not resolved in that time period, then the employer must choose between terminating the employee or risk having the DHS find that the employer had "constructive knowledge" of employing an unauthorized alien - knowingly violating the immigration laws.

Importantly, if the employer and employee can resolve the discrepancy and verify the employee's identity and work authorization using the steps outlined in the final rule over a 90-day process, then the employer will not be found to have constructive knowledge even if it turns out that, in fact, the employee is unauthorized.

❑ ❑ DON'T CHANGE YOUR POLICIES YET

On August 29, 2007, an alliance of labor and immigrant rights groups, led by the National Immigration Law Center (NILC), the AFL-CIO labor federation and the American Civil Liberties Union (ACLU) filed a lawsuit in the Northern District of California in San Francisco against the Social Security Administration ("SSA") and the Department of Homeland Security ("DHS"), arguing that the Social Security database is full of errors and that the new regulation could lead to discrimination against documented and

US citizen workers and could result in erroneous termination. After a hearing, Judge Maxine Chesney found that plaintiffs raised sufficiently serious questions as to whether the new DHS rule was inconsistent with the law and issued a temporary restraining order preventing the SSA from sending "No-Match" letters, which were scheduled to be sent on September 4, 2007, to companies whose employees' names do not match the Social Security numbers. Judge Chesney's order also prohibits the DHS from implementing the new rule, set to go into effect September 14, 2007.

A full hearing before U.S. District Judge Charles Breyer on the plaintiffs' request for a permanent injunction to bar implementation of the new rule is scheduled for October 1, 2007.

We will report on all developments on this issue.

HANSON BRIDGETT MARCUS VLAHOS RUDY·LLP

More Information

If you would like to pursue the subject of this newsletter or other labor and employment matters, please contact Diane O'Malley (415-995-5045, domalley@hansonbridgett.com) or any Hanson Bridgett attorney with whom you have an existing relationship.

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HANSON BRIDGETT MARCUS VLAHOS RUDY·LLP

Labor and Immigration Advocacy Groups Delay Effective Date of Department of Homeland Security New "No-Match" Letter Regulations

by Diane M. O'Malley

THE NEW REGULATIONS IN BRIEF

Until recently, employers were not required to take any action when they received "No-Match" letters from the Social Security Administration's (SSA) stating that their employees' identification documents did not match SSA records. However, the Department of Homeland Security ("DHS") published new federal regulations last month regarding the SSA's "no-match" letters sent to employers. The new DHS rule would impose "constructive knowledge" liability on employers based on the employer's failure to react to an SSA "no-match" letter.

Specifically, the new regulations provide that, in order for an employer to avoid a finding that it had "constructive knowledge" that it was employing someone not authorized to work in the United States when an employer receives a No-Match letter, an employer must do the following:

1. Within thirty (30) days, the employer must check for clerical or recordkeeping errors that may have occurred during the original paperwork and I-9 form completion. If there is such an error, the employer must correct its records and inform the relevant agencies.

2. If the employer determines that there is no clerical error in its records, it must notify the employee (still within the first 30 days) and request that the employee re-verify his or her documents and confirm the accuracy of employment records.

3. If the employee can not resolve the record discrepancy, the employer must ask the employee to resolve the issue with the SSA. The employee has ninety (90) days after the initial No-Match letter to correct the discrepancy found in the documents. The discrepancy will be considered resolved only if the employer can verify with SSA or DHS, as the case may be, that the employee's name matches the SSA's records or DHS records.

5. If the problem still is not corrected after 90 days, then the employer has three (3) days to try and re-verify the employee's identity and work authorization *without* using the mismatched Social Security number. The employer must complete a new I-9 form as if the employee were newly hired, but no document containing the SSN or alien number that is the subject of the No-Match letter can be used to establish employment authorization or identity or both. Also, no document without a photograph may be used to establish identity.

6. If the employer can verify the employee's work authorization through alternative documents within the ninety-three (93) days, then the employer will not be considered to employ knowingly an unauthorized alien, *even if it turns out that the employee is an undocumented worker.* In other words, employers who follow these steps will be given a legal "safe-harbor" from liability should an undocumented worker be discovered on its payroll.

7. If an employer cannot verify work authorization, then, it must choose between terminating the employee or risk having DHS find that the employer knowingly continued to employ unauthorized persons – resulting in possible fines and penalties.

In sum, whether to terminate employees based on no-match letters is still a problematic question. The final rule does not explicitly require employers to, nor does it prohibit employers from, terminating employees if the discrepancy is not resolved within the 90 days. Instead, if the discrepancy is