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Ninth Circuit Rejects Terminations Based on No-Match Letter

By Steven D. Leach

Whether an employer's receipt of a Social Security Administration ("SSA") "no-match" letter constitutes knowledge of an employee's work authorization status has been a hot employment law topic. The Department of Homeland Security ("DHS") recently attempted to create a rule drawing that conclusion. That rule making effort was put on hold through a federal court preliminary injunction, yet the question remained whether the receipt of such a letter could lead an employer to have "knowledge" that it was employing an unauthorized worker in violation of federal and Arizona law. Moreover, DHS recently instituted a revised rule making effort in its continued battle to make no-match letters relevant to an employee's work status. Accordingly, there is uncertainty about how to deal with employees who are the subject of no-match letters.

On June 16, 2008, the Ninth Circuit Court of Appeals (the Circuit governing Arizona) gave some guidance on this issue. In ***Aramark Facility Services v. Service Employees International Union, Local 1877***, the Court held that an employer could not terminate an employee because the employee was unable to quickly fix no-match problems identified in an SSA "no-match" letter.

The SSA informed Aramark that the identification information provided to the SSA on 48 employees did not match the SSA database. In response, Aramark gave the employees three days to fix the problem with SSA or face termination. 33 employees did not comply within the three days and were terminated.

The employees' union filed a grievance that was heard by an arbitrator. The arbitrator found that there was no "convincing information" that the fired employees were unauthorized, and ruled that Aramark must reinstate and give back-pay to all 33 employees. A District Court overturned the arbitrator's ruling, and the union appealed to the Ninth Circuit.

In the Ninth Circuit, Aramark claimed that the terminations were necessary to comply with federal immigration law prohibiting the knowing employment of unauthorized aliens. Aramark argued that receipt of the no-match letter plus the employees' failure to fix the problem gave it constructive knowledge of the 33 employees' unauthorized status thereby requiring their termination. Aramark agreed, however, that it had no concrete knowledge that the workers were unauthorized and that it possessed properly completed I-9 forms, supported by facially valid identity and work authorization documents, on each of the terminated employees.

The Ninth Circuit ruled that the concept of constructive knowledge (constructive knowledge is a conclusion that can be reasonably reached through notice of certain facts or circumstances) is strictly applied in immigration matters. In other words, the Court found that an employer must have significant information supporting the conclusion that an employee is unauthorized before the employer is in violation of federal immigration law.

The Ninth Circuit also recognized that SSA no-match letters are not intended to demonstrate an employee's unauthorized status, but merely to advise the employee that their earnings are not being properly credited for social security benefits. The Court also found that a SSA no-match can occur for many reasons unrelated to an employee's work authorization status. Accordingly, the Court held that receipt of a no-match letter does not, by itself, constitute constructive knowledge that an employee is not authorized to work.

As for the fact that the 33 employees did not correct the no-match, the Court found that the three days given by Aramark to fix the problem was unreasonable. The Court felt that an employee could very easily fail to respond not because they were unauthorized, but because they concluded they could not meet the demanding deadline.

The Ninth Circuit concluded that even though some of the fired employees were likely unauthorized, the no-match letter, combined with the fact that the 33 employees did not fix the no-match in the time allowed by Aramark, provided insufficient evidence of the employees' work status to overturn the arbitrator's award.

The SSA has stated that it will not issue no-match letters for 2007 due to the confusion created by the DHS rule making effort. Whether such letters will be sent out for 2008 is currently unknown. But, at this point, the Ninth Circuit's decision demonstrates that receipt of a no-match letter without additional facts is not sufficient reason to terminate an employee for fear of violating federal immigration laws. The same conclusion will presumably apply to any concern that the continued employment of such workers (if hired after 12/31/07) is a violation of the Legal Arizona Workers Act. Any employer considering terminating employees with no match problems must, at the very least, provide sufficient time for the employee to solve the problem.

Please feel free to contact **Steven Leach**, chair of the **JS&H Employment Law Practice Group**, with any questions regarding this issue, or any other employment law question, by emailing him at sleach@jshfirm.com.◆

About The Author

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Mr. Leach joined the firm as a partner in 2005 and is the chair of the firm's Employment Law Practice Group. His practice is focused on defending employers on all manner of employment related disputes. In particular, for much of his near 20 years of practice, Mr. Leach has assisted employers with efforts to reduce or manage employment liability, and has defended employers on employment claims such as wrongful termination, sexual harassment, gender, race and disability discrimination, and civil rights violations in both Arizona and Federal Courts. Mr. Leach is committed to working with clients to manage employment risk to avoid exposure, or to be in the best position possible to succeed when litigation is inevitable. He recognizes that effective employer representation requires a team approach between client and counsel, and he strives to provide his clients with services that are both highly effective and efficient.

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