRO & OSC RE: PRELIMINARY INJUNCTION, Case No.

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	FX PARTE APPLICATION FOR TRO & OSC RE- PRELIMINARY INITINCTION Case No.

# EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE WHY PRELIMINARY INJUNCTION SHOULD NOT ISSUE

Plaintiffs hereby request, pursuant to FRCP 65 and Civil Local Rules 7-10 and 65-1, that the Court issue a temporary restraining order and an order to show cause why a preliminary injunction should not issue.

### NEED FOR TEMPORARY RESTRAINING ORDER

On August 15, 2007, the Department of Homeland Security ("DHS") published a Final Rule that would commandeer the Social Security tax system for immigration-enforcement purposes. The new rule would place millions of U.S. citizens and non-citizens with work authorization at risk of losing their jobs because of discrepancies in the Social Security Administration ("SSA") tax database. The new rule becomes legally effective on September 14, 2007, but DHS and SSA plan to jump the gun by beginning on September 4, 2007 to mail SSA "no-match" letter packets to employers that will include a separate DHS guidance letter about compliance with the new rule.

The SSA generates no-match letters to employers when names and Social Security Numbers ("SSNs") submitted by the employer on Forms W-2 cannot be matched with SSA records. The DHS guidance letter will inform employers that they face civil and criminal liability under the immigration laws unless they address the no-match letter and that workers should be fired if the no-match cannot be resolved with SSA within 90 days.

The initial round of SSA/DHS mailings to employers is scheduled to run from September 4 to November 9, 2007. This round of mailings would reach about 140,000 employers and affect about eight million employees. It would be the first time that the SSA's Earnings Suspense File, an error-prone database that contains more than 255 million mismatched records, has been used as an immigration-enforcement tool. The SSA receives about 8 to 11 million earnings reports per year that fail to match with SSA records. There are many reasons for mismatches that are unrelated to unauthorized work, so a no-match is not an indication of immigration status. When the SSA has been able to reconcile no-matches, most involved U.S. citizens.

This lawsuit contends that the new DHS rule is invalid because it is contrary to the governing statute adopted by Congress. This lawsuit further contends that DHS and SSA are

exceeding the authority they were granted by Congress by using SSA's confidential Earnings
Suspense File for purposes of immigration enforcement instead of for purposes of the Social
Security program. Plaintiffs seek a temporary restraining order to push back the September 4, 2007
start of the new DHS/SSA mailings until their motion for a preliminary injunction can be heard.
Plaintiffs also seek a hearing date for their motion for a preliminary injunction before September 14, 2007, when the DHS Final Rule would become legally effective.

### **GROUNDS FOR APPLICATION**

The application is made on the ground that Plaintiffs meet the requirements for a temporary restraining order because they have demonstrated: 1) a likelihood of success on the merits and the possibility of irreparable injury, or 2) serious questions about the legality of Defendants' conduct and that the balance of hardships tips sharply in Plaintiffs' favor. *Lands Council v. Martin*, 479 F.3d 636, 639 (9th Cir. 2007).

Plaintiffs have a strong likelihood of success on the merits because the DHS Rule and letter are contrary to the governing statute. They would expand civil and criminal liability under the Immigration Reform and Control Act ("IRCA") far beyond what Congress intended. Congress provided for IRCA liability when an employer continues to employ a worker "knowing" the worker is an "unauthorized alien." 8 U.S.C. §1324a(a)(2) (emphasis added). The word "knowing" is "a familiar term of art" that describes a state of mind necessary for civil or criminal liability; it has a meaning that "Congress is presumed to have known and adopted." United States v. Jewell, 532 F.2d. 697, 703 (9th Cir. 1976) (en banc). Given that there are many reasons for no-matches that have nothing to do with unauthorized work (e.g. clerical errors, employee name changes after marriage and divorce, different naming conventions, such as use of multiple surnames, in many parts of the world), the DHS rule is premised on a definition of the term "knowing" that the term will not bear. The DHS rule also is contrary to the governing statute because it effectively would establish a continuing work-authorization verification process for existing employees that Congress declined to establish, disturbing the delicate balance of policy interests that Congress has made in the immigration laws.

The DHS/SSA scheme to use the "no-match" mailings as an immigration-enforcement tool also is beyond the statutory authority that Congress granted to these agencies. SSA is only permitted to use the Earnings Suspense File for purposes of the Social Security program. And DHS lacks the authority to attach immigration-law obligations to SSA no-match letters, which are purely advisory and relate solely to the tax system.

The balance of equities also overwhelmingly favors a stay to preserve the status quo until Plaintiffs' request for a preliminary injunction can be heard. The government will suffer no real harm if the start of the SSA/DHS mailings is briefly delayed pending judicial review. The DHS rule is a major change in existing policy, and the proposed rule lay dormant for an entire year until DHS published it as a Final Rule after Congress recessed without adopting immigration legislation that DHS had supported. No law or emergency requires that the rule be implemented immediately. There certainly is no law or emergency that requires the DHS/SSA mailings to begin before the Final Rule even becomes legally effective.

On the other hand, once the mailings commence, employees who are U.S. citizens or non-citizens with legal work authorization, many of whom will be workers represented by Plaintiffs, will face the loss of their jobs unless they can resolve an SSA data discrepancy within a 90-day deadline. These employees will have to take off work without pay to visit SSA field offices that will be inundated with similar requests for no-match corrections. Some workers will lack birth certificates or other necessary identification documents, and SSA already has informed DHS that in "difficult cases" no-match issues will not be resolved by the deadline. Those workers would be fired. Additionally, based on past-experience with no-match letters, it is clear that some employers receiving the SSA/DHS mailing will just terminate workers immediately because they fear IRCA liability, particularly when the workers have a "foreign" appearance or accent. It will be impossible to completely "unring the bell" later if the DHS rule is struck down.

## **RELIEF SOUGHT**

Plaintiffs respectfully request that the Court grant this ex parte motion as follows:

1. The Court should issue an immediate temporary restraining order, pending a hearing on the request for a preliminary injunction, that enjoins Defendants, their officers, agents, servants,

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employees, and attorneys, and all persons acting by, through, under, or in concert with them, from taking any action to implement the Final Rule adopted by the Department of Homeland Security entitled "Safe Harbor Procedures For Employers Who Receive a No-Match Letter," 77 Fed. Reg. 45611 (Aug. 15, 2007), including by causing to be mailed Social Security Administration no-match letters that are accompanied by the Department of Homeland Security guidance letter about the Final Rule.

The Court should issue an order to show cause why a preliminary injunction should 2. not issue to enjoin Defendants from implementing the Final Rule and set a hearing on the motion for a preliminary injunction for before September 14, 2007, when the Final Rule would become legally effective.

### SUPPORTING DOCUMENTS

The motion is based on this Ex Parte Application and the following documents that are being filed herewith: the Complaint For Injunctive And Declaratory Relief; the Memorandum of Points and Authorities in Support of Motion for Temporary Restraining Order and Preliminary Injunction; the Declarations of Kenneth S. Apfel, Ana Avendaño, Linda Chavez-Thompson, Laura Foote Reiffe, Tyler Moran, Nik Theodore in Support of Temporary Restraining Order and Preliminary Injunction; the Declaration of Notice to Opposition; the Request for Judicial Notice; the Declaration in Support of Request for Judicial Notice; the Motion to Exceed Page Limitations; the Declaration in Support of Motion to Exceed Page Limitations; the [Proposed] Order Granting Motion to Exceed Page Limitations; and the accompanying [Proposed] Temporary Restraining Order And Order To Show Re: Preliminary Injunction; the complete files and records of this action; and such other and further matters as the Court may properly consider.

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Dated: August 28, 2007

Respectfully submitted

Stephen P. Berzon Scott A. Kronland Jonathan Weissglass Linda Lve Danielle E. Leonard

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