

## **SOCIAL SECURITY ADMINISTRATION TO REFRAIN FROM SENDING “NO-MATCH” LETTERS**

### *PRELIMINARY INJUNCTION BLOCKS DEPARTMENT OF HOMELAND SECURITY FROM IMPLEMENTING RULES FOR EMPLOYERS WHO RECEIVE SUCH LETTERS*

On October 10, a federal court in California granted a motion for temporary injunction brought by the American Federation of Labor, the ACLU and other groups to prohibit the Department of Homeland Security (“DHS”) from implementing its final rule entitled “Safe Harbor Procedures for Employers Who Receive a No-Match Letter.” Since 1994, the Social Security Administration (“SSA”) has tried to correct discrepancies between workers’ names and social security numbers from employer-supplied W-2 forms and its own records by sending employers “no-match” letters requesting corrected information. Employers would then generally ask employees to resubmit their social security numbers so the employer could determine whether a clerical or transcription error had caused the “no-match.” If that did not solve the problem, the employer would then advise the employee to contact the SSA. If the discrepancy was not cleared up, an employer who continued to employ an alien “knowing the alien is (or has become) unauthorized to work in the United States” is caught between two unpalatable choices: risking penalties for employing the unauthorized alien or firing the worker.

The proposed rule would have provided a safe harbor for employers who followed certain steps, including checking its own records and notifying the inquiring agency in writing of the errors within 30 days or, thereafter, telling the employee to pursue the matter directly with the SSA and allowing the employee an additional 60 days to correct the record. An employer’s response to a “no-match” letter that complied with the safe harbor procedures would be deemed “reasonable;” thus, even if the employee turned out to be an unauthorized alien, the employer would not be deemed to have had constructive knowledge of the employee’s ineligibility to work in the United States. If, on the other hand, the verification procedure was not resolved within an additional 60 days of receipt of the “no-match” letter, and if the employee’s identity and work authorization could not be verified, the employer must choose between firing the employee or risk that the DHS might determine that the employer had hired or knowingly retained an illegal alien. *An employer with actual knowledge that an employee is an unauthorized alien could not avoid liability just because it followed the safe harbor procedures.*

The California court held that the DHS exceeded its authority in implementing the rule and that the rule contravenes the governing statute, is arbitrary and capricious under the Administrative Review Act and violates the Regulatory Flexibility Act. Finding that “the balance of hardships tips sharply in plaintiff’s favor,” the court expressed concern that the effects of the rule’s implementation will be severe, that there would be significant financial costs to employers, and that employees legally authorized to work in the United States but who are singled out in “no-match” letters due to clerical or other errors could face the risk of being fired because of the SSA’s inability to correct its own information during the 90-day period designated in the rule.



Some states also have entered the fray. For example, Illinois Governor Blagojevich signed an amendment to The Right to Privacy in the Workplace Act, which prohibits Illinois employers from participating in the federal government's electronic employment verification system (E-Verify). On September 24, the DHS sought an injunction to stop Illinois from implementing its law. And, Oklahoma's broad new immigration law, the Taxpayer and Citizen Protection Act of 2007, which includes penalties for employers that hire illegal aliens, became effective on November 1. The District Court for the Northern District of Oklahoma denied a motion for preliminary injunction to prevent enforcement of that Act.

So where are we now? The answer is, in a holding pattern. On November 13, the Social Security Administration announced that it will not be sending out "no-match" letters to employers based on 2006 tax year data it received from employers. The SSA's decision was prompted by its recognition that it needed to revise the letters it had planned to send out to approximately 138,000 employers involving as many as 9,000,000 employees in light of the October 10 injunction.

If you are confused about this issue, join the crowd. To clarify your confusion, contact **Joan M. Eagle** at 312.845.5439 or [jeagle@schwartzcooper.com](mailto:jeagle@schwartzcooper.com) or any other member of Schwartz Cooper's Labor & Employment practice.