NOTES

The "No-Match" Letter Rule: A Mismatch Between the Department of Homeland Security and Social Security Administration in Worksite Immigration Law Enforcement

I. INTRODUCTION

September 14, 2007 was to mark the first day that the Department of Homeland Security ("DHS") and the Social Security Administration ("SSA") would unite in a collective effort to regulate the employment of illegal aliens.[1] Such a monumental arrangement was facilitated by a controversial amendment to a long-standing immigration regulation that, since its initial proposal in August of 2006, instantly struck panic and uncertainty in employers and employees alike.[2] If followed to its black

1. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. 45,611, 45,611 (Aug. 15, 2007) (to be codified at 8 C.F.R. pt. 274a).

2. *See* Julia Preston, *Government Set for a Crackdown on Illegal Hiring*, N.Y. TIMES, Aug. 8, 2007, at A1 [hereinafter Preston, *Government Crackdown*]; Casey Woods & Niala Boodhoo, *Immigration: ID Rule Rankles Florida Industries*, MIAMI HERALD, Aug. 8, 2007, at A1; Gregory Siskind, *Social Security "No Match" Rule*, IMMIGRANT'S WEEKLY, http://www.ilw.com (search "Siskind and Social Security No Match Rule"; then follow the "ILW.COM—immigration news: Immigrant's Weekly: Social Security 'No Match' Rule" hyperlink) (last visited Mar. 20, 2008); Letter from the Am. Immigration Lawyers Ass'n to the Dir., Regulatory Mgmt. Div., U.S. Citizenship Servs., Dep't of Homeland Sec. (Aug. 11, 2006) (on file with the Department of Homeland Security at DHS Docket No. ICEB-2006-0004-0204.1), [hereinafter Comment—AILA American Immigration Lawyers Ass'n] (discussing the establishment of safe-harbor procedures for employers receiving no-match letters from the SSA and ICE), *available at* http://www.regulations.gov/fdmspublic/ContentViewer?objectId=09000064801c7959&disposition=attachment&contentType=pdf; Letter from the Chamber of Commerce of the U.S. to the Dir. Regulatory Mgmt. Div., U.S. Citizenship Servs., Dep't of Homeland Sec. (Aug. 14, 2006) (on file with the Department of Homeland Security at DHS Docket No. ICEB-2006-0004-0135), [hereinafter Comment—U.S. Chamber of Commerce] (discussing how excessive regulations encourage immigrant individuals to enter the underground workforce), *available at* http://www.regulations.gov/fdmspublic/ContentViewer?objectId=09000064801c405e&disposition=attachment&contentType=pdf; Letter from the Nat'l Restaurant Ass'n to the Dir., Regulatory & Mgmt. Div., U.S. Citizenship Servs., Dep't of Homeland Sec. (Aug. 11, 2006) (on file with the Department of Homeland Security at DHS Docket No. ICEB-2006-0004), [hereinafter Comment—Nat'l Restaurant Ass'n] (discussing the impact of immigration regulations on the restaurant industry), *available at* http://www.whitehouse.gov/omb/oira/1600/meetings/639.pdf; Letter from the Low-Wage Immigrant Worker Coalition to the Dir., Regulatory & Mgmt. Div., U.S. Citizenship Servs., Dep't of Homeland Sec. (Aug. 14, 2006) (on file with the Department of Homeland Security at DHS Docket No. ICEB-2006-0004), [hereinafter Comment—Low Wage Immigrant Coalition]

letter, this amendment has the potential to adversely impact over eight million employees and 140,000 employers throughout the nation.[3] However, due to political posturing and the mobilization of immigrant rights groups to oppose such a change, its true effect remains to be seen. Presently, the regulation looms like a tempest in the horizon. Employers are alarmed at the prospect of a compliance nightmare, and employees fear the possibility of firestorm layoffs. Meanwhile, the federal government seeks to justify its piecemeal approach of immigration enforcement at the worksite.

The need for this regulatory reform action stems from the influx of immigrants over the last twenty years, during which the United States has witnessed an unprecedented increase in the population of both legal and illegal immigrants.[4] Particularly troublesome is the wave of undocumented aliens who have reached our shores and gained employment in industries that have a desperate need for low-income earning laborers. While this surge of undocumented workers has raised many concerns as to the safety of our borders, the dilution of our national character, and the job security of United States citizens, these undocumented workers have established themselves as an integral part of the numerous industries that are vital to the United States economy. Fittingly, the Federal government has been called upon to address this issue.

This note explores a specific solution, created by the DHS, to address this issue through a regulatory initiative that utilizes SSA databases.[5] Its goal is to curtail illegal employment by exposing workers who are not authorized to work in the United States.[6] Its main weapon is the utilization of a "no-match" letter, which is intended to impute knowledge on employers who "knowingly" hire undocumented workers.[7] Parts V, VI, and VII of this note attempt to illuminate the new

(responding to the DHS's request for public comment "on the proposed 'Safe-Harbor Procedures for Employers Who Receive a No-Match Letter'"), *available at* http://www.nilc.org/immsemplymnt/SSA-NM_Toolkit/SSAnomatch_longcomments_2006-8-14.pdf; Cory Reiss, *Employers: Immigration Isn't Our Business*, THE LEDGER, Aug. 27, 2006, http://www.theledger.com/apps/pbcs.dll/article?AID=/200608270456&template=printart.

3. *See* Order Granting Motion for Preliminary Injunction at 6, AFL-CIO v. Chertoff, No. C 07-4472-CRB (N.D. Cal. Oct. 10, 2007), 2007 WL 2972952; Julia Preston, *Social Security Warns of Logjam From Immigration Ruling*, N.Y. TIMES, Sept. 7, 2007, at A20.

4. *See* STEVEN A. CAMAROTA, IMMIGRANTS AT MID-DECADE: A SNAPSHOT OF AMERICA'S FOREIGN-BORN POPULATION IN 2005, at 1, 5 (2005), *available at* http://www.cis.org/articles/2005/back1405.pdf.

5. *See infra* Parts IV.A, VII.B.1.

6. *See infra* Part III.A.

7. *See infra* Part IV.C–D.

regulation's limitations by analyzing the rule from the perspectives of both of the interests groups who stand in opposition and the DHS posturing in support. However, to fully appreciate the magnitude and wide-spread reach of this regulatory change, the reader must first recall the purpose of immigration to the United States found in Part II, the legal mechanisms employed to control that immigration outlined in Part III, and the development of the SSA program implicated by this new rule described in Part IV.

II. BACKGROUND OF IMMIGRATION IN THE UNITED STATES

Since the late Nineteenth Century, the United States has experienced a steady flow of immigrants onto its shores.[8] In response, Congress has enacted numerous immigration laws in an attempt to monitor and control this ever expanding segment of its population.[9] Arguably, no law passed in recent history has had more impact than the Immigration and Reform Control Act ("IRCA") of 1986.[10] The legislature's main goal in passing the Act was to deter illegal immigration into the United States by imposing sanctions upon employers who knowingly hired illegal immigrants.[11]

However, the inability of IRCA to curb illegal immigration is evidenced by the unprecedented influx of illegal immigrants in the United States over the past forty years.[12] In 2005, the nation's foreign-born population reached a new record of more than thirty-five million.[13] Perhaps even more indicative of IRCA's inefficiency are statistics that show 9.6 to 9.8 million illegal immigrants currently live and work in this

8. *See* CAMAROTA, *supra* note 4, at 1.

9. *See, e.g.*, Omnibus Consolidated Appropriations Act of 1996, Pub. L. No. 104–208, 110 Stat. 3009 (1997); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, 110 Stat. 1214 (1996); Immigration Act of 1990, Pub. L. No. 101–649, 104 Stat. 4978 (1990); Immigration Reform and Control Act of 1986, Pub. L. No. 99–603, 100 Stat. 3359 (1986); Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99–639, 100 Stat. 3537 (1986); Abolition of Joint Committee on Immigration and Nationality, Pub. L. No. 91–510, 84 Stat. 1189 (1970); Immigration and Nationality Act of 1952, Pub. L. No. 82–414, 66 Stat. 163 (1952); s*ee also* Stephen Franklin & Antonio Olivo, *Match Game Hard on Farmers: Immigrant Workers' Availability Uncertain Amid Legal Battle*, CHI. TRIB., Oct. 14, 2007, at 1, (noting that "[m]ore than 300 employment-related laws aimed at illegal immigrants have been passed by various forms of government."), *available at* http://www.chicagotribune.com/news/nationworld/chi-sun_nomatchoct14,0,3784267.story.

10. Pub. L. No. 99–603, 101 Stat. 3359 (1986).

11. *See id.*

12. CAMAROTA, *supra* note 4, at 4–5 & fig.2 (Graph indicates the continuing increase in the number and percent of the immigrant population in the United States between 1900–2005).

13. *See id.* at 5 fig.2.

country.[14]

Naturally, questions arise with respect to where these undocumented workers are finding jobs and how they are managing to fit into the American economic system. In fact, many immigrants simply are not and are living at or close to the poverty line.[15] However, those immigrants who are employed are typically concentrated in low-paying industries.[16] For example, immigrants constitute 43.7% of the farming, fishing and forestry industries, and 34% of the building cleaning and maintenance industries in the United States.[17]

In addition, while these numbers are greater than have ever existed in American history, the recent immigration trends indicate that the immigrant population in the United States will continue to increase. Between 2000 and 2005 more than 1.5 million immigrants arrived, annually, in the United States.[18] Further, the U.S. Census Bureau projects the immigrant population will "cause the population of the United States to swell from its present 288 million to more than 400 million" in less than fifty years.[19] Naturally, this ever-expanding number of immigrants, primarily distributed in certain low-wage industries, represents the sector of the economy and population most sensitive to any change in policy.

III. THE STRUCTURE OF IRCA

Before addressing the regulatory change, it is necessary to examine the relevant underlying section of the congressional act that the new regulation purports to reinterpret.

A. Purpose

The goal of enacting the elaborate verification scheme of IRCA was

14. *Id.* at 4. This number only includes those aliens who were captured by the March 2005 "Current Population Survey." *Id.*

15. Recent statistics reveal that the poverty rate for immigrants is 17.1%, as compared to 12% for non-immigrants. *Id.* at 13. While this statistic depicts a bleak existence for many immigrants in this country, even more striking is that "42.5 percent of immigrants [as] compared to 29.7 percent of natives live in or near poverty." *Id.* at 15.

16. *See id.* at 1.

17. *Id.* at 12 tbl.8.

18. *See id.* at 3.

19. NAT'L ACAD. OF SCIS., IMMIGRANTS, http://www.diversityresources.com/nas/Immigrants%20Market%202006.pdf (last visited Mar. 20, 2008).

to stem the tide of undocumented aliens into the United States.[20] Further, with the end goal of promoting "economy and efficiency in Government procurement," Congress was intending to increase "stability and dependability" in the American workforce.[21] The legislature saw contractors who hired illegal immigrants as less stable and dependable and, therefore, as a less attractive option for procurement sources for the federal government.[22] Therefore, the legislature's main strategy to stabilize the workforce was to impose strict prohibitions on employers hiring illegal immigrants, in hopes of making illegal immigrants, who do not require health benefits or even minimum wages, less attractive to potential employers.[23]

Table 1—Immigrants by Occupation

Table 8. Immigrants and Natives by Occupationin 2005,
Ranked by Native Unemployment Rate in Occupation (Numbers in Thousands)

Occupation	Native Unemployment Rate	Immigrant Share of Occupation	Number of Natives Employed	Number of Unemployed Natives	Number of Recently Arrived Immigrants Employed*	Number of Immigrants Employed
Farming, fishing, & forestry	12.6 %	43.7 %	505	73	132	392
Construct. & extraction	11.3 %	25.9 %	6,368	809	644	2,228
Bldng. cleaning & maintenance	10.1 %	34.0 %	3,279	370	412	1,693
Food preparation	9.2 %	23.7 %	5,115	521	454	1,585
Production	7.6 %	22.5 %	7,410	611	400	2,152
Transportation & moving	6.8 %	17.2 %	6,980	509	265	1,446
Personl. care & service	6.1 %	16.6 %	3,537	230	126	703
Sales	5.1 %	11.9 %	13,729	736	255	1,847
Healthcare support	5.1 %	17.5 %	2,462	131	104	523
Office & admin. support	5.0 %	9.7 %	17,206	902	240	1,840
Arts, entertain.& media	4.7 %	10.7 %	2,379	118	56	286
Installation and repair	4.6 %	12.3 %	4,502	216	90	629
Protective service	4.1 %	7.6 %	2,564	109	24	211
Computer mathematical	3.9 %	21.5 %	2,482	100	149	679
Life, physical, & soc. science	2.9 %	17.8 %	1,066	32	46	231
Architecture & engineering	2.9 %	15.3 %	2,250	67	60	405
Business and financial	2.5 %	10.5 %	5,121	130	63	598
Management Occp.	2.4 %	9.4 %	12,817	312	133	1,329
Legal occupations	2.0 %	6.2 %	1,459	30	7	96
Community & Social service	1.9 %	8.6 %	1,904	38	29	180
Educ., training	1.5 %	7.6 %	7,624	118	131	627
Healthcare practitioner	1.2 %	12.3 %	5,870	71	90	823
Total	5.1 %	15.0 %	116,629	6,234	3,909	20,505

Source: Center for Immigration Studies analysis of March 2005 Current Population Survey. Figures are for persons 18 and older in the labor force.
* Immigrants who arrived 2000-2005. Based on the year immigrants said they came to the United States to stay.

B. Restrictions

The Act attempts to accomplish its purpose primarily by declaring three employer activities unlawful. First, it makes it unlawful to knowingly hire, or recruit for a fee, an alien who is unauthorized to be

20. *See* Etuk v. Slattery, 936 F.2d 1433, 1437 (2d Cir. 1991) (citing McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479, 481 (1991)).

21. *See* Exec. Order No. 12,989, 61 Fed. Reg. 6091 (Feb. 13, 1996), *amended by* Exec. Order No. 13,286, 68 Fed. Reg. 10, 623 (Feb. 28, 2003), *reprinted as amended in* 8 U.S.C. § 1324a (2002).

22. *Id.*

23. *See id.*

employed in the United States.[24] Second, the Act makes it unlawful to hire an individual in the United States without complying with the statutory employment verification system.[25] Lastly, and most importantly, it states: "It is unlawful for a person or other entity, after hiring an alien for employment in accordance with paragraph (1), to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment."[26]

This last provision creates a continuing obligation for the employer to ensure it is not employing illegal aliens, and if, at any time, such employer comes to know that an employee is an alien, it may no longer continue to employ that individual. Typically, the first time an employer may learn that an employee is an alien is during the Form I-9 verification process, when the employee may be unable to adequately complete verification.[27] If an employer continues to employ an employee despite failure to complete the Form I-9 verification, such action may later be used as evidence that the employer knowingly employed an unauthorized alien.[28]

C. Form I-9 Verification System

The verification system detailed in the statute requires all employees to complete the first section of the I-9 employment eligibility verification form ("Form I-9") at the time of hire.[29] This section requires the employee to provide biographical information, including name, address, birth date and social security number.[30] A prospective employee can prove its employment authorization and identity by providing a valid U.S. passport, a resident alien card, an alien registration card, or other document designated by the Attorney General that evidences that the employee is authorized to work in the United

24. 8 U.S.C. § 1324a(a)(1)(A) (2000).

25. *See* § 1324a(a)(1)(B).

26. § 1324a(a)(2).

27. *See generally* United States v. Haim Co., 7 O.C.A.H.O. 988, at 1033–34, 1998 WL 745994, at *3 (1998) (discussing the Form I-9 registration process).

28. *See* 8 C.F.R. § 274a.1(*l*)(1)(i) (2008).

29. 8 C.F.R. § 274a.2(b)(1)(i)(A) (2007); *see also* § 274a.1(c) (defining time of hire as, "the actual commencement of employment of an employee for wages or other remuneration.").

30. *See* DEP'T OF HOMELAND SEC., U.S. CITIZENSHIP & IMMIGR. SERVS., FORM I-9, EMPLOYMENT ELIGIBILITY VERIFICATION (2007) [hereinafter Form I-9] (instructing employee to complete section one of the Form I-9 and listing "[d]ocuments that [e]stablish [b]oth [i]dentity and [e]mployment [e]ligibilty"), *available at* http://www.uscis.gov/files/form/i-9.pdf; Martha J. Schoonover & Marti Nell Hyland, *Employment Authorization Regulations and I-9 Compliance*, SF82 A.L.I.-A.B.A. 243, 249 (2001).

States.[31] These documents must be provided within three days of the time of hire.[32] While at least one of these documents is required to establish an employee's authorization, employers must be careful not to infer from an employee's accent or appearance that the employee is unauthorized and ask for additional or supplemental documents beyond the statutory and regulatory requirements.[33] Employers who demand additional authorization or proof of citizenship expose themselves to charges of discrimination based on "alienage."[34] The reluctance of employers to demand additional authorization for fear of discrimination lawsuits, combined with the fact that counterfeit documents are readily available almost anywhere in America, puts these employers in a rather precarious position.

The second section of the Form I-9 must be completed by the employer upon reviewing the documents submitted by the employee and requires the employer to attest, under penalty of perjury, that the employer, at the time of hiring, has verified the requisite document or documents that demonstrate both the employee's identity and authorization to work in the United States.[35] However, it is increasingly challenging to determine whether an applicant's identification and employment verification forms are valid, since counterfeits "often appear as genuine as those issued by government agencies."[36] This principle is illustrated in *United States v. Tyson Foods Inc.*,[37] where federal immigration agents were unable to effectively decipher between fake and accurate work authorization documents.[38] What becomes clear is that deciphering between a counterfeit and a valid authorization document is not an easy task, especially since "the average American business person is not an expert in document authentication."[39]

31. § 1324a(b)(1)(B).

32. § 274a.2(b)(1)(i)(B)–(ii).

33. § 274a.1(*l*)(3).

34. 8 U.S.C. § 1324b(a)(6) (2000); *see, e.g.*, Espinoza v. Farah Mfg. Co., 414 U.S. 86, 95 (1973) (holding that "nothing in [Title VII] makes it illegal to discriminate on the basis of citizenship or alienage"); Zamora v. Elite Logistics, Inc., 478 F.3d 1160, 1163–65, 1183 (10th Cir. 2007) (en banc) (disposing of plaintiff's Title VII discrimination claims against his former employer).

35. § 1324a(b)(1)(A); Form I-9 (instructing employer to complete section two of the I-9 Form).

36. Thomas C. Green & Ileana M. Ciobanu, *Deputizing—and then Prosecuting—America's Businesses in the Fight Against Illegal Immigration*, 43 AM. CRIM. L. REV. 1203, 1206–07 (2006).

37. No. 4:01-CR-061, 2003 WL 21095580 (E.D. Tenn. Jan. 28, 2003).

38. Green & Ciobanu, *supra* note 36, at 1207 (interpreting Tyson Foods, 2003 WL 21095580).

39. *Id.*

Unfortunately, an employer who is concerned with compliance can do no more than accept any document that, on its face, appears to be valid, since requiring additional documentation may constitute discrimination against the employee.[40]

An employer's obligation to follow precise verification requirements when making a new hire while simultaneously ensuring their workforce remains free of illegal aliens places the employers in a catch twenty-two. As mentioned previously, under IRCA, an employer must request documentation evidencing an employee's authorization to work in the United States. If the employee presents documentation as required by Form I-9, then the employer, in order to avoid violating the employee's civil rights, must accept it and ask no further questions. However, if it turns out there is a discrepancy with the employee's authorization forms, the employer must walk the fine line between aiding the employee in resolving the situation and impinging on its civil rights by demanding additional documents evidencing authorization.[41]

The federal government has contributed to employer paranoia, through a practice of sending undercover federal agents to ferret out employers who hire illegal immigrants.[42] Ultimately, IRCA places a heavy burden on employers to be vigilant in refusing to hire or continuing to employ illegal aliens, while simultaneously prohibiting employers from requesting any additional proof of work authorization beyond that which is required by Form I-9.[43] In essence, IRCA demands for employers to construct a workforce of authorized workers while withholding the tools necessary to build such a structure.

D. Enforcement

Although once exclusively vested in the INS, it is now the duty of the DHS to investigate all violations of immigration law, since the

40. 8 U.S.C. § 1324b(a)(6) (2000); *see, e.g.*, *Zamora*, 478 F.3d at 1162–64 (where an employer who required further proof of citizenship was sued by his employee); Collins Foods Int'l, Inc. v. United States Immigration and Naturalization Serv., 948 F.2d 549, 554 & n.16 (9th Cir. 1991) (noting that employers are only required to reasonably examine documents for purposes of verifying that their employees are legally authorized to work in the United States, not rigorously inspect them).

41. However, employer's use of a consistently applied policy of terminating employees for fraudulent use of social security numbers does not violate IRCA's anti-discrimination provision. Simon v. Ingram Micro Inc., 9 O.C.A.H.O. No. 1088, at 16, 2003 WL 634572, at *14 (Jan. 27, 2003).

42. *See, e.g.*, Tyson Foods, 2003 WL 21095580, at *1.

43. 8 C.F.R. § 274a.1 (2008).

Homeland Security Act of 2003.[44] Under IRCA, notice of a violation must be given to the employers.[45] In addition, if requested, a hearing by an Administrative Law Judge ("ALJ") shall be conducted at the "nearest practicable place to where the person or entity resides or of the place where the alleged violation occurred."[46] If no such hearing is requested, the Attorney General shall pass a "final and unappealable order."[47] While civil monetary penalties are most common, where there are repeated violations, employers may also face criminal sanctions.[48] An employer's failure to adhere to the employment verification system is referred to as a paperwork violation and will typically only lead to a civil monetary penalty.[49] However, the regulation allows the government to treat a company's failure to verify the employment eligibility as evidence that a company is knowingly hiring illegal aliens.[50] The statute provides the following guidelines for the ALJ to consider: (1) the size of the employer's business; (2) the employer's good faith; (3) the seriousness of the violation; (4) whether the individual involved was an unlawful alien; and (5) whether the employer has a history of violations.[51] Criminal penalties are limited to a maximum of six-month imprisonment, while the ultimate monetary penalty depends on the number of unauthorized aliens the employer has employed.[52]

E. Knowledge Requirement

To violate IRCA an employer must *knowingly* hire or continue to employ an unauthorized alien.[53] Both case law and regulation suggest that this knowledge requirement, the key to successful prosecution, can be satisfied by either actual or constructive knowledge.[54]

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44. *See* 6 U.S.C. § 202(3) & (5) (2000); 8 C.F.R. § 2.1 (2008).

45. 8 U.S.C. § 1324a(e)(3)(A) (2000).

46. § 1324a(e)(3)(B).

47. *Id.*

48. § 1324a(e)(4)(f); *see* Paul R. Penny III, Comment, *Fire First and Ask Questions Later: What is the Effect of The Social Security Administration's "Mismatch Letters?,"* 5 SCHOLAR 355, 371 (2003); Carl Shusterman & Scott Laurent, *Bills Toughen Standards for Hiring Alien Workers: Legislation Seeks More Stringent Requirements for Complying with Employment Verification Rules*, 18 NAT'L L.J. C2 (1995). For more information on potential civil and criminal liability under the current statutory framework see John R. Bunker, *An Offer They Can't Refuse: Crafting an Employer's Immigration Compliance Program,* 25 HOFSTRA LAB. & EMP. L.J. 199 (2008).

49. *See* § 1324a(e)(4),(5); Penny, *supra* note 48, at 371.

50. *See* 8 C.F.R. § 274a.1(*l*)(1)(1)–(2) (2008).

51. 8 C.F.R. § 274a.10(b)(2) (2007).

52. 8 U.S.C. § 1324a(f)(1).

53. 1324a(a)(1).

54. § 274a.1(*l*)(1); *see* Mester Mfg. Co. v. I.N.S., 879 F.2d 561, 566–67 (9th Cir. 1989)

1. Actual Knowledge

While less common in practice, actual knowledge may be imputed to an employer when there is either a statement given by the alien attesting to the employer's knowledge of its illegal status or an admission by the employer during the course of an investigation.[55] Likewise, actual knowledge acquired by an agent for the employer will be imputed to the employer.[56]

2. Constructive Knowledge

An employer can also be found to have constructive knowledge that an employee is unauthorized to work in the United States.[57] The relevant administrative regulation[58] defines constructive knowledge as "knowledge that may fairly be inferred through notice of certain facts and circumstances that would lead a person, through the exercise of reasonable care, to know about a certain condition."[59] Since its initial promulgation this definition has withstood the test of judicial scrutiny.[60]

This regulatory definition, prior to amendment, also provided three situations where an employer may be found to have constructive knowledge that an employee is unauthorized.[61] Those three situations are when an employer:

> (i) Fails to complete or improperly completes the Employment Eligibility Verification Form I-9;
>
> (ii) Has information available to it that would indicate that the alien is not authorized to work, such as Labor Certification and/or an Application for Prospective Employer; or

(finding that when an employer who received information that some employees were suspected of having presented false documents to show work authorization, such employer had constructive knowledge of their unauthorized status when the employer failed to make any inquiries or take appropriate corrective action).

55. Schoonover & Hyland, *supra* note 30, at 262.

56. *Id.*

57. *See, e.g.*, *Mester Mfg. Co.*, 879 F.2d at 566–67.

58. § 274a.1(*l*)(1).

59. *Id.*

60. *See* New El Rey Sausage Co. v. INS, 925 F.2d 1153, 1157–58 (9th Cir. 1991); *Mester Mfg. Co.*, 879 F.2d at 566–67; United States v. Jewell, 532 F.2d 697, 700 (9th Cir. 1976) (en banc).

61. 8 C.F.R. § 274a.1(*l*)(1) (2007), *amended by* 8 C.F.R. § 274a.1(*l*)(1) (2008).

> (iii) Acts with reckless and wanton disregard for the legal consequences of permitting another individual to introduce an unauthorized alien into its work force or to act on its behalf.[62]

Case law has contributed to establishing a workable definition of constructive knowledge. In *New El Rey Sausage Co. v. INS*,[63] the court found that the employer's failure to investigate written notification from an INS inspector of possible problems with the paperwork of some of its employees constituted constructive knowledge.[64] In this case, the employer, after receipt of the written notification, merely accepted the word of the employee who indicated that he was authorized to work in the United States.[65] The court held that the employer can only make such a determination when valid employment authorization documents, as set out in the statute, are presented.[66] Similarly, in *Mester Manufacturing Co. v. INS*,[67] the employer was charged with constructive knowledge when it blatantly ignored hand written notification by the INS that many of its employees may be in possession of false green cards.[68] In both cases, deliberate failure to investigate suspicious circumstances imputed knowledge.[69]

Unfortunately, the courts have not always precisely followed the language of the regulations. For example, although the regulation appears to state the contrary, the Office of the Chief Administrative Hearing Officer ("OCAHO") has consistently held that "mere failure to prepare an I-9 Form is not proof of knowledge."[70] Although, when an employer's failure to prepare Form I-9 is coupled with conscious avoidance of certain facts, such a combination may "provide believable circumstantial evidence of [the employer's] knowledge of an employee's unauthorized status."[71] Unfortunately, the water becomes muddied when the violation stems from an employer's error in the completion of

62. *Id.*

63. 925 F.2d 1153.

64. *Id.* at 1157–58.

65. *Id.* at 1155.

66. *See id.* at 1158.

67. 879 F.2d 561 (9th Cir. 1989).

68. *Id.* at 566–67.

69. *See id.* (citing United States v. Jewell, 532 F.2d 697, 700 (9th Cir. 1976) (en banc)); *New El Rey Sausage Co.*, 925 F.2d at 1158.

70. United States v. Valdez, 10 O.C.A.H.O. 91, at 610, 1989 WL 433882, at *10 (1989); *see also* United States v. Haim Co., 70 O.C.A.H.O. 91, at 1038, 1998 WL 745994, at *6 (1998). *But cf.* 8 C.F.R. § 274a.1(*l*)(1)(i) (2007) (which provides that "situations where an employer . . . fails to complete or improperly completes the Employment Eligibility Verification Form, I-9" may establish constructive knowledge).

71. *Valdez*, 10 O.C.A.H.O. 91, at 610, 1989 WL 433882, at *10.

an employee's verification form.

In *United States v. Haim Co.*,[72] the court ruled that a mere mistake of failing to accurately verify a worker's employment authorization is not, in itself, sufficient to exonerate an employer of liability.[73] The employer was found to have at least constructive knowledge because he did not fill out any I-9 forms for employees who admitted that they were not authorized to work in the United States.[74] Yet, the court emphasized that a "verification failure in violation of IRCA's paperwork requirements by itself is not sufficient to establish the knowing element of an alleged knowing hire violation without other probative evidence corroborating the scienter element."[75]

Similarly, in *Collins Food International, Inc. v. INS*,[76] the court held that the employer's faulty inspection of a social security card at the time of hire was not enough to constitute constructive knowledge of the employee's lack of work authorization.[77] In this case, the INS relied on a social security card, which, it contended, the employer should have known was invalid.[78] On appeal, the Ninth Circuit reversed the finding of constructive knowledge by the ALJ and OCAHO where no INS warning had been given during the initial hiring situation.[79] More importantly, the *Collins* court gave clear warning that "the doctrine of constructive knowledge must be sparingly applied."[80]

A synthesis of the case law suggests that the employer cannot sit by and consciously avoid obtaining knowledge of its employees' alien status when presented with circumstances that establish the possibility of such an inference. As evinced by the above discussed case law, an employer must investigate any notifications by the regulatory body responsible for immigration law enforcement (now the DHS) that brings

72. 10 O.C.A.H.O. 988, 1998 WL 745994.

73. *See id.* at 1038, 1998 WL 745994, at *6.

74. *Id.* at 1040, 1998 WL 745994, at *8 (citing United States v. Alana, 1 O.C.A.H.O. 297, at 1967 (1991), 1991 WL 531943, at *2–*3).

75. *Id.* at 1038, 1998 WL 745994, at *6 (citing *Valdez*, 10 O.C.A.H.O. 91, at 609, 1989 WL 433882, at *10).

76. 948 F.2d 549 (9th Cir. 1991).

77. *Id.* at 551.

78. *See id.* at 551 nn.6–7.

79. *Compare id.* at 555, *with* Mester Mfg. Co. v. INS, 879 F.2d 561, 566–67 (9th Cir. 1989) (finding constructive knowledge where the INS notified the employer that certain employees were suspected of green card fraud, yet the employer took no corrective action and continued to employ the unauthorized aliens), *and* New El Rey Sausage Co. v. INS, 925 F.2d 1153, 1159 (9th Cir. 1991) (finding constructive knowledge where the INS notified the employer that several of its employees were using improper alien registration numbers, but the employer still relied on the word of the aliens as to the validity of their employment authorization, and continued to employ them).

80. *Collins*, 948 F.2d at 555.

to the employer's attention an issue with the employee's work status. In practice, the question that arises more frequently is whether an employer must follow the same procedure if the notification comes from a government agency other than the DHS. This scenario is especially troublesome when the employer is unable to determine from the notification that the employees described therein are, in fact, unauthorized to work. In order to address this question, the DHS amended the regulatory definition of constructive knowledge to include situations where notification comes from other government agencies—specifically, a written notice to the employer from the SSA, commonly referred to as a no-match letter.[81]

IV. SOCIAL SECURITY ADMINISTRATION NO-MATCH LETTERS

Before the contours of the no-match letter rule can be analyzed, one must first establish the origins of its subject—the no-match letter. As such, a brief discussion of the SSA No-Match Letter Program follows.

A. Regulatory Background

The Social Security Act of 1935[82] created a national welfare system in the United States.[83] Administration of the Act is delegated to the SSA, which provides social security benefits to individuals based on the number of acquired credits retained throughout the individual's employment career.[84] In order to determine the amount of benefits to be paid, the SSA must keep record of all reported wages paid to individuals by their employers.[85] In an attempt to facilitate this process, the SSA created the social security number ("SSN") in 1936 to identify individuals' personal earning records.[86] Tax law requires employees to present their employers with a valid SSN, or a receipt showing that they

81. *See* Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 71 Fed. Reg. 34,281, 34,281, 34,284–85 (proposed June 14, 2006) (to be codified at 8. C.F.R. pt. 274a); *see also* Letter from the U.S. Dep't of Homeland Sec. to Employer (on file with author), *available at* http://www.ssa.gov/employer/ICEinsert.pdf (informing employers that they may not "simply disregard" such notification from the SSA).

82. Ch. 531, 49 Stat. 620 (1935) (codified as amended at 42 U.S.C. §§ 301–306 (2004)).

83. *Id.*

84. *See* J. Ira Burkemper, *The "Mismatch Letter" Is in the Mail: The Social Security Administration Ramps Up Its Warnings to Employers*, 2002, http://www.entertheusa.com/publications/mismatch_letter.html.

85. 42 U.S.C. § 405(c)(2)(A) (2000).

86. Burkemper, *supra* note 84.

have applied for a SSN.[87]

All employers must report the earnings of each of its employees to the SSA and the Internal Revenue Service ("IRS") at the end of every tax year via the IRS Form W-2, the Wage and Tax Statement.[88] The employer must include the SSNs presented to him by its employees in that submission.[89] After receiving the filings, the SSA has a duty to check the information submitted by the employer against its Master Earnings File on its employee database.[90] Where the information provided corresponds with the SSA's internal records, the agency posts earnings credits to the employee's account.[91] However, when the information does not match the SSA's database records, credit is applied to a "suspense account" while the SSA awaits verification of the reported wage information.[92] There are two possible explanations as to why an employee's SSN would not match the SSA's internal records. One explanation is that the information does not match because the SSN provided does not exist in the database.[93] Alternatively, it may be the case that the SSN provided does appear in the database, but the name or birth-date associated with it does not match the name or birth-date provided on the employer's filings.[94]

There are a numerous reasons that such discrepancies arise. The SSA attributes the majority of these mistakes to "human blunder and typographical errors."[95] For workers who do have valid work authorization, these reasons include, but are not limited to, clerical/transposition errors with respect to the employees' names or SSNs, unreported name changes due to marriage or divorce, incomplete or omitted names on W-2 forms, or use of non-Roman names.[96] For

87. 26 C.F.R § 31.6011(b)–2(b)(i) to (iii) (2007).

88. *See* Burkemper, *supra* note 84; *see also* Scott J. FitzGerald & Gary N. Merson, *Forms, Fraud, and Security: A Call for the Overhaul of the Form I-9 Employment Eligibility Verification System*, 80 INTERPRETER RELEASES 501, 508 (Apr. 7, 2003).

89. *See* FitzGerald & Merson, *supra* note 88, at 508; David Nachman & Debi Debiak, *Social Security Mismatch Letters are in the Mail*, 169 N.J.L.J. (2008).

90. Burkemper, *supra* note 84.

91. *Id.*; Penny, *supra* note 48, at 362.

92. Burkemper, *supra* note 84; Penny, *supra* note 48, at 362.

93. Burkemper, *supra* note 84.

94. *Id.*; Penny, *supra* note 48, at 362.

95. Penny, *supra* note 48, at 362.

96. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 71 Fed. Reg. 34,281, 34,281–82 (proposed June 14, 2006) (to be codified at 8 C.F.R. pt. 274a); CHIRAG MEHTA, NIK THEODORE, & MARIELENA HINCAPIÉ, CENTER FOR URBAN ECONOMIC DEVELOPMENT, SOCIAL SECURITY ADMINISTRATION'S NO-MATCH LETTER PROGRAM: IMPLICATIONS FOR IMMIGRATION ENFORCEMENT AND WORKERS' RIGHTS 1, 6 (2003), *available at* http://www.uic.edu/cuppa/uicued/npublications/recent/SSAnomatchreport.pdf; Penny, *supra* note 48, at 362.

unauthorized workers, this discrepancy can be due to the use of false SSNs or SSNs assigned to other people.[97] Interestingly, legal immigrants are more likely to face the former discrepancies "because they often use compound, maternal or paternal last names; have commonly misspelled names; and often inconsistently spell their names on various legal documents."[98] In addition, newly-authorized individuals who formerly worked without valid SSNs, illegally, sometimes continue to work using their old, false SSNs for fear of losing their jobs if they were to call the prior falsities to the attention of their respective employers.[99]

B. Earnings Suspense File—The Problem

When a mismatch occurs and no employee's account can be credited, the credit is temporarily posted to the Earnings Suspense File ("ESF") while the agency tries to resolve the discrepancy.[100] This account, held by the SSA, totaled $519 billion in 2005.[101] This creates a problem not only for the employee whose wages were not credited, but also for the SSA, which incurs significant costs of processing these no-matches.[102] While it typically costs less than fifty cents to post information to an employee's account, correcting an item on ESF costs about three hundred dollars.[103] The SSA reported that in November 2004, its suspense-account postings had risen to a level of 246 million items, totaling an estimated $463 billion in earnings that remain indefinitely un-credited on the ESF.[104] In tax year 2002 alone, the SSA posted approximately 9 million wage items, which accounted for nearly $56 billion in wages on ESF.[105]

97. *Coming Soon To Your Desk: Bad Social Security Numbers*, MISS. EMP. L. LETTER (Watkins Ludlam Winter & Stennis, PA., Jackson, MISS.), Sept. 2002, at 4.

98. MEHTA ET AL., *supra* note 96, at 6–7.

99. *Id.* at 7.

100. *See* 20 C.F.R. § 422.120(a) (2007); Martin Bosworth, *The Earnings Suspense File: Social Security's "Secret Stash,"* CONSUMERAFFAIRS.COM, Feb. 22, 2006, http://www.consumeraffairs.com/news04/2006/02/ss_secret_stash.html.

101. *See* Bosworth *supra*, note 100.

102. Stanley Mailman & Stephen Yale-Loehr, *Social Security 'Mismatch Letters' Jeopardize Jobs*, 227 N.Y.L.J. 3 (2002).

103. *Id.*

104. U.S. GOV'T ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL COMMITTEES, SOCIAL SECURITY: BETTER COORDINATION AMONG FEDERAL AGENCIES COULD REDUCE UNIDENTIFIED EARNINGS REPORTS 1 (2005), *available at* http://www.gao.gov/new.items/d05154.pdf.

105. SOC. SEC. ADMIN., SSA'S FY 2005 PERFORMANCE AND ACCOUNTABILITY REPORT 172 (2005), *available at* http://www.ssa.gov/finance/2005/FY_05_PAR.pdf.

Considering the cost of managing the ever-increasing number of items posted on the ESF, the Agency is now more concerned than ever about these items.[106] Reducing the number of items posted to the ESF could potentially decrease the Agency's operating costs, and improve its financial situation.[107]

C. No-Match Letters—The Solution

In 1993, the No-Match Letter Program became one of the latest additions to the SSA's arsenal of techniques to reduce the ESF.[108] The SSA began sending letters to employers notifying them that the Agency was unable to post earnings for some of their workers due to a mismatch between the employer's reported information and the Agency's internal records.[109] The correspondence is labeled "Employer Correction Request"[110] and "referred to as a form of 'edcor' (educational correspondence)" by the SSA.[111] The purpose is to inform employers of discrepancies between the employee information in the SSA's database and that provided by the employer on the Form W-2.[112] The letter accomplishes this by providing the employer with a list of the SSNs of all employee accounts which have been placed in suspense.[113] The correspondence also provides instructions as to how to rectify the discrepancies.[114] By notifying the employers and requesting a response to the letter "within 60 days," the agency has always hoped to receive fast corrections from employers, which would translate into a prompt reduction of ESF postings.[115] The letter also warns the employer not to

106. *See Coordinated Approach to SSN Data Could Help Reduce Unauthorized Work: Before the Subcomm. on Social Security and on Oversight*, 109th Cong. 8 (2006) [hereinafter *Bovbjerg Statement*] (statement of Barbara D. Bovbjerg, Director of Education, Workforce, and Income Security Issues, United States Government Accountability Office), *available at* http://www.gao.gov/new.items/d06458t.pdf; CONGRESSIONAL RESPONSE REPORT, SOCIAL SECURITY ADMINISTRATION BENEFITS RELATED TO UNAUTHORIZED WORK, DOC. NO. A-03-03-23053, at 11 (2003).

107. *See* Burkemper, *supra* note 84.

108. *See id.*

109. *See* 20 C.F.R. § 422.120(a) (2007); *Id.*

110. Austin T. Fragomen, Jr. & Steven C. Bell, *Strategies When an Employer Receives Social Security Administration "No Match" Letter*, IMMIGR. BUS. NEWS & COMMENT, Sept. 1, 2004, at *1, *available at* 2004 WL 1882574 [hereinafter Fragomen, *No-Match Letter Strategies*].

111. Burkemper, *supra* note 84.

112. *Id.*

113. *Id.*

114. *Id.*

115. *See* 20 C.F.R. § 422.120(b) (2007) (providing that the default statutory period in which an employer can return a corrected wage report without penalty is actually forty-five days, but

take adverse action against any employee whose name appears on the list of employees in the no-match letter, and expressly states that such adverse action, if taken, may violate both state and federal law.[116] Lastly, the letter suggests a number of tips for filing accurate wage reports, including that the employers verify names and SSNs of future job applicants during the hiring process to avoid future problems.[117]

D. History of the SSA No-Match Letter Policy

The first no-match letters went out in 1994.[118] These letters were initially sent to employers with a workforce in which at least 10% of their employees' records did not match those held by the SSA.[119] Smaller companies had to employ eleven or more mismatched employees in order to receive a no-match letter.[120] The first page of the form letter read that it is not to be treated so as to constitute notice to the employer that a particular employee referenced therein lacks work authorization.[121] The INS's failure to provide guidance to employers who received these letters led to confusion as to the appropriate response to such a letter, and what action an employer should take in order to remain in compliance with IRCA.[122] This uncertainty, in turn, led to "hasty and ill-considered termination" of thousands of employees.[123]

Repeated revisions to the No-Match Letter Program further compounded the problem. In 2000, the SSA began planning a new no-match letter policy in which every employer with at least one mismatched employee would receive a no-match letter.[124] In 2001, before announcing the implementation of a new policy in 2002, only 110,000 letters were sent out while the following year that number jumped to over 900,000 letters.[125] One out of every eight employers in

employers may request an additional fifteen days in which to submit their reports without penalty); *see also* Fragomen, *No-Match Letter Strategies*, *supra* note 110, at *1.

116. Burkemper, *supra* note 84; Fragomen, *No-Match Letter Strategies*, *supra* note 110, at *2.

117. Burkemper, *supra* note 84.

118. Anna Marie Gallagher, *The Situation of Undocumented Migrants in the United States*, IMMIGR. BRIEFINGS 1, 11 (2005).

119. *Id.*; *see* Fitzgerald & Merson, *supra* note 88, at 508.

120. AUSTIN T. FRAGOMEN, JR. & STEVEN C. BELL, COMPLAINT PROCEDURES AND ADMINISTRATIVE PROCEEDINGS, IMMIGR. EMP. COMPLIANCE HANDBOOK, § 6:53 (2006), *available at* 2003 WL 1560595.

121. Paul L. Zulkie, *Protecting The Employer*, SJ080 A.L.I.-A.B.A. 45, 64 (2004).

122. FRAGOMEN & BELL, *supra* note 120, § 6:53.

123. *Id.*

124. *Id.*

125. *Id.*; David B. Dornak, *Is SSA's 'No-Match' Letter a Trap for the Unwary?*, ARIZ. EMP. L.

the United States received these letters accounting for a total of approximately 7 million workers.[126]

The reasons for changing the program also grew. Initially, the agency hoped to guarantee that all workers "receive appropriate credit for their wages and social security payments."[127] However, over time, the Social Security Commissioner also cited "national security concerns and problems of identify theft" as cause for the change.[128] According to SSA Senior Financial Executive Norman Goldstein, the change was neither a rash response to the terrorist attacks of September 11, nor intended to target undocumented workers,[129] but rather the execution of an agency plan in the making "for several years to improve the accuracy of reporting that SSA receives from employers."[130]

If the main goal of this policy change was to increase the number of responses from employers, it fell short since it "yielded a substantially low number" of reported corrections in 2002.[131] What the policy change did increase was the cost to the agency—$5.4 million to implement the program and another $600,000 just to send the 944,000 letters.[132] In light of the costs and the relative ineffectiveness of this policy, the SSA decided to again make a number of revisions to its No-Match Program. First, the SSA wanted to reduce the sheer number of letters sent out to employers.[133] Second, it wanted to minimize the unnecessary employee discharges based on misinterpretations of the law.[134] Lastly, it wanted to increase the number of correction responses.[135]

In order to accomplish these goals, the SSA changed the parameters for notifying employers in 2003.[136] Under these new guidelines, no-

LETTER (Lewis and Roca LLP, Phoenix, Ariz.), Sept. 2005, at 3; Zulkie, *supra* note 121, at 64.

126. Zulkie, *supra* note 121, at 64.

127. FitzGerald & Merson, *supra* note 88, at 508.

128. *Id.*

129. *'No-Match' Letters Continue to Cause Disruption*, OR. EMP. L. LETTER (Perkins Coie LLP, Portland, Or.), Jan. 2003, at 3.

130. *Id.*

131. MEHTA ET AL., *supra* note 96, at 10–11 (quoting J. Malone, *Social Security Agency Sharply Reduces Effort to Validate Cards*, COX NEWS SERV., June 11, 2003). The exact number of corrections resulting from the no-match letter mailings is not available because "[t]he SSA does not track the results of its no-match letter campaigns." NAT'L EMPLOYMENT LAW PROJECT, JUSTICE FOR LOW WAGE AND IMMIGRANT WORKER PROJECT: SOCIAL SECURITY ADMINISTRATION "NO-MATCH" LETTERS: TOP 10 TIPS FOR EMPLOYERS, 2, Nov. 2007, *available at* http://www.nelp.org/docUploads/Top_Ten_Tips%20110707.pdf.

132. CONGRESSIONAL RESPONSE REPORT, *supra* note 106, at 11.

133. Fragomen & Bell, *supra* note 143, at *1.

134. *Id.*

135. *Id.*

136. *Id.*

match letters were sent only to employers with eleven or more employees, and who reported no-matches that totaled at least 0.5% of wage items reported on Form W-2 for tax year 2002.[137] In addition, the agency decided to send out no-match letters to employees about two to three weeks before sending letters to the corresponding employers.[138] In order to reduce the employer panic, the SSA lifted the warning of possible IRS penalties for failure to supply correct SSN information.[139]

E. No-Match Letter Guidance

Aside from the content of the letter, there has been little guidance as to how employers should respond when they receive no-match letters.[140] In fact, many of the policy changes mentioned above do not change any of the different possible obligations created by no-match letters, namely those under current immigration, anti-discrimination, and tax law.[141] Unfortunately, employers are often presented with different advice from "government agencies, their accountants, their payroll companies, and even their attorneys" on how to handle a no-match letter.[142]

1. SSA—Social Security Obligations

Ironically, the SSA, sponsor of the No-Match Letter Program, has no enforcement authority with regard to the no-match letters. Since it has no regulatory power to force employers to respond with information corrections, the sixty day response deadline is irrelevant for all practical purposes.[143] The SSA Program Operations Manual Systems provides that "[t]here is no requirement in the Social Security Act obligating an employer to respond to SSA's . . . [n]o-match letter."[144] Not only is the SSA unable to procure corrections, but it is also unable to share the

137. United States Social Security Administration, Overview of Social Security Employer No-Match Letters Process, http://www.ssa.gov/legislation/nomatch2.htm (last visited Mar. 20, 2008).

138. Fragomen, *No-Match Letter Strategies*, *supra* note 110, at *2.

139. *Id.*

140. Dornak, *supra* note 125, at 4; *see* Laura L. Lichter, *Recent Developments in Immigration-Related Employment Issues*, WYO. LAWYER, June 2002, at 18, 23.

141. *See* FRAGOMEN & BELL, *supra* note 120, § 6:53.

142. Dornak, *supra* note 125, at 4.

143. Austin T. Fragomen, Jr. & Steven C. Bell, *Social Security Administration Expands Scope of "No-Match" Program: Practice Pointer*, IMMIGR. BUS. NEWS & COMMENT, Sept. 1, 2002, at *1, *available at* 2002 WL 1949652.

144. Dornak, *supra* note 125, at 4 (internal quotations omitted).

information with government agencies who could create incentives for employers to submit corrections, namely the DHS.[145] From the SSA's point of view, the no-match letter is nothing more than a notification, and creates no real obligation for the employer. As such, the employer has no reason to respond other than its goodwill consideration of its employees' future social security.

2. IRS—Tax Obligations

While the SSA cannot enforce its policy, the IRS can penalize employers for providing incorrect information on wage forms.[146] Since the SSA is required by law to provide the IRS with information on W-2 forms which led to mismatches,[147] the IRS has the ability to impose the fine referenced in the no-match letter.[148] However, the IRS has indicated that it will only impose the proscribed fine, $50 per mismatch, in cases in which the employer was willfully negligent.[149] Further, an IRS program manager for penalties and interest stated that the fine will only be imposed in the "most egregious cases."[150] In addition, this penalty may be waived in cases in which the employer shows that "significant mitigating factors" exist, which justify its failure to provide correct information.[151] For instance, the employer could demonstrate that the failure occurred because of circumstances beyond its control,[152] such as the independent actions of an employee.[153] One such circumstance is if an employer relies, in good faith, on an employee's incorrect SSN, and uses it to prepare Form W-2 for that employee.[154] However, the employer must also prove that it acted in a responsible manner before and after providing the erroneous information.[155] This can be

145. *See Bovbjerg Statement*, *supra* note 106, at 9–10. The SSA does not inform the INS (now ICE) when it corrects a mismatch, but it is obligated to provide the INS with "an annual report of earnings reported on Social Security Numbers assigned for non-work purposes and information relevant to joint SSA-INS investigations," including such issues as fraudulent use of SSNs to obtain work authorization. Fragomen & Bell, *supra* note 143, at *2.

146. 26 U.S.C. § 6721(a)(1) (2000); 26 C.F.R. § 301.6721-1 (2007); Zulkie, *supra* note 121, at 65.

147. 20 C.F.R. § 422.120(a) (2007).

148. Zulkie, *supra* note 121, at 65.

149. § 6724(a); Dornak, *supra* note 125, at 4; *see* 26 C.F.R. §301.6724-1(a) (2007).

150. Dornak, *supra* note 125, at 4–5.

151. § 301.6724-1(a)(2)(i); *see id.* at 5. It is important to note that a good track record with respect to IRS compliance can be treated as a mitigating factor. § 301.6724-1(b)(2).

152. § 301.6724-1(a)(2)(ii).

153. *See* § 301.6724-1(c)(v); Zulkie, *supra* note 121, at 65.

154. § 301.6724-1(c)(6)(ii); Zulkie, *supra* note 121, at 65.

155. § 301.6724-1(a)(2)(ii).

demonstrated by proving the employer properly solicited the employee's SSN at the time of hiring, and relied in good faith on incorrect information its employee provided.[156]

3. ICE (INS)—Immigration Law Obligations

In a letter by William Ho-Gonzalez dated December 16, 1993, the INS (now the DHS) and the Office of Special Counsel ("OSC") took the position that "an employer cannot deduce that its employee is not work authorized merely because it receives" no-match letter.[157] Prior to the amended regulation, immigration law did not specifically oblige the employer to respond or otherwise act pursuant to the letter. Mounting pressure induced by follow-up letters has led many employers to react, often resulting in unintended or undesirable effects.[158]

Interestingly, while the INS did not impose an affirmative obligation to respond to a no-match letter, if an employer took it upon himself to fix the discrepancy, but was unable to resolve it, the legacy INS suggested that such circumstances actually created an affirmative obligation on the employer to re-verify the employee's work authorization status.[159] It indicated that failing to re-verify may lead to a finding of constructive knowledge that an employee lacked work authorization, effectively creating liability and a disincentive for the employer to try and resolve a mismatch.[160] However, the OSC has taken the position that failure to re-verify in these circumstances would not be considered document abuse for anti-discrimination purposes.[161]

On March 1, 2003 the Immigration and Customs Enforcement ("ICE") was granted jurisdiction over the enforcement of federal immigration law, and was given the authority to impose sanctions on employers violating the same.[162] Prior to installment of the ICE, the legacy INS had issued several opinions as guidance on the obligations created by an employer's receipt of a SSA no-match letter.[163] While these statements are not binding on the ICE, they may serve as a starting point for gauging the position of the new agency.[164]

156. *See* § 301.6724-1(c)(6)(ii).
157. Zulkie, *supra* note 121, at 65–66 (internal quotations omitted).
158. Mailman & Yale-Loehr, *supra* note 102, at 3.
159. *See* Zulkie, *supra* note 121, at 66.
160. Fragomen & Bell, *supra* note 110, at *2.
161. *Id.*
162. Zulkie, *supra* note 121, at 48.
163. *See* Fragomen & Bell, *supra* note 110, at *2.
164. *Id.*

(a) David Martin Letter

In a letter dated December 23, 1997, David A. Martin, serving as INS General Counsel, indicated that, as a general rule, a no-match letter alone does not put an employer "on notice" that an employee whose information is referenced therein is unauthorized to work or require the employer to re-verify documents, but that "there may be specific situations in which SSA notice of an SSN irregularity would either cause, or contribute to" a determination that the employer was on notice.[165] Specifically, such a situation may arise when an employee provides an invalid SSN to its employer during the work verification process.[166] The SSA provides the following definition of a valid SSN to all employers:

> A valid SSN must have a total of nine digits. The first three digits are referred to as the area, the next two as the group, and the last four as the serial. No SSNs with a 000 area number, or an area number in the 800 or 900 series, have been issued. Also, no SSNs with a 00 group or 0000 serial number have been issued.[167]

If an employee provides a SSN violating the above-mentioned definition and is in fact unauthorized, the employer's failure to follow up and re-verify may be found to satisfy the knowledge requirement of IRCA and expose the employer to the penalties associated with hiring an unauthorized alien.[168]

(b) Paul Virtue Letter

Approximately two years later the General Counsel of the INS, Paul W. Virtue, provided further guidance on the implications of no-match letters.[169] He began by reiterating the norm established by his predecessor, emphatically stating that a no-match letter alone does not put the employer on notice as to the work authorization status of any

165. Letter from David A. Martin, Gen.l Counsel, Immigration & Naturalization Serv., to Bruce R. Larson, Esq. (Dec. 23, 1997) (on file with The Office of the General Counsel) [hereinafter *David Martin Letter*]; Zulkie, *supra* note 121, at 66.

166. *INS Issues Guidance on Improperly Filed §245(I) Adjustment Applications 75* INTERPRETER RELEASES 203, 204 (Feb. 9, 1998); *David Martin Letter*, *supra* note 165.

167. *David Martin Letter*, *supra* note 165.

168. *Id.*

169. Letter from Paul W. Virtue, Gen. Counsel, Immigration & Naturalization Serv. (Apr. 12, 1999) (on file with The Office of the General Counsel) [hereinafter *Paul Virtue Letter*].

employee mentioned therein.[170] At the same time, he indicated that "actual or constructive knowledge of unauthorized status is a case-by-case determination."[171] By giving an example of a newly-married employee who failed to report her name change to the SSA, he points out that name discrepancies reported by no-match letters may be a product of circumstances other than the fraudulent procurement of employment by an illegal alien.[172]

While initially stressing that employers should not treat no-match letters as an indication that an employee is necessarily unauthorized to work, Mr. Virtue cautions that "it would be equally incorrect for an employer to assume that in all cases it may safely ignore any possible INA relevance or consequences of SSA discrepancies."[173] He notes that a no-match letter is a relevant factor in a "totality of the circumstances" analysis, wherein the existence of an employer's actual or constructive knowledge regarding his employee's work authorization status is determined.[174] Mr. Virtue illustrates this point through an example in which an employer receives a "tip" from one employee regarding the unauthorized status of another employee.[175] In this example, Mr. Virtue notes that the receipt of a no-match letter listing that employee's information, along with the previous "tip," would contribute to a "totality of the circumstances" determination that the employer had either actual or constructive knowledge of the employee's unauthorized status.[176]

Further, both opinion letters also addressed the implications of follow-up activity that an employer may take in order fix a discrepancy that is brought to an employer's attention via a no-match letter.[177] First, they clearly noted that follow-up activity "is not required by the INA (nor is it prohibited by it), [although] the knowledge obtained by an employer through this process may have INA implications."[178] Three situations, all with differing immigration law implications, may arise when an employer confronts an employee about a no-match discrepancy. First, the employee may admit that he is in fact unauthorized to work, in which case the employer is considered to have actual knowledge of the

170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.*; *David Martin Letter*, *supra* note 165.
178. *See Paul Virtue Letter*, *supra* note 169.

employee's lack of work authorization and will stand liable under current immigration law if the employment relationship is continued.[179] Second, the employee may report a different name or SSN, in which case the employer is required to follow the guidelines for processing and recording such a correction.[180] Lastly, if no adequate explanation is proffered for the discrepancy, the letter implies that the employer becomes obligated to re-verify the employee's work status.[181] Taking appropriate steps after such a re-verification may include termination of employment in the event that the re-verification process could not be completed satisfactorily.[182]

4. DOJ—Anti-Discrimination Law Obligations

Employers are obligated to report accurate information to the SSA and ensure that all their employees are legally authorized to work in the United States.[183] Unfortunately, this can conflict with certain anti-discrimination provisions of IRCA which prevent employers from requiring that employees produce specific documents in order to verify or re-verify their employment status.[184]

Zamora v. Elite Logistics, Inc.[185] illustrates this conflict in obligations. The employer in this case rechecked its employees' work documents prior to an immigration investigation.[186] The plaintiff, an employee originally from Mexico, had used a social security card and completed the I-9 documentation as proof of authorization to work for the defendant.[187] Upon discovering that on several occasions someone else had used Mr. Zamora's SSN, the employer demanded that Mr. Zamora provide I-9 documentation again.[188] When Mr. Zamora produced documents that his employer should have found satisfactory, including a naturalization certificate, the employer refused to accept such documents until he produced proof that the SSN he had previously

179. *Id.*

180. *Id.*; *see supra* Part IV.E.3.b (discussing David Martin's Letter).

181. *See Paul Virtue Letter*, *supra* note 169.

182. *Id.*

183. *See supra* pp. 6–9 (discussing IRCA obligations).

184. 8 U.S.C. § 1324b(a)(1), (6) (2000); Jeffrey Van Doren, *'Safe Harbor' Provision Proposed for Social Security No-Match Letters*, VA. EMP. L. LETTER (LeClair Ryan, Richmond, Va.), Aug. 2006, at 3.

185. 478 F.3d 1160 (10th Cir. 2007) (en banc).

186. *Id.* at 1162–63.

187. *Id.* at 1162.

188. *Id.* at 1163.

provided was, in fact, his.[189] Mr. Zamora furnished the request proof, but was nonetheless fired when he requested an apology before returning to work.[190] Claiming race and national origin discrimination, Mr. Zamora sued for wrongful discharge.[191] The Tenth Circuit found that Mr. Zamora had produced enough evidence to show that his employer's actions were motivated, at least in part, by the plaintiff's Mexican heritage and sent the case to a jury, but the decision was ultimately vacated after a rehearing en banc, and the court affirmed the district court's holding granting summary judgment to Mr. Zamora's employer.[192]

This case portrays the concerns and obligations typically faced by employers in their attempts to maneuver through the murky waters of immigration and anti-discrimination laws.[193] In the above case, failing to take any steps to resolve Mr. Zamora's SSN discrepancy could have exposed Elite Logistics to liability under IRCA if the company's I-9 forms were audited by the ICE.[194] On the other hand, Elite Logistics' attempts to comply with immigration law led to litigation regarding whether its actions violated any anti-discrimination laws.[195] Authoritative and clear guidance on the interplay of anti-discrimination laws and work-site immigration obligations would have likely helped Elite Logistics avoid this situation.

V. THE NO-MATCH RULE PROPOSAL & THE INTERIM "MURKY" SITUATION NECESSITATING FINALITY

Due to the contradictory and confusing nature of the present law, employers are left to using their best judgment to try to simultaneously comply with federal immigration and anti-discrimination law, meanwhile fearing that they may face criminal penalties for failing to do so. As noted in a Legislative and Regulatory Update by the Information Systems Security Association ("ISSA"):

189. *Id.* at 1164.

190. *Id.*

191. *Id.*

192. *Id.* at 1165.

193. *See id. passim*; *see also*, Roger Tsai, *The Immigration Crackdown on Employers: The Government Steps Up Work Site Enforcement*, 16 BUS. L. TODAY, July–Aug. 2007, at 45, 45–46 (discussing the problems encountered by Swift & Company and other employers "trying to abide by the law" in the face of the currently problematic system).

194. *See Zamora*, 478 F.3d at 1162–63.

195. *Id.* at 1164.

> [i]n today's unsettled immigration arena, employers need to make sure that they maintain a balance between the need to take every reasonable action to ensure that they do not hire illegal aliens and the need to operate in a manner that will not result in criminal prosecution for violating federal and state law.[196]

Thus, in recognition of this dilemma, on June 14, 2006 the DHS issued a proposal that would amend the regulatory definition of the term "knowing" an essential element the government must prove in order to establish an employer is employing an illegal alien in violation of IRCA.[197] Specifically, the amended regulation would explicitly cover a situation in which the employer receives a no-match letter from the SSA and proceeds to disregard it.[198] This proposal signaled the first definitive guideline for employers in determining the legal significance of a no-match letter, and an appropriate response thereto.

The DHS proposal also provided a safe-harbor procedure for employers in receipt of a no-match letter: if an employer "take[s] reasonable steps" to resolve the discrepancy within fourteen days of receiving the no-match letter, the employer will avoid any risk of the DHS finding he had "constructive knowledge that the employee was not authorized to work in the United States."[199]

Since its proposal, the regulation created a "kind of voluntary corporate compliance with a rule that [did not] yet formally exist."[200] The extended period during which the rule was in proposal form further added to the confusion regarding no-match letters, precariously undermining the very purpose for the regulation to offer definitive guidance.[201] Despite not being formally promulgated, many employers implemented its requirements as if the rule was in effect.[202] In reality, the regulation was not in effect nor was it even certain that it would go into effect in its proposed form, if at all.[203]

196. *Receiving a No-Match Letter…What's an Employer to do?*, ISSA LEGIS. & REG. UPDATE (Info. Systems Security Ass'n), Nov.–Dec. 2006, [hereinafter *ISSA Update*], *available at* http://dvnewsmaker.digivis.com/issa/index.jsp?pageType=3&layoutType=1&id=2375&articleObjectName=com.issa.article.Article.

197. *See* Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 71 Fed. Reg. 34,281, 34,281–82 (proposed June 14, 2006) (to be codified at 8. C.F.R. pt. 274a).

198. *See id.* at 34,282.

199. *Id.*

200. Lee Sustar, *Feds Greenlight Firing of Immigrant Workers: Bosses Take Aim at the Undocumented*, COUNTERPUNCH, Sept. 15, 2006, http://www.counterpunch.org/sustar09152006.html.

201. *Id.*

202. *Id.*

203. Int'l Sanitary Supply Ass'n, *Receiving a No-Match Letter… What's an Employer to do?*,

During this period, legal experts analyzing the issue remained divided on the implication of no-match letters in light of the newly proposed rule. For example, Marielena Hincapié, program director at the National Immigration Law Center, argued that firings based on no-match letters may "run[] afoul of current law."[204] She indicated that employers who complied and enforced the rule in its proposed form could be found liable for discriminatory and unfair labor practices.[205] While others, like attorney Cynthia Lange, disagreed, noting "the law cuts the other way."[206] She explained that businesses that do not act upon no-match letters may find themselves a target of the DHS.[207]

Even prior to finalization of this rule, many corporate employment law firms advised their clients that they can, and should, regard no-match letters as indicative of an employee's lack of work authorization, since many believe this proposed regulation to be the first of many efforts from the DHS to step-up worksite immigration enforcement.[208] Certain members of the legal profession noted that regardless of whether the regulation is ever implemented, "ICE [expects] that employers take immediate steps to address these mismatch letters."[209] A Milwaukee firm recognized that this change in sentiment towards enforcement and compliance is occurring unbeknownst to most employers and as such the firm advised "[e]mployers should revisit how they are addressing mismatch letters in order to ensure that they limit the possibility of liability for knowingly hiring or retaining employees that are referenced in mismatch letters."[210] A Chicago attorney suggested that this compliance policy has been "given the green light" by the DHS even without the formal adoption of the proposed rule, effectively creating a situation where the "DHS is operating outside the law."[211]

The confusion and difficulties associated with abiding by the regulation were evident even before the rule formally went into effect.

ISSA LEGISLATIVE AND REGULATORY UPDATE, Nov.–Dec. 2006, *available at* http://ww.issa.com/?m=publications&event=issue&id=34&pub_id=8&page=1&lg= (follow "Receiving a No-Match Letter… What's an Employer to do?" hyperlink).

204. Mischa Gaus, *Employers Use 'No-Match' Social Security Letters to Fire Immigrants*, THE NEW STANDARD, Nov. 8, 2006, *available at* http://newstandardnews.net/content/index.cfm/items/3861.

205. *Id.*

206. *Id.* Ms. Lange is a partner at Fragomen, Del Rey, Bernsen & Loewy, LLP, which represents corporations in immigration cases. *Id.*

207. *Id.*

208. *Id.*

209. Sustar, *supra* note 200.

210. *Id.*

211. *Id.*

A. Smithfield Case

In North Carolina, the Smithfield Food plant, the largest hog-slaughtering facility in the world, fired several dozen employees citing their undocumented status as cause.[212] Prior to the on the spot firings, the company sent "no-match" letters to hundreds of employees giving them a fourteen day response deadline.[213] On November 16, 2006, some one thousand plant workers walked out in response.[214] The next day the company agreed to extend the time for employees to respond to the company issued no-match letters and rehired the laid off employees.[215]

B. Cintas Case

Cintas Corp. received no-match letters regarding employment discrepancies for over four hundred employees.[216] In response, Cintas Corp. sent out letters informing their employees that they would be suspended indefinitely if they were unable to resolve their SSN discrepancy within a sixty day deadline.[217] Cintas vice-president for corporate communications, recognizing "a legal obligation to make sure all employees are legally authorized to work in the US," stated that all workers with mismatches were notified.[218] In a warning letter to Cintas, Rep. Bennie Thompson's (D-MS) office stated that the company "faces criminal charges if they fire workers who have received a no-match letter and are unable to resolve the social security number discrepancy."[219]

C. Applebee's Case

Apple Illinois LLC operates thirty-five Illinois restaurants which are part of the Applebee's franchise.[220] The company received a SSA no-match letter regarding two of its employees at different restaurants in

212. Seth Dellinger, *Workers Walk Out at N. Carolina Meat Plant: 1,000 Protest 'No-Match' Letters, Firing Threats*, THE MILITANT, Dec. 4, 2006, *available at* http://www.themilitant.com/2006/7046/704601.html.

213. *Id.*

214. *Id.*

215. *Id.*

216. *See* Gaus, *supra* note 204; ISSA Update, *supra* note 196.

217. Gaus, *supra* note 204; ISSA Update, *supra* note 196.

218. Gaus, *supra* note 204.

219. ISSA Update, *supra* note 196.

220. Sustar, *supra* note 200.

the Chicago suburbs.[221] According to employee Jorge Lopez, two days after being notified about a "problem" with his SSN, he was fired from his kitchen manager position.[222] The company also dismissed Juan Oropez at another restaurant.[223] Following the dismissal, both men, with the assistance of the Chicago Workers Collaborative, filed a complaint with the EEOC claiming the discharge was based on national origin discrimination.[224] Six other Applebee's kitchen managers fired for mismatches were rehired after the charges were filled.[225]

After the dismissal, Lopez began working for another suburban Chicago restaurant at a lower wage.[226] His situation is a typical example of "churning" in the immigrant labor market.[227] Tim Bell, executive director of the Chicago Workers Collaborative, stated that "[i]f you fire people for no-match . . . we're going to put your company under the microscope."[228] Moreover, local immigrant rights support groups, by leveraging their buying power, called for a boycott of Applebee's hoping to force change.[229]

Cases such as these illustrated the need for a final rule that employers could look to in regulating their workforce. Further, they demonstrated the need for revision of the proposal in order to effectuate the intended purpose.

VI. SUPPORT AND RATIONALE FOR THE CHANGE

The reasons for the rule implementation, include, among other things, making employers more accountable for investigating workers with invalid SSNs, strengthening enforcement of immigration law in the workplace, and most importantly, providing employers with guidance on how to handle receipt of a no-match letter.[230] Even those who have spoken out in support of the proposal recognized a clear need for

221. *Id.*

222. Gaus, *supra* note 204; *see* Sustar, *supra* note 200.

223. *See* Sustar, *supra* note 200.

224. *See* Gaus, *supra* note 204; Sustar, *supra* note 200.

225. *See* Gaus, *supra* note 204.

226. *Id.*

227. *See id.*; Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. 45, 611, 45, 621 (Aug. 15, 2007) (to be codified at 8 C.F.R. pt. 274a).

228. Gaus, *supra* note 204.

229. Evelyn Holmes, *Immigrant Rights Group Calls for Boycott*, ABC7CHICAGO.COM, Sept. 30, 2006, http://abclocal.go.com/wls/story?section=local&id=4615520.

230. *See* Cindy Gonzalez, *Employers Face Tighter Hiring Rules: Homeland Security Aims to Curb Employment of Illegal Immigrants by Penalizing Documentation Mismatches*, OMAHA WORLD-HERALD (Nebraska), July 10, 2006, at 01A.

defining what exactly an employer can and cannot do in order to abide by the extensive legal obligations implicated by receipt of a no-match letter.[231] Many supporters believe the new rule will help clarify confusion among employers while also satisfying the need of the government to hold accountable those employers who disregard the law.[232]

DHS Secretary Michael Chertoff took the position that "[t]hese new regulations will give U.S. businesses the necessary tools to increase the likelihood that they are employing workers consistent with our laws"[233] while, simultaneously, helping the DHS "identify and prosecute employers who are blatantly abusing [the] immigration system."[234] Jerrod Agen, a Homeland Security Spokesman, viewed the proposal as one which sought to avoid unnecessary sanctions against employers who have made innocent mistakes, while at the same time aiding the government in making a case against employers who routinely ignore no-match letters because they have knowingly hired illegal immigrants.[235] The proposal can also be viewed as a direct response to DHS's efforts to step up enforcement through increased raids and federal criminal prosecution due to employers' consistent disregard of numerous no-match letters.[236]

Additionally, many supporters believed that a definitive rule will facilitate prosecution of employers who use the excuse that they are not

231. *See id.*

232. "Rep. Tom Osborne, R-Neb., said most business owners aren't trying to employ illegal workers but previously lacked clear guidance on how to respond to no-match letters." *Id.* "Although Sen. Chuck Hagel, R-Neb., supported the new employer guidelines as a move to help businesses comply, he voiced reservations about providing [the DHS with] access to Social Security records." *Id.*

233. David B. Dornak, *DHS Publishes New Proposed Rule Addressing How to Handle an SSA No-Match Letter*, NEV. EMP. L. LETTER (Lewis & Roca LLP, Las Vegas, Nev.), Aug. 2006, at 1.

234. Press Release, Dep't of Homeland Sec., Worksite Enforcement Proposals Announced by DHS, (June 12, 2006) (on file with author) *reprinted in* 83 INTERPRETER RELEASES 1121, 1121. "'Experience tells us that as many as 90 percent of [agricultural] workers do not clear up the mismatch for the simple reason that they are illegal aliens not authorized to be working or even be in this country and who procured their jobs through immigration fraud,' said Michael Chertoff . . . in a statement on [the DHS] Web site." Kevin Bouffard, *Proposal May Pinch Growers*, THE LEDGER ONLINE, July 11, 2006, *available at* http://www.theledger.com/apps/pbcs.dll/article?AID=/20060711/NEWS/607110399&SearchID=73270974540763&template=printart.

235. *See* Gonzalez, *supra* note 230, at 01A.

236. *Proposed Rules Would Require Employer Action for 'No-Match' Letters*, KY. EMP. L. LETTER (Greenebaum Doll & McDonald PLLC, Louisville, Ky.), Sept. 2006, at 1; *see, e.g.*, Roger Tsai, *How to Advise Employers on Immigration Issues*, UTAH B. J., May–June 2007, at 32, 34 ("[S]even managers of IFCO Systems, the largest pallet services company in the country, were arrested on criminal charges for failing to terminate workers after being repeatedly notified that more than half of IFCO's workers had invalid or mismatched Social Security numbers.").

document experts as an out to avoid prosecution under the current law.[237] Steward Baker, the Homeland Security's Assistant Secretary for Policy, indicated "that the purpose of the regulation is to discourage the use of false social security numbers and partner with employers to deny work to unauthorized immigrants."[238] The proposed regulation was created in response to ICE's determination that simple penalties are not an effective deterrent in worksite enforcement.[239] In fact, the ICE explicitly stated that it was "looking at ways to bring significant criminal charges to those businesses engaged in hiring illegal aliens."[240] Specifically, the ICE was referring to employers who had consistently ignored the no-match letters, using the excuse that they could not decipher between a fake social security card and a real one.[241]

Another factor cited in support of this new regulation was the speed with which the change could take place.[242] Although granting the DHS access to social security data, or any other comprehensive immigration solution, would require congressional action, the proposal could go into effect upon final agency approval by the DHS.[243] In the summer of 2007, immigration bills proposed by the House and the Senate evidenced Congress's unified belief that "something need[ed] to be done about illegal immigration."[244] Ultimately, however, Congress "hit an impasse in its debate over whether and how to crack down on illegal immigration."[245] Despite this legislative stall, the DHS and its enforcement arm, the ICE, engaged in raids of worksites employing workers unauthorized for employment.[246] So, while Michael Chertoff agreed with many "[m]idlands lawmakers," that comprehensive immigration legislation may be a more appropriate solution, he decisively took action into his own hands.[247]

237. *See* Bouffard, *supra* note 234.

238. Gaus, *supra* note 204.

239. Bouffard, *supra* note 234.

240. *Id.*

241. *See id.*

242. *See* Gonzalez, *supra* note 230, at 01A.

243. *Id.*

244. Rebecca Riddick, *Nervous Employers Re-Examine Practices in Wake of Immigration Raids*, LAW.COM, Sept. 15, 2006, http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1158224722634.

245. *Id.*; *see Immigration: Senate's Immigration Bill Blocked for a Second Time*, CCH BUS. & CORP. COMPLIANCE, July 30, 2007, http://hr.cch.com/news/employment/070307a.asp.

246. Riddick, *supra* note 244. ICE has raided IFCO Systems North America and Midwest Airport Services. *Id.*

247. Secretary Chertoff notes that fixing the problem of illegal immigration requires a comprehensive solution that must include a temporary worker program, stating, '[a] temporary worker program would replace illegal workers with lawful taxpayers, help us

VII. THE FINAL REGULATION

Thirteen months since its initial proposal and after months of negotiations between immigration and SSA officials,[248] the DHS, for better or for worse, published the final rule in the Federal Register.[249] Along with a final version, materially different from the proposed version, Michael Chertoff attached a summary of the rule which attempts to explain how the revised rule resolves the concerns articulated by its opposition.[250] The initial response by experts suggested that the final rule "represented a major tightening of the immigration enforcement system."[251]

While members of the Bush Administration who support the proposal have pointed out its many goals and advantages, many feel that those same goals and supposed advantages will only add to the ever widening and complex immigration problems that face our country today.[252] After its proposal in June, a large number of political and economic groups and organizations, as well as many businesses formally submitted over five thousand comments to the DHS and spoke out publicly in opposition to the change.[253]

A. The Regulatory Text

The final version places the same legal significance on a no-match letter as the proposal. The regulation maintains that constructive knowledge may be inferred from "certain facts and circumstances."[254] One such situation explicitly provided by the regulation remains the failure to "take reasonable steps" upon receipt of a "written notice to the

> hold employers accountable, and let us know who is in our country and why they are here.'

Press Release, Dep't of Homeland Sec. *supra* note 234 at 1121–22; *cf.* Gonzalez, *supra* note 230, at 01A.

248. *See* Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. 45,611, 45,611 (Aug. 15, 2007) (to be codified at 8 C.F.R. pt. 274a); *see* Preston, *Government Crackdown*, *supra* note 2, at A1.

249. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. at 45,611.

250. *Id.* (explaining in the Table of Contents how the revised rule resolves concerns by the opposition).

251. Preston, *Government Crackdown*, *supra* note 2, at A1.

252. *E.g.*, *id.*

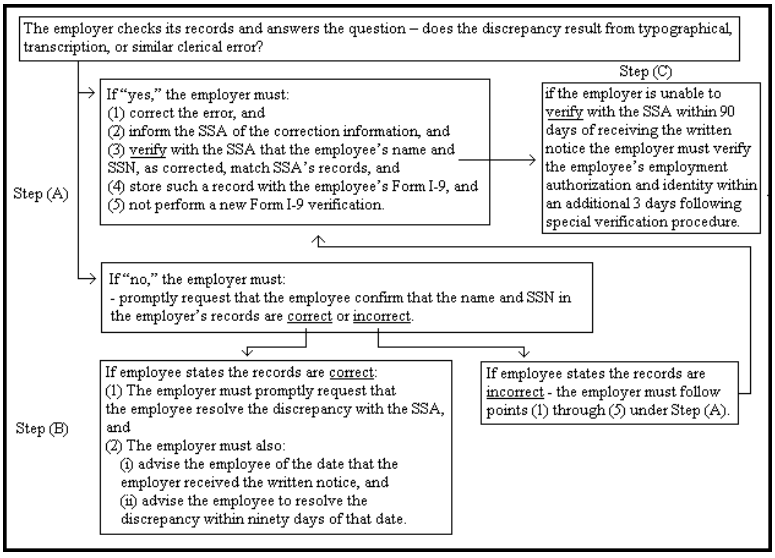
253. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. at 45,611.

254. *Id.* at 45, 615.

employer from the Social Security Administration reporting earning on a Form W-2 that employee's names and corresponding social security account numbers fail to match Social Security Administration records."[255] However, the regulation is clear to note, that such a situation is only a factor in the totality of the circumstance test in determining whether an employer has "constructive knowledge that an employee is an unauthorized alien."[256] Further, the phrase "reasonable steps" mentioned in this section refers specifically to the safe-harbor procedure defined in the second section of the regulation.[257]

In the second section, the regulation provides that "receipt of the written notice will . . . not be used as evidence of constructive knowledge—if the employer takes" certain "reasonable steps" (cross-referencing the "reasonable steps" mentioned in the first section).[258] These reasonable steps are explicitly mapped out in successive paragraphs of the regulation (see Table Two).[259]

Table 2—Reasonable Steps



While the summary and public commentary, in describing the ninety day safe-harbor period, has always assumed that a ninety day

255. *Id.* at 45,623–24.
256. *Id.* at 45,623.
257. *Id.* at 45,618.
258. *Id.* at 45,624.
259. *Id.*

period is imposed as a limit on all safe-harbor steps, a careful reading of the regulatory language suggests otherwise.[260] The lack of clarity as to time limits is further confused by the asymmetric use of the "promptness" language in the text.[261] The reader is advised to reference the table two above due to the complex and weighty nature of the forthcoming analysis.

Steps (A) and (B) in the safe-harbor procedure involve the employer. The employer must first determine whether the discrepancy results from "typographical, transcription, or similar clerical error."[262] If the employer determines the discrepancy is due to an error in its own records the employer must (1) correct the error, (2) inform the Social Security Administration of the correct information (in accordance with the written notice's instructions, if any), (3) "verify with the Social Security Administration that the employee's name and social security account number, as corrected, match Social Security Administration records," (4) store such a record with the employee's Form I-9(s) in accordance with 8 C.F.R. § 274a.2(b), and (5) not perform a new Form I-9 verification.[263] In order to qualify for safe-harbor "[t]he employer must complete these steps within thirty days of receiving the written notice."[264]

Step (B) deals with cases where the "employer determines . . . the discrepancy is not due to an error in its own records."[265] If this is the case, the employer must *promptly* request that the employee confirm that the name and SSN in the employer's records are correct.[266] If the employee confirms that the employer's records are incorrect, the employer must complete points (1) through (5) outlined in Step (A) (see above).[267] If, on the other hand, the employee states that the records are correct, the employer must *promptly* ask the employee resolve the discrepancy in accordance with any instructions provided in the notice.[268] The employer must also "advise the employee of the date that the employer received the written notice . . . and advise the employee to resolve the discrepancy . . . within ninety days . . ." of that date.[269]

260. *Id.* at 45,613.
261. *Id.*
262. *Id.*
263. *Id.* at 45,613, 45,619.
264. *Id.* at 45,624.
265. *Id.*
266. *Id.*
267. *Id.*
268. *Id.*
269. *Id.*

Step (B) does not explicitly contain a specific time frame within which the employer must perform its requirements. It does not explicitly state the first day an employer may take those second steps or a cut-off point beyond which taking such steps will not qualify the employer for the safe-harbor. A timeframe may be indirectly inferred from the language of the regulation. The regulatory summary states "[t]he rule contemplates that employees will be able to correct the SSA's records within ninety days . . . . [but i]f the employee . . . takes no action during those ninety days to resolve the SSA notice, employers wishing to receive the benefits of the safe harbor must proceed with the special Form I-9 verification procedure . . . ," presumably at the end of the ninety day time period.[270] However, the text of the regulation does not explicitly impose this or any other deadlines for the employer to complete its obligations in step (B). This is unlike step (A) which provides the employer thirty days for completion.[271]

When an employer seeks to take the steps outlined in step (B) they encounter a "promptness requirement" evidenced by the word "promptly" appearing twice in that paragraph of the regulation.[272] Thus to satisfy this requirement, the employer, in requesting confirmation, must first "promptly" request the employee confirm that the information in the employer's records is correct.[273] If the employee confirms that the employer's records are correct, the employer must then make a "prompt" request of the employee to resolve the discrepancy with the SSA.[274] Interestingly, while the word "promptly" appears in those first two sentences of step (B), it is absent in the last sentence of step (B).[275] The last sentence of step (B) obligates the employer (i) to advise the employee of the date the employer received the no-match letter and (ii) to advise the employee that he or she has ninety days to resolve the discrepancy.[276] The principle of implied exclusion[277] suggests that parts

270. *Id.* at 45,619.
271. *Id.* at 45,624.
272. *Id.*
273. *Id.*
274. *Id.*
275. *Id.*
276. *Id.*
277. If one section of a statute or regulation contains a material term and that term does not appear in another related section of the statute, the presumption is that the legislature intended not to use that term in the second section. *See* Russello v. United States, 464 U.S. 16, 23 (1983) ([W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972))).

(i) and (ii), found in the last sentence of step (B), need not be performed with the "promptness" required of the obligations in the first two sentences of step (B).

Further, with regards to defining promptness, the summary suggests that none of the elements of step (B) must "occur within thirty days, [however] employers must nevertheless act within reasonable time frame in order to satisfy this promptness requirement."[278] It notes that "[i]t is also important for employers to notify employees promptly if further action is required." [279] This provides employees with a reasonable amount of time to contact the appropriate agency, so that the agency can correct its records within the ninety day time frame.[280] Interestingly, the language of the regulation never imposes a ninety day time frame on any agency. The regulation merely requires that the employer advise the employee to resolve the discrepancy with the SSA within ninety days, but does not provide any further steps requiring the employer to check whether the employee actually resolved that discrepancy within the ninety day period, or at all.[281] In fact, the regulation does not provide any further steps the employer must take after it makes a "request" with the employee to contact the SSA.[282]

Perhaps if the last provision of step (B) required the employer to "verify" with the SSA that the employer resolved the discrepancy then step (C) would apply by reference; but no such provision is present. The only ninety day time frame imposed upon the employer is mentioned in step (C). The paragraph states that,

> [i]f the employer is unable to *verify* with the Social Security Administration within ninety days of receiving the written notice that the employee's name and social security account number matches the Social Security Administration's records, the employer must again verify the employee's employment authorization and identity within an additional three days by following the verification procedure specified in [a subsequent paragraph].[283]

This last provision appears to provide a ninety day limit up to

278. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. 45,611, 45,617 (Aug. 15, 2007) (to be codified at 8 C.F.R. pt. 274a).

279. *Id.*

280. *Id.*

281. *Id.* at 45,624.

282. *See id.*

283. *Id.* (emphasis added).

which point an employer may "verify" with the SSA.[284] But, the requirement to verify only appears in one other section of the entire regulation, specifically in step (A) element (3), which requires the employer "verify" with the SSA that the employee's corrected name and SSN matches the SSA's records.[285] The employer reaches step (A) element (3) in two situations. Under step (A), if the employee determines the discrepancy is due to an error in its own records or under step (B), if the employee asked to confirm the employer's records states that they are incorrect.[286] In both of these situations the employer is eventually required to "verify" with the SSA.[287] However, under step (B), if the employee asked to confirm the employer's records states that they are correct, no obligation to "verify" with the SSA is required of the employer.[288] The employer must merely request that the employee resolve the discrepancy with the SSA, advise the employee of the receipt date, and advise the employee to resolve within ninety days from the receipt date.[289] No further obligation on the employer is imposed to check whether its request and advice to the employee was in fact followed. As such, the employee may do nothing upon receiving such a request from his or her employer knowing full well that the employer has no obligation to check whether it has met the request and followed the advice.

Situations may arise where the employer reaches Step (A) element (3) that requires the employer to "verify" with the SSA that the employee's corrected name and SSN match the SSA's records but is never able to successfully make such verification within the ninety days proscribed by Step (C). According to Step (C), the employer must proceed to the "special verification procedure" outlined in section (*l*)(2)(iii) of the final rule.[290]

In order to complete this alternative verification procedure, the employer must follow the standard verification procedures, "as if the employee were newly hired," outlined in 8 C.F.R. § 274a.2(a) and (b) except for three qualifications.[291] First, the new Form I-9 must be complete within ninety-three days of the employer's receipt of the no-

284. *See id.*
285. *Id.*
286. *See id.*
287. *See id.*
288. *See id.*
289. *Id.*
290. *Id.*
291. *Id.*

match letter.[292] Second, the "employer may not accept any document . . . that contains a disputed social security account number" as referenced in the no-match letter.[293] Third, the "employee must present a document that contains a photograph in order to establish identity or both identity and employment authorization."[294] The newly complete Form I-9, just as the original completed upon hire, must also be retained in accordance with 8 C.F.R. § 274a.2(b).[295]

B. Concerns with the Final Rule

1. Promulgation Authority— Stepping on the Toes of the SSA, IRS, and DOJ

A major procedural concern with the final rule is that it empowers the DHS to use the SSA in ways that exceed the limited statutory authority delegated by Congress.[296] Attempting to deal with this concern as well as a plethora of others, the DHS attached a summary to the final rule.[297] In that summary the DHS states that it has authority to investigate and pursue sanctions against employers for violations of immigration law.[298] It describes the final rule as a "limit" on its discretion to investigate and pursue sanctions.[299] Specifically, it argues the rule would prevent the DHS from using no-match letters as evidence of constructive knowledge against an employer, as long as they followed the safe-harbor procedure.[300] As such, the DHS believes the rule would not affect the authority of other administrative agencies, such as the SSA, IRS or DOJ, with respect to no-match letters.[301]

Unfortunately, this logic disregards the incentive the rule creates for employers. If an employer, in receipt of a no-match letter, follows the "reasonable steps" the rule outlines, they can limit DHS's ability to use

292. *Id.*
293. *Id.*
294. *Id.*
295. *Id.*; 8 C.F.R. § 274a.2(b) (2008).
296. *See* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) (found regulatory power is "limited to the authority delegated by Congress").
297. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. 45,611, 45,611 (Aug. 15, 2007) (to be codified at 8 C.F.R. pt. 274a).
298. *See id.*
299. *Id.* at 45,614.
300. *Id.*
301. *Id.*

that letter in prosecution.[302] Interestingly, many of these "reasonable steps," such as the employer "verify[ing] with the Social Security Administration," as detailed in the final rule, are similar to those suggested in the tax year 2006 Social Security Sample No-Match Letter.[303] Thus, an employer would be performing many of the same steps it would take if it followed the suggestions made in the SSA no-match letter. Originally, the incentive for employers to correct the discrepancy was simply to ensure their employees' social security accounts were credited; however now, employers would also take these "reasonable steps" in order to limit their liability under IRCA.[304]

The final rule would cause the tax report information underlying the no-match letters to be used not only for managing the Social Security Program but also enforcement of immigration law; a result contrary to Congressional intent.[305] Congress authorized the SSA to use tax reports containing information such as SSNs on employee W-2 forms, for the sole purpose of administering the Social Security Program.[306] No-match letters, which rely on this information, to date have been used by the SSA in furtherance of that purpose; specifically to correct the SSA's records.[307] However, this new rule would create an unintended new purpose to the SSA no-match letter, one that the SSA would have no authority to effectuate—the use of their database for immigration law enforcement.[308] Congress has consistently denied attempts to use tax reports for immigration purposes.[309] While an employer taking these "reasonable steps" would be effectuating the SSA's purpose in sending out the no-match letters, it would unfortunately also be furthering DHS's

302. *Id.* at 45,624.

303. *Compare* Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. 45,611, 45,624 (Aug. 15, 2007) (to be codified at 8 C.F.R. pt. 274a) ("If the employee confirms that its records are correct, the employer must promptly request that the employee resolve the discrepancy with the Social Security Administration . . . ."), *with* SOC. SEC. ADMIN., RETIREMENT, SURVIVORS AND DISABILITY INSURANCE: EMPLOYER CORRECTION REQUEST 5 (2006), *available at* http://www.ice.gov/doclib/partners/employers/safe_harbor/SSAsampleLetter.pdf ("If your records match the information on the employee's Social Security card, have the employee contact any Social Security office to resolve the issue.").

304. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. at 45,614, 45,624.

305. *See* Memorandum in Support of Motion for Temporary Restraining Order & Preliminary Injunction at 2–3, AFL-CIO v. Chertoff, No. 07-CV-4472 (N.D. Cal. Aug. 29, 2007), 2007 WL 2915304.

306. *See id.* at 3.

307. *See supra* Part IV.

308. *See* Memorandum in Support of Motion for Temporary Restraining Order & Preliminary Injunction, *supra* note 305, at 3.

309. *See id.*

immigration law enforcement efforts.

2. Timetable Issues and Small Business

Since the rule was initially proposed in 2006, the issue of time frames has been a major concern for employers and employees alike.[310] As such, the final rule saw an expansion of the sixty-three day timetable proscribed in the proposed version to a ninety-three day period in the final rule.[311] While the DHS believes the revised period "provides sufficient time" for employers to take "reasonable steps" the SSA has already voiced its concern that even the new timeframe may not be sufficient for "the most difficult cases."[312] In defense, the DHS recognizes situations may arise where the employer may not be able to take advantage of the safe-harbor procedures, and they insist that this rule is only "an option, [and] not a requirement" that all employers must follow.[313] As such, if certain employers are not able to complete the safe-harbor procedure within the outlined timeframe they merely forgo the benefit it provides rather than failing to meet a specific legal obligation.[314]

Neither employers nor employees are convinced, while employees cite the burden of following the safe-harbor steps should the employer choose to enforce them as policy;[315] employers worry about disruptions in their workforce.[316] In fact, there are documented cases where a no-match discrepancy took over four months to resolve.[317] Naturally, delays will only increase as the volume of employers looking to gain "safe-harbor" increases. Thus, the mere receipt of the letter and short deadline may lead some employers to terminate employees in fear of

310. *See* Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. 45, 611, 45,616–17 (Aug. 15, 2007) (to be codified at 8 C.F.R. pt. 274a).

311. *Compare* Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 71 Fed. Reg. 34,281, 34,283 (proposed June 14, 2006) (to be codified at 8 C.F.R. pt. 274a) (sixty-three days), *with* Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. at 45617 (ninety-three days).

312. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. at 45,616–17.

313. *Id.* at 45617.

314. *Id.*

315. *See* Memorandum in Support of Motion for Temporary Restraining Order & Preliminary Injunction, *supra* note 305, at 3 (discussing employees taking off from work without pay, visits to SSA field office, SSA capacity limitations, time necessary to procure additional documents, i.e. birth certificates and other necessary documentation).

316. *Id.* at 11 (discussing Nik Theodore's empirical evidence).

317. *Id.* at 12.

liability; forgoing an attempt to reach safe-harbor altogether.[318] Other employers, in attempting to make a good-faith effort at achieving safe-harbor, may nonetheless resort to mass firings as the ninety day deadline passes and employers are faced with the daunting task of re-verifying employees who are unable to proffer new documentation.

Further, the specified time-frame is especially unreasonable and overly burdensome for employers who receive a no-match letter with a disproportionately large amount of mismatches. For those employers, the procedure that it would have to go through in order to identify all the listed employees and then take the required "reasonable steps" to resolve the discrepancy within the time allotted would result in an undue stress on that employer's resources. For example, the employer would have to gather and compare SSNs with payroll records, which oftentimes involves a third party preparer.[319] This is a particularly burdensome task for industries with high turnover rates such as agriculture, manufacturing facilities, hotels and restaurants which also tend to have a disproportionate amount of immigrant workers.[320] Further, in the course of these safe-harbor procedures, many of the documents needed to verify an employee's SSN, such as marriage certificates and birth certificates, may not become available within the proscribed ninety day period, making achievement of safe harbor by an employer even more unrealistic.[321] In fact, in the event that the employee has misplaced their social security card and needs a new one, receiving a new social security card may, in itself, take longer than ninety-three days.[322]

Lastly, the proposed regulation and its accompanying timeframe did not give employers enough time to rehire and retrain new employees in the event that many of its employees were unauthorized workers and could no longer be employed.[323] For example, the American Immigration Lawyers Association ("AILA") set forth this dilemma where "a 60-employee company facing a 40 item no-match letter might be able to handle the paperwork challenge at the expense of much other business but could be shut down by the possible loss of almost an entire workforce."[324] Despite the additional thirty days added by the final rule, many of these concerns still exist and have failed to be addressed.

318. *Id.* at 3–4.
319. Comment—AILA American Immigration Lawyers Ass'n, *supra* note 2, at 6.
320. *Id.* at 6–7.
321. *Id.* at 7.
322. *Id.*
323. *Id.* at 11.
324. *Id.*

This problem is magnified by the extraordinary costs and paperwork this rule will impose on the private sector; especially small businesses that do not have the resources to efficiently follow the safe harbor steps. When the DHS set forth the procedure an employer would have to go through when in receipt of a no-match letter, AILA predicted that it would cost the private sector at least $100 million per year.[325] This number takes into account the amount of time a company's human resources department will have to spend on addressing these problems and the lost opportunity costs that the company will be sacrificing by neglecting other important issues.[326] In addition, companies will face substantial costs in rehiring, retraining and reequipping a workforce in the light of a potential mass exodus of an employer's workforce.[327]

There are many who argue that for those employers who will be faced with such a daunting reality, it is entirely their own fault for hiring these unauthorized workers at all.[328] However, this opinion overlooks the good-intentioned employers who do follow appropriate hiring procedure and may nonetheless be adversely affected.[329] In addition, many fear this rule will have a disparate impact on small businesses for often they do not have a permanent administrative staff to address these matters in the short timeframe required.[330] As such, small business owners wear many hats beyond the everyday running of their business, including monitoring bookkeeping, supervising their workers and completing numerous administrative tasks, may find themselves overwhelmed.[331]

3. Impact of Using the SSA Database

Another key concern surrounding the final rule is the inaccuracies of the records found in the SSA database which are used to create the no-match correspondence.[332] The DHS dismisses this concern by describing a SSA no-match as nothing "more than indicators of a potential problem."[333] Instead, DHS primarily relies on the fact that a

325. *Id.* at 14.
326. *Id.* at 14–15.
327. *Id.* at 15.
328. *Id.*
329. *Id.*
330. *See* Comment—US Chamber of Commerce, *supra* note 2, at 3.
331. *Id.*
332. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. 45, 611, 45,622 (Aug. 15, 2007) (to be codified at 8 C.F.R. pt. 274a).
333. *Id.*

SSA no-match could occur for a number of reasons, only one of which being that the employee's potential unauthorized status.[334] As such the final rule only provides a method for excluding such a situation from the list of potential problems that a no-match letter could be referring to, although the DHS recognized that such data inaccuracies are "challenges that must be addressed."[335] Nonetheless, this issue did not result in any change to the rule as planned.[336]

The concern remains that employers upon receipt of no-match letter, that are oftentimes the result of innocent discrepancies, will terminate otherwise authorized and legal employees; a disastrous result for both the employee and employer. The fact that there is a "no-match" between the employee's name and their SSN does not necessarily indicate that the employee lacks authorization to work in the United State since oftentimes the "no-match" is the result of some other more benign reason, i.e. misspellings, change in names due to marriage or divorce, and typographical errors.[337] This is further compounded by the use of a "notoriously inaccurate and out of date system like the SSA database" which in effect might lead to fearful employers firing certain employees before those individuals have the opportunity to demonstrate their erroneous placement on the list.[338]

Even assuming that the SSA should be used for immigration law enforcement purpose, concerns with the accuracy of the SSA's database and their lack of resources to resolve mismatches still remain and weigh strongly against using the SSA system for such enforcement.[339] For example, exorbitant delays associated with resolving alien enumerations cases are often found to be caused by the SSA's failure to verify immigration status.[340] This failure often results from the use of a database replete with errors that are impossible to correct.[341] The statistics seem to support this proposition showing with error rates as high as 35% to 50% for foreign born workers.[342]

334. *See id.*; discussion *supra* Part IV.A.

335. Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. at 45,622.

336. *Id.*

337. *See* sources cited *supra* note 96 and discussion *supra* Part IV.

338. Letter from Gail Ryall to Dir., Dep't of Homeland Security (July 24, 2006) (on file with Dep't of Homeland Security at DHS Docket No. ICEB-2006-0004-0040), *available at* http://www.regulations.gov/fdmspublic/ContentViewer?objectId=09000064801a7eb8&disposition=attachment&contentType=pdf.

339. *See id.*; Bosworth, *supra* note 100 (illustrating data discrepancies in the SSA database).

340. Comment—AILA American Immigration Lawyers Ass'n, *supra* note 2, at 4.

341. *Id.*

342. *Id.*; *see also* Bosworth, *supra* note 100.

However, the GAO has concluded in its study that many of the entries in the ESF contain information about U.S. citizens and the percentage of unauthorized workers is wholly unknown.[343] Thus, the fact that the rule requires employers to rely on often flawed federal databases to make termination decision is an especially frightening prospect, for aliens and U.S. citizens alike. When combined with the relatively short response time given to the employers, the rule may "result in hundreds of thousands of cases where well meaning, intelligent, and diligent employers will perceive no choice but to terminate employees to avoid a finding of constructive knowledge, even if it ultimately turns out employment was authorized."[344]

4. Discrimination in the Workforce

The proposal was criticized for providing employers, faced with a no-match letter, a justification to terminate employees in flagrant violation of existing anti-discrimination law.[345] "In so doing, they risk a charge of unlawful discrimination by terminating employees who are not able to explain and resolve SSN/name discrepancies," but yet are authorized to work in this country.[346] For this reason, some commentators see a need for the regulation to contain a "companion provision immunizing employers from citizenship discrimination liability for terminating employment when it has not been able to verify in accordance with the safe harbor provisions."[347]

Another fear that exists amongst experts is that the proposal will force many employees into the black market to the detriment of both the employees and the U.S. economy in general.[348] Historian Gail Ryall

343. *See Bovbjerg Statement*, *supra* note 106, at 7, 9 (citing U.S. GOV'T ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL COMMITTEES, SOCIAL SECURITY: BETTER COORDINATION AMONG FEDERAL AGENCIES COULD REDUCE UNIDENTIFIED EARNINGS REPORTS, GAO-05-154, at 17 (2005), *available at* http://www.gao.gov/cgi-bin/getrpt?GAO-05-154).

344. Comment—AILA American Immigration Lawyers Ass'n, *supra* note 2, at 4–5.

345. *See id.* at 11 ("Unfortunately, some employers have improperly used the EDCOR (Code V—No-Match Letter) to take adverse action against their employees." (quoting SSA, RM 01105.027, SSA's PROGRAM OPERATIONS MANUAL SYS., HANDLING INQUIRIES RELATING TO SSA LETTERS ON NO-MATCH NAMES AND SOCIAL SECURITY NUMBERS (SSNS) (2004))).

346. *Id.* at 12 (citing League of United Latin Am. Citizens v. Pasadena Indep. Sch. Dist., 662 F. Supp. 443, 445, 451 (S.D. Tex. 1987) (School district required to reinstate unauthorized aliens eligible for legalization under IRCA to custodial positions they occupied prior to termination for providing district with false SSNs.)).

347. Comment—AILA American Immigration Lawyers Ass'n, *supra* note 2, at 12.

348. *See* Letter from Gail Ryall, *supra* note 338; *see also* FitzGerald & Merson, *supra* note 88, at 509 (citing Mary Beth Sheridan, *Records Checks Displace Workers: Social Security Letters Cost Immigrants Jobs*, WASH. POST, Aug. 6, 2002, at A1).

foresees that "[w]ith these new regulations, some employers may feel increased pressure to go 'off the books,' promoting an underground economy and defeating a primary goal of immigration reform."[349] Others fear the proposal will disproportionately impact employers who are following the rules and paying employees on the books, and encourage those employers who are paying their employees under the table to continue to do so.[350] From an economic standpoint, the Chamber of Commerce views this as unsound policy since it forces workers into the black market economy where employers are held unaccountable for their actions and employees do not pay taxes.[351]

Another realistic and logical fear is that employers not wanting to invest the time and cost of following the rule requirements will not only resort to hiring employees "under the table," but will simply not hire any employees that appear be undocumented.[352] An employer "[o]ut of fear of non-compliance with DHS's proposed regulation . . . might be extra vigilant in trying to verify an employee's identity and eligibility to work in the U.S."[353] Due to the anti-discrimination provisions set out in IRCA, this could result in a violation of an employee's civil rights not to be discriminated on the basis of its national origin. Further, there is the real possibility that many employers will simply fire those employees referenced in a "no-match" letter, in order to avoid the procedure and steps required to fix the situation and retain the employees.[354] This would in turn expose employers to citizenship discrimination claim and prosecution by the Office of Special Counsel for Immigration Related Unfair Employment Practices of the Department of Justice ("DOJ").

C. Implementation and Lawsuit

Despite the aforementioned concerns, the final rule described above was scheduled to become effective on September 14, 2007—only thirty days after publication in the Federal Register.[355] Starting September 4, 2007 the SSA planned to send out 138,447 already prepared no-match

349. Letter from Gail Ryall, *supra* note 338.

350. *See* Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. 45, 611, 45,621–22 (Aug. 15, 2007) (to be codified at 8 C.F.R. pt. 274a).

351. Comment—US Chamber of Commerce, *supra* note 2, at 7.

352. *See* Letter from Gail Ryall, *supra* note 338; Comment—AILA American Immigration Lawyers Ass'n, *supra* note 2, at 15.

353. Comment—US Chamber of Commerce, *supra* note 2, at 7.

354. *Id.*

355. *See* Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. at 45,611.

letters.[356] These letters, reflecting discrepancies discovered in tax year 2006, would include an insert from the ICE regarding the final rule and employer's obligations thereunder.[357] While this mail-out included letters addressed to all fifty states and several territories, a disproportionate amount were addressed to California which would receive over 25% of these letters, Texas was next with just over 9%, followed by Florida with about 5%, and Illinois and New York with slightly above 4% each.[358]

In anticipation of this administrative action, on August 29, 2007, the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), the American Civil Liberties Union, the National Immigration Law Center ("NILC"), and the Central Labor Council of Alameda County, along with other local labor movements in San Francisco, filed a complaint with the United States District Court for the Northern District of California.[359] The complaint sought declaratory and injunctive relief restraining the DHS from implementing the final rule and the SSA from mailing the tax year 2006 no-match letters with the ICE insert.[360] The plaintiffs in this case pointed to many of the same concerns and reservations as those who submitted comments on the proposed regulations.[361] Specifically, they alleged, inter alia, the "new rule would place in jeopardy the jobs of U.S. citizens and non-citizens legally authorized to work" because of errors in the SSA's database.[362]

Two days later, on August 31, 2007, Judge Maxine M. Chesney signed an order granting the temporary restraining order.[363] On October 10, 2007 Judge Charles R. Breyer granted plaintiff's motion for preliminary injunction halting the mailing of the already prepared no-match letters.[364] The court found the plaintiffs showed "that serious

356. Memorandum in Support of Motion for Temporary Restraining Order & Preliminary Injunction at 11, AFL-CIO v. Chertoff, No. 07-CV-4472 (N.D. Cal. Aug. 29, 2007), 2007 WL 2915304; SSA, Statistics: EDCOR Notices by State TY06, http://www.ssa.gov/legislation/EDCOR%20Notices%20By%20State%20TY06%20-%20080407.pdf (last visited Mar. 20, 2008) [hereinafter SSA, Statistics].

357. Order Granting Motion for Preliminary Injunction, *supra* note 3, at 5–6.

358. SSA, Statistics, *supra* note 356.

359. First Amended Complaint for Declaratory & Injunctive Relief at 1, AFL-CIO v. Chertoff, No. 07-4472-CRB (N.D. Cal. Sept. 11, 2007).

360. *Id.* at 15–16.

361. *See* Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. 45,611, 45,622 (Aug. 15, 2007) (to be codified at 8 C.F.R. pt. 274a); First Amended Complaint for Declaratory & Injunctive Relief, *supra* note 359, at 1–2.

362. First Amended Complaint for Declaratory & Injunctive Relief, *supra* note 359, at 3.

363. Temporary Restraining Order & Order to Show Cause Re: Preliminary Injunction at 2, AFL-CIO v. Chertoff, No. 07-4472-CRB (N.D. Cal. Aug. 31, 2007).

364. Order Granting Motion for Preliminary Injunction, *supra* note 3, at 22.

questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor."[365] The court came to its decision by balancing the hardships the plaintiffs and defendants would respectively suffer.[366] The plaintiffs could suffer irreparable harm if the rule was implemented while a delay in the implementation of the rule, pending consideration of plaintiff's claims, would not impose a significant burden on defendants.[367]

Judge Breyer's opinion was replete with many of the concerns raised by those who submitted comments when the regulation was still in its proposal stage. Specifically, while Judge Breyer dismissed concerns that the regulation was exceeding its statutory bounds, deciding that "the SSA [through its no-match system] does not exceed the bounds of its enabling statute by referring employers" to the ICE insert,[368] he did note DHS's interpretation of IRCA anti-discrimination provisions raised "serious question[s] [about] whether DHS has impermissibly . . . encroached on the authority of the Special Counsel" arm of the DOJ.[369] Specifically, the final rule attempts to absolve unlawful discrimination charges from "employers who follow the safe harbor procedure[]" uniformly throughout its workforce, "without regard to perceived national origin or citizenship status."[370] The ICE insert provides a similar assurance of absolution from anti-discrimination prosecution, so long as the employer applied "the same [safe harbor] procedure to all employees referenced in the mismatch letter."[371] Such *ultra vires* action by the DHS has been previously invalidated when infringing on the authority of another agency.[372]

Further, the court held that "serious questions" were raised as to whether the DHS violated the Regulatory Flexibility Act.[373] While the

365. *Id.* at 1.

366. *Id.* at 5.

367. *Id.*

368. *Id.* at 6, 11.

369. *Id.* at 11. The DOJ has sole authority over immigration related anti-discrimination law enforcement. *See* 8 U.S.C. § 1324b(c)–(d) (2000).

370. Order Granting Motion for Preliminary Injunction, *supra* note 3, at 11 (citing Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. 45,611, 45,613–14 (Aug. 15, 2007) (to be codified at 8 C.F.R. pt. 274a)).

371. *Id.*

372. *See* Nat'l Treasury Employees Union v. Chertoff, 452 F.3d 839, 865 (D.C. Cir. 2006). "[A]n agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear." MCI Telecomm. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 229 (1994) (applying Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984)).

373. Order Granting Motion for Preliminary Injunction, *supra* note 3, at 13.

DHS certified that this rule would "not have a significant economic impact on small businesses,"[374] it never conducted a "flexibility analysis" under the Act to demonstrate that the rule does not create any new obligations on employers.[375] Giving weight to the plaintiffs' concerns about costs of compliance with the new rule, the court found DHS's position that compliance with the new rule "is 'voluntary,' . . . wholly unavailing"[376] and refused to consider the Agency's justification that "the safe harbor rule is [merely] interpretive," discounting it as a post hoc rationalization.[377]

Finally, the combination of such concerns as employers bearing "significant" expenses in order to comply with the rule's ninety day timeframe, the strong likelihood that employees being unable to resolve the discrepancy within ninety days will be fired even though they are actually authorized to work, and the small amount of inconvenience that the DHS would suffer from a delay in order to investigate the lawfulness of this regulation was enough for Judge Breyer to grant the preliminary injunction.[378]

VIII. CONCLUSION

With Judge Breyer's decision to grant the preliminary injunction, the nation is left where it began—in need of comprehensive legislation to solve the ever growing illegal immigration population in our country and perhaps in greater need to satisfy our dependence on low-wage labor. Clearly, there is no easy answer. But while those in the government posture for political power,[379] the DHS remains vigilant in its commitment to "crack down" on immigration law violations, resulting in employees being fired by fearful employers, at times for nothing more than misspelling their names. While a piecemeal approach

374. *Id.* at 12.

375. S*ee* 5 U.S.C. § 605(b) (2000); Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. at 45,623.

376. Order Granting Motion for Preliminary Injunction, *supra* note 3, at 13.

377. *Id.* at 12 (citing Cent. Tex. Tel. Coop., Inc. v. FCC, 402 F.3d 205, 214 (D.C. Cir. 2005)); Independence Mining Co. v. Babbitt, 105 F.3d 502, 511 (9th Cir. 1997) (discussing how courts use "post hoc agency rationalizations" in practice).

378. Order Granting Motion for Preliminary Injunction, *supra* note 3, at 5–6.

379. *See* Larry Fester, *Tancredo Seeks to Overturn 'No Match' Court Ruling*, USA TODAY, Oct. 14, 2007, http://www.usadaily.com/printFriendly.cfm?articleID=123718.

which ignores the economic realities this nation faces and turns a blind eye to discrimination is not the ideal, currently, we are left with the alternative: nothing.[380]

Michael Gibek[*] *& Joshua Shteierman*[**]

380. On December 4, 2007 the DHS filed a notice of appeal seeking review of Judge Breyer's order granting preliminary junction from the Ninth Circuit Court of Appeals. Notice of Appeal at 2, AFL-CIO v. Chertoff, No. C 07-4472-CRB (N.D. Cal. Dec. 4, 2007). This represents the latest chapter of the "No-Match" Letter saga as of the date of publication of this Note.

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