



IMPORTANT RULING AGAINST DHS NO-MATCH REGULATION CREATES DILEMMA



Anita Patel
"In general, the court ruled that the new rule is arbitrary and capricious..."

On October 10, 2007, a federal district court judge in San Francisco granted a preliminary injunction against the enforcement of DHS's new Social Security no-match regulation. In general, the court ruled that the new rule is arbitrary and capricious because DHS failed to supply a reasoned analysis for the agency's new position that a no-match letter is sufficient, by itself, to put an employer on notice of an employee's unauthorized status, and that DHS exceeded its authority by interpreting IRCA's anti-discrimination provision. The court further ruled that DHS violated the Regulatory Flexibility Act by not conducting a final flexibility analysis. The court reasoned that if the regulation goes into effect, thousands of employers would bear a significant expense of complying with the rule's new 90-day time frame, and under the circumstances there was immediate harm to the plaintiff employers and labor organizations, while there would be no similar harm to the government should the enforcement of the regulation be postponed.

Editor's Note - While the October 10 ruling is well written, it is not a final ruling on the legality of the new regulation. Thus, employers have no clear guide as to what actions to take in response to the receipt of such no-match letters in the future, or similar information from other third parties suggesting some sort of discrepancy. Employers should develop protocols or at least strategies as to how to deal with such information. The Perspective offers some initial comments.



ABUSIVE UNION "CARD-CHECK" AGREEMENTS SUFFER A SETBACK

Gary Wright
"While this legislation has been stalled in Congress, the Democratic contenders have supported the legislation that will likely become a major issue after the next Presidential election."

Today some 80% of new union members come not from secret ballot NLRB elections, but from "card-check" agreements negotiated with employers, often accompanied by "neutrality" provisions. These "neutrality" provisions sometimes forbid employers from educating employees on the disadvantages of joining a union, and sometimes allow union organizers access to the premises as well as access to employee mailing lists and the like. The motivation for entering into such an arrangement by an employer is often that the union has a lot of leverage or economic strength to put pressure on the employer, or sometimes there is a "sweetheart deal" as to a favorable bargaining agreement for the employer. Whatever the motivation, many unions today orient their campaigns towards getting card-check agreements with an employer, rather than seeking a secret ballot election.

Further, Democrats in Congress generally support proposed federal legislation that would require employers to recognize a union based upon such a "card-check," and further providing for a contract to be determined by a labor arbitrator if the parties do not otherwise agree. While this legislation has been stalled in Congress, the Democratic contenders have supported the legislation that will likely become a major issue after the next Presidential election.

An important new ruling of the National Labor Relations Board (NLRB), issued September 29, 2007, grants employees additional rights to challenge such card-check agreements between their employers and unions. The

Continued on page 2 ►►

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ABUSIVE UNION "CARD-CHECK" AGREEMENTS SUFFER A SETBACK *continued from page 1*

case basically rules that once an employer has recognized the union based upon a card-check, the parties must notify the NLRB and the NLRB will provide an official notice that the employer shall post in conspicuous places at the workplace, notifying employees that they have a 45-day period for filing an election petition with the NLRB, seeking a secret ballot election to withdraw recognition from the union. If a valid petition for an election is supported by 30% or more of the employees in the recognized unit within 45 days of the posting of the official notice, the petition will be processed resulting in the employees having an opportunity to vote by secret ballot as to whether or not they want union representation. Dana Corp. and Metaldyne Corp., ____ NLRB No. ____ (consolidated cases, decided 9/29/07).

The current Board ruling overturns a line of cases beginning in 1966 in which the Board ruled that once an employer voluntarily recognizes a union in good faith based on a demonstrated showing of majority support, the parties have a reasonable time to bargain without challenge to the union's majority status. According to the Board majority in the current case, the Board must protect employee freedom of choice on the one hand, and promote stability of bargaining relationships on the other. Striking the balance, the Board found that the immediate post-recognition imposition of an election bar does not give sufficient weight to the protection of the statutory rights of affected employees to exercise their choice of union representation through the preferred method of a Board-conducted election. The Board stated that after all, free choice is the fundamental value protected by the Labor Act.

There are some clarifications in the Board decision that give guidance. First, the ruling does not address when employers may file post recognition petitions or unilaterally withdraw recognition from a union, as the rights granted in the two consolidated cases apply to employees' rights to file a decertification petition. Also, during the 45-day period, the union can begin its representation of employees, and processing of their grievances, and begin bargaining with the employer for a first contract. However, even if a first contract is reached before the end of the 45-day period, the employees still have a right to file a decertification petition if timely filed. During the 45-day period, both the employer and union are free to express their non-coercive views about the perceived benefits of a collective bargaining relationship.

The Board also made some extremely interesting comments about the whole concept of union card-signing recognition. The Board majority stated that the majority card showing is "a far less reliable indicator of actual employee preference than results of a Board's secret-ballot election." The majority stated that employees that sign authorization cards in support of a union are likely to do so because they (1) want to avoid "offending the person who asks them to sign;" (2) are "susceptible to group pressure exerted at the moment of choice;" (3) are given "misinformation or lack of information about employees' representation options;" (4) "may not even understand the consequences of voluntary recognition until after it has been extended;" (5) are fooled by an employer's voluntary grant of union access and will "conclude they have no real choice but to accede to representation by that union;" and (6) "can and do change their minds about union representation thereby calling into question any signature in support of the union. Even the two Democrats on the Board agreed with the majority's statement that "Secret elections are generally the most satisfactory - indeed the preferred - method of ascertaining whether a union has majority support." The Board majority concluded that it "remains preferable to determine employee free choice by a method that can assure greater regularity, fairness, and certainty in the final outcome."

Editor's Note - The various discussions of the NLRB as to the preference for a secret ballot election, over simply having a neutral party check whether a majority of employees have signed union cards, would be something that persons in Congress should hear as they debate the union card-check bill. Should the union card-check bill ultimately be signed into law, it will be interesting to see whether it will have the effect of overruling these decisions. The current decision should be applauded as an additional protection to employee free choice, keeping both unions and employers from "signing away" employee free choice rights.



MINIMUM TIME PERIOD FOR LUNCH, AND USE OF TIME CLOCK FOR LUNCH BREAKS

Recently questions were submitted to the Wage and Hour Division on an employer's proposal to automatically deduct a 30-minute lunch period from employees' total daily time worked, unless employees give notice that a lunch break was not taken. According to the U.S. Department of Labor

Ron Daves

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Opinion, such a proposal to discontinue the use of a time clock does not violate the wage- hour law so long as the employer accurately records actual hours worked, including any work performed during the lunch period. The opinion also cautions that meal periods must be counted as hours worked if employees are not relieved of their duties during that time. Meal periods of less than 30 minutes in which employees are completely relieved from duty for the purpose of eating may be bona fide, and thus not considered hours worked, under special conditions. Wage and Hour Opinion Letter No. 2558, May 14, 2007. Policies must be carefully worded.



EMPLOYER FACES LITIGATION FOR COOPERATING WITH POLICE LIE DETECTOR TESTING

A federal law, the Employee Polygraph Protection Act, provides that it is unlawful for an employer "directly or indirectly, to require, request, suggest, or cause any employee or prospective employee to take or submit to any lie detector test." In a recent federal district court ruling, over \$4,000 in

Mark Travis

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merchandise was stolen from a distribution center, and after an internal investigation turned up no information, the employer referred the matter to the local police. The police requested that any employee who had been working at the distribution center around the time of the theft be subjected to a voice stress analysis. The plaintiff was scheduled for such a voice stress analysis at the police department, and left work for the test but neither reported to the police department nor returned to work. He was terminated for insubordination for not following a directive given to him by management and refusing to participate in an investigation, and the employee sued

under the polygraph protection law.

Federal regulations under the polygraph protection law state that employers who cooperate with the police during an investigation are not deemed engaged in prohibited conduct "provided that such conduct is passive in nature." 29 C.F.R. Section 801.4. For example, the regulations state that an employer is allowed to "release an employee during working hours to take a [lie detector] test at police headquarters." The issue in this case, was whether the instruction from the supervisor crossed the line between merely releasing the employee from work and actively requiring, requesting, or suggesting that he take the lie detector test. Watson v. Weekends Only, Inc., 26 I.E.R. Cases 498 (E.D. Mo. 2007).

The court found a jury issue was created as to whether plaintiff was fired for refusing to take a lie detector test, or rather for not following the instruction to report to the police station and then not returning to work.

Editor's Note - This dilemma could have been avoided had the employer provided more carefully written instructions to the employee about reporting to the police station. Employers should also be aware of the limited exceptions to the polygraph law, which allow employers to polygraph employees during an "on-going investigation" involving "economic loss or injury," provided certain steps are satisfied. First, the target employee must have had "access" to the property involved. Second, the employer must have "reasonable suspicion" that the employee was involved in the alleged incident. Before any testing can occur, an employee must receive a written statement which identifies the loss to be investigated, the employer's grounds for suspecting the employee, and the employee's statutory rights under the law. Even if all these requirements are met, an employer

may not, without additional supporting evidence, carry out an adverse employment action against an employee solely on the basis of the results of the polygraph test or the refusal to take the polygraph test.

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PERSPECTIVE

STRATEGY ON DEALING WITH NO-MATCH LETTERS IN THE FUTURE



Anita Patel

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"The premise of the indefinitely postponed regulation is that the receipt by an employer of a letter from Social Security indicating that its employees' names and Social Security numbers do not match may be constructive knowledge of their unauthorized status."
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The public debate and litigation over the new DHS regulation concerning Social Security "no-match" letters, has triggered a national debate as well as national interest over the subject of "constructive knowledge." The premise of the indefinitely postponed regulation is that the receipt by an employer of a letter from Social Security indicating that its employees' names and Social Security numbers do not match may be constructive knowledge of their unauthorized status. The postponed regulation serves as a "wake-up call" to employers not only on how to handle such no-match letters in the future, but also how to handle similar types of information they may receive, as to whether such information may constitute constructive knowledge, and what actions they must take.

The IRCA statute prohibits the hiring of an alien "knowing" the alien is an unauthorized alien . . ." The current DHS regulation provides that "the term knowing includes not only actual knowledge but also knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition." 8 CFR 274 a.1(1)(1). The postponed DHS no-match regulations, in its comments, discusses cases based on whether the employer has received "specific information that several of his employees were likely to be unauthorized," or whether the employer failed to make any inquiries or take appropriate corrective action after receiving information that some employees were expected of having presented false documents.

In the next newsletter we will address and give some advice as to how the law is likely to develop concerning what constitutes "knowledge" of illegal status, and what type of action an employer is obligated to take, and how soon, in response to such knowledge.



Jeff Jones

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"The court found that the employer did not discriminate against the female employee, because of the legitimate, non-discriminatory reasons for selecting her for termination rather than the male."
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DISCHARGE OF FEMALE OF PAIR HAVING AFFAIR UPHeld BY COURT

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A federal court recently faced an issue of an extra marital affair between two married employees. The husband of the female employee called the male employee and warned him to stay away from his wife, telling the male employee that he was going to make the employee's life as miserable as the employee had made his. The employer determined that it would be disruptive to have both employees back into its operation, and so the female employee was terminated because management feared that her husband might cause workplace disruption and also because the male employee was a top salesman and producer and thus was more important to the organization. The terminated female employee sued, contending that, among other things, it was sex discrimination to terminate her, rather than her former lover.

The court found that the employer did not discriminate against the female employee, because of the legitimate, non-discriminatory reasons for selecting her for termination rather than the male. The court noted that the female plaintiff failed to show that any similar situated employees had threatened to disrupt the workplace so that the employer's alternative explanations - that her co-worker was a top salesman and that the employer was afraid of her husband - were a pretext unworthy of belief. Hossack v. Floor Covering Assoc., 100 FEP Cases 1617 (CA 7, 2007)

Editor's Note - Many employers have rules against nepotism, familiarity, and other inappropriate relationships among employees, particularly if they are in the same organizational unit or reporting structure. Some employers even have rules requiring employees to report such relationships to the employer. If such an issue should arise, the question always becomes, what to do. In theory, any legitimate, non-discriminatory reason for an action, could be deemed lawful. Sometimes employers get the employees themselves to decide which employee is to leave or transfer. Absent such a resolution, the employer then comes up with some objective reason for the action, such as seniority. However, these matters are always controversial, and the employer in the present case was fortunate to win.