



Immigration Landscape Continues to Change

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Immigration continues to be one of the most frequently changing areas of employment law. In the last few weeks, the Ninth Circuit ruled that an employer does not obtain “constructive knowledge” that an employee is not authorized to work by its receipt of a “no-match” letter. Further, President Bush proposed a rule to require all federal contractors to participate in the Department of Homeland Security’s (“DHS”) computerized employment-authorization verification program, E-Verify. This Alert updates employers on these and other hot immigration issues.

Ninth Circuit Rules That Receipt of Social Security Administration No-Match Letters Does Not Constitute Constructive Knowledge of Undocumented Status Under Immigration Reform and Control Act

In April 2003, Aramark, which provides facility management and staff to facilities such as the Staples Center in downtown Los Angeles, received a Social Security Administration (“SSA”) letter notifying it that the Social Security numbers of 48 of its employees did not match the SSA’s records—a so-called “no-match letter.” Aramark informed the employees identified in the no-match

letter that they had three days to correct the no-match by obtaining a new Social Security card, or submitting a verification form that indicated a new card was being processed. Aramark terminated 33 employees who did not comply with the Company’s directive.

The Service Employees International Union (“SEIU”) filed grievances on behalf of the employees. An arbitrator ruled in favor of the employees, ordering Aramark to reinstate the employees. Aramark challenged the arbitrator’s decision in federal district court. The district court threw out the arbitrator’s decision, ruling that the arbitrator’s decision would force Aramark to violate the Immigration Reform and Control Act (“IRCA”), which prohibits employers from knowingly employing undocumented workers. SEIU appealed the decision to the Court of Appeals for the Ninth Circuit.

On appeal, Aramark asserted it had constructive knowledge that the employees were unauthorized to work based on two facts: (1) receipt of the no-match letters, and (2) the employees’ response (or lack thereof) to Aramark’s request to correct their information.

The Ninth Circuit explained that the receipt of the no-match letter did not constitute constructive knowledge for four reasons:

- (1) The no-match letters are not immigration-related, but rather are used to inform workers that their earnings are not being properly credited;
- (2) Multiple reasons exist for generation of no-match letters other than undocumented status, including typos, name changes, compound last names, and inaccurate or incomplete employer records;
- (3) The SSA, in its Social Security Number Verification Service Handbook, advises that a no-match letter does not make any statement about immigration status, and is not a basis in and of itself to take any adverse action against employees. (The most recent no-match letters now contain similar language. In 2003, however,

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when Aramark received the letter, the letter did not); and

(4) There is no penalty for not responding to the no-match letter.

Addressing whether the employees' failure to correct the no-match placed Aramark on constructive notice, the Ninth Circuit ruled that the employees were not given adequate time to respond to Aramark's demand to correct their information. The employees' failure to correct their information after ten days did not cause Aramark to have constructive knowledge that the employees were undocumented. The court noted that the proposed DHS Safe Harbor regulations (see discussion below) provide 90 days to correct the no-match, and three days to submit a new Form I-9 if the Social Security number is not corrected.

Thus, the Ninth Circuit reversed the district court, ruling that Aramark did not have constructive knowledge that the employees were undocumented. See *Aramark Facility Services v. Service Employees International Union* (June 16, 2008).

President Proposes New Rule Requiring Federal Contractors to Enroll in E-Verify

On June 9, 2008, President George W. Bush signed Executive Order 13465. The Executive Order proposes a new rule, under which, federal contractors would be required to process all new hires, and all existing employees working on federal contracts, through the E-Verify employment authorization verification system. You may recall that E-Verify is an Internet-based system operated by U.S. Citizenship and Immigration Services ("USCIS") in partnership with the SSA. E-Verify provides an automated link to federal databases to help employers determine employment eligibility of new hires and the validity of their Social Security

numbers.

The proposed rule is open to public comment until August 11, 2008, and a final rule will follow. There may be substantial changes to the rule before it is finalized.

DHS Re-proposes Safe Harbor Regulations With No Change After Federal Court Stopped Government From Issuing No-Match Letters and Enforcing Safe Harbor Rule

You may recall that in August 2007, the DHS issued a final rule entitled "Safe-Harbor Procedures for Employers Who Receive a No-Match Letter." The rule added a new standard for constructive knowledge under IRCA where employers fail to follow the DHS's Safe Harbor procedures in response to receipt of an SSA no-match letter. Shortly thereafter, unions and business groups joined forces to sue the government in federal district court and seek a preliminary injunction against the DHS from enforcing its Safe Harbor rule and the SSA from issuing its no-match letters.

On August 31, 2008, in *American Federation of Labor-CIO v. Chertoff*, the United States District Court for the Northern District of California granted a temporary restraining order pending full briefing of the issue for a preliminary injunction.

On October 10, 2007, the court issued a preliminary injunction, stopping the DHS from enforcing its new regulations and the SSA from issuing no-match letters because if allowed to proceed, the mailing of no-match letters, accompanied by DHS's Safe Harbor procedures, would result in "irreparable harm to innocent workers and employers."

The DHS declined to appeal the decision to the Ninth Circuit. Instead, the DHS moved to stay proceedings in the district court and reissued

its safe harbor regulations without change on March 21, 2008. In its preamble to the rule, the DHS attempted to address the issues raised by the district court in issuing its injunction, and the DHS hopes that its explanations will convince the court to remove the injunction once the final rule is published.

The comment period for the proposed rules ended on April 25, 2008. A final rule is expected to be published sometime this summer. A status conference in *Chertoff* is scheduled for August 1, 2008, indicating that the final rule may be published before that date.

Form I-9 Change

Just over a year ago, the DHS issued a new Form I-9, updating the documents that may be used to establish authorization to work in the United States. Employers should ensure that they are using the current Form I-9 as they process new hires. The current Form I-9 is Rev. 06/05/07, as indicated in the lower right hand corner of the form, and should have an expiration date of 06/30/09, as indicated in the upper right hand corner of the form. We have enclosed the new form. Additional copies may be obtained at <http://www.uscis.gov/files/form/I-9.pdf> (address is case sensitive).

November Elections Impact Legislation in 2008 and Beyond

Because this is an election year, employers should not expect to see any new federal legislation addressing immigration issues due to the controversial nature of the issues. However, employers should anticipate movement on immigration legislation in 2009 regardless of whether Senator Barak Obama or Senator John McCain win the election, as both candidates have promised to address immigration issues.