Halt of DHS No-Match Rule Provides Employers No I-9 Reprieve

Workforce Management

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The Department of Homeland Security rule was to be implemented on September 14, but a federal judge halted mailing 'no-match letter' packets from the Social Security Administration that were to include DHS guidance on the new rule.

A San Francisco judge has blocked a key element of a recent federal crackdown on illegal immigration, but that doesn't mean employers can breathe easy.

On August 31, U.S. District Judge Maxine Chesney issued a temporary restraining order delaying the implementation of a Department of Homeland Security regulation forcing companies to either resolve within 90 days discrepancies between a worker's name and Social Security number or fire the employee.

Failure to act on a so-called "no-match letter" could be construed as a violation of immigration law. Companies currently aren't compelled to clear up inconsistencies. Mismatches occur in about 4 percent of the 250 million earnings reports submitted annually to the Social Security Administration.

The DHS rule was to be implemented on September 14, but Chesney halted a mailing of no-match letter packets from the Social Security Administration that were to include DHS guidance on the new rule.

Chesney said the plaintiffs—the AFL-CIO and the American Civil Liberties Union—had raised serious questions about whether the regulation violates the law and whether the DHS has the authority to promulgate it.

They also argued that the regulation could lead to job discrimination and encourage companies to fire any employee who receives a no-match letter, even if they are legal. Business groups have asserted the Social Security database is rife with mistakes.

Even though the DHS rule is now on hold, it doesn't mean that employers should sigh in relief.

"I would take a short breath and get back to working on my I-9 forms," says David Whitlock, a partner at Fisher & Phillips in Atlanta. "The safe and smart move is to use this time to get your house in order, improve your compliance situation."

Even if the DHS is stymied on the no-match regulation, it is intent on cracking down on illegal employment, Whitlock says. After the demise of immigration reform this spring, the Bush administration is under pressure to show Congress that it can enforce immigration laws.

Employers will bear the brunt of the effort, according to Whitlock. The department is "going to be putting more feet on the ground," he says. "They're going to conduct more raids, more audits, more investigations. They're committed to it."

The DHS projects that attitude as it prepares to make its argument before the San Francisco court. It says it is confident that it will prevail in the case and that the no-match rule is meant to clarify the law for employers.

“In the meantime, we will use every tool and authority within our power to enforce the rule of law, and we remind employers that there are serious consequences for those who choose to disregard our laws,” says Laura Keehner, a DHS spokeswoman.

It could be a long time before the agency can use the no-match letter tool to prosecute companies for alleged illegal hiring if the judge decides to issue a preliminary injunction after the October 1 hearing.

The rule would be prohibited from going into effect as long as the legal proceedings continue—unless a court of appeals intervenes.

“This litigation could go on for years,” says Angelo Paparelli, a lawyer with Paparelli & Partners in Irvine, California, and president of the Academy of Business Immigration Lawyers.

The AFL-CIO may be angling for such an outcome. It’s making its case to a court that has demonstrated sympathy to employees and unions.

“It’s no accident that the plaintiffs chose to file in this jurisdiction,” says Gregory Wald, an attorney with Squire, Sanders & Dempsey in San Francisco.

In a previous case, the federal court ruled that a company had to have actual knowledge of an immigration violation, as opposed to being held accountable for something it should have known, Paparelli says.

Regardless of what happens to the no-match rule, Paparelli advises employers to do a self-audit of their I-9 process. If a company is aware that it is illegally employing someone, they’ll be vulnerable to a government crackdown.

“Employers are not going to be free from criminal or civil investigations and prosecution,” he says. “This is not a complete reprieve from the duty to comply with the law. Employers must make sure they’re diligent in employment eligibility verification and reverification.”

But businesses vociferously oppose having the no-match regulation at the heart of the effort to ensure a legal workforce.

In an August 27 letter to DHS Secretary Michael Chertoff, the Essential Worker Immigration Coalition, a group of construction, food service and hospitality companies, asked for a 180-day implementation delay and posed 82 questions about the rule.

It criticized the accuracy of the Social Security database.

“Employers will be overwhelmed with paper work as the government seeks to make employers responsible for decades old administration problems,” the letter said.

The group also warned that the regulation “would foster anti-Latino and anti-immigrant discrimination,” which is exactly what the AFL-CIO is arguing.

“What’s ironic about this is the rule has found common ground between unions and employers,” Wald says.