Lead Report

Immigration

'No-Match' Ruling Creates Uncertainty About Future of Rule, Government Efforts

A federal judge's recent decision to temporarily halt the Bush administration's attempts to use Social Security Administration letters as part of its immigration enforcement efforts has resulted in uncertainty about the future of the rule and the direction of administration's enforcement efforts, several practitioners and observers told BNA.

In his Oct. 10 ruling, Judge Charles Breyer of the U.S. District Court for the Northern District of California held that SSA could not send out "no-match" letters to correct SSA records if the letters included language implementing a Homeland Security Department rule relating to immigration law liability (*AFL-CIO v. Chertoff,* N.D. Cal., No. 07-04472, *preliminary injunction granted* 10/10/07).

"It's nice to win a round, but there's no reason to believe the fight over the rule is over," John Gay, senior vice president of government affairs for the National Restaurant Association, tells BNA.

Currently, the SSA sends "no-match" letters to employers to notify them of employees' names or Social Security numbers on W-2 forms that do not match SSA databases. Under the DHS's "no-match" rule, when the SSA sends a "no-match" letter to an employer containing language spelled out in the DHS rule, the employer would be required to resolve a mismatch resulting from a clerical error or similar problem or face liability. SSA had been preparing to send out the revised letters prior to Breyer's ruling.

While critics of the "no-match" rule were pleased by Breyer's Oct. 10 decision, some saw the victory for opponents of the rule as potentially short-lived.

"It's nice to win a round, but there's no reason to believe the fight over the rule is over," John Gay, senior vice president of government affairs for the National Restaurant Association, told BNA Oct. 16.

The restaurant trade association was one of several business groups that joined the AFL-CIO and immigrant rights organizations in challenging the rule, which would have permitted SSA to include letters from DHS that outlined potential liability—and a safe harbor provision—if employers did not respond to the SSA letters.

Few Hints From Administration. On the day of the ruling, Marielena Hincapie of the National Immigration Law Center in Los Angeles told BNA the ruling is "a huge relief for employers and workers."

It is unclear, Hincapie added Oct. 10, what the next step will be in the litigation. She said the government could file an appeal with the U.S. Court of Appeals for the Ninth Circuit and seek a stay to the preliminary injunction. She said it is also possible that DHS would go back and try to respond to the court's concerns.

"I don't see DHS just dropping this rule and giving up. They are very serious about trying to create some sort of enforcement," Hincapie said. NILC was one of the lead groups in bringing the challenge to the no-match letters.

The legal challenge to the rule attracted an unusual coalition of organized labor, immigrant rights groups, business interests, and even an office within the Small Business Administration. The AFL-CIO, the American Civil Liberties Union, and the NILC initially brought the lawsuit on behalf of California-based unions and workers. They were later joined by a group of business associations headed by the U.S. Chamber of Commerce.

The administration so far has said little about its plans in challenging the ruling. DHS Secretary Michael Chertoff said in a written statement shortly after the ruling that the government was considering all of its options but that it had not decided whether to pursue an appeal.

An SSA spokesman told BNA Oct. 17 that SSA has not made a decision whether to send out the traditional no-match letters that lack language consistent with the DHS regulations. While SSA said during the litigation that it could prepare the traditional letters in 30 days, the spokesman said SSA was still in discussions with DHS and the Justice Department.

Rule's Magnitude Called 'Staggering.' In his ruling, Breyer said the "magnitude of DHS's safe harbor rule is staggering" and that "there can be no doubt the effects of the rule's implementation will be severe." The judge said that there would be significant financial costs to employers and that employees legally authorized to work in the United States—but who are singled out in "no-match" letters due to clerical or other errors—face the risk of being fired because of SSA's inability to correct its own information during the 90-day period outlined in the rule.

Under the rule's safe harbor provisions, employers would have 30 days to determine whether the mismatched numbers were caused by errors on their part. Employees then would have 60 days to resolve the discrepancy with the SSA. Failure to respond to the letters would be construed as a "knowing" violation of immigration law if an action were taken later against that employer.

The judge also said the plaintiffs demonstrated a high probability of success on four theories—that the rule contravenes the governing statute; that the rule is arbi-

trary and capricious under the Administrative Procedure Act; that DHS exceeded its authority; and that the rule was promulgated in violation of the Regulatory Flexibility Act, Breyer said.

Breyer rejected arguments by the plaintiffs that the safe-harbor rule contravenes the Immigration Reform and Control Act, suggesting the DHS had not strayed from IRCA in crafting the rule. However, Breyer said there was evidence that DHS did not ''supply a reasoned analysis for the change'' and therefore the plaintiffs ''raised a serious question whether the rule is arbitrary and capricious'' under the APA.

DHS 'Change in Position.' Pointing to what he described as the agency's ''change in position'' on the question of liability based on the receipt of the no-match letters, the judge said that DHS failed to provide ''reasoned analysis'' for its change, even if it was within the agency's authority to change its prior position.

The judge was skeptical of the argument that DHS was intruding on SSA's responsibilities or even federal tax authority by issuing the safe harbor rule. In addition, the judge was dismissive of the suggestion by plaintiffs that SSA did not have a role to play in immigration enforcement. The court did, however, agree with plaintiffs that there were concerns about the safe harbor rule's suggestion that it could protect employers from the anti-discrimination provisions of IRCA by following the guidelines.

What concerned the court was that the anti-bias provisions are enforced by the Justice Department's Office of Special Counsel—and not DHS—and ''there is therefore a serious question whether DHS has impermissibly exceeded its authority—and encroached on authority of the DOJ special counsel—by interpreting anti-discrimination provisions to preclude enforcement where employers follow the safe-harbor framework.''

In addition, Breyer expressed concerns about whether DHS had satisfied the RFA because of questions regarding the potential costs to employers. Dismissing the government's arguments during the litigation about whether it even had to comply with the RFA, Breyer agreed with the plaintiffs that costs to small businesses were likely.

''The rule as good as mandates costly compliance with a new 90-day timeframe for resolving mismatches,'' Breyer said. ''Accordingly, there are serious questions whether DHS violated the RFA by refusing to conduct a final flexibility analysis.''

Continuing Concerns. While the decision gives workers and employers some breathing room in terms of reacting to no-match letters, Hincapie said concerns remain that employers may use the no-match letters—even if references to the DHS rule are deleted—as a rationale for targeting certain classes of workers. Although employers are under no obligation under the original SSA regime to view the letters as an immigration-enforcement tool or warning, she said the attention to the rule has now raised the concern in the minds of employers.

In the wake of the ruling, AFL-CIO Assistant General Counsel Ana Avendaño, co-counsel in the case, said the no-match letters ''have long been used to defeat worker organizing. And the new rule would have added strength to that pretextual use of the letters.''

''Time and time [again] employers have tried to use the letters as a pretext to fire workers when they tried to organize, file a wage claim or otherwise tried to exercise their labor rights,'' Avendaño told reporters Oct. 10 in a telephone conference call.

In a statement, AFL-CIO President John Sweeney Oct. 10 called the ruling ''a significant step towards overturning this unlawful rule, which would give employers an even stronger way to keep workers from freely forming unions.''

New Enforcement Regime. Lucas Guttentag, director of the American Civil Liberties Union Immigrants' Rights Project, said Breyer ''exposed the new rule's fatal flaw by recognizing that no-match letters are based on error-filled Social Security records and that the administration's about face on the use of these records was improper and a violation of the law.''

Nancy-Jo Merritt of Fennemore Craig in Phoenix said that the court's decision reinforced concerns that DHS may have overstepped its boundaries by creating the no-match rule and by encouraging changes in how SSA warns employers in the letter.

''We are definitely under a new enforcement regime and DHS's issuance of regulations on a letter from SSA creates real anxiety for employers,'' Phoenix attorney Nancy-Jo Merritt said, adding there was evidence that workers who were authorized to work in the United States can be caught up in confusion over SSA data and thus the risk of liability for legal workers was real.

Merritt, who advises employers on immigration issues, told BNA Oct. 10 that while the regulation actually provides a good structure for employers to understand how to comply with the no-match letters, the concern among critics of the rule was whether this was properly DHS's role.

''We are definitely under a new enforcement regime and DHS's issuance of regulations on a letter from SSA creates real anxiety for employers,'' she said. She added there was evidence that workers who were authorized to work in the United States can be caught up in confusion over SSA data and thus the risk of liability for legal workers was real.

'Middle-Ground Approach.' While the DHS rule attracted opposition from many corners—including business, organized labor, immigrant and civil rights groups, and even an office within the Small Business Administration—not everyone was critical of the rule.

Bob Dane of the Federation for American Immigration Reform in Washington, D.C., told BNA Oct. 16 that the rule crafted by the administration was not a new burden on employers and that the goal of the rule was laudable.

''The general idea behind the rule has existed since 1986, but the government has approached the law with a-wink-and-a-nod and business has largely ignored it,''

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said Dane, a spokesman for the group that wants to limit immigration.

Dane called the rule a ''middle-ground approach'' because it focused on workplaces, which are the primary magnet for undocumented workers. If the government wants to focus on undocumented workers and workplaces that illegally hire and employ them, he said the rule and other worksite enforcement efforts are ''common sense, practical, and effective.''

For his part, Chertoff said after the decision that the regulation ''gives employers clear guidance on what to do'' if they receive a no-match letter. ''Ultimately, employer diligence will make it more difficult for illegal aliens to use a fraudulent Social Security number to get a job.''

Congressional Failure Led to Rule. Gay, who is the co-chair of the Essential Worker Immigration Coalition, conceded that there was support for tougher worksite enforcement efforts when they were accompanied by other measures as part of comprehensive immigration reform being considered by Congress. But without the accompanying, non-enforcement efforts, focusing just on the workplace is no longer reasonable to the business community. EWIC is an employer group that supports comprehensive immigration reform,

''The no-match rule is an example of the patchwork approach to immigration that we feared,'' said Gay. ''A lot of people were dismissive of the business community when warned about this, but now it's coming true and it turns out we were right.''

The sense that the dispute over the no-match rule was a product of the failure of Congress to pass a comprehensive immigration overhaul was echoed by Chertoff the day of the decision.

''Today's ruling is yet another reminder of why we need Congress to enact comprehensive immigration reform,'' the secretary added.

Although the Bush administration's proposals for a comprehensive immigration regime appear to have lost steam in Congress, one lawmaker who favors limiting legal immigration and cracking down on illegal immigrants says he is crafting a bill that would side-step Breyer's ruling by passing a law that would implement the DHS no-match process and eliminate regulatory requirements.

Rep. Tom Tancredo (R-Colo.), who is running for president, announced Oct. 14 that he plans to introduce legislation that would overturn Breyer's ruling.

''Congress must take out the legs from underneath the court's misguided ruling with legislation,'' Tancredo said in a written statement from his campaign. ''By giving DHS direct authority from Congress to send out the no-match letters, the court would be hard pressed to find another excuse to prevent DHS from enforcing our immigration laws.''

By Michael R. Triplett

Text of Breyer's decision may be accessed at http://op.bna.com/dlrcases.nsf/r?Open=vros-77uq5t.