What the Temporary Restraining Order Means for the DHS-issued Rule about Social Security "No-Match"

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On Aug. 15, 2007, the U.S. Dept of Homeland Security (DHS) published a 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). DHS claims that if an employer follows the "safe harbor" procedures set forth in the final rule, it will not use the no-match letter as evidence that the employer has "constructive knowledge" that it has hired undocumented workers. The rule was scheduled to go into effect on Sept. 14, 2007, and SSA planned to send no-match letters to approximately 140,000 employers — affecting about 8 million workers — beginning Sept. 4. The ACLU Immigrant' Rights Project, AFL-CIO, Altschuler Berzon, LLP, the San Francisco and Alameda Central Labor Councils, and NILC filed a lawsuit on Aug. 29 arguing that DHS does not have the legal authority to implement this rule and that the changes DHS seeks to make to the immigration laws can be made only by Congress and not through this administrative procedure. On Aug. 31, 2007, the U.S. district court in northern California, where the lawsuit was filed, granted the plaintiffs' request for a temporary restraining order (TRO).

What does it mean that the court granted a TRO?

In granting the TRO, the court has temporarily prohibited DHS from implementing the final no-match rule until the court has an opportunity to hear the arguments in the case. This means that the final DHS rule cannot go into effect on Sept. 14. In its decision, the court also said that SSA could not send no-match letters that refer to the DHS rule and that, if sent, would also have included a notice from DHS. Both DHS and SSA have agreed to modify their websites to remove notices of the final rule. This order applies to the entire country, not just northern California.

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, the government has indicated that SSA will not send letters to the 140,000 employers until the court decides the agency can send the new letters out. However, SSA will continue its longstanding practice of sending no-match letters to individual workers at their homes and to employers about specific individual workers. The letters sent to or about individual workers do not contain the reference to the new DHS rule and are not affected by the litigation.

What will happen after the October 1 hearing?

- The plaintiffs are asking the court to issue a preliminary injunction so that the government is blocked from implementing the rule until the court decides whether or not the rule is legal. The court may issue a decision on the day of the hearing (Mon., Oct. 1) or extend the TRO until it issues a decision.
- If the court does not grant the preliminary injunction, DHS could begin implementing the rule. It would probably take several days for SSA to actually start sending the letters out. However, the plaintiffs have the right to appeal the decision and would request a "stay" blocking the implementation of the rule until the court of appeals has the opportunity to hear the appeal.

The DHS rule has caused lots of confusion and panic among workers and employers alike. Many employers are not even aware that the rule is temporarily suspended and have started to implement the rule. 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.

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