Fox Rothschild LLP
ATTORNEYS AT LAW

October 2007

IMMIGRATION PRACTICE AREA

ALERT

Temporary Ban on New Social Security Mismatch Regulation No Protection for Employers

By Alka Bahal and Robert E. Goldman

The recent Department of Homeland Security (DHS) Final Rule called "Safe-Harbor Procedures for Employers Who Receive a Mismatch Letter," which was originally scheduled to go into effect on September 14, 2007, remains on hold pending a 10-day extension of the Temporary Restraining Order (TRO) granted by the U.S. District Court for the Northern District of California on October 1. The TRO enjoins DHS from implementing the new Rule until it reaches a decision on the Rule's legality. However, enforcement activities at worksites throughout the country, including coordinated multi-location raids, continue at an unprecedented rate.

Employers should be aware that the TRO does not provide liability protection for those who receive mismatch letters during the extension. All employers should be careful to follow normal compliance obligations with regard to employment verification procedures under the Immigration Reform and Control Act of 1996 (IRCA).

About the Final Rule

The new 'Mismatch Rule' specifically relates to an employer's responsibilities upon receipt of a notification letter regarding a mismatch of employment authorization information either from the Social Security Administration (SSA) or DHS. Because the Rule is limited to achieving two main things, it is important for employers to understand what the Rule does and does not do. The Rule:

1) describes a specific procedure (and within what timeframes) an employer should follow in response to a No-Match letter in order to achieve a "safe-harbor" from responsibility for an IRCA violation[1].

2) expands the definition of "constructive knowledge" to include mismatch information as a potential item that can lead an employer to conclude that an employee is actually unauthorized (i.e. it creates a link between the mismatch and immigration status which, previously, was expressly prohibited.)

What the Pending Litigation/TRO Accomplishes

The TRO enjoins DHS, the Immigration and Customs Enforcement Agency (ICE), and the SSA from "giving any effect or otherwise taking any action to implement" the new Rule. This order applies to the entire country, not just California. In anticipation of the new Rule, the SSA has held back its normal annual issuance to thousands of employers of its letter entitled "Employer Correction Request," commonly known as "No-Match" letters, since last year. SSA recently has indicated that it has been ready to transmit notices in accordance with the new Rule to approximately 140,000 employers, affecting about eight million

[1] Immigration Reform and Control Act of 1996 (IRCA), which prohibits the knowing employment of unauthorized aliens and makes all U.S. employers responsible for verifying the "employment eligibility" and "identity" of all employees hired to work in the U.S. after November 6, 1986.

employees, since the Rule was originally scheduled to go into effect in mid-September. In light of the TRO, the SSA is unable to send these new mismatch notices, which are to include a "Special Notice" from the DHS.

What the Pending Litigation/TRO Does NOT Do

The SSA is not prohibited, however, from sending standard mismatch notices, and has stated it will continue its longstanding practice of sending no-match letters to individual workers at their homes and to employers about specific individual workers, which will not contain any reference to the new Rule and are not affected by the litigation. Employers or individual workers who receive such notices are not relieved of their ordinary obligations under those notices. Employers may question whether to follow 'old' procedures (under which there were no specific guidelines to an employer as to how to follow up, document, or report back regarding a mismatch) or the new "safe-harbor" procedure, even though it technically is not currently enforceable.

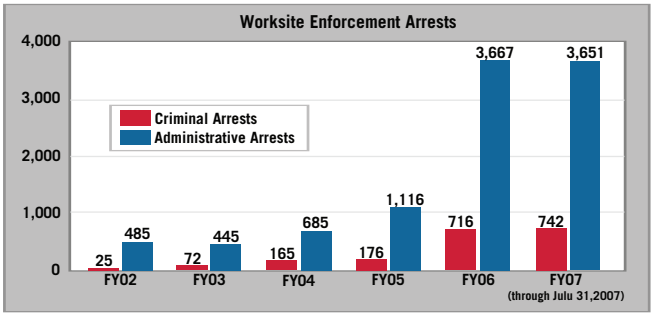
Unfortunately, employers have no clear guidance as to how best to protect themselves during this uncertain time. Our recommendation to employers who have received current mismatch notifications is to read each notice carefully and follow the steps outlined in the notice as closely as possible since the notice will relate to a specific individual worker and contain guidance for the employer. Issues and questions may arise as a result of the notice and the information SSA seeks, and we suggest you contact your corporate immigration and/or employment counsel for assistance.

It is imperative for employers to understand that the temporary hold on the Rule does **not** alleviate an employer from its normal compliance obligations with regard to employment verification procedures under IRCA, **nor** does an employer have any protection from an audit, investigation, or raid. Employers need to be particularly careful to ensure that their paperwork, policies, and procedures are in compliance at the present time since worksite enforcement activities continue to increase exponentially. ICE, the enforcement arm of DHS, frequently has used mismatch type information (viewed as an indicator of the crime of identity theft) as one of many indicators in identifying an employer for an investigation or raid. The vast number of enforcement activities in recent weeks would indicate that ICE has not been inhibited by the current state of the Rule and pending litigation.

Enforcement Activities

ICE continues to conduct extensive worksite enforcement and investigation actions, including multi-state raids on specific companies, and persists with sweeps in communities in various parts of the country. Major news reports abound about large coordinated raids at employers' multi-location worksites throughout California, Nevada, New York, and New Jersey in early October. ICE itself reports that in recent months it has successfully investigated or raided employers across the nation (Midwest - OH, IL; Northeast - MD, MA; South - FL, LA, TN, TX; West - OR, NV), and it is clear that ICE is targeting a wide range of industries, including food processing and packaging facilities (particularly poultry), contractors (landscape, cleaning and sanitation, other janitorial services), construction, temporary employment agencies and, most recently, the fast food industry. Major ongoing and newly instigated investigations affect a wide range of employers, from large national companies (Koch Foods, Swift, Fresh Del Monte Produce) to small stand alone or chain restaurants in one state (El Pollo Rico Restaurant and a local Japanese restaurant chain in Maryland).

The results of these investigations have included significant fines and arrests of unauthorized employees as well as corporate officers, employers, managers, contractors, and facilitators. ICE has dramatically increased the number of criminal fines and forfeiture procedures in recent years. During the first three quarters of FY 2007, ICE has acquired in excess of $30 million via criminal fines, restitutions, and civil judgments.



The Enforcement Action of Choice: The Raid

Beyond the somewhat abstract potential for fines and criminal charges, the actual investigative process initiated by a coordinated ICE raid, typically simultaneously executed at stand alone locations (stores, restaurants) as well as the corporate headquarters, can be extremely difficult for an employer to endure,

particularly since they normally occur without any warning. Employers should retain legal counsel in advance of a raid to assist in compliance issues and to be available in the event that you are subject to an audit or raid. A combination of attorneys with expertise in immigration compliance and white collar criminal investigations is ideal.

Raid planning is an important and comprehensive process that every employer is recommended to undertake. Employers should keep in mind several key points in the event an Agency shows up unexpectedly.

- Call your attorney immediately
- Get the name of the lead investigator at the scene, the title of his/her federal agency, and contact information
- Determine the purpose of the agents' visit (a search of the facility, a criminal search warrant, an administrative warrant, or an audit)
- Request a copy of any warrant in their possession
- If the agents are acting pursuant to a warrant in their possession, do not interfere with their search
    - Review the warrant to clarify the areas/information and documents covered by the warrant
    - DO NOT sign a Consent to Search document unless reviewed and approved by your legal counsel
- Instruct employees not to interfere with searching agents and let them know that they are not required to answer agents' questions and have the right to have counsel present if they do wish to speak. It may be necessary to arrange for separate counsel for employees.
- Accompany the agents at all times and take careful notes of all that is said and done and make a list of every file that is searched or seized
- Rather than answer questions posed by the agents, politely advise them that you wish to await the arrival of your counsel

Conclusion

While employers await clarity as to their obligations when in receipt of a mismatch notification, the promulgation of the Rule and the government's staunch defense of it serves to expose the government's mindset regarding what DHS and SSA expect from employers, and, consequently, the vigilance with which employers must continue to act to ensure the employment authorization of its workforce and compliance with IRCA. The recent trend in enforcement further clarifies that the government continues to aggressively pursue its increasingly stringent worksite enforcement efforts, focusing more and more on raids as the employer's introduction to the investigation. Employers should not be lulled into a false sense of security just because there is ongoing litigation over the new Rule; an employer's compliance procedures and/or workforce can be targeted for inspection at any time. Similar to disaster and recovery planning, every employer should pay attention to its raid and recovery planning as the ramifications to business operations are not dissimilar.

For more information regarding this *Alert*, or if you require assistance with your company's immigration issues, including IRCA compliance, social security mismatches, I-9s, raid planning, audits, or investigations, please contact Alka Bahal, partner and co-chair of Fox's Corporate Immigration Practice; Bob Goldman, partner and co-chair of Fox's White Collar Compliance & Defense Practice; or another member of Fox's Immigration Practice.

FOX ROTHSCHILD LLP
IMMIGRATION ATTORNEYS

Alka Bahal	973.994.7800	abahal@foxrothschild.com
A. Robert Degen	215.299.2085	adegen@foxrothschild.com
Deanna L. Forbush	702.262.6899	dforbush@foxrothschild.com
Robert E. Goldman	215.918.3550	rgoldman@foxrothschild.com
Min S. Suh	215.299.2801	msuh@foxrothschild.com
Robert S. Whitehill *	412.394.5595	rwhitehill@foxrothschild.com
Beatrice S. Williams	973.994.7803	bswilliams@foxrothschild.com
Polina A. Zuccolotto	412.391.6423	pzuccolotto@foxrothschild.com

**Chair, Immigration Practice Area*