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IMMIGRATION, EMIGRATION & RELATED INTERNATIONAL LAW

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# U.S. DEPARTMENT OF HOMELAND SECURITY (DHS) ANNOUNCES SUPPLEMENTAL PROPOSED RULEMAKING FOR THE SOCIAL SECURITY "NO- MATCH" LETTER REGULATION

On Friday afternoon, March 21, 2008, the DHS announced the imminent formal release of a supplemental rule that is expected to have the effect of issuing hundreds of thousands, perhaps millions, of Social Security "No Match" letters to Employers as early as late April 2008.

These No-Match letters are expected to put employers on notice that they must pursue strictly prescribed procedures in relation to named employees or face potential civil and criminal charges.

On the other hand, overzealous enforcement by employers may lead to discrimination claims and liability. Therefore, employers must thoroughly understand and strictly abide by these new regulations. Even well-intentioned actions may lead to violations of existing laws if these regulations are not scrupulously followed.

As reported in the Tindall & Foster, P.C. Email Bulletin dated August 10, 2007, in August of 2007, the U.S. Department of Homeland Security (DHS) published regulations outlining certain steps that employers should take following receipt of a Social Security "No-Match" letter. So long as the employer follows the prescribed steps in a timely manner in accordance with the regulations, the employer may benefit from a "safe-harbor" provision in the event that the employee is later found to have been unauthorized for employment. However, failure to take the recommended steps, as described in the Tindall & Foster, P.C. Email Bulletin dated August 16, 2007, within 93 days following receipt of the "No-Match" letter could result in a finding that the employer knew or should have known that the employment was unauthorized if the individual is later found to have been unauthorized for employment.

The ACLU Immigrant Rights Project, the AFL-CIO, and others filed suit against the Department of Homeland Security on August 29, 2007, and ultimately secured a preliminary injunction forestalling implementation of the regulation until such time as the Court could decide the merits of plaintiffs' complaint that the regulation exceeds the scope of DHS' regulatory authority.

On November 23, 2007, attorneys for the Federal Government filed a Motion to Stay Proceedings pending a new regulatory effort underway to address concerns raised over the original regulation. The U.S. DHS has now completed its new regulatory effort and on March 21, 2008, issued a Press Release announcing the new supplemental proposed rule, addressing procedural deficiencies that prompted the District Court to award the plaintiffs a preliminary

injunction. By allowing a thirty-day comment period, the DHS hopes to cure the fatal procedural flaws in the regulation without addressing the significant substantive flaws. With this supplemental proposed rule, the DHS proposes to re-promulgate the original rule without change.

Following final implementation of the new regulation, the SSA could begin inserting DHS letters in the Social Security "No-Match" Letter mailings to employers, effectively putting employers on notice that one or more of its workers may be unauthorized for employment. If the employer fails to follow the prescribed steps in the "safe-harbor" regulation, such letters may be used by the Federal Government as evidence that the employer knowingly employed workers unauthorized for employment, subjecting an employer to potential civil and/or criminal penalties. For further details on the steps recommended by the "safe-harbor" regulation, please refer to Tindall & Foster's recent article outlining an employer's obligations under the new regulation.

As reported in Tindall & Foster's February Email Bulletin, the Federal Government has recently increased the civil fines for knowingly employing undocumented workers in an effort to further ongoing workplace enforcement initiatives. With more at stake, employers must be more diligent in the establishment of appropriate policies and procedures for ensuring worksite compliance. Because of the risk of "over documentation" and other immigration-related employment discrimination violations, employers should secure experienced legal counsel before implementing any policy with respect to "No-Match" letters and Form I-9 compliance. For more information, contact your Tindall & Foster immigration attorney today, before the new regulation goes into effect.

To date the DHS has only announced its proposed supplemental rule and has not yet published it in the Federal Register. However, based on Friday's announcement, publication is expected in a matter of days. As always, Tindall & Foster, P.C. will continue to monitor the Government's latest regulatory effort in connection with employment eligibility verification, as well as potential litigation and all developing matters concerning worksite enforcement activity. New information will be made available to our clients via the Tindall & Foster, P.C. web site, and, when appropriate, via future Email Bulletins.