Employment Edge 78th Edition (Immigration Issue) - No-Match Safe Harbor Rule Blocked Indefinitely by Federal Court

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IN THIS ISSUE:

Implementation of the new No-Match Safe Harbor Rule issued by the Department of Homeland Security ("DHS") has been blocked indefinitely pending a full federal court proceeding. In a lawsuit brought by various unions and immigrants' advocacy groups seeking to permanently block the rule from taking effect, a federal court in California has issued an order blocking implementation of the rule, which sets forth steps an employer must follow to receive "safe harbor" protection against a legal finding that it has knowingly employed an unauthorized worker in violation of federal immigration law. The groups that brought suit allege that the No-Match Safe Harbor Rule is contrary to law, imposes costly and burdensome compliance obligations on employers and will result in increased discrimination against workers. DHS is now prohibited from enforcing its No-Match Safe Harbor rule until resolution of this lawsuit, which could take a year or longer to reach.

As a practical matter, the Social Security Administration ("SSA") is now prohibited from sending out 140,000 No-Match letters in the new form that it had planned to use this fall. SSA is also prohibited from enclosing in its No-Match letters a notice from DHS that discusses actions an employer should take to benefit from the safe harbor protection upon receiving the No-Match letter. SSA may, however, choose to send out No-Match letters using its previous format, without reference to the new Rule.

Although the Court's ruling temporarily blocks enforcement of the No-Match Rule, it does not prevent an employer from following the procedures in the Rule in response to a No-Match letter. Employers who choose not to follow the Rule should nevertheless respond carefully to a No-Match letter. This would include notifying an employee about the No-Match letter and following up in a timely manner to resolve the mismatch, while keeping records of the steps taken. If it can not be resolved, an employer should take a look at the totality of the circumstances in weighing whether it appears that they have constructive knowledge of an employee's unauthorized status. Employers are well advised to work with counsel in developing a policy for their own reasonable response to a No-Match letter. Such a policy needs to carefully balance an employer's obligations to treat its workforce in a nondiscriminatory matter while avoiding legal action against it based on employment of unauthorized workers.

Gray Plant Mooty will continue to monitor the developments in this case and will provide updates as information becomes available. If you have questions or need assistance with any aspect of workplace immigration legal compliance or enforcement, please contact Mark Mathison, Casey Nolan, or another member of the Gray Plant Mooty Employment and Labor Law Practice Group.

For additional information on this topic, please visit:

EMPLOYMENT EDGE 74th Edition - DHS Releases Final "No-Match" Regulation

EMPLOYMENT EDGE 75th Edition - Special Alert: Federal Judge Blocks "No-Match" Regulation

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Related People

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