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Employment Law Update: Federal Court Bars Implementation Of New Rules on “No-Match Letters”

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A federal judge in San Francisco has issued a preliminary injunction **barring** the Department of Homeland Security from implementing its new “no-match” regulations. The judge ruled on October 10 that “serious questions” existed concerning the legality of the regulations, and that “irreparable harm” would result if DHS was permitted to enforce the regulations before those questions could be resolved at a full trial.

DHS’s “No-Match” Regulations

The new DHS regulations were issued in August (G&K [Employment Law Update August 15, 2007](#)). The regulations significantly alter the impact of Social Security “no-match letters,” and create a dramatic new tool for the enforcement of federal immigration laws. Specifically, the new rules provide that **if an employer fails to take certain investigative and corrective steps upon receipt of a no-match letter**, and the particular worker referenced in the letter turns out to be an unauthorized alien, **then the employer is “knowingly” employing the worker in violation of federal law**. (With the passage in July of the “Legal Arizona Workers Act,” of course, Arizona state law similarly penalizes employers who “intentionally” or “knowingly” employ unauthorized aliens.)

The regulations do create a “safe harbor,” laying out specific steps that employers may take to reduce the risk of liability upon receipt of a no-match letter. Those steps basically involve making affirmative efforts to correct any internal errors that might have created the mismatch, and to actually verify with the Social Security Administration the accuracy of any corrected information. Under the regulations, however, employers who fail to take such steps after receipt of a no-match letter will be deemed to be knowingly violating federal immigration laws.

Federal Court Action

The regulations were scheduled to become effective in September (at which time the SSA was planning to send out no-match letters to approximately 140,000 different employers, referencing roughly 8 million workers). However, a coalition of unions and

employer groups filed suit against DHS in San Francisco in August, claiming that the new regulations are invalid. The judge issued a temporary restraining order, barring DHS from implementing the regulations until the court could conduct a preliminary hearing into the case. That hearing took place on October 1, and the judge issued his ruling yesterday.

The judge ruled that the unions and employer groups had shown that enforcement of the regulations would create immediate and substantial hardship for businesses and workers. The judge pointed to the significant new burdens and costs to employers of compliance with the “safe harbor” provisions. The judge also cited the immediate harm to employees, noting that implementation of the regulations would likely result in mass terminations of employees, including many individuals who, though legally authorized to work, might not be able to prove that within the regulation’s deadlines.

The judge also ruled that the plaintiffs had raised a serious question as to whether the regulations were “arbitrary and capricious,” and whether the regulations exceeded DHS’s authority. The judge also ruled that a serious question existed as to whether DHS had complied with general federal laws concerning the proposal and implementation of new regulations that have an economic impact.

Under all of those circumstances, the judge granted the unions’ and employer groups’ request for an injunction, and barred DHS from implementing the regulations until the conclusion of a full trial on the underlying merits of the case. (The court has not yet set a trial date; the court will conduct an initial scheduling conference in December, and is expected to set a trial date at that time.)

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The government is expected to appeal the order immediately to the U.S. Court of Appeals for the Ninth Circuit. The judge also retains the authority to modify his own ruling at any time, based on new evidence or legal authority. **But until further action from either of those courts, DHS is barred from enforcing the new no-match regulations.**

For a copy of the federal court’s 22-page order, or for more information about any of these topics, feel free to contact any of the following members of Gallagher & Kennedy’s Employment & Labor Law Group:

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