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The DHS NO Match Rule: Are We There Yet?

Is this the end of the road for the Department of Homeland Security (DHS) Social Security Number No-Match Rule? With all the detours and pit-stops, it seems that we never went very far on this [Long Strange Trip](#). The latest turn came on October 28, 2008, when DHS published the No-Match/Safe Harbor Supplemental Final Rule ("the Rule" or "Supplemental Final Rule") in the [Federal Register](#) (which, for all intents and purposes, is the same rule employers originally challenged in *AFL-CIO v. Chertoff* in October 2007).



In publishing the Supplemental Final Rule, DHS stated, in no uncertain terms, that it "...finalized the additional legal analysis set out in the supplemental notice of proposed rulemaking, *and determined that the rule should issue without change.*"¹ (emphasis added). The Supplemental Final Rule simply "republishes the text of the August

2007 rule without substantive change."² The Rule calls for implementation upon being published in the *Federal Register*; however DHS has acknowledged it will not be enforced until the U.S. District Court for the Northern District of California lifts the [existing injunction](#). DHS is confident that the additional steps they have taken in this newly "revised" form of the regulation will address the concerns Judge Breyer raised when he issued an injunction prohibiting implementation of the August 2007 Rule.

Remind Me Where We Were Heading

In part, the No-Match Rule is DHS's attempt at providing guidance to employers on what the department believes is a correct response to a No-Match letter from the Social Security Administration (SSA) or the equivalent notification letter from DHS. But that is not where the "guidance" stops. The other part of the No-Match Rule seeks to broaden the definition of "constructive knowledge" as it is used in reference to the employment of individuals who are not authorized to work in the U.S. The regulations do this by including the receipt of a Social Security (or DHS equivalent) No-Match letter as one of the ways DHS can prove that an employer has "constructive knowledge" that it has an unauthorized worker on its payroll.

Current federal law prohibits an employer from "knowingly hiring" or "continuing to employ" a worker who is not authorized to work in the U.S. In addition to

¹ Department of Homeland Security, *Safe Harbor Procedures for Employers Who Receive a No-Match Letter: Clarification; Final Regulatory Flexibility Analysis at 7*, [DHS Docket No. ICEB-2377-06; ICE 2377-06] (2008). See 71 Fed. Reg. 209 (Oct. 28, 2008) (Supplemental Final Rule)

² *Id.*

actually knowing an employee is unauthorized to work (referred to as “actual knowledge”), employers can also learn that the employee is not authorized to work through “constructive knowledge.” Accordingly, the DHS rule claims a “reasonable person” can infer an employee’s unauthorized status through receipt of a No-Match Letter. Therefore, DHS reasons, it can reasonably expect a company to take steps to address the No-Match Letter to ensure that an employee is truly authorized to work. If the company does not take the suggested steps and DHS finds that the employee is an unauthorized worker, the company can be held liable for continuing to employ an unauthorized worker.

Through the DHS guidance, the employer is now given the option of following the procedure outlined in the Rule to resolve No-Match Letters. If these procedures are followed, the employer will then be provided a “safe harbor,” meaning DHS will not use receipt of the No-Match Letter as a basis for holding an employer liable for continuing to employ an unauthorized worker. Given such a limited application, the true value of the safe harbor provision to the employer, even when it is granted, will need to be proven. Be aware that Immigration and Customs Enforcement (ICE) will still consider other factors to prove “constructive knowledge,” even if a safe harbor is provided for the No-Match letter. Much of this remains unclear because DHS failed to address many of the hundreds of questions forwarded to Secretary Chertoff by the business community seeking clarification on the processes and procedures needed to implement the No -Match Rule guidelines.

Despite the fact that the No-Match rulemaking journey began on June 14, 2006, when DHS first published a proposed rule purporting to create a “safe harbor” for employers who receive No-Match Letters,³ the Rule itself remains ambiguous and unclear, even after all of the business community’s attempts to seek clarification. DHS received more than 5,000 comments on the proposed rule and it was not until August 15, 2007, that DHS published a “final” rule (“2007 Rule”) addressing those comments. The 2007 Rule was scheduled to take effect on September 14, 2007. However, the 2007 Rule was stopped in its tracks by a lawsuit filed by the U.S. Chamber of Commerce, National Roofing Contractors Association, American Nursery and Landscape Association, the AFL-CIO, the ACLU and other members of the business community. The suit successfully challenged some of the procedural aspects of how the 2007 Rule was issued, leading to a preliminary injunction issued on October 10, 2007, by the U.S. District Court for Northern California. On November 23, 2007, DHS requested that the Court delay proceedings, until March 1, 2008, in order to allow it to reissue the 2007 Rule in a new rulemaking effort. DHS, in effect, asked the Court to freeze the litigation to allow it to correct the record that served as the basis for the Court’s injunction.

On March 21, 2008, DHS forged ahead in response to the Court’s decision and injunction by continuing its rulemaking journey and releasing a Supplemental Proposed Rulemaking. The Supplemental Proposed Rule was published in the *Federal Register* on March 26, 2008, and the public comment period closed on April 25, 2008. Procedurally, this was a supplement to the original Proposed Rule issued on June 14, 2006. In particular, the Supplemental Proposed Rule provided an Initial Regulatory Flexibility Act (IFRA) analysis and attempted to respond to other issues raised in the litigation. Please see the existing [GT Alert](#) addressing this process. The Supplemental Proposed Rule can be likened to an attempt to “go back in time” to the original Proposed Rule to

³ Employers annually send the SSA millions of W-2 forms; in numerous cases the employee names and Social Security Numbers (SSNs) do not match. When this occurs, the SSA sends out letters to employers throughout the United States listing the names and SSNs of employees whose names do not match the social security numbers provided to the employer. Often these letters are the result of clerical errors or name changes. Nevertheless, ICE argues that these are sometimes indicators that employees are unauthorized to work in the United States and should be used as one of the triggers for an investigation. DHS considers No-Match to also be a letter sent to employers by ICE following an inspection of the employer’s Form I-9s. If ICE is unable to successfully confirm the employee’s immigration status or work authorization from the Form I-9, ICE will generate a type of DHS No-Match letter informing the employer of the discrepancy

correct the deficiencies in that document and in the rulemaking itself. To the business community at large, it just added more chaos to an already confusing situation.

Where Are We Now?

The preliminary injunction remains in effect as of today's date, and the issuance of the Supplemental Final Rule does not change its impact in any way. The government stated it is planning to simultaneously file a motion to vacate the preliminary injunction and a motion for summary judgment on the merits of the case within the next two weeks. The plaintiffs will then need to respond and reply to both motions; it is possible that this response will not be filed until after the next status conference, which is currently scheduled for November 21, 2008. At this juncture, it appears that politics is the key factor which will determine the timing and the ultimate destination for the No-Match regulations.

Questions that continue to plague employers:

- Will the SSA No-Match Letters be sent out right away, before the court looks at the motions?

While nothing prohibits it from sending No-Match Letters, the SSA announced it is "waiting to see what happens with the no-match litigation" before it decides whether or not to send out No-Match Letters for Tax Year 2007 to approximately 140,000 employers.⁴ It is possible the SSA does not want to be forced into sending out two separate mailings. If the DHS rule takes effect, it will require the SSA to include in the mailing of the No-Match Letters a separate insert explaining the safe harbor provision and telling employers that they are required to resolve the Social Security number discrepancy or face possible liability. If the No-Match Letters are sent out immediately and the injunction is lifted subsequent to the mailing, the SSA may be compelled to notify employers of the No-Match Rule in a separate mailing.

- If the court injunction is lifted, how long before we can expect No-Match Letters for Tax Year 2007 to go out?

This will depend on what happens next in court and how the plaintiffs respond to DHS's expected motions. The timing is not predictable because we are unsure of the exact date the government will file its motions with the court. It is safe to say that we will have a much better understanding of where everything stands after the November 21st status conference.

- If the District Court Judge eventually grants both of the government's motions, will the injunction immediately be lifted and will the SSA and DHS insert letters go out?



⁴ *The Bureau of National Affairs, Inc. October 27, 2008*

Many believe that if the Judge grants DHS's motion, the plaintiffs will immediately appeal to the 9th Circuit and ask for an immediate stay. If the stay is granted, SSA will be prohibited from mailing the letters.

Timing is everything and politics seems to be the driving force. The government appears to be extremely intent on moving forward and on implementing this regulation before the end of the current administration. The plaintiffs, on the other hand, seem to be banking on an anticipated benefit from having the *incoming* administration review the core of the regulation itself. Business, trade associations, unions and community groups continue to band together in an effort to prevent the implementation of the DHS rule "until the case has run its due course in the court of law."⁵

The Three Reasons Why the Court Originally Slammed the Brakes on the 2007 Rule

The U.S. District Court provided three reasons for issuing the injunction:

- First, DHS did not supply a "reasoned analysis" justifying a change in its position that a No-Match Letter, without more, would be sufficient to put an employer on notice that some of its employees may be unauthorized to work in the United States;
- Second, DHS infringed on the authority of the Department of Justice (DOJ) by interpreting the anti-discrimination provisions of the Immigration Reform and Control Act of 1986 (IRCA); and
- Third, DHS violated the Regulatory Flexibility Act by failing to conduct a regulatory flexibility analysis.

DHS re-stated its belief that the Supplemental Proposed Rule addressed the issues raised by the U.S. District Court and its order granting the injunction. Despite this view, DHS directly addressed each of the court's concerns in the Supplemental Final Rule. The highlights of DHS's prior responses were discussed in detail in the [GT Alert](#) published in March 2008.

So What's New? Only One Technical Change (Five Days is No Longer the Time Frame for Notifying Employees of the No-Match Letter)

The 2007 Rule required that employers contact the employee regarding the No-Match Letter within five (5) business days after the employer completed its internal records review. In the Supplemental Final Rule, DHS "declined to set a formal limit in the rule text," and therefore removed the five (5) day employee notification requirement.⁶ DHS also authorized employers to notify employees of the No-Match issue even while the employer is reviewing its internal records. DHS reinforced this point by stating that "immediately notifying an employee...may be the most expeditious means of resolving the mismatch."⁷



⁵ Open letter to Members of Congress by EWIC Members, www.Ewic.org

⁶ *Id.* at 72.

⁷ *Id.*

The Long Trip Ends Where it Began—The Rule Remains Essentially Unchanged

DHS reasserts its claim that the No-Match regulation only specifies what steps constitute a reasonable response to the receipt of a No-Match Letter by a responsible employer. DHS maintains that an “SSA no match letter standing alone, does not conclusively establish that an employee...is an unauthorized alien” and that the “totality of the circumstances” should be reviewed before liability is imposed.⁸ They also state that the Rule protects employers because employers who take the steps the Rule “suggests” will be insulated from a finding of constructive knowledge of an employee’s unauthorized work status. If only dealing with No-Match Letters and the subsequent I-9 process was as simple as DHS claims, the entire Rule would not be so hard to swallow. In the reality of the business world, dealing with No-Match and other immigration compliance issues is time consuming, complex and difficult for the majority of U.S. employers.

Remind Me, Where Were We Going?-Explain the Rule to me!

Receipt of a No-Match Letter, in context with the totality of the circumstances, may be considered constructive knowledge that an employee is an unauthorized alien. The DHS Rule outlines the following procedures employers must follow when they receive a No-Match letter. If the outlined procedures are followed, the letter will not be used as evidence of constructive knowledge against the employer-thereby creating a *safe harbor*-albeit a very limited one.

Step 1

The employer must check its records to determine if the SSA no-match is a result of a clerical error. If the letter is the result of such an error, the employer should correct its records, inform the SSA of the error and verify that the name and number, as corrected, match the Agency’s records. Notations of the review undertaken should be made and kept with the Form I-9. The employer must complete these steps within **thirty (30) days** of receipt of a letter.

Step 2

If by checking its records the employer cannot resolve the discrepancy, it must *promptly* contact the employee and request confirmation that the name and social security account is correct. If the information is *incorrect*, the employer must correct the employee’s information in its records, inform the relevant agencies of the correction, and match the corrected information with the SSA’s records. If the records are *correct* according to the employee, then the employer must ask the employee to pursue the matter personally with the SSA. The employer must advise the employee of the date that employer received the written notice from SSA and further advise the employee to resolve the discrepancy with the agency **within ninety (90) days** of the date the employer received the letter. Please note that DHS will consider the discrepancy resolved only after the employer verifies with the SSA that the employee’s name matches in SSA records a number assigned to that name and that the number is valid for work or work with DHS authorization.

⁸ *Id.* at 35.

Step 3

If the No-Match issue is not corrected within ninety (90) days of receipt of the No-Match Letter, the regulation outlines the procedure that employers have been grappling with since the proposed rule was announced in June of 2006. The procedure requires re-I-9ing the individual to re-verify the employee's identity and work eligibility. The new form must be kept with the original

The employer and employee must complete a new Form I-9 as if the employee was a new hire, with certain restrictions. These restrictions include:

- Requiring Section 1 to be completed within 93 days of receipt of the No-Match or DHS Letter. Under current law, employers are given 3 days from the date of hire to complete the Form I-9;
- Excluding any document that was the subject of the No-Match or DHS letter, including a social security number and alien registration number, from being used to establish employment eligibility; and
- Excluding any document without a photograph of the employee from being used to establish identity.



It should be noted if the No-Match letter is received from DHS rather than the SSA, the procedure is a bit different. In this case, *the employer* must contact the local DHS office and attempt to resolve the questions raised by the DHS about the immigration status document or employment authorization document. The employer must complete this step within thirty (30) days. If the employer is then unable to verify with the DHS within ninety (90) days of receipt of the DHS notice, the employer should follow the process outlined in Step 3 above.

While the requirements focus on documentation, employers are reminded not to over-document (request more or different documents than are statutorily required) when completing the new Form I-9s, as that could subject them to additional liability for discrimination. If the procedure described above is completed and it is ultimately determined that the employee is unauthorized, DHS will not consider the employer to have constructive knowledge of this particular unauthorized worker's status.

Remember, following the procedure does not insulate employers from any other charges, but may assist in putting forth a good faith defense when reviewed as part of the totality of the circumstances in an ICE investigation. GT will further discuss the practical ramifications, anti-discrimination issues and procedural problems with the re-I-9ing process described above in a future alert.

Where Should We Be Headed Now?

Many employers in the U.S. started creating and implementing their own internal Social Security No-Match policies when the regulations were being drafted and continued to tailor these policies throughout the litigation. Based on sound legal advice, many employers have taken some type of action in light of DHS's rulemaking and their own heightened awareness of the penalties and liabilities associated with hiring and continuing to employ unauthorized workers. It is imperative for employers to think about internal compliance policies and to consider the benefits of instituting basic procedures versus the costs of ignoring these problems. ICE has stepped up

criminal enforcement actions as well as administrative reviews and I-9 audits. Legacy INS, the agency that accepted pennies on the dollar for I-9 fines, is long gone and ICE is no longer interested in negotiating fines. ICE's budget for worksite enforcement continues to grow and they are aggressively pursuing compliance issues, particularly in identified critical infrastructure sites and targeted industries.

Regardless of the outcome of the litigation over the No-Match Rule, or the outcome of the Presidential election, enforcement activity will continue to increase and become more sophisticated. Damage control and remedial action after an investigation is initiated or after a notice of inspection is delivered is not as effective in minimizing liabilities as proactively addressing these issues. Employers must take stock of their exposure, conduct internal audits and have experienced compliance counsel guide them through this complicated area of the law. The chances of your company being the government's next target are slim, but if you are selected for an investigation, are you ready?

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