

Low-Wage Immigrant Worker Coalition

April 25, 2008

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Re: Low Wage Immigrant Worker Coalition Comments Opposing the DHS Docket No. ICEB-2006-0004, Safe Harbor Procedures for Employers Who Receive a No-Match Letter: Clarification

Introduction

The Low Wage Immigrant Worker (LWIW) Coalition hereby submits comments on the Department of Homeland Security (DHS), U.S. Immigration and Customs Enforcement (ICE) supplemental proposed rule clarifying the DHS August 2007 final rule on “Safe Harbor Procedures for Employers Who Receive a No-Match Letter.”¹ The LWIW Coalition opposes the implementation of the DHS rule on the following grounds: the rule does not address the serious issues that were raised by the court in its order granting the preliminary injunction in *AFL-CIO, et al. v. Chertoff, et al.*, No. 07-4472-CRB (N.D. Cal. filed on Aug. 29, 2007); DHS has failed to demonstrate that the Social Security Administration (SSA) no-match letter is an effective immigration enforcement tool; hundreds of thousands of lawfully authorized workers will lose their jobs; the SSA will be overburdened by the rule; and the rule will have a detrimental impact on the economy.

The LWIW Coalition is co-convened by the American Federation of Labor – Congress of Industrial Organizations, Change to Win, Interfaith Worker Justice, Jobs with Justice, the National Council of La Raza, the National Day Laborer Organizing Network, the National Employment Law Project, and the National Immigration Law Center. The LWIW Coalition is a unique collaboration of religious, labor, civil rights, immigrants’ rights and workers’ rights organizations raising its collective voice to strengthen the rights of low-wage immigrant workers and lift up the dignity of their work. The goal of the LWIW Coalition is to strengthen the work of its individual member organizations through pooled resources and coordinated messaging and to ensure low-wage immigrant workers a meaningful voice with local, state and federal policymakers and the media.

Each of the co-conveners of the LWIW Coalition have ample experience in responding to SSA no-match letters and have witnessed first-hand the detrimental impact that the no-match letters have had on workers’ rights.

¹ 73 FR 15944–55 (March 26, 2008).

The Rule Does Not Address the Issues Raised By the Federal Court.

On October 10, 2007, the United States District Court for the Northern District of California issued a preliminary injunction blocking the implementation of the 2007 final rule on “Safe Harbor Procedures for Employers Who Receive a No-Match Letter” because of the harm that the rule would have on thousands of innocent workers and employers.² Specifically, the court found that DHS failed to provide a justified reason for its change in policy that no-match letters can be considered by employers as putting them on notice that workers listed in the letter may not be authorized to work. The supplemental proposed rule fails to justify its change in policy, and instead reissues the 2007 rule without any substantive changes. The same harmful impact on workers that was inherent in the August 2007 final rule and that was brought to the court’s attention, therefore, has not been remedied.

The supplemental proposed rule does not demonstrate that SSA no-match letters are a legitimate indicator of unauthorized immigration status.

Despite DHS’s assertion that there is growing “consensus” that no-match letters are a “legitimate indicator” of unauthorized immigration status,³ DHS fails to provide any direct evidence to support this statement. Instead, DHS selectively references an SSA Office of Inspector General (SSA-OIG) report, comments submitted by certain businesses to the 2006 proposed rule, and a 2003 private study conducted by the Center for Urban Economic Development (CUED), University of Illinois at Chicago.⁴

DHS asserts that the SSA-OIG report noted that fraud was a significant cause of SSA no-match letters, however, the report only focuses on three industries that are recipients of no-match letters (service, restaurant, and agricultural services).⁵ Although these three industries may have a high incidence of discrepancies, they are not representative of the universe of employers who receive no-match letters or the universe of reasons why a no-match letter is issued.

DHS also claims that the CUED report “concluded” that “most workers with unmatched SSNs are undocumented immigrants.”⁶ The report did not reach this conclusion; rather, it concluded that no-match letters are “ill-suited” to be used as an immigration enforcement tool.⁷ The citation to the CUED report in the supplemental proposed rule is simply a cite to a 2000 SSA-OIG report used by the authors to demonstrate undocumented workers “may account” for one of the reasons why no-match letters do not result in a substantial number of reinstatements to the

² See Order Granting Preliminary Injunction, (Oct. 10, 2007, N.D. Cal.), *AFL-CIO v. Chertoff*, No. C 07-07772 (N.D. Cal. filed August 29, 2007).

³ Safe Harbor Rule *supra* note 1 at 15949.

⁴ *Id.*

⁵ See SOCIAL SECURITY NUMBER MISUSE IN THE SERVICE, RESTAURANT, AND AGRICULTURE INDUSTRIES (Office of the Inspector General, Social Security Administration, April 2005), <http://www.ssa.gov/oig/ADOBEPDF/A-08-05-25023.pdf>.

⁶ Safe Harbor Rule *supra* note 1 at 15946 *citing* Chirag Mehta, et al., SOCIAL SECURITY ADMINISTRATION’S NO-MATCH LETTER PROGRAM: IMPLICATIONS FOR IMMIGRATION ENFORCEMENT AND WORKERS’ RIGHTS (Center for Urban Economic Development, University of Illinois at Chicago, November 2003) (www.uic.edu/cuppa/uicued/npublications/recent/SSAnomatchreport.pdf).

⁷ See Mehta, et al., *supra* note 6 at ii.

Earnings Suspense File (ESF).⁸ Furthermore, the report also recommended to SSA that it terminate the no-match letter program in large part because of the study's findings regarding the negative and adverse impact that no-match letters have on workers' rights, as well as the ineffectiveness of the no-match letter program in helping the agency correct the inaccuracies in its database.

Since then, there have been many more government reports, studies, and testimony by government officials that demonstrate that no-match letters are in no way a reliable indicator of immigration status. These studies alone are enough to challenge the notion that there is consensus in this area, and indeed point to the fact that the no-match letters are not a reliable source for accurately identifying whether a worker is authorized to work or not.

For example:

- SSA's primary database used for identification, the Numident file, contains millions of discrepancies that could generate a no-match letter. The SSA-OIG estimates that of the 17.8 million records in SSA's database that contain discrepancies, nearly 13 million (or 70 percent) of those records pertain to U.S. citizens.⁹
- The SSA database that generates no-match letters also does not contain information about all workers' immigration status.¹⁰ The limited immigration status information that does exist in the database regularly becomes inaccurate because it is not automatically updated when a worker's immigration or work authorization status changes. According to the SSA-OIG, a conservative estimate is that at least 3.3 million noncitizen records in SSA's database contain incorrect citizenship status codes.¹¹
- The Government Accountability Office (GAO) testified before Congress that the ESF contains "hundreds of millions of records, many unrelated to unauthorized work," and that "in terms of poor earnings reporting, its focus is not on unauthorized workers." GAO further stated that "most" of the earnings that have been correctly reinstated belong to "U.S.-born workers, not to unauthorized workers."¹²
- In the Safe Harbor rule itself, DHS admits that it "does not have adequate data to estimate the percentage of unauthorized employees whose SSNs are listed on no-match letters."¹³
- DHS has also recognized that SSA's database is ineffective as an immigration enforcement tool. For example, SSA already shares with DHS a list of SSNs associated

⁸ See THE SOCIAL SECURITY ADMINISTRATION'S EARNINGS SUSPENSE FILE TACTICAL PLAN AND EFFORTS TO REDUCE THE FILE'S GROWTH AND SIZE (Office of the Inspector General, Social Security Administration, Feb. 2000), <http://www.ssa.gov/oig/ADOBEPDF/A-03-97-31003.pdf>.

⁹ CONGRESSIONAL RESPONSE REPORT: ACCURACY OF THE SOCIAL SECURITY ADMINISTRATION'S NUMIDENT FILE (Office of the Inspector General, Social Security Administration, Dec. 2006), www.socialsecurity.gov/oig/ADOBEPDF/audittxt/A-08-06-26100.htm.

¹⁰ It was not until 1978 that SSA began requiring all SSN applicants to provide evidence of U.S. citizenship or noncitizen status. See ACCURACY OF THE SOCIAL SECURITY ADMINISTRATION'S NUMIDENT FILE, *supra* note 9.

¹¹ *Id.*

¹² Barbara D. Bovbjerg, Director, Education, Workforce, and Income Security Issues, TESTIMONY BEFORE THE SUBCOMMITTEES ON SOCIAL SECURITY AND OVERSIGHT, COMMITTEE ON WAYS AND MEANS, HOUSE OF REPRESENTATIVES (Government Accountability Office, February 16, 2006), <http://www.gao.gov/new.items/d06458t.pdf>, at 9.

¹³ Safe Harbor Rule *supra* note 1 at 15953.

with the “Nonwork Alien File,” which contains information on noncitizens who have earnings recorded under nonwork SSNs. DHS insists, however, that the file is not an effective worksite enforcement tool due to “inaccuracies in the data and the absence of some information that would help the department efficiently target its enforcement.”¹⁴ These “inaccuracies,” however, are the same ones that generate no-match letters.

The no-match letter is not sufficient to put an employer on notice that a person is not authorized to work.

The no-match letter is a notice to workers and employers that there are discrepancies in SSA’s records that prevent workers from receiving credit for their earnings. The Educational Correspondence, or “EDCOR,” no-match letter for employers itself has stated the following for years:

“This letter does not imply that you or your employee intentionally gave the government wrong information about the employee’s name or Social Security number. Nor does it make any statement about an employee’s immigration status.”¹⁵

There are many reasons why a worker might receive an SSA no-match letter, including the fact that SSA’s primary database used to identify workers with Social Security no-match information, the Numident file, contains errors;¹⁶ clerical errors made by the employer in completing the W-2; errors made by the worker in completing the W-4; the fact that the worker might have used a different name convention (such as a hyphenated name or multiple surnames) when applying for a Social Security card than he or she did when applying for a job; and name changes due to marriage or divorce.¹⁷

DHS is incorrect in analogizing the no-match letter to the “Notice of Suspect Documents” that DHS sends to employers. The Notice of Suspect Documents is a notice specifically raising questions about workers’ employment authorization. This information is based on an audit or investigation into the employer’s I-9 records and lists the individuals that DHS or ICE have reason to believe are not authorized to work.¹⁸ Conversely, the no-match letter does not raise questions about the workers’ employment authorization and simply informs a worker or employer that there are discrepancies in SSA’s records that prevent workers from receiving credit for their earnings.

¹⁴ See Bovbjerg, *supra* note 12.

¹⁵ The first page of the 8-page EDCOR employer letter can be viewed at https://secure.ssa.gov/apps10/poms/images/poms09/09009/G-NL_00901.051C-1.pdf (To view any of pages 2–8, in your Web browser’s address window replace the numeral “1” immediately before the suffix “.pdf” with the number of the page you want to view, then press “Enter.”).

¹⁶ See ACCURACY OF THE SOCIAL SECURITY ADMINISTRATION’S NUMIDENT FILE, *supra* note 9.

¹⁷ SSA Program Operations Manual System (POMS), RM 01105.027, <https://secure.ssa.gov/apps10/poms.nsf/lrx/0101105027!opendocument>.

¹⁸ 8 C.F.R. §274a.9(c), 1274a.9(c).

The rule will have a detrimental impact on all workers.¹⁹

In issuing the preliminary injunction blocking the implementation of the August 2007 final safe harbor rule, the judge found that the no-match letters would have resulted in job losses of employment authorized workers and U.S. citizens because of the government-recognized flaws in the SSA database, and that the rule would result in “irreparable harm to innocent workers and employers.”²⁰ This has been our experience. Some employers have taken drastic, often unlawful, steps in response to the no-match letter to ensure that they protect themselves from liability under immigration laws. Other less scrupulous employers have used no-match letters as a tool to undermine workers’ rights to engage in concerted activity, eliminate the benefits that come with seniority, and defeat a variety of workplace claims, including their own failure to pay the minimum wage. The DHS rule will only exacerbate these scenarios.

Implementation of the rule will result in unjust firings of thousands of lawfully authorized workers and U.S. citizens.

In its economic analysis of the supplemental proposed rule for DHS, Econometrica, Inc., estimated that of the 3.9 million employment authorized and U.S. citizen workers that will be the subject of an employer no-match letter, 2 percent of these workers will be fired because of their inability to resolve the discrepancy within the specified time period in the proposed rule.²¹ Accordingly, a conservative estimate is that up to 70,781 workers will be fired. Richard B. Belzer, Ph.D., an economist hired by the U.S. Chamber of Commerce and who is an expert in federal agency regulatory policies and practices, estimates that the total number of authorized workers who will be fired because of their inability to resolve the discrepancy is more likely to be as high as 165,000.²² These estimates, however, only take into account the number of workers that will be fired in response to the EDCOR no-match letter, which is sent to employers with more than 10 workers with no-matches, and where the total number of no-matches represents more than .5 percent of the employer’s total Forms W-2 in the report. The estimates do not reflect the number of workers that may be fired in response to the DECOR no-match letter, which is sent to employers about an individual worker. The SSA-OIG found that 86 percent of the employers who receive the DECOR no-match letter do not qualify to also receive the EDCOR letter.²³ In 2007, 1.7 million DECOR letters were sent to employers regarding wages paid in Tax Year 2006.

DHS implies that implementation of the proposed rule will be limited to the EDCOR letter when it states that it is relying on the SSA “criteria” for sending employer no-match letters, and that the DHS rule does not apply to employers with “stray mistakes” or “inaccuracies” in their

¹⁹ For additional examples of workers harmed by the no-match letter, see Appendix A.

²⁰ See *AFL-CIO v. Chertoff*, *supra* note 2.

²¹ See Final Report: Small Entity Impact Analysis: Supplemental Proposed Rule “Safe Harbor Procedures for Employers Who Receive a No-Match Letter,” By Econometrica, Inc., Jan. 15, 2008, at 25.

²² Richard B. Belzer, Ph.D., “Comments on DHS’s Safe-Harbor Interim Regulatory Flexibility Analysis,” April 21, 2008, <http://www.regulations.gov/fdmspublic/component/main?main=DocumentDetail&d=ICEB-2006-0004-0324.1>.

²³ EFFECTIVENESS OF DECENTRALIZED CORRESPONDENCE SENT TO EMPLOYERS (Office of the Inspector General, Social Security Administration, September, 2006), <http://www.ssa.gov/oig/ADOBEPDF/A-03-06-26096.pdf>.

records.²⁴ Yet, since the proposed rule was issued in 2006, employers have applied the safe harbor rule to all no-match letters it receives from SSA — EDCOR and DECOR alike. Because there is nothing in the rule that explicitly limits the safe harbor rules to the EDCOR letter, we can assume that this practice will continue, which will result in far more than 70,000 workers being terminated.

The rule will increase discrimination against immigrants and other workers of color.

As DHS considers converting SSA no-match letters into an immigration enforcement tool, it is important to review the history of discrimination that has resulted from employer sanctions that were implemented by the Immigration Reform and Control Act of 1986 (IRCA). This experience informs the concern that use of flawed databases as a tool for sanctioning employers will result in widespread discrimination.

When Congress passed IRCA, it was concerned that employer sanctions would lead to employers discriminating against individuals who "looked or sounded foreign."²⁵ To counterbalance this anticipated discrimination, Congress created a prohibition against immigration-related unfair employment practices, including discrimination based on national origin or citizenship status.²⁶

IRCA's anti-discrimination provisions, however, have not stopped discrimination against authorized foreign-born workers and people of color. In 1990, the GAO issued a report in which it determined that federal employer sanctions had resulted in a widespread pattern of discrimination by employers.²⁷ For example, the GAO found higher rates of discriminatory verification practices "in areas having high Hispanic and Asian populations."²⁸ In the course of developing the report, the GAO conducted a hiring audit of a sample of employers using matched Anglo and Latino testers. According to the report, the results of the audit "showed that the Hispanic testers were three times as likely to encounter unfavorable treatment when applying for jobs as were closely matched Anglos."²⁹ Similarly, a U.S. Commission on Civil Rights report found "clear and disturbing indications that IRCA has caused at least a 'pattern of discrimination,' if not widespread discrimination."³⁰

²⁴ Safe Harbor Rule, *supra* note 1 at 15949.

²⁵ Natalie Prescott, *Immigration Reform Fuels Employment Discrimination*, 55 Drake L. Rev. 101, 105 (2006).

²⁶ See 8 U.S.C. §1324b. Indeed, one of the first cases litigated after the creation of employer sanctions under IRCA was on behalf of a Puerto Rican worker whose employer insisted that she produce a "green card" which he could not do since Puerto Ricans are U.S. Citizens. See, *U.S. v. Marcel Watch*, OCAHO No. 83200085 (Mar. 22, 1990).

²⁷ IMMIGRATION REFORM: EMPLOYER SANCTIONS AND THE QUESTION OF DISCRIMINATION (General Accounting Office, March, 1990), available at <http://archive.gao.gov/d24t8/140974.pdf>, at 4.

²⁸ *Id.* at 6.

²⁹ *Id.* at 47. See also Cynthia Bansak & Steven Raphael, "Immigration Reform and the Earnings of Latino Workers: Do Employer Sanctions Cause Discrimination?," 54 Indus. & Lab. Rel. Rev. 275, 277 (2001). "Results from the employer survey indicate that a substantial minority of employers engage in illegal discriminatory practices such as only examining the documents of applicants who are foreign-looking, or not hiring applicants with a foreign appearance"

³⁰ THE IMMIGRATION REFORM AND CONTROL ACT: ASSESSING THE EVALUATION PROCESS (U.S. Commission on Civil Rights, September 1989), <http://www.law.umaryland.edu/marshall/usccr/documents/cr12r25z.pdf>, at iii.

In attempting to implement the safe harbor rule after receiving a no-match letter, it is very likely that employers will treat workers they perceive to be foreign-born differently based on skin color, limited English proficiency, or because the worker speaks English with a foreign accent. The discrimination against workers who look or sound foreign that has taken place under IRCA will be aggravated by the proposed connection between employer sanctions and the separate SSA no-match program.

Examples of discrimination that has resulted from the SSA no-match letter and DHS rule include the following:

In September 2007, an employer in New York received a no-match letter for one of its workers. The employer instructed the worker to go to SSA to correct the discrepancy. The worker returned to his employer with a restricted Social Security card with a valid DHS-issued employment authorization document. The employer refused to accept the worker's social security card because the employer erroneously assumed the worker was undocumented. The U.S. Department of Justice, Office of Special Counsel for Unfair Immigration-Related Employment Practices (OSC) had to intervene and explain to the employer that the worker was authorized to work.³¹

In late August 2007, shortly after the issuance of the final no-match rule, a naturalized U.S. citizen worker who had presented a valid green card when hired at a Whole Foods in California was told that there was an "error" with her paperwork, and that she needed to present valid work authorization. The worker was placed on a three-month leave even though she provided documentation showing that she had naturalized. A legal services organization filed a charge with the U.S. Department of Justice's Office of Special Counsel for Immigration-Related Unfair Employment Practices.³²

Following DHS's announcement of the 2007 final no-match rule, a Salvadoran national with Temporary Protected Status (TPS) who worked at a Target store in California was questioned about her employment authorization documents. The employer refused to accept the worker's proof that she had valid work authorization and terminated her. A legal services organization filed a charge with the U.S. Department of Justice's Office of Special Counsel for Immigration-Related Unfair Employment Practices on her behalf.³³

³¹ U.S. Department of Justice, Office of Special Counsel for Unfair Immigration-Related Employment Practices (OSC), intervention report for FY 2007.

³² Charge filed by the Legal Aid Society-Employment Law Center with U.S. Department of Justice Office of Special Counsel for Immigration-Related Unfair Employment Practices, Nov. 14, 2007, on file with authors; Will Oremus, *Immigrants file complaints against Target, Whole Foods*, SAN MATEO DAILY NEWS, Nov. 16, 2007.

³³ Charge filed by the Legal Aid Society-Employment Law Center with U.S. Department of Justice Office of Special Counsel for Immigration Related Unfair Employment Practices, Nov. 14, 2007, on file with authors; Oremus, *Immigrants file complaints*.

Improper implementation of the rule will have an adverse impact on all workers.

Employers began implementing the safe harbor rule immediately after it was proposed in 2006 — either out of confusion about the rule’s status, advice from legal counsel, or intentionally. Employers have also asserted that they received a no-match letter when no such letter existed, have used old letters to implement the rule, and have simply fired workers without giving them an opportunity to correct their records.³⁴

Examples of employers improperly implementing the rule include the following:

In January of 2007, in Boston, Massachusetts, a group of factory workers were called into the main office and handed a written notice issued on company letterhead that said that according to SSA, the workers’ social security numbers on file with the employer did not match SSA’s records. The notice said that that the workers had 30 days to correct the discrepancy or they would be fired. In the subsequent months, approximately 45 other workers were called to the office and handed the same notice. The only workers who ever received the notice were from Guatemala, despite the diverse backgrounds of workers employed in the factory. It wasn’t until the workers organized a petition and lawyers and the community intervened, that the employer notified the workers that they would not be fired. No evidence was ever provided to the employees that there was any discrepancy with the social security numbers in the employer’s files and those at the SSA.³⁵

In Milwaukee, Wisconsin, workers at a furniture factory were given written notice in September 2007 that due to SSA no-match letters, they had 30 days to correct their social security numbers or face dismissal. When a community-based organization questioned the company, it was told that the company was acting on the basis of a no-match letter that it had received nearly six months earlier, and that the company had been advised by its attorney that there were new rules regarding no-match that required the company to fire the workers.³⁶

No-match letters are used to retaliate against workers who assert their labor rights.

Unscrupulous employers use no-match letters to retaliate against workers who have been injured on the job or complain of unpaid wages or other labor violations. For example, the 2003 CUED study found that 25 percent of workers reported that employers fired them in retaliation for complaining about inadequate worksite conditions.³⁷ Many times, these employers may have knowingly hired unauthorized immigrants in order to save money on wages and benefits. It is not until the workers come forward with a labor complaint or support other workers being

³⁴ These actions are consistent with past employer responses to no-match letters. For example, the 2003 CUED study found that 58 percent of workers fired due to a no-match letter were never given the opportunity to provide proof of employment authorization. See Mehta, et al., *supra* note 6 at 15.

³⁵ Telephone conversation between Monica Guizar, National Immigration Law Center, and Ingrid Nava, Greater Boston Legal Services, March 12, 2008; email correspondence between Monica Guizar, NILC and Ingrid Nava, March 26, 2008.

³⁶ Affidavit of Christine Neumann-Ortiz, Director, Voces de la Frontera, December 12, 2007, on file with authors.

³⁷ See Mehta, et al., *supra* note 6 at 16

adversely impacted by no-match letters, that the employer uses the no-match letter to intimidate those workers. This, in turn, affects all workers' ability to exercise their labor rights, and all workers suffer as a result.

Unscrupulous employers also use the no-match letter to stymie organizing campaigns by ignoring the letters when they first receive them, then later using them as a pretext to fire workers who participate in efforts to improve working conditions and wages. For example, the 2003 CUED study found that 21 percent of workers reported that their employer permanently fired them in retaliation for their union activity.³⁸ The supplemental proposed rule would only exacerbate this problem.

Examples of employers using the no-match letter to retaliate against workers who assert their labor rights include the following:

*In April 2007, 13 housekeepers were fired from a hotel in northern California as apparent retaliation for filing a complaint against their employer for unpaid wages. The employer had refused to comply with a living wage ordinance, and the workers began to organize to pressure company management and spoke out to the media and city council. In response, the hotel told the workers that they were the subject of a no-match letter, and that if the workers didn't correct the information, they would be terminated. Many of the workers had been employees of the hotel for years, and the hotel had not required them to follow up on a no-match letter in the past. In fact, the employer received the most recent no-match letter in May 2006, but didn't initiate any action until September 2006 after the employees began efforts to ensure their employer complied with the new living wage ordinance.*³⁹

*Marcos Samano, 31, a supervisor at a Chicago plant, said that initially, he was told to stay at the company through the end of the year to train new employees, but he was fired after walking out to join other employees in protest [over no-match firings at the plant].*⁴⁰

*In Delano, California, workers took successful collective action to raise their wages in January of 2007. Throughout the summer of 2007, the United Farm Workers union was gathering worker signatures for a campaign aimed at union membership and collective bargaining. However, in December 2007, the company informed the workers that they would have to "reverify" their immigration status because it had received a no-match letter. When the union asked for a copy, the company admitted that it hadn't received any such letter, but still insisted that the workers reverify their immigration status.*⁴¹

³⁸ *Id.*

³⁹ Telephone conversations and communications between Brooke Anderson, East Bay Alliance for a Sustainable Economy, and the National Immigration Law Center beginning in April of 2007.

⁴⁰ Vanessa Bauza and Jerry Smith, "Protest over firings leads to more at Aurora Plant" THE CHICAGO TRIBUNE, September 22, 2007.

⁴¹ Telephone conversation between Rebecca Smith, National Employment Law Project and Armando Elenes, United Farm Workers Union, March 4, 2008; email correspondence between Laura Moskowitz, National Employment Law Project and Armando Elenes, March 26, 2008.

No-match letters are used to keep workers from receiving the proper wages and benefits to which they are entitled.

Many employers assume that the no-match letter is a notice about an immigration status violation. Unscrupulous employers then use the no-match letter to circumvent their obligations under labor and employment laws. Some employers also use no-match letters to depress wages and benefits by selectively terminating long-term employees with higher wage and benefit rates.

For example:

A Houston, Texas employer announced it could not pay a worker who was the subject of a no-match letter for work already performed because the employer interpreted the no-match letter to mean that it was illegal to pay this worker.⁴²

A Houston staffing agency summarily fired a worker upon receiving a no-match letter and told the worker he had no right to receive his last paycheck.⁴³

In November of 2007, 11 out of 13 workers in Nevada warehouse were told by their employer that there was a problem with their Social Security Numbers and that they would be fired if they didn't fix their records. The employer refused, however, to show the workers a copy of the letter. Of the 13 workers at the warehouse, the 11 workers who received the letters had the highest seniority and highest salaries. The other two workers had been at the company for one year. Starting salary at the warehouse is \$7 per hour versus \$12 for a worker with over 5 years of experience. It wasn't until an attorney intervened that the workers were allowed to keep their jobs. They were told, however, that the company would revisit their case in April 2008.⁴⁴

The no-match rule will not stop unauthorized work but will contribute to the underground economy

While unauthorized workers may be among the millions of workers who are the subjects of no-match letters each year, the benefit of using the letters as a means of identifying the small percentage of workers who are unauthorized is far outweighed by the costs that the proposed rule will impose on the U.S. economy. The DHS rule will not result in undocumented workers leaving the U.S. Rather, they and their employers will simply burrow even further into the underground economy, taking a greater share of their earnings off the tax rolls and destabilizing the playing field even more for lawful workers and employers that hire above-board. The Congressional Budget Office recently estimated that a bill to create a mandatory electronic employment verification system would decrease Social Security trust fund revenue by more than

⁴² Telephone conversation between Laura Moskowitz, National Employment Law Project, and Laura Boston, Houston Interfaith Worker Justice, March 26, 2008.

⁴³ Email correspondence between Laura Moskowitz, National Employment Law Project, and Laura Boston, Houston Interfaith Worker Justice, March 28, 2008.

⁴⁴ Telephone conversation between Monica Guizar, National Immigration Law Center and individual worker in Las Vegas, Nevada, December 4, 2007, notes on file with the author.

\$22 billion over ten years *because it would increase the number of employers and workers who resort to the black market, outside of the tax system.*⁴⁵

Unscrupulous employers can easily evade any obligation to respond to no-match letters simply by paying workers as independent contractors,⁴⁶ or completely off the books in a cash transaction. Misclassification of workers as independent contractors may occur at the time of hire, or an employer may convert a worker to independent contractor status at a later date in the employment relationship. By this simple arrangement, employers avoid paying unemployment insurance, workers' compensation, and social security taxes, and escape the cost of withholding income taxes, since employers are not obligated to make these payments to, or on behalf of, independent contractors who are technically self-employed.⁴⁷ Employers who engage in misclassification schemes stand to save as much as 30 percent of their payroll costs if they count workers as independent contractors. Thus, they can undercut law-abiding employers because they don't account for these normal payroll costs.

Conversion of social security no-match letters into an immigration enforcement tool will also exacerbate the gap between payroll and other taxes owed to states and the federal government, and actual payment of these taxes. Total losses could include unpaid and uncollectible income taxes, payroll taxes, unemployment insurance and workers' compensation premiums. The GAO estimated that misclassification of employees as independent contractors reduces federal income tax revenues by up to \$4.7 billion.⁴⁸ Coopers & Lybrand estimated in 1994 that proper classification of employees would increase tax receipts by \$34.7 billion over the period 1996-2004.⁴⁹

Finally, converting employees into independent contractors or paying them off the books affects law-abiding employers. In some systems, such as unemployment insurance or workers compensation, employers who cheat are subsidized by employers who are not cheating on their payroll taxes, since the costs of benefits are borne largely by employers. In other systems, the U.S. Treasury simply loses taxes that pay for benefits for all workers. Ironically, the conversion of employees to independent contractors also means that the SSA, which issues no-match letters, will lose revenue as well since undocumented workers who are either paid in cash or misclassified will no longer contribute to the social security trust fund.

⁴⁵ Letter to John Conyers, Chairman, Committee on the Judiciary, U.S. House of Representatives from Peter R. Orszag, Director, Congressional Budget Office, April 4, 2008.

⁴⁶ Generally, employers accomplish this by giving their employees an IRS Form 1099 instead of a Form W-2.

⁴⁷ Workers classified as independent contractors also lack coverage under labor protective laws such as minimum wage, overtime, discrimination, and freedom of association. *See* EMPLOYMENT ARRANGEMENTS: IMPROVED OUTREACH COULD HELP ENSURE PROPER WORKER CLASSIFICATION (U.S. General Accountability Office, July 2006), <http://www.gao.gov/new.items/d06656.pdf>.

⁴⁸ TAX ADMINISTRATION INFORMATION: RETURNS CAN BE USED TO IDENTIFY EMPLOYERS WHO MISCLASSIFY EMPLOYEES (U.S. General Accounting Office, September 1989), <http://archive.gao.gov/d26t7/139838.pdf>.

⁴⁹ PROJECTION OF THE LOSS IN FEDERAL TAX REVENUES DUE TO MISCLASSIFICATION OF WORKERS (Coopers & Lybrand, now Price Waterhouse Coopers, for Coalition for Fair Worker Classification, June 1994).

The no-match rule will overburden the Social Security Administration

The SSA's mission is to "advance the economic security of the nation's people through compassionate and vigilant leadership in shaping and managing America's Social Security programs."⁵⁰ The agency is not an immigration enforcement agency. The no-match letter program is only one of several programs that the SSA employs to correct the errors in its database, and in fact, is one of the agency's least effective tools for doing so.⁵¹

According to the President of the SSA's employee union, because of the voluminous errors in the SSA's database, the DHS safe harbor rule would "inundate offices with visitors seeking corrections," and its impact on SSA "will be devastating."⁵² Already, SSA estimates that the average wait time for more than three quarters of a million cases awaiting a hearing decision on disability cases is 499 days.⁵³ Additionally, SSA Field Offices receive over 60 million phone calls each year and over half of the callers receive a busy signal.⁵⁴

While SSA's responsibilities have increased over time, its financial resources have not increased commensurately. Since the beginning of FY 2006, SSA's 1,267 field offices have lost over 1,700 claims representatives and over 520 service representatives.⁵⁵ Furthermore, it is anticipated that many SSA employees, particularly those hired when SSA began to administer the SSI program in 1974, will retire soon. SSA is already closing offices due to staffing and resource issues.⁵⁶

Conclusion

The stated purpose of the no-match letter is to ensure that workers receive credit for their earnings, which can affect future disability and retirement benefits. The SSA no-match letter program can not effectively meet DHS's goal of preventing employers from unlawfully hiring

⁵⁰ See Social Security Administration Mission Statement at <http://www.ssa.gov/aboutus/>.

⁵¹ In 2006 for Tax Year 2005, SSA estimated that only 6 percent of reinstated earnings were based on information corrected as a result of employer no-match letters. This result is in sharp contrast to those produced by other, more effective front-end and back-end validation routines. See EFFECTIVENESS OF THE SINGLE SELECT EDIT ROUTINE (Office of the Inspector General, Social Security Administration, Sept. 2007), <http://www.ssa.gov/oig/ADOBEPDF/A-03-07-17065.pdf>.

⁵² See "Council 220, President's Message: More staff needed or immigration issue sinks SSA," American Federation of Government Employees, September 2007, <http://www.afgec220.org/documents/Newsletters/Unity/Unity07-09.pdf>.

⁵³ Patrick P. O'Carroll, Inspector General, Testimony before the House Appropriations Committee, Subcommittee on Labor, Health and Human Services, and Education and Related Agencies (Social Security Administration, Office of the Inspector General, February 28, 2008), http://www.ssa.gov/oig/communications/testimony_speeches/02282008testimony.htm.

⁵⁴ Richard Warsinskey, Testimony before the House Appropriations Committee, Subcommittee on Labor, Health, and Human Services, and Education and Related Agencies (National Council of Social Security Management Associations, Inc., February 8, 2008, <http://socsecperspectives.blogspot.com/2008/02/social-security-advocacy-group-written.html>).

⁵⁵ *Id.*

⁵⁶ Witold Skweirczynski, "SSA Workers: Unwilling Agents of DHS," Unionblog.com, January 3, 2008, <http://www.afge.org/index.cfm?Page=UnionBlog&FuseAction=View&BlogID=516>.

unauthorized workers. Moreover, any potential employer violation of unlawful hiring of unauthorized workers that may be identified by no-match letters is far outweighed by the costs borne by documented workers and U.S. citizens, employers, the economy, and SSA itself.

The loss of jobs and loss of productivity that will result due to the DHS rule is a high price to pay for an ineffective immigration enforcement tool. U.S. workers and the economy will undoubtedly bear the brunt of the costs. Because of the millions of inaccurate records in the SSA database, hundreds of thousands of U.S. workers will be required to take time off of work to visit SSA field offices to correct alleged no-match discrepancies. Many of these hundreds of thousands of workers will likely be required to make multiple visits to SSA offices in order for no-match issues to be resolved due to evidentiary requirements. Workers will lose time from work and pay to correct discrepancies, and many will unnecessarily be fired.

The supplemental proposed rule does not rectify the inherent problems in the August 2007 final safe harbor rule. We therefore urge DHS to reconsider its ill-conceived policy and withdraw the supplemental proposed rule.

Appendix A

In addition to the examples included in the LWIW Coalition comments, the following are examples from November 2006 to February 2008 of how the no-match letter program and U.S. Department of Homeland Security (DHS) Safe Harbor rule adversely affect workers.

- In November 2006 in Tar Heel, North Carolina, a Honduran national with Temporary Protected Status (TPS) was told by her employer that her records did not match SSA's database. She was given 60 days to correct the discrepancy or face termination. After visiting the local SSA office a total of five times and rectifying the alleged discrepancy, the employer still fired her because it assumed that she was undocumented. The worker filed a charge of discrimination with the U.S. Department of Justice, Office of Special Counsel for Unfair Immigration-Related Employment Practices.⁵⁷
- In September 2007 in Chicago, Illinois, a valve company fired eight workers, telling them that it had received SSA no-match letters about them. Twenty other workers who protested the firings were also fired. When worker representatives asked the employer for a copy of the letters, the employer conceded that it had not received any. The workers have since filed complaints with the National Labor Relations Board and Equal Employment Opportunity Commission alleging unfair labor practices and discrimination.⁵⁸
- In September 2007 in Chicago, Illinois, a grocery fired a number of workers who were the subject of SSA no-match letters. The employer also threatened to fire other workers for the same reason. After community members intervened on their behalf, the fired workers were given their jobs back and the workers threatened with termination were not fired. On the day after Thanksgiving 2007, however, after the busiest grocery shopping day of the year, the company fired about 100 employees without any warning. Most were long-term employees with higher than average pay and benefit rates.⁵⁹
- In October 2007, an employer in Menlo Park, California fired several workers for having "invalid" social security numbers. A year earlier, the employer received no-match information about fourteen employees but no further action was taken at that time. The firings in October 2007 appeared to be a reaction to the new DHS rule.⁶⁰

⁵⁷ Telephone conversation between Monica Guizar, National Immigration Law Center and individual worker from Tar Heel, North Carolina, May 2007, notes on file with the author.

⁵⁸ Amy Boerema, "Hispanic workers allege discrimination at Aurora plant," *The Daily Herald*, Sept. 27, 2007; telephone conversation between Rebecca Smith, National Employment Law Project and Martin Unzueta, Chicago Workers' Collaborative, March 11, 2008; email correspondence between Laura Moskowitz, National Employment Law Project and Christopher Williams, Working Hands Legal Clinic, April 8, 2008; National Labor Relations Board and Equal Employment Opportunity Commission affidavits on file with the authors.

⁵⁹ Telephone conversation between Rebecca Smith, National Employment Law Project, and Tim Bell, Chicago Workers Collaborative, March 10, 2008, notes on file with the author; email correspondence between Laura Moskowitz, National Employment Law Project and Tim Bell, March 24, 2008, notes on file with the author..

⁶⁰ Telephone conversation between Laura Moskowitz, National Employment Law Project, and Carole Vigne, The Legal Aid Society-Employment Law Center, March 18, 2008, notes on file with the author. The Employment Law Center reports that it received a steep increase in calls regarding document abuse after publication of the August 2007 no-match rule.

- In October 2007 in Danville, California, a McDonald's told a cook that there was an SSA no-match issue, but then sent the worker a letter stating he had to resolve a discrepancy with his alien number within 30 days or be fired. Two other workers were reportedly terminated in the same fashion.⁶¹
- Workers at a manufacturing plant in Chicago had been complaining over the course of two years about workplace safety conditions and violations of their union contract. In January 2008, the company announced that, based on SSA no-match letters, about 80 workers would have to be reverified and potentially terminated. In March 2008, some of the workers threatened with termination and their fellow co-workers complained that the company's action was discriminatory. They were subsequently fired for speaking with the news media about the no-match letters and the discrimination claim.⁶²

In February 2008, in Batavia, Illinois, worker representatives report that an employer was using receipt of no-match letters to fire workers in a "rolling" fashion, concentrating on a few employees at a time, and beginning only with those who had the most seniority, in order to save money on higher-cost employees.⁶³

⁶¹ *Id.*

⁶² Telephone conversation between Laura Moskowitz, National Employment Law Project, and Tim Bell, Chicago Workers Collaborative, April 4, 2008, notes on file with the author; telephone conversation between Laura Moskowitz and Christopher Williams, Working Hands Legal Clinic, April 7, 2008; Equal Employment Opportunity Commission charges on file with the authors.

⁶³ Associated Press, *Workers leave Batavia plant to support 10 fired over Social Security numbers*, Feb. 26, 2008; telephone conversation between Rebecca Smith, National Employment Law Project and Tim Bell, Chicago Workers Collaborative, March 10, 2008, notes on file with the author..