

## Immigration Enforcement Update

February 2008

As opinion polls continue to indicate immigration remains a top political issue, the U.S. Department of Homeland Security (DHS) is moving ahead with a revised Social Security Administration (SSA) "no-match" letter rule and other immigration enforcement efforts that target employers. This report provides an update on the revised no-match rule; summary of DHS' latest immigration enforcement efforts; and discussion of key immigration reform developments at the state and local levels and how these initiatives may affect the debate about comprehensive federal immigration reform.

### Update on DHS' SSA no-match letter rule

After having its original proposal blocked in 2007 by the U.S. District Court for the Northern District of California, DHS is expected to release a revised SSA no-match rule in the near future. The revised proposal purportedly will attempt to rectify the deficiencies identified by the court in the original rule DHS issued in August 2007. The original rule would have required employers to take certain steps to confirm the work eligibility of employees who are the subjects of no-match letters. Employers would have been required to terminate workers whose eligibility information cannot be rectified within 93 days or risk being deemed to have "constructive knowledge" of employing illegal workers. "Constructive knowledge" is the legal standard for enforcement under the Immigration Reform and Control Act of 1986.

In October 2007, the U.S. District Court for the Northern District of California blocked DHS and the SSA from implementing the no-match rule in litigation brought by a coalition of business and labor groups (in which NRCA is a named plaintiff). U.S. District Court Judge Charles Breyer found DHS had not performed a Regulatory Flexibility Analysis as required by the Regulatory Flexibility Act (RFA), and, therefore, its certification that the final rule would not have a significant effect on a substantial number of small entities lacked credibility. The judge found the "plaintiffs have demonstrated they will be irreparably harmed if DHS is permitted to enforce the new rule." DHS appealed the court's ruling. It also indicated it will conduct the proper economic analysis as required by law and then will reissue a revised proposal that addresses Judge Breyer's concerns.

The new DHS no-match proposal is reportedly in the final stages of review at the Office of Management and Budget. There have been reports the revised rule will, when formally issued, provide for a 60-day public comment period, which would provide ample opportunity for NRCA and other interested groups to respond. However, other sources

indicate there may only be a 30-day comment period, which could constrain efforts to provide constructive input for such a complex rule. NRCA, as co-chair of the Essential Worker Immigration Coalition (EWIC), is working with other business organizations on strategies for responding to the revised no-match rule once it is issued. This includes an effort by EWIC to retain an experienced economist to conduct an economic analysis of the original regulation in anticipation of DHS' revised proposal and potential further litigation regarding this matter.

### **New DHS/ICE enforcement effort**

U.S. Immigration and Customs Enforcement (ICE), the investigative arm of DHS, recently initiated a nationwide enforcement campaign that could potentially affect NRCA members. The new enforcement effort consists of ICE inspections that involve serving administrative subpoenas demanding employers produce I-9 forms for all current employees and employees terminated during the past year. In addition, the subpoenas request that targeted employers provide ICE with any Social Security no-match letters received in the prior three calendar years. The subpoenas may also demand copies of employers' most recent payroll reports, certified lists of all current employees hired after Nov. 6, 1986, and other business information.

ICE's issuance of these administrative subpoenas appears to be an attempt to work around the U.S. District Court's ruling blocking implementation of the DHS no-match regulation. This ICE "phishing" expedition is of serious concern to NRCA as it appears there are substantial deficiencies in ICE's legal authority to demand no-match letters from employers. Under current law, ICE does not have the authority to obtain copies of no-match letters from the SSA unless such information is relevant to a pending or anticipated criminal investigation of the subject employer. Moreover, administrative subpoenas are not self-enforcing, meaning a recipient is not legally required to comply with the subpoena. Furthermore, DHS is supposed to include a \$30 check made payable to the recipient of the subpoena because the employer is technically a "witness" for purposes of the subpoena.

Attached is a redacted copy of an ICE administrative subpoena issued in January.

NRCA is providing a sample response employers may want to use to respond to an ICE subpoena. The following suggested text has been provided by Laura Reiff of Greenberg Traurig, counsel to EWIC:

"ICE has requested through Administrative Subpoena # \_\_\_\_\_ all "Employer Correction Requests and Requests for Employee Information issued by the Social Security Administration for the tax period of (2004 – 2005)." Company is cooperating with this investigation even though there are serious legal deficiencies in the administrative subpoena. Please note that the regulations set forth the legal requirements and procedures for ICE to issue an administrative subpoena. The administrative subpoena does not follow the legal requirements, it is not issued on the Form I-138 and it is not signed by the proper signatory as envisioned and set forth in regulation. The language of

this subpoena is also substantively deficient and far reaching as ICE does not have the jurisdiction to obtain the requested information.”

NRCA will provide further information to members with respect to this enforcement effort as further developments warrant. Any NRCA member who receives an ICE subpoena is encouraged to inform NRCA’s Washington, D.C., office so the extent of this effort and its potential effect on members can be more thoroughly ascertained.

### **State immigration reform developments**

With the failure of Congress to approve comprehensive immigration reform legislation in 2007 and the prospects for further action by Congress for comprehensive reform before 2009 extremely remote, many state and local governments are moving forward with immigration enforcement initiatives. During 2007, more than 1,500 immigration-related bills were introduced at the state level, more than three times the number during 2006. More than 200 of these immigration-related bills have become law, including bills that impose new conditions and sanctions on employers. However, state and local immigration laws may be of questionable constitutional validity because many legal experts believe the U.S. Constitution gives the federal government sole jurisdiction over the regulation of immigration. This situation is producing extensive litigation, some of which NRCA is involved with on behalf of its members.

Arizona’s Legal Workers Act, approved by the legislature and signed by Gov. Janet Napolitano (D) in 2007 is considered a bellwether state immigration initiative. The act provides for the suspension or revocation of business licenses for any employer that knowingly employs an unauthorized worker(s). In addition, the law mandates use of the federal E-Verify program by employers to electronically verify the immigration status of their employees. Currently, the E-Verify program is voluntary. The act became effective Jan. 1.

A coalition of business groups, including NRCA, is a plaintiff in litigation to challenge the Arizona law in U.S. District Court on federal pre-emption and due process grounds. In December 2007, District Court Judge Neil Wake ruled against the plaintiffs largely on technical grounds, and the suit was refiled. At a subsequent hearing, Judge Wake largely upheld the law. At yet another hearing in January, Arizona’s county attorneys agreed to wait until March 1 before prosecuting complaints filed under the new law, pending clarification of some aspects of the statute by Judge Wake. However, businesses that are charged under the new law as of Jan. 1 could be prosecuted after the March 1 date. One of the primary disputes is whether the law applies only to employees hired after Jan. 1 or to all employees regardless of date of hire. Judge Wake expects to issue another ruling in early February. It appears likely Judge Wake’s final decision will be appealed to the 9th U.S. Circuit Court of Appeals.

Another prime example of state/local immigration action is in Pennsylvania where the small town of Hazelton enacted a series of ordinances in 2006 aimed at curtailing illegal immigration through sanctions on employers and landlords. The Hazelton laws, which

have served as templates for similar efforts in other states, have been blocked from taking effect by a federal judge, primarily on pre-emption grounds. Hazelton has appealed the judge's decision to the 3rd U.S. Circuit Court of Appeals, and both sides are expecting a protracted legal battle that will end up in the Supreme Court. The outcome is likely to affect many other state and local immigration measures and could have implications for future action by Congress for comprehensive immigration reform.

Oklahoma is another state that has enacted a major immigration reform law that likely will have broad implications nationwide. The Oklahoma law, regarded by some as the toughest crackdown on illegal immigration in the country, requires employers to use federal databases to verify their employees' immigration status and establishes new sanctions for employers who hire illegal workers, among other provisions. So far, the law has been upheld by a U.S. district judge but still faces further litigation. To illustrate how convoluted the situation has become, Inola, Okla., recently passed its own immigration ordinance that places other new burdens employers. The Inola ordinance appears to conflict with Oklahoma state law and federal immigration law.

But not all state and local immigration-related laws that have been enacted in recent months are punitive to employers or workers. The Illinois General Assembly approved a measure that prohibits companies from consulting federal databases such as E-Verify to prevent the hiring of illegal immigrants. Not surprisingly, the Illinois law is being challenged in court by the U.S. Department of Justice. Also, New Haven, Conn., has approved a program to issue municipal identification cards so illegal residents can open bank accounts and use other services that traditionally have required a driver's license. These examples illustrate the wide diversity in the nature of immigration initiatives at the state and local levels.

However, it is clear most state and local laws are focused on employers as a linchpin of the government's immigration enforcement efforts, which is bound to intensify adverse effects on employers. Moreover, the existence of widely different and sometimes conflicting statutes in different states poses even greater challenges for multi-state employers. In addition, the proliferation of state and local immigration laws could significantly affect economic growth. For example, Oklahoma government officials recently blamed the state's strict immigration law for a dramatic reduction in the number of business license applications since the law took effect.

### **Next steps**

As challenges faced by NRCA members and all employers as a result of increased immigration enforcement measures at the federal, state and local levels continue to intensify, the need for comprehensive federal reform becomes even more acute. NRCA will be communicating this message to Congress and others involved in the immigration reform debate in 2008 and beyond.

If you have any questions or have received an ICE administrative subpoena, please contact Duane Musser, NRCA's senior director of federal affairs, at (800) 338-5765 or (847) 493-7565 or [dmusser@nrca.net](mailto:dmusser@nrca.net).

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U.S. Immigration  
and Customs  
Enforcement

**SUBPOENA**

Date: January 3, 2008

Case Number: [REDACTED]

Subpoena # [REDACTED]

To: [REDACTED]

You are hereby commanded to appear before DHS-ICE Special Agent

[REDACTED]

On January 10, 2008 at 10:00AM

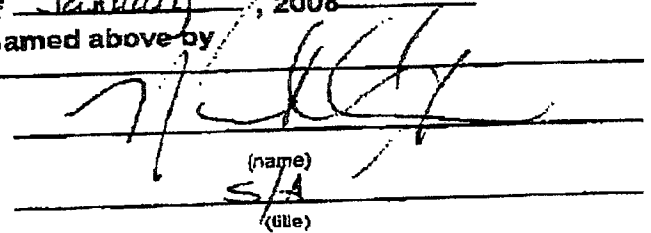
To give testimony in connection with an investigation/proceeding being conducted under the authority of the Immigration and Nationality Act, relating to Title 8 United States Code section 1324 A. You are commanded to bring, copies of all Social Security Administration "Employer Correction Requests" and "Request for Employee Information" letters that the company has received in calendar years 2005-2006 (tax years 2004-2005) and any payroll records corresponding to the employees identified in these letters.

  
Monty L. Price

Assistant Special Agent in Charge  
Chicago, Illinois

**RETURN ON SERVICE OF SUBPOENA**

I hereby certify that on the 4<sup>th</sup> day of January, 2008  
I served the above subpoena on the witness named above by

  
\_\_\_\_\_  
(name)  
S/A  
\_\_\_\_\_  
(title)