

## **DHS Issues Supplemental “No Match” Rule**

In response to a federal court block of an earlier rule, the U.S. Department of Homeland Security (DHS) has issued a supplemental rule for employers who receive a Social Security Administration (SSA) no match letter.

Each year, the SSA sends notice to employers with a certain percentage of workers whose names and social security numbers do not match. In an effort to determine which of these workers are authorized to work, DHS formulated a procedure for employers to remedy the mismatch. The rule, announced in August 2007, established a 90 day safe harbor period for employers to check their records, send employees to the local SSA office, and complete a new I-9 if necessary. The rule also stated that failure to follow the process could lead to a determination that the employer had knowingly hired unauthorized workers.

A group of employers, business and labor associations, and immigrant rights advocates challenged the rule in federal court. Citing concerns with the way the rule was promulgated and a high error rate in the SSA database, a federal judge blocked implementation of the rule. Instead of issuing a final ruling in the case, the judge allowed DHS to rewrite the rule to address his concerns. DHS agreed to issue a supplemental rule by March 31, 2008.

The supplemental rule was published in the Federal Register on March 24, 2008. It does not change the August 2007 final rule's safe harbor requirements that employers check their records for inaccurate reporting within 30 days of receipt of a no match letter or that employees resolve the mismatch with the SSA within 60 additional days. Instead, the rule offers legal arguments rebutting the judge's criticisms of the August 2007 final rule and opens a thirty-day comment period.

The U.S. Department of Justice through its Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) is charged with enforcing the antidiscrimination provisions of federal law. In response to the supplemental rule, the OSC said that if an employer follows the safe harbor steps and applies them uniformly to all employees whose names appear on no match letters, OSC will not find that the employer has engaged in unlawful discrimination if the employer terminates workers whose legal work status is indeterminable.

Both sides are due back in court on April 8, 2008 to determine if the supplemental rule has adequately addressed the court's concerns.