

One Minute Memo[®]



Lawsuit Halts DHS Crackdown on Unauthorized Workers

The Department of Homeland Security's Immigration and Customs Enforcement agency (ICE) hit a roadblock on Friday, August 31, in its increasingly aggressive efforts to clamp down on the use of illegal workers. ICE had published a final rule to be effective on September 14 requiring employers who receive a "mismatch" letter from the Social Security Administration (SSA) to take specific steps to resolve the mismatch within a 93-day period. Under the rule, if the mismatch is not resolved and if the employer continues to employ the individual, then ICE could use the mismatch letter as the basis to find that the employer knowingly continued to employ an unauthorized worker in violation of Federal I-9 law. As a part of its enforcement strategy, ICE had arranged for SSA to send mismatch letters this week to more than 140,000 employers covering an estimated eight million workers.

On Friday, August 31, a Federal judge in California issued an order temporarily prohibiting the SSA from sending out the mismatch letters and, in addition, prohibiting DHS from using the mismatch letter—standing alone—as a basis for finding employers in violation of the Federal rules against hiring unauthorized workers. A coalition of labor and immigrant rights groups (including the AFL-CIO and the ACLU) had filed the lawsuit asserting, among other things, that the new mismatch rule and the actions contemplated to be taken were beyond the scope of the agencies' authority and, in addition, would lead to discrimination against authorized workers.

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There is a hearing scheduled for October 1, 2007 at which the government will argue that the prohibition against implementing the new mismatch rule should be lifted and that its enforcement efforts should proceed.

There has been a significant increase in worksite enforcement initiatives, from a resource as well as legislative perspective. Employers should ensure that their employment authorization verification policies and procedures are appropriate and sufficient and that they reflect best practices in this area. Moreover, employers who anticipate receiving numerous mismatch letters should begin planning now in order to be in a position to respond in the event that the temporary block against implementation of the new rule is lifted.

Seyfarth Shaw LLP offers extensive immigration and I-9 expertise to assist employers in auditing their current I-9s, in training their personnel in the proper completion of I-9s, and in developing and implementing state-of-the-art work authorization policies. If you have additional questions please contact your Seyfarth Shaw attorney, or any Seyfarth immigration attorney on our website www.seyfarth.com.