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Briefly

May 2008 Volume 8, Issue 5

STATUS OF REVISED DHS NO-MATCH RULE

Gary Wright

"The no-match rule sets forth certain steps an employer is supposed to follow upon receipt of such a no-match letter, and to provide a procedural 'safe harbor' for the employer to follow in order to avoid being deemed to have 'constructive knowledge'."

The Department of Homeland Security (DHS) originally proposed certain procedures for employers to follow after receiving a notice from the Social Security Administration (SSA), called a "no-match letter," on August 15, 2007. Federal law prohibits an employer from knowingly hiring or continuing to employ a worker who is not authorized to work in the U.S. In addition to actually knowing an employee is unauthorized to work (actual knowledge), employers can also learn that the employee is unauthorized through "constructive knowledge." The no-match rule sets forth certain steps an employer is supposed to follow upon receipt of such a no-match letter, and to provide a procedural "safe harbor" for the employer to follow in order to avoid being deemed to have "constructive knowledge."

The whole concept of what knowledge might be inferred from the receipt of a no-match letter has had a long and twisted history. The SSA has traditionally taken the position that the receipt of a no-match letter is not any indication of a worker's immigration status. The position taken by DHS (formerly INS) over the years has vacillated, from one very much like that of SSA, to one suggesting that a receipt of a no-match letter might be evidence that a worker is unauthorized. The problem has been compounded by the somewhat unreliable nature of the SSA no-match process itself. That is, many foreign-born persons have multiple legal names, others have names changed through marriage and divorce, clerical errors are made, and the whole SSA match system runs about a year behind. The bottom line is that SSA indicates that there is an error rate in excess of 4% in its no-match designations. That may not sound like a high error rate, but based on the number of job applications made by persons each year in the U.S., the rule could disqualify some 17 million lawful workers annually.

The DHS would respond that there is a procedure built into its no-match system by which such errors can be corrected. However, the question of whether the SSA can actually make these corrections within the applicable time frames is in dispute.

The DHS no-match rule was originally scheduled to go into effect on September 14, 2007. A number of entities, ranging from the American Civil Liberties Union, to the Chamber of Commerce and AFL-CIO, filed suit in Federal District Court in San Francisco, contending that the no-match rule was unlawful. The Federal District Court judge on October 10, 2007, enjoined the no-match rule. On March 21, 2008, DHS issued a supplemental proposed rule attempting to respond to the findings underlying the District Court's injunction.

Many hurdles remain for the revised no-match rule to go into effect, and many commentators speculate that it is unlikely that a no-match rule will go into effect during the current Administration. Following the issuance of the revised no-match rule on March 21, the revised rule is open for comments until April 25. Presumably at that point DHS will have to study and review and potentially address whatever comments it receives. Then, DHS would have to return to the Federal District Court in San Francisco that issued the injunction, and request that the injunction be lifted on the basis that the grounds for the injunction have been resolved.

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KNOW YOUR ATTORNEY

Jerome D. Pinn

JEROME D. PINN is a Member of the Knoxville, Tennessee office of Wimberly Lawson, which he joined in 1996. His law practice includes an emphasis in employment discrimination and wrongful discharge litigation, as well as ADA and FMLA compliance and wage and hour law compliance. He received his Bachelor of Arts degree in Government and History from Cornell University, and his law degree from the University of Michigan.

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CAN AN EMPLOYEE BE DISCHARGED FOR A COMBINATION OF UNEXCUSED AND FMLA ABSENCES?

Fred Bissinger

"The court found that the employee failed to provide sufficient evidence that she was incapable of attending work on those five days."

A recent federal court ruling gave an employer the right to terminate an employee for five unexcused absences that were outside of her FMLA leave. The court found that the employee failed to provide sufficient evidence that she was incapable of attending work on those five days. Culpepper v. Blue Cross Blue Shield of Tennessee, E.D. Tenn.

The employer had a policy that it could terminate any employee that had more than five unexcused absences in a 12-month period. The employee had been utilizing FMLA leave for infertility treatment during the year in question. According to the evidence, the employee had two unexcused absences prior to her fertility treatments, and during those treatments the employee had collected another eleven absences. The employee's doctor excused only six of the eleven absences. The five remaining absences, along with the other two, prompted the employer to terminate the employee.

The employee argued that due to the treatment and medication, she was too sore to work those five days. The employer contended that it had to credit only six of the absences because her doctor's orders and testimony only necessitated two periods of absence, each lasting three days.

The court granted summary judgment to the employer, reasoning that the employee's own doctor required only six days of absences from work.

Editor's Note *- A recurring and difficult pattern concerning leaves of absence occurs when an employee is absent on a number of days, some of which are FMLA-protected, and some of which are not. The employer has to be extremely careful in only disciplining or terminating an employee for those days not protected by FMLA. Further, the employer needs to be careful in its termination notices not to list days that are protected by FMLA as part of the reasons for the termination. In this case, the employer was fortunate that it was able to rely on the employee's doctor's excuses, which indicated only six of the eleven absences were FMLA-protected.*

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IS MANDATORY RETIREMENT EVER LAWFUL?

Suzanne Roten

"The ADEA provides a narrow exception to the general prohibition against mandatory retirement."

At one time, the federal Age Discrimination and Employment Act (ADEA) protected employees up to age 65, against age discrimination. It was subsequently amended to age 70, and then the age 70 limitation was deleted leaving no age beyond what employees were not protected. The natural reaction by some employers, is how do we ever force an older employee out? The legal answer, of course, is that you do it the same way you force any other employee out, based on job performance and other non-discriminatory factors, unrelated to age.

The ADEA provides a narrow exception to the general prohibition against mandatory retirement. This exception applies to "bona fide executives" and/or "higher policy making" employees; the employee must have been in such a position for the two-year period immediately before retirement; and, the employee must be entitled to an immediate, non-forfeitable, annual retirement benefit from a pension, profit-sharing, savings or deferred compensation plan, or any combination of such plans, of at least $44,000. See 29 U.S.C. 631(c).

For these reasons, it is dangerous for an employer to approach an employee about his or her "retirement" plans, as even innocent questions might be construed as prejudice against an employee because of age. Where a retirement-age employee is terminated for performance or other non-discriminatory reasons, the termination reason should be handled separately from whether the employee chooses to take retirement as part of the separation.

On rare occasions, employers have attempted to establish a lawful reason for some employment actions, such as non-promotion, on the basis that an employee only plans to work a set number of years, inconsistent with the employer's future promotional plans. An example of a case in which it was claimed that the employer's long term leadership development plan was evidence of age-based discrimination because it endeavored to identify younger managers for promotion to senior management, is Sandstad v. C.B. Richard Ellis, Inc., 19 FEP Cases 249 (C.A. 5, 2002). Such programs are extremely controversial, and need to be subject of advice of counsel.

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DISABLED WORKER RAISES CLAIM OF FREQUENT BATHROOM BREAKS

Jeff Jones

"The court denied summary judgment to the employer, because there was some material issues of fact as to whether plaintiff's continuing presence is necessary to the assembly position or whether using area supervisors or other employees to cover the plaintiff's bathroom beaks could be a reasonable accommodation."

Another fact pattern that had to eventually generate a claim, involved an assembly line worker who had various medical problems, including problems with her bladder, requiring that she "must be able to use the bathroom frequently and without delay." Wertz v. Ford Motor Co., E.D. Mich. No. 05-40324, (2/28/08). The employer argued that if a replacement could not be found when she took these breaks, the assembly line had to be stopped, and the employer's doctor reviewed documentation from the employee's doctor and concluded that she could not perform the essential functions of her job. The employee sued alleging violations of the ADA for failure to accommodate.

The court denied summary judgment to the employer, because there was some material issues of fact as to whether plaintiff's continuing presence is necessary to the assembly position or whether using area supervisors or other employees to cover the plaintiff's bathroom breaks could be a reasonable accommodation. The court relied on an earlier Sixth Circuit ruling in Workman v. Frito Lay, which held that a jury could have decided that "controlling one's bowels is a major life activity," and found that the same analysis should apply to controlling one's bladder.

STATUS OF REVISED DHS NO-MATCH RULE continued from page 1

Significantly, the revised no-match rule made no changes in the substantive rule itself, but only addressed a few modifications in its comments to the rule. Many of the comments were an attempt to provide a "reasoned analysis" supporting the change in DHS policy found by the District Court. DHS asserts that the most basic justification for issuance of the rule - and for the "change" in policy found by the District Court - is to eliminate the ambiguity regarding an employer's responsibilities upon receipt of a no-match letter. DHS contends that its position - that an employer's failure to conduct reasonable due diligence upon receipt of an SSA no-match letter can, in the totality of the circumstances, establish "constructive knowledge" of an employee's unauthorized status - was a reasonable "change" from the statements in the prior informal agency responses. Further, DHS attempts to comply with the Court's concerns regarding the lack of a regulatory flexibility analysis, by providing an initial regulatory flexibility analysis in its supplemental proposed rule. Finally, regarding another point raised by the District Court, that the DHS had no authority to interpret the anti-discrimination provisions of the immigration law, DHS decides to rescind the statements in its earlier preamble describing the employer's obligations under the anti-discrimination law.

***Editor's Note** - Because of the substantive and procedural hurdles awaiting DHS in implementing its no-match rule, there is a less than even chance the rule can be implemented during the current Administration. It will thus be left to one of the three leading presidential contenders to set policy in this sensitive area.*

Several critical questions remain during this interim period. First, will the SSA even issue no-match letters this year, inasmuch as no SSA no-match letters were issued at all last year? The second question is, what actions, if any, should an employer take based on no-match letters received in the past, or in regard to the current receipt of a different type of letter from SSA, called a "Request for Employer Information?" These subjects will be addressed in future issues of this publication.

UPDATE ON PENDING FEDERAL IMMIGRATION LEGISLATION

Fred Baker

"It would, among other things, require all employers within four years to use the E-Verify Employment Authorization Verification system for all workers."

Two significant federal immigration bills are working their way through Congress, one being the Secure America Through Verification And Enforcement Act ("SAVE Act"), introduced by Representative Heath Shuler and Senator Mark Pryor, H.R. 4008 and S.2368. The other significant federal legislation pending is the Security Through Regularized Immigration and a Vibrant Economy Act of 2007 ("STRIVE Act"), introduced by Representative Luis V. Gutierrez. The SAVE Act in particular has gathered support in Congress, and is a very tough bill. It would, among other things, require all employers within four years to use the E-Verify Employment Authorization Verification System for all workers). Further, upon the receipt of an SSA no-match letter, it would give affected workers only ten days to correct the mis-match process before being terminated. A discharge petition is pending regarding this bill, and if the discharge petition receives 217 signatures, House leaders will be forced to bring the bill to the floor for an up or down vote.

The STRIVE Act is a comprehensive immigration reform bill that requires implementation of many enforcement measures and certification that the enforcement measures are implemented before undocumented workers can obtain legal status and before expanded new worker program becomes effective. The STRIVE Act increases penalties for certain crimes by aliens. The STRIVE Act also creates a system for employers to verify electronically workers' employment authorization, establishes criminal penalties for employers and workers who operate outside the system, and implement strong enforcement mechanisms. The STRIVE Act creates a new worker program, overhauls the family-based and employment-based visa system to reduce backlogs, and provides a program for undocumented workers to obtain legal status.

***Editor's Note** - There is great pressure in Congress to pass some type of federal immigration legislation this year because the federal E-Verify Program expires on November 4 of this year, and therefore some type of Congressional legislation will be necessary to continue the program.*