Despite Court Setback on No-Match Rule, Homeland Security's Outsourcing of Immigration Enforcement Gains Momentum

By Angelo A. Paparelli and Ted J. Chiappari

American employers, union leaders and civil-rights advocates breathed a collective sigh of relief on October 10, as Federal District Judge Charles Breyer entered a preliminary injunction[1] barring implementation of a much-feared "no-match" regulation issued by the Department of Homeland Security (DHS) and U.S. Immigration and Customs Enforcement (ICE).[2]

Despite this judicial impediment, DHS and ICE continue to outsource immigration enforcement duties, e.g., to United States attorneys and the Department of Justice (DOJ) in criminal prosecutions, to employers who are forced to enroll in, or voluntarily sign up for, the ICE Mutual Agreement between Government and Employers (IMAGE) program, to large companies who are pressured into using their economic bargaining power to police the immigration compliance of their contractors, and to federal procurement officers who will give preference points to contract bidders who sign up for E-Verify (an online system for employment eligibility verification formerly known as Basic Pilot).

This article will review the court's decision enjoining the no-match regulation and consider the various outsourcing strategies to be used by DHS and ICE during and (whatever the outcome at trial) after the judicially mandated pause in no-match-rule enforcement.

The no-match rule would have established a 90-day safe harbor for employers and workers to respond to any no-match notice or letter issued by the Social Security Administration (SSA) identifying one or more discrepancies between SSA's records and the employer's payroll tax withholding reports. These letters can list a single employee or many more. According to government counsel at oral argument, if the preliminary injunction had not been granted, SSA was poised to mail U.S. employers approximately 140,000 no-match letters, listing roughly 8 million workers.

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[1] Order Granting Motion for Preliminary Injunction in *American Federation of Labor, et al. v. Michael Chertoff, et al*. (N.D., CA, No. C 07-04472-CRB, Oct. 10, 2007).

[2] See final rule entitled "Safe-Harbor Procedures for Employers Who Receive a No-Match Letter,"

72 Fed. Reg. 45611 (Aug. 15, 2007).

Employers who failed to satisfy the safe-harbor requirements (by satisfactorily resolving the discrepancy, e.g., discovering a name change or transcription error, reverifying the worker's employment eligibility or terminating employment) could have faced possible civil or criminal penalties if the government later established that the employer knew or should have known its employees lacked work authorization. At the same time, overzealous employers who fire workers unlawfully in an effort to attain safe-harbor protection would have risked liability for wrongful termination and employment discrimination.

The preliminary injunction, requested by the AFL-CIO, several labor unions and business groups, also prohibits SSA from sending employers the agency's 2007 version of its no-match notice (for the 2006 tax year), which would have urged compliance with DHS's no-match regulation, or from including a DHS insert with the notices. The DHS insert warned employers that they should not disregard no-match notices but should take action with the named employees to resolve the discrepancies, reverify on Form I-9 that the employees are work-authorized – using documents other than those containing the challenged social security number (SSN) – or terminate employment. The insert also offered an assurance (which, the court found, exceeded the authority of DHS) that, by applying the safe-harbor procedures uniformly, employers would not be subject to provisions penalizing immigration-related employment discrimination.

The court determined that plaintiffs had demonstrated a high probability of success on the merits of four legal issues (whether the DHS regulation conflicts with the antidiscrimination provisions of the immigration laws [8 U.S.C. § 1324b], and is arbitrary and capricious under the Administrative Procedures Act [5 U.S.C. § 706(2)(A), whether DHS and SSA exceeded their statutory authority, and whether DHS violated the Regulatory Flexibility Act [5 U.S.C. §§ 601-612]).

In addition, the court found that the labor union plaintiffs demonstrated a likelihood of immediate future harm:

> As the SSA itself concedes, the agency will not be able to resolve all mismatches – even if the mismatch is the result of SSA error – within the safe harbor's 90-day window. . . . Accordingly, there can be no doubt that at least some of the 600,000 AFL-CIO members who are identified in no-match letters, though authorized, will be fired pursuant to the safe harbor provision because they cannot resolve the discrepancy within 90 days. Loss of a job is an economic injury that constitutes injury in fact for standing (slip opinion at 21; citations and footnote omitted).

Although the preliminary injunction will continue until the trial on the merits, perhaps for months or years, employers should not take comfort in the protections of the injunction, lest their sighs of relief turn into squeals of anguish. At most, the court order is but a reprieve against one tool of immigration enforcement.

The injunction does not bar SSA from continuing to send earlier versions of its no-match letter, which as the court noted "downplayed the immigration implications of a mismatched SSN." As an example, the court cited SSA's model 2006 no-match letter for tax year 2005 which "emphasized that receipt of the letter 'does not imply that you or your employee intentionally gave the government wrong information

about the employee's name or Social Security number. Nor does it make any statement about an employee's immigration status [Slip opinion at 2].'"

More important, nothing in the court's order requires DHS and ICE to cancel their adhesion contract with American employers and relieve the business community of the duty to serve as outsourced enforcers of the immigration laws. Indeed, the order granting the injunction expressly recognized that the receipt of a no-match notice, together with other evidence, could establish an immigration law violation:

> It does not follow . . . that DHS is precluded from relying on no-match letters as one indicator of possible non-compliance with immigration law. . . . DHS is authorized to and may punish employers for violating immigration law by knowingly continuing to employ unauthorized employees (slip opinion at 16-17; underscoring in original).

Aside from the enjoined no-match rule, DHS and ICE, in their efforts to punish or deter immigration violations, remain free to use a wide variety of law enforcement tools, many of which are outsourced to other government units or to private parties.

Ironically, however, ICE and its predecessor agency, the Immigration and Naturalization Service, for several years have eschewed reliance on the prime civil enforcement tools created by the Immigration Reform and Control Act (IRCA), the very same legislation that for the first time punished employers for knowingly employing unauthorized workers. While DHS Secretary Michael Chertoff has asserted in a press conference[3] on the no-match rule that the agency uses "every tool that we have in the toolbox," civil enforcement of the laws against unlawful hiring has plummeted.

As a result, the Administrative Law Judges in the Office of the Chief Administrative Hearing Officer (OCAHO) who hear civil immigration violations involving illegal employment are about as busy as the Maytag repairman. For example, of the 66 published OCAHO decisions from 2000 to 2007, only two involved unlawful employment of aliens (with the rest addressing immigration-related discrimination charges).[4] In the same press conference Secretary Chertoff acknowledged as much, saying that the government has a "credibility problem" because "particularly after the 1986 act [IRCA] there was a real lack of vigor . . . [a]nd there's some cynicism and certainly skepticism about whether the government has ever really been serious about [immigration] enforcement." In testimony before the Senate, Julie Myers, Assistant Secretary DHS who oversees ICE, suggested a reason for the lull in civil prosecutions, stating

[3] Aug. 10, 2007 transcript of "Immigration Reform Press Conference" with DHS Secretary Chertoff and Dept. of Commerce Secretary Carlos M. Gutierrez, available at: http://www.commerce.gov/NewsRoom/SecretarySpeeches/PROD01_003257 (last accessed on Oct. 11, 2007).

[4] OCAHO cases from 2007 to 2007 can be found at: http://www.usdoj.gov/eoir/OcahoMain/publisheddecisions/Looseleaf/Volume9/vol9listforInternet.htm (last accessed on Oct. 11, 2007).

that "fines for employing unauthorized aliens . . . are subject to substantial legal challenges, and have not been effective."[5]

The most visible and punitive DHS outsourcing of immigration enforcement has instead been in the area of criminal prosecutions by the DOJ's United States Attorneys. In FY 2006, the DOJ indicted 716 criminal defendants on immigration-related charges. By mid-September 2007 (as FY 2007 drew to a close), ICE opened 1,036 criminal investigations against "possible egregious employers" and made 840 arrests of persons or entities in worksite enforcement investigations, including "companies, managers [and] fraudulent document purveyors". Property seizures, fines, forfeitures and other payments in lieu of forfeiture for FY 2006 exceeded $2 million, but multiplied 15-fold in FY 2007, to an estimated $30 million.[6] These statistics confirm Secretary Chertoff's warning during his August 10 press conference: "Obviously, there are employers who deliberately violate the law, and we will come down on them like a ton of bricks, as we [have] been doing, and that means felonies, and not just administrative slaps on the wrist."

Even without help from SSA or the suspended no-match regulation, DHS and DOJ can readily confirm in the course of a civil or criminal investigation that an employer received no-match notices. DHS, like other enforcement agencies, can obtain tax information through 26 U.S.C. § 6103(i).[7] DHS can also inspect employer records, including no-match notices, under 8 U.S.C. § 1324a(e)(2)(c), or through a judicial order or grand jury subpoena. According to Secretary Chertoff, tips from informants also play a significant role:

> "[I]t's amazing the number of people who come forward and tell us about illegality in the workplace – and we go in, we see that someone's gotten no-match letters and they've simply put them in the wastebasket, that's going to be awfully hard for them to explain to a jury when the time comes for their trial."[8]

Outsourcing of immigration enforcement can take many forms beyond the instigation of no-match notices and worksite raids. Secretary Chertoff reports that DHS is "starting to see employers on their own beginning to check their work force because they see what's coming and they don't want to risk liability. . . . I think that [like the tax laws, immigration law] . . . is an area where we're going to get lots of that self-policing as well."

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[5] Written answers to additional questions of Senator Susan M. Collins, Nomination Hearing of Julie Myers, Sept. 12, 2007 p. 1., accessible at: http://bibdaily.com/pdfs/Myers%20QFRs%20(Collins).pdf (last accessed on Oct. 15, 2007).

[6] Written answers to additional questions of Senator Claire McKaskill, Nomination Hearing of Julie Myers, Sept. 12, 2007 pp. 1-2., accessible at: http://bibdaily.com/pdfs/Myers%20QFRs%20(McCaskill).pdf (last accessed on Oct. 15, 2007).

[7] See generally, *United States Attorneys Manual, Criminal Resource Manual,* Vol. 9, §§ 505 et seq., describing procedure for obtaining disclosure of tax returns and return information in federal criminal prosecutions not involving tax violations.

[8] Chertoff press conference, *supra,* note 3.

DHS outsourcing of enforcement duties has gone beyond employer self-policing and extended to corporate policing of immigration compliance by contractors. In the aftermath of a March 2005 $11 million settlement paid by Wal-Mart to avoid criminal prosecution, the company agreed to create "an internal program to ensure future compliance with immigration laws by Wal-Mart contractors".[9] Since then, immigration lawyers who represent contractors of Wal-Mart were asked to offer opinions attesting to their clients' compliance with the immigration laws (presumably after auditing, and if necessary, urging corrections of the clients' immigration practices and paperwork). As Ms. Myers noted at her confirmation hearing, "ICE is starting to see concrete evidence of the effectiveness of . . . worksite enforcement" from previously targeted employers who "with no additional prompting from the government" changed their business practices. She cited the example of two large companies whose changed practices affected not just their own companies, but "in one case tens of thousands of subcontractors."[10]

Another form of immigration outsourcing is ICE's IMAGE program,[11] a plan for a voluntary self- and third-party policing system. According to ICE's website and FAQ, a participating employer can use IMAGE to "enhance your corporate image . . . and help secure the homeland."[12] Among IMAGE's program components is a requirement to establish "a protocol for assessing the adherence to 'best practices' guidelines by the company's contractors/subcontractors."

Government contracting requirements serve as yet another inducement to the outsourcing of immigration enforcement. On August 10, 2007, DHS sent a memorandum to its major government contractors urging voluntary participation in E-verify.[13] This online program has been criticized on several grounds (primarily because DHS and SSA databases have not achieved an acceptable level of accuracy).[14] E-Verify is also

[9] March 19, 2005 *New York Times* article "Wal-Mart to Pay U.S. $11 Million in Lawsuit on Illegal Workers" by Steven Greenhouse, quoting Michael J. Garcia, the assistant DHS secretary of the Department of Homeland Security who then headed up ICE

[10] Written answers to additional questions of Senator Joseph I. Lieberman, Nomination Hearing of Julie Myers, Sept. 12, 2007 pp. 6-7, accessible at: http://bibdaily.com/pdfs/Myers%20QFRs%20(Lieberman).pdf (last accessed on Oct. 15, 2007).

[11] Information from ICE on its IMAGE program is available at: http://www.ice.gov/partners/opaimage. Concerns about IMAGE and the potential risks to workers and unions are outlined in a January 2007 report by the National Immigration Law Center, which can be obtained at this link: www.nilc.org/immsemplymnt/ircaempverif/eev009.htm. (Both links last accessed on Oct. 12, 2007.)

[12] The IMAGE FAQ can be found at http://www.ice.gov/partners/opaimage/image_faq.htm (last accessed on Oct. 12, 2007.)

[13] Memorandum of Paul A. Schneider, DHS Under Secretary for Management, Aug. 10, 2007, available at http://www.whitehouse.gov/omb/memoranda/fy2007/m07-21.pdf last accessed on Oct. 12, 2007).

Employers can register on-line at https://www.vis-dhs.com/employerregistration/, which provides instructions for completing the Memorandum of Understanding (MOU) required for official registration for the program, or call the E-Verify program at 1-888-464-4218. (Links last accessed on Oct. 12, 2007.)

[14] See, e.g., Sept. 10, 2007 Memorandum, "Comments on Amendments to H.R. 1585 (S. 1547), The FY 2008 National Defense Authorization," by the Acquisition Reform Working Group, a consortium of several industry associations, commenting specifically on S. 2253, an amendment sponsored by Sen. Chuck Grassley that would make E-Verify mandatory for all Dept. of Defense service contractors, available at:

the subject of a suit by the federal government against the state of Illinois seeking to enjoin a new state law, set to go into effect in 2008, which would prohibit Illinois employers from enrolling in any employment eligibility verification systems, including Basic Pilot and E-Verify, until SSA or DHS can make a final determination of employment eligibility within three days in 99 percent of the cases. Given that E-Verify does not provide a final answer in virtually all cases in three days, the Illinois law "would effectively preclude employers in Illinois from enrolling in the Basic Pilot Program." [15]

With the growing hue and cry against illegal immigration, the strident claims in the media about employer venality in hiring unauthorized workers, and the government's stepped-up outsourcing of enforcement duties, the business community should not be lulled into bouts of jubilant high-fives by the preliminary injunction. Instead, prudent employers – goaded into providing outsourced enforcement of the immigration laws – will use this no-match respite to evaluate, and where necessary, correct their employment-related immigration policies and practices.

http://www.itaa.org/upload/es/docs/ARWG%20Comments%20to%20Amendments%20to%20S%20%201547%20-%20FINAL%2009102007.pdf (last accessed on Oct. 12, 2007).

[15] The complaint is available at: http://www.epic.org/privacy/ssn/usvill_gov_092407.pdf (last accessed on Oct. 12, 2007).