



## UPDATE ON NO-MATCH LETTERS AND ICE ENFORCEMENT



**Anita Patel** .....  
"The delay in sending out social Security no-match letters is due to the current lawsuit against the No-Match rule which sets out strict guidelines for employers who receive the letters."

On December 5, Homeland Security Secretary Michael Chertoff issued a statement concerning the no-match issue, relating to an appeal of the injunction against the No-Match Rule issued by a federal judge in San Francisco. News organizations separately reported that the Social Security Administration will not send out Social Security no-match letters until after the Spring of 2008. The delay in sending out Social Security no-match letters is due to the current lawsuit against the No-Match Rule which sets out strict guidelines for employers who receive the letters. Important portions of the statement issued by Secretary Chertoff in connection with this appeal are quoted below:

- Employers receive a No-Match letter from the Social Security Administration when an employee's name does not match the social security number it has on file. Sometimes there is an innocent explanation for this discrepancy, such as a clerical error. But sometimes the discrepancy reflects the fact that the employee in question is an illegal alien. When employers receive such No-Match letters, they are on notice that the employees in question may not be authorized to work.

- Under our No-Match Rule, no employer should terminate an employee based upon a letter alone. But no employer should ignore such a letter or the discrepancy it reveals. The No-Match Rule gives employers and employees 90 days – a full three months – to correct the discrepancy.
- If the mismatch is a clerical error, that is a good opportunity to correct the mistake. When the mismatch shows fraud, however, appropriate steps should be taken. Businesses that follow the procedures in the rule will have a safe harbor from enforcement action. Those that ignore letters place themselves at obvious risk and invite suspicion that they are knowingly employing workers who are here illegally.
- Far from abandoning the No-Match Rule, we are pressing ahead by taking the district court's order to the Ninth Circuit Court of Appeals. At the same time, we will soon issue a supplement to the rule that specifically addresses the three grounds on which the district court based its injunction. By pursuing these two paths simultaneously, my aim is to get a resolution as quickly as possible so we can move the No-Match Rule forward and provide honest employers with the guidance they need.
- The ACLU's lawsuit has put this vital protection on hold.

DHS is proceeding down two paths to put into effect an enforceable No-Match Rule. Thus, they are appealing the adverse ruling of the federal district court judge in San Francisco who prohibited the enforcement of the rule which was to have gone into effect on September 14. Second, DHS is internally revising the rule to comply with some of the court's concerns. Internal sources tell Wimberly & Lawson that a new, different rule will likely come out around April, at the earliest, and that it will be significantly different from the previous rule.

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## KNOW YOUR ATTORNEY

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## EMPLOYEE BLOGGING



**Judith DePrisco**

“Prohibiting employee blogging may also be difficult as it may be construed as too draconian and employees may be blogging from their private homes.”

What is blogging and what can an employer do about it? Blogs are generally considered personal journals or diaries posted on the internet. Why should employers be concerned or interested in such activities? Consider if the employee is performing such activities during work time, and may be posting items that are inflammatory, derogatory, illegal, in breach of contract, or otherwise disruptive. The question is, what can, or should, an employer do about the issue?

A recent article discussed whether an employer should ignore employee blogging, prohibit it, or regulate it. Clearly, it may be dangerous to ignore the issue, particularly

if the employee is using company time and equipment to blog, and it is generally agreed that it is difficult to regulate employees' blogging without some type of policy to address it. Prohibiting employee blogging may also be difficult as it may be construed as too draconian and employees may be blogging from their private homes. Moreover, many states have laws protecting employees from discrimination based on lawful activities outside the workplace.

For those employers choosing to regulate employee blogging policies, similar to those regulating use of employer equipment, e-mailing, internet use, etc., with some additional considerations are advisable. The policies could include the following provisions.

- Employees are not permitted to write blog postings during work time, and the employer reserves the right to monitor company-owned computer systems.
- Inform employees of the potential civil and criminal penalties for posting confidential, trade secret, copywritten, discriminatory, harassing or similar information.
- Prohibit employees from identifying themselves as agents of the employer or suggesting they are representing the employer's views in any blogging activity that is not specifically required as part of their jobs.

Some employers are even setting up “company-sponsored” blogs, where such comments can be entered on a company site. However, while that device may improve communication among employees, it also creates additional opportunities for problems to occur, particularly if adequate monitoring is not performed and comprehensive policies are not established.



## WHAT IS A REASONABLE HARASSMENT COMPLAINT PROCEDURE?

**Mike Jones** .....

**“The current case turned on the reasonableness of the employer’s procedures, in a case involving a fast food restaurant where many of the workers were part-time teenagers.”**

A recent significant federal court ruling addresses the reasonableness of an harassment complaint procedure. *EEOC v. V.J. Foods, Inc.*, 101 FEP Cases 1676 (C.A. 7, 2007). The way the sexual harassment rules have evolved, an employee must normally report any harassment claim to the employer before turning to the courts, at least where the employer has a reasonable, published mechanism for its employees to report such claims and obtain a remedy. The current case turned on the reasonableness of the employer’s procedures, in a case involving a fast food restaurant where many of the workers were part-time teenagers. In fact, the plaintiff was a 16 year old high school student, working at her first job, after school and on weekends.

The Seventh Circuit of Appeals states that what constitutes a reasonable mechanism for complaints depends upon the circumstances, including the capabilities of the employees. “If they cannot speak English, explaining a complaint procedure to them only in English would not be reasonable. In this case the employees who needed to be able to activate the complaint procedure were teenage girls working in a small retail outlet . . . An employer is not required to tailor its complaint procedures to the competence of each individual employee. But it is part of [the employer’s] business plan to employ teenagers, part-time workers often working for the first time. Knowing that it has many teenage employees, the company was obligated to suit its procedures to the understanding of the average teenager.”

The court reviewed the employer’s complaint procedures in its employee handbook, and found them so complex that they were “likely to confuse even adult employees.” For example, the handbook states such complaints are to be made to the “District Manager,” but who this person is or how to communicate with them is not explained. The list of corporate officers and managers at the beginning of the handbook does not include such a person. There is a phone number on the cover of the handbook, but if you call it you get either a receptionist or a recorded message at the employer’s headquarters. The court states that an employee would not know whom to ask for at headquarters. Further, if an employee complains to a Shift Supervisor or Assistant Manager, that person is supposed to forward the complaint to the General Manager, even if the complaint is about the General Manager.

*Editor’s Note - In this case, the employer was deprived of a defense because it did not have an effective complaint procedure for handling harassment complaints. The employer was also deprived of an opportunity to correct the problem before it got to court. The EEOC has suggested that certain specific provisions be included in any harassment policy, and the wise employer will carefully review those requirements to make sure its harassment reporting policy is sufficient. This case particularly emphasizes that the harassment policy must be understandable, giving as an example a suggestion that if an employee has a large number of non-English speaking employees, the harassment policy should be also be published in their language. The court states that a policy against harassment that includes no assurance that the harassing supervisor can be bypassed in the complaint process is unreasonable as a matter of law. Special care is needed in drafting such policies, and it is probably a good idea to include an “appeals” procedure if the employee does not get a prompt and effective response on the complaint, and/or is dissatisfied with the results.*

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In a separate but related issue, ICE is conducting I-9 audits again, so an employer should not be shocked it if is audited. Upon hearing these reports, our firm investigated to determine whether the audits were in fact routine and random, as opposed to an employer targeted for major enforcement action. We have confirmed in fact that some of these audits are routine, even though they are accompanied by a subpoena for certain documents, including letters received over the prior three years. We also believe that the audits may be used as a basis for targeting the audited employer.

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## PERSPECTIVE



### RECENT LABOR SETTLEMENTS PROVIDE DRAMATIC CHANGES

**Joe Lynch** .....

*“One change would be the shift of union organization methods away from petitioning the National Labor Relations Board to conduct secret ballot elections, to the strategy of neutrality agreements and ‘card-check’ agreements.”*

For the last ten years, at least two major developments have occurred in the union movement. One change would be the shift of union organization methods away from petitioning the National Labor Relations Board to conduct secret ballot elections, to the strategy of neutrality agreements and “card-check” agreements. Today, a majority of newly organized workers come from “card-check agreements,” in which there is no secret ballot election. The second major recent development would be the split of the International Labor Federation, the AFL-CIO, into two organizations, the second organization now being Change to Win. Over the past year, a third major development has occurred in union negotiations, particularly in regards to benefit issues such as pensions and health care benefits.

The United Auto Workers has generally been considered one of the most powerful unions in the U.S. Similarly, at one point, the U.S. auto industry dominated domestic U.S. auto sales, with General Motors alone accounting for more than one-half of all U.S. auto sales. GM’s hourly labor costs in the U.S. currently have risen to about \$75.00 per hour, compared with about \$50.00 for Toyota and other non-U.S. companies. Its sales have dropped to less than one-quarter of U.S. auto sales, and in the past two years it has lost \$12 billion.

This type of situation couldn’t last, and in a landmark settlement reached recently, the UAW agreed with GM to offer more buyouts to senior workers and hire new workers at lower wages, at least in some jobs, with pay increases being mainly in the form of lump-sum payments. More importantly, GM will turn over its retiree health insurance program and costs to an independent trust known as a “Voluntary Employee Beneficiary Association,” or VEBA. GM will contribute some \$32 billion to the VEBA, Ford under its settlement will contribute around \$13.6 billion, and Chrysler around \$8.8 billion. The impetus for these dramatic changes are not only the cash-flow issues, but also the accounting rules requiring companies to report the liabilities on their balance sheets. The effect of turning over retiree health programs to the VEBAs is that the automakers will reportedly reduce as much as \$7 billion in retiree healthcare costs annually, and about \$87 billion in future obligations.

In spite of the apparent significant union concessions, most observers view the settlement as a “win-win” for both sides. The union gained additional job security guarantees, and may become potentially more relevant as it assumes control over the new trust fund for retiree healthcare.

Similarly dramatic developments have occurred in trucking negotiations, an industry not facing the losses and foreign competition as in auto making. In the settlement between United Parcel Service (UPS) and the Teamsters, UPS will pay some \$6.1 billion to withdraw from the Central States Fund, the Teamsters’ largest pension fund. A number of other settlements in trucking are following the lead of UPS in withdrawing from union pension funds. UPS and other industry employers plan to replace the contributions they make to Central States with company-funded benefits and retirement plans. There are special rules regarding multi-employer pension funds, often known as “union” pension funds, that create risk to employers who participate in such multi- employer plans of contingent pension obligations. In addition, the contingent pension obligations create accounting issues similar to those affecting retiree health benefits. While the Teamsters and other unions apparently want employers to participate in their multi-employer pension plans, the Central States plan allegedly was only about 50% funded, and the cash infusion from UPS and other industry employers, as well as the transfer of some early-retirement benefits to company-funded pension plans, will reportedly improve the financial condition of the union plans and therefore reduce the risk associated with contingent pension liabilities.

These settlements are significant and may serve as models for collective bargaining negotiations in other sectors.