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Conference Report

Immigration

Critics Call 'No Match' Program Error-Prone As Attorney Recommends Employer Strategies

LOS ANGELES--The Department of Homeland Security's plan to use discrepancies in Social Security numbers reported by employees as an enforcement tool against illegal immigrants is too prone to mistakes to be effective, organized labor representatives said July 23.

Speaking at the annual Labor and Employment Law Conference presented by Region 21 of the National Labor Relations Board, Ana Avendano, associate general counsel and director of the AFL-CIO's Immigrant Worker Program, said instead that enforcement of immigration rules must go hand-in-hand with enforcement of workers' rights.

The "cheap labor magnet" that illegal workers represent is the real problem, but enforcement of wage and hour laws and regulations in industries that hire immigrants is way down, Avendano said.

At the same time, national origin discrimination is high, Anna Park, regional attorney for the Equal Employment Opportunity Commission, told conference participants.

Meanwhile, a management attorney said employers are finding themselves "between a rock and a hard place" while waiting for DHS to respond to legal concerns with its no-match policy. Richard S. Rosenberg, an attorney with Los Angeles-based Ballard, Rosenberg, Golper & Savitt, told the audience that employers that fail to comply with the no-match rule eventually could face not only fines, but criminal prosecution.

SSA Records Contain Errors, Critic Says

Ernesto Medrano with International Brotherhood of Teamsters Local 952 and an executive board member of the California Teamster Hispanic Caucus said more than 17 million of the Social Security Administration's 430 million entries contain errors, including some 3.3 million entries misclassifying foreign-born U.S. citizens as aliens.

Those errors could be the result of "typos," or name changes, but once employers receive a "no-match" letter from the Social Security Administration and accompanying DHS guidance, they could panic and tell the affected worker to fix the error or face termination, he added.

Unions can help combat the problem, Medrano suggested, by seeking to include language in collective bargaining agreements on how no-match letters will be handled.

In October 2007, Judge Charles Breyer of the U.S. District Court for the Northern District of California, at the request of a consortium of labor, civil rights, and business groups, granted a preliminary injunction blocking the government from sending out no-match letters and effectively blocking implementation of the rule, which would render employers liable for violating federal immigration law if they are notified of a discrepancy in a worker's Social Security number and fail to follow specific DHS "safe harbor" procedures (*AFL-CIO v. Chertoff,* N.D. Cal., No. 3:07-cv-

04472-CRB, *injunction granted* 10/10/07; 196 DLR AA-1, 10/11/07).

In March, DHS issued a supplemental proposed rule in response to the court decision, but did not change the safe harbor provisions, under which employers would have 30 days to determine whether mismatched SSNs were caused by errors on their part (56 DLR AA-1, 3/24/08). Employees then would have 60 days to resolve the discrepancy with SSA.

Failure to respond to the letters would be construed as a "knowing" violation of immigration law if there were a later action against that employer.

Recommendations Pending Final Rule

Rosenberg recommended that in the absence of final new rules, employers should take a number of steps, including: auditing their process for filling out Employment Eligibility Verification forms (commonly referred to as I-9); looking back and auditing past I-9 processes; checking collective bargaining agreement language on I-9s; and putting in place a process that recognizes that workers can present other documentation proving their right to work in the United States.

Employers need to remember that they are signing I-9 forms under penalty of perjury, he added.

However, SSA does not share no-match letters with DHS, Avendano told BNA. Thus, they only could be discovered if DHS found them during an audit, she said.

But there is no guarantee that DHS will not one day gain access to the SSA's no-match list, or that investigators could not learn of such communications in another way, Rosenberg countered. Thus, employers that choose to ignore or discard such letters run a risk, he added.

In fact, Rosenberg said he believes employers must act on the letters, even though the U.S. Court of Appeals for the Ninth Circuit in June ruled that receipt of such a letter did not amount to "constructive knowledge" that the workers in question were not authorized to work in the United States, as defined in the 1986 Immigration Reform and Control Act (*Aramark Facility Services v. Service Employees Int'l Union Local 1877*, 9th. Cir., No. 06-56662, 6/16/08; 117 DLR AA-1, 6/18/08).

"The question is how" to respond to the letters, Rosenberg said. To take advantage of the safe-harbor provisions in the DHS proposed rule, he said, employers would need to inform the affected employees and give them a chance to correct the mismatched Social Security number.

If they are unable to do that, the employer has two choices: submit a new I-9 form, perhaps with other acceptable documents, or if the employee was unwilling to go through a new I-9 process, to terminate the affected worker, Rosenberg said.

In response to a question after the panel discussion, Avendano said she believed a comprehensive immigration reform bill would be introduced in Congress sometime "early next year."

In her remarks, Avendano said there was a need to evaluate future labor shortages and to craft a way to bring in employees to address those shortages--with full worker rights.

Medrano also called for legislation that would include a path to legalization, saying guestworker programs, which historically have been used as means to break strikes, "are not the solution."

By Tom Gilroy